

Rangiteaorere Land Claim

3 - Ngati Rangiteaorere And The Te Ngae Mission Farm

1 - Nga Kupu o Nga Rupuna: The Traditions of Ngati Rangiteaorere

Ngati Rangiteaorere and the Te Ngae Mission Farm

3.1. Nga Kupu o Nga Tupuna: the Traditions of Ngati Rangiteaorere

Ngati Rangiteaorere are one of the eight iwi of the Arawa confederation of the Rotorua district. They trace their descent from Tamatekapua of the Arawa canoe through Kahumatamomoe, Tawakemoetahanga, Uenukumairarotonga and Rangitihī. It was Rangitihī who, with his four wives, produced the eight children, nga pu manawa e waru, the eight hearts of Rangitihī, who gave their names to the iwi of Te Arawa. According to the traditions, the Arawa canoe had its final resting place at Maketu. Though the Arawa people were to settle mainly around the lakes with another branch, Tuwharetoa, on the shores of Lake Taupo, they have always sought to preserve their corridor through the Kaituna river to the coast at Maketu. Ngati Rangiteaorere, with their foothold at Te Ngae on the eastern shore of Rotorua, were strategically placed to exploit that corridor once Pakeha traders and missionaries came to Maketu and Rotorua.

Yet Ngati Rangiteaorere were both assertive of territorial rights and conscious of their obligations to other Arawa kin. If Te Ngae was their property, and Mataikotare was one of their several marae, so they had obligations with other Te Arawa iwi, and more especially their near neighbours and kin, Ngati Uenukukopako, to share with them the bounties of Te Ngae. Likewise those other people of Te Arawa had to reciprocate when they were tangata whenua on their marae and Ngati Rangiteaorere were manuhiri. This point is important when we come to consider the "sale" of Te Ngae to the Church Missionary Society (CMS). Ngati Rangiteaorere may have "sold" it (or gifted it, as they prefer to put it), but representatives of other Te Arawa iwi had their hands on the transaction. Indeed they provided most of the signatories of the deeds.

The web of kinship obligations is wound also from the strands of history, which is keenly remembered by the kaumatua of today. Much of it was told to researchers of the claim and at the hearings on the marae at Mataikotare. Thus Hiko Hohepa recounted traditions relating to Rangiteaorere; his father's instruction that if he was a boy, he was to be named after the clouds that passed in the sky; his up-bringing with his mother's people who were of Mataatua descent, Puketahu near Te Teko; his growing prowess as a warrior when he joined his father at Mourea, above Okawa Bay at Rotoiti, culminating in the defeat of a Tainui force in occupation of Mokoia Island. This brought the whole of Rotorua under the mana of the children of Rangitihī (A2:8-9).

Though there were frequent disputes between the various iwi of Te Arawa over land, these related mainly to boundaries, since their general territorial locations were largely agreed. Ngati Whakaue occupied the land around the western shore of Rotorua from Hinemoa to Weriweri; Ngati Rangiwewehi the land around the north of the lake from Awahou almost to Mourea on the Ohau channel outlet from Rotorua; Ngati Pikiāo the land from Ohau, encompassing Rotoiti, Rotoehu and Rotoma; and Ngati Rangiteaorere and Ngati Uenukukopako the land fronting the eastern side of Rotorua from Mourea to Owhatiura, where they adjoined Ngati Whakaue. Mokoia Island was claimed by all of the iwi around the lake. The land claims and whakapapa of Ngati Rangiteaorere and Ngati Uenukukopako were so intertwined that it was difficult to separate them. In 1882 the Native Land Court awarded the 10,350 acre Whakapoungakau-Pukepoto block, running inland from near the lake shore to Tikitere and the Whakapoungakau range, jointly to the two iwi. But in 1886 they went back to the court for a sub-division which divided the land into 16 blocks, awarding seven in the northern portion to Ngati Rangiteaorere and the other nine in the south to Ngati Uenukukopako (A2:12-13). Te Ngae mission farm, the subject of this claim, fronted the Ngati Rangiteaorere blocks and was therefore within their tribal territory, though Ngati Uenukukopako and indeed other Arawa iwi could lay some claim to it by way of kinship connections.

Waitangi Tribunal, Department of Justice, Wellington.

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2 - The Cms Mission And The "Purchase" Of Te Ngae

3.2. The CMS Mission and the "Purchase" of Te Ngae

Invasion from the north

3.2.1 The territorial alignments of the iwi of Te Arawa had been established long before Pakeha contact brought about a new turmoil in the lives of Te Arawa. At first this contact was indirect and the trouble was caused by the intrusion not of Pakeha, but of long-standing Maori enemies of Te Arawa, armed with the deadly weapons of the Pakeha. The Ngapuhi of the Bay of Islands were the first to get a substantial supply of muskets, and from about 1818 embarked on annual expeditions to the south under the leadership of Te Morenga and Hongi Hika. In 1823 Hongi led an expedition to the Bay of Plenty and, seeking utu for the killing of a relative at Motutawa (Green Lake), brought his great war canoes overland into Rotoiti and Rotorua to set upon Te Arawa on Mokoia Island. They were decimated. Many were slaughtered; many others taken as slaves back to the north. It was not until 1831, when the Danish trader Hans Tapsell established a flax trading station at Maketu, that Te Arawa got access to muskets. However his attempt to establish an agent at Rotorua failed.

Christianity comes to Te Arawa

3.2.2 Yet Hongi's raid had one useful result. It brought the Arawa prisoners into contact with the missionaries at the Bay of Islands. One Ngati Whakaue woman became the wife of a northerner called Pita, who had become an assistant to the missionary Richard Davis. The two of them were able to travel back to Rotorua, taking news of the missionaries and their religion, before those missionaries arrived in their district. In 1831 Te Arawa sent an emissary, Wharetutu, to the north to ask for a missionary for Rotorua. Henry Williams, the head of the CMS in New Zealand, came back with Thomas Chapman, the intended missionary. They preached a Christian service at Ohinemutu on 28 October 1831 and, before they left, selected a mission site nearby at Koutu, on the invitation of the chiefs.

Chapman did not return for three and a half years and then stayed for only ten weeks. He and his assistant, H M Pilley, erected a mission house at Koutu with the help of Ngati Whakaue. Chapman returned in September 1835 accompanied by his wife, Pilley and another assistant, S M Knight, but even this more concerted attempt to establish a mission failed. The Rotorua district was soon enveloped in further warfare, with invasions by Ngaiterangi of Tauranga and Ngati Haua of Matamata. When Te Waharoa and Ngati Haua attacked the district in August 1836 the mission buildings were destroyed. Chapman and his party withdrew, but he returned for a visit in May 1837 and more permanently in January 1838, this time accompanied by his wife and John Morgan and his wife. On this occasion they decided to establish their station in relative security at Puketi, on Mokoia Island. However Mokoia had disadvantages for

missionary work, so, when peace had apparently returned, Chapman and Morgan began to look for a site on the mainland. They fixed on Te Ngae, on the eastern shore of Rotorua and with good access through Rotoiti and the Kaituna to the coast at Maketu.

The mission finds a home: the deeds are signed

3.2.3 Hitherto, it seems, Chapman had not attempted to negotiate formal purchase deeds for mission sites at Koutu or Puketi, though he had paid some blankets for the latter (B2:16). But on 14 and 25 September 1839 Chapman and Morgan formally negotiated the purchase of an estimated 600 acres of land at Te Ngae, which they recorded in two deeds of purchase (see appendix 2). The deeds are similar to some other CMS deeds negotiated at this time and are written in Maori. The first deed has 42 tohu, or marks, the second has 28 tohu and five handwritten signatures. Neither deed is signed by the missionaries or any other Pakeha witness. There are two English texts and some later translations for the two deeds. The deeds were for adjoining parcels of land, described rather vaguely by geographic features. The first deed described a block of land lying along the shore of Rotorua from the Waiohewa river to "the bush at the Ngae", then running inland to the edge of the bush known as Te Takauere, then to the edge of other bush known as Te Poti-a-ta-Mangu, and through the middle of other bush by Paiwhenua until it reached the Waiohewa, and back along that river to the lake. Then the deed named the kainga within the boundaries: Tatua o te Hauiki, Poti a te Mangu, Ineawa Koaao, Tuterakura, te Kahu, and te Hoie. The second deed is even more vague, describing the land as "our home at Rotorua - Te Takauere and Te Turi-o-te-Uirangi" (which are kainga, not boundary lines). The deeds listed the goods paid over: an assortment of blankets, implements, clothing, items for personal adornment, pipes and tobacco. Finally, the deeds were quite explicit on the sale, or selling, of the land. Thus the first deed, which was the more expressive, concluded with the following:

In witness of our fully agreeing to this selling by us of the land above named we have put our hand by name or sign: the land with all things upon the land and below the surface of the land, are sold by us to Messrs. Chapman and Morgan, on behalf of and for the Church Missionary Society, for them and their heirs and assigns, to sell, sit upon, give away, or to dispose of in whatever manner they may please, for ever. (see Turton's Deeds, p 380)

Or as in the translation provided at the Godfrey enquiry:

These are our names or marks subscribed by us to this document as evidence of our consent to the sale of the land above described as also all things upon or within the said land to the said Chapman and Morgan on behalf of the Committee of the Church of England to them all and to their successors or purchasers from them or otherwise forever. (see appendix 2)

The second deed has a somewhat briefer rendering of this statement, omitting the reference to all things above and below the land.

