

CHAPTER 5

RATIFICATION PROCESS AND SURPLUS LAND

Immediately after my arrival at Kaitaia, all Nopera's tribes assembled there in considerable numbers; and in a public conference many violent and seditious speeches were made by Nopera [Panakareao] and other chiefs. In these harangues they declared . . . That the sales of land around Kaitaia, already made by Nopera and his party to individuals, should be acknowledged; but that any surplus lands, ie those the Government does not grant to the claimants, will be resumed by the chiefs who sold them.

Report on the welcome to Commissioner Godfrey at Kaitaia, 1843

5.1 CHAPTER OUTLINE

This chapter considers the outcome of the inquiries conducted by Commissioner Godfrey in 1843, with the final adjustments as effected by Commissioner Bell between 1857 and 1859.¹ It concludes with an assessment of the issues as a whole, and of the Maori claim to the surplus lands, as introduced in the previous chapter. The description of the Government inquiry follows the course that Godfrey took: beginning in the east at Mangonui, then shifting to Kaitaia.

5.2 THE INQUIRY IN THE EASTERN DIVISION

The inquiry into those transactions east of Mangonui Harbour can be briefly reported on, for, as far as Maori were concerned, there was none. The eastern transactions were detailed in chapter 3. They were summarised in table B and depicted in figure 19. The claims not covered in Godfrey's inquiry are depicted in figure 27.

Panakareao
rejects claims,
prevents inquiry

A week or so after Godfrey arrived at Mangonui, on 6 January 1843, he was prevented from proceeding with his proposed inquiry by the likelihood of warfare. Panakareao attended the opening, sitting with 250 warriors 'to dispute and resist all the purchases . . . that were not derived from him'.² Pororua also

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1. The references to counsel's arguments and the research reports were given in the introductory footnotes to the previous two chapters.
 2. Godfrey to Colonial Secretary, 15 January 1843, BPP, vol 2, pp 125–126 (doc A21, app 17)

Figure 27: The investigation of old land claims in central and eastern Muriwhenua, 1843

established himself at Mangonui with a like-sized party of Nga Puhi from Whangaroa. Later, in accordance with the custom that disputes of this sort should not be fought in the heat of the moment, an appointment was made for a contest on the beach at Taipa. Only a few were killed there, however. In what must have been an act of extraordinary valour, the Reverend Henry Williams stood between the warring parties in the name of God, to bring the proceedings to a sudden end. Given the Maori aversion to fighting if the tohunga (priest) regarded the signs as unpropitious, and Panakareao's regard for the ministry, it is not surprising the battle was discontinued. Skirmishes occurred elsewhere in Oruru Valley, however, and about a dozen had been killed when, as was also usual in Maori affairs, two well-known rangatira from outside intervened as mediators: Tamati

Waka Nene and Mohi Tawhai. These Nga Puhi rangatira were linked to Pororua but had also aligned before with Panakareao.³

Although Europeans portrayed the context as a title dispute, as a question of who could sell and not whether a sale was desired, neither titles nor sales were known to Maori. The contest was really about authority: who had the authority to speak for the area and whom would the Government recognise?⁴ It was only later, when Panakareao and Pororua had passed from the scene, that Maori pointed out that a question of title was also inherently involved, and that, moreover, ‘ownership’ could not have been settled when the transactions were made.

An issue of authority, not title

Knowing no Maori, Godfrey was dependent on the interpreter, H T Kemp. Kemp recorded Panakareao’s message, though perhaps with his own cultural imprint.⁵ Panakareao’s message, as relayed by Commissioner Godfrey to the Colonial Secretary, is printed below, but we stress that, in our view, the issue was who had authority over the settlers in Mangonui, or under whose protection did they stay – that of Panakareao, or of Pororua? Godfrey reported:

Panakareao's opposition to the eastern transactions

Upon my opening the court and commencing the examination of certain sales of land made by Pororua (or Warekauri) and others, Nopera entered and declared as follows:

Firstly. He opposes all the purchases of land not made from himself at Mongonui.

Secondly. That he had a priority of right over all the land in the neighbourhood of Doubtless bay, and denies the right of any other party to sell any land there without his sanction and ratification, which, however, had not been obtained in any case except in Captain Butler’s purchase, which, consequently, was the only one he would allow of.

Thirdly. That he considers the trifling property and cash given to him in 1840 by the Government for the lands in Doubtless Bay was only an earnest of what he was to receive for these lands; Pororua having received as much, although he had

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3. Before the Native Land Court in 1877, it was claimed the Nga Puhi leaders imposed a truce whereby Panakareao would take control from Mangonui to the west, while Pororua would take the division in the east. The evidence must be treated circumspectly, since it was given to support Nga Puhi land rights in the area, but it was admitted that Panakareao took the harbour itself and the creek where ships obtained their water. This was a major concession, for, throughout the north, the principal rangatira had been charging harbour dues and watering rights.
 4. The issue of Maori authority, or autonomy, is more particularly examined in the *Taranaki Report*: see Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996.
 5. During the Tribunal hearings, the Crown stressed that Henry Tacy Kemp had lived amongst Maori and spoke the language fluently. We are not inclined to accept the corollary that he understood the Maori dimension. It appears to us that he was very much the son of his father, James Kemp, whose mission was to convert Maori to another world-view. On our reading of H T Kemp, where his words were in Maori his thinking was still in English, and, like Maning, he judged Maori by English cultural criteria. It also has to be remembered that later Kemp held office as district land purchase commissioner. In the South Island, in 1848, he effected the largest purchase in New Zealand history, about one-third of the South Island. His disregard for the interests of the local Maori is detailed in the *Ngai Tahu Report 1991*: Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991.

disposed of his rights to and received payment from, the settlers. This purchase by the Government not having been completed according to his view of the matter, he thinks that the amount he has already received is only a fair equivalent for the feast given by him at Kaitaia upon the late Governor's arrival there [ie, Hobson's visit in June 1840].

Fourthly. He, Nopera, promises that the settlers at Mongonui shall remain unmolested and be permitted to occupy 'the spots they reside on, with any cultivation attached,' until the whole of the matter be arranged, and this license he considers an ample compensation to Pororua, &c, for any rights they may have had to the lands.

Fifthly. That he would not now relinquish his right over the lands either to the settlers or to the Government for any consideration that could be offered but that he will maintain his right to the lands *vi et armis* [by force of arms] . . .

Godfrey added:

I proposed divers modes of arranging their differences to these chiefs, but without effect. Nopera being the most determined in resistance, he considers that the offer (as he calls it) of the Government in 1840 to purchase his rights over the heads of Europeans already settled upon these lands was an absolute confirmation and admission of his title.

The two parties mustered upwards of 400 fighting men, were fully armed with abundance of ammunition, and their muskets loaded with ball cartridge; each party danced the war dance and was harangued by their respective chiefs, and one time it appeared very probable that they would have come to blows before me.⁶

The lack of inquiry
in the east

In the result, Godfrey never conducted the necessary inquiry under the Land Claims Ordinance in respect of the eastern district; and, as shall be seen, neither Bell nor anyone else was to complete an inquiry for this area in the manner that the ordinance required. No Maori confirmed that the deeds were explained and understood. No Maori acknowledged that the specified quantum of goods had been allocated, or distributed to the right people, and no one ratified the description of boundaries or testified as to title.

It seems likely that occupation had been taken in some cases before deeds were formalised, and that there was a rush to document transactions in 1839. The claimants contended, but did not establish, that some of those deeds had been backdated. There were no surveys or plans, boundaries were imprecisely described and were incapable of survey, and estimates of areas were very approximate, or areas were not given at all.

Sales none the
less assumed
through scrip

In any event, were the transactions to be treated as land sales, it is obvious that the vendor's title was not settled and was disputed. Claims that Pororua had no title were still being made years afterwards as late as 1855.⁷ Some disputed that Pororua had an over-right, claiming the Ngati Kahu ancestral title holders at

6. Godfrey to Colonial Secretary, 15 January 1843, BPP, 1844, vol 2, pp 125–126 (doc A21, app 17)

7. See B Rigby, 'A Question of Extinction: Crown Purchases in Muriwhenua, 1850–1865', 14 April 1992 (doc F9), p 45

Mangonui were never subdued, but at least it is clear that their possessory rights were unaffected, for, along with casual residents from Ngati Kuri and Te Rarawa, they continued to reside and cultivate there. Nor had they been driven from their other main areas of settlement: Waiaua, Waimahana, Taemaro, or Motukahakaha. A claim by conquest would necessarily have been stretched.

Most Pakeha seem to have known this and to have considered that the political authority was in fact held by Panakareao. Thus George Clarke reported in 1845:

Some of the [Pakeha] settlers held their lands by direct purchase from Noble or from his father; and others who derived from Pororua, were so conscious of the defective character of their titles, derived exclusively from him and his party, that they unitedly offered a considerable payment to Noble, in presence of Messrs Matthews and Puckey, in 1840, as an inducement for him to ratify their purchases, and acknowledge their titles!⁸

It will be recalled from the previous chapter that, notwithstanding that to all appearances the title was in dispute, and notwithstanding that the transactions were not affirmed, the Governor requested Godfrey to assess the entitlements of the European claimants for the purposes of issuing scrip. This was done without hearing any Maori. The outcome is now described.

