

Ngai Tahu Land Report

16 The Eight Crown Purchases _An Overview

16.1 Introduction

Chapter 16

THE CROWN PURCHASES - AN OVERVIEW

16.1. Introduction

16.1.1 With the Rakiura purchase in 1864 the Crown completed its acquisition of Ngai Tahu land first begun 20 years earlier. For the sum of £14,750 the Crown had acquired 34.5 million acres from Ngai Tahu. This was most of the South Island and more than half the land mass of New Zealand, which is some 66,200,000 acres in extent. All but an insignificant fraction of Ngai Tahu's land was gone; only 37,492 acres remained. No doubt the Crown's representatives were well satisfied with their efforts.

By 1864 Ngai Tahu were in a parlous, some might say pitiable condition. They were now an impoverished people largely confined on uneconomic patches of land, almost entirely isolated from mainstream European development, neglected by government at both central and provincial level, marginalised and struggling to survive both individually and as a people. Their rangatiratanga greatly diminished, their communal way of life and the cultural and spiritual values associated with it seriously undermined. As settlement steadily encroached on them from all sides, as land was progressively fenced and drained, as their access to mahinga kai steadily decreased, Ngai Tahu eked out a bare subsistence on land incapable of sustaining them. No wonder their voices came to be heard more and more in protest.

Why did this happen? The short answer, as must by now be abundantly clear, is that the Crown failed, time and time again, to honour the principles of the Treaty of Waitangi. Why then did the Crown so consistently act in breach of its Treaty obligations? There were various reasons. Probably the most important was that in all the evidence relating to these purchases there is no indication that either the governors giving the instructions or the Crown purchasing agents responsible for carrying them out ever so much as adverted to the Treaty. Other reasons stem in large part from radically different assumptions on the part of Crown officials on the one hand and Ngai Tahu, the tangata whenua, on the other.

Contemporary assumptions

16.1.2 Professor Ward noted several contemporary assumptions of Crown officials and settlers at the time of the purchases (T1:5-6). These we discussed at chapter 5.7. They included an assumption of cultural superiority often manifested in an attitude of arrogance, condescension and at times aggressiveness by officials towards Maori. In

some officials however, it could on occasions lead to a sense of obligation and responsibility.

Europeans widely believed that the Maori were dying out. We agree that this almost certainly conditioned officials' assessments of Ngai Tahu's "present and future needs", particularly in relation to their land requirements.

To the extent that the Maori could be saved from extinction it was thought desirable to assimilate them speedily into western culture and values. This would include abandoning their communal way of living and the break up of their reserves.

The nineteenth century values of self-reliance and the ethic of competition would, it was said, need to be absorbed by Maori. And so continued reliance on their traditional communal social structures and lifestyle would need to be abandoned. The retention of such values would "sap" initiative and independence. It is apparent that Mantell, for instance, was strongly influenced by such convictions. Hence his extreme reluctance to agree to more than minimal reserves. He and other purchasing officers shared a desire to be seen by their superiors as hard bargainers. This strongly influenced the outcome, notably in the case of James Mackay Jr at Kaikoura.

Intermarriage between Maori women and Pakeha men had taken place and was likely to continue. The children of these mixed marriages would, it was thought, merge increasingly with the European community through further intermarriage, thereby enhancing assimilation. In this way the tribal social fabric would be weakened.

16.1.3 It is clear that Ngai Tahu wished to engage actively in the new economic order and profit from trade and the opportunity to acquire European goods. By the early 1840s Ngai Tahu had in fact absorbed many of the Europeans who had married Ngai Tahu women. This was assimilation in reverse. By 1840 the incursion into Ngai Tahu territory by northern tribes had been repelled and the tribe was at peace with its neighbours. But Ngai Tahu were not in a strong bargaining position. Unlike many North Island tribes they constituted no real threat to prospective settlers. They had been weakened by civil war, by battles with northern tribes and struck down by European diseases. Some had dispersed, temporarily at least, from their traditional kaika. Whaling and the prosperity it had brought was in decline. In various ways they were in a weakened condition.

There remained however a strong desire to enhance tribal mana. To this end Ngai Tahu were prepared to accommodate prospective settlers and to sell land to the Crown to facilitate settlement. It is, however, unlikely that they had a real appreciation of the likely speed of settlement or of the numbers of settlers soon to be spreading over the land. It is highly likely they expected many of their traditional usages to continue in the foreseeable future over much of their land, in particular their access to mahinga kai. Throughout the 1850s Ngai Tahu cultivated or grazed stock beyond the reserves and continued to hunt and forage much as previously.

Ngai Tahu, in agreeing to sell their lands to the Crown, contemplated an ongoing relationship with the Crown and with the new owners of the land. For, at the time of the early purchases, they would have had little real understanding of the finality and irrevocability of the sale of their land or of their consequential permanent alienation

from it and its resources. Only over time, as settlement increasingly pressed upon them, did they come to realise the full significance of the land transactions. As settlement built up and properties were fenced in Ngai Tahu found their access was tolerated on less and less of the land other than the little reserved for them. The full significance of the deed of sale and later Crown grants to settlers gradually became impressed upon them. There seemed little scope for further discussion or negotiation. Increasingly the settlers claimed the right to exclusive possession of their land. Increasingly Ngai Tahu became confined to their minimal reserves and the prospect of poverty and isolation.

