

CHAPTER 4

RATIFICATION PRINCIPLES

The shadow of the land goes to the Queen, but the substance remains with us.

Nopera Panakareao, in the debate on the Treaty of Waitangi at Kaitaia,
Muriwhenua, 28 April 1840

4.1 INTRODUCTION

The main question is whether the Government made sufficient inquiry into the pre-Treaty transactions to treat them as sales. The gravamen of the claimants' case was that the Government did not, and that it was incapable of comprehending the Maori dimension. The Crown's rejoinder was that the land commissioners made a thorough investigation of those matters that needed to be considered in terms of the legislation, and that the legislation was adequate for the purpose. In this and the following chapter we conclude the transactions were simply presumed to be sales or were treated as sales, without adequate inquiry of the Maori intent.¹ There was no inquiry, or no authority to inquire, whether, in the circumstances, a trust should have been imputed and given legal effect. The legislation was insufficient for the task if all equities were to be considered.

Insufficient inquiry was made to treat the transactions as sales

The inquiry of the pre-Treaty transactions should also have disclosed, in our view, that the arrangements for Pakeha in Muriwhenua needed better planning. The Treaty of Waitangi should have served to remind the Government that sound settlement policies were required, not ad hoc land transactions, if Pakeha and Maori were to share fairly in the land.

The question is also whether Maori and Pakeha had so merged since the transactions were made as to become of one mind. We conclude they had grown no closer by the time the transactions were examined, and indeed were further apart. After annexation, Europeans were no longer bound to Maori law and, increasingly, were acting in an independent manner. For Maori, their law and

Each party had more cause to think their own criteria would prevail

1. The main research reports to the Tribunal on the pre-Treaty transactions and their subsequent investigation are given at footnote one to chapter 3. This chapter also considers, however, the issue of surplus land, which was the subject of special submissions in M Nepia, 'Essential Documents of the Royal Commission on Surplus Lands 1948' (doc F7); R Boast, 'Surplus Lands: Policy-making and Practice in the Nineteenth Century', June 1992 (doc F16); David A Armstrong and Bruce Stirling, 'Surplus Lands: Policy and Practice, 1840–1950', September 1993 (doc J2); M Nepia, 'Muriwhenua Surplus Lands Commission of Inquiry in the Twentieth Century', October 1992 (doc G1, G8).

authority was still the same. It is necessary to consider, then, the alternative mind-sets of the parties at the points of interaction from 1840. This chapter begins by reviewing the Treaty of Waitangi in that context, and a certain land transaction at Mangonui soon thereafter, the first land transaction between Maori and the Government in New Zealand history.

The criteria for examining the pre-Treaty transactions are then considered, as set out in the New Zealand Land Claims Ordinance 1841. Thereafter, a review is made of the general operations of the Godfrey commission to consider the European land claims; of the separate arrangements for scrip lands, as they came to be known; of the unofficial inquiries conducted by Resident Magistrate White; and of the final adjustments effected by Commissioner Bell, some 15 years after the ratification process began.

Chapter 5 then deals with the results in each of the Muriwhenua districts. It will then draw conclusions on the process as a whole, and on the Government's right to what is called the 'surplus land'.

4.2 THE TREATY OF WAITANGI AND MAORI EXPECTATIONS

Treaty debate reinforces view that Maori law would prevail

Notwithstanding that the British Colonial Office and the fledgling local bureaucracy continued to assume the transactions would be judged by British law, the Treaty debate could only have convinced Maori that the result would be settled by their terms.² We refer to the record of that debate at Waitangi in the Bay of Islands on 6 February 1840, at Mangungu, Hokianga on 11 February 1840 and at Kaitaia, Muriwhenua on 28 April 1840. The record is important, though again it must be treated cautiously, since the debate in Maori has not survived but only English interpretations of it.

The distinctiveness of the Maori debate

The Maori contribution to the making of the Treaty reflects their debating modes and the customs that gave their order of speaking. The friendly relationship between Maori and missionary, and the missionaries' evaluation of the Governor's visit, obliged Maori to honour the occasion. They responded as etiquette required. To whakanui, or enlarge the day, 'several thousand' were reported at Waitangi. Had he been a Maori, the Governor might have sensed victory even before the debate began, for there would have been real cause for alarm only if the attendance was poor. Further, the first day's debate was prolonged for an exhausting six hours after the Governor retired. Thus was the day honoured as it deserved to be.

Importance of the feast

Unfortunately, there was no large feast at Waitangi. The missionaries should have known that was required, but Maori rectified the social gaffe for them. Soon

2. A comprehensive summary of the material relevant to the Treaty debate is provided by Professor Evelyn Stokes at 'Muriwhenua: Review of the Evidence', May 1996 (doc p2), chs 8, 9.

after, the Treaty was taken to the mission station at Mangungu, where 3000 Maori were estimated to have been present, 400 to 500 of them being ‘chiefs of different degrees’, and a huge meal was laid on. It is possible that Mangungu was thus more important than Waitangi.

It is not clear how many assembled at Kaitaia, but 500 were described as forming an immediate circle. There, however, and not to be outdone, a gift was made to the Governor of 12 tons of potatoes and kumara, eight pigs and some dried shark.³ Such munificence would compensate for any lack of numbers. A large feast was also put on for the Governor’s party. This was more important for establishing a relationship than any contractual terms and, as shall be seen, Panakareao was later to remind officials of the feast, not the Treaty, when describing the responsibilities of each to the other.

European accounts depict lively Treaty debates, with the position being saved or violent argument quieted through the timely appearance of a principal rangatira. This could be accurate, but the record is of a European view, and to our minds the result may not have been so finely balanced. A matter is ‘koretake’ (of no account), to Maori, if it arouses no passion or debate, while a battle of words does justice to the cause, sharpens the issues, augments the occasion, and leaves stories to memorialise the event.

Traditional rhetoric

It was said that the Governor was harangued with allegations, but impassioned declamation is also a standard oratorical tool. It solicits a clear position on a point in issue.⁴ Thus Europeans opposed to the Treaty (for annexation would restrict their ability to trade and buy land) had advised Maori that the Governor would enslave them and leave them landless. The Maori way is to clear the air by so averring, in order to compel a forthright denial. Further, to discredit the missionaries as Maori counsellors, some traders claimed the missionaries had already robbed Maori of their land. Again, the Maori manner was to repeat the allegations so as to compel an open disavowal.

They had also a parabolic debating mode. One speaker appeared in rags in a show of penury. His purpose, we consider, was not to complain of land loss, but to imply that the Europeans should give much more than they had already.

A further cultural trait deserves mention: in forming contracts, Maori looked not to the heart of the terms but to the heart of the person making them. It was integral to Maori philosophy, as illustrated in gift exchanges, that there should be trust, honesty, and generosity in establishing working alliances. Accordingly, a

Contracts based on trust

3. In fact, the etiquette of gift exchange was observed. The Governor’s return gift, sent later, was 12 bales of blankets and a cask of tobacco.