When Dieffenbach had visited Mangonui, three years earlier, he described about 30 Europeans living around the harbour, chiefly sawyers and storekeepers. About half of them were interested in land claims.⁹ Many of these were the sawyers who had lived there since 1831, some of whom had married local Maori and saw themselves as permanent residents. They were not generally in a position to accept scrip and they maintained both their residences and their land claims. Commissioner Godfrey dealt with the claims of the various traders individually but without hearing Maori, and arranged scrip where he could.

Thomas Ryan claimed 2280 acres (923 ha) in five blocks, three in the eastern division, one in Mangonui township, and the largest in Oruru. His claims were considered even though the deeds were missing for the three eastern blocks. Based on the declared value of the goods, and the schedule, Godfrey recommended scrip for 514 acres (208 ha). However, Godfrey did not multiply the value of the goods by three as the ordinance required. Godfrey was punctilious in his observance of the law, and this was not a proceeding under the ordinance but was simply a fulfilment of the Governor's request. However, Governor FitzRoy made the multiplication and gave a grant for 1542 acres (624 ha). Ryan was married to a local Maori and so declined to take scrip, but later his interests in Oruru were assigned to Gilbert Mair to meet debts. Mair then took the scrip by assigning the several claims to the Government for 1500 acres in Oruru Valley.

The circumstances in Mangonui at the time

The particular scrip awards

8. GBPP, 1846, p 337

9. E Dieffenbach, *Travels in New Zealand*, London, John Murray, 1843 (reprinted Christchurch, Capper Press, 1974), vol 1, p 229

James Berghan, another sawyer turned settler, with a Maori wife of distinguished rank, claimed 4600 acres (1862 ha) out of seven transactions: four in the east, three in Mangonui township and three in Oruru. Commissioner Godfrey proposed 438 acres (177 ha) scrip, which Governor FitzRoy increased to 1146 acres (464 ha), but it was not accepted. Later the matter went to Commissioner Bell, who awarded 1862 acres (754 ha). Berghan took that land in four places, and the Government kept all that was left over, at Oruaiti, Kohekohe (Cooper's Beach) and Taipa.

In a similar series of transactions, Stephen Wrathall claimed 9800 acres (3966 ha) from purchases in the east and at Oruru. Based on the value of the goods, Godfrey recommended scrip for 242 acres (98 ha), which Governor FitzRoy increased to 640 acres (259 ha). Wrathall accepted the scrip but remained living with his family near Taipa, and later he bought scrip land there. The Government assumed the right to the whole of Wrathall's claims.

George Thomas and Thomas Phillips claimed 3750 acres (1518 ha) in seven transactions in the east and at Oruru. Commissioner Godfrey recommended 279 acres (133 ha) scrip, which Governor FitzRoy increased to 757 acres (306 ha). Under pressure from Maori, the claimants refused this scrip offer. Later Commissioner Bell authorised grants to their half-caste children for 1288 acres (521 ha) taken in the east, with the Government retaining the balance.

Captain William Butler claimed 3640 acres (1473 ha) in two purchases. Commissioner Godfrey recommended scrip for 1054 acres (427 ha), which the Governor approved and Butler accepted. The Government assumed the claim areas. Butler remained, however, on land previously claimed by Ryan and known as Ryan's Point (or Butler Point today).

Clement Partridge and Hibernia Smyth appear to have been speculators who arrived in 1839. They claimed 8000 acres (3238 ha) in six transactions in the eastern district. Commissioner Godfrey recommended scrip for 448 acres (181 ha), which Governor FitzRoy upgraded to 1310 acres (530 ha). This was accepted, the Government then assuming the right to their original claim areas.

William Murphy sought 800 acres (324 ha) at Oparera near Oruru. At that time he was the only trader to have obtained his interests through Panakareao, and he went to Kaitaia to have his claim approved before him and Godfrey. Based on the value of the goods, Godfrey recommended a grant to Murphy of 303 acres (123 ha), but subsequently he took scrip in exchange.

John Ryder, a carpenter for the Church Missionary Society, claimed 200 acres (81 ha) near Taipa at the foot of Oruru Valley, by a deed with Panakareao and others. He failed to appear before Commissioner Godfrey, who therefore recommended no grant. Ryder wrote to the Governor, who offered 200 acres scrip, which was not taken up. Much later, Commissioner Bell assessed Ryder's entitlement at 120 acres (49 ha) and he received a grant for that amount, with a surplus of 167 acres (68 ha) passing to the Government.

5.3 THE INQUIRY IN THE CENTRAL DIVISION

5.3.1 The inquiry generally

The transactions in the central division, extending from Mangatete to Mangonui, were summarised in table C in chapter 3 and depicted in figure 22(a), (b), and (c), covering the Mangonui township, Oruru Valley, and the Karikari Peninsula respectively. Here again Commissioner Godfrey's inquiry can be dealt with briefly, for once more, as far as Maori were concerned, there was no inquiry into the transactions at Mangonui or Oruru owing to the dispute between Panakareao and Pororua.

No inquiry was made of Mangonui and Oruru transactions

Karikari was outside the dispute, however. The Ngati Kahu control of that part of Doubtless Bay had never been affected. There the people were in four major settlements: on the northern end of the peninsula at Parakerake or Whatuwhiwhi, and on the south-eastern base at Raramata (also known as Aurere), and at Mangatete on the south-western side where Colenso described a small village in 1839.

Karikari

Oruru Valley was a potentially productive Maori agricultural district. The population there had declined but in 1840 Dieffenbach had noted:

Oruru

I was agreeably surprised to see the native plantations at Oruru. In neatness they exceed everything that would be done by Europeans with similar means; but strange to say, the natives had preferred the steep sides of a hill to the rich alluvium of the valley.¹⁰

There were only three claims heard in the central division as a result (see fig 27). James Davis, son of the missionary Richard Davis and brother-in-law of both Joseph Matthews and William Puckey of the Kaitaia mission, claimed the south-western base of the peninsula known as Mangatete. Joseph Matthews claimed the south-eastern segment, which took in three Maori blocks: Raramata, Parapara, and Te Mata. On the peninsula, the trader Walter Brodie claimed Kauhoehoe block, named Knuckle Point by Captain Cook. This appears to be the only transaction in Muriwhenua that was not effected under the aegis of either Panakareao or Pororua.

Only three claims heard in central division

The three claims were dealt with when Commissioner Godfrey sat at Kaitaia after closing the Mangonui hearings. There, Godfrey was sitting under the watchful eye of Panakareao. We will consider each claim briefly, the examination of them being more particularly detailed in Professor Stokes's background report.¹¹ We will then consider the award of scrip for land in the centre.

10. Ibid, p 226

11. Professor Evelyn Stokes, 'Muriwhenua: Review of the Evidence', May 1996 (doc p2), ch 17

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Figure 28: Kauhoehoe, Karikari; award to Brodie and Government surplus

5.3.2 Kauhoehoe (Knuckle Point)

The Kauhoehoe (Knuckle Point) transaction is depicted in figure 28. Initially, Brodie's deed purported to acquire, for an assortment of guns, powder, blankets, clothes, and tobacco, the whole northern section of Karikari, about 35,000 acres (14,165 ha). More realism was evident when this was crossed out in the deed and replaced with an alternative area, said to be 1200 acres and surveyed later at 1326 acres (537 ha). Brodie himself claimed that this reduction had been forced on him by Maori, who would not otherwise have affirmed the transaction before the land commissioners. That makes sense, for it transpired that Brodie was not a regular settler intending to farm the land and that he wished only to work a coppermine in the reduced area.

Brodie's claim to
Kauhoehoe

Two Maori attended to support the reduced claim and there was no objection from Panakareao. Based upon the assessed value of the goods and the scale in the Land Claims Ordinance, Godfrey recommended a grant to Brodie of 567 acres. The Government retained 759 acres as surplus. Three years later, Brodie, having

5.3.3

successfully claimed 380 acres in the Bay of Islands, had that area added to his Kauhoehoe award in lieu, thus taking 947 acres there and reducing the Government's portion.

5.3.3 Mangatete

Davis's claim to
Mangatete

Although James Davis's deed was not signed by Panakareao, it was more important to state – and it was so claimed – that the transaction had Panakareao's approval. The area, according to the claim, was 4000 to 5000 acres but Davis claimed only 1000 acres (405 ha). Davis had paid £40 in cash, entitling him, at the scale rate for the year 1837, to 320 acres (130 ha). That amount was recommended.

Sixteen years later, at Bell's direction, the whole of the original transaction area was surveyed at 4880 acres (1975 ha). Bell then decided to increase the grant to Davis to 466 acres (189 ha) and the Government took the surplus of 4414 acres (1786 ha) (see fig 29). There is a long record of Maori protests over the survey and the Government's claim to the surplus. The implication is that the balance area that Davis did not claim for himself was meant to be kept for Maori. The final outcome is related to certain Government purchases that were going on at the same time, and accordingly we deal with this matter more fully later, in chapter 7.

