Ngai Tahu Land Report

07 Princes Street Reserve

7.1 Introduction

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The claim of Ngai Tahu in respect of a small piece of land which became generally known as the Princes Street reserve has a long history. Its genesis lies in certain actions taken by Governor Grey in 1853. The claim has been pursued at intervals since the 1860s. At the hearing the historian for the claimants gave lengthy evidence supported by some 700 pages of documents. The Crown historian produced additional material. The Ngai Tahu people of Otakou have never abandoned the claim. For the first time they have had the opportunity to advance it in terms of the Treaty of Waitangi.

As the lengthy documentation would indicate, the history of this claim is complex and bedevilled with legal complications and court proceedings. At the risk of oversimplification, it can be described in the following way.

In June 1853, Governor Grey, on the recommendation of Walter Mantell, then commissioner of Crown lands, Otago, approved of a reserve being made for Ngai Tahu for the erection of houses at Port Chalmers and at Dunedin. Subsequently doubts arose as to whether the government had complied fully with legal requirements in approving Mantell's request. A few years later when the then recently created Otago provincial government heard of Grey's action, they challenged it on the ground that the land had earlier been designated as a public reserve for wharves and quays by the New Zealand Company and the Otago Association. The province contended that Governor Grey lacked authority to change that designation. Representations were made to the central government and the issue became thoroughly politicised. In the result, Governor Grey Crown granted the land to the Otago provincial superintendent in circumstances which have never been satisfactorily explained, but in which political considerations clearly played a major role.

Ngai Tahu challenged the issue of the Crown grant in the courts without success. The Privy Council gave them leave to appeal. In 1872, acting on the advice of their lawyers, Ngai Tahu somewhat reluctantly agreed to abandon their appeal and to accept a payment of œ5000 from the Otago province. Ownership of the reserve remained with the province, which in due course transferred it to the fledgling Otago municipality. Ngai Tahu, having settled their claim, then sought the payment of a further œ6000, being rents which had accrued from the letting of the reserve up to the time of it being Crown granted to the province. A committee of the House of Representatives recommended that œ5000 should be paid to Ngai Tahu. Eventually Ngai Tahu felt compelled to accept this sum, although they believed they were entitled to œ6000, plus interest of some œ400.

While Ngai Tahu felt obliged to accept the two payments amounting to œ10,000 in full satisfaction of their claims in respect of the reserves, they have always maintained that they were wrongfully deprived of the reserve. It quickly became a valuable city property. They contend that the land should have been properly vested as a "native reserve". Had that been done they would, it is said, over the years have enjoyed very substantial benefits from the high rental value, always assuming of course that it retained its status as a Maori reserve.

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7.2 The Origins of a Reserve in Dunedin

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7.2.1 Some two years before the arrival at Otago of the first emigrant ships, the John Wickliffe and the Philip Laing, the New Zealand Company surveyor, Charles Kettle, had laid out the new town of Dunedin. Princes Street was adjacent to the foreshore of the upper harbour and parts were submerged in tidal waters. Kettle evidently envisaged some reclamation. He subdivided the irregular strip of land on the harbour side of Princes Street into lots. It was on a strip of this land that the "native reserve" was to be approved by Governor Grey in 1853. A stream, some 200 metres west along the foreshore, known to Ngai Tahu as the Toitu, crossed Princes Street and flowed into the harbour. This was a traditional landing place for Ngai Tahu in pre-settler times when they had occasion to land on the upper harbour. They did not reside there, but resorted intermittently to the site. When, in 1848, the first emigrants established their settlement on the present site of Dunedin, the Toitu estuary came to be regularly used by Ngai Tahu for landing, with a view to trading with the settlers.

7.2.2 One of the claimants' grievances concerning the Princes Street reserve is that the Crown failed to set aside the Otepoti (Dunedin) reserves which had been promised to Ngai Tahu as part of the Otakou sale. This claim appears to have been first made by John Topi Patuki in a petition to the Queen dated 17 August 1867 (F2:56-57).{FNREF|0-86472-060-2|7.2.2|1} Topi Patuki claimed that in addition to the lands expressly excepted from the sale in the Otakou deed, the Ngai Tahu chiefs demanded certain small reserves, including two at Otepoti. One was said to be near the stream which crossed Princes Street (the Toitu), and the other fronting a small sandy cove to the east of the site afterwards occupied by the manse, and the land adjoining (the Princes Street reserve). Topi Patuki further alleged that during the negotiations with the New Zealand Company's agent (presumably one of the Wakefields), and the agent representing the government, J J Symonds, they were refused these demands. The chiefs thereupon withdrew from the negotiations and departed. But, Patuki said, after a lapse of some days, "on being assured that the above reserves would be made for them, the said chiefs returned, and the purchase was concluded" (F2:56).{FNREF|0-

86472-060-2|7.2.2|2}

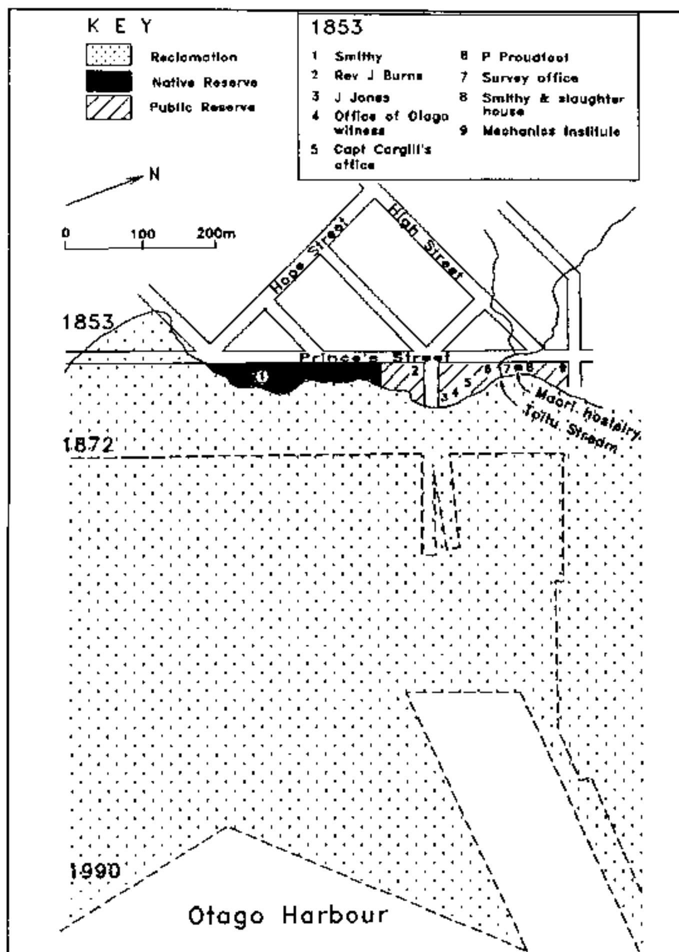

Figure 7.1: The Princes Street reserve from Mantell's 1853 sketch, showing the location of the hostel near the mouth of the Toitu Stream and the extent of reclamation since 1853.

Mr John Jones, a well-known Otago trader, gave evidence to the petitions committee of the House of Representatives in support of this part of Topi Patuki's petition. (He did not support the reference to tenths having been promised). Jones claimed that he was present at Port Chalmers when claims for reserves were discussed and later at Dunedin when Daniel Wakefield and Symonds were present. On proceeding to where Dunedin now stands he said Ngai Tahu selected the two spots mentioned by Patuki in his petition. Wakefield would not agree and negotiations came to an end. Jones claimed that all the Ngai Tahu present, including Tuhawaiki, went back with him in his vessel to Waikouaiti. Ten days had elapsed when a message arrived from Daniel Wakefield seeking a resumption of negotiations. Jones said he took the Ngai Tahu people back to Port Chalmers. When negotiations resumed he claims Daniel Wakefield gave in. "I distinctly state that these two reserves were exempted from the sale of the block subsequently known as the Otago Block..." (F2:62).{FNREF|0-86472-060-2|7.2.2|3}

Counsel for the claimants drew our attention to a memorandum by J C Richmond, then native minister, dated 5 October 1867, in which he said that the allegations contained in Topi Patuki's petition were for the most part correct:

There is good evidence that the Native owners at the time of the first negotiations for the land at Otakou objected to giving up a part of what now forms the reserve, and in consequence of that objection the negotiation was broken off. In the subsequent deed of sale no specific reservation of the land is made, but a general understanding is indicated that some lands are to be surveyed by the Governor for the sellers, and the vague terms of the deed may have been meant to include inter alia a portion of the reserve in question. (F2:60){FNREF|0-86472-060-2|7.2.2|4}

Unfortunately Richmond does not specify the "good evidence" in question. Presumably it referred to Patuki's allegations and John Jones' statement.

The claimants' historian, Dr Ann Parsonson, conceded that these reserves were not in fact mentioned in the Otakou deed. Nor does there appear to be any contemporary written account of any such demands by Ngai Tahu. At the time of the Otakou purchase, the New Zealand Company proposed to establish the new town at the head of the upper harbour but was undecided as to just where it would be sited. Maori Dunedin, a recent study by M Goodall and G Griffiths, discusses the pre-purchase significance of the Toitu estuary landing place:

While this [the Toitu Estuary] was undoubtedly a traditional Maori landing place-probably among the half-dozen or so most used within the Upper Harbour-it was not a focal point for trade and traffic in the way that it became after the settlers built their wharves and township there. Otakou played that role for the Maoris, and the southern routes from Otakou and Purakanui went past urban Dunedin, not through it: along the western hill-tops, the line of Kaikorai Valley, and the sea-coast. Visits to the mouths of the Toitu or Owheo (Leith) would have been an end in themselves, to visit a kaika in older times, or hunt birds and eels, or round up pigs. The most important traditional landing place as far as the pre-European Maoris were concerned might well have been the place where, from Shortland's account, canoes and whaleboats usually landed for the short portage across the neck of land to the open sea. It was therefore not due to any mistake that the Toitu landing place did not appear in the 1844 deed: it simply had no special significance at that time.{FNREF|0-86472-060-2|7.2.2|5}

7.2.3 The contemporary documentation in no way confirms Topi Patuki and Jones' recollection of events. The New Zealand Company surveyor, Tuckett, when reporting on the offer to sell dated 20 June 1844, which was signed by Tuhawaiki, Taiaroa and Karetai, made no mention of the alleged Ngai Tahu demands for reserves at Port Chalmers and Dunedin. He did refer to a place called Otawhakoro on the lower or outer harbour, claimed by Taiaroa's sister, the wife of one Chasland, who had written to John Jones requesting him to maintain his wife's claim and not to sell it. In commenting on Jones' involvement Tuckett said:

The fact is John Jones wishes to establish himself here immediately as a Merchant, and of course does not like to lay out money as a squatter, if a water frontage Section in the Town is given to him by the Company in return for his assistance and influence he will endeavour to persuade the natives to abandon any land which we wish to acquire, if this cannot be done he will probably induce the natives to make a Reserve which will answer his purpose, for the occupation of which he will negotiate with them. (C2:11:11-12){FNREF|0-86472-060-2|7.2.3|6}

Tuckett later recommended giving Jones or Chasland's wife a town section with a water frontage; the alternative being a sum of œ200, beyond the œ2400 asked by Ngai Tahu to extinguish all claims to land on which they were not actually residing.{FNREF|0-86472-060-2|7.2.3|7}

The significance of the foregoing comments by Tuckett is two-fold. They suggest that Jones was very much an interested party and was acting from mixed motives. And it is surely remarkable that in his report of the signing of the 20 June 1844 Ngai Tahu offer, Tuckett did not mention any demands for two reserves at Port Chalmers and Otepoti respectively. Nor did he refer to the somewhat dramatic withdrawal from negotiations and Ngai Tahu's departure for 10 days with Jones to Waikouaiti.