4. Lieutenant-Governor Hobson commented on this: ‘The New Zealanders are passionately fond of declamation, and they possess considerable ingenuity in exciting the passions of the people’: see Hobson to Gipps, 17 February 1840, in H Turton, *Facsimiles of the Declaration of Independence and the Treaty of Waitangi*, Wellington, Government Printer, 1976.

missionary protest that their love was enduring had as much weight as precise proposals for land sharing.⁵

Transaction
problems

Care is needed, too, with accounts that Maori complained of land loss through sales. The debate was all in Maori, there was no language equivalent for a land 'sale', and nothing survives of the Maori words used. These reports may represent the translator's understanding more than Maori intentions.

Order of speaking

It was usual, as well, and it is often still so today, that the main leader spoke last. Leaders' addresses commonly end debate. They soothe the wounds of earlier discussion, add passion or reasoning as required, and allay fears or doubts. Further, since previous discussions gave rangatira a feel for the consensus, a general affirmation regularly attended their closures. This chiefly anchoring of debate often had two purposes: to state a pre-formed consensus view, and to show the authority to declare it.

No academic analysis is needed for these views. Tribunal members recall how Maori placed more faith in people's words than written contracts, or relied mainly on personal relationships, even in our times. The oratory, the staged declamations, the aggressive allegations, the impassioned claims, the cautious and reasoned summations, and sudden consensus, are all standard fare today, on marae and before the Waitangi Tribunal and Maori Land Court.⁶ To Maori, such processes help achieve lasting decisions.

Thus the closing address may deserve most weight. Those preceding it may reflect positions required in customary rhetoric and process. It was in his now famous closing address at Kaitaia that Panakareao illuminated the Treaty by saying, 'The shadow of the land goes to the Queen but the substance remains with us.' He added, 'We will go to the governor and get a payment for our lands as before', for under the new regime, only the Governor could pay for land rights.⁷

The shadow of
the land

Professor Dame Anne Salmond, whose advice we valued, referred to 'the shadow of the land' as meaning that the Queen had a spiritual, protective, or kaitiaki role, the shadow, the 'atakau' or 'atarangi', denoting the protective and spiritual aspect of a being, in Maori views. Independently, Rima Edwards, a claimant well versed in Maori law, argued the same.⁸ There were different opinions, however, on whether 'substance' stood for 'land' or for 'authority', but

5. The Reverend Henry Williams apparently understood this cultural predilection. In introducing the Treaty debate at Waitangi, for example, he described the Treaty as an act of love on the part of the Queen: see Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin and Port Nicholson Press, 1987, pp 45–46. In the Maori mind, such a declaration is the first prerequisite to contract formation.
6. The order and form of Maori debate vary according to the occasion. We here refer to whakawhiti korero, the criss-crossing debate amongst the members of the related hapu of a district.
7. See BPP, vol 4, pp 511–512
8. See A Salmond, 'Submission for the Waitangi Tribunal: Muriwhenua Land Claim' (doc F19), p 46; Evidence of Rima Eruera (doc F23), pp 12–15; L Head, 'An Analysis of Linguistic Issues Raised in Margaret Mutu (1992) Tuku Whenua or Land Sale?' and Joan Metge (1992) Cross Cultural Communication and Land Transfer in Western Muriwhenua, 1832–1840' (doc G5), pp 11–12; Orange, pp 82–83. The arguments are more fully summarised in doc P2, chs 8, 9.

we consider it covered both, since land and authority were fused in Maori minds. The words Panakareao added, however, may shed more light: ‘We will go to the governor and get a payment for our lands as before.’ The implication could be that Maori expected the Governor to pay for the use of the land but the underlying Maori title would remain.

As we understood Dame Anne Salmond to say, the Queen would serve as *kaitiaki*, as guardian and protector. Maori in turn would protect the Queen, the two standing in alliance. The Governor would serve as *kai-whakarite*, as broker or mediator between Maori and European, but the authority of the land would remain with the *rangatira*, with whom it had always been.⁹

Accordingly, we doubt whether Maori anxieties were in fact as large as the reports of their alarm that they would be made slaves or would lose their land. They had little to fear, not yet at least. They were measured in their thousands, whereas Europeans were but a handful at Kaitaia and Mangungu and a mere few hundred in the Bay of Islands. Their towns could even be sacked if Maori chose – and indeed, soon after, Kororareka in the Bay of Islands was destroyed. Certainly, the Governor forewarned that many more Europeans would come, but Maori had known Europeans for over 50 years, their numbers had hardly grown in that time and Maori were concerned mainly to secure more. Any suggestion that they would suddenly be swamped must have seemed beyond belief. The British boats were large, but not that large. We think the Treaty rhetoric was, rather, a warning that Maori would entertain no diminution of their authority and expected, at the very least, that power would be shared in arrangements made with the missionaries and the Governor.¹⁰

European numbers were unlikely to pose a threat

Despite those cautionary remarks, the debate is informative none the less. ‘You must preserve our customs and never permit our lands to be wrested from us.’ Those words from another leading figure, Tamati Waka Nene, were typical of the leadership’s opinion, where land, law, and authority were invariably treated as one. These graphically illustrate how Maori expected their law and authority to remain. The Governor responded as he was bound to do. At Waitangi, the issue had become mixed with a dispute amongst the churches. There, the English account of the Governor’s response was:

But Maori expected their customs and law would prevail

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9. It is said that Panakareao later reversed his metaphor when he considered the Governor was challenging his authority.
 10. Mention was made of an event at Hokianga when a group of Treaty signatories returned the blankets given to them the day before and asked that their marks to the Treaty be expunged. We read the incident not as a rejection of the Treaty, however, but as a rejection of the blankets. They were clearly insufficient in number, and an inadequate return for the massive hosting of 3000 people that had been required. Much worse, they were less than those given to the *rangatira* of the Bay of Islands. According to Maning, *Old New Zealand*, 1948 pp 216–220, one *rangatira* considered, ‘I got for myself and all my sons and my two brothers and my three wives, only two blankets. I thought it was too little . . .’ Subsequently, and by way of comparison, Panakareao received from the Governor 12 bales of blankets and a cask of tobacco. While this was in return for a substantial gift from Panakareao, Hokianga Maori had also given freely in hosting a large hui for the Governor. Maning suggests that Hokianga Maori signed principally to obtain blankets, but he was not an impartial observer and his anecdotal accounts are related with a sardonic flair.

The Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome and also the Maori custom, shall be alike protected by him.¹¹

At Kaitaia, Willoughby Shortland for the Governor put the matter more succinctly:

The Queen will not interfere with your native laws or customs.¹²

From the Treaty guarantee of rangatiratanga (or traditional authority), from oral undertakings to respect the custom and the law, and from the guarantee that Maori could keep their land, Maori had cause to believe that the Europeans already in possession of land held it only on customary terms. The Treaty debate could not have disabused them of that customary notion but, rather, could only have reinforced it. If this were so, the pre-Treaty transactions had properly to be judged by Maori custom. As shall be seen, however, they were not.