The nature of the agreement

3.2.4 Several matters relating to these deeds need to be noted. In the first place, we have very little evidence about the nature of the negotiations and the Maori

understanding of the deeds, either in missionary records or Te Arawa oral traditions. Chapman himself appears to have written nothing on the matter, and there is only one comment in Morgan's journal, an entry for 21 September 1839 (a week after the negotiation of the first deed, and four days before the second):

A great portion of Mr. Chapman's time and my own for the last month has been spent in purchasing land at Te Ngae for a station which after much difficulty and vexation arising from disputed claims and the very unreasonable demands of the natives we have accomplished. (B2:163)

We are left to speculate over what Morgan meant by disputed claims, but he and Chapman had clearly not satisfied them since the purchase, far from being "accomplished", had to be followed up by the second deed - though this was for a separate parcel of land and was signed largely by a separate group of claimants. Only three appear to have marked both deeds (B2:38-9) and, if we look at the subsequent behaviour and statements of signatories, as well as of claimants who did not sign, there must be considerable doubt, at least on the Maori side, as to whether there was a "sale" at all. Nevertheless the two missionaries, and their parent body, had no doubt that the signatories had sold, as the English text of the deeds said, and that they had a valid title to the land which should be confirmed by the Crown.

3.2.5 There is also considerable doubt about the involvement of Ngati Rangiteaorere who were resident on the land. The deeds appear to have been signed at the mission station on Mokoia (B2:45), rather than at Te Ngae, although there was probably some negotiation at Te Ngae, particularly to try to resolve disputes over boundaries (B2:159). From the evidence presented to us, it is well nigh impossible to identify Ngati Rangiteaorere as distinct from signatories from other Te Arawa iwi. In a statement to Mr Paora Maxwell, which is quoted in his report, Mr Hiko Hohepa said that all of the signatories to the deeds were able to claim descent from Rangiteaorere, though many of them lived with and had their principle rights from other iwi, such as Ngati Whakaue and Ngati Rangiwewehi (A2:21). When giving evidence to the tribunal on 17 July 1990, he admitted that only one Ngati Rangiteaorere tipuna from Te Ngae had signed, and that most of the leading rangatira, including Matuha, Uamakerewhatu, Te Wehikore, Te Awekotuku and Tamarangi, had not. This might explain why Chapman and Morgan had trouble completing the "purchase" and why, in subsequent years, there was local Ngati Rangiteaorere opposition, especially when the church leased the land in the 1870s.

By taking signatures from representatives of other iwi, no matter how remote their Ngati Rangiteaorere affiliations, the two missionaries were probably trying to conciliate them, with a share of the payment and access to future bounties, for locating the new mission station in Ngati Rangiteaorere territory. In any case they were probably quite happy to "sell" land they had only a remote claim to, a common occurrence in Maori land transactions with the Pakeha at this time. The apparent lack of signatures from resident Ngati Rangiteaorere must cast doubt on the validity of the sale, although this does not appear to have deterred the CMS in its later attempts to obtain a Crown grant, or the Crown in finally issuing one.

Selling the land for ever?

3.2.6 The next question to be considered is whether the Maori signatories believed that they were "selling" the land "for ever", as the first of the deeds said. Once again,

it is impossible to be absolutely certain what was in their minds, so long after the event. The claimants, in speaking to the tribunal's researcher and in giving evidence to the tribunal, were generally although not entirely unanimous in the opinion that the land had been gifted, not sold. As was the case in Maori custom, gifts were supposed to be returned when they were no longer needed for the original purpose. Mrs Aho Welsh, who is in her late seventies, used the whakatauki, "ki a koe to taua koti", "to you our coat", to emphasise that such a gift was not forever:

It is understood that it is only because the storm has blown up and you haven't brought a coat, so it is a covering, but in the future you're expected to return it. In the Church's hour of need the old people came forward. (A2:3)

And she quoted her mother, Ruihi Ratema, as saying that the land was given because the church had lost its original mission station at Te Koutu during Te Waharoa's invasion. She recalled that her koroua, Ratema Awekotuku (a minister at the Te Ngae church), helped himself to fruit from the farm orchard, though the farm was leased to a Pakeha, and distributed it to the local people, saying it was "From the farm" (A2:3-4); as if to say, "We gave the land to the church, but it is ours". This oral evidence is consistent with the documentary record, for there is a report of the same Ratema Awekotuku saying to the native minister, John Ballance, at a meeting at Mokoia on 18 February 1885, that "the land was given as a mark of affection to the missionaries for religious purposes, but, seeing that it is no longer put to that use, we think that the land should come back to us" (B3:471) As we shall see, Ngati Rangiteaorere continued to occupy the land after it was "sold", they continued to cultivate it (albeit on a larger scale), and, no doubt, they continued to collect mahinga kai. They were keeping alight their ahi kaa. And when the CMS abandoned the mission, when Chapman eventually left for Maketu, they quite naturally assumed that the land had reverted to them, as had happened with the mission sites at Te Koutu and Mokoia.

Though the missionaries and later the Crown regarded the deeds as sufficient evidence that the land had been sold, there is no clear evidence that the Maori signatories so regarded them. Te Arawa had no previous experience of selling land, except perhaps in the case of Tapsell's acquisition of a site at Maketu and they may have had some second-hand knowledge of the selling that had been going on at the Bay of Islands. The first deed uses the verb hoko for "to sell", or variations of it such as "hokona atu e matou" for "we sell", and "tenei hokonga o te wahi whenua" for "this selling of this land". Of course it was the missionaries who drew up the deed who are equating hoko with selling. But, according to the Williams Dictionary, the word can mean "exchange, barter, buy or sell". It is reasonable to conclude that those who agreed to the Te Ngae deeds believed that they were bartering or exchanging, rather than parting with the land forever, in return for certain continuing secular and spiritual services that the missionaries were expected to provide. In any case, few if any of the "sellers" would have understood the written documents - after all only five attempted to write their names on the second deed - and they would have been guided by the spoken explanations, whatever they were, of the missionaries. Once again, the subsequent behaviour of Ngati Rangiteaorere was consistent with a more limited transaction than outright sale - something like a conditional lease or right of occupation.

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3 - The Cms Occupation Of Te Ngae

3.3. The CMS Occupation of Te Ngae

After completing the "purchase" of Te Ngae in September 1839, the missionaries took almost a year to establish themselves at their new station. Morgan's and Chapman's papers record some of their day to day progress. On 14 January 1840 Morgan reported that he had been across to Ohinemutu (not Te Ngae) and "engaged two parties of natives, one party to build me a house at Te Ngae ... and the other party to get stones out of the lake for a chimney" (B3:164). On 5 March Morgan noted that he had spent the day with "my own natives and party from the native village felling trees, pulling up ferns, preparing stones for my chimney, making out the site for my house and sharpening a saw" (B3:167). And on 24 May he wrote that they were preparing to move from Mokoia to Te Ngae and hoped to move with their families in about six weeks. But it is not clear when they actually moved, for Morgan wrote in his report for October 1840 that he had been using his week days:

cutting stones and building a chimney, in superintending my natives felling some trees, sawing clearing ground and erecting a dwelling house for myself and family, land in removing of the station ... from the island to the mainland. (B3:40)

But if the Morgan's occupied the house at all, it could not have been for long. In that same month he moved from Rotorua, due to his wife's ill health, and in February 1841 opened a new mission station at Otawhao in the Waikato.

3.3.1 Chapman was left to carry on alone. He too seems to have made only slow progress, reporting to the CMS in London in February 1842 that he had "nearly completed all the buildings necessary for a settlement" (B3:35). Chapman was also suffering from ill health and over the next few years he was frequently away from Te Ngae. He spent a term at Bishop Selwyn's theological college at Waimate in 1844 as a candidate for the diaconry, and towards the end of the year relieved for A N Brown at Tauranga, leaving S M Spencer, who had established a mission at Te Wairoa by Lake Tarawera, to watch over Te Ngae. Even when he returned to Te Ngae, Chapman was unwilling to reside there permanently, preferring to avoid Rotorua's cold winters by staying at Maketu for at least two months each year. By 1847 he was wanting to increase that period from "the very beginning of winter...until the middle of spring" (B3:153). In November 1849 the CMS agreed to allow him to move permanently to Maketu, though he spent some time at Te Ngae in 1850. T H Smith, a former government surveyor who was then a candidate at St John's Theological College, also spent some time at Te Ngae in 1850, but it was not occupied by any CMS missionary after that year. Once again, Spencer had to watch over it from Tarawera.