16.1.4 But they were parties to the Treaty of Waitangi. Ngai Tahu rangatira were prepared to treat with the governor and his representatives in good faith. They had expected that dealings over land would lead to ongoing relationships and be for the mutual benefit of the parties. The Treaty provided or should have provided an essential protection to Ngai Tahu in their dealings with the Crown over land. Yet only in the Otakou purchase negotiations was an independent protector made available. Following Grey's abolition of the Protectorate Department, Ngai Tahu had to rely entirely on their own resources, with such assistance and good will (if any) as might be offered by the Crown's agent whose principal role was to extinguish their title to the land. The primary loyalty of the various land purchase commissioners clearly lay with the Crown, not Ngai Tahu. It is instructive to assess their actions and those of their superiors, the governors, in the light of the relevant Treaty principles.

Waitangi Tribunal, Department of Justice, Wellington.

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16.2 Crown Protection of Maori Rangatiratanga

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16.2.1 In chapter 4 we have discussed the principles of the Treaty as they apply to this claim. We propose now to test the Crown actions over the various purchases against certain of these principles. First, the principle that:

cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga.

As our earlier discussion of Treaty principles shows, rangatiratanga is both a complex and subtle concept. When in article 2 the Crown guaranteed to Maori tino rangatiratanga-full authority-over their lands and other property and valued possessions, it guaranteed more than ownership, so long as they wished to retain it. Rangatiratanga signifies the mana of Maori not only to possess what they own but to manage and control it in accordance with their preferences. That is, in accordance with Maori customs and cultural preferences. And so land retained by Maori and over which they exercised rangatiratanga would involve continuing to hold the land communally as a community resource with the subordination of individual rights necessary to maintain tribal unity and cohesion. But as we have seen, the Crown denied the right of Ngai Tahu to retain land they wished to keep and left them with the merest fraction of the vast lands they formally owned. Such deprivation meant not only a loss in material terms but also a loss of the exercise of their rangatiratanga upon which the viability of their social system itself depended. When, as later happened, much of what little tribal land they retained came to be individualised under the Native Lands Acts of the 1860s, this allowed the irreversible process of dismantling the tribal social structure to be accomplished.

16.2.2 For Ngai Tahu's social system to remain in place it was essential they kept ample lands and access to traditional food resources. When it is recalled that Ngai Tahu had customary title over more than half of Aotearoa it is idle to suggest they could not have been left with substantial areas in locations of their own choice. But instead we find Kemp purchasing some 20 million acres and promising, but not actually setting aside, any land for Ngai Tahu. Mantell, who followed, denied their requests when he felt so inclined and left them with a few thousand acres in places not always of Ngai Tahu's choosing. On Bank's Peninsula he acted with a high hand, inducing Ngai Tahu to accept totally inadequate reserves. In Murihiku he again acted as sole arbiter in deciding what land of their own they would be allowed to retain. Hamilton had no sooner settled the Akaroa purchase with a mere 1200 acres than he received a request from Ngai Tahu for a further 400 acres.

This he felt compelled to deny, as did James Mackay Jr, who received a similar request at Kaikoura. Hamilton denied Ngai Tahu the right to retain any land at all in the North Canterbury purchase. James Mackay was again constrained by arbitrary limits imposed by his superiors on the amount he could leave with Poutini Ngai Tahu and denied their request to retain substantial lands on either side of the Arahura River. In none of these purchases was the land which remained in Ngai Tahu ownership and possession remotely adequate to enable them to maintain their traditional way of life and social structure, let alone engage in new activities such as pastoral farming.

16.2.3 Under article 1 the Crown secured sovereignty over New Zealand. This was conceded by the Maori people in exchange for the protection of their rangatiratanga by the Crown. The Crown however failed in its Treaty duty to protect Ngai Tahu's rangatiratanga over their lands and other valued possessions, including pounamu. This failure lies at the heart of their many grievances.

Mr Bill Dacker, in his evidence to us on the prejudicial effects Ngai Tahu suffered by the lack of land, emphasised that the loss of land and the consequential loss of traditional resources deprived the people of an economic base for their communities. This eventually forced more and more of them to migrate to where there was work. As Mr Dacker explained, once the strength of the communities was broken in this way, the people were exposed increasingly to the predominantly negative European attitudes towards Maori and their culture. And so the loss of economic strength flowed through into loss of culture. In short, Ngai Tahu's rangatiratanga had become seriously eroded. The magnitude of the Crown's failure of its Treaty obligation to protect Ngai Tahu's rangatiratanga will be considered further in the context of the next Treaty principle.

Waitangi Tribunal, Department of Justice, Wellington.

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16.3 The Crown Right of Pre-emption Imposed Reciprocal Duties

16.3. The Crown Right of Pre-emption Imposed Reciprocal Duties

16.3.1 While under article 2 of the Treaty the Crown guaranteed to Maori their tino rangatiratanga over their lands and other valued possessions, Maori in turn made a valuable concession to the Crown. Lord Normanby had instructed Hobson that he should, if at all possible, obtain from the Maori people their agreement to sell their land only to the Crown. Article 2 accordingly gave the Crown the extremely valuable monopoly right to purchase land from the Maori to the exclusion of all others. The tribunal has found that the granting of this right to the Crown by Maori imposed a reciprocal obligation on the Crown. This was to ensure, when exercising its right of pre-emption, that the Maori people in fact wished to sell; secondly that each tribe was left with a sufficient endowment for its own needs-both present and future.