Other likely Maori perspectives from the Treaty and the northern debate would include these:

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| Maori expected an alliance | • That Maori and the Queen would stand in partnership or alliance, and Maori would continue to benefit from having more Pakeha living with them. |
| Unity with Pakeha and tribal conciliation | • That the Governor would unify Pakeha and Maori, would end inter-tribal confrontation and would keep order amongst Pakeha. This would secure law, order, and national unity. As Panakareao put it: ‘We now have a helmsman; before everyone wanted to be helmsman; one said, let me steer, another, let me steer, and we never went straight.’ ¹³ |
| Equal status | • That Maori and the Governor would be equal, not one above the other. A persistent metaphor was that the Governor should not be up and Maori down. |
| Mutual trust | • That Maori would repose in the Governor an absolute trust. Such a relationship already existed with the missionaries. As Panakareao put it, in urging the execution of the Treaty, ‘What man of sense would believe that the governor will take our food away and give us only a part of it?’ ¹⁴ By this, we think, he was referring to the land. For Maori, trust, and the display of trust and love, were the essential ingredients to forming a lasting relationship. It was assumed, of course, that this trust would not be one-sided. Unfortunately, however, the Maori display of trust was seen by the British as acknowledging subservience. |
| Settled tribal representation | • That the Governor would respect the Maori social structure by dealing through the leadership and not with upstarts who relied on Pakeha |

11. W Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi*, Wellington, 1890

12. From John Johnson’s journal, 28 April 1840, Auckland Public Library

13. BPP, vol 4, p 511

14. Per Willoughby Shortland, BPP, vol 4, pp 510–511

recognition to rise above their stations. This was one area where Maori did have cause for concern. The new wealth in goods and the British method of trading had allowed individuals to treat independently of the established leadership. The effect was to destabilise the Maori communities. Under the Treaty, however, rangatiratanga had been guaranteed.

- Although Maori echoed the Governor’s promise to protect them by calling on him to do so, at the time it was the Governor who most needed shelter. There was concern, however, that Maori should not be regarded with the same low esteem as the Australians regarded the aboriginals, the ‘paraiwhara’ (black fellows) as Maori called them. Despite the rhetoric, later events soon showed that Panakareao expected an alliance of equals for mutual protection, not paternalism.
- That the pre-Treaty transactions would be inquired into. That was the Governor’s express promise, made in the course of the debates, although it may have been meant to appease the assembled Europeans more than Maori. Maori had not specifically urged this course and, following Lord Normanby’s instructions, the Governor proclaimed the inquiry even before the Treaty debate began.
- That lands unjustly held would be returned. This was in direct response to Te Kemara, Rewa, and Moka, who alleged that seven Europeans (who were specifically named) were wrongly claiming their land and who challenged them to return it. We think that was sufficient to forewarn the Governor that the Maori understanding of the transactions would need to be inquired into.

Acknowledged status

An inquiry into pre-Treaty transactions

Lands would be returned

4.3 THE TREATY OF WAITANGI AND BRITISH EXPECTATIONS

When considering the Treaty of Waitangi and British expectations, the Treaty debate is more significant for what was not said than for what was. It was not said, for example, that, for the British, sovereignty meant that the Queen’s authority was absolute. Nor was it said that with sovereignty came British law, with hardly any modification, or that Maori law and authority would prevail only until they could be replaced. Similarly, while Maori assumed that they had kept the underlying right to the land on which Pakeha were living, in accordance with ancestral norms, the British assumed, but did not say, that the underlying (or radical) title would be held by the Crown, in accordance with English beliefs. Although no deception was intended, the assumption was none the less that, in brief, the British would rule on all matters, and the fair share for Maori would be what the British deemed appropriate.

Despite Treaty promises, the British expected their law would prevail

We do not think the pre-eminence of British law and rule was at all stressed in the Treaty debate. The talk did not match Panakareao’s clear exhortation:

Hear, all of you, Pakeha's and Mouris. This is my speech. My desire is that we should all be of one heart. Speak your words openly; speak as you mean to act; do not say one thing and mean another.¹⁵

Wastelands
argument

A more astonishing assumption by the British persisted from 1840 to 1846: that all lands not stocked, gardened, or lived on by Maori would be wastelands of the Crown. In instructing Lieutenant-Governor Hobson, Lord Normanby had cautioned against that view, but it persisted for six years none the less.¹⁶ Governor Grey then made it plain that, whatever the worth of the doctrine in law, it would be impossible to enforce it in fact. Although wastelands were not mentioned at Waitangi, as Normanby regarded all the land as Maori-owned, and although scorn would justly have greeted that doctrine had it been raised in the Treaty debate, it gained currency soon after the Treaty's execution. It is likely to have influenced those who subsequently held official positions, including the examiners of the pre-Treaty transactions.

Despite good
intentions, the
parties were still
in two worlds

We imply no subterfuge in describing the enormous gap between what was said and agreed and what was left unspoken. Like Maori, the British were locked into their own world-view and spoke of things which carried a raft of implications that they could take for granted and yet only they could know. Matters had to be put simply, and British constitutional norms were as incomprehensible to Maori as Maori societal norms were a mystery to the British. What needs to be stressed, therefore, is that each side approached the Treaty with genuine good feelings for the other – Maori seeking advantages from Pakeha trade and residence, the British expecting benefits from this expansion of their empire. They also proposed protection for the indigenous people. As a wealth of historical material reveals, there was in England at this time a strong evangelical and humanitarian tradition consistent with this objective. As Maori knew, the terms were not as important as the hearts of those making them.

The result, however, is that, despite the goodwill, the parties were talking past each other. Maori expected the relationship to be defined by their rules. It was natural to think so and, far from disabusing them of that view, the Treaty and the debate reinforced it. By the same token, the British, true to what was natural to them, assumed that sovereignty had been obtained by the Treaty and therefore matters would be determined by British legal precepts. It is thus important to see the Treaty not in terms of its specific details but for what it mainly was: a statement of good intent and of basic and necessary principles. With regard to the earlier transactions, however, the Treaty and Treaty debate showed that, in contractual terms, the parties were further apart than they were when the transactions were first made. Each had more cause to think their own rules applied, to the exclusion of any other.

15. Per the Reverend Richard Taylor and Dr Johnson, Gipps to Russell, 15 June 1840, BPP, vol 3, pp 180–181

16. For a fuller discussion on the topic, see doc P2, ch 9. The wastelands doctrine is criticised by the Tribunal in *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 2, p 252.

4.4 THE TREATY OF WAITANGI AND LORD NORMANBY

Whatever the mismatches of Maori and Pakeha aspirations, none gainsay the Treaty's honest intention that Maori and Pakeha relationships would be based on mutual respect and the protection of each other. For Maori, these principles were essential to any alliance. For the British, they were part of the art of statesmanship and of humanitarian objectives.

The royal instructions flesh out the Treaty's terms

The more specific intentions of the British are explained in the royal instructions through the Colonial Secretary, Lord Normanby, which flesh out and give meaning to the Treaty's bland promise of protection.¹⁷ They so illuminate the Treaty's goals that, in our view, the Treaty and the instructions should be read together. Two of Normanby's injunctions have particular relevance for these claims: the first, that all contracts should be on fair and equal terms; the second, that Maori must keep sufficient lands for themselves and only the excess should be sold.