Symonds noted in his journal that Jones, who had arrived at Otago on the evening of 18 June 1844, had spent the next day trying "in his way" to settle matters without success (P3:9).{FNREF|0-86472-060-2|7.2.3|8} It appears Jones' discussion with Tuckett took place the same day. Symonds, in his report on the sale to Richmond, made no mention of any requests for reserves at the upper harbour foreshore. Years later, on 18 February 1880, he was questioned by Commissioner Nairn. Both Mr Nairn and Mr Izard appear to have had in mind the Princes Street reserve in the questions now reproduced.

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|7.2.3|9}

Given Symonds' meticulous, if not pedantic, care in his supervision of the negotiations it would be surprising that he would not have recalled the incidents referred to by Topi Patuki and John Jones. Griffiths and Goodall comment on the view that the Maori claim stemmed from mis-kept promises of 1844:

The first recorded reference connecting the landing-place with the 1844 deed does not appear until a quarter of a century later; corroboration is insecure and came from interested parties; and there are strong indications that, as so often happens, the events of 1844 and the Mantell promises of 1852 became telescoped in people's minds.{FNREF|0-86472-060-2|7.2.3|10}

It is difficult to accept that the participants would not have recorded the demands for the two reserves, had they been made in the dramatic circumstances as depicted by Patuki and Jones. Even after a lapse of 26 years Symonds would surely have recollected it.

7.2.4 Having regard to all the circumstances, we are not satisfied that Symonds and Wakefield or Tuckett promised Ngai Tahu the two reserves on the upper harbour

foreshore. As we will explain, we believe the genesis of the Princes Street reserve lies in Mantell's initiatives in 1852. To this and associated matters we now turn.

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7.3 The History of the Princes Street Reserve

7.3. The History of the Princes Street Reserve

Mantell proposes a reserve for Ngai Tahu at Princes Street

7.3.1 Local Ngai Tahu quickly became important suppliers of fish, potatoes and other commodities to the new settlement at Dunedin. Griffiths and Goodall refer to "continual contemporary references to the presence...of the Maoris and their boats" at the Toitu estuary where they did "their briskest trade".{FNREF|0-86472-060-2|7.3.1|11} It became a natural trading post. Ngai Tahu in turn utilised the services of boat-builders and other tradesmen.

7.3.2 On 24 November 1852 Mantell, then commissioner of Crown lands for Otago, wrote to the colonial secretary, Domett (F2:104-105).{FNREF|0-86472-060-2|7.3.2|12} He informed the colonial secretary that Ngai Tahu at Otakou, Waikouaiti, Moeraki and elsewhere had "urgently and constantly" requested him to persuade the governor-in-chief to grant a small portion of land at both Port Chalmers and Dunedin for the erection of houses. Mantell advised Domett that Ngai Tahu had no other shelter than that provided by "their boats, oars and sails over a low unhealthy beach near the survey office" (F2:105).{FNREF|0-86472-060-2|7.3.2|13} Mantell asked the colonial secretary to put this request before the governor. In response to a request from Domett for plans of the proposed reserves, Mantell, on 18 April 1853, sent tracings to the colonial secretary. The tracings showed an irregular-shaped piece of land on the harbour side of Princes Street. Mantell advised that this was:

the only suitable piece of land now vacant; although steep towards the water it has (at X on the tracing) a spot where the Natives could easily construct a place for their boats to lie. (F2:15){FNREF|0-86472-060-2|7.3.2|14}

In a much later memorandum (3 January 1865) for the attorney-general, Mantell advised that he had not recommended the site proposed by Ngai Tahu but "a narrow steep between Princes Street and the mud flats of the harbour which was regarded as of less value, and as at that time almost out of the town" (F2:34).{FNREF|0-86472-060-2|7.3.2|15} Domett duly wrote to Mantell on 6 June 1853 advising, with reference to the two plans Mantell had forwarded in April, that:

His Excellency approves of these reserves being made as recommended by you, and has accordingly directed me to authorise you to purchase section 401 to complete the proposed reserve at Port Chalmers. (F2:16){FNREF|0-86472-060-2|7.3.2|16}

We note at this point that while the governor in June 1853 approved of the two reserves "being made" he had apparently not constituted them as such. Presumably

because the purchase of an additional section at Port Chalmers was first needed to "complete the proposed reserves". As we will see, more than the governor's approval would appear to have been necessary.

We do not really know why Mantell did not meet Ngai Tahu's wishes and recommend a reserve at or near the Toitu estuary. There is persuasive evidence that Mantell (an Englishman and an Anglican), was not on good terms with William Cargill, the superintendent of the Otago province, (a Scotsman and a Presbyterian), and that their somewhat petty rivalry severely strained their relations. The site chosen by Mantell was next to the presbyterian manse site. It was suggested that this may have been intended to be deliberately provocative (F1:12-13). It is possible that Mantell chose it because it was, as he claimed, the only piece of land then vacant, but he later suggested it was of little value and on the edge of town. This is why, perhaps, he does not appear to have told Ngai Tahu of his actions in obtaining Governor Grey's approval to a reserve being made at the Princes Street site adjoining the manse. More than a year later 107 Ngai Tahu signed a petition to Cargill, asking that some place of shelter be provided for them on any part of the beach or other part of the town of Dunedin as Cargill might think appropriate (F2:107-110).{FNREF|0-86472-060-2|7.3.2|17} Ngai Tahu appear at that time to have been unaware of Mantell's initiatives in relation to the site further along Princes Street.

7.3.3 Meanwhile Governor Grey's term of office expired on 31 December 1853 and he left New Zealand. On 12 May 1854 Mantell had forwarded the Port Chalmers conveyance of the section he was authorised to buy to the colonial secretary. On 5 June 1855, in response to an earlier suggestion from Mantell, the colonial secretary wrote-in Mantell's absence on leave-to the acting commissioner of Crown lands, Otago, sending:

certified plans of certain reserves at Dunedin and Port Chalmers, as enclosed in his [Mantell's] letter of the 18th April, 1853, to the Civil Secretary, in order that they may be duly recorded as approved by His Excellency. (F2:19){FNREF|0-86472-060-2|7.3.3|18}

These plans no doubt included the section at Port Chalmers purchased by Mantell on the authority of Governor Grey. There is nothing to suggest that Grey, who had departed some 18 months earlier, or his successor had taken any further steps to constitute the proposed sites as Maori reserves.

A Maori hostelry is erected in Princes Street

7.3.4 It was not until 1858 that the actions of Mantell and Governor Grey in respect to the Princes Street reserve became known to the Otago Provincial Council. In the meantime, the provincial council was contemplating erecting a Maori hostelry. In 1855 it considered there to be an "urgent necessity ...for the immediate erection of a suitable building at or near the beach, for the comfortable lodging of the natives in their visits to Dunedin..." (W2:appendix:1).{FNREF|0-86472-060-2|7.3.4|19} Within two weeks, on 24 April 1855, plans for a building for local Maori were approved by the provincial council (W2:appendix:2).{FNREF|0-86472-060-2|7.3.4|20} Shortly after however, it was decided that the plan was inadequate. Instead, the council approved of the superintendent's proposal to renovate the survey office near the

former Toitu estuary for the Maori people; "the site...being the one of all others most acceptable to the Natives" (W2:appendix:3).{FNREF|0-86472-060-2|7.3.4|21} The council left the superintendent to carry it out, but nothing appeared to come of it.

In 1857 the Otago Colonist, (at the time an anti-Cargill newspaper), reported a number of Maori women "huddled together cold and shivering upon the open beach, with the thermometer below freezing point, exposed to the rain and snow".{FNREF|0-86472-060-2|7.3.4|22} Such a sight, the newspaper claimed, "might have been seen any night during the past week in the Christian town of Dunedin..." (F1:34).{FNREF|0-86472-060-2|7.3.4|23}

7.3.5 It took the visit of Stafford, premier and colonial secretary, and C W Richmond, native minister, to Dunedin in November 1858 to stimulate action. They inspected various sites, including the Princes Street reserve, which they found to be unfit for the erection of a Maori hostelry (F2:26).{FNREF|0-86472-060-2|7.3.5|24} Earlier in the same year the commissioner of Crown lands, W H Cutten, had condemned as "utterly useless" the Princes Street site (F2:26).{FNREF|0-86472-060-2|7.3.5|25} At the same time Cutten questioned the authority of the governor to make the site a Maori reserve, on the grounds that the land in question had already been set apart as a public reserve under the Otago terms of purchase. This and related questions we discuss later.

Following the site visits by Stafford and Richmond, Richmond wrote from Dunedin to the provincial superintendent on 22 November 1858, advising that the general government wished to erect a hostelry for Ngai Tahu visiting Dunedin. He sought the superintendent's cooperation in providing a suitable site. He continued:

The only eligible situations that exist for the purpose are on the Beach frontage of the Reserve No. 7, lately granted to the Superintendent under the Public Reserves Act 1854, or on the adjoining strip of Beach frontage extending from the new Culvert along the line of High Street-on which a Smith's Shop now stands. (F2:245){FNREF|0-86472-060-2|7.3.5|26}

Richmond pointed out that the second piece of land was still in Crown ownership and the government could proceed to build a hostelry on it. But he was unsure, in the absence of the provincial chief surveyor, whether a building on this site might interfere with other contemplated public works. He therefore proposed to leave it to the provincial government to fix on a proper site within the limits proposed in his letter. And he further proposed:

that the Provincial Government will propose to the Provincial Legislature any legislation which may be requisite to secure the site in perpetuity for the use of the Natives, and for preserving a convenient landing place for their canoes at some point on the above-named Beach frontage. (F2:246){FNREF|0-86472-060-2|7.3.5|27}

In conclusion, Richmond sought early advice as to whether the superintendent concurred in his proposals as he was "desirous before leaving Dunedin of giving instructions respecting the erection of the Building"(F2:246).{FNREF|0-86472-060-2|7.3.5|28}

7.3.6 Evidently Richmond and Superintendent Cargill came to an arrangement during this time. The central government was to get a small piece of land for the Maori lodging house and in return:

they gave (or would give) to the Provincial Government the entire right to the ground between the culvert and Gallie's smithy. (along eastern side of Princes Street near intersection with High St.) (F1:37)

It appears that, following approval by central government of the plan prepared by the civil engineer, tenders were called (F1:37). The central government then went ahead without further consultation with the provincial government. In 1859 work began on the building on land known as reserve no 7 which had been granted to the superintendent in trust for public offices in June 1858 (W2:appendix:24-25).{FNREF|0-86472-060-2|7.3.6|29} This site was adjacent to the old survey office near the former Toitu estuary and was a very suitable location for a Maori hostelry.

