

Ngai Tahu Land Report

05 The Background to the Purchases: Crown Policy and Settlement

5.1 Introduction

Chapter 5

THE BACKGROUND TO THE PURCHASES: CROWN POLICY AND SETTLEMENT

5.1. Introduction

Just four years after the signing of the Treaty of Waitangi the Crown embarked on a policy of land purchase from Ngai Tahu which over twenty years made available tens of millions of acres for European settlement. The Crown's actions in acquiring title to what is the vast majority of land in the South Island is at the heart of this claim. The areas of the individual purchases were huge, ranging from tens of thousands of acres up to around twenty million acres. Few land purchases from Maori in the North Island exceeded the smallest Ngai Tahu blocks. The grievances associated with these purchases make up eight of the "Nine Tall Trees" which comprise the major claim. This section of the report deals with each of these heads of claim separately in order of purchase.

It is necessary to examine the circumstances of each purchase in some detail. The tribunal has been taken through each of these on more than one occasion, first by the claimants, then by the Crown and finally by Professor Ward and Dr Tremewan. The actions of the Crown in allowing the New Zealand Company to purchase land from Ngai Tahu or in purchasing land directly from the tribe can only be adequately examined if there is a clear understanding of what occurred in the negotiation of each individual deed. On much of this material the witnesses for the Crown and the claimants were agreed. But there were still many major areas where there was a clear difference of view as to how the details should be interpreted. For this reason the tribunal has found it necessary to explore in depth the circumstances of each sale.

Before embarking on a discussion of these complex transactions we will review the general development of Crown policy as it related to Ngai Tahu during this period. The Crown's policies towards Maori fluctuated over the two decades during which the purchases took place. Dramatic changes in the settlement and government of the country occurred; governors were replaced, colonial secretaries succeeded colonial secretaries and a succession of Crown agents were dispatched to the South Island to purchase land. In 1844 when the Otakou purchase took place, Europeans were heavily outnumbered and almost all the country was still in Maori ownership and control. Settler government did not exist and the Colonial Office dealt with Maori issues directly through its man on the spot, the governor. Battles between British troops and Maori tribes were taking place in the far north and in Wellington. Understaffed, without adequate financial support and at a serious military disadvantage, the governor was unable to assert his authority over Maori. In 1864, when Rakiura

(Stewart Island) was purchased, the scenario had changed almost beyond recognition. All of the South Island and a good deal of the North had been acquired by the Crown. The demographic and military balance had changed in the Europeans' favour. Another series of wars were being fought across the centre of the North Island and the frontier of Crown influence had extended into the Waikato, Bay of Plenty and Taranaki. Settler politicians were planning the confiscation of huge areas of Maori lands. The British government had passed most of its powers to control the internal affairs of the colony to a locally elected, settler government in which there was no Maori voice whatsoever.

Waitangi Tribunal, Department of Justice, Wellington.

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5.2 The Governors : the Crown in New Zealand.

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5.2.1 New Zealand did not have its own constitutional government until 1853, when the Imperial Parliament's New Zealand Constitution Act 1852 was implemented. Until that time, New Zealand was a Crown colony. The power vested in the Crown by the various Acts of Parliament relating to New Zealand was in turn vested in the governor. The colonial secretary issued him with instructions as to how this authority was to be exercised. In a colony with only one governor, none of the executive powers were delegated. He could take advice from subordinates but nothing could be done without his authority. In theory once lieutenant-governors were appointed, as in New Zealand after 1846, they would conduct the administration of their provinces, and certain executive powers would be delegated to them under the supervision of the governor-in-chief.

New Zealand was initially under the administration of the New South Wales governor, Sir George Gipps. On 3 May 1841 the country became a Crown colony in its own right and Hobson was elevated from lieutenant-governor to governor. Hobson died on 10 September 1842 after a series of illnesses which left many of his duties to his few officials. His replacement was Captain Robert FitzRoy, governor from 26 December 1843 until 17 November 1845. It was during his term of office that the Otakou purchase was negotiated. The Hobson and FitzRoy administrations were periods of considerable economic and political difficulty. Government was severely under-resourced and under-funded. Tensions between Maori and settlers, and between both races and the Crown remained unresolved. With the appointment of Captain George Grey, backed by Imperial troops and much stronger financial support, the Crown was able to take the initiative.

5.2.2 For the purpose of this claim, Sir George Grey is the most important figure among those who acted vice-regally in New Zealand. His term of eight years, from 18 November 1845 to 31 December 1853, far exceeded those of his predecessors. Autocratic by nature, Grey kept tight control over the parliamentary grant and made sure that his lieutenant-governors' powers were more formal than real. Grey was a most effective politician, undermining the authority of any group, Maori or Pakeha, which could threaten his control over government. One of the first casualties of his administration was the Protectorate Department, set up to look after Maori interest and under the independent control of the chief protector, George Clarke Sr.

Apart from the obvious duty of governing, the most important obligation of the governor was to keep the Colonial Office informed about events in New Zealand and the measures taken to deal with them. While general guidelines were laid down

12,000 miles away, much had to be left to the judgement of the governor about the precise manner in which government would be carried out. Here again, Grey's personal qualities were important. His acumen as a despatch writer gave him even greater freedom of action.

On Grey's departure, the dominating influence in land purchasing became that of Donald McLean. Already established as the leading official dealing with land buying from Maori, McLean gave continuity to the management of this area of government for the remainder of the 1850s.

Although the Crown was directly represented in New Zealand, the lines of communication were long and difficult. It took many months for British officials to get responses from their governors in New Zealand. Distance gave the initiative to the governors, but in their actions they were always responsible to the Imperial government. We turn to examine how this relationship between the British government and the governors in New Zealand influenced the ongoing recognition of Maori rights as promised in the Treaty of Waitangi over the period when the Ngai Tahu purchases took place.

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5.3 The Challenge to Treaty Guarantees in the 1840s

5.3. The Challenge to Treaty Guarantees in the 1840s

5.3.1 We have discussed in some detail Lord Normanby's instructions to Hobson which dictated the terms of the Treaty offered to Maori (4.7.1). As we have seen, they contained an unequivocal recognition of Maori tribal ownership and control of their land and other resources in New Zealand. We have found that this would clearly have been the way Maori signing the Treaty would have interpreted the promise of "te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa". In New Zealand few intelligent Europeans with any experience of the country and familiar with Maori views on the rights of land ownership would have seen this promise in any other terms. However in Great Britain, Normanby's instructions were not the final word in the Crown's recognition of Maori property rights to the whole of the country. They were little more than the opening round in a debate which extended throughout much of the 1840s over whether Maori did own lands beyond their villages and cultivations, and whether the guarantees of article 2 of the Treaty extended beyond these very limited classes of property. The ebb and flow of this debate coloured the instructions which the Colonial Office sent to the Crown's agents in New Zealand throughout the decade.

The whole weight of European cultural assumptions was against acknowledging the ownership of land beyond what was cultivated or held under a recognisable legal title. Most British politicians held on to the narrow interpretation of the land guarantee. It is hard to exaggerate the importance placed on the meaning of this guarantee coupled with a second argument, that of the transfer of sovereignty. If you believed, as the New Zealand Company and its supporters believed, that Maori owned only the relatively small amount of land which they cultivated and the Crown owned all the rest by virtue of sovereignty, then buying land from Maori was a matter of little significance. If, on the other hand, Maori land ownership was co-extensive with the whole of New Zealand, and to be respected in the way in which private, rather than public, land ownership was respected in the European tradition, the implications changed dramatically. The process of acquiring an estate for the Crown to dispose of for settlement would be difficult, time-consuming and a drain on those funds which, according to the supporters of systematic colonization, ought to go into emigration and the development of the new settlement.

5.3.2 Normanby's views had been greatly influenced by the permanent under-secretary of state, James Stephen, an advocate of the aboriginal rights of indigenous peoples. The instructions to Hobson were largely drafted by Stephen himself. {FNREF|0-86472-060-2|5.3.2|1} Stephen too had close ties with Dandeson Coates, the lay secretary of the Church Missionary Society. The society was opposed

to the intentions of the New Zealand Company and represented a missionary view of the affairs of New Zealand to the Colonial Office. Also influential was the 1837 Commons Committee on Aborigines in British Settlements and the lobbying of the Aborigines Protection Society. {FNREF|0-86472-060-2|5.3.2|2} The committee had a particularly gloomy view of the impact of British settlement on indigenous communities. The Aborigines Protection Society was founded by members of the 1837 Commons committee. Unlike Coates and the Church Missionary Society however, the society believed that colonisation could take place if adequate protection was provided for indigenous peoples. Such protection included an unconditional property guarantee.