In Lord Normanby's elegant phraseology:

it will be your duty to obtain by fair and equal contracts with the natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers. . . .

All dealings with the aborigines for their lands must be conducted on the same principles of sincerity, justice and good faith, as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all: they must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves. To secure the observance of this, – will be one of the first duties of their official protector.¹⁸

It may be seen that, had Normanby's instructions been adhered to, Maori could only have become significant stakeholders in the new order.

Using Lord Normanby's instructions as an overlay, another principle emerges: that the restriction on alienation of land to private individuals was intended not only to augment State revenues but to protect Maori by enabling State supervision of land sales. The trouble was, however: who would supervise the State?

The Treaty of Waitangi will be referred to again, but for now three promises should be kept in mind, for they assuredly influenced Maori at that time:

17. The rules for the interpretation of treaties with indigenous peoples, including those for the incorporation of background documents, have been examined in previous Tribunal reports. American authorities have been reviewed for the Tribunal in Professor W Morse and Rosemary Irwin, 'Treaties, Deeds and Surrenders: An Analysis of Canadian and American Law' (doc 02).

18. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87

4.5

- Maori law or custom, and Maori authority, or rangatiratanga, would be respected;
- the pre-Treaty transactions would be inquired into and lands unjustly held would be returned; and
- all future dealings would be with the Governor, who would provide for and protect Maori interests.

4.5 THE MANGONUI AFFIRMATIONS, 1840–41

The Mangonui transactions were not strictly sales

The next major point of Government and Maori interaction came on 24 June 1840, only two months after the Treaty was signed at Kaitaia. On this occasion George Clarke, for Governor Hobson, and Panakareao, with four others, completed the first official ‘land sale’ in New Zealand, which we call the ‘Mangonui transaction 1840’ to distinguish it from another Mangonui transaction of 1863. We do not see this first transaction, or a similar one of 1841, as a sale, however. Some historical evidence suggests that the Governor was trying to quieten Panakareao’s claims by buying him out, and was hoping to maintain peace by keeping settlers out as well until matters had settled. In any event, so many complications accompanied recognition of this ‘purchase’ that it was rarely relied on. Amongst other things, Clarke was in a conflict situation, as Government purchase agent, since his primary responsibility was as Protector of Aborigines.

Later events would show that Panakareao saw the transaction as no more than an affirmation that he held authority over Mangonui and the eastern division. It is not always appreciated, although historians have noted it before, that in transacting with Europeans over land, the rangatira did not see themselves as ceding their authority over that land but as asserting it, and as being acknowledged as possessed of that power.

The English text of the Mangonui deed is set out in figure 26. It related not to the land as such but to Panakareao’s interest in it. There was no accompanying plan and the rough boundary lines are barely comprehensible, so the depiction in figure 25 is no more than approximate. The deed incorporated land already claimed by settlers under transactions with Pororua. It appears to have been managed by three missionaries, Puckey, Matthews, and Clarke, and the style shows it was written by Puckey. Puckey was a lay catechist and carpenter whose honesty, which was above question, was in excess of his ability as a legal conveyancer.

The transaction followed a discussion between Panakareao and Governor Hobson. Panakareao apparently complained that Pakeha were entering Mangonui without his permission. Afterwards Hobson expressed his hope, in a letter to Governor Gipps in New South Wales, that the deal would ‘restrain in some degree, the settlers from making encroachments on the land which has been

Figure 25: The possible location of the Mangonui ‘purchase’, 1840–41

and still is the cause of much annoyance to the natives’.¹⁹ On 9 July 1840 Hobson had issued a proclamation cautioning anyone without a prior claim against entering the territory the deed referred to.

Subsequent conduct, where Panakareao still dealt with the land as though his authority was unimpaired, shows that he did not regard this transaction as extinguishing his interests or authority. The indications are that, as at June 1840, Panakareao was still operating by the laws of his ancestors and not by the English laws of sale. We think the more likely scenario to be that Panakareao would have placed importance on the Mangonui transaction but for different reasons than those the Governor may have imagined. By his agreement with Dr Ford,

19. Hobson to Gipps, 18 July 1840, BPP, vol 4, pp 57–58 (quoted in doc A21, p 12)

Panakareao had secured Pakeha recognition of his rights throughout Oruru and even to Kohumaru, and by the Mangonui transaction, as Panakareao saw it, the Governor had recognised his rights to Kohumaru, Mangonui, and an indeterminate area to the east.

Pororua's position

Pororua apparently saw things in a similar light. When he heard of the transaction with Panakareao, Pororua protested that he should be acknowledged in the same way – even though, if the pre-Treaty transactions had indeed been sales, he had already sold most of the land in question. The result was a second deed, dated 28 May 1841, conveying ‘all his part and that of his tribe’ in the same land for the same amount of £100, only this time in specie: one horse, one cloak, one saddle and bridle. In the same way as Panakareao, Pororua continued to act thereafter as though he were now the sole owner of the land in question.

Conclusions on
the Mangonui
transactions,
1840–41

Our conclusions are:

- On the face of the deeds, the Government bought the ‘possessions and interests’ of Panakareao and Pororua in the vicinity of Mangonui. It is doubtful whether this conveyed a property right, or whether either Panakareao or Pororua had an interest in possession that was capable of severance and alienation. What Panakareao and Pororua were contending for was not a private right of property but a political right of authority – which they did not see themselves as transferring.
- There was no independent assessment or confirmation of the transactions at the time. The nature and extent of the interests referred to were not examined. There was no inquiry as to whether Maori understood the transactions in the terms the deed described.
- On the evidence that is now available, the right and interest that Panakareao and Pororua respectively claimed was mainly the right to admit and control newcomers to the territory. Neither had interests in possession, except that Pororua was resident at Kohumaru in association with others, and Panakareao claimed the right to reside in the area, in community with others, if he chose.
- It was clearly not seen as a sale. Pororua and his people continued to reside at the village at Kohumaru.
- On the available evidence and in the light of subsequent conduct, neither rangatira freely and willingly sold the authority he had to control newcomers to the territory; on the contrary, each saw the transaction as acknowledging his authority. The deeds were in conflict with reality and accordingly, notwithstanding their terms, there was no effective conveyance of anything.

This book sheweth that Noble Panakareao the Chief of Kaitaia on the twenty-fourth day of June in the year of Our Lord One thousand Eight hundred and forty did sell to His Excellency the Lieut Governor Captain William Hobson Esq of Her Majesty's Royal Navy, his possessions and interests in Manganui and its vicinity, bounded as follows, commencing at Oweto (in Doubtless Bay) continuing along the River Paekotare from thence over to the Mouth of Kohumaru along the waters of Puta Kaka over Hill and Dale, untill you come to Otangaroa, returning by Unuhia, from thence to Wakapaku, from thence to Tae Maro, the Watu and Oneti, over Rangi toto, crossing to Rangi Kapiti, from thence to Koe Koea, the Kopu and Parore, continuing until it meets Oweto. The Payment for Nobles interest in the said land given to him is £100, One Hundred Pounds Stirling, Lawful Money of the British Empire, given in the presence of Noble Panakareao and his Tribe in Witness whereof he has duly signed this deed.