7.3.7 Commencement of work on the hostelry prompted the provincial government to pass a Bill:

- authorising the superintendent to let part of reserve no 7 for a nominal rent to the governor of New Zealand. (The plan in the schedule to the Bill shows the Maori hostelry being built);

- stating that the lease was to expire whenever the provincial government should resolve that the site was required for town improvements and the building should be removed; and

- stating that the province would pay the cost of erecting a similar building in a convenient locality. (W2:appendix:9-10){FNREF|0-86472-060-2|7.3.7|30}

Cargill declined to approve this Bill. He explained why in a letter of 26 November 1859 to the colonial secretary.

With respect to the "Maori Lodging Bill" which nullifies the arrangement made last year between the General and Provincial Governments, and insomuch as I was a party to that arrangement I now write to Mr Richmond, who concluded it on the part of the General Government, to satisfy him that I was no party to this Bill... (W2:appendix:5-6){FNREF|0-86472-060-2|7.3.7|31}

The governor did not consent to the proposed Bill (W2:appendix:9).{FNREF|0-86472-060-2|7.3.7|32} Stafford wrote on 6 February 1860 to the Otago superintendent explaining why the governor had been advised to withhold his assent (F2:248-249).{FNREF|0-86472-060-2|7.3.7|33} Stafford expressed his regret that the Bill failed to give effect to the arrangement entered into in November 1858 with the general government in relation to the erection of the Maori hostelry, and continued:

On the faith of this arrangement funds have been provided for the erection of an Hostelry on the land agreed upon, being a portion of a reserve for public purposes recently handed over by the Crown to the Superintendent, and it cannot now but be a matter of surprise and disappointment to the Government to find that the Bill under

consideration, would substitute entirely different conditions as regards this building to those originally agreed upon. (F2:248-249){FNREF|0-86472-060-2|7.3.7|34}

It appears from Stafford's letter that in 1858, agreement had been reached with the province that the hostelry would be built on part of reserve no 7-which in fact is where it was built. Unfortunately he does not spell out the "entirely different conditions" which were originally agreed on, but which were not contained in the provincial Bill. In the result, a hostelry was constructed by the central government on land vested in the provincial government, and which consequently had no security of tenure.

According to Griffiths and Goodall the hostelry was a two-storeyed stone building with sleeping quarters upstairs and cooking facilities and market space downstairs. "It was a feature of the township for some years, then became swallowed up in the rapid reclamation of the foreshore".{FNREF|0-86472-060-2|7.3.7|35}

The fate of the Maori hostelry

7.3.8 By 1863 it seems the Maori hostelry fronting Princes Street, erected by the central government on provincial reserve no 7, was in a parlous condition. According to the clerk of the Dunedin Town Board, street-widening earthworks had resulted in the building being almost buried and "altogether unfit for occupation". To make way for necessary town improvements he recommended its removal or increase in height (W2:appendix:30).{FNREF|0-86472-060-2|7.3.8|36}

Nothing further is recorded concerning the fate of the hostelry until 1865 when, on 27 May, the Otago Executive Council received advice from A Chetham Strode, a central government official, that he had authority to remove the building (W2:appendix:39).{FNREF|0-86472-060-2|7.3.8|37} On 30 May 1865 the Otago Executive Council "Agreed to provide a Site for the Native Hostelry on the north side of Stewart Street Jetty" (W2:appendix:40).{FNREF|0-86472-060-2|7.3.8|38} On 8 September 1865 the council decided that "the materials of the Maori House be removed to the site approved by Mr Strode for re-erection" (W2:appendix:48).{FNREF|0-86472-060-2|7.3.8|39} In fact the building was not re-erected. Nor was any other hostelry provided for Maori at Dunedin either by the province or the central government.

Provincial government questions validity of the Princes Street reserve

7.3.9 While, as we have seen, belated provision was made by the Crown for a Maori hostelry in Dunedin, it was on a site with no security of tenure and it survived for no more than five or six years. Having recounted the rise and fall of the Maori hostelry further along Princes Street, we now return to the Princes Street reserve adjoining the manse site, to which Mantell had secured Governor Grey's approval in June 1853. In the year when the provincial council decided to dismantle the Maori hostelry, it instructed the superintendent, on 11 July 1865, to obtain from the colonial secretary the reasons for the delay in deciding "as to the so-called Maori Reserve in Princes Street south", and to suggest that the matter be laid before the general assembly (W2:appendix:42).{FNREF|0-86472-060-2|7.3.9|40}

7.3.10 As earlier indicated (7.3.4), Mantell's initiatives over the Princes Street reserve did not become more generally known until 1858. On 14 April of that year W H Cutten, then commissioner of Crown lands (and also the provincial secretary), reported to the superintendent on the topic of the 16 Maori reserves in Otago. Besides those reserves which he considered to strictly adhere to the description of Maori reserves, he referred to two others:

a reserve...made at Port Chalmers of nearly an acre in extent. It consists of sections 403 and 404, and a portion of unsurveyed land. It is not shown on the record plan. This reserve was recommended by Mr. Mantell, and was sanctioned by the Governor in 1854 and 1855.

A quarter of an acre adjoining, viz. section 401, was purchased by Mr. Mantell from Mr. R. Williams with the sanction of the Governor. The reserve was made under the pretence of its being required for the use of the Natives landing at Port Chalmers; but for that purpose it is entirely useless, as it has a steep frontage to the beach of considerable elevation. It has never been used by the Natives.

A reserve for a similar object was made at Dunedin. Its exact extent is not defined, but comprises all the land between the shore of the harbour and the east side of Princes Street, and abuts upon the land upon which the Manse has been built. This reserve was made upon the authority of the Governor; but it appears to me that His Excellency the Governor exceeded the powers vested in him in this latter case, the land in question having been already set apart as a public reserve under the Otago Terms of Purchase (F2:26).{FNREF|0-86472-060-2|7.3.10|41}

Cutten suggested it would be for the commissioner of native reserves to ascertain the correct legal position of each of these two reserves. Each he considered "utterly useless" for their contemplated purpose. The matter lay in abeyance until 1862 when the Otago gold rush, which had begun the previous year, greatly increased the population and commercial activity in the town of Dunedin. Shipping entering the port of Otago trebled within the year. New jetties in deeper water and reclamation of the foreshore proceeded. This greatly increased activity stimulated the trader John Jones and 18 other merchants to petition the governor to agree to the Princes Street Maori reserve being leased for storing various goods until the government required it for another purpose. In a report of 15 January 1862 to the secretary of Crown lands, Cutten advised that:

The land referred to by the petitioners was in the original survey of the Town of Dunedin laid off in sections, and ran some distance into the water below high water-mark. But as it was deemed advisable by the New Zealand Company that there should be no exclusive privilege to the water frontage, but that it should be made a public quay, the sections were withdrawn from the map and marked as reserved. Subsequently Mr. Mantell, the Commissioner of Crown Lands in Otago, selected a portion of the reserve, and recommended that it should be appropriated to the use of the Natives on their visits to Dunedin, an arrangement which I believe was sanctioned by His Excellency Sir George Grey. The Natives however never made use of the place, it being not suited to the purpose, but continued to land their produce at a small bay where the water is deeper, and upon which latter spot a stone house for their use has been erected by the General Government. A portion of the frontage reserve has

been used by the Provincial Government for the erection of Immigrant Barracks, and for Police Barracks and offices. In all probability the whole of the reserve will be required by the Government for public purposes, as but few reserves have been made in Dunedin. (F2:22){FNREF|0-86472-060-2|7.3.10|42}

In the meantime he recommended that small lots be let on an annual basis.

It is not clear whether Cutten considered the Princes Street land to be a Maori reserve. He pointed to the Maori hostelry and landing place being elsewhere by arrangement with central government. He thought it probable that the whole of the reserve would be required for public purposes. Whatever Cutten's views, the central government clearly had reservations about the position. In 1862 Cutten was required to pay the rents from the lots being leased into a bank account separate from other Crown revenue "to abide the decision of whether the reserve was a reserve for the Natives, or a reserve for the construction of a quay" (F2:34-35).{FNREF|0-86472-060-2|7.3.10|43}

Central government intervention

7.3.11 In April 1864 the central government sent an officer, H T Clarke, to Dunedin to investigate the Princes Street Maori reserve and the provincial government's objections to its designation as such. He discovered that it had now produced some œ5000 by way of revenue but learned little else. In November 1864 Walter Mantell again became native minister in the central government. He was now known as a champion of Ngai Tahu. On 3 January 1865 he wrote to Sewell, the attorney-general, about the Dunedin and Port Chalmers Maori reserves. He related his earlier attempts to secure the two reserves for Ngai Tahu. He concluded his memorandum by saying:

There is now no reason why the title to these reserves for Native purposes should not be distinctly recorded. How can that be done? (F2:34){FNREF|0-86472-060-2|7.3.11|44}

The attorney-general's response was to invoke the New Zealand Native Reserves Act 1856 as amended in 1862. On 6 January 1865 by order in council made pursuant to section 8 of the 1862 amendment, the governor, with the advice and consent of the Executive Council, delegated to A Chetham Strode (a government official) all of the powers of a commissioner appointed under the New Zealand Native Reserves Act 1856, in respect of the two Maori reserves set apart in Dunedin and Port Chalmers. This action necessarily assumed that such reserves did, as a matter of law, exist. The order in council did not, however, constitute them as such.