It should be noted for the moment that the Maori village of Mangatete was in this area, across the river from Davis's land. Maori appear to have taken an active interest in the adjoining properties.

5.3.4 Raramata, Parapara, and Te Mata

Matthews' claim
and the Raramata
reserve

A feature of Joseph Matthews' transactions was the assumption that Maori would remain in occupation, that they would continue to have an interest, and that their interests would somehow be protected by the arrangement, presumably because Matthews as title holder could prevent an alienation. There was nothing unusual in this. The missionaries were later to claim that much of the land was purchased to protect Maori interests, and they referred to a large number of Bay of Islands transactions where the resultant trust for the benefit of Maori was clear. Matthews may have been aware of this but Puckey, who appears to have written the deed, may not have known how to give it legal effect. This was apparent not only at Raramata, but also at Otatararau, Kaitaia, as will be seen later.

When the Raramata–Parapara claim came before Commissioner Godfrey, Panakareao stated explicitly:

Mr Matthews has but a small portion of Raramata – the remainder of that place belongs to the natives still.¹²

12. Papers supporting T Walzl, 'Pre-Treaty Muriwhenua' (doc D5(d)), vol 4, p 975

Figure 29: Mangatete; award to Davis and Government surplus

Godfrey noted that, on that part of the land, Matthews was to take only a small piece on which he had a cottage. The area concerned is shown in figure 30.

Based upon the goods – tobacco, blankets, and US\$100, valued in total at £60 – Commissioner Godfrey recommended a grant to Matthews of 306 acres (124

5.3.5

ha). Governor FitzRoy, accepting Matthews' personal appeal, increased the grant to 800 acres (324 ha).

Again, we revisit this matter in more detail in chapter 7, relating to Government purchases, but for the moment we note that, 16 years later, a survey showed the whole area to be 7317 acres (2961 ha). Matthews then appeared before Commissioner Bell and asked:

- (a) That Raramata block be reserved for Maori 'in performance of my promises'.¹³ He described this block as including the whole of that area from the Aurere or Raramata stream to Te Pikinga (as shown on figure 30), an area of 2967 acres (1201 ha).
- (b) That a sacred hill, Pararake, be also reserved for Maori according to their requests.
- (c) That part of his entitlement be passed to William Clarke, surveyor, for survey costs.

Commissioner Bell, allowing for survey and other costs, recalculated Matthews' entitlement at 1748 acres (707 ha). Part, 659 acres (267 ha), was awarded to Clarke, as shown in figure 30. The balance, 1089 acres (441 ha), was awarded to Matthews in two severances, as also shown in figure 30. The smaller severance to the south provided a share, about 177 acres, in the valuable timber country of the Tapuirau bush. The commissioner reduced the Maori interest in Raramata from 2967 acres (1021 ha) to 340 acres (138 ha), cut out as Okokori native reserve, but gave no grounds for so doing. Pararake was not reserved; it was used for a trig station and later as a quarry. The whole of the land not awarded as above, or 5229 acres (2238 ha), was retained by the Government as surplus.¹⁴

This startling situation illustrates Bell's assumption that the transactions had extinguished all Maori interests. Although Maori in fact continued in occupation of Raramata, and although the European party attested to the intention that Raramata be reserved for them, it was still assumed that Maori interests had been extinguished through the intervention of an uncustomary instrument, so that, if Maori were to receive any part of the block at all, it would be by grace and favour only, no matter what promises were made.

There is a long record of petitions over these arrangements also, relating to the failure to secure the proper reserve and the Government's claim to the surplus. As mentioned, they are considered in a later chapter.

5.3.5 Oruru–Mangonui

With one exception, the remaining transactions, in Oruru, Taipa, and Mangonui, were not investigated, except for the purposes of awarding scrip. Most of the affected Europeans had claims as well in the eastern sector. The commissioner

Oruru–Mangonui transactions, including Ford's trust, are not heard; scrip given

13. OLC 1/328 (doc D12(a)), p 44

14. See OLC 1/328, (doc D12(a)), p 49

Figure 30: Raramata, Parapara, Te Mata; award to Matthews and Clarke and Government surplus

simply added to the eastern sector lands the value of the goods said to have been given for lands in the centre, and calculated scrip entitlements on the total value. Those who did not also have claims elsewhere were offered scrip according to the value of the goods given for the central land.

The most significant claim was that of Dr Ford. Again, since matters relating to this claim were not finalised until much later, and then in association with a Government purchase programme, the final outcome is considered in chapter 7. For the moment, it is recalled that Dr Ford was a medical officer for the Church Missionary Society in whom Panakareao reposed considerable faith. The

The widening of the Awanui River. From the Northwood collection, photograph courtesy of the Alexander Turnbull Library (G10650 $\frac{1}{4}$).

The *Apanui* on the Awanui River before the dock of the Northern Steam Ship Company. From the Northwood collection, photograph courtesy of the Alexander Turnbull Library (G4930¹/₄).

evidence is that 20,000 acres was entrusted to Ford, as a place for him, and to hold the land for local Maori according to Panakareao's allocations. Later, the deed was amended to define Ford's share at 5000 acres. Since the dispute between Panakareao and Pororua extended to Oruru, Godfrey could not formally hear Ford's claim and, furthermore, Ford had recently left the Church Missionary Society.

In order to assess his scrip entitlements, however, Godfrey heard Ford in private, in the Bay of Islands. Maori were not involved. Based on the value of the goods delivered, Ford was awarded scrip for 1725 acres, which he accepted. The Government presumed to own Ford's land, as a result, but it presumed to hold, without any further inquiry, not just the 5000 acres (2024 ha) that Ford claimed, but the 20,000 acres (8094 ha) of the original transaction. There was no suggestion of implementing the trust.

The Government assumed the right to all the Oruru–Mangonui land in the same way. Without hearing any Maori, it simply assumed that Maori interests had been extinguished over the whole of the lands which the Government considered had been affected by the pre-Treaty transactions.

Nevertheless, we should not draw too sharp a distinction between the transactions that were investigated and those that were not. On delving deeper into Commissioner Godfrey's proceedings at Kaitaia, we consider Maori understandings of the transactions were not inquired into even for those cases that were heard. Maori expectations at the time of the inquiry were not brought into account, and the perception that Maori affirmed the transactions was merely a matter of form, in our view.

5.4 THE INQUIRY IN THE WESTERN DIVISION

5.4.1 The Western scene at 1843

Conditions in the
west; joint
occupations
continue

The western division, which included Ahipara, Kaitaia, and Awanui, supported the most numerous Maori population in Muriwhenua at this time. The few Europeans there were nearly all connected to the church. They claimed land rights over the whole of the flats from Awanui to Kaitaia. There were Maori settlements in the valley south and east of Ahipara and Kaitaia, and also in the north around Awanui and Mangatete. In addition, however, Maori were also living on the same lands that were claimed by Europeans, from the mission station at Kaitaia to Henry Southee's farm at Awanui.

From his visit in 1840, Dieffenbach has left a description of the area at the time Godfrey conducted his inquiry. In those days entry was by the Awanui River, which was navigable for some distance at high tide, and provided access to the Kaitaia district from Rangaunu Harbour via 'an open though an intricate channel

for moderate-sized vessels'¹⁵ (fig 31). Smaller craft were needed to follow the serpentine course of the river itself. Dieffenbach described the landscape on a trip up the river from Rangaunu Harbour:

The higher we went, the more agreeable was the scene. On the shores were native settlements, with long seines hanging out to dry, and many natives at work mending canoes and their fishing apparatus, for the season is approaching when the shark is caught in great numbers. Here and there fields of potatoes, kumeras, melons, and pumpkins, neatly fenced in, and kept extremely clean, show all the vigour of vegetation for which New Zealand is so remarkable.

Further upstream, Southee's farm was reached:

The maize, growing ten or twelve feet high, and the fields of yellow wheat, bowing under the weight of the grain, showed what this land is capable of producing. Cattle were grazing about, and the well-stocked farm-yard bore testimony to an industry such as is very rarely met with amongst the numerous settlers of all classes who for several years have had almost the whole of the land partitioned amongst themselves, as the generality of them have bought the land for the purpose of speculation, instead of cultivation.

Mr Southee has about 300 natives around him in his immediate neighbourhood, who cultivate bits of land interspersed with his own, and who, for cheap wages, work for him in various branches of husbandry, and thus procure for themselves those European commodities for which they have acquired a taste. He gives them articles to the value of £2 for every acre they clear.¹⁶

Dieffenbach recorded that by 1840 land access had been obtained. A 'bridle road' cut by a party of 50 Maori, some 25 kilometres through the Maungataniwha range, had connected the Kaitaia mission with Waimate and the Bay of Islands. Maori had also cut roads around a village he visited, where he observed that they reaped wheat and ploughed several acres of land.