As permanent under-secretary, Stephen was however only the civil servant, and it was his political masters, the colonial secretaries, who made final decisions and established policy. Lord Glenelg (1835-1839) Lord Normanby (1839) and Lord John Russell (1839-1841) all relied heavily on Colonial Office advice, but the most important of their successors, Viscount Stanley (1841-1845) and Earl Grey (1846-1852) were more independently minded. The views of a number of these colonial secretaries differed substantially with Stephen's on this very question of Maori ownership of the soil. Peter Adams, in his study of the British government's reluctant moves to intervene in New Zealand, points out that in 1840 during a debate in the House of Lords, Russell argued that the Crown's policies in New Zealand had been in accord with the ideas of Emerich Vattel. {FNREF|0-86472-060-2|5.3.2|3} Vattel's arguments, as expressed in his *The Law of Nations*, first published in an English edition in 1760, were commonly referred to in debates over indigenous rights during the nineteenth century and had been taken up by Dr Thomas Arnold, the famous headmaster of Rugby School. According to Vattel and Arnold, indigenous societies could only claim ownership to land they had cultivated. Rights to the ownership of land could only be maintained by "civilised" societies who were able to cultivate them. The argument was a clear denial of Maori ownership of land not occupied by dwellings or gardens. Governor Gipps, who was Hobson's immediate superior from 1840 until 3 May 1841, certainly did not espouse an all-embracing view of Maori property rights. In introducing legislation to examine pre-1840 purchases in New Zealand, he expressed views of Maori ownership that were far more limited. After stating that the Bill was founded on three general principles, which he regarded as "political axioms", Gipps defined the first of these as:

that the uncivilized inhabitants of any country have but a qualified dominion over it, or a right of occupancy only; and that, until they establish amongst themselves a settled form of government, and subjugate the ground to their own uses, by the cultivation of it, they cannot grant to individuals, not of their own tribe, any portion of it, for the simple reason, that they have not themselves any individual property in it. {FNREF|0-86472-060-2|5.3.2|4}

The other principles were that the right of pre-emption was held exclusively by civilised power and thirdly, that a colony could not be established by private individuals without Crown assent.

5.3.3 In the minds of officials and ministers the question of Maori ownership rights under article 2 of the Treaty remained confused and abstract until the whole issue of the New Zealand Company's ownership of land was examined by William Spain in

1842. The New Zealand Company initially had every reason to acknowledge extensive Maori rights to land because its titles had been based on deeds of transfer from Maori tribes. However, an agreement between the Crown and the company in late 1840 obliged the Crown to provide four acres for every pound spent by the company, not just that spent on land purchase (C2:4:1-4). {FNREF|0-86472-060-2|5.3.3|5} When Spain's investigation showed the Cook Strait deeds to be virtually worthless, the company tried vainly to argue that the Crown had promised it a grant of around one million acres and that any further responsibility to extinguish Maori title lay with the Crown. The Crown maintained its position that any grant had been promised on the assumption that Maori title had been extinguished. Eventually on 12 May 1843 Stanley accepted an offer proposed by the company to provide additional funds to extinguish whatever remaining title was found to exist within the lands to be granted to it (P3:180). {FNREF|0-86472-060-2|5.3.3|6} This turn of events reinforced the view of the company and its supporters in Britain that Maori did not in fact have title to "waste lands", although this was in clear contradiction to the recognition of Maori ownership implied in the deeds of purchase negotiated with Maori only three years earlier (C1:13-14). The company's views were bluntly put:

If an interest in the land, never yet recognised by any Christian nation, as possessed by savages, is to be attributed to the natives of New Zealand;-if the aborigines are to be regarded as being ... proprietors of the whole surface of New Zealand, ninety-nine hundredths of which are probably covered with the primeval forest;-then, doubtless, the claims of the natives would be co-extensive with those of the Company;... But the only interest in land which our law has ever recognised as possessed by savages, is that of "actual occupation or enjoyment";... If the claims of the natives be limited to such lands, ... the question can, at the utmost, be one only of a few patches of potato-ground, and rude dwelling-places, and can involve no matter of greater moment than some few hundred of acres. {FNREF|0-86472-060-2|5.3.3|7}

5.3.4 Under pressure from the company, a parliamentary select committee was established in 1844 to look into the whole question of the colonisation of New Zealand. A draft report was prepared for Lord Stanley which stated his view that Maori rights to land ownership could not be determined in England but would have to be established in New Zealand according to local Maori custom. Although Stanley, like others in England, doubted that these rights would add up to the whole of the country's lands, the draft argued that Maori had their own complex system of property rights and that this would probably apply in New Zealand. The committee was told by several witnesses that Maori did in fact claim ownership to every acre of New Zealand.

The Colonial Office draft was rejected by the committee in favour of Lord Howick's alternative, which condemned the Treaty of Waitangi as "injudicious", rejected the concept that "wild lands" were owned by Maori and recommended that the Crown take steps to assert ownership of all land in New Zealand not in the actual occupation of Maori. There can be little doubt that actual occupation was limited to European notions of cultivations and dwellings. Although the committee's report was a victory for the New Zealand Company, Lord Stanley chose largely to ignore its findings and recommendations. To implement such a course of action, Stanley argued, was contrary to "justice, good faith, humanity, or policy". {FNREF|0-86472-060-2|5.3.4|8} Stanley was well aware from the reports he was receiving from New Zealand that

implementing such a narrow interpretation of the Treaty would cause insurmountable difficulties for his agents there. But he also believed that the rights of indigenous peoples could not in justice be denied.

5.3.5 The Normanby instructions to Hobson in 1839 had assumed that the Crown's estate in New Zealand would be comprised of lands purchased from Maori. It is also likely that the Colonial Office believed that once an examination of land titles derived from purchases of land prior to the Treaty had been completed, there would be a large surplus of land between that granted to European purchasers and that where aboriginal title had been extinguished. This land, it was assumed, would belong to the Crown. Even those, like Stanley, who believed that Maori could assert title to what was seen in European eyes as wilderness lands, still felt that there must be substantial lands somewhere in New Zealand unowned by Maori or claimed by Europeans, which could only be the property of the Crown. In the corridors of Downing Street it was still inconceivable that a 100,000 "uncivilized" Maori could own all the lands of New Zealand.

Once in New Zealand, these ideas did not match the reality of Maori title. All the country was claimed and owned under Maori concepts of ownership, which were in many ways quite different from those of British custom. Perceptive Europeans who dealt directly with Ngai Tahu and who learned the Maori language often came to accept that the tribe did hold title to the large areas of land which to European eyes consisted of untouched wilderness. Edward Shortland, who had considerable contact with Ngai Tahu while acting as interpreter for the land claims commission in the South Island, provides an example. After fulfilling his responsibilities with the commission, he travelled as far south as Aparima (Jacob's River), visiting whaling stations and taking a census of Maori population, and then walked the 200 miles of coast from Waikouaiti back to Akaroa. Material from his journal, kept during the six months spent in the South Island, was later published. {FNREF|0-86472-060-2|5.3.5|9} Humane and educated, Shortland stands out as the most perceptive and enlightened European recorder of Ngai Tahu of the period.

In Shortland's eyes, Ngai Tahu dominated their territory, though whether they filled the whole vast area was less certain to him. When he wrote the introduction to *The Southern Districts of New Zealand* back in England several years later, he was ready to think that because of the small Maori population, the southern region might accommodate the system of colonization as carried out by companies:

For it is indispensable to the success of this system, to have at command a continuous and extensive block of land, unembarrassed by the claims of native proprietors; which requisite is not to be obtained in the North Island. {FNREF|0-86472-060-2|5.3.5|10}

His text and notes however, show that he was more aware of the Maori viewpoint. As protector he dealt with complaints against Europeans who had begun to arrive with cattle and sheep which they spread over the country while refusing to make any payment to the inhabitants, on the ground that all the land belonged to the Queen of England. Shortland encountered one such new arrival who declared that he understood it was illegal to pay anything to the Maori for land:

The doctrine which Mr. G[reenwood] advocated was, I had before remarked, a very favourite one among new comers, who landed full of the idea that there were large spaces of what they termed waste and unreclaimed land, on which their cattle and flocks might roam at pleasure, and to which they had a better right than those whose ancestors had lived there, fished there, and hunted there; and had, moreover, long ago given names to every stream, hill, and valley of the neighbourhood. {FNREF|0-86472-060-2|5.3.5|11}

Although Europeans in New Zealand did not necessarily equate Maori ownership of land with that of a British land title, they did realise that Maori could assert title to land very widely on the basis of traditional use and occupation.

It was in the midst of the 1844 Common's inquiry that the first Crown purchase from Ngai Tahu took place. The Crown waived pre-emption in allowing the New Zealand Company to enter into a purchase for the New Edinburgh settlement at Otakou. However these negotiations were little influenced by the deliberations of the Commons committee; local conditions prevailed. In the wake of the Wairau affair, Governor FitzRoy was determined that the purchase should be carried out as smoothly as possible, fearful that if the negotiations went awry, further violence could result. There appears to have been no open suggestion that the block of over 500,000 acres purchased from Ngai Tahu on 31 July 1844 was not in every sense owned by Ngai Tahu.