3.3.2 The missionary papers also contain scattered information about Maori activities and attitudes during the ten year occupation of Te Ngae. This material needs to be treated with some caution since the missionaries tended to veer from extreme optimism at their apparent success in converting the Maori to Christianity, to almost total despair at Maori recalcitrance in sticking to their heathen practices. As was common elsewhere, the younger people were the earliest and most enthusiastic converts, and the older ones, more especially prominent chiefs and tohunga, refused to go over at all. In the early 1840s there was apparently great progress in conversions and in displays of Christian worship, and by 1845 the station was said to have a congregation of 1400 (A2:28). However by the end of the decade there had been a considerable falling off.

Though precise details are sketchy, Chapman and his Maori helpers seem to have made considerable progress in developing the mission farm, running stock, cultivating wheat and potatoes, planting an orchard, and constructing a mill and bakery (the remains are still visible). As Chapman wrote on one occasion:

We hope the introduction of cattle, agricultural implements, the cultivation of wheat and hand mills will continue and gradually dislodge the present mode of civilisation. (A2:29)

Such increased production was needed to feed the local people, others who had taken up residence at the mission station, and the many visitors who came to attend Christian services or other hui. Chapman established a school and a dispensary. There seems little doubt that during the 1840s Te Ngae became a thriving settlement - as the missionaries would have seen it, an oasis of Christian civilisation.

However, the situation there was never quite as rosy as this. Rather, to the dismay of the missionaries, Maori who flocked to the mission station often had distinctly secular goals in mind. Chapman was forever complaining about their exorbitant demands, writing on one occasion:

I had hoped the good people here ... would have graduated their love a little upwards ... but lo? It turns out that we are daily sinking lower and lower in their estimations, and consequently they have felt it their duty to rise higher in their demands, to pester, to harass and worry us until I am fairly worn out I have also been civilly told ... not to touch that firewood yonder and Mr Morgan has been very ill used because he won't pay for a little dirt he dug to help build his chimney and some stone he gathered by the lakeside!!!!!!...In fact you would really think they had combined to drive us civilly away... (B3:144) (emphasis in original)

3.3.3 It is difficult to know what to make of such statements since there was obviously a good deal of cross-cultural misunderstanding going on. However, we need not doubt that the Maori who gathered at Te Ngae used the missionaries for all they were worth, so long as they did not in fact drive them away. Also, by claiming payment for dirt and stones, the local Ngati Rangiteaorere seem to have been asserting continuing rights over the land that the missionaries assumed that they had bought. At times Chapman was a little uneasy about his title to Te Ngae. Once he wrote to his fellow missionary A N Brown that:

should once the notion get fairly abroad, that land purchased was not ... purchased; each native would consider himself at liberty to settle the question of quantity It was but the other day I was informed that this purchase here was rite [finished]. I had had it long enough to pay for the taonga given for it! (B2:56-7)

Again there is some difficulty in knowing how to interpret these statements. The first sentence actually refers to the chief Te Rangihaeata disputing an alleged sale of land in the Hutt valley. But in the next two sentences Chapman seemed to be admitting that he was expected to pay another instalment of taonga or "rent" as the condition of his continued occupation of Te Ngae.

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4 - The Cms Title To Te Ngae

3.4. The CMS Title to Te Ngae

The establishment of a land claims commission

3.4.1 Captain Hobson's instructions from the Marquis of Normanby of 14 August 1839 required him to negotiate a cession of sovereignty with the Maori and to issue a proclamation on his arrival in New Zealand, stating that no titles to land would be recognised that were not "derived from, or confirmed by" a grant from the Crown. In the meantime, the boundaries of the colony of New South Wales were extended to include New Zealand. The governor and Legislative Council of New South Wales were instructed to appoint a commission to investigate all previous purchases of land from Maori and report on whether confirmatory grants should be issued by the Crown. Governor Gipps of New South Wales accordingly issued a proclamation prohibiting further land purchases in New Zealand on 14 January 1840, and Hobson issued a similar proclamation on 30 January on his arrival at Kororareka. He then proceeded to negotiate the Treaty of Waitangi from 5 February, and proclaim sovereignty over New Zealand on 21 May. On 4 August the New South Wales legislature passed an ordinance providing for the appointment of commissioners to investigate the pre-1840 land claims. New Zealand was separated from New South Wales at the end of 1840 and on 9 June 1841 Hobson enacted a land claims ordinance to replace that of New South Wales. Claimants were given 12 months to submit their claims. It was under this New Zealand ordinance that the CMS claim to Te Ngae was investigated.

On 25 June 1841 Hobson appointed two commissioners to investigate claims, Major Matthew Richmond and Colonel Edward Godfrey, and later in the year a third commissioner, William Spain. They were issued with instructions which, among other things, required them to give advance notice of intended hearings; hold court in such places as would provide "the greatest facility" for producing Maori witnesses; be guided by "the real justice and good conscience" of the case, rather than strict laws of evidence; record all evidence; and not hear a claim unless a protector of aborigines or his appointee was present to represent the rights of the Maori and protect their interests (B2:67-8).

The CMS submits its claims

3.4.2 Thomas Chapman, who was secretary of the Southern District Committee of the CMS, as well as resident missionary at Te Ngae, submitted a schedule of claims to the commission on 10 May 1842, less than a month before the expiry date for submitting claims. The schedule contained claims for 11 CMS purchases ranging from Manukau, through various stations in Waikato and the Bay of Plenty, and including Te Ngae.

This was listed as two claims to correspond with the two deeds, although they were eventually heard as a single claim.

The Te Ngae claim was heard by Commissioner Godfrey at Tauranga in July 1844. It was presented by John Morgan, rather than Chapman. Edward Shortland, sub-protector of aborigines at Tauranga, acted for the protector and also served as interpreter. Morgan presented copies of the two purchase deeds, described the boundaries and the goods paid over, and claimed that:

The possession of this land by the Mission has never been disputed since the purchase, either by Natives or Europeans. (B3:172)

He then presented a single witness for the vendors, known as Te Ao. He had signed the second deed, of 25 September 1839, being one of five who actually wrote his name but was not from Te Ngae. He was of the Ngatihauora hapu of Ngati Rangiwewehi and came from Ngongotaha (B2:76; and evidence of Hiko Hohepa, 17 July 1990). However he also had kinship connections with Ngaiterangi, which probably explains why he was the sole representative of the vendors to risk attending the hearing at Tauranga. The Tauranga tribes had recently been at war with those of Rotorua. In his evidence Te Ao stated that the places described in the second deed were sold to Chapman and Morgan some years ago by those whose names were affixed to the deed, and that the payment received had been correctly described. He also noted that young men had been employed by Chapman to dig a trench to mark the boundaries, but that they had not got it in quite the right place - perhaps a hint of a boundary dispute that appears in other documents. And he made a slight error in that he said "Te Hoie" was a place within the land described in the second deed, whereas it was within that described in the first deed (B2:76-7).

3.4.3 Since Godfrey had adopted the rule that at least two witnesses for the vendors must give testimony at a hearing, he was unwilling to make a recommendation on the Te Ngae claims at the Tauranga hearing. But he did give the CMS a ten week period in which to produce further witnesses at Auckland. When they failed to do so, he reported to the colonial secretary, on 30 September 1844, that he could not recommend a grant to the CMS for the Te Ngae land:

The Natives of Rotorua being inimical to those in Tauranga when this claim was advertised for Investigation, permission was granted to the Claimants to produce their witnesses at Auckland, at any point before the 30th of September 1844.

They having neglected to do so No Grant can be recommended. But, the Commissioner, in thus reporting, from the deficiency of proof, must add his conviction that considering the Evidence of Mr Morgan and Teao, purchases of Land have been made by Messrs Chapman and Morgan, for the Society, at Rotorua (B3:171)

Godfrey appears to have been a conscientious commissioner, scrupulously carrying out his duties as he saw them. He was right in refusing to recommend the grant and his final aside would have been harmless, had it remained where it was.