Witness

Wm G Puckey	Nopera Pana kareao	x	His mark
Joseph Matthews	Puhipi Ripi	x	His mark
George Clarke P A	Hohepa Poutama	o	His mark
	Reihana Morenui	o	
	Kepa Waha	o	His mark

Note: Although Panakareao has his mark on the deed, a receipt for the money bears his signature.

Figure 26: The English text of the 1840 Manganui purchase, New Zealand's first official land 'sale'

4.6 BRITISH PRESUMPTIONS AFFECTING THE PRE-TREATY TRANSACTIONS

The principles already developed, of respecting Maori law and authority and protecting Maori interests, were lost almost immediately, by officials, in a preoccupation with the English system. Integral to understanding the laws and practices for examining the pre-Treaty transactions are certain assumptions of English law. The first was that all land is held by the Crown and no one is entitled to any part without a Crown grant or licence, provided, however, that in New Zealand the Crown is assumed to hold the land subject to any Maori usages until Maori rights are lawfully extinguished. In the result, the Government had no need to register a conveyance of land from Maori, and had only to be satisfied that such Maori rights that may have existed had been extinguished. It could then do as it chose.

The second assumption, at that time, was that the extinguishment of native title was an act of State and, as such, was not reviewable in the courts. This was

Impact of Government theories of land tenure and native title

despite the fact that Maori were New Zealand citizens. Later, this was given statutory reinforcement. In the result, and at the time, it was sufficient for the Government to say that native title had been extinguished. It was not necessary for the Government to show how that had been done.

The third assumption was not consistently made but was still regularly apparent. It was considered that, when Maori accepted any uncustomary instrument or land conveyance, or were subjected to one, the stream of customary consciousness was broken, customary title was impaired, and the Government could dispose of the land as it considered appropriate. Thus land could be transferred to Dr Ford or the Reverend Richard Taylor upon a trust and the Government, while not acknowledging the trust, could regard the native title as extinguished.

We see the two main problems with the ratification process as follows. The first was the presumption that, as a matter of law, all Maori interests were deemed to be extinguished, while Maori saw their interests as continuing. The perception of a continuing Maori interest had been made known to the British House of Commons beforehand.

The second was that the transactions could be treated as sales provided they were affirmed by one or two Maori and were equitable. This was so though Maori affirmed no more than their customary understanding, which was not of a sale. In addition, the equity of the transactions was barely considered. The only transactions adjudged as inequitable were those outside Muriwhenua that were seen as notoriously bad for they covered whole provinces.

It appears, moreover, that the transactions could be treated as sales without any lawful inquiry at all. Those of Muriwhenua East and the centre were regarded as valid sales even though none was officially inquired into in the way the legislation required.

4.7 THE LAND CLAIMS ORDINANCE 1841 AND THE SURPLUS LAND DEBATE

The ordinance gives inadequate protection

The assumptions concerning the Crown's radical title, the process of extinguishment and the loss of customary status through uncustomary instruments, fit with the arrangements made to inquire into and resolve the European land claims arising from the pre-Treaty transactions. We consider that the relevant legislation, the New Zealand Land Claims Ordinance 1841, was insufficient, in all the circumstances, to compel the full examination that was needed if Maori law was to be upheld, and Maori interests protected, as the Treaty of Waitangi had required.

NSW model

In explanation, the New Zealand legislation was patterned on models from New South Wales, where native rights were not part of the design. This arose as follows. Certain squatters in that colony, having assumed rights to land, had

Women harvesting kumara. From the Northwood collection,
photograph courtesy of the Alexander Turnbull Library (G6265^{1/1}).

onsold all or part to newcomers. The latter sought recognition for their purchases. By legislation of 1825 and 1833, recognition was given on the limited basis that no one could take more than 2560 acres (or four square miles), and each would receive according to their respective payments. The claimants were to appear before land commissioners to settle the amount paid and the boundaries of the land concerned. There was a problem, however. The Statute of Frauds required land sales to be evidenced in writing, but the early squatters and settlers were often illiterate and such written documents as may have existed were often unsatisfactory. It was therefore provided that the commissioners should be guided by the real justice and good conscience of the case without regard to legal forms and solemnities.

Again, no native questions were involved, and it was not necessary to consider whether the alienor understood a sale since everyone was from the same culture. It was sufficient if both sides affirmed to the land commissioner that a certain sum had been paid and a definite land area had been given over.

It then happened that, while New Zealand was a dependency of New South Wales and annexation was pending, certain Sydney speculators who had invested in land in New Zealand had become anxious to secure good title for their purchases immediately on annexation. Governor Gipps of New South Wales was able to produce the necessary legislation to investigate their claims from that which already existed in his colony.

Surplus debate in
NSW

Gipps's legislation for New Zealand was hotly debated in New South Wales, since it limited grants thereunder to 2560 acres (1036 ha) with the balance, or the surplus as it was called, passing to the Government. Governor Gipps was adamant, however, that, by English law, the Government would have the underlying or radical title to all the land in New Zealand once sovereignty was proclaimed, that the Government could then do with the land as it chose, and that the Government was fully entitled to grant part only of that acquired by the purchasers and to keep the balance. The Australians, it seems, had not heard of this radical title and acted as though it were an absurd legal fiction, or medieval relic that could hardly have applied south of Capricorn.²⁰ Gipps's legislation for New Zealand was enacted none the less.

Thus the surplus land issue arose at this early stage. It is helpful now to give it a definition, as appropriate to the New Zealand situation and the debate that followed:

Surplus land: surplus land is the balance of a pre-Treaty land transaction which was not granted to a putative purchaser.

It is land which the Government presumed to own.

20. The origins of the New Zealand legislation, and the extensive debate in Australia, were outlined to the Tribunal in a major historical work: D M Loveridge, 'The New Zealand Land Claims Act of 1840', 18 June 1993 (doc 12).

After annexation, Gipps's legislation was re-enacted in New Zealand by Governor Hobson, with virtually no change, as the Land Claims Ordinance 1841. Governor Gipps, however, continued to give assistance. He appointed the land commissioners from New South Wales, with Colonel Edward Godfrey, a British military officer, being posted to the northern part of New Zealand including Muriwhenua.

Australian law re-enacted in New Zealand

As we read it, the primary purpose of the legislation was not to protect Maori interests. The main purpose was to achieve a fair distribution of land amongst Europeans by defeating the extravagant claims to millions of acres that some had made, even in a single transaction. As in Australia, the New Zealand Land Claims Ordinance set a maximum of 2560 acres for any one person, unless the Governor allowed more.²¹ It would have prejudiced the objectives of settlement, as outlined by Lord Normanby, had a few individuals been allowed to own most of the land.

The legislation

A further primary purpose was to achieve equity between the various European claimants, and especially between the 'genuine' settlers, who purchased early, and speculators and others who came later, once annexation was imminent. For this purpose a scale was provided, allowing land awards according to the value of the goods transferred and a set price for land increasing over each year. Presumably to cover transport costs, the goods were to be valued at three times their selling price in Sydney. No thought was given to maintaining equity as between Maori and Europeans.