5.4.2 Joint occupation

Dieffenbach also observed the joint occupation of land by Maori and Europeans and thought it augured well for Maori advancement in agricultural pursuits. Shared land-use fitted the Maori way, but a feature of some of the land deeds in this area was the extent to which the shared-use arrangements had been written into them, in particular the deeds for Awanui, Okiore, Ohotu, and Pukepoto blocks referred to in chapter 3.

It is not clear how Maori understood the joint-use arrangements. If one looked not at the deed but to what was happening on the ground, the only apparent change was that a European was now sharing the land with them. From this it

Joint use and trusts

15. Dieffenbach, vol 1, p 212

16. Ibid, pp 213-215

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Figure 31: Rangaunu Harbour

might be assumed that the European had no larger interest than any individual of the tribe, though undoubtedly possessing high mana on account of certain skills. It is possible that the rangatira saw things differently, and relied upon promises by missionaries that they would hold the land to prevent factions within the tribe from entering into sale agreements with others. This may have been in Panakareao's mind when he advised Commissioner Godfrey, regarding the claims for Pukepoto and Ohotu:

The Natives are allowed to live on and cultivate upon this land but are prohibited from selling or alienating any part of it.¹⁷

Taking a quite different view, the Europeans maintained to Commissioner Godfrey that the deed permitted Maori use only in so far as the Europeans allowed it, and then only for their cultivations. Thus it was stated:

The term in the deed 'also for the use of the Natives' was inserted because I guaranteed to them the undisturbed possession of as much land as they required for cultivation.¹⁸

Subtly, the roles were changing. Where once, and as late as 1839, the missionaries acknowledged that they occupied on Maori sufferance, the inference was now that Maori were tenants at the will of Europeans. When the law changed with annexation, the perception of the arrangements with Maori changed too – at least amongst the Europeans.

In addition, Maori were occupying lands without joint-occupancy clauses in the associated deeds. For example, there were several homes and a Maori 'village' at the Church Missionary Society mission on the Kaitaia–Kerekere block. According to Joseph Matthews, a Government official recorded 'the many native plantations' on the society's ground in 1848, and there were 35 to 40 acres of wheat and potatoes there.¹⁹ There is a further note that Maori were cultivating 'Rawiri's ground' on Joseph Matthews' farm as late as 1856, when the map on which figure 32 is based was prepared.

In any event, it must have seemed to Maori that they had good prospects for growth and development through having Europeans living among them. No doubt the Europeans saw matters the other way around, believing that Maori were sojourners on what was now European land, for the whole of the flats from Kaitaia to Awanui were held under deed by Europeans in only eight blocks, as shown in figure 33.

Dieffenbach was encouraged by Maori agricultural advances when he toured the district in 1840, and he was not pessimistic for their future on account of the large area under deeds. Assuming that the surplus lands would return to Maori, he wrote:

17. Document D5(e), vol 5, p 1680

18. Ibid, p 1679

19. Matthews to Church Missionary Society, 13 April 1848, CMS/CN/MI8

Figure 32: Joint occupations, Kaitaia, Awanui blocks

A great portion of the land has been purchased by a few private individuals; but if the intentions of Government, of not allowing more than 2,500 acres to any one individual is strictly carried into effect, a great part of these purchases will come back to the natives, and without injuring the interests of the latter, government will have no difficulty in acquiring a fine agricultural district.²⁰

5.4.3 Additional payments

The evidence of second and third payments for some areas was likewise played down. It provided a possible clue that Maori did not regard the first transaction as conclusive and that they expected ongoing payments to be made. There seems to be little doubt that the leasing of land more closely approximated Maori cultural expectations than a sale.

5.4.4 Maori conditions to confirmation

While Dieffenbach assumed the surplus lands would return to Maori, others had not the same view, despite Lieutenant-Governor Hobson's statement at Waitangi that 'lands unjustly held will be returned'. It would have been apparent to the discerning, from the debate in Australia on the New Zealand Land Claims Act, that the surplus was to pass to the Government.

The expectation that the surplus lands would return

It is very likely that rumours that the Government would take the surplus reached New Zealand, and that Pakeha would have made that known to Maori. We can well imagine, for example, that the Reverend Joseph Matthews would have conveyed this view, expressing his concern to Panakareao that the Government might take part of the land that had been entrusted to the care of the missionaries, or the word could have passed to him from the Hokianga.

We cannot be sure what Maori would have made of such intelligence. So far they had no cause to be other than happy with the arrangements, the Europeans being simply conjoint occupiers of Maori land. None the less, it was consistent with Maori culture that the rumour of the Government's intention to take the surplus land was raised directly with Government officials at the first public opportunity.

After the aborted hearings at Mangonui in February 1843, Godfrey shifted his inquiries to Kaitaia. He reported, relying upon the interpretations of H T Kemp:

Panakareao's caveat in the east

Immediately after my arrival at Kaitaia, all Nopera's tribes assembled there in considerable numbers; and in a public conference many violent and seditious speeches were made by Nopera and other chiefs.

In these harangues they declared—

- I. That the sales of land around Kaitaia, already made by Nopera and his party to individuals, should be acknowledged; but that any surplus lands, ie those

20. Dieffenbach, vol 1, p 221

Figure 33: Pre-Treaty transactions, Kaitaia–Awanui

the Government does not grant to the claimants, will be resumed by the chiefs who sold them.

2. That they will sell no more land either to individuals or to the Government.
3. That the chiefs will exercise all their ancient rights and authority, of every description, as heretofore; and will not in future allow of any claims or interference on the part of the Government.²¹

Again, we would caution against undue reliance upon Kemp's summarised interpretation, bearing in mind that words like 'sales of land' had no Maori-

21. Godfrey to Colonial Secretary, 10 February 1843, Turton, *Epitome*, p B7

language equivalent. Even so, however, the declaration is extremely significant: it is as clear a statement as one could expect that the transactions were not affirmed if the effect was to allow the Government to take the ‘surplus’. The Crown constantly urged in the Tribunal hearings that the pre-Treaty transaction was less important than the Maori affirmation of the transaction before the land commissioners. If that were so, what clearer condition to affirmation could there have been?

More particularly, we see the transactions as a whole as affirming the traditional Maori view that their contracts related to people, not property. They had ‘purchased’ Matthews and the other missionaries, and had provided land for them. They had not sold the land, but, according to their customs, had placed Pakeha on it. It was not their understanding of the contract that any part of the land that was not needed could pass to anyone else.

The Maori understanding of personal contracts

The view that land rights were personal and not assignable was not novel or peculiar, for it had pervaded other Pacific cultures for over a thousand years. It was not unknown to English law, either, that lands might be entailed.

This, then, was Panakareao’s statement of contractual understanding. It also seems likely, however, that Matthews was of the same opinion. From then onward both Matthews and Panakareao acted as though any surplus lands would naturally stay with Maori. This appears to have been Matthews’ expectation with his own block at Otararau (or Tangonge), but we will return to that point later.

Panakareao’s significant opening statement that any surplus lands would be resumed by the chiefs seems to have had no effect on the commissioner. The inquiry carried on, and the opening statement was not treated as restricting the affirmation of the transactions in any sense! This highlights a difficulty that continues to confront Maori to this day when bodies are established to hear Maori submissions, especially if the sittings are on marae. What is said in open debate on the marae or similar forum counts most for Maori, and all else is subservient to it. In official inquiries, however, the marae commentary is set aside and all that counts is the evidence in the ‘hearings’, where witnesses can be examined in the European manner. Customary evidence is thus disregarded. That, it appears to us, is what happened with Commissioner Godfrey 150 years ago. This Tribunal is well aware, from its own proceedings, how important messages are relayed on marae during the opening proceedings. Colenso recorded his view of the importance of the preceding marae debate for Maori:

Panakareao's caveat is discounted by the commissioner

Some of the New Zealanders were truly natural orators, and consequently possessed in their large assemblies great power and influence. This was mainly owing, next to their tenacious memories, to their proper selection from their copious expressive language; skilfully choosing the very word, sentence, theme, or natural image best fitted to make an impression on the lively, impulsive minds of their countrymen. Possessing a tenacious memory, the orator’s knowledge of their traditions and myths, songs, proverbs, and fables, was ever to him an exhaustless mine of wealth. For the New Zealander, both speaker and hearer, never tired of

5.4.5

frequent repetition, if pregnant and pointed. All the people well knew the power of persuasion – particularly of that done in the open air – before the multitude. Hence, before anything of importance was undertaken, there were repeated large open-air meetings, free to all, where the tribe or confederates were brought into one way of thinking and acting by the sole power of the orator. Their auditories applauded and encouraged with their voice, in an orderly manner, as with us. Not unfrequently has the writer sat for hours (some twenty or thirty years ago) listening with admiration to skilled New Zealand speakers arousing or repressing the passions of their countrymen – scarcely deciding which to admire the most – their suitable fluent diction, their choice of natural images, their impassioned appeals, or their graceful action!²²

Sadly, we have no record of the addresses that can be presumed to have been delivered on the marae on other important occasions, before transactions between Maori and European were entered into.