On 29 March 1865 the colonial secretary advised the superintendent that the general government wished to come to a decision as to the title to the Princes Street reserve site (F2:35).{FNREF|0-86472-060-2|7.3.11|45} The superintendent, J Hyde Harris, replied to the colonial secretary on 13 April 1865 and enclosed a copy of a letter of the same date to Postmaster-General Richardson which set out the grounds upon which he considered the provincial government was entitled to the Princes Street reserve land. In it he registered the province's protest against any act whereby the Princes Street reserve land might be transferred to trustees for Maori purposes (F2:35-36).{FNREF|0-86472-060-2|7.3.11|46}

7.3.12 Before referring further to Superintendent Hyde Harris' letter of 13 April, it is desirable to trace the history of this piece of land from the time it was Crown granted to the New Zealand Company on 13 April 1846 as part of the 400,000 acre Otakou purchase (C2:27:1-2).{FNREF|0-86472-060-2|7.3.12|47} Kettle, the New Zealand Company surveyor, initially provided a line of sections between Princes Street and the foreshore for selection by the colonists (F4).{FNREF|0-86472-060-2|7.3.12|48} However, on 21 October 1846, T C Harington, secretary of the New Zealand Company in London, on Cargill's initiative instructed Colonel Wakefield that all water frontages from about high-water mark should be reserved for public use (F2:123).{FNREF|0-86472-060-2|7.3.12|49} The necessary changes were accordingly made - the map of the south end of Dunedin showing the land having a water frontage as "Reserves for Public Purposes" (F2:47).{FNREF|0-86472-060-2|7.3.12|50} Mantell later testified that he was aware of this designation of the land at the time he recommended it as a Maori reserve (F2:45).{FNREF|0-86472-060-2|7.3.12|51} This raises the question of whether Governor Grey had legal authority to accede to Mantell's request that the Princes Street site be made a Maori reserve.

Legal complexities

7.3.13 In September 1845, prior to the Otago block being Crown granted to the New Zealand Company in 1846, the company had already agreed on terms of purchase with the Otago Association, initially in respect of some 144,600 acres of land including the site of the future Dunedin. By clause 14 of that agreement, if the association failed within five years to sell some 2000 properties, the New Zealand Company had the right to dispose of the remaining land (F2:138-144).{FNREF|0-86472-060-2|7.3.13|52} This provision was modified by revised terms of purchase on 1 August 1849. The five years given the association to sell the 2000 properties was to run from 23 November 1847.

In 1850 the New Zealand Company surrendered its charter to the Crown, pursuant to section 19 of an 1847 Imperial Act to promote colonisation in New Zealand (F2:148-155).{FNREF|0-86472-060-2|7.3.13|53} On doing so all New Zealand Company land in New Zealand reverted to the Crown "as Part of the Demesne Lands of the Crown in New Zealand, subject nevertheless to any Contracts which [should] be then subsisting in regard to any of the said Lands" (F2:154).{FNREF|0-86472-060-2|7.3.13|54} The British government recognised the continuance in force until November 1852 of the 1847 terms of purchase agreement between the New Zealand Company and the Otago Association (F2:163).{FNREF|0-86472-060-2|7.3.13|55} In February 1851 Governor Grey was instructed by the Colonial Office that he was to interfere "as little as possible with the course of management...already established by the New Zealand Company" (F2:173-174).{FNREF|0-86472-060-2|7.3.13|56}

By 23 November 1852 however, the Otago Association had not succeeded in selling sufficient land. Accordingly, the 1849 terms of purchase expired and legal control of all land within the Otago block was assumed by the Crown under the provisions of the New Zealand Constitution Act 1852.

7.3.14 The then colonial secretary, Sir John Pakington, in a despatch of 15 December 1852 advised Governor Grey that, until the general assembly constituted by the Constitution Act determined otherwise, he was to continue to administer the lands in

general conformity with the terms of purchase. The New Zealand Constitution Act 1852 was proclaimed in New Zealand and came into force on 17 January 1853. Section 72 empowered the general assembly:

to make laws for regulating the sale, letting, disposal and occupation of the waste lands of the Crown in New Zealand. (F2:203){FNREF|0-86472-060-2|7.3.14|57}

Pending the making of any such laws the Crown retained the right to regulate such matters. On 24 June 1853, Royal instructions were issued to Governor Grey pursuant to section 72 of the New Zealand Constitution Act 1852, requiring him to observe the 1849 terms of purchase in respect of all sales of land and licences until the New Zealand general assembly enacted otherwise (F2:190c).{FNREF|0-86472-060-2|7.3.14|58} This instruction was despatched to Grey by the colonial secretary, the Duke of Newcastle, on 1 July 1853. What is not clear is whether Governor Grey received Pakington's earlier despatch of 15 December 1852 (gazetted in New Zealand on 13 June 1853) before he approved the Princes Street Maori reserve being made in June 1853. Given the date of gazetting it seems likely he had. He is unlikely however, to have received the Duke of Newcastle's despatch of 1 July 1853 before he left New Zealand at the end of December of that year.

7.3.15 The position is further complicated by the possible application of the Royal instructions of 1846. Chapter 13 of these instructions related to the settlement of waste lands of the Crown. But these provisions were suspended from operation in New Munster (including Otago) until 5 July 1850. Until that date section 2 of Act 10 and 11 Victoria, chapter 112 (1847) provided that all rights, powers and authorities of the Crown might be exercised by the New Zealand Company. No direction was given by the Imperial Parliament for the extension of the suspension beyond 5 July 1850. Accordingly, chapter 13 of the 1846 Royal instructions again appears to have become fully operative in relation to the South Island. By additional instructions of 12 August 1850 (L4:appendix A), chapter 13 of the 1846 instructions was not to apply to the New Zealand Company and the Otago and Canterbury Associations to the extent they were inconsistent with the contracts entered into by the New Zealand Company with (inter alia) the Otago Association. But as a result of a further provision in the additional instructions, the whole of chapter 13 of the 1846 instructions became fully operative as from 23 November 1852 when the Otago Association, as we have seen, ceased to exist. What is not certain is whether chapter 13, and in particular section 17 which enabled the governor, with the advice of the Executive Council, to set aside reserves, continued to apply after the New Zealand Constitution Act 1852 came into force on 13 January 1853. Neither this nor other relevant issues were argued before us and we make no decision on the point. We will later discuss the implications of the litigation brought by Ngai Tahu in the case of Regina v Macandrew (1869) 1 CA 172 in which section 17 of chapter 13 played a central role.

The provincial government claims entitlement to the reserve

7.3.16 In the meantime we return to our consideration of the fate of the Princes Street reserve. We resume our narrative at the point in 1865 when, by a letter of 13 April, the Otago superintendent advised the New Zealand colonial secretary of the grounds upon which the province claimed to be entitled to the Princes Street reserve. These related to the action of the New Zealand Company in October 1846 in instructing

Wakefield to reserve all water frontage land above high-water mark for public use; and the failure of Mantell to consult with or advise the Otago Association of his actions and associated matters. The Otago province had at least an arguable case:

- Mantell acted the very first day after the Otago Association ceased to have control over the Otago block land;

- he did not, when seeking to have the land reserved for Maori purposes, advise the governor of the then status of the land;

- there is no evidence that Governor Grey knew the status of the site of the proposed Princes Street reserve when he approved it being made a "Native Reserve";

- Mantell did not seek clarification from the civil secretary of his powers in relation to former New Zealand Company sections, and in particular, sections reserved for a future municipal corporation; and

- he was advised by the civil secretary, Domett, on 9 November 1853 that "With the sections reserved for a contemplated Municipality the Government cannot interfere" (F2:223).{FNREF|0-86472-060-2|7.3.16|59}

7.3.17 On 20 October 1846 Wakefield was expressly instructed with regard to water frontages that instead of being sold they should:

REMAIN IN EVERY INSTANCE, THE PROPERTY OF THE PUBLIC - OR OF THE MUNICIPALITY AS THE REPRESENTATIVES AND TRUSTEES OF THE LOCAL PUBLIC. (F2:113){FNREF|0-86472-060-2|7.3.17|60} (emphasis in original)

Had Mantell, before he initiated his application for a reserve in 1852, consulted with Cargill (at that time both superintendent and commissioner for Crown lands for the Otago block), he would no doubt have been told of the status of the land, assuming he did not already know. The province would have had notification and could have communicated with the governor. Instead, as we have seen, Mantell's actions in relation to the Princes Street reserve did not become generally known until 1858, from which time the governor's authority to create the Princes Street reserve was questioned by the Otago province.

7.3.18 Further correspondence ensued between the province and the postmaster-general designed to establish that the New Zealand Company had withdrawn the harbour-fronting sections from sale and reserved them for public purposes (F2:37).{FNREF|0-86472-060-2|7.3.18|61} A provincial council select committee reported on the reserve. The council adopted the committee's report, which reached a similar conclusion, on 17 May 1865. It pointed out that when he left office in 1855 Mantell had "stripped his office of all official documents" (F2:39).{FNREF|0-86472-060-2|7.3.18|62} The committee recommended the issue of a Crown grant be sought from the general government and the accrued rents be paid to the province.

Meanwhile, Mantell lost the support of Postmaster-General Richardson, a Dunedin politician who for a time was also acting-superintendent of Otago. Richardson urged that the province be given an opportunity of a fair hearing of its claim to retain the

reserve (F2:40).{FNREF|0-86472-060-2|7.3.18|63} Although on 29 June 1865 Attorney-General Sewell gave an opinion that the Princes Street site had been "duly reserved as a Native Reserve..." (F2:42){FNREF|0-86472-060-2|7.3.18|64}, the government appointed a select committee of the House of Representatives which reported on 25 August 1865 its conclusion that:

After a careful consideration of the above facts, as to the equity of the case, your Committee have arrived at the conclusion that the land forming the Dunedin Reserves, having been reserved from sale for a specific public purpose, was wrongfully set aside for the use of the Natives, and therefore recommend that a Crown Grant be issued in favour of the Municipality of Dunedin, as trustees and representatives of the local public, as was evidently the intention of the New Zealand Company, conveyed in the instructions of Mr T. C. Harington to Colonel Wakefield. (F2:44){FNREF|0-86472-060-2|7.3.18|65}

The reserve is granted to Otago province

7.3.19 The issue was soon to become embroiled in provincial politics. Professor Alan Ward in A Show of Justice succinctly describes how a cabal of politicians came to strike a bargain. Late in the 1865 session the new native minister, J E FitzGerald, (Mantell having resigned at the end of July), introduced a Native Provinces Bill which Ward relates:

envisaged the creation of semi-autonomous Maori provinces...

The Bill was regarded as a serious issue, especially by the Auckland members who stood to lose most by the making of three Maori Provinces within the existing Auckland Province. It was defeated by a formidable display of 'log-rolling', Auckland gaining the support of Wellington and Otago in return for agreeing to a clause in the Native Lands Act reserving to Wellington monopoly rights of purchase in the Rangitikei-Manawatu block, and (for Otago) the transfer of the Princes Street Reserve to that Province.