5.3.6 On 13 June 1845 Stanley issued instructions to Captain George Grey calling for strict attention to the provisions of the Treaty of Waitangi:

I repudiate, with the utmost possible earnestness, the doctrine maintained by some, that the treaties which we have entered into with these people are to be considered as a mere blind to amuse and deceive ignorant savages. In the name of the Queen I utterly deny that any Treaty entered into and ratified by Her Majesty's command, was or could have been made in a spirit thus disingenuous, or for a purpose thus unworthy. You will honourably and scrupulously fulfil the conditions of the Treaty of Waitangi. {FNREF|0-86472-060-2|5.3.6|12}

Later in the despatch Stanley lamented that in his view the failure to identify and register Maori land had been one of the chief reasons for the colony's numerous problems under FitzRoy:

If Lord John Russell's instructions of the 28th January 1841, to define on the maps of the colony the lands of the aborigines, and my own for a registration of such lands, had been carried into effect, much of this difficulty would have been surmounted. {FNREF|0-86472-060-2|5.3.6|13}

A fortnight later Stanley returned to the issue of the registration of Maori lands and the Crown's right to "waste land":

It would appear to follow as a natural consequence of the Treaty of Waitangi, which recognises the title of the native tribes to their lands, that the limits of those lands should be distinctly recognised and set forth under the sanction of the sovereign authority. {FNREF|0-86472-060-2|5.3.6|14}

Stanley suggested to Grey that a two or three year period be given to allow tribes to register their lands, however Grey was given considerable discretion in carrying out these instructions. After the registration had been completed, Stanley went on to suggest that it would then be possible to judge:

what portion of the unoccupied surface of New Zealand can justly, and, without violation of previous engagements, be considered as at the disposal of the Crown...{FNREF|0-86472-060-2|5.3.6|15}

It is clear from the reference to the Treaty, that Stanley saw no contradiction in the instructions to register land and to uphold the Treaty, particularly as we have seen that he was prepared to acknowledge Maori customary ownership.

Stanley was moving towards a view that the Treaty could be interpreted in terms of the system of rights and ownership of Maori themselves. Stanley argued as much before the House of Lords in 1845. Peter Adams saw his reasoning as a significant recognition that the issue of ownership could not be imposed on Maori, it only had meaning in terms of Maori customary rights:

It had taken five years after the signing of the Treaty of Waitangi for the Colonial Office to recognise clearly and firmly that the correct interpretation of the land guarantee could only be decided by reference to Maori custom. Lord Stanley had at last created the possibility that the Treaty of Waitangi would be interpreted according to the sense in which the signatories understood it. {FNREF|0-86472-060-2|5.3.6|16}

5.3.7 The possibility was shortlived. In December of that year, Stanley was replaced by W E Gladstone, who after a six month period was followed by the man whose report had been adopted by the 1844 committee on New Zealand, and who had since been elevated to the title of Earl Grey. As colonial secretary, Earl Grey immediately set about to implement the tenor of the committee's report. He sent further instructions to Grey, which reiterated Stanley's intentions of 1845. His despatch of 23 December 1846 leaves little doubt as to his views on Maori land ownership:

The opinion assumed, rather than advocated, by a large class of writers on this and kindred subjects is, that the aboriginal inhabitants of any country are the proprietors of every part of its soil of which they have been accustomed to make any use, or to which they have been accustomed to assert any title. This claim is represented as sacred, however ignorant such natives may be of the arts or of the habits of civilized life, however small the number of their tribes, however unsettled their abodes, and however imperfect or occasional the uses they make of the land. (K2:12:67-68){FNREF|0-86472-060-2|5.3.7|17}

It was a principle he firmly rejected and after citing Arnold at length he continued:

To contend that under such circumstances civilized men had not a right to step in and to take possession of the vacant territory, but were bound to respect the supposed proprietary title of the savage tribes who dwelt in but were utterly unable to occupy the land, is to mistake the grounds upon which the right of property in land is founded. (K2:12:68){FNREF|0-86472-060-2|5.3.7|18}

Unlike Stanley he went on further to deny any tribal right whatsoever. Tribal property was public property and on cession, public property was transferred to the Crown. In laying down these general principles Earl Grey made only passing reference to the Treaty, and then only to find added support for the policy of pre-emption.

5.3.8 Debates in England as to whether to recognise the Maori ownership of the soil of New Zealand were little more than academic. Even strongly worded instructions were of little value if they could not be implemented. The reality was that government in New Zealand could not be carried out without an overall recognition of Maori property rights. Governors were then posed with a very real dilemma. They were instructed to locate a vast Crown domain, which they either believed did not exist or, even if they shared the views of Earl Grey and the New Zealand Company, knew could not be enforced. The prospect of registering Maori land ownership, proposed by Stanley and Earl Grey as the solution to the problem, was also unrealistic. When the Native Land Court was eventually established to do the same thing in the 1860s it proved a difficult, drawn-out and expensive process. This was not the quick and easy solution to identifying Maori rights to lands which colonial secretaries envisaged in the 1840s.

Governor Grey's response was to ignore the instruction and provide Earl Grey with a carefully worded justification. After a long introduction during which the governor skirted around the issue by suggesting that strict compliance with the instructions would possibly have put the Crown in a position where it would be acting in a "manner opposed to the principles of equity and justice", Grey suggested that a middle way could be found on the issue:

Indeed there was an evident necessity for considering the principles enunciated by your Lordship, in reference to the peculiar state of New Zealand; for even if those principles were admitted to be abstractly true, they related to the rights of two parties, one of which parties it would have been impossible to have induced to assent to them; and as this party was a very powerful one, and composed for the most part of very loyal subjects, who were disposed to make very great concessions to meet the views of the Government, the question which would always arise would really be, Would it [be] better to endeavour at all hazards to enforce a strict principle of law, or to endeavour to find out some nearly allied principle which should be cheerfully assented to by both parties, and which would fully secure the interests and advantages of both. (A9:3:2){FNREF|0-86472-060-2|5.3.8|19}

Grey's "allied principle" lay in pre-emption, and after blaming a good deal of the ills of the colony at the time of his arrival on the abolition of pre-emption, he explained how the objectives of Lord Stanley's instructions-the identification of a sufficient estate of Crown land to allow settlement-could be achieved by strict adherence to the principle of pre-emption:

As far, therefore, as I can understand the position of this country in reference to the lands of the natives it is this-that the native population would, to the best of their ability, resist the enforcement of the broad principles which were maintained by Dr. Arnold; but that they will cheerfully recognize the Crown's right of pre-emption, and that they will in nearly all-if not in all-instances dispose, for a merely nominal consideration, of those lands which they do not actually require for their own

subsistence. Even further than this: in many cases if Her Majesty requires land, not for the purposes of an absentee proprietary but for the BONA FIDE purposes of immediately placing settlers upon, the native chiefs would cheerfully give such land up to the Government without any payment, if the compliment is only paid them of requesting their acquiescence in the occupation of these lands by European settlers. (A9:3:2){FNREF|0-86472-060-2|5.3.8|20}

Grey was not willing to assert that all New Zealand was owned by Maori and set his position clearly against what he described as the "opinions which have been so generally expressed to your Lordship by such high authorities in the northern part of this island" that there was no such thing as waste land within the colony unowned by Maori. He informed Lord Grey that such land existed even in the densely populated areas of the North Island:

there are very large tracts of land claimed by contending tribes to which neither of them have a strictly valid right; and that when these tracts of country come to be occupied by Europeans, the natives will cheerfully relinquish their conflicting and invalid claims in favour of the Government, merely stipulating that small portions of land, for the purposes of cultivation shall be reserved for each tribe. An instance of this kind has recently occurred, in which an extensive and valuable tract of country has been in this manner ceded to the Government. (A9:3:3){FNREF|0-86472-060-2|5.3.8|21}

Grey went on to inform the colonial secretary that he would deal with the whole problem by strictly maintaining pre-emption and by modifying the thirteenth chapter of the royal instructions headed "On the Settlement of the Waste Lands of the Crown". Grey proposed that the registration of Maori land be a gradual process, and that it be achieved through purchase:

I have therefore deemed it inexpedient to disturb the present tranquillity of the country by calling upon the natives generally to register their claims to land; but I have taken care, in as far as possible, to keep the land purchases of the Government so far in advance of the wants of the European settlers as to be able to purchase the lands required by the Government for a trifling consideration. What has then been done was, to extinguish absolutely the native title to the tract purchased, but to reserve an adequate portion for the future wants of the natives, which reserves were registered as the only admitted claims of the natives in that district, and they have been furnished with plans of these reserves, and with certified statements that they were reserved for their use, which documents are somewhat in the nature of a Crown title to the lands specified in them, are much esteemed by the natives, and accustom them to hold land under the Crown, which is an extremely desirable object to attain. This mode of proceeding also renders the labour of registration very trifling-secures the perfectly accurate registration of all such claims as are entered, and gives to the act of registration the appearance of a boon conferred by the Government, instead of clothing it with a compulsory character. I have also no doubt that, in process of time, when the Europeans require the more distant districts of the country, the natives will have wholly forgotten, and have abandoned many invalid claims to tracts of country which would now be urged. (A9:3:4){FNREF|0-86472-060-2|5.3.8|22}