3.4.4 Its fate will be discussed below, but in the meantime it is necessary to make some brief comment on Godfrey's hearing of the claim. In the first place, his choice of Tauranga as the venue for the hearing was quite at odds with the rule that the hearing should be held at such a place as would provide "the greatest facility" for producing Maori witnesses. On Godfrey's own admission, Tauranga was unsuitable in view of the enmity between the peoples of Tauranga and Rotorua. Nor was the proposed alternative venue any more practicable since Auckland was a very considerable distance from Rotorua. Godfrey, in refusing to proceed from Tauranga to Te Arawa territory at Maketu, where witnesses were prepared to go (B2:82), to hear the Te Ngae claim, was clearly considering his own convenience more than that of the claimants and witnesses. Secondly, in his unguarded final comment, he was placing undue faith in the word of Te Ao who was a signatory of the second, not the more important first deed, and in the word of the missionary Morgan. This is not to say that Morgan was not telling the truth as he saw it, merely that Godfrey willingly accepted Morgan's belief that an outright sale had taken place. He did not investigate the possibility that the Maori who agreed to the deeds may have thought that they were conveying somewhat less, and expecting a continuing reciprocity from the mission as well as a continuing right of occupation. Godfrey, like Morgan, continued to think in terms of English conveyancing law, not Maori custom. Finally, there is the point made by Ms McHugh in the Crown's research report, that Godfrey and Richmond, having had to wrestle with numerous exorbitant claims by speculators, were inclined to give the CMS's far more modest claims "the benefit of the doubt unless...there was specific Maori testimony to the contrary." She goes on to present her analysis of the commissioners' reports on 24 CMS claims:

Of these, two were disallowed after negative Maori testimony. Twenty two were recommended; ten on the evidence of two or more Maori witnesses, nine on the evidence of only one Maori witness, and three without any evidence from Maori at all. In these last three cases, the testimony of the missionaries alone (the alleged purchasers) was sufficient. (B2:80-1)

According to this analysis, Godfrey was in fact tougher on the CMS in relation to Te Ngae than he, or Richmond, was for most of the other CMS claims.

Crown moves to issue a grant to the CMS

3.4.5 Unfortunately the Crown decided to ignore Godfrey's recommendation that no grant be made, but to accept his aside that he believed a purchase had taken place. The first move in this direction came when governor Robert FitzRoy received the file, a fortnight after Godfrey had made his recommendation on Te Ngae. He minuted for his registrar of deeds:

Mr Fitzgerald

Prepare a Deed of Grant in respect of the within mentioned land at Rotorua (B3:170)

Though that instruction was not implemented, possibly because other CMS grants were yet to be attended to, at least the die had been cast and it was presumed that the CMS was entitled to a grant for Te Ngae.

3.4.6 Nevertheless the matter lay fallow for some years, until the CMS parent body in London took the initiative in 1846 by setting out the terms under which it wanted trust

deeds to be drawn up for mission lands. Then the local committees of the CMS in New Zealand took up the matter. George Clarke wrote to the colonial secretary in October 1847, asking when the grants for the CMS land claims would be ready (B2:94-95). But grants could not be issued until the land claimed was surveyed, a process that took several years. The governor, Sir George Grey, stayed with Chapman at Te Ngae over Christmas in 1849, when they talked of erecting a mill and a hospital, and, no doubt, the CMS title to Te Ngae. In the New Year Grey reciprocated the hospitality: Chapman visited Auckland and stayed with Grey who:

promised that when the Surveyor General visited Rotorua, relative to the proposed Hospital ... that then enquiry should be made and the Land surveyed by him, and this done he (Sir George) would order the proper Deeds to be made out. The matter of the Hospital still remains unsettled and so, necessarily, the Land also. (B3:236).

Another, more picturesque, version has Grey making the promise of a deed to Chapman during a ride around Auckland's military pensioner settlements (B3:178).

But it was still necessary to have the land surveyed. A survey of a kind was carried out by T H Smith who had been a tenant briefly at Te Ngae in 1850 and was appointed resident magistrate for Rotorua at the end of 1851. Smith appears to have done the survey early in 1852, although it was not until May 1853 that Chapman forwarded the survey plan to Grey, reminding him of:

the kind promise Your Excellency made me ... that you would grant a deed to the Church Miss. Society, for the Rotorua (Ngae) Estate, as soon as surveyed. (B3:178).

In appealing directly to Grey, Chapman seems to have been seeking a Crown grant under the governor's prerogative power, since the attempt to obtain the grant under the Land Claims Ordinance had failed when Godfrey refused to recommend one. Chapman now claimed the grant on the ground of undisturbed possession:

as I have held quiet and resident possession, from, previously to the arrival of the late Governor Hobson, I beg to be permitted to use the remark you made to me on this hea[d?] - that you could but consider that this overrode any objection which might be made on the grounds of any informality. (B3:178)

In fact Chapman had not been in "resident possession" since prior to Hobson's arrival. He did not occupy Te Ngae until mid 1840, he was frequently absent from it after that date, and he gave up his residence altogether about the end of 1850, not being replaced by any other missionary.

Grey was a little hesitant in accepting Godfrey's aside that the land had been purchased. On receiving Chapman's letter, he minuted to his colonial secretary:

Dr Sinclair

If the native title has been extinguished this grant can be made to the Church Missionary Society in the usual form. (B3:179)

But there appears to have been no further inquiry into whether the Maori title had in fact been extinguished. The request was now forwarded to the surveyor general who

decided that Smith's survey was not sufficiently detailed. Smith provided the additional details which Chapman sent to the colonial secretary on 10 September 1853. But, although Grey asked for the grant to be sent to him for signature without delay, it was not in fact ready before he left New Zealand at the end of his governorship on the last day of the year. Indeed nothing was done about it until well into 1854. In May the acting governor, Robert Wynyard, asked for the grant to be prepared as Grey had directed, but it was not presented to him for signature until 23 August. Two days later an exasperated Thomas Chapman arrived in Auckland:

Having ... determined to visit Auckland (if God permitted) and plead my own course personally - lest in the meantime another Governor should arrive and new obstacles be presented. (B3:237a)

He need not have worried since Wynyard finally signed the Crown grant on 21 September 1854.

Waitangi Tribunal, Department of Justice, Wellington.

Rangiteaorere Land Claim

3 - Ngati Rangiteaorere And The Te Ngae Mission Farm

5 - The Validity Of The Crown Grant

3.5. The Validity of the Crown Grant

3.5.1 With the amendment of the Treaty of Waitangi Act in 1985 the tribunal was given jurisdiction to examine claims relating to breaches of the principles of the Treaty since the initial signing at Waitangi on 6 February 1840. The CMS deeds to Te Ngae were of course negotiated before that date but, since they were converted into a Crown grant subsequent to it, we need to examine the process whereby the grant was issued. Although this tribunal is not a court it can comment on legal issues. We can make a finding on whether the Crown's actions in relation to the grant were in accord with the principles of the Treaty.

The claimants have argued that the land was "gifted" to the CMS for a mission; that when the land was no longer required for this purpose, it should have been returned to Ngati Rangiteaorere; and that the Crown in issuing a grant to the CMS after the abandonment of the station was acting contrary to the principles of the Treaty of Waitangi (A2:1-2).

3.5.2 We understand from the evidence and submissions before us that, in the immediate post Treaty years, there were three possible authorities whereby a Crown grant could be made in claims like Te Ngae pursuant to:

- (a) the Land Claims Ordinance 1841
- (b) the Australian Waste Lands Act 1842; and
- (c) the exercise of the Crown prerogative.

A further authority was enunciated by Mr Justice Prendergast in the *Wi Parata v The Bishop of Wellington* case of 1877 namely, an act of state. We shall comment on this below, but note here that the Crown did not plead this authority in support of its case.

Since the legal authority for the Crown grant was not spelled out on the grant itself or in any of the documents presented with the research reports, the tribunal asked counsel representing the claimants and the Crown to address themselves to this issue. The questions are summarised as follows:

- (a) if the grant was issued under the Land Claims Ordinance, 1841, was it valid in the light of *Queen v Clarke* (1849-1851) NZ PCC 516?

(b) alternatively, if the grant was issued under the Australian Waste Lands Act, 1842, (as had been suggested in Ms McHugh's research report) did the land qualify as waste lands under that Act?

(c) or if, as a third possibility the land had been granted under the governor's prerogative, did this allow him to grant the land without the consent of the Maori owners?; and

(d) finally, was this an absolute grant, and, if not, who held the reversion?

We now summarise the counsels' replies, referring first in each instance to those of the Crown counsel, followed by those of the claimants' counsel, and finally our own comments.

3.5.3 Before commenting on the above queries, Crown counsel made some observations on the nature of the 1839 transaction. He admitted on behalf of the Crown that the Maori vendors "may have had a different expectation" from the CMS view that this was an outright sale, "for ever"; that the vendors "may have regarded themselves as continuing to have rights in the land..."; and that the CMS had "an obligation to surrender its title when the purpose for which the land was acquired was definitely at an end" (C3:8-11). This was accepted by the claimants' counsel (C4:2) and is in line with our own views on the nature of the transaction, as expressed above. But this concession from the Crown has important consequences for our interpretation of the validity of the Crown grant, since it suggests that the Maori customary title to Te Ngae had not been fully extinguished and that the land was not therefore waste land of the Crown at the time it was granted to the CMS in 1854.