Thus was policy made in the Parliaments of the 1860s. (F1:54){FNREF|0-86472-060-2|7.3.19|66}

On 13 September 1865 the following resolution was carried by the House of Representatives:

That in the opinion of this House, the public reserve in the City of Dunedin, which was set aside by the New Zealand Company as trustees for the settlers in 1846 for the purpose of a wharf and public quay, and on which the police and immigration barracks at present stand, should be vested in the Superintendent of Otago, in trust for the municipality of Dunedin, as originally intended. (F2:258){FNREF|0-86472-060-2|7.3.19|67}

7.3.20 On 4 November 1865, no doubt as a result of the resolution of the House, two Crown grants were sent by the Otago Crown grant clerk to the secretary for Crown lands, Wellington, for the governor's signature. One of these, grant 4871, was for a "Piece of land situate in Princes Street Dunedin" for "Public utility".{FNREF|0-

86472-060-2|7.3.20|68} The colonial secretary, Stafford, on 21 November 1865 demanded more specific details of the purpose of the reserve. In his reply of 28 December 1865, the superintendent advised that it was "a reserve for wharves and quays", that being the purpose for which it was originally set apart" (F2:49-50).{FNREF|0-86472-060-2|7.3.20|69}

The Crown grant was placed before Governor Grey at a meeting of the Executive Council on 11 January 1866 and duly signed by the governor, who is stated to have done so on the advice and consent of the council. Present as members of the Executive Council were Stafford (the premier), Russell and Paterson. It granted one acre, two roods and thirty four perches to the superintendent of the Otago province:

in trust as a reserve for public Wharves and Quays and other purposes connected therewith of public utility to the Town of Dunedin and its inhabitants. (F2:282-284){FNREF|0-86472-060-2|7.3.20|70}

7.3.21 Governor Grey, in reporting to the Duke of Buckingham on Topi Patuki's petition to the Queen of 17 August 1867, enclosed a report by J C Richmond, native minister. Grey informed the duke that he:

will find from this Memorandum that my Responsible Advisers, at a meeting of the Executive Council, inadvertently advised me to sign a Crown Grant, dated the 11th January, 1866 by which the reserve in dispute was granted to the Superintendent of the Province of Otago, and which grant I signed in ignorance of what I was doing. (F2:60){FNREF|0-86472-060-2|7.3.21|71}

In the enclosed memorandum Richmond, after referring to the resolution of the House of Representatives based on the select committee report declaring that a grant to the superintendent should be issued under the Public Reserves Act, said:

The Government of the day proposed that an amicable suit should be instituted to try the questions of authority on one side and the other which had been raised. The Provincial Government never acquiesced in this proposal. Mr. Stafford, then Colonial Secretary, was advised that to bring the matter into Court a grant must issue to one party or the other, and had intended to recommend a grant; but in the meantime, inadvertently as regards His Excellency and the Colonial Secretary, a grant which had been prepared on the authority of the resolution of the House of Representatives was presented for signature and issued. (F2:61){FNREF|0-86472-060-2|7.3.21|72}

Some 10 years later Grey, by then a member of the New Zealand House of Representatives, gave a more detailed explanation to the Native Affairs Committee on 1 November 1877 (F2:368-9).{FNREF|0-86472-060-2|7.3.21|73} He recalled that following discussions with the law officers, he had decided he ought not to sign the grant until further discussions took place. Grey continued:

A number of grants were formally presented to me in Executive Council for my signature, and I signed them. I believed that one of the grants presented to me for signature was the grant for this land in question, but I could not positively identify it; and as the Colonial Secretary, who presented the grants to me, was perfectly satisfied that it was not the grant for this reserve I signed it. Subsequently it turned out that the

grant had been signed. It was done under a mistake, or, as Mr. Richmond put it here, "inadvertently as regards His Excellency and the Colonial Secretary." I believe there is further evidence of that in existence in the shape of a report of a speech delivered by the Hon. Mr. Stafford. It was discovered the same day that the grant had been signed improperly, and the Government tried to recover possession of the grant, but it was found the grant had been sent off that day in a vessel going to Otago, and in that way the land passed into the possession of the Municipality or the Provincial Government of Otago. (F2:368){FNREF|0-86472-060-2|7.3.21|74}

On 21 August 1867, 18 months after the Crown grant was signed, Stafford also explained how the grant came to be signed:

Of the three Ministers whose names were attached to the grant, not one was aware of it. He was bound to say how the irregularity occurred. As far as he could remember, there had been an application for a grant for a reserve, which turned out to be this one; and there were, at the same time, other grants, which were addressed in the ordinary way to the Secretary for Crown Lands, and he, not finding it stated for what purposes the grant was sought, referred it back to the Commissioner in Dunedin. The Commissioner stated, in reply, that it was for certain public purposes, which appeared to the Secretary sufficient. It happened, at that time, that His Excellency was about to make a visit to the North, and there were arrears of business at the end of the session, and after the Executive Council had commenced to sit, these grants were forwarded from the Crown Lands Office without the customary schedule showing what they were for; and it so happened that a number of grants which then came from the Secretary for Crown Lands, were signed hastily by His Excellency and countersigned by his Ministers. He was unaware of the purpose of the grant at the time, but he did not wish the House to think that if he had known it he would not have recommended it; for his desire was to have the grant signed, so that there might be a status for a case in the Supreme Court. (F2:260){FNREF|0-86472-060-2|7.3.22|75}

It will be recalled that on 21 November 1865 Stafford had written to the Otago superintendent for more details of the purpose of the reserve referred to in the Crown grant, and the superintendent replied as late as 28 December 1865, only two weeks before the grant came before the Executive Council at which Stafford was present and at which it was signed. Yet Stafford says he was unaware of the purpose of the grant at the time. Moreover, both Grey and Stafford assert that several grants were formally presented to the governor at the Executive Council for his signature. But as the claimants have shown by producing a copy of the minutes of the Executive Council for 11 January 1866 (W2:appendix:17-19){FNREF|0-86472-060-2|7.3.21|76}, only one grant, and that being in respect of the Princes Street land, was that day in fact presented to and approved by the Executive Council, comprising Governor Grey, Stafford (described as Prime Minister), Russell (native minister), and Paterson.

7.3.22 It strains our credulity to accept that the signing of the grant was "inadvertent" as claimed by both Grey and Stafford. Rather, as Professor Ward, in discussing this incident pointed out:

The Stafford Government had come into office dependent upon support from Otago members, secured by promises to give the Otago Provincial Council a grant for the Princes Street reserve.{FNREF|0-86472-060-2|7.3.22|77}

The evidence compels us to the view that the decision to sign the Crown grant was essentially a political one; a decision moreover taken without consultation with Ngai Tahu and with no apparent regard for their interests.

On 20 December 1866 the provincial council passed the Dunedin Reserves Management Ordinance to transfer certain lands, including the Princes Street reserve, from the superintendent to the Dunedin City Corporation. But because the dispute over the reserve was not yet settled, the governor, on the advice of the general government, disallowed the ordinance. It did not receive the governor's assent until 1873 when, after litigation and a negotiated settlement, the title to the land was finally settled in favour of the province (F8).{FNREF|0-86472-060-2|7.3.22|78}

Ngai Tahu Land Report

07 Princes Street Reserve

7.4 Ngai Tahu are Forced to Litigate

7.4. Ngai Tahu are Forced to Litigate

7.4.1 No sooner was the Crown grant received in Dunedin than the council applied to the general government for payment of the accrued rents on the Princes Street reserve (F1:60). The government was uncooperative and Stafford questioned the right of the province to the rents accrued prior to the Crown grant (F2:50).{FNREF|0-86472-060-2|7.4.1|79} In August 1866 H K Taiaroa wrote to the governor protesting that the Princes Street reserve had been taken from Ngai Tahu. The Stafford government, apparently troubled by the course of events, wrote to the Otago superintendent in October 1866 (F2:51){FNREF|0-86472-060-2|7.4.1|80} advising that the government had decided "the question of the validity of the grant should be submitted to a proper judicial tribunal". The superintendent was invited to bring the matter before the Supreme Court by writ of intrusion. Not surprisingly the superintendent declined to do so.

7.4.2 The matter dragged on. It appears to have been brought to a head by Topi Patuki's initiative, with support from Mantell, by now a member of the Legislative Council, in petitioning the governor on 15 July 1867 to support proceedings in the Supreme Court:

to ascertain...whether or not a remedy can be found for a great wrong and infringement of our rights which we conceive to have been committed. (F2:53){FNREF|0-86472-060-2|7.4.2|81}

The petition requested the governor to appoint a lawyer for Ngai Tahu:

in order that our right to this reserve and to these funds [the accrued rents] may be fairly tried in the Supreme Court. (F2:54){FNREF|0-86472-060-2|7.4.2|82}

Topi Patuki complained that Ngai Tahu had never been warned that the Maori reserve was about to be handed over to the provincial authorities, nor had they been given a chance to defend their title to the land.

7.4.3 The government responded promptly on 18 July 1867 by advising Patuki's lawyer, C B Izard, that the governor had assented to legal proceedings being taken in the name of the Crown by way of scire facias or such other means as Izard thought appropriate. It was to be understood that in agreeing to this course the government expressed no opinion on the validity or otherwise of the Crown grant (F2:54).{FNREF|0-86472-060-2|7.4.3|83} Later that month the native minister, J C Richmond, advised Mantell that the government would guarantee Ngai Tahu legal expenses up to œ200 (F2:54-55).{FNREF|0-86472-060-2|7.4.3|84} A few weeks

later, however, Richmond advised Mantell by letter (19 August 1867) that the government felt obliged to withdraw its offer to guarantee Ngai Tahu's costs so far as the future was concerned, but undertook to meet costs incurred up to the date of the letter. Not surprisingly Mantell was greatly incensed and he protested in the strongest terms to Richmond (F2:58-59).{FNREF|0-86472-060-2|7.4.3|85} Two months later, on 26 October 1867, Governor Grey authorised the payment of œ400 from the proceeds of other Ngai Tahu funds on the basis of a loan (F2:64){FNREF|0-86472-060-2|7.4.3|86}, and so early in August Izard issued proceedings and a writ of scire facias was served on the superintendent of Otago on 13 August 1867.