As long as the Crown was able to purchase land in advance of settlement, then the prices paid would only need to be nominal:

the real payment which they receive for their waste lands is not the sum given to them by the Government, but the security which is afforded, that themselves and their children shall for ever occupy the reserves assured to them, to which a great value is given by the vicinity of a dense European population. They are also gradually becoming aware that the Government spend all the money realized by the sale of lands in introducing Europeans into the country, or in the execution of public works, which give employment to the natives, and a value to their property, whilst the payment they receive for their land enables them to purchase stock and agricultural implements. (A9:3:4){FNREF|0-86472-060-2|5.3.8|23}

Grey's plan was ingenious. Nominal title would be recognised so that Maori, and the missionary and aboriginal protection lobbies would be kept happy. Nominal sums would be paid for this land so the exchequer would be satisfied. But the areas of land acquired to meet the needs of the Crown and settlers would be far from nominal. The whole test of the policy would be, could the Crown purchase lands from Maori in sufficient quantity? The timing of Grey's proposition is highly significant to the claim before us. In May 1848, H T Kemp had just been sent to the South Island to purchase from Ngai Tahu all their rights to land between the Wairau and Otakou purchases, on the basis of an agreement Grey had negotiated with a number of the tribe's rangatira the previous February. In 1847 Grey had negotiated with Ngati Toa a deed of purchase for very substantial areas of the northern South Island. On the basis of this purchase he was about to issue a Crown grant for a block which would eventually comprise much of Marlborough and a good deal of Nelson provinces. Although Grey had a tendency to overstate his control of the situation and to prophesy the assured success of his policies, in this case he can be seen to have had some cause for optimism.

5.3.9 The South Island was the ground on which these policies of extinguishing Maori title and defining reserves was tested. The Wairau and Kemp purchases were tendered by Grey to the Colonial Office as clear evidence that the messy business of extinguishing Maori title was once and for all under control. Following the Wairau purchase he reported confidently:

Every land claim but one, in the southward of the Colony, which is likely to occasion any future discussion or disturbance, has now been disposed of. (A8:I:202){FNREF|0-86472-060-2|5.3.9|24}

After the Kemp purchase had been negotiated but even before the reserves had been finalised he wrote to Earl Grey:

I think, therefore, that Her Majesty's Government may, for all practical purposes, regard all Native claims to land in the Middle Island as now conclusively set at rest, with the exception of the portion of the Island in the immediate neighbourhood of Foveaux Straits, and I do not apprehend that any difficulties will arise in respect to that portion of the country. (A8:I:208){FNREF|0-86472-060-2|5.3.9|25}

Following the completion of the Murihiku purchase in August 1853, the Crown claimed title to almost all of the South Island, with the exception of the southern portion of Banks Peninsula including Akaroa Harbour, the Marlborough Sounds and parts of the area between Golden Bay and the mouth of the Buller River.

5.3.10 However Grey's confidence glossed over the serious deficiencies in these blanket tribal purchases. There were numerous protests by many of the tribes concerned that these early purchases had been incomplete, that legitimate rights had not been recognised, that the wrong people had received payment and that significant areas of land had not in fact been bought. We will be examining these complaints in detail as they apply to Ngai Tahu when we discuss the individual purchases. Until 1853 the Crown generally rejected these complaints, or offered some additional payments, as in the case of Ngai Tahu's rights to lands north of the northern boundary of Kemp's purchase. However, in 1853 the Crown's efforts to purchase land it acknowledged as remaining in Maori title in the South Island were being stalled by the major tribes involved. Ngai Tahu and Ngati Toa refused to enter into any further land sales with the Crown unless their rights were recognised to areas supposedly already purchased. Other tribes such as Rangitane, Ngati Tama, Te Atiawa and Ngati Apa had not had their rights recognised at all. Ngai Tahu had complained on numerous occasions since 1848 that their rights north of Kaiapoi pa had been ignored, and that Ngati Toa had been wrongly paid for this land. After having these grievances rejected for several years, Ngai Tahu made recognition of these rights in North Canterbury conditional on entering into negotiations for the sale of Akaroa (T1:271). For their part Ngati Toa refused to enter into any further sale agreement until rights to Arahura were recognised.

5.3.11 Between August 1853 and 1860, the whole question of Crown purchases was re-opened in the South Island. The Crown entered into several new purchase agreements. Many of these were particularly vague about boundaries. The terms of the "Te Waipounamu" deed is typical. Grey, who with Donald McLean negotiated the deed which was signed on 10 August 1853, aimed at extinguishing the rights of Maori on the island once and for all. Henceforth Maori would be confined to reserves:

Na, ko te paunga rawatanga tenei o a matou whenua katoa ki tera moutere, ka oti nei i a matou te tuku, te tino whakaae, me ona Rakau, me nga Roto, me nga Wai, me nga Kohatu, me nga mea katoa, o runga ranei o te whenua, o raro raro o te whenua, me nga aha noa iho o aua whenua ki a Wikitoria te Kuini o Ingarangi, a ake tonu atu. (A8:I:307){FNREF|0-86472-060-2|5.3.11|26}

Which was translated by Alexander Mackay as:

Now this assuredly is the final transfer or sale of all our lands on the said Island, which we have hereby certainly and faithfully conveyed, with its trees, lakes, waters, stones, and all and everything either under or above the said land and all and everything connected with the said land, to Victoria the Queen of England, for ever and ever. (A8:I:307-308){FNREF|0-86472-060-2|5.3.11|27}

Despite this deed claiming to represent the interests of all the tribes in the island, including Ngati Toa, Ngati Awa (Te Atiawa), Ngati Koata, Ngati Rarua, Rangitane

and Ngai Tahu, this was not the last but the first of a series of purchase agreements with these tribes. Ngai Tahu were not in fact even a party to the deed.

In 1854 a further deed was entered into with Te Atiawa (2 March). On 10 November 1855 Ngati Rarua and Ngati Tama signed a deed ceding all but specified lands in the South Island to the Crown. On 1 February 1856 Rangitane signed a similar deed. During 1856 several deeds were signed with Te Atiawa, Ngati Rahiri, Ngati Kuia and Ngati Koata. In this year also the last Ngai Tahu sale on Banks Peninsula was completed. In 1857 the Crown negotiated the North Canterbury purchase with Ngai Tahu and in addition, Matiaha Tiramorehu received œ200 for his rights north of Kaiapoi. In 1859 the Kaikoura deed was signed by Ngati Kuri of Ngai Tahu and finally, in 1860, the Crown purchased Arahura from Ngai Tahu (A8:I:2-5). {FNREF|0-86472-060-2|5.3.11|28}

There was a sketch plan with the North Canterbury deed, and clear maps accompanied the deeds negotiated with James Mackay Jr for Kaikoura and Arahura. For the most part however, there was little attempt to determine precise boundaries to the non-Ngai Tahu deeds. It would appear that the Crown wanted to claim that all rights were extinguished wherever they may be, and the sellers may have in turn seen these deeds as some form of recognition of rights in areas where their ownership could have been highly contentious. We are reminded of Grey's advice to Earl Grey in 1848 that waste lands distant from the usual residence of their Maori claimants and subject to competing claims could be acquired cheaply by simply recognising Maori ownership. Eventually, when the lands were occupied by settlers, so the argument ran, Maori would forget all about them.

5.3.12 The last of the Ngai Tahu purchases, that of Rakiura (Stewart Island), took place in 1864 and stands out on its own. This was the final purchase of a large block of Ngai Tahu land. After this the tribe would be confined on the various reserves which had been imposed or agreed to during the process of the sale negotiations. Despite this purchase taking place with a good deal more attention to the needs of the Ngai Tahu sellers than had many of the previous purchases, only four years after the deed was signed the Crown was obliged to send a further commissioner to allocate additional reserves. From 1864 on, Ngai Tahu would be involved in a series of campaigns to have their claims to further lands and their interpretation of the terms of these purchase agreements acknowledged.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

05 The Background to the Purchases: Crown Policy and Settlement

5.4 The New Zealand Company and the Crown

5.4. The New Zealand Company and the Crown

5.4.1 Several of the Ngai Tahu purchases were a direct consequence of Edward Gibbon Wakefield's New Zealand Company scheme to colonise New Zealand and turn the country into a prosperous version of rural English society. The Otakou purchase in 1844 led to the settlement of over half a million acres by the Scottish settlers of the Otago Association. The Kemp purchase became the location for the proposed Canterbury Association settlement, following the failure of the Crown to purchase land in the Wairarapa, the association's first choice for Canterbury. The Port Cooper and Port Levy purchases were also to provide land for company settlers and investors. Although the North Canterbury, Arahura, Port Cooper, Port Levy, Akaroa and Kaikoura purchases took place after the company's demise, they all in some way resulted from earlier acquisitions for one or other of the Wakefield settlements.