5.4.5 The conduct of Godfrey's inquiry

The inquiry is
mechanical

Godfrey's inquiry thus carried on in a methodical but mechanical way, missing the vital issues while concentrating on form. Naturally, Maori came forward to affirm the transactions. The word of Maori was their bond at that time and a failure to stand by promises would cause too much loss of mana. But it was their own word they were affirming none the less – that is, the promises as they saw them to be. If they affirmed that a settler was entitled to occupy certain land, for example, it did not follow they had sold it. Historian Philippa Wyatt argued that, considering the recorded responses of Maori witnesses, which followed a set formula, a picture emerges of a series of standard questions from the commissioner based upon a reading of the claim and the deed then before him, with such variations as the written material might require:

Is this your mark on the deed now shown to you?
Was the deed read and explained to you before you signed?
Did you sell the land stated in the deed to the claimant?
Did you receive the goods stated in it?
Did you receive any further payment?
Did you have the right to sell this land?
Have you sold it to any other?

And thus the formulaic Maori evidence as recorded for the claims before him:

That is my mark on the deed now shown to me. It was read and explained to me before I signed it, etc, etc.

22. W Colenso, 'On the Maori Races of New Zealand', *Transactions and Proceedings of the New Zealand Institute*, no 1, 1868, pp 48–49

The Crown responded that such a peremptory approach could not be assumed. It could be that Maori had full licence in speaking and the commissioner merely recorded those matters that had to be proven. We doubt that that was so – except at the opening, the very part that was ignored. The minutes of the hearings do not match the tenor of the preceding open debate as recorded. Even were there free discussion in the hearing, however, the minutes indicate that the commissioner saw no need to minute anything other than the limited remarks he recorded. In this respect he was doing all that was necessary when the commissioners dealt with the land sales, from European to European, in New South Wales. We have no reason to doubt that Colonel Godfrey was acting in an honest, conscientious, and methodical manner. It appears to us none the less that he was marching to a drum rather than making a full assessment of everything that might be relevant. The main trouble, however, as we said earlier, was the assumption that Maori had sold the land, or must be deemed to have done so. The customary comprehension of transactions was simply not considered.

5.4.6 Bell's inquiry and Maori reserves; Tangonge, Okiore, Awanui

Bell's inquiry, 16 years later, altered the contractual relationships. Godfrey had simply given the area to which the European claimant was entitled, repeating (except in Puckey's two cases) such joint occupancy or other special clauses as may have been in the deeds. Bell, however, not only increased the Europeans' share substantially, but he gave unconditional grants, severing such ancillary obligations as may still have been apparent.

In return, he provided Maori with a few, small reserves, but with such parsimony that the effect was not to benefit Maori, but to limit them; to remove their claims to a continuing right of occupation of the surplus lands.

It should first be noted that the need for reserves would not have been apparent to Maori for some time, in our view. Irrespective of Godfrey's determinations on paper, on the ground the land was used jointly as before, and there was nothing to show that any surplus land existed or had passed to anyone else. Maori remained part of the missionary community at Kaitaia, or, depending on the point of view, the missionaries remained part of theirs.

Philippa Wyatt described the position some four years later. Panakareao stood by the missionaries in 1847, when Governor Grey sought to discredit them on account of their purchases.²³ Joseph Matthews testified in 1848 that Kaitaia Maori:

have a village and plantation [on the mission station] . . . [and] have lived with us in harmony for 14 years. . . . The two chiefs whom Noble [Panakareao] first deputed to guard our settlement are living inside my fence [ie, on Otararau,

23. See P Wyatt, 'The "Sale" of Land in Muriwhenua: A Historical Report on Pre-1840 Land Transactions', 16 June 1992 (doc F17), pp 43–47

adjoining the mission station] and have done so ever since our station was formed.²⁴

A subsequent survey of the land depicted 'Rawiri's ground'. Rawiri Tiro was one of the two rangatira whom Panakareao had assigned as guardians of the mission. The evidence of Robert Burrows to Commissioner Bell of 20 September 1859 shows that Maori were still occupying the land at that date.²⁵

It should be noted, however, that Godfrey had seen the need for reserves. He had been operating under the Land Claims Ordinance Amendment 1842, which was later disallowed by the Imperial Government but which had specifically vested the pre-Treaty land in the Government. Thus, at the time, any part not awarded to the Europeans was automatically the Government's in terms of the law. Godfrey was thus concerned that there should be Maori reserves. As claimant counsel pointed out, when Godfrey had heard the Kaipara claims, in 1842,²⁶ he had reported that Maori had 'certainly never calculated the consequences of so entire an alienation of their territory', that they had been 'allowed and, frequently encouraged to remain upon the lands with an assured promise or understanding of never being molested' and that their 'cultivation and fishing and sacred grounds' had properly to be reserved to them. The assumption was that reserves would be made as a matter of course, from out of the sold land, by the surveyors who came later. Thus Godfrey's directions could be general, as in Puckey's case: that 'all cultivation or other grounds in the present occupation of the natives and any quantity judged to be required for their use by the Protector of Aborigines' should be reserved.

Bell, however, either allowed no reserves or made minimal ones. Thus, in Puckey's case, Maori received only 246 acres (100 ha), and there was no one to play the Protector of Aborigine's role.

Despite the continuing joint occupations, Bell severed the interests of Pakeha and Maori, providing secure Crown grants for the former and reserves for the latter. It may have made a difference that, by the time of Bell's operations, Panakareao was dead, for those who followed him may not have appreciated Panakareao's condition that the whole of the surplus was to return to them. They argued for reserves when they were entitled to the whole surplus, although it may be that that was their minimum position. It was clearly the most that Bell would allow.

Bell's reserves, or the lack of them, must now be mentioned because of subsequent complaints. Sometimes, however, the root causes of a complaint are clearer the further removed one is in time. The issues were, in this instance, whether the lands were ever sold, in the first instance, and whether it was ever agreed that the surplus could pass to the Government. Nevertheless, as the consequences of the Government's investigation became apparent to Maori,

24. Joseph Matthews to Church Missionary Society, 13 April 1848, CMS/CN/MI8

25. OLC 1/675 (doc D12(a)), p 24

26. See closing submissions of Williams and Powell (doc NI), vol 1, p 90

usually after about 1890, Maori complaints focused on particular incidences. This was not unnatural, since what the Government had done was never clear to Maori, and the complaints were often valid in themselves. The politics were also such that the most Maori could argue for was a minimal position. Still, they were symptomatic of a larger problem than the ones they gave vent to.

With regard to the particular reserves, we refer briefly to those below, although some will need to be revisited later, in more detail.

- (a) *Tangonge*: A significant complaint concerned Tangonge block, which, in our opinion, was part of Matthews' Otararau transaction. Just as Maori continued to occupy a part of Otararau adjoining the mission station, being 'Rawiri's ground' as earlier referred to, so also, it appears, Maori were in occupation of the Tangonge section of the Otararau land to the south. Maori have claimed that Matthews promised Tangonge to them, and cut off 685 acres (277 ha) for that purpose. The Government considered, however, that the land excised was Government surplus land and presumed to own it. The last seven Maori families, all otherwise landless, were not removed from that land until the 1960s, over a century after the transaction that gave rise to the problem. Tangonge will be dealt with further in a subsequent chapter, relating to the Government purchase programme.
- (b) *Okiore*: A further complaint concerned Ford's Okiore property. Unfortunately, Ford had long since left the area, and Panakareao had died, by the time Bell arrived. The Maori then there do not appear to have appreciated that most of the 8000 acre (3238 ha) block was meant to be held for them. They merely sought a reserve on the west coast. Bell does not appear to have been aware of the true circumstances either, however, as no reserve at all was allowed.
- (c) *Awanui*: Numerous Maori had lived with Henry Southee on the Awanui block, but Henry Southee too had died before Bell came. Most of his lands had passed to William Maxwell, who was opposed to Maori continuing to live in the area. None the less, in this instance 200 acres (81 ha) was given for what appears to have been a few hundred Maori. The differences should be noted, however: Maxwell received 4198 acres (1700 ha), Southee's estate 500 acres (202 ha), the surveyor 400 acres (162 ha) and the Government 8360 acres (3383 ha), while more than 300 Maori received 200 acres (81 ha). Despite the larger questions of whether there had been a sale or whether Maori were entitled to the surplus, the initial complaint was only that Bell had promised a further reserve in addition to the one mentioned, and this had not been allocated.

Again, these complaints are considered in more detail in a later chapter.

One area the land commissioners never allocated, however, was much prized by Maori at the time as a rich food resource, Lake Tangonge. The area is shown in figure 34. Here the complaint was that the natural resource was destroyed by

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Figure 34: Lake Tangonge

draining the surrounding wetland. In 1933, the Native Land Court declared as Maori land the bed of Lake Tangonge, or such of it as then remained after the extensive drainage works. In 1970 it was vested in the Lake Tangonge Maori Incorporation for Te Rarawa and Aupouri.