7.4.4 At much the same time, 7 August 1867, Stafford introduced a (Dunedin) Princes Street Reserve Bill in the House of Representatives (F2:59).{FNREF|0-86472-060-2|7.4.4|87} Its purpose was to authorise the payment of the accrued rents on the Princes Street reserve site, amounting to œ6031 18s 9d, to the Otago province, to be held in trust for the same purpose for which the land had been Crown granted to the superintendent. It contained no provision protecting the rights of Ngai Tahu in the event of the legal proceedings authorised by the government being successful. Strong protests by Mantell (F2:59){FNREF|0-86472-060-2|7.4.4|88} and further petitions by Topi Patuki, including one to the Queen, praying that the Bill be not passed, resulted in an amendment to the Bill, before being passed by the House of Representatives. Clause 3 now protected Ngai Tahu rights in the event of the court proceedings upholding their right to the land (F2:330).{FNREF|0-86472-060-2|7.4.4|89} The Bill in fact lapsed in the Legislative Council on 12 September 1867 (F1:72).

The Otago province offers a settlement

7.4.5 The general government deferred reporting to the Colonial Office on Patuki's petition to the Queen in the hope that:

an arrangement of an equitable kind might be effected between the two claimants to the reserve-the Province and the Ngaitahu tribe. (F2:60){FNREF|0-86472-060-2|7.4.5|90}

The provision inserted in clause 3 of the (Dunedin) Princes Street Reserve Bill protecting Ngai Tahu interests appears to have stimulated the Otago province into seeking a compromise. The superintendent, Macandrew, advised Richmond, native minister, by letter of 27 August 1867, that the province was prepared to set aside for Maori purposes a piece of land at Pelichet Bay of equal area to the Princes Street reserve. Further, the province would undertake to expend not less than œ1000 on erecting a suitable home, or Maori hostelry, to be built in brick. This offer was made without prejudice to the province's rights in the Ngai Tahu proceedings before the Supreme Court (F2:383a-b).{FNREF|0-86472-060-2|7.4.5|91} Izard was not impressed with the offer (F2:334).{FNREF|0-86472-060-2|7.4.5|92} In September the mayor of Dunedin and the Otago province decided to withdraw their Pelichet Bay offer and to defend the Supreme Court proceedings. On 12 September 1867 the superintendent agreed to refund the back rents if the Ngai Tahu action was successful, and to accept the rents in the meantime, on those terms. The sum of œ6031 18s 9d was paid over by the colonial treasurer on 24 September 1867 on that condition (F2:67).{FNREF|0-86472-060-2|7.4.5|93}

7.4.6 In May 1868 the Native Land Court held its first sitting at Dunedin. An application on behalf of Ngai Tahu to have matters relating to the Princes Street reserve investigated was declined by the court on the ground that the land had been Crown granted. The applicants were told they would have to go to the Supreme Court (F2:340).{FNREF|0-86472-060-2|7.4.6|94}

The Ngai Tahu proceedings known, as Regina v Macandrew (1869) 1 CA 172, were brought in the name of the Queen, on behalf of Ngai Tahu, against the superintendent of Otago, J Macandrew (F2:341-362). They sought a declaration by the court that the Crown grant of the Princes Street reserve be set aside, on the ground that the governor had previously reserved the land for the use of Ngai Tahu visiting Dunedin. It was claimed, on behalf of Ngai Tahu, that the reserves, recommended by Mantell in his letter of 18 April 1853 and Domett's letter of 6 June 1853 advising the governor's approval, "were duly made". Reliance was placed on section 17 of chapter 13 of the Royal instructions of 1846. This and all other claims made on behalf of Ngai Tahu were disputed by the superintendent.

Court of Appeal judgment

7.4.7 In the Supreme Court Mr Justice Ward held that section 17 of chapter 13 of the Royal instructions did not give the governor power to make the reserve in question. In the Court of Appeal the court assumed (without deciding) that section 17 of chapter 13 applied to the making of the Maori reserve. They disagreed with Mr Justice Ward's Supreme Court decision that section 17 was not wide enough to cover the making of such a reserve. However, they went on to point out that the power to make such a reserve was not given to the governor alone, but to the governor with the advice and consent of the Executive Council. As the court emphasised, it had not been pleaded or proved that the application for the reserve had been submitted to the Executive Council and approved by it. This was held by all five judges to be fatal to the proceedings. But Mr Justice Richmond went on to stress in his judgment that the court had acted on an assumption that the power of the governor, with the advice of the Executive Council, to make such a Maori reserve, depended upon the Royal instructions of 1846. He then said:

I believe I express the opinion of the whole Court when I say that, although we have necessarily pressed upon that point, we have in the course of the argument felt that the Instructions of 1846 did not regulate the matter. (F2:362){FNREF|0-86472-060-2|7.4.7|95}

What Mr Justice Richmond is saying is that the case was put on the basis that the Royal instructions of 1846 applied. The court itself dealt with the case on that assumption but it did not consider the assumption to be sound.

Unfortunately the official report of the case does not give details of the argument of counsel or the judges' comments on this critical point. It is not clear why all members of the court considered that the 1846 Royal instructions did not apply. It may have been because of the uncertainty engendered by the coming into force of the New Zealand Constitution Act 1852 in January 1853, and the consequential doubt as to just what power the governor had in June of that year to make the reserve in question. The effect of the judgment is that Ngai Tahu were wrong in assuming they could rely on

section 17 of chapter 13 of the Royal instructions as giving the governor power to make the reserve. Further, even had the governor been entitled to act under section 17, it had not been shown that he had acted with the advice and consent of the Executive Council, and so the Crown grant to the Otago superintendent remained in force.

A settlement is reached

7.4.8 In April 1870 Ngai Tahu's lawyer, Izard, wrote to the attorney-general confirming that an appeal would be taken to the Privy Council (F2:385-6).{FNREF|0-86472-060-2|7.4.8|96} Not until February 1872 was advice received from London that the Privy Council had given leave to appeal (F2:576-7).{FNREF|0-86472-060-2|7.4.8|97} In August 1872 on Taiaroa's application, the government agreed to grant œ500 to meet Ngai Tahu's legal costs and œ150 was sent immediately to England (F2:394a).{FNREF|0-86472-060-2|7.4.8|98} Soon after this Superintendent Macandrew suggested that the "proceedings [be] stopped, to save the money being squandered in law" (F2:373).{FNREF|0-86472-060-2|7.4.8|99}

On 22 November 1872 Izard wrote to Topi Patuki as follows:

I have been endeavouring to make a compromise with regard to the claims of yourself and your tribe to the Princes Street Reserve.

It is the best bargain I can make, and is approved of by Mr. Mantell. I do not think that the Maoris are entitled to anything less, in strict justice, than the whole of the land, but we must consider the chances of their success in the suit that you have commenced. Before it could be brought to a conclusion a very long and expensive litigation would have to be gone through, and one that might not result in the Native claims being established. If the suit failed, the Natives would get no part of the land at all.

Considering all these points, I recommend that you should agree to the terms I am about to mention. They were settled in a long interview between Mr. Vogel and myself, and have been submitted to Mr. Mantell, who agrees with me in thinking that the best thing to do is to accept them.

The terms of agreement, of which I send a copy, amount substantially to this, viz:- The present suit to be stopped, and each side to pay its own costs. The Provincial Government of Otago to pay to Mr. Mantell, and Mr. McLean, if he will consent to act, the sum of œ4,650, and to pay to the General Government the sum of œ500 to cover an amount advanced by the Government for the purposes of the suit. The sum of œ4,650 and the sum of œ350 which Mr. Mantell has now, making altogether œ5,000, to be divided among the Natives according to their own wish. This sum of œ5,000 will therefore be free from deductions, and the Natives are not to pay anything to refund the moneys that have been advanced for the purposes of the suit. In addition to the sum of œ350 mentioned above, œ150 has been sent to England, and I fully believe that this œ150 will fully pay all expenses. Of course the suit is not to be stopped until the money is paid.

This arrangement requires your sanction. Think over it carefully, and let me have your answer as soon as possible, because, if you agree to it, the sooner I can stop

proceedings in England and any further expenses there the better. If you do not agree to the above terms, the suit must go on; but I strongly recommend you to accept them. They are, in my opinion, as good terms as can be got, and the sum of œ5,000 will fully represent the value of the ultimate chance of getting the land. Do not delay in giving me your answer; let it be in Maori, written by yourself, and get some friend to turn it into English that I may understand it. (F2:379-380){FNREF|0-86472-060-2|7.4.8|100}

7.4.9 Mantell also approved the proposed settlement. In a letter to the Reverend Wohlers on Ruapuke at the same time as he wrote to Patuki, Mantell said:

the terms offered are beyond what I dared to hope, considering the overwhelming odds against them. (F2:573-575){FNREF|0-86472-060-2|7.4.9|101}

In making his recommendation Izard no doubt had full regard to all the legal difficulties and uncertainties. He would almost certainly have known, as we have learnt from a search of the Executive Council minutes for the relevant period in 1853, that in fact Governor Grey did not obtain the advice and consent of his Executive Council to his approving a reserve being made in Princes Street, as recommended by Mantell. Doubts as to whether the 1846 Royal instructions applied must also have concerned Izard, given Mr Justice Richmond's statement in his Court of Appeal judgment. The legitimacy of the New Zealand Company's prior action, in setting aside the land in question as a public reserve for wharves and quays, must also have weighed with him. At this distance it is difficult to escape the conclusion that, given all the legal uncertainties and the failure of the governor, assuming he was entitled to act under section 17 of chapter 13 of the 1846 Royal instructions, to comply with his terms, the settlement was not only justified but was the wisest course for Ngai Tahu to adopt.

7.4.10 As will be seen, the agreed sum of œ5000 was paid out to the Ngai Tahu people in January 1874. We received evidence from Mr Ah-Lek Tay, a registered valuer called by the Crown, that in 1866 the value of the Princes Street reserve, of one acre, two roods and 34 perches, was œ12,600; in 1877 it was œ25,200 (O1:1). The land was Crown granted in January 1866 to the Otago superintendent. How good the settlement was in monetary terms depends on what date is thought appropriate as the base date.