Ngai Tahu land provided the laboratory for Wakefield's experiments in colonisation. Not only was Ngai Tahu land acquired so that these settlements could take place, but Wakefield's ideas were influential in the policy adopted by the Crown in dealing with the Ngai Tahu sellers.

The idea of colonising New Zealand for profit was not a new one. In 1825 an expedition was sent to New Zealand under Captain James Herd to explore the potential for colonisation as a commercial venture. Rapid industrialisation and population growth were seen by many in Britain as dangerous to social order. Colonisation was promoted as a solution to the problems of overcrowding, population explosion and the boom and bust cycles which marked the British economy from the 1820s to the 1840s. Social and economic uncertainty were accompanied by intellectual and political ferment, with any number of radical philosophers offering their panacea for society's ills. It was during this period that the Chartist movement demanded universal male suffrage and that the ideas of Marx and Engels on economics and history were developed. Edward Gibbon Wakefield entered this debate about what was called the "condition of England". Wakefield was an entrepreneur who wove around the idea of systematic colonisation a vision of an idealised rural England, recreated in a new country and better than the original.

5.4.2 Wakefield's views were first expressed in what were described as Letters from Sydney. Although supposedly written by a colonist with first hand experience of the situation in New South Wales, they were actually written while Wakefield was in Newgate prison serving a three year sentence for abducting a fifteen year old heiress. The problem with colonies, according to Wakefield, was that land could be obtained too cheaply. This destroyed the social order of things because labourers, not capitalists, gained access to land. Low land prices were a disincentive to investment

and without investment the colony was starved of capital, immigration stagnated and the colony languished. Wakefield's solution was simple. Control colonisation through a single association or company. Keep the price of land high to European investors. Use the proceeds from these sales to encourage the migration of labourers and for public works so that the colony would develop. The price of land would increase as development occurred. The original purchasers would make a tidy profit, and profits would promise even further investment.

The other side of the equation was that land would have to be acquired cheaply from the indigenous proprietors. The cost of the scheme in New Zealand was to be borne by the original Maori owners. But Wakefield saw no injustice in this. Sharing the commonly held European view that only European labour and European capital could give value to land, he saw Maori title as without commercial worth. He argued that Maori interests could be protected by ensuring that 10 per cent of all lands purchased were reserved for Maori. This land would enable Maori chiefs and their immediate families to become part of the gentry classes as they became Europeanised and shared in the increasing value of their estates. It was assumed that the rest of the tribe would become landless labourers like everyone else.

Wakefield and his supporters' self confidence and zeal were as high as their knowledge of Maori and New Zealand was low. One historian described the hyperbole with which the venture was floated:

Like the modern advertising agent, Wakefield and John Ward, the first Secretary of the New Zealand Company, were masters of the gentle art of the puff direct and the puff oblique. Fine phrases flowed smoothly and abundantly from their pens, and although neither of them had ever visited New Zealand, this acted only as a further stimulus to their imagination. 'There is probably no place in the world,' declared Ward, 'which presents a more eligible field for the exertion of British enterprise.... New Zealand is fitted by nature for the production in abundance of those three articles, which have always been the especial signs of plenty, wealth and luxury of a country-corn, wine and oil. The vine has already been found to thrive luxuriantly in the islands, and the possibility of its successful cultivation, both for home consumption and commerce, admits of no doubt...and there is good reason to believe that the wines, not only of Italy, but of Spain, Portugal and the south of France, might be brought to as great perfection as in those countries. Finally, the latitude and climate are suitable to the olive, the plant, par excellence, of the sweet south, and the ancient emblem not less of plenty, than of peace.' Thus argument passed into poetry; reason into faith. {FNREF|0-86472-060-2|5.4.2|29}

Maori were presented in these arguments as a noble race, industrious, peaceful and above all, ready to throw off their own culture and adopt that of the European almost as soon as the first immigrants arrived on their shores.

Wakefield's ideas were taken up by many influential parliamentarians, and by a number of associations promoting emigration and colonisation. In 1832 some of these theorists turned their attention to the possibility of a colony in South Australia and after various negotiations with government, an Act was passed in 1834, which incorporated Wakefield's ideas about emigration based on a land fund. Wakefield was

not involved in the implementation of the scheme and was critical of the compromises being made with his theoretical principles. His attention turned to New Zealand.

5.4.3 Between 1837 and 1839 three organisations were established to promote colonisation in New Zealand; the New Zealand Association, the New Zealand Colonisation Company and the New Zealand Land Company. By this stage intervention by the British government was becoming inevitable. The high enthusiasm of prospective colonists and investors became channelled into a race to establish a stake in New Zealand before the country became a British colony. On 12 May 1839, the Tory left England to purchase land in New Zealand. In September 1839, before any word could have reached England about the success of the mission, four boat loads of colonists were farewelled from England, many of the emigrants firm in the belief that they possessed a secure title to lands in New Zealand.

In attempting to turn the New Zealand Company vision into reality William Wakefield, Edward's brother, entered into a number of deeds with Maori from Taranaki to Cook Strait in late 1839. These deeds made provision either for a tenths reservation or for the reservation of sufficient lands for Maori endowment. When Colonel Wakefield was sent by the company to purchase land in New Zealand before the Crown arrived he took the following instructions:

you will take care to mention in every booka-booka, or contract for land, that a proportion of the territory ceded, equal to one-tenth of the whole, will be reserved by the Company, and held in trust by them for the future benefit of the chief families of the tribe you will readily explain that, after English emigration and settlement, a tenth of the land will be far more valuable than the whole was before. And you must endeavour to point out, as is the fact, that the intention of the Company is not to make reserves for the native owners in large blocks, as has been the common practice as to Indian reserves in North America, whereby settlement is impeded, and the savages are encouraged to continue savage, living apart from the civilized community-but in the same way, in the same allotments, and to the same effect, as if the reserved lands had been purchased from the Company on behalf of the natives. (C2:4:20-21){FNREF|0-86472-060-2|5.4.3|30}

The Tory arrived at Te Whanganui a Tara (Wellington) in August 1839. Within two months Colonel Wakefield claimed to have purchased twenty million acres of land on both sides of Cook Strait and at Taranaki. Although tenths were not specifically identified in all these deeds, there can be little doubt from Wakefield's instructions that this was what was intended.

There was no intention that these reserved lands would be held directly by Maori, at least not in the foreseeable future. The sections were to be selected by ballot in the same way as all the other sections in the new settlements. An agent of the company would collect every tenth (or every eleventh) section balloted and this was to be held by the company in trust for the Maori sellers. Just who would manage this trust became a matter of debate. Under an agreement made between the Crown and the company in late 1840, the Crown took over responsibility for providing reserves for Maori. We now consider this agreement in the light of the relationship between the Crown and the New Zealand Company.

5.4.4 The Colonial Office was not impressed with the company's frantic rush to establish a foothold in New Zealand before the Crown arrived and it remained hostile to the plans of the New Zealand Company to colonise New Zealand as a private capitalist venture. Hobson was told that the governor of New South Wales would be instructed to have the claims of private purchasers of Maori land investigated by a commission to determine:

what are the lands in New Zealand held by British subjects under grants from the Natives, how far such grants were lawfully acquired and ought to be respected, and what may have been the price or other valuable considerations given for them. The commissioners will make their report to the Governor, and it will then be decided by him how far the claimants, or any of them, may be entitled to confirmatory grants from the Crown, and on what considerations such confirmations ought to be made. (A8:I:14-15){FNREF|0-86472-060-2|5.4.4|31}

On 30 January 1840 Hobson issued a proclamation declaring that Her Majesty did not:

deem it expedient to recognise as valid any titles to land in New Zealand which are not derived from or confirmed by Her Majesty.(A8:I:23){FNREF|0-86472-060-2|5.4.4|32}

This was followed up by the appointment of land claims commissioners with wide powers to investigate the nature of pre-Treaty purchases. If these purchases were found to be valid, the commissioners were able to recommend that Crown grants be issued up to a maximum of 2560 acres.

5.4.5 The New Zealand Company's claims were similar to hundreds of other European claims. But because the company's claims involved hundreds of settlers already in the country, it was essential that the Crown and the company come to some special arrangement. The British government was forced to acknowledge the company and in late 1840 it negotiated an agreement which gave Crown sanction to the company's colonisation scheme (C2:4:1-4).{FNREF|0-86472-060-2|5.4.5|33} This led the way for the company to receive a Royal charter. The agreement included provisions for:

- a government-appointed accountant (James Pennington) to examine the company's total expenditure on colonisation;
- the granting to the company four acres for every pound spent; and
- the lands to be granted in the parts of the colony already settled with 160,000 acres available for the company around Port Nicholson and New Plymouth.