5.4.7 The outcome

The outcome of Godfrey's inquiry in the western division, as adjusted 16 years later by Commissioner Bell, may be summarised as follows: after assessing the value of the goods paid – blankets, clothes, implements, and the like – against the scale, and allowing for survey and other costs, the total area affected, from Kaitaia to Awanui, was apportioned as follows:

16,199 acres (6556 ha) to six Europeans
15,966 acres (6441 ha) surplus for the Government
446 acres (180 ha) for several hundred Maori

The areas are illustrated in figure 33.

5.5 THE INQUIRY IN THE NORTHERN PENINSULA

The distinctive feature of Godfrey's inquiry in the northern peninsula is that virtually no Europeans were living there when the inquiry was made. Maori were living mainly around Parengarenga and Houhora Harbours. Only two blocks were concerned, Muriwhenua Peninsula, some 65,000 acres (26,306 ha) (although the size was not known at the time); and Kaimaumu, some 1200 acres (485 ha) claimed by Thomas Granville.

5.5.1 Kaimaumu

William Potter claimed that Thomas Granville had acquired 1200 acres at Kaimaumu in exchange for gunpowder, tobacco, blankets, spades, and hoes and had since transferred the property to him. Based on the value of the goods, Potter was declared to be entitled to 225 acres (91 ha), which Potter then assigned to William Macky.

However, the size of the full block was never settled. In 1861 Resident Magistrate White considered that the given boundaries circumscribed no more than 50 acres (20 ha). Commissioner Bell then determined that the area of 50 acres should be reserved for a township. Macky was paid out in land scrip, the Government assumed the claim rights, and the land was included in the Government's purchase of the 13,555 acre Wharemaru block (5486 ha). The possible location of Kaimaumu is shown in figure 35.

Figure 35: Possible location of the Kaimaumu claim

5.5.2 Muriwhenua Peninsula

When Commissioner Godfrey investigated Richard Taylor's claim, he ought to have been aware that transactions of this type, where lands were held in trust for Maori, were not unusual. In November 1840 the Church Missionary Society missionary and Chief Protector of Aborigines, George Clarke, submitted to Lieutenant-Governor Hobson a list of 17 Church Missionary Society deeds where the land was held 'for the Aborigines of New Zealand'.²⁷ As we have also seen, the elements of a trust could be inferred from the deeds, or from extrinsic evidence, for Oruru, Raramata, Mangatete, and Okiore.

As stated in chapter 3, Taylor claimed an area of uncertain size (now known to be about 65,000 acres), to be held for the local hapu, whom he referred to

27. Clarke to Hobson, 16 November 1840, IA 1/1841/135, NA Wellington (doc FI, sub-doc 1)

compendiously as Te Aupouri. He claimed the land for himself and his partners. It was uncertain whether Waikuku was included; the boundaries in the deeds suggested it was not.

Unfortunately, Taylor's old land claim file has long since been lost. A copy of the claim describes the land as:

formerly the abode of the Aupouri, a tribe which was conquered and expelled by the Rarawa. It was chiefly to give a home to the remnant of this tribe that I was induced to make the purchase, which intention is stated in my deed and at this time there are nearly 100 of the Aupouri residing upon it. . . . My intention, as expressed in the deed, is to give up to this tribe the greater portion retaining only sufficient to form an equivalent for the property invested.²⁸

No record survives of the evidence given, or of the reasons for any decision. It is not known, for example, how the commissioner dealt with the problem that Taylor's transaction post-dated the proclamation of 14 January 1840, prohibiting further private purchases and declaring any after that date to be absolutely null and void.

The commissioner's report of 16 February 1843, following the Kaitaia hearing, shows that the claim was opposed by Maori from the area and that Maori parties were at loggerheads. After the hearings, however, according to Godfrey, Nga Takimoana had withdrawn his opposition when he found that his own family lands were not included. This appears to refer to Waikuku.

Again, it is not known what happened subsequently, except that, on 22 October 1844, Governor FitzRoy issued to the Reverend Richard Taylor a Crown grant of remarkable composition. It gave the area as 1704 acres (690 ha), which is presumably the size of Taylor's assessed entitlements based on the value of the goods, but it then described the land by the same boundaries as in the original deed, thus enclosing some 65,000 acres but excluding Waikuku. The trust to protect the land for the tribe was not provided for, however. Instead, these words were simply added at the end of the Crown grant:

Excepting any cultivation or other grounds required by the Aupouri Tribes, at the discretion of the Protector of Aborigines more particularly excepting Waikuku.²⁹

Subsequently, however, Taylor sought to excise an area for himself. Of the 1704 acres, his two partners claimed half, or 426 acres (172 ha) each, which, by an arrangement with Resident Magistrate White, they took instead on the eastern shore of Mangonui Harbour. By a plan of 1852, Taylor delineated his half-share of 852 acres, but, adding 12 acres for roads, he took a total of 864 acres (350 ha). The land granted to him, as shown in figure 36, was called Kapowairua.

28. Taylor to Colonial Secretary of New South Wales, 12 November 1840, Taylor MS/254, ATL

29. Taylor's Crown grant, 22 October 1844 (doc B15, sub-doc 4)

Figure 36: Kapowairua, Taylor's grant

As for the balance, 64,136 acres (25,956 ha), the Government claimed it as surplus land. Such a legal fantasy could not be sustained, however, and eventually, shortly before the sale of the land, the Government did not contest a Maori claim to the Native Land Court for title. From out of that confused picture,

latter-day Maori were left with the impression that the Kapowairua block, which went to Taylor, was the land that Taylor was to hold as a permanent trust for the tribe. There was no other land in Taylor's name. Accordingly, Maori lived upon that block. They were there until the 1960s, but the land had long since been sold and they were eventually required to move. They never understood why. When the Tribunal visited the Kapowairua block and spoke with the local people, with those who had once been living on the land, they continued to maintain that this land was theirs as of right, that it was all that was left of the land Taylor had secured for the tribe.

5.6 ASSESSMENT OF THE GENERAL ISSUES

Counsel urged, and we agree, that the transactions should be measured according to how they were affirmed. The essential point here, however, is that in no case was there a full and binding affirmation. The transactions were not affirmed, nor formally inquired into, by anyone, throughout Muriwhenua East, Oruru, or Mangonui. All others were affirmed at Kaitaia, but on condition that the surplus was returned; and in no case was that done. Those affirmations, moreover, must be seen as confirmations of the transactions as Maori saw them, in terms of their own culture. The only certainty is that, customarily, Maori had a particular view of their transactions that was integral to their society, and the evidence, once shorn of its cultural bias, does not convince us that Maori society had so changed that this view had been ceded.

We now examine more particularly the issues relevant to the ratification process.

5.6.1 Adequacy of the legislation

In the Treaty of Waitangi debate of 1840, a full investigation of the preceding transactions, the return of lands unjustly held and the protection of Maori interests had all been promised, but neither the Land Claims Ordinance 1841 nor the Land Claims Settlement Act 1856 sufficiently set out the matters that had to be dealt with to fulfil those promises. While it was probably intended that inequitable contracts would not be sanctioned – and the dismissal of claims to 9.2 million acres elsewhere shows the effect the legislation had on the wildly extravagant claims – it seems the comparatively moderate transactions in Muriwhenua were regarded as equitable sales, without the need for further question, provided there was some minimal affirmation.

The ordinance did not require the commissioners to consider, as it should have, whether there was a contract in terms of mutual comprehension; and, if so, the adequacy of consideration; the measures needed to protect any trusts and ancillary obligations; the sufficiency of other land; the certainty of the alienors'

title; the clarity of boundaries; or whether the land was fairly apportioned between Maori and European.

5.6.2 Adequacy of examination

There was no sufficient evidence that the transactions were seen by Maori as sales, and no adequate inquiry was made of whether Maori in fact saw them that way. This was despite the fact that Maori were in occupation of lands ‘sold’, assuming the right to be there; or despite the evidence, well known at the time, that Maori were demanding further payments for lands allegedly alienated. It was not considered either whether, in accordance with their customs, Maori had bargained not for the goods but for future benefits, or whether their agreements envisaged an ongoing personal relationship with particular individuals. Based upon our inquiry, we are of opinion that Maori would not have seen the transactions as sales, in the European sense, either at the date of execution or in 1843.

5.6.3 Sufficiency of mutuality

Our opinion is further that Maori and Pakeha were so much in different worlds, in 1843, that no new contract, on mutually agreed terms, may be deemed to have arisen out of the commissioner’s inquiries.

5.6.4 Conditions on affirmation

The Maori opening statement at Kaitaia constituted a conditional affirmation only. Notwithstanding that statement – that the transactions were affirmed on the basis that the surplus land would be resumed by Maori – the transactions were treated as having been affirmed unconditionally, with lands passing to both the European claimant and the Government as a result.