16.3.2 This raises the question of what might constitute a sufficient endowment for the tribes' present and future needs. As we pointed out in our discussion of Treaty principles, there can be no single answer to this question. Much might depend upon a wide range of demographic and other factors such as

- the size of the tribal population;
- the land the tribe was occupying or over which various members enjoyed rights;
- the principal food resources and their location;
- the location of wahi tapu; and
- the likely impact of European farming practices.

It was well known by Crown officials, including Governor Grey, that the Ngai Tahu people would for many years remain dependent upon traditional sources of mahinga kai, including sea and inland fisheries. To secure these the Crown, in negotiating a purchase, was under a duty to ensure that extensive areas of land in suitable locations remained in the tribe's possession. In other words, that Ngai Tahu's rangatiratanga over the land was maintained.

It was known that Ngai Tahu, in welcoming Europeans amongst themselves, were anxious to engage in the new economy. It was apparent by the late-1840s that much of the land east of the Southern Alps was well suited to the development of pastoral farming. To engage in this activity alongside the new settlers, Ngai Tahu would need to be left with extensive portions of their land. The tribunal notes that pasturage licences issued to individual settlers ranged in area from 5000 to more than 30,000

acres. In time no doubt land which yielded traditional forms of mahinga kai might also be adapted, in part at least, to pastoral and other forms of farming, including agricultural cropping.

16.3.3 The claimants' grievances in relation to reserves fall under two main heads. First, that certain land which Ngai Tahu sought to have left in their ownership was included in the various purchases at the insistence of the Crown agents. Secondly, that in each purchase other than Rakiura, insufficient land was set aside for Ngai Tahu as an economic base to provide for their present and future needs. The tribunal has found in each of such purchases that both grievances have been made out by the claimants. The areas in the first category requested and refused by the Crown purchase officers varied in size from in excess of 200,000 acres, in the case of the Kemp purchase and some 100,000 acres in the Kaikoura purchase, down to relatively small areas in Murihiku and some other purchases. The tribunal stresses that it is dependent very largely on records, often sketchy, made at the time by the Crown purchasing agents of reserves expressly requested by Ngai Tahu which they refused to make. But the Crown has not suggested that such notes are complete or exhaustive. Nor, nearly 30 years later in evidence before the Smith-Nairn commission, could we expect Ngai Tahu rangatira who participated in the purchase negotiations to recall all the reserves requested and refused. The tribunal believes that other requests for reserves were made and declined of which we have no record. The likelihood is that these were quite numerous. An indication of values at the time of the Kemp purchase was given by the Crown valuer, Mr Armstrong. He valued an area of some 220,000 acres requested by Ngai Tahu at \approx 205,000, as at 1848. The present day prairie value of this land was assessed by Mr Armstrong at 370 million dollars.

But it was in the second category that the most serious breaches occurred in seven out of the eight purchases, Rakiura being the sole exception. The following table shows the areas of the eight purchases and the reserves set aside.

Table of Purchase and Reserve Areas

Purchase Area in acres [1] Reserves in acres

Otakou 533,700 9615

Kemp (net) 13,551,400 [2] 6359

Banks Peninsula 251,500 3426

Murihiku 7,257,500 4875

North Canterbury 2,137,500 -

Kaikoura 2,817,000 5558

Arahura 6,946,000 6724 [3]

Rakiura 420,000 935 [4]

Total area 33,915,100 37,492

Notes

1 The various purchase areas have been calculated by the Department of Survey and Land Information from boundary information supplied by the tribunal. A simple calculation of all land in the South Island below the northern boundaries of the Arahura and Kaikoura purchases gives a gross area of 34,500,000 acres. The discrepancy between this figure and the aggregate figure of 33,915,100 is probably accounted for by ambiguities in certain purchase boundaries.

2 The gross area of land in the Kemp purchase is 20,497,400 acres, extending to the west coast. But the land in the Arahura purchase subsequently acquired separately has been deducted to give the net figure of 13,551,400 acres.

3 Plus endowment reserves of 3500 acres and 2000 acres to meet surveying costs.

4 Plus an unspecified area of land at the Neck some of which was set aside for half-castes and 21 Titi Islands (area unknown) and an education endowment reserve of 2000 acres.

Ngai Tahu population in the 1840s

16.3.4 In 3.2.2 the tribunal concluded from the evidence of Professor Anderson for the claimants and Professor Pool and Mr Walzl for the Crown that in 1840 the Ngai Tahu population was of the order of 2000 to 3000. Seasonal migration and other factors however may have resulted in an underestimate. No final conclusion can be reached at this stage. The tribunal thinks it reasonable to assume that in the 1840s the Ngai Tahu population would have numbered approximately 3000.