A lead was taken from the Aborigines Protection Society, which maintained that Maori rights could be protected by the kinds of safeguards promised by Wakefield under clause 13 of the agreement. The Crown assumed responsibility for implementing the Maori reservations intended in the original company deeds of purchase. It also provided for:

the Government reserving to themselves, IN RESPECT OF ALL OTHER LANDS, to make such arrangements AS TO THEM SHALL SEEM JUST AND EXPEDIENT FOR THE BENEFIT of the natives.(C2:4:3){FNREF|0-86472-060-2|5.4.5|34} (emphasis added)

On 22 April 1841, after representations from the company, Russell allowed the company to exchange their grants for land outside the original deed boundaries, but subject to existing provisions for Maori reserves and not for lands in the vicinity of Auckland.

5.4.6 In entering this agreement with the company, Russell assumed that their deeds of purchase had in fact extinguished title to substantial areas of the colony. This was soon found not to be the case. William Spain, sent to investigate the purchases, found all the company purchases around Cook Strait to be seriously flawed. The tribes involved informed Spain that they had not agreed to sell all their rights to the lands involved and they refused to shift from their traditional places of occupation onto the company tenths set aside for them. The issue became serious, since the lands most desired by the settlers at Pipitea and Te Aro were occupied by Te Atiawa, who refused to abandon them. Professor Alan Ward described the situation in Wellington as it applied to these tenths reserves:

Notwithstanding the deeds, which purported to convey some 20 million acres of land to the Company, the resident Maori clearly had no intention of handing over both ownership and control of this vast territory and putting themselves at the disposition of the Company's officers. Whatever they had intended (those who in fact marked deeds) they did not mean that. However well-intended the 'tenths' scheme, the Wellington Maori in particular, declined to vacate their pa and their cultivations within the new town boundaries in favour of the subdivisions that were selected on their behalf upon some of which they were supposed to reside. (T1:75)

By 1842, then, it was clear that the company had not extinguished Maori title to the lands it had sold to settlers and that Maori were refusing to abandon their pa and cultivations for tenths which they did not directly own or control.

5.4.7 The uncertainty continued while the Crown and the company argued over who would be responsible for purchasing the lands to be granted to the company under the Pennington award. Finally on 12 May 1843, the company's offer to provide funds to buy further land from Maori was accepted (P3:180). {FNREF|0-86472-060-2|5.4.7|35} Meanwhile the impatience of the Wellington and Nelson settlers increased. With the question of the company's rights to land at Wairau still being considered by Spain, the settlers attempted to occupy the valley. In an armed and violent confrontation on 17 June 1843, four Maori and twenty-two Europeans were killed. The dead included Te Rongo, the wife of Te Rangihaeata, and Captain Arthur Wakefield, a brother of Edward Gibbon Wakefield. {FNREF|0-86472-060-2|5.4.7|36} Governor FitzRoy arrived in New Zealand at the end of 1843 and was forced to consider the situation on his first visit to Wellington in February 1844. He acknowledged the injustice of the settlers' attempt to occupy the lands still being considered by Spain, and earned the ire of many Europeans by taking a conciliatory line with the tribes involved. However he had little alternative: his powers were limited, his lines of communication difficult

and he had few troops at his disposal to enforce his will against Ngati Toa and Te Atiawa, had he decided such a course was justified.

The Wairau affray further heightened uncertainty about the state of affairs in New Zealand. A fortnight after the confrontation, George Rennie's scheme to establish a Scottish colony was accepted by the New Zealand Company in Britain. The scheme was eventually abandoned when 11 months later news of the Wairau reached Scotland and startled investors and prospective colonists. It was not known in New Zealand until mid-September that the settlers were not coming. By this time the company had completed its purchase of lands at Otakou.

Armed with greatly increased resources in money and troops, Grey was able to restore some optimism to the company's British investors and prospective immigrants. In 1847, the Otago Association was able to send immigrants to take up the land purchased in 1844. In the same year plans were advanced to establish a high church, Anglican settlement to be called Canterbury. Grey's apparent success in dealing with Ngati Toa and Ngai Tahu in 1847 and 1848 was a major factor in his ability to sustain this confidence.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

05 The Background to the Purchases: Crown Policy and Settlement

5.5 The Protectors of Aborigines

5.5. The Protectors of Aborigines

5.5.1 Before 1839 there had been little consideration by the Colonial Office of just how Maori interests would be protected should New Zealand become a British colony. Normanby's instructions made protection of Maori interests one of the chief justifications for British intervention and also one of the prime responsibilities of a new administration. These instructions included the appointment of a special protector of aborigines. The protector's role was to include watching "over the interests of the aborigines" as Hobson's representative in negotiating purchases of land from Maori by "fair and equal contracts". The protector was also to ensure that Maori did not alienate lands which would cause them "stress or serious inconvenience" (A8:1:15). {FNREF|0-86472-060-2|5.5.1|37}

5.5.2 George Clarke was appointed the first protector on 6 April 1840. A missionary who had been in the country since 1824, Clarke was fluent in Maori, knowledgeable of tribal custom and well qualified to take on the position. Initially, as Normanby's instructions made clear, he was expected to be the official who bought land from Maori while promoting their amelioration. This dual role was an inherently contradictory one. The requirement to maximise profits from the resale of land created serious difficulties for the protector. It was impossible for him to offer Maori a good price, although he could ensure that sales were otherwise fairly conducted and that sellers did not part with land that they needed. There was a danger that it would undermine the protector's more important tasks if he continued to be an entrepreneur in land dealings, albeit for the Crown. Clarke requested to be relieved of this duty in 1842 and this was accepted.

As it turned out, one of the most important roles of the Protectorate was defusing potentially disruptive situations because the governor had few means to deal with clashes between the races. During the Hobson and FitzRoy period the protectors were an essential arm of government. The protectors' advocacy of Maori interests however, earned them the approbrium of many of the company settlers. In the Spain inquiry, George Clarke Jr, sub-protector and son of the chief protector, actively assisted Maori to provide evidence against the company's claims. It was not a role which endeared him to settlers holding company titles. Although a continuing financial crisis prevented money being available for land purchases, the failure of the Crown to acquire land for settlement was often blamed on the protectors. When tensions in the far north and in Wellington led to war in 1843, this too was seen by many settlers as a consequence of the protectors' actions and those of the missionary families who supported them.

FitzRoy used George Clarke Jr to look after the interests of Ngai Tahu during the Otakou negotiations and chose John Jermyn Symonds, previously a sub-protector, to supervise the company purchase on behalf of the Crown. In the wake of the Wairau disaster the protection of Maori interests and keeping the peace were closely allied.

5.5.3 Prior to 1848 the Crown's principal relationship with Ngai Tahu had been to some degree protective in nature. In 1843, the land claims commission held an inquiry into the pre-1840 purchases from Ngai Tahu. The tensions created by the Crown leading the market for land sales were little in evidence. In the years immediately following annexation, land was not bought on a large scale anywhere in New Zealand by the Crown itself. Shortage of resources made it impossible for governors before Grey to embark on ambitious land purchase programmes or to attempt to extend control over Maori districts. The Imperial government, anxious to save British taxpayers' money, provided the barest elements of a civil administration and virtually no military force. In the circumstances, most tribes, including Ngai Tahu, continued to be regarded as outside the scope of British law. The emphasis was on protection from the adverse effects of encroaching European colonization, rather than on government. In theory, the policy was to protect Maori society in the observance of its own customs while it was gradually adjusting to the presence of Europeans. Hobson's instructions here indicated that there would be occasions when intervention would be necessary, for example for the suppression of cannibalism, infanticide and tribal warfare, for which the Crown would rely on moral influence. By not involving the use of an army on the colonial frontier, this policy was intended both to save money and to satisfy the humanitarian ideal of peaceful coexistence of aboriginal and settler societies.

5.5.4 Despite the essential role the Protectorate had played in both Hobson and FitzRoy's administrations, Grey decided to abolish it only a few months after his arrival. Explaining his actions to Lord Stanley, Grey made a series of accusations against the department and against George Clarke Sr:

when I arrived here, I found that a department termed that of the Protector of Aborigines, was maintained at an annual cost of about £2500 of which sum about £1000 was appropriated to the salaries and allowances of Mr. Clarke and two of his sons, and that not a single hospital, school or institution of any kind supported by the Government was in operation for the benefit of the Natives.

I found moreover, the Natives were generally utterly wanting in all confidence in the Government, insomuch as, that several of the Native chiefs refused positively to trust themselves on board a British man of war and visit me... A rebellion was raging in the North, the Native race were paramount in the South. I found that Mr. Clarke and his sons were equally disliked by the Natives and the settlers

(X6:appendix:37){FNREF|0-86472-060-2|5.5.4|38}

Grey determined that he would personally control the Crown's dealings with Maori and argued that the sums spent on the Protectorate would be much better spent on schools and hospitals and other means for bringing Maori the fruits of "civilisation". It was quite true that the cost of the Protectorate had been considerable and that little real benefit had been provided Maori by the creation of institutions for their use. However the Protectorate had supervised land transactions and since 1842 had been

able to provide some protection of Maori interests by not being directly responsible for purchasing land. In abolishing the Protectorate at a time when he was about to embark on a massive land purchase programme, Grey recombined the role of land purchase officer with that of the protection of Maori interests. In all the Ngai Tahu purchases after Otakou, Ngai Tahu had no authority to advise them other than the purchasing officer.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

05 The Background to the Purchases: Crown Policy and Settlement

5.6 Endowments for Maori Purposes

5.6. Endowments for Maori Purposes

5.6.1 When the Colonial Office had to turn its attention to how it would run the new colony, it found much in the theory of the Wakefield scheme to recommend it. The prospect of establishing a fund to make the government and public works of the colony self-sufficient and therefore not a drain on the Imperial coffers was particularly attractive. Normanby's instructions to Hobson on buying land from the Maori cheap and then selling it at a very substantial profit have already been discussed. We have seen how the financing of the colony was to be firmly fixed into the policy of pre-emption, and how Sir George Grey saw pre-emption as the means of providing the Crown with sufficient land for colonisation.