7.4.11 Patuki and H K Taiaroa both sought to have the œ5000 divided between them, and each would make part of their share available for distribution to the tribe. Patuki wanted to use his share to build a house (F2:426-7; 422-3).{FNREF|0-86472-060-2|7.4.11|102} Eventually, on 30 September 1873, the trustees of the fund, W Rolleston and D McLean, agreed that œ1000 would be paid to each of Topi Patuki and H K Taiaroa in recognition of their initiative in instituting the proceedings and obtaining a settlement; the balance to be distributed as agreed upon by Patuki and Taiaroa "and some European gentleman to be selected by them to assist" (F2:436-437).{FNREF|0-86472-060-2|7.4.11|103}

In January 1874 the monies were distributed. Patuki and Taiaroa each received œ1000; T Karetai and K Karetai and family, œ225; T Ropitini and others of Otakou, œ850; H Nani and others, œ225; A Kihau, œ200; Te Koti, Te Rato, Ihaia Tainui and

others, œ120. œ15 went to Rakiura, œ20 to Ruapuke, œ25 to Hokitika, œ20 each to Moeraki and Waikouaiti, and œ50 to all the Canterbury kaika (F2:454-475; F1:88).{FNREF|0-86472-060-2|7.4.11|104}

Ngai Tahu claim the accrued rents

7.4.12 The sum of œ6031 12s 9d had accrued by way of rents paid up to the time of the Crown grant to the Otago superintendent in January 1866. On 6 March 1874 Taiaroa wrote two letters to McLean, the native minister. In one he reported the distribution of the œ5000 as having taken place except for some œ700 (F2:477-479).{FNREF|0-86472-060-2|7.4.12|105} In the second he wrote claiming the accrued rents from the Princes Street site up to the date of the Crown grant (F2:580).{FNREF|0-86472-060-2|7.4.12|106} Taiaroa renewed his application for the back rents to Julius Vogel on 21 July 1874 (F2:580).{FNREF|0-86472-060-2|7.4.12|107} Further unacknowledged efforts were made by Taiaroa in 1875 and 1876 (F1:90). Finally, in 1877 Taiaroa petitioned Parliament for the payment of the œ6000 back rent, plus interest. The Native Affairs Committee of the House of Representatives held a hearing on the petition. Predictably, Macandrew from Dunedin claimed the earlier payment of œ5000 was "a complete and final settlement of the whole thing" (F2:373-4).{FNREF|0-86472-060-2|7.4.12|108} Izard testified that the question of back rent had not come up at the time of the compromise of the court proceedings. The œ5000 was accepted, he said, for the sake of peace and quietness, and Ngai Tahu were "paid" to leave them in possession of the land (F2:371).{FNREF|0-86472-060-2|7.4.12|109}

The Native Affairs Committee, chaired by John Bryce, reported that:

there appears to have been a misapprehension as to the full extent of the compromise enacted by the payment of the sum of œ5,000 to the Natives, and the two parties understood the agreement differently. That, under all the circumstances, it is highly desirable to remove all further grounds of complaint; and the Committee is of opinion that a further payment should be made to the Natives of the rents which had accrued prior to the issue of the Crown grant, or a reserve should be made of land to that value, for the benefit of the Natives interested. (F2:364){FNREF|0-86472-060-2|7.4.12|110}

7.4.13 In December 1877 the government approved the payment of œ5000 out of the œ6031 12s 9d accrued by way of rents. Why only œ5000 was to be paid and not the full sum, as recommended by the Native Affairs Committee, is not known. Nor is it known whether the committee's alternative suggestion, that a reserve should be made to the value of the accrued rents, was considered. On 7 June 1878, œ1000 of this money was paid, with the agreement of Patuki and Taiaroa, to certain Ngai Tahu assembled at Kaiapoi by the Reverend James Stack (F2:506-507).{FNREF|0-86472-060-2|7.4.13|111} The remaining œ4000 was remitted to Dunedin on 17 June 1878 and credited to the official account of Newton Watt, the resident magistrate, who in turn, without authority, paid it into a deposit account in the Bank of New Zealand in the joint names of Taiaroa, Patuki and himself, but subject to the condition that it could not be withdrawn except on the authority of the colonial treasurer. There the money remained until May 1880, earning interest amounting to some œ400 over the period of nearly two years. It lay there because Taiaroa refused to sign the receipt and

discharge for the œ4000 in full satisfaction of all claims to the rent, because of the œ1000 which the government had declined to pay over. In short, Taiaroa sought payment of the full œ6000 whereas Ngai Tahu were being asked to accept œ5000 in full satisfaction, of which they had already received and paid out œ1000 (F2:592).{FNREF|0-86472-060-2|7.4.13|112}

7.4.14 Eventually the patience of the native minister Bryce wore thin and he threatened, unless the œ4000 was accepted in full satisfaction, to have the funds returned by Mr Watt to the public account. In fact the Bank of New Zealand, in compliance with instructions, transferred the œ4000 to Mr Watt's official account, while the interest of œ400 was paid direct to the public account. This occurred on 4 May 1880, on which day Mr Watt withdrew the œ4000 from his official account and the following day paid it over to the Ngai Tahu people at Otakou Heads, in the presence of Patuki and Taiaroa. The next day he advised the Native Department that the previous day he had paid over the œ4000 and "a receipt in full" was taken from Ngai Tahu (F2:593).{FNREF|0-86472-060-2|7.4.14|113} This receipt, which Taiaroa had earlier refused to sign, was in the following form:

We, the persons whose names are attached, certify that the œ4,000 we have received is the balance of the final payment on account of the Princes Street Reserve, Dunedin. This is the final payment for that reserve to us, nor shall any person or persons claiming that land through us ever make a further demand for payment on account of that land hereafter for ever upon any ground whatsoever. This is the last and final payment, in final and complete extinguishment of the title of all of us for that land. (F2:598){FNREF|0-86472-060-2|7.4.14|114}

Subsequent unsuccessful efforts were made by Taiaroa to obtain payment of the œ400 interest on the accrued rents while they were held in the deposit account (F1:96-97).

Watt, in reporting on the distribution of the œ4000 at Otakou Heads, gave no particulars as to precisely how the money was divided up, but on 14 March 1879, on instructions from Sheehan, the then native minister, Watt was advised that the minister had agreed with Taiaroa on the following distribution:

- œ1000 to Topi Patuki;

- œ1400 to Taiaroa; the extra œ400 being in consideration of the work done by him and lawyers' fees paid by Taiaroa; and

- the balance to be divided by Watt, Patuki and Taiaroa among the people entitled to receive it, as was formerly done.

We think it likely that the distribution would have followed this pattern.

7.4.15 Dr Ann Parsonson (F1:98-100) provided details of various later attempts by Ngai Tahu to obtain further compensation for the loss of the Princes Street reserve. These included a hearing before the Native Land Court in 1939 which rejected a submission made on behalf of Ngai Tahu that the Maori had never had their claim tested on its merits (F1:104). Judge Shepherd, whose report on the case was delayed

until 1945, concluded that the two payments received by Ngai Tahu meant they could not claim to have been unfairly treated.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Land Report

07 Princes Street Reserve

7.5 Ngai Tahu's Grievances

7.5. Ngai Tahu's Grievances

7.5.1 Throughout the long and tortured history of the Princes Street reserve it appears that Ngai Tahu, the ostensible beneficiaries, were rarely, if ever, consulted. There could be no doubt they needed, in the short term at least, a suitable landing place and adequate shelter, including a base for their trade, in the new settlement. It was reasonable for them to apply, as they did, to Mantell in 1852, and again in November 1854 to the provincial superintendent, for the provision of accommodation during their visits to Dunedin to trade. While Mantell responded promptly, he recommended an unsuitable site both in terms of the landing place and for accommodation. Nor, having obtained the governor's assent in 1853, does he appear to have told Ngai Tahu of what had been approved.

We do not know when Ngai Tahu first learned of the Princes Street reserve. It may not have been for some years. We do know that Ngai Tahu continued to use the Toitu estuary site as a landing place, making shift as best they could on the beach. Not until 1859 was a stone house, near the old survey office, erected as a Maori hostelry. While it was located where Ngai Tahu wanted it to be, it remained for no more than five or six years. It was not replaced. The Princes Street reserve was perhaps used intermittently by Ngai Tahu. We have one account of crayfish being sold from the site in 1864, but it never served the purpose for which it was ostensibly set aside by Grey in 1853.

7.5.2 The manner of it being Crown granted to the Otago province in January 1866 reflects no credit on the Crown. It is difficult to escape the conclusion that Governor Grey and his three ministers, including Premier Stafford, did not act "inadvertently". The most likely explanation is that given by Professor Ward, that it was the result of a "deal" between northern and southern politicians, with a new government seeking parliamentary support. The feeling that they were unfairly, indeed unjustly, deprived of "their" reserve has remained with Ngai Tahu down to the present day. While their counsel recognised in his closing address (W1:124) that a binding settlement had been reached in 1880, and that could not now be challenged, it was urged upon us that:

- Ngai Tahu were promised land (in 1844);

- if there had not been some bungling or incompetence by the Crown's administrative staff in 1853, a Crown grant would have been issued for the land at that time; and

- the tribunal's examination should be of a breach of the Treaty by the Crown, not the settlement of 1880, but rather the failure to grant them effective control of the land, promised and designated in 1853. (W1:125)

7.5.3 In his final reply (Y1:49) Mr Temm, for the claimants, invoked the "deliberate political decision" to issue a Crown grant to the Otago province as being a breach of the Crown's duty under the Treaty to protect Ngai Tahu interests. It was described as the basis for the claim made in respect of the Princes Street reserve. Later in his reply (Y1:52) Mr Temm submitted, in reference to the settlement, that the "real point" is whether there was a breach of the Crown's duty to protect, in failing to set aside the land and in failing to do it properly. It was the failure to complete the designation in 1853, Mr Temm submitted, of which the claimants complained, and they have been deprived of the benefit of the land because of the Crown's administrative bungling. Their rights, it is said, were not protected, and that failure was a breach of the Crown's Treaty obligations.

Statement of grievances

7.5.4 In their statement of grievances relating to Otakou the claimants included three grievances concerning the Princes Street reserve. They were:

6. The Crown failed to set aside the Otepoti reserves which had been promised to Ngai Tahu as part of the sale.

7. The Crown failed to create the Princes Street reserve in 1853 which prejudiced the position of Ngai Tahu in later litigation and negotiations.

8. The Crown failed to protect Ngai Tahu by not providing a permanent hostelry in Dunedin for their personal use and occupation and as a base for their commercial activity. (W5)

7.5.5 Before considering these various claims we must first determine whether the 1880 settlement (which claimants' counsel admitted cannot be challenged) precludes any claim now being made to us under the Treaty of Waitangi Act 1975, in respect of alleged breaches of the Treaty. We do not think the fact of such a settlement necessarily excludes claims in respect of the Princes Street reserve being made under the Treaty. Our reasons are substantially those which we elsewhere articulate in respect of the Ngaitahu Claim Settlement Act 1944 (21.4). In 1880 there was no way by which Ngai Tahu could have claimed relief for the breach of the Treaty. The Treaty at that time was considered to be a nullity. There was no legal provision such as there now is, whereby Ngai Tahu could advance their claim before a tribunal having jurisdiction to entertain it. While, therefore, as Mr Temm conceded, the settlement may be taken into account, we do not consider that it precludes our entertaining a claim under the Treaty of Waitangi Act 1975. We turn then to consider whether any act or omission of the Crown in relation to the Princes Street reserve constituted a breach of one or more principles of the Treaty.