On an assumed population of 3000 Ngai Tahu the 37,492 acres set aside from the eight purchases gives an average of 12.5 acres for each individual. It is not surprising that counsel for the Crown conceded that the reserves set aside for Ngai Tahu were inadequate and that the Crown had failed to meet its Treaty obligations. The tribunal is satisfied that not only were the reserves insufficient, they were so grossly insufficient as to be no more than nominal in character. Most, if not all the Crown purchase agents, well knew that the reserves were insufficient for Ngai Tahu's needs. A moment's thought would have shown them that the lands left with the various Ngai Tahu hapu could not possibly sustain them as tribal communities. It must have been readily apparent that many would be forced to leave the land or, if they sought to remain, they would have a struggle to survive. It must have been equally obvious that Ngai Tahu would have no opportunity to do more than engage in very small scale agricultural production, assuming the land was suited to such activity.

16.3.5 In 1848 when the second and largest purchase took place this resulted in Mantell apportioning minimal reserves of 10 acres or less per person. By this time the Crown representatives well knew that European settlers were taking up extensive

pastoral holdings ranging from tens to hundreds of thousands of acres. The tribunal can only assume that the Crown consciously decided that 10 to 12 acres was sufficient for individual Ngai Tahu but that individual Europeans required vastly more land. It is not surprising that Matiaha Tiramorehu in 1849 was vigorously complaining at the inadequacy of the Moeraki reserve which allowed no scope for running cattle and sheep in any numbers.

To make matters worse the Crown permitted licences for extensive holdings of pastoral runs to be issued to Europeans on Banks Peninsula, and especially in the Akaroa block, North Canterbury and Kaikoura well before the land was purchased from Ngai Tahu. As a consequence the Crown was to set aside no, or at the most, minimal reserves for Ngai Tahu. In doing so the Crown either totally overlooked its Treaty obligations or cynically disregarded them. Whatever the reason, the predictable outcome was that the new settlers prospered and Ngai Tahu were reduced to poverty and despair.

16.3.6 All this occurred as a result of the exercise by the Crown of its Treaty right of pre-emption without any recognition of its reciprocal Treaty obligation to ensure that Ngai Tahu were left with an ample endowment for their present and future needs. The tribunal recalls the New Zealand Company's pre-Treaty policy of vesting in the company one-tenth of the land purchased from Maori to be held by the company in trust for the future benefit of the tribe. Moreover, FitzRoy in 1844 in his waiver proclamation contemplated that tenths would be vested in Crown trustees for Maori and public purposes. New Zealand Company tenths were in Wellington later vested in the Maori beneficiaries. Had the Crown adopted this practice and in addition to land left in Ngai Tahu ownership vested a tenth of all land acquired in trust for Ngai Tahu this would have been greatly to their advantage. In time the land might well have been transferred into Ngai Tahu's legal ownership. This would have resulted in Ngai Tahu receiving some 3.4 million acres in addition to land expressly reserved to them. This would have been a vast improvement on the nominal 37,492 acres reserved to them. For 3000 Ngai Tahu this would, if vested directly in the tribe, have provided the equivalent of 1133 acres per person.

Given that Ngai Tahu undoubtedly owned the land, the vesting in them of an area which amounted to about 1133 acres per person, particularly when compared with the much more extensive runs thought appropriate to the needs of European settlers, could scarcely be regarded as generous. The tribunal cites this merely by way of example and not because we see it as the appropriate measure of the land which should have been left with Ngai Tahu. Ngai Tahu clearly had a need of land which would have been suitable for pastoral or other forms of farming. But Ngai Tahu also had a strong affinity, in some cases of a spiritual nature, to other notable features of the landscape. Prominent is Aoraki (Mount Cook). Their trails throughout their extensive domain, including those over the great mountain range, their lakes and rivers, were all taonga, all greatly prized.

Instead, these people, the tangata whenua, whose homeland it was, were against their will reduced to subsist on a mere 12 acres per person. Their rangatiratanga denied; their future both tribally and individually bleak; their Treaty rights ignored. All this with the knowledge or connivance of successive governors acting on behalf of the Crown.

16.3.7 In the course of our discussion of the Kemp purchase we noted that in 1868 Chief Judge Fenton in the Native Land Court increased Ngai Tahu's reserves from an average of 10 acres per person to 14 acres. This resulted in some 5000 acres of new reserves in Canterbury and Otago (8.10.8) This was done at a time when much of the land in Canterbury, North Canterbury and Kaikoura had been taken up either under pasturage licences or by the acquisition of the freehold of large runs of many thousands of acres for individual settlers. A single pasturage licence would equal or exceed the total area of 5000 acres granted by the court on the representation of Crown officials that an increase from 10 to 14 acres would meet the needs of individual Ngai Tahu. Such a flagrant double standard is explicable only on the basis that the Crown had no serious concern for the rights and well-being of its Treaty partner, in this case the Ngai Tahu people. The Crown simply ignored the Treaty.

We relate in chapters 18 to 22 of this report subsequent efforts of Ngai Tahu to obtain redress for the great wrong done them and the Crown's response. As we will show, it was extremely belated and did little to mitigate the landless or near landless state of so many Ngai Tahu.

Waitangi Tribunal, Department of Justice, Wellington.

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16.4 The Crown Obligation Actively to Protect Maori Treaty Rights

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16.4.1 We turn now to this, the third of the relevant Treaty principles which applies to the eight Crown purchases from Ngai Tahu. We recall the words of Sir Robin Cooke in the New Zealand Maori Council case that:

the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manakau and Te Reo Maori reports which support that proposition and are undoubtedly well founded.