The British government believed that not only were Maori entitled to retain the lands they required for their economic needs, both present and future, but that additional measures needed to be taken to ensure their future prosperity and progress. The company scheme, with its reservations held by the company, or later by the Crown, provided one possibility. During the 1840s, as disputes between Maori and the company over the Wellington purchases were worked through, there evolved a three-fold classification of land required by Maori. The first was pa and cultivations. Maori rights to their villages and their actual cultivations after the sale of lands to the Crown were clearly acknowledged by the mid-1840s. The next class of land to be considered was land for additional cultivation. As Professor Ward demonstrated to the tribunal, the Crown realised that larger areas of land would be required to allow for future cultivation and for increased agricultural activity when hunting and gathering declined as a part of the Maori economy (T1:166-167). Finally it was also recognised that additional land could be required as an endowment. These lands would not be directly controlled by Maori, but income from them would be used for Maori purposes. These concepts of Maori needs and endowment were, of course, to apply to lands which Maori were prepared to sell.

The last of these categories, the provision of endowment lands, became somewhat confused by a parallel provision which provided for a fund to be established from the sale of Crown lands for Maori purposes. On 28 January 1841 Lord Russell directed that a sum of not more than 20 per cent and not less than 15 per cent of the proceeds of the sale of lands purchased from Maori be placed in a fund for Maori purposes. These purposes included the costs of the Protectorate Department and the measures recommended by the protector and approved by the governor and his Executive Council for "promoting the health, civilisation, education and spiritual care of the natives" (X6:appendix:1-2). {FNREF|0-86472-060-2|5.6.1|39} Any funds not immediately required were to be invested. The money received from the New Zealand

Company reserves was separately administered and trustees were eventually appointed to administer proceeds from these reserves. In this case, however, no actual funds were made available to the trustees.

5.6.2 Although administrative measures were taken to implement these instructions, in practice they fell far short of what was intended in providing for Maori needs. One of the Crown's historians, Mr David Armstrong, examined these provisions in some detail (X6:3-5). Mr Armstrong agreed with Professor Ward that this fund was only of limited value. The cost of the Protectorate took up a good deal of the money, and the Crown purchased and on-sold so little land that the account was starved of funds. Only in one year following sales of Auckland lands was a considerable sum made available. In the period of severe financial crisis during the early 1840s the fund was severely short-changed.

Following the abolition of the Protectorate more money was spent on the provision of educational and health facilities. Professor Ward considered that Grey also used the fund for immediate political expediencies:

Grey also paid salaries to Maori assessors attached to the Resident Magistrates Courts, and gave additional sums for the building of flour mills, provision of agricultural implements etc. Some of this was useful but it was increasingly condemned by the settlers, as a 'flour and sugar policy' which temporarily enhanced Grey's mana but left a dangerous void in Maori involvement on a regular basis in the colony's affairs. (T1: 401)

The situation was further complicated by the separate provision made for the New Zealand Company. The government used funds from land sales for its overall Maori programme. Until specific provisions were provided in some deeds in the 1850s for a percentage of the returns from Crown sales to be allocated to the sellers, the land fund was used for all Maori. However those tribes included in the company scheme were to be provided for from their own reserves. In granting control over land to the New Zealand Company, the Crown was unable to use a 15 or 20 per cent of company sale proceeds for Maori purposes.

Moves to provide settlers with their own representative government further threatened the provision of Maori services from ordinary revenue. The legislatures of New Ulster and New Munster were followed by provincial and national legislatures with the coming into effect of the 1852 constitution. These settler parliaments were loath to spend money on Maori purposes. Although some Maori were eligible to vote for these assemblies, the vast majority were disenfranchised. Grey was successful in having a £7000 fund established in the civil list although, as Mr Armstrong pointed out, Grey continued to draw as he saw fit on the land fund.

In considering the Ngai Tahu purchases, we will have to determine what obligation there was, if any, on the part of the Crown to provide either considerable additional reserves as an endowment for the tribe and or an endowment fund for the provision of such amenities as schools and hospitals.

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05 The Background to the Purchases: Crown Policy and Settlement

5.7 Maori and Pakeha Understandings of Land Sales in the 1840s

5.7. Maori and Pakeha Understandings of Land Sales in the 1840s

5.7.1 Both parties to the deeds which were signed between Ngai Tahu and the Crown in the 1840s and 1850s had different assumptions about what these agreements involved. Professor Ward discussed a number of concepts shared by settlers and officials in their dealings with Maori. He identified a degree of "arrogance and condescension and aggressiveness" among many of the Europeans due to an assumption of cultural superiority (T1:5). However he did note that there could also be sense of responsibility and obligation among the more principled Crown agents. In assessing Maori needs Europeans were often convinced that the race was doomed to extinction. This view was at times shared by Maori themselves. Tuhawaiki commented that his tribe was but a "poor remnant now, and the Pakeha would soon see us all die out" (R35(a):33). Officials who believed that Ngai Tahu numbers would inevitably decline were less likely to ensure adequate reserves for the future needs of the tribe. However as we shall see, evidence presented to the tribunal shows that Ngai Tahu's numbers were beginning to improve, even as the later sales were being negotiated.

5.7.2 A sense of cultural superiority led most Europeans to the view that only rapid and complete amalgamation with their own culture-assimilation-would preserve Maori at all. Colonial secretaries urged governors to promote the skills of civilisation and demanded that Maori custom most offensive to European sensibilities be suppressed. Although Maori traditional practices were to be respected and tolerated, it was always assumed that they would be rapidly replaced by European customs. Evidence of a desire to use European technology and culture was often misinterpreted by Europeans as a displacement of things Maori. Tribalism was seen as one of the worst evils of Maori life and strenuous efforts were made to replace the communal rights of the tribe with the individual rights of the chief. Communal reserves were discouraged and Maori were expected to rise by dint of their individual effort. Professor Ward commented that:

there was a deliberate determination on the part of some officials ... to keep them [reserves] small so that Ngai Tahu should not persist with a traditional lifestyle but be obliged to leave reserves and engage with the European order. Capital and training for the purpose was not provided by government because nineteenth century people believed, not in welfare, but in an ethic of individual competition and self-reliance. It should be noted of course that this attitude was applicable to poor settlers as well as Maori-it was not discriminating in that sense. But members of ruling groups often conveniently overlooked the fact that they had not risen entirely on their own merits but had inherited capital or had acquired wealthy or powerful patrons-a usual way to advancement in those days, which even some Maori profited from. (T1:5-6)

Professor Ward went on to comment that European confidence in amalgamation could have been an encouragement for intermarriage with Europeans. By the 1840s Ngai Tahu had themselves assimilated many Pakeha into the tribal community.

5.7.3 Ngai Tahu shared some of the concerns of Europeans, but their perceptions and objectives in dealing with the Crown over land were essentially Maori. The tribe clearly wanted to engage in the new order and profit from opportunities to trade and acquire European goods. The pigs, corn, whaleboats, muskets, blankets and military uniforms were eagerly sought and paid for in the commodities easily provided by Ngai Tahu—fish, flax, timber and labour. Ngai Tahu's rangatira coordinated the tribal effort. Ngai Tahu also saw amalgamation in quite different terms from Europeans. The Europeans who married into the tribe provided the means of strengthening its resources. While for Ngai Tahu the signing of the Treaty roughly coincided with the achievement of peace with the northern tribes, a primary concern was still the desire to enhance tribal mana. In the 1840s this was still seen as best achieved by close contact with the new settlers, through the sale of land if necessary. Two decades later, however, the consequences of settlement and the marginalisation of the tribe which resulted left Ngai Tahu much less certain of the value of land sales. By that time it was too late to turn back the clock.