As in New South Wales, the lack of a deed was not fatal. Four transactions were accepted in Muriwhenua without the production of any deeds, and only an unsigned copy was produced for a fifth,²² for the ordinance specifically provided, as in Australia, that the commissioners were to be guided by 'the real justice and good conscience of the case without regard to legal forms and solemnities'. Although it was argued before us that this clause enabled the commissioners to consider a broad range of equities, we think the qualifying reference to legal forms and solemnities focused the clause to the problem described, that of obviating the Statute of Frauds requirements.

The Crown argued that the ordinance was adequate for the protection of Maori interests,²³ but we consider the protection of Maori interests was subsidiary to the other objectives described. In the ordinance, the requirement to protect Maori interests was at best obscure. As former Chief Justice Sir Michael Myers noted in 1946, when investigating the issue of surplus lands, the basis for considering

21. The commissioner could recommend above 2560 acres where that had been approved by the Governor, but the Governor presumed he had authority to enlarge the grants, and did so. His actions were later challenged. See *R v Clarke* (1849–51) NZPCC 516.

22. T Ryan did not produce deeds for three cases, J Berghan for one, and in one case Thomas and Phillips had only a copy.

23. See Crown submissions (doc 01), and especially see supporting historical evidence, D A Armstrong, 'The Land Claims Commission: Practice and Procedure, 1840–1856', July 1993 (doc 14(a))

the equity of the transactions was in section 6. This required that, in recommending a grant, the commissioners should be satisfied:

that the person or persons claiming such lands or any part thereof is or are entitled according to the declaration of Her Gracious Majesty as aforesaid to hold the said lands.

The 'aforesaid' declaration could only have referred to a recital in the preamble of Lord Normanby's instructions of 1839 'to recognise claims to land which may have been obtained on equitable terms'. Looking at the instructions and at the circumstances of the legislation, we think this must be taken to have meant that there must be no evidence of fraud, or that the price was not demonstrably unfair.

The point, however, is that the necessary matters to consider for the protection of Maori interests had properly to be spelt out, just as the legislation was specific about the criteria for equity between the purchasers and the prevention of undue land aggregation. The need for such specificity is more apparent when one considers that some commissioners, like Colonel Godfrey, were not lawyers.

The matters that needed spelling out, in our view, were these: had the alienors sufficient right and title? was a sale in fact intended? would a sale be in breach of any trusts? had the affected hapu sufficient other lands, or alternatively, in Lord Normanby's terms, was the alienated land excess to their requirements? were the transactions otherwise contrary to the interests of the Maori alienors? was the consideration adequate? and had matters been honestly put without fraud or unfair inducement?

The need to consider such matters was nothing new. They had been spoken of by colonial officials and missionaries for some years. They had previously been raised before a select committee of the British House of Commons. It may be noted that similar provisions for the protection of Maori interests were in fact introduced into legislation later, and were not removed from Maori land law until as late as the Maori Affairs Amendment Act 1967, and even then not entirely.

4.8 THE INQUIRY IN PRACTICE

Whatever the legislative intent, upon reading the record of the inquiry itself, it is all too evident, in our view, that no inquiry, or no adequate inquiry, was made into those matters, as mentioned above, that were necessary for the protection of Maori interests. The evidence elicited from Maori was mainly, or almost entirely, to the effect that they had signed the deed, received the goods and knew the affected land. It is difficult to escape the impression that the commissioners assumed that Maori had sold the land, and all that was needed was for one or two Maori to attend and affirm the transactions in the way described.

The Government made the same assumption. It will be seen that in several cases the land commissioner was unable to complete an inquiry. In those cases, the Government itself assumed the validity of the original transactions, without anyone having appeared in support or opposition, or without any hearing at all, leaving a question as to why Maori affirmation had ever been required in the first instance.

The Land Claims Ordinance may have worked well in other districts. It was effective in disallowing claims to some 9.2 million acres elsewhere. The individual Muriwhenua claims were small by comparison, however, and the equity of those claims appears to have been assumed. Not one claim that went to a hearing was disallowed.

In brief, as we see it, the ordinance implicitly assumed the pre-Treaty transactions were all valid purchases, but that some should be set aside as unconscionable if an injustice was plain. The ordinance did not require that the transactions should be examined for mutual comprehension, and no such examination was made in fact. The conditional occupations of custom law were thus changed to permanent alienations, and, accordingly, the ordinance served not to effectuate the agreements, but to amend them.

Crown counsel contended that, notwithstanding the terms of the ordinance, the land commissioners were instructed by Gipps to establish 'proof of conveyance according to the custom of the country and in a manner deemed valid by the inhabitants'. We do not think this called for an examination of custom law transactions but, rather, whether the deed was executed in some open manner that might best accord with the customary way of doing business. Once more, the question of comprehension was not considered.

Had an inquiry of customary understandings in fact been required by this instruction, we doubt that Commissioner Godfrey could have been of much assistance. Godfrey, in our view, was honest and conscientious. He was also methodical and adhered to his duties, as he saw them, to the letter; but the reality was that he was new to the country and had no idea of Maori custom. Had he that comprehension, he would have known that a conveyance, according to the custom of the country, was not a sale.

It may be noted in this context that Godfrey did have the benefit of an interpreter who was fluent in Maori, Henry Tacy Kemp, son of the missionary James Kemp. There was no one from the Office of the Protector of Aborigines, however, as was normally required, and although Kemp later acted as a subprotector, he was too young to discharge the functions of that office at this time. Moreover, although he was born in New Zealand and fluent in speaking Maori, his letters and reports do not demonstrate to us an understanding of Maori values or the underlying beliefs that governed Maori transactions. They show, rather, a concern to 'civilise' Maori, and thus to replace those beliefs, of which he had a surface understanding only.

It was also argued before us that, if normal practice was followed, someone from the protectorate would have been to Muriwhenua beforehand to explain matters to Maori. There is no evidence that that happened on this occasion, but, assuming it did, there is still a difference between teaching others what they might need to know and teaching oneself to know others.

The inquiry, in our view, was not of a kind that could have cured the fundamental defect: that the parties to the pre-Treaty transactions were not of common mind or purpose. It ought to have been obvious, in our view, that what was mainly needed was not a determination of settlement rights on the basis of deeds that meant nothing to one party, but a clear settlement plan designed to achieve fairness for all, and providing protection for Maori interests, along the lines Lord Normanby had directed.

4.9 SCRIP LANDS

The particular course of Godfrey's inquiry is examined in the next chapter. Here we are concerned with the broad consequences, and at this point need to consider one in particular, concerning the so-called 'scrip lands'.

Due to a small war between Panakareao and Pororua over who had the rights in the area, Godfrey was unable to complete an inquiry into the claims for eastern Muriwhenua, Mangonui, or Oruru. As claimants were complaining that the war would prevent them from receiving land, and since the Governor was keen to settle as many people as he could at Auckland, he decided that the European claimants affected should be offered scrip and, in return, the Government would take over their land claims.