As we have earlier held, the duty of protection imposed on the Crown extends not merely to the use of their lands and waters, as noted by Sir Robin Cooke, but to the exercise by the Crown of its Treaty right of pre-emption (4.7.11).

In his formal instructions to Hobson the colonial secretary, Lord Normanby, stressed the need for the Crown to protect Maori interests. Contracts with Maori were to be "fair and equal". This was to be ensured through the appointment by the Crown of an officer who would act on behalf of the governor and who would be "expressly appointed to watch over the interests of the aborigines as their Protector". Lord Normanby went on to suggest that a comparatively small sum would be paid to Maori for their land for reasons which we will return to later in this discussion. He then stressed:

- that all dealings with Maori for their lands should be conducted on principles of sincerity, justice and good faith;
- Maori must not be allowed to enter into any contracts which might, through ignorance or unintentionally, prove injurious to them;
- by way of example, land which would be essential or highly conducive to their own comfort, safety or subsistence should not be purchased from them; and
- Maori should alienate only such land as would not cause them distress or serious inconvenience.

Lord Normanby envisaged that the role of the protector would be to ensure compliance with these instructions. But as events proved there was considerable scope for a conflict in interest in the one person being charged with the duty of purchasing land for the Crown for on-sale to settlers and at the same time protecting Maori interests in the ways stipulated by Lord Normanby. Consequently George Clarke, who

was appointed the first protector in April 1840 requested to be relieved of his land acquisition duties in 1842 and this was approved.

16.4.2 In only one of the eight purchases from Ngai Tahu was a protector appointed. As we have seen, George Clarke Jr assumed this role in the Otakou purchase, while J J Symonds supervised the New Zealand Company purchase on behalf of the Crown. Governor Grey, for reasons of his own, abolished the Protectorate shortly after his arrival. And so in none of the remaining purchases was an official protector involved. Presumably the land purchase officers or commissioners to extinguish native title, as they were commonly called, were expected to fulfil this role also. If so, as our discussion of the various purchases has shown, they failed dismally to do so.

As the tribunal has shown, the Crown, through successive governors and their various purchasing agents, failed to protect Ngai Tahu rangatiratanga over their land and other valued possessions, failed to ensure Ngai Tahu retained land they did not wish to sell, and failed to ensure Ngai Tahu retained ample land for their present and future needs.

16.4.3 The duty of protection also extended to other matters. The tribunal considers that the Crown, in buying land from Ngai Tahu, assumed the burden of ensuring that the implications were properly understood by the sellers, assuming the latter were entitled to sell in the first place. The obligation fell on the Crown to resolve the contradiction between the Crown's duty to protect Maori rangatiratanga over their land and the Crown's right to buy that land if the owners were willing to sell. The evidence shows that when the roles of protector and purchaser were combined in the one individual, as was the case in seven of the eight purchases, the resolution was unlikely to be in Ngai Tahu's favour. To satisfy themselves that Ngai Tahu understood the nature of the transactions they were being invited to enter into, the Crown purchase agents would need to explore several questions. For example, was finality really understood by the Maori? Did they understand that there was no necessary and contractual ongoing relationship entailed in the sale; that payment was not a koha; that the vendor might have no residual rights such as the right to protect (and have access to) wahi tapu; to protect the land from physical and spiritual pollution according to Maori values and the right to conserve the resources of the land for common benefit according to these same values; that the sale did not entail the right to share the land or its fruits with the buyer, or make any further claim on him, or that money was less durable an asset than land and that it should be valued as a means for saving and investment lest it ultimately prove to be of little value.

16.4.4 Before briefly examining the evidence in the light of these observations the tribunal further notes that, in a culture with an oral tradition, the spoken word and manner of its delivery continue to have salience long after the advent of literacy. And so with transactions involving the Maori under the Treaty, what was actually said-or thought to have been said-in negotiations, how and by whom it was said, have always taken precedence over the documentary record. Rangatira have not often read the "fine print", carefully checked deeds against maps, become involved in technical details and so on. Moreover the physical act of signing a document had no cultural precedent and would, in the early days, have had no literal meaning whatever if done in private, away from the marae. By the same token a witness to a signature would have been thought equally strange and irrelevant. For centuries land had been used, conserved and handed over from one generation to the next. With each sale of land

however, and notwithstanding prior discussion, a few individuals by placing their mark on a document broke that continuity for ever. Tribes had always lost land in battle, losing it by selling it was something new.

16.4.5 There remains the question of consent. Before 1865 and the beginning of the Native Land Court, investigations of title, ownership of land and its resources were always liable to be contentious. So if the Crown believed it had obtained the owners' consent to a sale and purchase agreement, that did not absolve it under article 2 of the Treaty from ensuring that the consent of those rangatira entitled to give it on behalf of their beneficiaries had been obtained, and it should have been aware that those silent at a meeting were not necessarily giving silent assent to the agreement.

We have earlier indicated the likelihood that in some respects at least the Crown purchase agent on the one hand and the Maori vendors on the other, came away from the signing of a deed of purchase with different impressions of what had been done and the implications for the future. This was likely to be the case especially with the earlier purchases. But each party was probably unaware that the other had a different impression of the arrangement entered into.