The fact that both sides to the purchase agreements had different agendas and different perceptions of the agreements they were involved in, leads us to consider how well Maori understood the European concepts of alienation. These concepts were an essential part of the signing of sale deeds. As we have already seen, Ngai Tahu had signed numerous so-called deeds of sale prior to 1844. The vast majority of these deeds, when brought before the land claims commissioners, were found to be invalid. Despite Maori signatures, the wording of the deeds often did not reflect the Maori understanding of these agreements. Misunderstandings about the nature of sale may well have flowed directly from quite different cultural conceptions of the nature of ownership. Professor Ward commented that:

When the British arrived in New Zealand and tried to apply their property concepts they found they did not fit the Polynesian realities. And indeed they do not. There is a fundamental disjunction between the two systems, one derived from the state and centralised law and viewing land largely (though not wholly) as a commodity; the other based on a complex system of kinship, with many different kinds of association with the land, including spiritual. (T1:8-9)

With large cultural differences between Maori and settler and with the new immigrants clamouring for land, there was an enormous potential for cultural misunderstanding. In such an environment, Maori preparedness to welcome new technology and the advantages of economic association with Europeans had the potential to leave them the victims of agreements which came to be interpreted entirely from the European side.

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05 The Background to the Purchases: Crown Policy and Settlement

5.8 Conclusion

5.8. Conclusion

5.8.1 The Treaty had set the stage for the land purchases, providing a guarantee of protection in Ngai Tahu's dealings with the Crown over land. Upon this basis, Ngai Tahu willingly entered into the sale process. In doing so they were left in a vulnerable negotiating position should the Crown ignore the assurances contained in the Treaty. The pre-emption provision prevented them from finding a market price for their lands even if it protected them from exploitation by private individuals. The Native Land Purchasing Ordinance 1846 implemented pre-emption, but also made it illegal to lease Maori land. By this measure Ngai Tahu were prevented from gaining an income from leasing their land to private individuals while retaining title to such lands. Up until 1846 this practice had been common and most Europeans on Ngai Tahu land paid some kind of rent. After 1846 the practice continued informally, but as time went on European officials were in a better position to suppress private leasing. Ngai Tahu, then, could only sell, and they could only sell to the Crown.

Unlike many North Island tribes, Ngai Tahu were unable to rely on the threat of force to assert their position. Weakened by civil war, invasion and imported diseases, they had only a limited ability to dictate terms in any negotiation. Declining economic fortunes were also a consideration. Whaling, which had been a source of considerable wealth prior to 1840, was on the decline and many of the tribe were in situations of considerable poverty. Although Ngai Tahu still had its traditional resources, new commodities had created new dependencies. If anything it would appear that from 1840 the number of Europeans coming to trade with the tribe was actually falling.

5.8.2 Given these circumstances the Treaty provided an essential protection in Ngai Tahu's dealings with the Crown over land. Following the abolition of the Protectorate Department, which had overseen the Otakou negotiation, Ngai Tahu had to rely on the ability and goodwill of land purchase officers to protect their interests in negotiations. With the tribe unable to find alternative buyers, the Crown was under a strong obligation to deal with the utmost good faith in such matters as the quantity of land purchased and the price paid. Adequate reference to the provisions of the Treaty, particularly the requirement to protect Ngai Tahu's rangatiratanga, could have ensured that Ngai Tahu's willingness to sell land was not allowed to compromise their future as a tribe. Such a concern could have prevented the inevitable cultural misunderstandings which accompanied these negotiations from seriously disadvantaging Ngai Tahu. Given the prevailing European assumptions about land values and ownership, the Treaty was one of the only things Ngai Tahu could rely on to ensure that a Maori perspective of the agreement was given adequate weight. In coming to a conclusion over whether the Crown did take into account Treaty principles we will have to turn to the individual purchases.

References

{FNTXT|0-86472-060-2|5.3.2|1}1 P Adams *Fatal Necessity: British Intervention in New Zealand 1830-1847* (Auckland University Press, Auckland, 1977) p 153; see also C Orange *The Treaty of Waitangi* (Allen and Unwin/Port Nicholson Press, Wellington, 1987) ch 2

{FNTXT|0-86472-060-2|5.3.2|2}2 K Sinclair "The Aboriginal Protection Society in New Zealand" a study in nineteenth century opinion" MA thesis, University of New Zealand, 1949

{FNTXT|0-86472-060-2|5.3.2|3}3 Adams, p 180

{FNTXT|0-86472-060-2|5.3.2|4}4 George Gipps, in council, 9 July 1840, on the second reading of the Bill for appointing commissioners to inquire into Claims to Grants of Land in New Zealand, BPP/CNZ (IUP), vol 3, pp 185-186

{FNTXT|0-86472-060-2|5.3.3|5}5 Agreement between HM Government and The New Zealand Company, November 1840, Twelfth Report of the Directors of The New Zealand Company, vol 4, p 5c-10c

{FNTXT|0-86472-060-2|5.3.3|6}6 Hope (for Stanley) to Somes, 12 May 1843, BPP/CNZ (IUP), vol 2, Appendix to Report From Select Committee on New Zealand, p 92

{FNTXT|0-86472-060-2|5.3.3|7}7 Somes to Stanley, 11 November 1842, in Adams, p 183

{FNTXT|0-86472-060-2|5.3.4|8}8 Adams, p 185

{FNTXT|0-86472-060-2|5.3.5|9}9 E Shortland *The Southern Districts of New Zealand: A Journal with Passing Notices of the Customs of the Aborigines* (Longman, London, 1851)

{FNTXT|0-86472-060-2|5.3.5|10}10 *ibid*, p vii

{FNTXT|0-86472-060-2|5.3.5|11}11 *ibid*, p 259

{FNTXT|0-86472-060-2|5.3.6|12}12 Stanley to Grey, 13 June 1845, BPP/CNZ (IUP), vol 5, p 230

{FNTXT|0-86472-060-2|5.3.6|13}13 *ibid*, p 232

{FNTXT|0-86472-060-2|5.3.6|14}14 *ibid*, p 233

{FNTXT|0-86472-060-2|5.3.6|15}15 *ibid*

{FNTXT|0-86472-060-2|5.3.6|16}16 Adams, p 186

{FNTXT|0-86472-060-2|5.3.7|17} 17 Earl Grey to Grey, 23 December 1846, BPP/CNZ (IUP), vol 6, Correspondence Relative to the Affairs of New Zealand, pp 67-68

{FNTXT|0-86472-060-2|5.3.7|18} 18 *ibid*, p 68

{FNTXT|0-86472-060-2|5.3.8|19} 19 Grey to Earl Grey, 15 May 1848, BPP/CNZ (IUP), vol 7, Further Papers Relative to the Affairs of New Zealand, p 23

{FNTXT|0-86472-060-2|5.3.8|20} 20 *ibid*

{FNTXT|0-86472-060-2|5.3.8|21} 21 *ibid*, p 24

{FNTXT|0-86472-060-2|5.3.8|22} 22 *ibid*, p 25

{FNTXT|0-86472-060-2|5.3.8|23} 23 *ibid*, p 25

{FNTXT|0-86472-060-2|5.3.9|24} 24 Grey to Earl Grey, 26 March 1847, Compendium, vol 1, p 202

{FNTXT|0-86472-060-2|5.3.9|25} 25 Grey to Earl Grey, 25 August 1848, Compendium, vol 1, p 208

{FNTXT|0-86472-060-2|5.3.11|26} 26 The Ngatittoa deed of sale, Compendium, vol 1, p 307

{FNTXT|0-86472-060-2|5.3.11|27} 27 *ibid*, pp 307-308

{FNTXT|0-86472-060-2|5.3.11|28} 28 Abstract of deeds of purchase in the South Island, Compendium, vol 1, pp 2-5

{FNTXT|0-86472-060-2|5.4.2|29} 29 J Miller, *Early Victorian New Zealand, A Study of Racial Tension and Social Attitudes, 1839-1852* (Oxford University Press, Wellington, 1974) pp 5-6

{FNTXT|0-86472-060-2|5.4.3|30} 30 Instructions to W Wakefield, May 1839, Appendices to the Twelfth Report of the N Z Company (London, 1844), pp 7f-8f

{FNTXT|0-86472-060-2|5.4.4|31} 31 Normanby to Hobson, 14 August 1839, Compendium, vol 1, pp 14-15

{FNTXT|0-86472-060-2|5.4.4|32} 32 Hobson's proclamation, 30 January 1840, Compendium, vol 1, p 23

{FNTXT|0-86472-060-2|5.4.5|33} 33 see n 5

{FNTXT|0-86472-060-2|5.4.5|34} 34 see n 5, p 8c

{FNTXT|0-86472-060-2|5.4.7|35} 35 see n 6

{FNTXT|0-86472-060-2|5.4.7|36} 36 For accounts of these events see P Burns *Fatal Success: A History of the New Zealand Company* pp 229-36 and J Miller, see n 29

{FNTXT|0-86472-060-2|5.5.1|37} 37 see n 31, p 15; see also on the protectorate, P D Gibbons "The Protectorate of Aboriginies" MA thesis, Victoria University, Wellington, 1963

{FNTXT|0-86472-060-2|5.5.4|38} 38 Grey to Stanley, 10 May 1846, G30/9, NA, Wellington

{FNTXT|0-86472-060-2|5.6.1|39} 39 Russell to Hobson, 28 January 1841, BPP/CNZ (IUP), vol 3, *Correspondence Respecting the Colonization of New Zealand*, pp 51-52

Waitangi Tribunal, Department of Justice, Wellington.