Nevertheless the Crown's counsel went on to argue that, under the common law doctrine of pre-emption (reiterated in article 2 of the Treaty), whatever rights the Maori vendors had surrendered passed not to the CMS but to the Crown which was the only source of title under English law. This was supported by quotations from the leading New Zealand case, *The Queen v Symonds* (1847) NZPCC, though Crown counsel admitted that Chapman J in this had been "thinking in terms of an outright purchase which extinguished all aboriginal rights" (C3:13) Mr Blanchard was sure, however, that the "doctrine would also have to apply to any acquisition of a substantial permanent or semi permanent interest" (C3:13). We are not so sure. Counsel for the claimants argued that the doctrine of pre-emption could not apply until the Crown had obtained sovereignty; and, in any case, any settlement of the CMS claim would need to follow the terms of the legislation passed in 1841 to determine pre-1840 land claims, the Land Claims Ordinance.

3.5.4 We now consider counsels' submissions on the possible sources for the Crown grant. First, there was the question that, if the grant was issued under the Land Claims Ordinance 1841, was it valid in light of *Queen v Clarke*? Here the Crown conceded that the Privy Council decision in *Queen v Clarke* applied since the grant to Te Ngae was made without Commissioner Godfrey's recommendation and would therefore "fall to the ground", as Clarke's grant did.

3.5.5 Secondly, there was the possibility that the grant had been issued under the Australian Waste Lands Act, which initially applied to New Zealand. However it was

admitted by the Crown that this application was removed by the 1846 New Zealand Charter and accompanying instructions.

3.5.6 The final source of authority, the Royal prerogative, was argued forcefully by the Crown, but contested by counsel for the claimants. However we note that, if the prerogative was used, Te Ngae would have been a gratuitous grant which could only have been issued in accordance with the letters patent and instructions to the governor of 1846 and 1848. The Crown admitted that a grant such as that for Te Ngae was prohibited under section 14 of the 1846 instructions but this section was revoked by the additional instructions of 1848 which allowed such grants if a principal secretary of state so directed. We were informed by the Crown that such a direction was issued by Earl Grey in a dispatch of 14 April 1848, accompanying the additional instructions. The Crown argued that this direction was applicable to the Te Ngae grant. However, we do not accept that the "directive" went as far as was contended by the Crown. In our view Earl Grey's despatch empowered Governor Grey to grant one portion of Crown land in exchange for other land previously granted - in this case to Messrs Whitaker & Heale at Kawau Island. Governor Grey was authorised to issue a 'fresh' grant to them. The despatch went on to authorise the governor to act in similar manner in any cases that might arise in the future. The Crown argued that Te Ngae was such a case. But, as the matter at Kawau was the issue of a fresh grant of Crown land in lieu of a prior grant, we cannot read the directive to include a gratuitous grant (at Te Ngae) in satisfaction of any equitable claim to land.

Moreover the governor's authority to satisfy any claim was qualified by the 1846 Instruction and reiterated by further instructions of 13 September 1852 which laid down that he must consult his Executive Council before exercising such authority. Counsel for the Crown admitted that there was no record in the Executive Council minutes of any consultation over the Te Ngae grant, adding that, for this reason, "the validity of the Crown grant remains uncertain but it is my submission that the grant should be treated for the purposes of the present enquiry as being valid in formal terms" (C3:22-3). Counsel for the claimants argued that, in view of the failure of the Executive Council to endorse the grant and confirm that endorsement in its minutes, there was no evidence that the Royal prerogative had been used. We appreciate the Crown's candour in bringing this defect to light but conclude that the grant to Te Ngae, if issued under the Royal prerogative at all, must be regarded as defective in view of the lack of evidence, first of a direction from a principal secretary of state, and secondly of an Executive Council endorsement. We think it is unlikely that the grant was ever referred to the council. Indeed, like counsel for the claimants, we can find "no clear evidence under what authority the governor did exercise such a power [to issue title]" (C4:8).

3.5.7 There is a further objection to the Crown grant which has not been fully discussed by counsel, although it was implied in some of Mr Blanchard's earlier reasoning: that the Maori title to Te Ngae had not been fully extinguished, and therefore the land was not unencumbered waste land of the Crown. We are of the opinion that a Maori customary right of occupation - to occupy the land alongside the CMS - still existed when the Crown grant was issued, and should have been acknowledged in that grant. There should also have been provision for the land to revert to the Maori occupants in the event of the CMS not continuing its mission. Indeed, since missionaries had been absent from the site for nearly four years when

the grant was issued, the Crown should have insisted on re-occupation as a condition of issuing the grant in the first place.

We are of the view that the issue of the Crown grant was the culmination of a series of blunders commenced by Governor FitzRoy who, despite Commissioner Godfrey's decision not to make a formal recommendation, directed the registrar of deeds to prepare a Crown grant for Te Ngae. Governor Grey allowed the mistake to be perpetuated when he minuted to his colonial secretary that, if the native title was extinguished, a grant should be issued. Acting Governor Wynyard made the final error when he accepted that both FitzRoy and Grey had approved the grant and executed it.

We note that nowhere in any of the proceedings was there any suggestion that the prerogative was being exercised. However, we believe it is significant that when Robert Vidal, on behalf of the CMS appealed for the issue of a grant for a CMS claim at Opotiki (also previously declined by Godfrey), Dr Sinclair, after consulting Attorney General Swainson, stated that, because Commissioner Godfrey had not recommended a grant, "His Excellency [Lieut Governor Wynyard] is not aware of any authority by which he could make a valid Grant of the same" (B2:119). Nevertheless Wynyard assumed he had the authority to issue a grant for Te Ngae in similar circumstances in August 1854, since FitzRoy and Grey in turn had recommended it. But neither Sinclair, nor Swainson, nor Wynyard appears to have said that they were proceeding by way of the prerogative, and then, must have been aware that the Te Ngae grant had not been referred to the Executive Council for approval. The view expressed by Sinclair above was reiterated in 1855 by acting Attorney-General Whitaker when Vidal, dissatisfied with the terms of the trust written into the Crown grant for Te Ngae, asked for a new grant to be issued. Whitaker said that, "the Crown Grant already issued appears to have been made without the sanction of and rather in opposition to a Commissioner's recommendation and is therefore invalid..." (B2:137). It seems evident from these remarks by Sinclair and Whitaker that there was no legal basis for the Crown grant, either under the prerogative (since the proper procedures, by way of direction from the secretary of state and approval by the Executive Council, were not followed), or under the Land Claims Ordinance (since it was made in defiance of the recommendation of the commissioner). The grant therefore necessarily falls. Although the Crown was made aware soon after the grant had been made that it was defective it failed to rectify the situation.

We have before us a situation where senior government officers - the colonial secretary and the Attorney-General - were aware that the grant was defective. The claimants argue that these matters were placed before Native Minister John Ballance in 1885 (see below, 3.8.4), that he should then have acted to correct the alleged wrong, and that his failure to do so was a breach of Treaty principles. We do not disagree with the thrust of that argument, but suggest that the breach was much earlier in time, that is, when the Crown grant was issued in 1854.

3.5.8 Authority for the making of the grant as an act of state was earlier referred to in *Wi Parata v The Bishop of Wellington*. In that case Ngati Toa of Porirua had gifted land in 1848 to the Bishop of Wellington for a college to educate their children. A Crown grant for the land was issued to the Lord Bishop of New Zealand in 1850. The college was never established. In the 1870s Wi Parata of Ngati Toa took a case for the

restoration of the land that resulted in a Supreme Court decision against him written by Chief Justice Prendergast in 1877. The decision, once Prendergast had put aside procedural problems faced by Wi Parata, appeared to rest on two primary points of law. The first assumed that Maori had no settled form of law prior to 1840. This meant that the supreme government executive must acquaint itself as best it may of its obligations to respect Maori proprietary rights and must be the sole arbiter of its own justice. Moreover whatever it did could not be examined by the courts except on the Crown's initiative. The second point of law appeared to rest on the view that, as Prendergast put it:

the Maori tribes are, *ex necessitate rei*, exactly on the footing of foreigners secured by Treaty stipulations, to which the entire British nation is pledged in the person of its sovereign representative. Transactions with the natives for the cession of their title to the Crown are thus to be regarded as acts of State, and therefore are not examinable by any Court.

While the tribunal cannot overrule the Wi Parata decision, we can comment on whether it is applicable to the Crown grant before us. The two acquisitions are distinguishable in the sense that Te Ngae was originally acquired in 1839 whereas the Porirua land was obtained after the Treaty, in 1848. So far as the Porirua grant was concerned, it could not have been made pursuant of the Land Claims Ordinance or the Australian Waste Lands Act. We therefore presume that it was made in exercise of the Crown's prerogative, as Prendergast implied in his statement that, "the issue of a Crown grant undoubtedly implies a declaration by the Crown that the native title over which it comprises has been extinguished". If the Crown's prerogative was used after a direction from a principal secretary of state and after consultation with the Executive Council, then the decision would appear to be unimpeachable. We have found that these procedures were not used in the Te Ngae grant.