16.4.6 Each of the eight purchases was completed by the signing of a deed of purchase. The first such deed, which related to Otakou, said that the chiefs and men of Ngai Tahu consented "to give up, sell and abandon altogether..." all their claims and title to the land described in the deed. It went on to say they also gave up certain named islands but reserved other places as described in the deed for themselves and their children. Before this deed was signed representatives of Ngai Tahu, the Crown and the New Zealand Company physically traversed the region and identified the land which was to be excepted from the sale for Ngai Tahu. We have noted in our discussion of the Otakou purchase that Symonds, immediately after the purchase, advised Superintendent Richmond that he requested George Clarke, the protector, to explain to Ngai Tahu that in disposing of their land they for ever surrendered their interest and title to the land and that their consent was binding on their children as well as themselves. Symonds further reported that the boundaries were frequently explained to Ngai Tahu by George Clarke, who said Ngai Tahu fully understood the contents of the deed. William Wakefield later reported on 31 August 1844 that Clarke told Ngai Tahu that they were about to part with the land described in the deed which he was about to read to them, and that it would be gone from them and their children for ever, that they must respect the white man's land and that the white man would not touch the land reserved by Ngai Tahu. Wakefield went on to say that Karetai "spoke to the same effect, strongly insisting on each respecting the others rights in order to avoid disputes" (C2:11:57-58). After the deed was signed Tuhawaiki then removed a tapu from a burial site at Koputai and took away the remains for reburial. While no one can be sure at this distance in time what impression all this made on the minds of individual Ngai Tahu, the evidence suggests that in this instance the Crown made reasonable efforts to ensure that Ngai Tahu understood the full implications of the deed. Clarke in 1880 confirmed he went to considerable trouble to ensure this. And one of their leading rangatira appears to have reinforced this understanding when speaking to his people before the deed was signed. But, as we have earlier said, this was the only sale at which an independent protector was present. But having said that, the tribunal observes that even a conscientious protector failed to ensure that Ngai

Tahu retained sufficient land for their future needs. They were able to keep all they sought to retain but this in the event proved inadequate.

In the Kemp purchase which followed four years later, the deed of purchase provided that the chiefs and people surrendered their lands entirely and for ever, on the condition that certain lands were to be reserved, and then stated, as translated by this tribunal, that the bulk of the land was to be set aside for the Pakeha for ever. Later deeds speak of the "entire surrender of the land" (North Canterbury); of agreeing "entirely to give up all those lands which have been negotiated for" to the Queen "as a lasting possession for her or for the Europeans to whom Her Majesty or rather His Excellency the Governor shall consent that it be given", and later, that "all the lands and all other things above enumerated ... have been entirely surrendered to Her Majesty the Queen for ever and ever". After naming the reserves set aside for Ngai Tahu the deed further says, "The only portions for ourselves [Ngai Tahu] are those just named" (Murihiku); of parting with their lands "and for ever transferred unto Victoria Queen of England ... for ever" and later for the Queen to hold "as a lasting possession absolutely for ever and ever" (Arahura). The remaining deeds all contain wording to the same or similar effect (see appendix 2).

16.4.7 The Kemp transaction differed from all the other purchases (except North Canterbury) in that no reserves were set aside prior to the signing of the deed of purchase. Rather, Ngai Tahu were promised that reserves would be set aside and their mahinga kai reserved to them. We have considered at some length in our discussion of this purchase the likely Ngai Tahu expectations of what these promises meant and the failure of the Crown to meet them. No reserves at all were provided in North Canterbury—a clear breach of the Treaty. In six of the eight purchases the reserves (albeit in all cases inadequate) were first discussed and set aside by the Crown purchase agents before the deed of purchase was signed. Unfortunately there is little contemporary evidence of the nature and content of the discussions which took place between the Crown purchase agents and Ngai Tahu rangatira as to the implications for Ngai Tahu of the respective sales. We know that Mantell went to considerable trouble in implementing the Kemp purchase and negotiating the Murihiku purchase to ascertain which chiefs had interests in the various localities. At the same time he was unwilling to meet all their requests to retain land they did not wish to sell. By 1853, the date of the Murihiku purchase, settlement of Europeans in the neighbouring Otakou purchase area was building up. From that point on, as settlers moved onto the Canterbury, Banks Peninsula, North Canterbury and Kaikoura blocks, the implications of the sale of their land to the Crown would have become increasingly obvious to Ngai Tahu. It is not possible in the absence of any detailed evidence to know with any certainty the extent to which Ngai Tahu expectations of the outcome of the various sales differed from those of the Crown agents. Only in the Otakou purchase do we have reasonably explicit contemporary evidence on the point, but this is all from Pakeha sources. The tribunal would be surprised however, if, particularly in the case of the early purchases and especially in relation to continued access to mahinga kai, there were not differing expectations on the part of the Ngai Tahu vendors and the Crown purchasing agents. It may be that with the best will in the world this could not have been avoided. But the Otakou experience would suggest that the presence of the protector George Clarke did go some way at least to ensure that Ngai Tahu appreciated the implications of the sale and the fact that the land sold would be owned and occupied by future European settlers and not them.