Again, because of the importance of this matter in later events, some definitions may assist:

Scrip: Scrip was a certificate entitling European purchasers to a given amount of land at any place where the Government had land available.

Scrip land: Scrip land, in Muriwhenua, was pre-Treaty transaction land where, in exchange for scrip, the Government had taken over the purchaser's claim to that land.

At the Governor's direction, Godfrey was to meet with the various European claimants affected, but without the Maori party, to assess the entitlement of each claimant in terms of the Land Claims Ordinance and so to advise the Governor. On receipt of his advice, the Governor adjusted these entitlements and offered scrip for the amount so determined.

Some claimants declined to take scrip. They were mainly those who had settled in the area and now had adult half-caste children, or those who were persuaded against taking scrip by Panakareao, who then undertook to secure the

land for them.²⁴ Most, however, did take the scrip, and shifted to Auckland or took Government land elsewhere.

The particular scrip awards are considered in the next chapter. The main point here is that, as a result of those awards, and the implicit assignment of the purchasers' interests to the Government, the Government assumed it had acquired most of Oruru, Mangonui, and eastern Muriwhenua.

In fact, by taking an assignment of the purchasers' claims, the Government could have acquired no greater right than the purchaser had – that is, the right to pursue a claim before land claims commissioners. And yet, at all subsequent times, the Government acted as though its right to the lands in question, wherever they might have been, were total and complete, without any ratification process being needed. This may have been because the Land Claims Ordinance was not seen as binding on the Government.

In any event, no Maori affirmation was seen to be required. Moreover, since Maori had become adamant that their arrangements were personal to the Europeans concerned and that they were opposed to the Government taking the land, it is unlikely that that affirmation would have been given. Accordingly, in all the scrip land cases, there was no examination of Maori intentions, of boundaries, of the existence of trusts or the like. The Government itself now appeared to be assuming that valid transfers had been made throughout Muriwhenua. It was thus less likely that any Government official coming afterwards would advocate another view.

4.10 THE UNOFFICIAL INQUIRIES OF RESIDENT MAGISTRATE WHITE

The next stage in the process was the appearance of William Bertram White, who was appointed Resident Magistrate at Mangonui in 1848. The resident magistrate took it upon himself to recover, where he could, that which he regarded as the Government's land on account of surplus or scrip. To that end he endeavoured to sort out and locate the boundaries of the various old land claims. He had no authority to undertake the work of a land claims commissioner, and he lacked the necessary skills for the task. He was neither a lawyer nor an experienced administrator or Government official, and had simply been a surveyor, unqualified, for the New Zealand Company. He gave no notice of his intentions, conducted no public hearings, kept no minutes or records of his meetings, and gave no reasons for his decisions. Having considered at length the substantial

24. See Berghan to White, 25 September 1848, OLC 1/558–66, at p 16, where Berghan claimed Panakareao would not allow him to exercise his scrip; Panakareao to Grey, 20 June 1847, OLC 1/617–23, p 62, where Panakareao supported Thomas Phillips's claim to land but not scrip; and similarly, apparently, for Flavell: see Flavell to White, 20 September 1849, OLC 1/850, pp 13–15.

number of documents relating to his activities, we would describe his actions as consistently high-handed.

Nevertheless, the Government tacitly acquiesced in his proceedings. As a first step, the resident magistrate considered the lands at Mangonui township. He examined the old land claims, purported to purchase from Panakareao a small area not covered by them, added a washing-up clause to the deed to acquire any other 'unsold' land in the area, recovered by that means several times the area he had purchased from Panakareao, then recommended that the Governor issue Crown grants to various Europeans. This the Governor did.

Having thus acquired Mangonui, the resident magistrate then assumed the Government's right to the Oruru lands, on account of scrip, and without any inquiry allocated farms to a number of Europeans, including himself. Only then did Panakareao raise questions – at the point when something happened on the ground. In response, the resident magistrate purported to buy the lands on behalf of the Government. There are no satisfactory documents to show that Panakareao agreed to a sale, but a purchase was eventually claimed, by a deed executed soon after Panakareao's death, in 1856.

Much the same was done in eastern Muriwhenua. Assuming the land was the Government's, the resident magistrate allocated a few areas to various individuals, but later, when possession was taken by certain settlers who were strangers to the land, Pororua objected. Panakareao was dead by then. Again, Maori reaction had followed not a paper transfer but an act of possession on the ground. The resident magistrate responded as he had done in Oruru, by having a purchase document completed.

These purchases and transactions are detailed in a later chapter. Each of the deeds has been justifiably criticised, and it is doubtful whether all or any of the lands in the deeds were meant to be sold in the European sense. What should be noted now, however, is the assumption that the pre-Treaty transactions had extinguished all Maori interests, that no Maori affirmation was needed under the Land Claims Ordinance, and that the Government was entitled to the scrip lands without any formal inquiry into the validity of the original transactions which constituted the root of any European title. In that respect, the resident magistrate did not see his eventual purchase of the land as an admission that Maori were still the owners. Each purchase was for him merely an act of appeasement, and the prices paid reflect that view.

4.II THE INCOMPLETE GRANTS AND THE ADJUSTMENTS OF COMMISSIONER BELL

Crown grants
were insufficiently
particular

A further source of later confusion was that the Crown grants that followed Godfrey's inquiry were never properly completed. In each of the cases that Godfrey heard, he assessed the claimant's land entitlement in terms of the

ordinance and recommended to the Governor a grant for that amount from out of the claim area. In some cases the Governor increased the claimant's entitlement, purporting to exercise a discretion he may not really have had, then he issued a Crown grant. It was not the sort of grant that would satisfy a modern land registrar, however. It said, effectively, that the grantee was entitled to a certain number of acres from somewhere within an unsurveyed and vaguely described piece of territory, the description being simply that given in the original deed. It was difficult enough to locate the boundaries of the original transaction, but, even if they could be ascertained, it was impossible to know which part of the area was the purchaser's and which part was the Government's.

With good reason, many complained that the Crown grants were not proper grants at all, and were not worth the paper they were written on. There was a further concern that Maori were presuming the right to occupy any lands not in the actual possession of Europeans, as though the Maori concerned still owned them. It was considered vital that the Government should assert its title. The result was that, much later, the Land Claims Settlement Act 1856 was enacted, providing for a further Land Claims Commissioner – Francis Dillon Bell, in this case – to define the original transactions by survey, and then to identify the purchasers' parts and the Government's surplus.

The defects led to Bell's inquiry

Bell's primary work in Muriwhenua was to settle and define by survey the settler's grant and the Government's surplus in those cases where grants had been made. This did not mean rehearing the case. In fact, Bell considered he should not do so. The assumption was that the native title had been extinguished by the grant, that no Maori needed to be heard thereafter, and that the issues before Bell were entirely between the Government and the European purchaser. The only role for Maori in this process was to assist in the identification of boundaries, if they wished to, though they were also allowed to be heard on the location and size of reserves.