We refer now to Chief Judge Prendergast's second reason for deciding against Wi Parata: the act of state. The authorities appear to be unanimous in their view that two prerequisites are needed for the exercise of an act of state:

- the exercise was in non-British territory; and
- the person against whom it was exercised must be an alien or foreigner.

The authorities for these two propositions are *Walker v Baird* (1892) AC 496 (PC), *Johnstone v Pedlar* (1921) 2 AC 262; and *Attorney-General v Nissan* (1970) AC 179 (HL). It is relevant to record that an alien who was a citizen of a country friendly to Britain (ie not at war) would succeed against the act of state defence raised by the Crown if the act complained of was carried out in Britain or its dominions and the alien there was a resident. As Viscount Cave put it in *Johnston v Pedlar*, "so long as he [an alien] remains in [this] Country with the permission of the Sovereign, express or implied, he is a subject by local allegiance with a subject's rights and obligations". Lord Phillimore in the same case said that, "between Her Majesty and one of her subjects there can be no such thing as an act of State".

In so far as the territorial argument is concerned, we accept the view expressed by Richardson J in the *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 671 that:

It now seems widely accepted as a matter of colonial law and international law that those proclamations approved by the Crown and the gazetting of the acquisition of New Zealand by the Crown in the London Gazette on 2 October 1840 established Crown Sovereignty over New Zealand.

The proclamations referred to were the two issued by Hobson at Port Nicholson on 21 May 1840 declaring Crown sovereignty over New Zealand. There is no doubt that Te Ngae was within British territory when Commissioner Godfrey made his investigation and when the Crown grant was issued to the church.

As far as British citizenship is concerned, Ngati Rangiteaorere were at those dates, as article 3 of the Treaty assured them, under the Her Majesty's protection and entitled to the rights and privileges of British subjects. This was no more than a declaration of the colonial law that, on annexation as a British colony, the indigenous people became British subjects. They were not, as Chief Judge Prendergast put it, "ex necessitate rei, exactly on the footing of foreigners", but rather were entitled to the protection of the Crown. We conclude that the Crown could not exercise an act of state against Ngati Rangiteaorere, either under the law or the Treaty; indeed, under the Treaty, it was bound by its fiduciary duty to protect them and this it failed to do in issuing, and later failing to cancel, the Crown grant for Te Ngae.

We note that the Crown has conceded that the grant of 21 September 1854 gave to the CMS more than Ngati Rangiteaorere "sold" to the CMS. We accept this as a possible breach of the principles of the Treaty but, in view of our finding in respect to the validity of the grant, we believe the issue is wider than that accepted by the Crown.

Crown responsibility for the issuing of the grant

3.5.9 We must now consider the related matter of the Crown's malfeasance in granting to the CMS in 1854 more than Ngati Rangiteaorere had given in 1839. In his oral submissions Mr Blanchard for the Crown admitted that the grant was not all it should have been. In that respect ... it was too wide in terms of who could benefit under it", and he thought the Crown had "to take some of the responsibility for not making it clear that the grant was to be divestible if the church ceased to make personal use of the property". He conceded that the Crown grant should have included a right of reversion to Ngati Rangiteaorere (transcript 2). We note that this concession, properly made by the Crown, could also apply to other Crown grants to the church, including that at Porirua which was the subject of the *Wi Parata v Bishop of Wellington* case, where the grant awarded more than the Maori involved had agreed to relinquish. However if the Crown grant for Te Ngae had been litigated last century, because of the then judicial climate in New Zealand, it probably would have been treated in the same way as Prendergast treated *Wi Parata's* claim over the Porirua Crown grant.

Rangiteaorere Land Claim

3 - Ngati Rangiteaorere And The Te Ngae Mission Farm

6 - Treaty Principles And The Crown Grant

3.6. Treaty Principles and the Crown Grant

3.6.1 This tribunal is not restricted to issues of legality and under our statute we are obliged to take a more expansive view of the Treaty of Waitangi than Mr Justice Prendergast. We have to measure whether a particular proceeding of the Crown, in relation to any claim before us, is in conformity with the principles of the Treaty. In looking at the principles we need to take into account the provisions, as spelled out in the two texts of the Treaty, English and Maori. The Treaty made no reference to pre-Treaty purchases - these were dealt with by Gipps' and Hobson's proclamations of 14 and 30 January 1840, and the resulting Land Claims Ordinances. We consider that this legislation was an attempt to give proper effect to the principles of the Treaty in the sense that it endeavoured to ensure, through enquiries by a commissioner, that the land claimed had been willingly sold by the rightful Maori vendors. The rules issued under the Ordinance further elaborated this protective function. The Treaty, in the English text, stressed the anxiety of the Queen to protect the "just Rights and Property" of the chiefs and tribes (in the preamble) and "the full exclusive and undisturbed possession of the Lands ... so long as it is their wish and desire to retain the same in their possession" (in article 2). The Maori text, with its stress on te tino rangatiratanga o o ratou wenua, was less detailed but in a sense more comprehensive since the full or unqualified exercise of their chieftainship over their lands implied a complete control according to Maori customs (Kawharu 1989:319).

The Waitangi Tribunal's Manukau Report (1985) p 95 says that the Treaty not only obliges the Crown to recognise Maori interests specified in it, but also actively to protect them. This tribunal is heartened by the acceptance of this active protection principle by Sir Robin Cooke P when he confirmed that "the duty of the Crown is not merely passive but extends to active protection of Maori in the use of their lands and water to the fullest extent practicable". This approach was also supported by Casey J. In essence we have the highest court in the land requiring active protection by the Crown of Maori land, yet, before us, a situation where it was clear to the Crown that the grant to Te Ngae should not have been but was issued.

We believe that the Crown's obligation under the Treaty to protect the Maori and their lands involved also an obligation properly to consult them before disposing of their lands to the Crown or, by way of Crown grant, to any other party. They were not to be deprived of their lands without due legal process, or by unilateral action. Article 2 of the Treaty gave the Crown an exclusive right of pre-emption to acquire such land as the proprietors "may be disposed to alienate at such prices as may be agreed upon". Moreover it was not just a matter of willingness to sell, since the Treaty, especially in the Maori text, assured them of their "tino rangatiratanga o o ratou wenua" - not

merely ownership but control over their lands, to be exercised by their rangatira. This surely meant that chiefs, acting as trustees for their iwi, had a right to be consulted over and indeed to control the disposal of their lands. That was the rangatiratanga they had retained while transferring kawanatanga, or governance, to the Queen; and that rangatiratanga, in Maori eyes, was somewhat more than the kawanatanga given to the Queen. In the view of the Crown the exercise of kawanatanga, or sovereignty in the English text, clearly included the right to legislate; but in our view this should not have been exercised in matters relating to Maori and their lands and other resources, without consultation. Likewise, in the implementation of such laws, Maori should have been involved in the decision making process, possibly as assessors or commissioners (as they were to be involved in later years, for instance as assessors in the Native Land Court). Above all, the Crown had an obligation to ensure that they willingly participated in the alienation of their lands, either to the Crown or to third parties.

Findings as to breach of Treaty Principles

3.6.2 In the light of this, the tribunal must assess whether the Crown, by way of Godfrey's inquiry into the Te Ngae claim, and in subsequently issuing a Crown grant for Te Ngae, properly ensured that the land had been willingly sold by the rightful owners. We agree with Godfrey's conclusions that insufficient witnesses had been produced at Tauranga to justify the issue of a grant but, by the same token, his opinion that the "native title" had been extinguished was not proved. The word of Te Ao, at best a tenuous claimant to the Takuere copse named in the second deed, and of Morgan, who as one of those who drew up and negotiated the deed had a vested interest in it, were insufficient guarantee that there had been a full and final purchase. The failure or refusal of some of the principal Ngati Rangiteaorere kaumatua to sign or mark the deeds was overlooked. There was no inquiry into whether the transaction might have been regarded by the signatories as something less than an outright sale. We find that the issue of a Crown grant by Wynyard, without any further investigation of the nature of the original transaction and the Maori view of it and purely on the repeated urgings of Chapman, was in breach of the principles of the Treaty whereby the Crown was obliged to consult and protect. The grant was issued in spite of the fact that Ngati Rangiteaorere continued to occupy the land and exercise various rights of ownership - indeed they had a better claim to "quiet and resident possession" than Chapman himself. The Crown did not protect Ngati Rangiteaorere's "just Rights and Property" at Te Ngae. Having improperly issued a grant, the Crown failed to recall it when it became aware of the deficiency. This was a further breach of the Crown's obligation to protect Ngati Rangiteaorere's rangatiratanga over their lands. Lastly, we find that, since the Treaty of Waitangi Act 1975 binds the Crown, it must take responsibility for the wrongful issue of the Crown grant to the CMS and a corresponding responsibility today to put it right with the claimants, as we shall recommend below.