The primary obligation of Crown purchase agents was manifestly to the Crown, not to Ngai Tahu. This was evident from their conduct. The tribunal is satisfied that, had a protector been appointed to assist and advise Ngai Tahu on each of the purchases, they would have been more fully alerted to the consequences of the Crown's proposals. It is, for instance, inconceivable that on the major issue of reserves a protector would have acquiesced in the parsimonious attitude of the Crown agents over both the retention of land the vendors wished to keep and the provision of reserves for Ngai Tahu's present and future needs. As we have already indicated, a protector would have counselled them on the need to reserve all their pounamu. He would have warned them of a need to ensure adequate access to mahinga kai. He would have been in a position to check that those who sold were entitled to sell. His presence would have made less likely the making of threats or the exercise of unfair pressure, for example by playing on tribal rivalries. He would have discussed with them the vexed question of price. This last matter needs further consideration by us.

Waitangi Tribunal, Department of Justice, Wellington.

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16 The Eight Crown Purchases _An Overview

16.5 The Price Paid

16.5. The Price Paid

16.5.1 To acquire over half the land mass of New Zealand, some 34.5 million acres, the Crown paid Ngai Tahu the sum of œ14,750. The details are as follows:

16.5.2

Purchase Price(œ)	Area in acres
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Otakou	2400 533,700
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Kemp (net)	2000 13,551,400
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Banks Peninsula	650 251,500
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Murihiku	2600 7,257,500
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North Canterbury	500 2,137,500
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Kaikoura	300 2,817,000
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Arahura	300 6,946,000
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Rakiura	6000 420,000
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If we ignore the last purchase of Rakiura (Stewart Island) for œ6000, the remainder, that is all Ngai Tahu land in the South Island, amounting to some 34 million acres, was acquired for œ8750.

16.5.3 While Lord Normanby, in his instructions to Hobson, required the governor to acquire land from the Maori "by fair and equal contracts" through the oversight of a protector, he envisaged that the price to be paid the Maori would "bear an exceedingly small proportion to the price for which the same lands will be resold by the Government to the settlers". The colonial secretary saw no injustice in this. In his view much of the land was of no use to the Maori. In their hands, he said, it possessed scarcely any exchangeable value. He thought much of it might long remain useless even in the hands of the government. Its value in exchange would be first created and then progressively increased by the introduction of settlers and capital from Britain. "In the benefits of that increase the Natives themselves will gradually participate."

Putting aside for the moment the soundness or otherwise of the views expressed by Lord Normanby, the tribunal would stress that such efficacy as they might have depended on the last proposition-that as the value of the land increased as a result of British settlement, the Maori would gradually participate in such increase in value. But this proposition is valid only if, as Lord Normanby insisted, the Crown ensured that the Maori vendors were left with ample land for their own requirements. This did not happen due in part at least to the absence of a protector in all but one of the purchases. And even in the case of Otakou, as we have seen, the reserves left with Ngai Tahu were inadequate for their future livelihood. And so the justification envisaged by Lord Normanby for paying Maori a small price for their land was wholly invalidated by the minimal area of land left in Ngai Tahu's possession.

16.5.4 Professor Ward in his report (T1:14-15) pointed out that British officials frequently argued in justification of the low prices paid to Maori vendors the unimproved land title had little or no value. Only registration of title and the creation of legally recognisable interests in land or improvements to or in the vicinity gave the land its value. However, as Professor Ward demonstrated, it is wrong to say that the land had no value. He instanced the resources used in the hunter-gatherer economy, rights of access, the water and soil as all having a value for those who use them. Nevertheless, as Professor Ward pointed out, it is true that the incidence of title created and supported by land registration do give further value. As does the subdivision of land, the building of roads and bridges, drainage and so on.

This could not happen if Maori were not prepared to sell some of their land:

A more important issue is whether the loss of use-value to the Maori-the ability to maintain a household in whatever degree of security and comfort obtained at the time-was compensated by access to exchange-values likely to achieve at least a comparable standard in a commercial economy relative to the rest of society, not just a continuation of the previous standard. (T1:15)

Professor Ward conceded that it may well not have been feasible for large cash prices to have been paid by the Crown-to have done so might well have proved too much for immigration societies and stopped the whole colonisation process. Given that Ngai Tahu wanted settlement to go ahead and had expectations of sharing the advantages, access to added value from their reserves was important. "But", said Professor Ward, "if reserves were to provide revenue from added-value as well as continued subsistence, they would have to have been substantial and of good quality land". Instead the Crown agents agreed to pay no more than nominal sums, in most cases well below Ngai Tahu expectations and well below the prices paid more northern tribes. If that were not enough, they then conceded minimal reserves of such small dimension that any subsequent added value would do little if anything to ameliorate their condition. It is difficult to believe, had a protector been appointed in each case, that this would have been the outcome.

16.5.5 The tribunal has said enough to demonstrate that Ngai Tahu were very detrimentally affected by the Crown's breach of its Treaty obligation actively to protect Ngai Tahu's Treaty rights. In their single-minded commitment to the purchase of Ngai Tahu's vast estate, the respective Crown purchase agents, with the connivance or clear endorsement of the various governors of the day, very largely ignored Ngai

Tahu's rights as a Treaty partner. It is abundantly clear the odds were weighed so heavily against Ngai Tahu that, in the absence of a competent and committed officer appointed to advise and assist them, they stood no real chance of avoiding tribal disintegration, serious impoverishment and virtual landlessness.