5.6.5 Extent of affirmation

In view of their extensive custom on ancestral tenure, then, without clear evidence to the contrary, Maori must be taken to have conditionally affirmed the transactions as they understood them to be – that is, that use rights were given in return for ongoing support. The nature of the Maori reality, and their tenure system, needs emphasis. No matter how much a purchaser might talk of ‘permanent alienation’, to Maori, for so long as the land could not be packaged and shipped away, it would necessarily remain where it had always been, with the ancestral hapu. Amongst Maori, elements of this opinion have never ceased to apply.

5.6.6 Extent of support

Lack of objections to sales is not relevant in this situation. There would be no objection to a sale if a sale was not perceived. Similarly, while no record was made of the various rangatira who assembled for the opening at Kaitaia, the absence of any hapu from a meeting is not an indication of consent. Hapu have traditionally expressed neutrality or disapproval by staying away, or voting with their feet. Moreover, despite Gipps's charge to establish 'proof of conveyance according to the custom of the country', the commissioners did not themselves choose to adopt the custom of the country in making their inquiry. A hui was required but none was arranged, and the hui that Maori themselves held, at the opening, was disregarded.

It was equally serious that the land commissioners required corroboration from only one or two Maori; this, to Maori minds, could only have meant that nothing important was happening. Support required a positive affirmation, so that, when hapu representatives stayed away from a meeting, it was likely to mean, for example, that the hapu did not agree with the proposal, that the hapu did not consider its own interests were affected, that the hapu did not want its own interests to be affected, or that the hapu felt it had no right to be there as the business of the day had not been brought on by them.

5.6.7 Adequacy of consideration and ongoing benefits

Although the Land Claims Ordinance had some provision for the equity of the transactions to be considered, and although Governor Gipps, Lord Stanley and other officials had said the price to Maori must be looked at under that heading, we have found no evidence that the adequacy of the consideration was investigated. The equity of the transactions appears to have been presumed. As claimants pointed out, Maori themselves would have placed little value on the land if, to their minds, they were only trading a right of occupation or something like a lease. We accept that, for most Maori of the time, the real 'consideration' would have been the ongoing benefits to the hapu, and to future generations, from the occupation of the hapu's land. In the Maori scheme, the initial 'purchase' price is likely to have been of little comparative importance.

We also accept the Crown's argument that there were no criteria by which prices may have been assessed and that the schedule in the Ordinance was irrelevant for that purpose. This emphasises, however, how sound policy was needed. The issue was not really the price for the land sold, but the benefits to Maori from settlement. This might be assessed in terms of the increased value of the land retained, as Lord Normanby had said, so that a measure for the adequacy of consideration was the amount of land reserved. We think there were ways of ensuring that Maori could have benefited in both the immediate and longer terms. All that was lacking was the will to legislate for a comprehensive settlement plan.

5.6.8 Adequacy of reserves

There was no inquiry whether Maori would retain sufficient land for their immediate and future purposes, as Lord Normanby had required. The ordinance did not explicitly compel it. This was singularly unfortunate, for, in our view, the assurance of fair shares was one way Maori and Pakeha could both have been satisfied.

The essence of the Crown's position was that Maori retained considerable other lands at this time, but we do not think that is the point. The commissioners were dealing with the prime land, in the central band where most Maori lived. Maori were entitled to a fair share of that land, not the land on the perimeters, and this could have been the whole of the land of some hapu.

There was also no inquiry into the number of Maori affected by the pre-Treaty transactions, and the nature, location, and sufficiency of any other land left to them.

5.6.9 Adequacy of title; adequacy of settlement plans

It appears basic that there is no equitable sale of land if all those with an interest have not agreed. In no case, however, was the vendors' 'title' examined. Had it been, it should have been found that not all with land interests had disposed of them. This is unsurprising, for, as we see it, the 'alienors' were exercising a political authority to allocate use rights, not to extinguish the underlying right of the local hapu.

J Williams of counsel for claimants argued that Maori could alienate no more than they could give. Consequently, he contended, the purchasers received no more than a 'native title', no different from that which Maori possessed: the right of occupation subject to support for the group. His argument followed the lines of the findings of an international tribunal which, in 1925, investigated the old land claims in New Zealand on the petition of William Webster, a citizen of the United States. That tribunal reached the same conclusion that the rights acquired by any purchase before 1840 were 'no more than a native customary title'.³⁰

While we would reserve the term 'native title' for the artifices of law, divorced from anthropology, we generally concur with Mr Williams's approach. It follows that no absolute or unconditional title should have been given by the Government, or that the Government should not have assumed an unconditional right to the surplus, without a further agreement with all affected.

We have broad sympathy with Crown counsel's point, however, that in the circumstances of the time, the Government could not have gone behind Panakareao's back to treat with all and sundry. We agree that it would not have been appropriate to sideline the Maori leadership in that way. This all points,

30. See F K Nielsen, *American and British Claims Arbitration*, Washington DC, United States Government Printing Office, 1926, p 540

however, to the inappropriateness of the process as a whole. Most needed was a plan, agreed between the Maori leadership and the Governor, for how settlement would be arranged, the lands for Maori and those for settlers, how continuing benefits to Maori might flow, how Maori authority might be recognised and provided for, and so on. These were not matters that could have been dealt with by ad hoc land transactions, as the circumstances show, and as the effect was then, and has been ever since, to cast the whole debate about equity between Pakeha and Maori only in legal terms.

As we see it, the problems were not primarily those of ‘price’, ‘title’, and the like; the real problem was the assumption that all matters could be resolved by the application of English law, authority, and process alone, when what was most needed was a fair and agreed political plan.

5.6.10 Adequacy of purpose

In all, the purpose as we see it was primarily to grant lands to settlers and secure a surplus for the Government. To that end, it was assumed that the transactions were equitable, that the alienors had right and title and that, subject to minimal ratification, a sale in Western terms was intended. The protection of Maori interests was not really part of the play.

5.6.11 Adequacy of the Bell commission of inquiry

It was not the function of the second commission, under Bell, to review the workings of the first. In addition, it did not consider the claims in eastern and central Muriwhenua which Godfrey left untouched and for which the Government, assuming the claims were genuine and equitable, had issued scrip. The main work of the Bell commission was to tidy an uncertain title situation, converting vague Crown grants into certain ones by surveying the original grantee’s entitlements. In the process, Bell made it his mission to define the surplus for the Government as well. To secure the cooperation of the settlers, which was needed since no one else knew the boundaries of the original transactions, Bell so arranged the rules as to increase substantially the settler’s lands in return for the survey of the total area.

The context was elucidated by Professor Bill Oliver, a well-known and senior historian who was engaged in an independent capacity by the Crown Forestry Rental Trust.³¹ In Professor Oliver’s analysis, Bell may be seen as driven by political motives, rather than by impartial legal criteria. The Government had wavered over whether to pursue its surplus land claim, but Bell made it his concern to get as much land as possible for European occupation and use, and to secure the remaining surplus for the Government, irrespective of its existing use by Maori or their likely needs in future.

31. For Professor Oliver’s account, see doc L7

The consequences may be summarised as these:

- Such arrangements as Godfrey may have made to recognise joint occupancy arrangements were cancelled, unilaterally. Bell enabled unconditional titles to issue to the European grantees, disregarding all references to joint occupation in the original transactions or any trusts that might be construed from the deeds or the surrounding circumstances. The result was not to affirm the deeds but to change them substantially.
- In return, Bell might make reserves for Maori, but those he made were few and niggardly, without any consideration of Maori needs or interests, and without regard to comparable equities. Thus out of one block with a joint-occupancy arrangement, one European, William Puckey, would receive 3337 acres while an entire Maori community would receive only 246 acres. No allowance was made for those cases where land was jointly occupied in fact but without a joint-occupancy clause in the deed.
- It was not considered whether the Government, in taking the surplus, might acquire no larger right than that given in the original transactions, and whether its land might also be subject to joint-use arrangements or to certain fiduciary responsibilities.
- No surplus land returned to Maori in terms of Panakareao's conditional affirmation. The effect of Bell's substantial increase in the grants to European claimants was to reduce that surplus. The effect of his overall operations was to disregard Maori evidence entirely.
- Maori were not called upon to be heard, even in the few cases which had not been heard by Godfrey and in which scrip had not been taken, so that Bell was obliged to hear the matter anew. It was simply assumed that valid alienations had been effected.
- Although Bell's commission was constituted as a full court of record, no Maori evidence was minuted, no account of the argument was maintained and no reasons for his decisions were given. Consistently, it was simply written that matters were explained to the Maori, who then agreed, and without any account of the explanation given.
- Bell appears to have assumed that, once Maori had signed a conveyance, all their customary interests were at an end and that he, Bell, for the Government, had a wide discretion on what he might do. Matthews gave evidence, for example, that Raramata block was kept out of the sale and was to be reserved for Maori. Bell simply treated it as sold, then, as a matter of discretion, allowed a reserve for a small part.
- Consistently, the Maori reserves were minimal. Quite disregarding Matthews' assertion of a 3000-acre reserve for Maori at Raramata, that reserve was cut back to 340 acres. It was simply assumed that Tangonge had been cut off as Government surplus. Out of Southee's large claim, the Maori reserve was only 200 acres. In that case the Maori were rather lamely advised that they could run their cattle on the 'government land' until the

Government, or settlers, needed it. And, although Davis claimed only part of Mangatete, the Government itself surveyed and took the remainder, without reserves.