Rangiteaorere Land Claim

3 - Ngati Rangiteaorere And The Te Ngae Mission Farm

7 - The Cms Trust At Te Ngae

3.7. The CMS Trust at Te Ngae

The Crown grant (see appendix 3) issued for Te Ngae differed from most others issued to the CMS for its pre-1840 land claims, though it was similar to grants issued to the society for educational purposes at Porirua and Otawhao. It comprised 318 acres 2 roods and 10 perches (not the 600 acres originally claimed). The grant said that the land described had "for some time been used as a Mission Station" by the CMS and that it was "expedient" that it should be permanently set aside for this purpose. It went on to describe the boundaries and to specify the form of trust it was to be held under:

as a Mission Station or as a Site for a place for Public Worship or for School purposes connected with the religious and moral Instruction or in other like manner for the use and benefit of our subjects inhabiting the Islands of New Zealand or of other persons being the children of the Poor or destitute Inhabiting any Islands in the Pacific Ocean. (A2:71)

These terms would have surprised the original signatories, had they been consulted. They had willingly made the land available for a mission station and for the instruction of their own kin, but hardly for other inhabitants of New Zealand, let alone the Pacific Islands.

3.7.1 The form of the trust also shows that the Crown was using for its own broader educational purposes land originally sold or gifted by Maori for more specific purposes and benefits of their iwi. Governor Grey and Bishop Selwyn had embarked on a broad educational strategy of using mission stations as a spearhead for promoting Maori education generally and indeed that of Pacific Islanders. Selwyn had established a Melanesian Mission and was bringing Melanesian youths back to New Zealand for schooling. Not that any attempt was ever made to send them to Te Ngae, since the CMS had abandoned it as a mission and educational station before the grant was issued.

3.7.2 In any case, the CMS was somewhat embarrassed by the form of trust written into the grant for Te Ngae. On 15 March 1855 Robert Vidal wrote to the colonial secretary on behalf of the society, complaining that the grant for Te Ngae had not simply conveyed the land in an unspecified trust, like the grants for other pre-1840 mission purchases, and asking for a new title to be issued in this form (B3:186). That request led to a new round of discussions on the CMS title to Te Ngae. It was referred to the acting Attorney General, Frederick Whitaker, for an opinion. He replied on 2 August stating that:

The Governor has no authority to issue a grant under the Land Claims Ordinance, in opposition to the recommendation of the Commissioner. (B3:188)

However, he added that Godfrey had not reported that no purchase had been effected, merely that the claimants had not produced their witnesses, and concluded:

It is open therefore to the parties yet to substantiate their claims before a Commissioner, and if a grant were recommended it might be made. (B3:188)

The colonial secretary was prepared to follow this advice and proposed that the CMS surrender its grant and proceed as Whitaker had advised. Wynyard asked for the matter to be referred again to Whitaker. He replied on 4 September:

The Crown Grant already issued appears to have been made without the sanction of and rather in opposition to a commissioner's recommendation and is therefore invalid there does not appear to be any doubt that the Native Title has been extinguished and the best course to pursue would be to treat the claim as undisposed of, refer it to a commissioner under the land claims ords, and make a new grant in conformity with his recommendation. (133:189)

3.7.3 But no further action was taken on the CMS grant for Te Ngae. Whitaker's opinion that it was invalid has never been tested.

Interestingly, the CMS made no attempt to follow Whitaker's advice and apply for a new grant when the Native Land Claims Settlement Act was passed in 1856 to allow a new examination of unsettled pre-1840 land claims. The CMS put forward four claims for re-examination, but not Te Ngae. The two old claims to Te Ngae were re-numbered but not re-examined by the new commissioner, F D Bell. He merely remarked on a memorandum on CMS claims in March 1857 that "Governor FitzRoy ordered Grant for 318.2.10", and in a schedule on the claims of 29 October 1859 that Te Ngae was a "special grant for general purposes" (B2:139).

3.7.4 It seems that, in the end, the CMS preferred to retain its somewhat inconvenient trust rather than have the claim to Te Ngae, now no longer occupied by the mission, re-opened with the possibility of a re-examination of its original "purchases". However the Crown had a responsibility to refer the Te Ngae grant to Commissioner Bell under section 16 of the Act. Its failure to do so amounts to a breach of the Treaty principle of protection.

Finally, so far as this tribunal is concerned, it is necessary to comment on the Crown's role in spelling out the nature of the trust. By so expanding the nature of the trust to include the poor and destitute of New Zealand and the Pacific Islands, it was going far beyond what the original signatories could have believed they were conveying to the CMS in the original deeds of 1839. And it was doing so, moreover, without any attempt to consult Ngati Rangiteaorere and the other Rotorua iwi.

Rangiteaorere Land Claim

3 - Ngati Rangiteaorere And The Te Ngae Mission Farm

8 - The Church's Administration Of Te Ngae

3.8. The Church's Administration of Te Ngae

3.8.1 Once the Crown grant had been issued the Crown had a continuing responsibility to ensure that the trust was fulfilled. For this reason it is useful to provide a brief resume of events at Te Ngae after the issue of the Crown grant. This also throws some retrospective light on Ngati Rangiteaorere attitudes towards the original CMS transactions.

Te Ngae after the missionaries: the land returns to Ngati Rangiteaorere

3.8.2 After Chapman had withdrawn from Te Ngae, there was some falling off in Maori support for Christianity, though Maori teachers he had trained carried on with the work of the mission. This falling off was exacerbated by the New Zealand wars and particularly the unsettlement caused by the campaigns in the Rotorua district of the guerilla leader Te Kooti Rikirangi. Most of Te Arawa remained loyal to the Crown and many took part in the campaigns against Te Kooti. Spencer, the last remaining CMS missionary in the district, left Te Wairoa at this time. The CMS did not resume mission work in the district after the wars, though to some extent the Anglican church filled the gap, occasionally ordaining Maori clergy, including Ihaia te Ahu, one of Chapman's converts at Te Ngae, in 1855, and Frederick Bennett in 1896, later to become the first Bishop of Aotearoa (A2:31). Te Ngae became a parish - which covered a very much larger area than the CMS Te Ngae block - as part of the Waiapu Diocese. In 1891 the assets of the CMS were transferred to the Church Mission Trust Board which had been formed to take over the work of the CMS.

Te Ngae itself remained unoccupied after Chapman's departure and Smith's brief tenancy. Ferdinand Hochstetter passed by in 1859 and found the mission station "deserted and in decay" (A2:32). In 1871 Ollivier C Morton reported that "little or nothing could be traced of the buildings" (A2:32). Nevertheless newspaper reports at this time indicate that the land at Te Ngae was being cultivated by Maori, and that the old flour mill was being used.

Renewed European occupation of Te Ngae

3.8.3 In 1876 the CMS leased Te Ngae to two Pakeha, Robert and Francis Scott, on a 30 year term. But they were soon in dispute with local Maori. On 21 June 1876 the Bay of Plenty Times reported that:

Messrs Scott Brothers have again been interfered with by natives in their farming operations at the Ngae - ditching and fencing being destroyed, tools thrown away, and boundaries disputed, although the land is held under a Crown grant. This is not the

first time that those enterprising settlers have been interfered with by natives...
(B3:496)

The Scotts' farming operations were the first sign for more than 25 years that the CMS, through its lessees, was resuming its claim to Te Ngae. Although there could have been a quarrel over boundaries in this dispute, it appears that Ngati Rangiteaorere were also disputing the CMS title. They were probably unaware at this stage that a Crown grant had been issued to the society more than 20 years previously. In any case, since Chapman had left and not been replaced, Ngati Rangiteaorere must have assumed that the land had reverted to them. They had had over 25 years of "peaceful and undisturbed" occupation, a longer period than Chapman had had when he claimed title. Moreover their passive resistance to the Scotts' occupation continued unabated (B2:148-53). In 1878 the Scotts, tiring of opposition, sold their lease.

3.8.4 Nevertheless Ngati Rangiteaorere opposition continued intermittently through the 1880s. In 1885 they took their complaint to the Native Minister John Ballance when he visited Rotorua. Their rangatira, Ratema Awekotuku, stated:

We ask that a piece of land at Te Ngae, three hundred and sixty acres, given to the missionaries, may be reheard. The reason we make this request is that the people living here are not aware of how the missionaries become possessed of that land. Our idea is that the land was given as a mark of affection to the missionaries for mission purposes, but, seeing that it is no longer put to that use, we think that the land should come back to us. Another reason why we wish the matter to be inquired into is that we may know how the missionaries become possessed of that land. We do not understand at all how it was that the land passed from us. (B3:471)

That of course suggests that Ngati Rangiteaorere did not know anything about the proceedings which had led to the CMS getting its Crown grant. But Ballance hastened to tell them that the land was held by the CMS on a Crown grant, adding:

Now, you know that a Crown grant cannot be disturbed. Their title is complete, and cannot be disturbed now. My advice to you, therefore, is to let the missionaries remain undisturbed in the land. (B3:473)

All of which must have sounded strange to Ngati Rangiteaorere since the missionaries had not been there for 35 years. This was a second opportunity for the Crown to rectify the defective grant by proceeding to the Supreme Court for a writ of scire facias.