Finding on grievance no 6: Crown failure to set aside Otepoti reserves

7.5.6 We can deal briefly with this grievance, which is, that the Crown failed to set aside the Otepoti (Dunedin) reserves which were promised to Ngai Tahu as part of the Otakou sale and purchase. We have discussed this claim in some detail in the preceding paragraphs (7.2). For the reasons given we are not satisfied that the company or Crown representatives made any such promises for the two reserves at

the upper harbour foreshore. It follows that the claimants have not established any breach of the Treaty in this respect.

Grievance no 7: Crown failure to create Princes Street reserve

7.5.7 We turn next to the complaint that the Crown failed to create the Princes Street reserve in 1853, which failure it is said prejudiced the position of Ngai Tahu in later litigation and negotiation. It was put to us by Mr Temm that this failure was due to incompetence by the Crown's administrative staff in 1853 and but for this a Crown grant would have been issued. This submission assumed that it was legally competent, had the correct procedures been followed, for a Maori reserve in respect of this land to have been created for the permanent benefit of Ngai Tahu. The Crown, in lengthy submissions, disputed this and invoked the Court of Appeal decision in Regina v Macandrew (1869) 1 CA 172. We did not receive any detailed response to these submissions from claimants' counsel. Accordingly, we are in no position at this distance to come to any conclusion on the question of whether there was any legal basis at the relevant time which enabled Governor Grey to create the Maori reserve on the Princes Street site, in favour of Ngai Tahu. We are, however, left with very real doubts as to whether such power did exist from the comments of Mr Justice Richmond in Regina v Macandrew, to which we have earlier referred.

However, as the matter was pressed upon us in such detail by the claimants' historian we will assume that it was competent for the governor, provided he followed prescribed procedures, to create such a reserve. Would his failure to comply with prescribed procedures constitute a breach of Treaty principles? We also for the purposes of this discussion set aside the fact that Governor Grey, assuming he were purporting to act under section 17 of chapter 13 of the 1846 Royal instructions, failed to obtain the advice and consent of the Executive Council. It is presumably this failure which is characterised by claimants' counsel as "administrative bungling". Behind this claim is a further assumption, that is, that in failing to create the Princes Street reserve in 1853 the Crown was under a duty to Ngai Tahu to take such action. The Crown, through its counsel, Mrs Kenderdine, submitted to us that, if a reserve were promised as part of the sale and purchase transaction in 1844, Ngai Tahu would be entitled to be compensated for breach of contract or breach of trust (with due allowance for the monies paid in settlement last century). But Crown counsel submitted that, if no promise were made in 1844 (and we are not satisfied that such a promise was made), then the Crown was under no obligation to create a reserve. She submitted that:

It is not a breach of the Treaty for the Crown to perceive a need which has arisen for one of its subjects and to fail to remedy that need effectively. (L4:7)

7.5.8 In her closing address Mrs Kenderdine discussed further the question of whether the non-allocation of the reserves was a breach of the Treaty. She was concerned with the implications of certain passages in Professor Ward's report which we here reproduce, the first quotation being quoted more fully:

However, no proprietary title to land was ever granted to Ngai Tahu and there is no indication that government ever intended to do that. Phrases in the evidence and the submissions which refer to 'Maori land' or 'the Maori title' are therefore misleading. What the government set out to do was to ensure that a portion of central government

reserve was made a 'Native Reserve' for a hostelry and market, with the land title still in the Crown. It is doubtful therefore whether the added-value of the land could be properly claimed by Ngai Tahu, as if the land had been theirs, as distinct from entitlement to compensation for the loss of a facility with which they had been provided, and then had seen removed. Arguably the government had a duty to replace the hostel on other land rather than pay compensation. Indeed this was offered by the Provincial authorities in 1866-7, but rejected by Mantell, on Ngai Tahu's behalf. (T1:427)

In summarising his overview of the various Ngai Tahu claims in the second passage quoted by Crown counsel, Professor Ward said:

The Princes Street case illustrates particularly well the nature of Ngai Tahu's grievance. Taken by itself as a claim about a particular reserve, and measured in terms of formal law or obligation, it is not especially strong. Considerable compensation were paid in any case. But seen in terms of Ngai Tahu's reasonable and legitimate aspirations to engage with the commerce and development of Dunedin, the disappointment and frustration must have been great indeed and the failure of officialdom to assist that reasonable and legitimate aspiration is manifest. For, although many of their actions were taken to conserve valued traditions and lifestyle, Ngai Tahu had engaged successfully before 1840 with the modern order and wished to continue to do so, trading for its commodities, learning its skills and sharing in its enterprises. Every aspect of the claim bears on this aspiration in one way or another. Whatever the technical shortcomings in some aspects of the Princes Street claim, or any other, as matters of law or contract, all have to do with the conservation and development of a basis of self-determination, a basis combining traditional resources and skills with new learning and new forms of wealth. From such a basis Ngai Tahu could engage further still with the settlers on terms of economic, social and racial equality. (T1:25-26)

In commenting on these two passages Crown counsel first referred to earlier findings of this tribunal that article 2 of the Treaty required the Crown to ensure that Maori were left with sufficient land for their maintenance and livelihood or, put in another way, that each tribe maintained a sufficient endowment for its needs (Orakei and Waiheke Reports). We would affirm this proposition.

We would accept Professor Ward's view that Ngai Tahu's aspirations to engage in the commerce and development of Dunedin were legitimate aspirations. For a few years, during the life of the Maori hostelry in Princes Street, built by the general government for Ngai Tahu visiting Dunedin, that aspiration was materially assisted by the Crown. But, because ownership of the land lay with the provincial council, the Crown had no effective long-term control over the hostelry and was powerless, it seems, to prevent it being dismantled.

7.5.9 Mrs Kenderdine, for the Crown, rejected the notion which she found implicit in Professor Ward's statement, that the Treaty guaranteed Ngai Tahu, via the Princes Street reserve, a share in the Dunedin economy and that the arbitrary ending of the arrangement was a genuine deprivation in breach of the Treaty. She submitted:

- the so-called "Princes Street reserve" was integrally bound up with the Otakou purchase;

- that Ngai Tahu chiefs at Otakou selected the land they wished to exclude from the sale and chose not to exclude the Princes Street site; and

- that the land once sold passed absolutely to the Crown and Ngai Tahu then have, in respect of it, only such privileges (if any) as other British subjects have (X1:196).

7.5.10 We would agree that it is unrealistic to consider the claim of the Princes Street reserve independently of the wider claim for tenths made with respect to the Otakou purchase. We have earlier found that the Crown failed to ensure that Ngai Tahu, in retaining only 9600 acres out of over 533,000 acres sold to the Crown, retained sufficient land for their present and future needs. We have suggested that the additional provision of tenths vested in the Crown, substantially for Maori purposes would, along with the 9600 acres retained, have provided Ngai Tahu with an adequate endowment. Obviously, had the Crown secured a suitable reserve on Princes Street for use by Ngai Tahu, this would have served to meet part of its wider obligation.

But having said this, we find difficulty in holding that the Crown was under a Treaty obligation to provide in perpetuity a specific piece of land in the new town of Dunedin for the purposes of a Maori hostelry and trade. Clearly it was highly desirable, while the new town was in its infancy and accommodation was scarce, that the Crown or the provincial government should take steps to assist Ngai Tahu with accommodation. The steps taken by Mantell led to the government approving a site which was unsuitable and largely unused by Ngai Tahu. It is not easy to reconcile the contemporary rejection of the site by Ngai Tahu with the later claim that the Crown had a duty to retain it for Ngai Tahu. In fact, as we have seen, the Crown in 1859 provided adequate accommodation suitably sited for a few years. Preferably this should have been done earlier and some such provision maintained for a longer period, but in our view the need was of a relatively transitory nature, until accommodation became more readily available in Dunedin. The Crown's failure to meet its Treaty obligations in our view rested not on the limited accommodation provided, or the disposition of the Princes Street reserve site, but on its failure, as we have found in respect of the Otakou purchase, to ensure that Ngai Tahu retained an adequate endowment for their present and reasonable future needs. If, as a result of our findings, Ngai Tahu are compensated for this breach of the Treaty, such compensation should in our view more than encompass any perceived loss by Ngai Tahu of "their" Princes Street reserve.

Finding on grievance no 7

7.5.11 We can now deal quite shortly with the claimants' grievance that the Crown failed to create the Princes Street reserve in 1853 which prejudiced the position of Ngai Tahu in later litigation and negotiations. There are two distinct problems with this claim. First, it assumes that at the time it was competent, as a matter of law, for the governor to create the reserve in question. But, as Mr Justice Richmond indicated in Regina v Macandrew, this is problematical. It is simplistic to suggest that only "administrative bungling" prevented it being done. Secondly, the reserve, although recommended by Mantell and approved by Governor Grey, was by all accounts

unsuitable for the purpose for which it was ostensibly created. We find it somewhat incongruous to be asked to hold that it was a breach of the Treaty by the Crown, to fail effectively to create a reserve which was not suitable for the purpose for which it was needed.

Grievance no 8: the provision of a permanent hostelry

7.5.12 Finally, we consider the claim that the Crown failed to protect Ngai Tahu by not providing a permanent hostelry in Dunedin for the permanent use and occupation by Ngai Tahu, and as a base for their commercial activity. This claim has wide implications. Implicit in it is the assertion that if, and when, the Crown purchased blocks of land from Maori to facilitate Pakeha settlement, it was obligated under the Treaty to ensure that in any town that resulted from such settlement, permanent accommodation was provided for Maori wishing to visit the town to trade. We find difficulty in discerning any such obligation under the Treaty, or any principle which imposes such an obligation on the Crown. We have already indicated that Ngai Tahu had, in Professor Ward's words, "reasonable and legitimate aspirations to engage with the commerce and development of Dunedin". The failure of the Crown adequately to assist them, by providing suitable accommodation throughout the period of time that was required, was both disappointing and frustrating for Ngai Tahu. But any such assistance would have been necessary only so long as other accommodation was not available and, had it been provided, it need not have been vested in Ngai Tahu. The Crown could well have retained ownership.

Finding on greivance no 8

7.5.13 We are unable to find that the Treaty imposed any obligation on the Crown to provide a permanent hostelry vested in Ngai Tahu, to meet a temporary need. In the event, Ngai Tahu did receive some œ10,000 for the "loss" of the Princes Street reserve and the accrued rents. Regrettably, but understandably, this money was not invested by Ngai Tahu in a property of their own in Dunedin, but was, as we have seen, distributed quite widely among the tribe. Had it been so invested, and the property retained, almost certainly we would never have heard of this claim.

References

{FNTXT|0-86472-060-2|7.2.2|1}1 Petition of J T Patuki to H M the Queen, 17 August 1867, Compendium, vol 1, pp 148-149

{FNTXT|0-86472-060-2|7.2.2|2}2 ibid

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