There were some exceptions. There were six people whose claims near Mangonui or Oruru had still to be investigated because they had declined to take scrip. Bell was empowered to examine such outstanding cases, but felt he could assume that sales had been effected by the right people. He sought no evidence of the title of the 'sellers', yet title had been in dispute, and he did not inquire whether a sale was meant. It was argued before us, by reference to the general provisions in Part VI of the Land Claims Settlement Act, that Bell was obliged to protect Maori interests, and by inference would therefore have done so. Particular reference was made to section 38, that no lands were to be included in any grant where it was not proved to the commissioner's satisfaction that the native title was extinguished. We do not read that section, however, as obliging the commissioner to go beyond the face of the deed, and in no case did he go beyond the face of the deed in fact.

The outstanding claimants

Most especially, Bell did not investigate the claims of those who had taken scrip. He had no jurisdiction to do so. This is important to note, for in later

Scrip cases not done

inquiries it was assumed that Bell had finalised everything that Godfrey had left undone. It is clear that that was not so: section 15(2) of the Act prevented the Land Claims Commissioner from inquiring into those cases, the Government's mind by then being settled that the land had become the Government's.

Bell's operation

Bell's handling of the specific claims will be considered in chapters 7 and 8, along with the Government land purchases which fitted in with his programme. At this stage Bell's mode of operation should be examined. He was sitting on and off at Mangonui from 1857 to 1859. It is clear to us, from the record and from Professor Oliver's assessment of Bell's motives, that Bell entered upon his task with the political objective of recovering as much of the surplus land as he could, in the face of Maori occupations, and even although this would mean substantially increasing the grants to Europeans in order to obtain the settlers' cooperation. Conversely, the protection of Maori interests barely figured throughout Bell's operations.

Bell's survey arrangements

Although the Land Claims Settlement Act did not require survey of anything more than the grants, Bell devised and gazetted rules requiring grantees to survey the whole of their original claims. In return, they would receive substantial increases to their grants. This ensured that the Government not only secured the surplus, but recovered the maximum it could. Previously, grantees such as Matthews were happy that the surplus revert to Maori, since their own grants were limited. Where boundaries were uncertain, they had no cause to push their original claim boundaries to the limit, since only the Government would profit. Under Bell's scheme, however, the grantees received a bonus for every acre recovered for the Government. They thus had the incentive to extend the survey boundaries as far as possible. They also had preferred rights of purchase over the surplus that was recovered.

Moreover, as the claimants pointed out, Maori raised no objection to survey work being undertaken by the grantees since, in their view, they had a contract with the grantee. For the Government to intervene, and presume to effect a survey, would almost certainly have unleashed a protest. Indeed, in the one case where the Government did undertake the survey itself, with the Davis claim at Mangatete, there was a protest from Maori.

Bell felt impelled to adopt this course out of practical necessity. He summarised the position in a memorandum of 13 January 1857:

it has been laid down as a general rule that claimants should survey the external boundaries of their whole claim so that after laying off the quantity that they may be found entitled to, the surplus land may revert to the Crown without disputes – the supposition being, that while the Natives will give possession to a claimant and allow surveys to be made of all the land they originally sold him, they were likely to object to the Crown taking possession of any surplus land afterwards, if only the part to be granted to the claimant is surveyed by him.²⁵

25. R P Boast, 'Surplus Lands: Policy-Making and Practice in the Nineteenth Century', June 1992 (doc F16), p 188; doc F11, p 25, doc J2, p 95

He was convinced, however, that the surplus had to be recovered, for otherwise it would 'practically, have reverted to the natives, and must at some time or other have been purchased again by the government'.²⁶ He added:

But when the claimants were told they would receive an allowance in acreage to the extent of 15 per cent on the area surveyed, it became in their interest to exert all their influence with the native sellers to give up the whole boundaries originally sold.²⁷

Under the Act, lands could also be added onto the settler's grant, up to one sixth, for example, to provide for natural and practicable boundaries or other purposes. To encourage settlers to claim the full extent of the original purchases, as they saw it, Bell allowed the maximum additions in each case, together with a land allowance for survey charges. An illustration of how the survey incentive scheme applied is Matthews' survey of his Parapara claim, at 7317 acres (2961 ha). There, the scheme worked this way:

	<i>Acres</i>	<i>Acres</i>
Godfrey's recommendation based on value of goods × 3		306.5
FitzRoy's grant based upon executive discretion		800
Bell's adjustment:		
Original grant	800	
Add one-sixth allowance, under section 23	133	
Add 15 percent survey allowance on 7317, under section 44	1097	
Add fees allowance, under section 45	<u>66</u>	
Adjusted grant	2096	(848 ha)

William Puckey claimed on two blocks totalling 4036 acres. His awards were assessed as follows:

	<i>Acres</i>	<i>Acres</i>
Godfrey (as amended)		1296
FitzRoy's grant, based on discretion		2300
Bell's adjustment:		
Original grant	2300	
Add one-sixth allowance, under section 23	383	
Add 15 percent survey allowance on 4036, under section 44	605	
Add fees allowance, under section 45	<u>58</u>	
Adjusted grant	3346	(1354 ha)

26. F D Bell, 'Land Claims Commission Report', AJHR, 1862, D-10, p 5

27. Ibid

Puckey was able to obviate the 2560-acre maximum since his claim related to two purchases. Ford, however, received 2627 acres in one block. In Southee's case, Godfrey's original recommendation of 1228 acres grew to 2070 acres.

It is arguable that the section 44 allowance for survey could apply only to the survey of the grant, not to the survey of the entire purchase, and that in this respect Bell's rules were *ultra vires*.

Bell concluded:

There is no doubt that the grant of liberal survey allowance had a very beneficial effect. If the Government had attempted to survey the claims themselves, the claimants would have had no interest in the whole exterior boundaries being got and would only have felt called upon to point out as much as was actually to be granted to them. The residue would practically have reverted to the natives and must at some time or other have been purchased again by the Government: and a large extent of territory must have remained, as it was before the passing of the Land Claims Acts, a *terra incognita*. But when the claimants were told they would receive an allowance in acreage to the extent of 15 per cent on the area surveyed it became their interest to exert all their influence with the native sellers to give up the whole boundaries originally sold. The result had been not only to produce a large surplus of land which, under the operation of the existing Acts, goes to the Crown; but to connect the claims together, and lay them down on a map. Under the arrangements which I directed to be adopted by the surveyors engaged in the survey of the claims, I was enabled, as the original boundaries of a great number of the claims were conterminous, to compile a plan of the whole country about the Bay of Islands and Mongonui [sic], showing the Government purchases as well as the Land Claims; and a connected map now exists of all that part of the Province of Auckland which lies between the Waikato River and the North Cape.²⁸

When surveyed boundaries were cut and marked on the ground, the extent of the settler's award and the Government's surplus was apparent. In addition, as the settler's area was added to from out of the left-over land, which in the Maori view had reverted to them, it appears some Maori could see that the additional areas being allowed to the settlers were coming from out of the Maori portion.

This chapter having considered the way the pre-Treaty transactions were generally inquired into, and the roles, over time, of Godfrey, White, and Bell, the following chapter considers the more particular consequences in the districts affected.

28. See AJHR, 1862, D-10, p 5