However a succession of Pakeha lessees remained firmly entrenched on Te Ngae. The most recent lessee, Ronald Bishop, took up his lease on 1 August 1965. It has been renewed several times and expired on 1 September 1990. There appears to be no clear record of how the rentals were dispersed in the early years of the lease, though in recent years they have been used for general diocesan purposes within Te Ngae parish. Since some Ngati Rangiteaorere lived in the parish they would have received some benefits from this expenditure, but they were far from being the only beneficiaries.

The church as trustee

3.8.5 Finally, we think it is necessary to comment briefly on whether or not the church has fulfilled the original purposes of the trusts recited in the Crown grant. The Crown, in view of its fiduciary responsibilities under the Treaty of Waitangi, had a responsibility to ensure that the trusts it had granted were honoured. In support of this we note the report of the 1905 Royal commission into the Porirua, Otaki, Waikato (Otawhao) Kaikokirikiri and Motueka schools trusts, chaired by none other than Mr Justice Prendergast. This looked into the administration of these trusts, including "Whether the original trusts have been carried out, and if not, why". For some reason this commission was not asked to look at Te Ngae, which is surprising since it did examine Otawhao which had an almost identical trust deed. The commission found that in most instances the letter of the trust deeds had not been observed - with the lands no longer being used for schooling but, like Te Ngae, leased out and the proceeds devoted to general diocesan purposes. However it did not recommend that any of the deeds be terminated, let alone that the land be returned to the original Maori donors. It was as if Prendergast had applied the doctrine of cy pres, which he would have used in the Wi Parata case if he had not already dismissed the suit on the principle of act of state.

Since we do not accept the validity of the act of state doctrine, we need to consider whether cy pres applies to the Te Ngae case. Was the church's leasing of the land to Pakeha and expenditure of the proceeds for diocesan purposes sufficiently in accordance with the terms of the trust, as the principle of cy pres requires?

If we regard the original Maori signatories to the CMS deeds as the settlers, then clearly the church was not fulfilling their original purpose, which was the establishment of a mission and the development of a farm for their purposes.

But of course Ngati Rangiteaorere were in no way informed of or involved in the terms of the Crown grant of 1854, under which the Crown was technically the settlor. We find that the Crown did nothing to ensure that the church was fulfilling the terms of the grant - not even bringing it within the compass of the Prendergast commission of 1905. We note that Crown counsel, in the course of our hearing, admitted that the leasing of the land may not have been in accord with the terms of the trust (oral submission, 27 August 1990). We do not think that the doctrine of cy pres could be stretched far enough to cover the Crown's deficiency in failing to ensure the proper application of the trust.

Nevertheless, the church is prepared to hand back to Ngati Rangiteaorere what is now a fully developed farm property, without compensation for improvements, plus an additional adjoining area of 59.5 acres which the Mission Trust Board purchased from the Crown in 1918. These matters must be born in mind as we discuss the claimants' case for compensation.

Waitangi Tribunal, Department of Justice, Wellington.

Rangiteaorere Land Claim

3 - Ngati Rangiteaorere And The Te Ngae Mission Farm

9 - Compensation

3.9. Compensation

In his final submissions counsel for the claimants requested the tribunal, if it found breaches of the principles of the Treaty, to recommend that these be put right by the Crown by accepting responsibility for the costs of passing any necessary private act of parliament, as well as recompensing Ngati Rangiteaorere for the loss of use and mana of the land at Te Ngae. The tribunal has found that there were breaches of the principles of the Treaty and we agree that the costs of returning the land to Ngati Rangiteaorere, whether by legislation or otherwise, should be borne by the Crown. We note that the church, without any request from the tribunal, has agreed to transfer, without charge, 59.5 acres of adjacent land, as well as the original Te Ngae farm, described in the deed as comprising 318 acres 2 roods and 10 perches. We commend the church for adopting such a reasonable and generous approach. However the claimants have argued that such generosity does not absolve the Crown from its duty to compensate; they see the additional 59.5 acres as putting matters right between them and the church.

The claimants have sought exemplary or punitive damages from the Crown, but in this regard we agree with the Crown that it is not appropriate to recommend punitive damages. Having said this, however, we have addressed the lesser question of compensation for the loss of the use of the land after it was leased in 1876. (We are bearing in mind that Ngati Rangiteaorere did have the use of the land after the CMS had withdrawn in 1850 until it was leased in 1876.) We have come to the conclusion that the Crown should commission an actuary to calculate the rentals that Ngati Rangiteaorere would have received had they, rather than the church, leased out the land from 1 July 1875, the commencement date of the first lease, until 1 September 1990, the culmination date of the last lease, with this sum adjusted to take into account the loss of the use of the rental money throughout the period. However the sum should be reduced by 5 per cent, in acknowledgment of the fact that Ngati Rangiteaorere received some benefit of church activities, partly funded by its rentals from Te Ngae, and because they also had some minor use of the land while it was leased, probably until the 1920s. We accept that the rentals Ngati Rangiteaorere are likely to have received may not be very different from those actually received by the church, but it has to be remembered that the church leases made no provision for compensation for improvements. The church is offering to return a well developed farm with considerable capital improvements, free of charge. Ngati Rangiteaorere may have done better with the firm over 115 years; or they may not have done so well. We believe that our recommendation is a reasonable compromise of these imponderables.

Rangiteaorere Land Claim

3 - Ngati Rangiteaorere And The Te Ngae Mission Farm

10 - Conclusions

3.10. Conclusions

The tribunal records its appreciation of the stance taken by the Church Mission Trust Board and the Waiapu Board of Diocesan Trustees of the Anglican Church of New Zealand. The mana of the tribunal was enhanced by the attendance throughout of the Most Reverend Whakahuihui Vercoe, Bishop of Aotearoa, and for part of the time by the Most Reverend George Connor, Bishop of Waiapu. Throughout our hearing we have made it clear that, without the church voluntarily offering to return the mission farm to Ngati Rangiteaorere at least, it would have been much more difficult to reach an equitable solution. The information placed before us demonstrates that the church authorities have been willing to return the mission farm to Ngati Rangiteaorere for some time, but they quite properly wish to ensure that in doing so they do not breach the trusts upon which the land is held. Nor do they wish to become liable for any costs and expenses in returning the land.

Counsel for the various parties involved have addressed the mechanics of the proposed return of the land and appear to be agreed that legislation is the preferred mode. This tribunal agrees, notwithstanding the lengthy delays that have occurred in passing legislation recommended in other tribunal reports. In the meantime, however, we understand that the church intends to appoint representatives of Ngati Rangiteaorere as trustees to replace the existing trustees, thus in effect severing the church's connection with the mission farm. The land will remain subject to the present trust until such time as there is either judicial intervention or legislation. Since the lease of the property has recently expired, this is an opportune time to involve Ngati Rangiteaorere in the administration and the future use of the land.

We have considered the future status and vesting of the freehold of the land. We have suggested to Ngati Rangiteaorere's legal advisers that it be vested in their eponymous ancestor, Rangiteaorere, and that it become Maori freehold land as defined in the Maori Affairs Act 1953. As we see matters, the Maori Land Court, under s 438 of that Act, can appoint trustees to administer the property for all Ngati Rangiteaorere and declare a suitable trust order. Vesting the land in the eponymous ancestor would inhibit any future alienation of the fee simple. If, from time to time, Ngati Rangiteaorere wanted the trusts varied, the Maori Land Court can do this promptly and inexpensively. We note that counsel in this claim are aware that variation of the present trust means legislation or, possibly, costly and lengthy High Court proceedings, with no certainty of result. We would not wish the latter regime on Ngati Rangiteaorere in the future. Counsel for the claimants was prepared to accept our suggestion of legislation vesting the land in the eponymous ancestor, with the Maori Land Court setting up the trusts, though he suggested, as an alternative form of

legislation, that which established trusts for Port Waikato lands returned from the church to Tainui. We would prefer the former.

Accordingly, we recommend that the Crown at its expense in all things legislate to effect the following:

- (a) The vesting of the Te Ngae Mission Farm, plus such other adjoining land that the New Zealand Mission Trust Board and Waiapu Board of Diocesan Trustees wish to add, in the eponymous ancestor of the claimants, Rangiteaorere.
- (b) The status of such land be Maori freehold land as defined in the Maori Affairs Act 1953.
- (c) The land be freed from the present trusts.

Waitangi Tribunal, Department of Justice, Wellington.