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16.6 The Principle of Partnership

16.6. The Principle of Partnership

16.6.1 The New Zealand Court of Appeal has affirmed that the Treaty signifies a partnership and requires the Crown and Maori partners to act toward each other reasonably and with the utmost good faith. Underlying all the Crown's Treaty obligations is the concept of the "honour of the Crown".

16.6.2 The tribunal has not found it necessary to make many explicit findings of a lack of good faith on the part of the Crown. Examples will be found in Kemp's purchase (8.9.19), Arahura (13.5.7), Banks Peninsula (9.10.3) and North Canterbury (11.5.5, 11.5.8). But this was not because the instances were few and far between. Much of Mantell's conduct in laying down the reserves in Kemp's purchase; his high-handed and arbitrary approach to the Ports Cooper and Levy purchases on Banks Peninsula and to a lesser extent perhaps to reserves at Murihiku, is difficult if not impossible to reconcile with the duty of the Crown to act towards its Maori partner "reasonably and with the utmost good faith". Hamilton found it expedient to give a false reason for his unwillingness to grant reserves in North Canterbury; James Mackay Jr threatened reliance on the Ngati Toa purchase while he was at the same time denying its validity during the Kaikoura purchase; he resorted to a "false start" to induce agreement on the purchase price. The Crown's actions, in refusing to pay more than a nominal price for land largely settled at North Canterbury and Kaikoura, and in the case of Arahura for which a very substantial rise in value was imminent, reflect badly on the honour of the Crown.

16.6.3 Nor can Governor Grey in particular escape responsibility. He was aware of and endorsed the conduct of those he appointed to purchase or allocate reserves in the Kemp, Banks Peninsula and Murihiku purchases. Governor Browne was privy to the North Canterbury, Kaikoura and Arahura purchases. These two governors were necessarily implicated in the wholesale breaches of the Treaty which occurred during the purchases effected by their duly appointed agents. There is no evidence that either questioned any aspect of any of the transactions which took place on their instructions. On the contrary they expressed satisfaction with the outcome. Had not the Crown after all, for the paltry sum of less than £15,000 acquired over half of Aotearoa while leaving the tangata whenua with a mere 37,492 acres out of 34.5 million acres? We have seen no evidence that this near total denial of Ngai Tahu's rangatiratanga, their confinement to a handful of totally inadequate reserves and the inevitable tribal disintegration and impoverishment of a proud and loyal tribe caused Her Majesty's governors any concern at all.

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16.7 Other grievances

16.7. Other grievances

This overview would not be complete without a brief reference to the tribunal's findings on three other major grievances. In two of these, namely the boundary disputes as to the extent of the land included in the Kemp and Murihiku purchases, the tribunal found in favour of the Crown. In the third the claimant's grievance was in effect substantiated but on grounds other than those relied on by the claimants. We will refer to each in turn.

The "hole in the middle"

16.7.1 The claimants' maintained that the western boundary of Kemp's purchase followed the "foothill" ranges from Maungatua to Maungatere and did not extend to the West Coast as claimed by the Crown. The tribunal has however found that Ngai Tahu agreed with Kemp to give up a substantial part of the land they owned or in which they had an interest from coast to coast. But this finding is tempered by the further finding that Ngai Tahu did not agree to part with their kainga, their mahinga kai, or the extensive areas required to enable them to adapt to and prosper in the new society which European settlement among them would facilitate. Ngai Tahu expected by this arrangement with Kemp to participate fully in the new economy which the sale to Kemp would make possible. But while settlers prospered the Crown's obligations to Ngai Tahu were not honoured and they were reduced to poverty, distress and landlessness.

The land west of the Waiau

16.7.2 The claimants have said that the land west of the Waiau was wrongfully included in the Murihiku sale. This comprises the extensive area of the southern Fiordlands. After a careful and detailed consideration of all available evidence the tribunal was unable to sustain the claimants' grievance. The weight of evidence supported the Crown's claim that Ngai Tahu agreed to sell from coast to coast. But the tribunal also found that in addition to the Crown failing to reserve to Ngai Tahu ownership of various areas of land, including Rarotoka Island, which they sought to retain, the Crown further failed to ensure that Murihiku Ngai Tahu were left with adequate land for their present and future needs. The tribunal further found that the Crown's agent Mantell, failed to take any steps to consult Ngai Tahu as to the nature, location and extent of hapu hunting and food gathering rights over the tribal territory as part of the essential provision for their present and future needs. As a consequence Ngai Tahu were deprived of reasonable access to their traditional food resources including those west of the Waiau.

The Otakou tenths

16.7.3 The tribunal has not sustained the claimants' contention that FitzRoy's waiver proclamation of 26 March 1844, which provided for tenths, applied to the Otakou purchase. Nor has it upheld the claim that at the time of the purchase either the Crown or the New Zealand Company undertook that tenths would be provided. But the tribunal has found that the failure of the Crown either to make provision for tenths in terms of its then policy or to make other adequate provision for Ngai Tahu was a breach of the Crown's duty under the Treaty to set aside ample land as an economic base for the future. On different grounds then the claimants' grievance is justified.

Waitangi Tribunal, Department of Justice, Wellington.