5.6.12 The extent of both inquiries

- Although it has regularly been maintained, in response to Maori petitions, that the pre-Treaty transactions in Muriwhenua were fully inquired into, first by one commissioner in 1843, and then by another in 1856, that is simply not the case. Of the 62 European land claims, only 14 were ever examined. Most of those in eastern and central Muriwhenua have never been considered.
- The 14 that were considered were only ever examined by one person.
- In no case was the Maori understanding of the transactions inquired into.
- In each case the Maori condition to the affirmation of the transactions, that the surplus must return, was not observed.

In all the circumstances, we consider there were no grounds for treating any transaction as a full and final conveyance of the land described in it.

5.7 ASSESSMENT OF THE ISSUE OF SURPLUS LANDS

A significant consequence of the ratification process was the issue left hanging of the right to the surplus lands, the lands left over after only part of a ‘purchase’ had been awarded to the ‘buyer’. Who should have the surplus, Maori or the Government?

Before an answer is attempted, it is emphasised that the surplus land issue is secondary, in the claimants’ case, to the primary point that the land was not sold in the first instance. It may be presumed that the Maori argument had always been that way. If, as the claimants contended, no absolute title was conveyed, and the arrangement was more like a lease with Maori retaining an underlying right, then of course there was no surplus for the Government to lay claim to. However, in later years, when the Government presumed that sales had been effected and would countenance no other view, Maori were obliged to limit their claim to the surplus. No other claim was likely to succeed. In the climate of the day, a claim that there had been no sale would have been laughed out of court. Thus Maori have frequently found the need to reframe their arguments in terms of the adjudicator’s mind-set. It should not be thought, therefore, that a larger Maori claim would not have been brought in the past, had it been practicable to bring it.

The issue is also distinct from that of the Government’s right to regulate. There was no argument that the Government may limit the amount of land any one

Surplus land debate is secondary for claimants

Compare right of regulation

person may buy, as a matter of national policy. The question of whether the Government was entitled, as of right, to the surplus is another issue.

Personal
contracts that
were not seen as
sales

We see the Maori claim as standing on five tiers. On the first, the transactions were not sales, and in our view the Government has never established that they were. If nothing properly passed, there was no surplus that could be properly claimed. On the second, it was fundamental that the transaction was personal to the European concerned with whom an ongoing relationship was expected. A stranger could not intervene without a licence and nor could rights be assigned to strangers without approval from the hapu. There needed to be an agreement between the ancestral land holders and the occupier and, accordingly, there was no space for the Government to intervene.

Governor's
statements

The third tier assumes that the Governor knew of the surplus land issue when the Treaty of Waitangi was signed, the debate having started beforehand. The argument is that, if the Governor failed to say that the Government would take the surplus land, before the Treaty was signed, he should be stopped from saying so afterwards, for the Treaty might not have been signed had Maori known the Governor's intention. The Governor in fact said that lands unjustly held would be returned, creating an expectation that this would apply to any lands not allowed to the 'purchaser'. Likewise, Governor FitzRoy said that the surplus land would return, and this may have influenced Maori in affirming the transactions, a point which is considered later.

Theoretical

The fourth tier considers the Government's claim to be overly artificial, founded on a complex theory of feudal land tenure which would not have applied if an allodial tenure system, as found in most of Europe, had happened to exist. We consider that the Government should acquire Maori land by direct dealing with Maori, not by a legal sidewind.

Conditional
affirmation

The fifth tier is obvious. The transactions were ineffectual without affirmation, and affirmation was conditional on the reversion of the surplus to Maori.

Government
claim and the
doctrine of tenure

The basis for the Government's claim to the surplus land was not simple. The matter was also dealt with by successive governments in an inconsistent, obscure, and irresolute manner. The theoretical position was apparent from 1839, when the New Zealand Land Claims Ordinance was first proposed in New South Wales.³² Governor Gipps explained, after obtaining instructions from England, that it was founded on a political, legal theory that English law would be ushered in on the assumption of British sovereignty and, with it, the doctrine of tenure. Under this doctrine all land belonged to the Crown, subject only to any native rights of user until those rights were extinguished. It followed that no individual could hold land except by Crown grant. In applying this theory, it was assumed that a sale by Maori did not convey the land to the purchaser, but none the less it extinguished the Maori interest, leaving the land unencumbered in the

32. The position is explained fully by D Loveridge in 'The New Zealand Land Claims Act of 1840', 18 June 1993 (doc 12)

Government's hands to dispose of as it wished. The Government could then decide how much it would give to the purchaser and what surplus it might keep for itself.

Also, on this thinking, the surplus land issue had nothing to do with Maori. If Maori had sold a block of land, then they had sold the whole block, and how the block was then divided between the Government and the buyer was purely a matter of debate for the Europeans.

The New South Wales land buyers argued against this theory, contending that, at the time of sale, Maori were a sovereign and independent people, that any contract was a matter between them and Maori only, and the Government had no right to intervene. The settlers in New Zealand argued much the same, but some admitted that the Government had the right to control land-buying – to prevent undue land aggregation, for example. It followed, however, that any part denied to the purchaser should return to Maori. Many North Auckland settlers had developed close relations with Maori, and were strongly of the view that any part denied to any purchaser should return to Maori. We suspect they appreciated full well that Maori never intended to convey an absolute and exclusive right to the whole of the land in the first instance. It was only much later, when Bell offered substantial advantages to those settlers who cooperated, that positions changed.

New South Wales
debate

Despite the debate in New South Wales, the royal instructions associated with the Treaty of Waitangi, under the hand of Lord Normanby, did not propose the transfer of the surplus land to the Government. Lord Normanby went to some lengths to propose special arrangements for an inquiry into the pre-Treaty transactions, to prohibit further private sales, and to prescribe the conditions on which the Government might acquire land, that is, by 'fair and equal' contracts with Maori. None the less, nowhere in his instructions to Hobson did Lord Normanby advert to any 'surplus land' doctrine or suggest that, following the Land Claims Commission investigations, land 'sold' to pre-Treaty 'purchasers' but not awarded to such purchasers should become Crown land rather than revert to Maori. Given the concern of the Colonial Secretary to ensure that Maori were fully protected and dealt with on the basis of 'fair and equal' contracts, the lack of any instruction to return the surplus land is not surprising. We consider that, had the British Government intended to take the surplus land, it would or should have said so before the Treaty was signed. It must therefore be presumed that the Government did not intend to take the surplus land, or any land not granted to Europeans except that it should be acquired by the Government by 'fair and equal contracts', as Lord Normanby had said.

Normanby's
position

Nor did Governor Hobson, or his representatives, mention any surplus land proposal during the Treaty debate. Instead, the opposite impression was given. When challenged, Hobson replied that the transactions would be inquired into and lands unjustly held would be returned.

Hobson's position

FitzRoy's position

Governor FitzRoy's position was even more clear-cut. In December 1843, he promised publicly that the surplus land would return.³³ The newspaper *Southern Cross* reported that the Governor's speech had 'allayed the fears of the natives' and that the Governor stated he would 'most unequivocally and with the utmost sincerity disown any and every intention on the part of the government to appropriate . . . the surplus lands of the original settlers, they are to revert to the original owners'.

Commissioner Bell argued in a formal report of 1862 that FitzRoy's views must be discounted, as they were contrary to advices from Lord Stanley.³⁴ Bell's partiality was thus apparent. Whatever the validity of the Governor's opinion, however, or whatever FitzRoy's competence to make such a comment when he was still new as Governor, the fact is that the opinion was given, and was not retracted; and it is doubtful whether Lord Stanley objected. FitzRoy wrote to Stanley in October 1844:

While it was the object of the local Government to raise as much money as possible by the sales, of lands, irrespective of the real interests of the settlers and the colony, it was of course an object to take as much as possible from the old settlers, with the view of those lands (not reverting to their original owners, but) becoming disposable for sale by the local Government.

Such a step as selling those 'excess lands' was happily never attempted, however generally contemplated. The natives would never have allowed it to take effect; and the attempt to do so would have injured the character of the Queen's Government very seriously, if not irretrievably; so tenacious are the natives of what they consider to be strict justice. As yet it is quite impossible to make them comprehend our strictly legal view of such cases.³⁵

In brief, FitzRoy was not denying the right of English law, but was warning against exercising it. Nothing was done about the surplus land for over a decade and, to all intents and purposes, on the ground it remained in the possession and ownership of Maori. With reference to the country as a whole, it was recorded in the Report of the Outstanding Claims Select Committee of the House of Representatives in July 1856, which led eventually to Bell's commission:

Some of the grantees are in possession of the lands granted; but a greater part of those claimed are unoccupied by anyone. Some portions have been resumed by the natives, and some where the native title has been extinguished, and no grants made, have been considered Crown Lands and taken by the Government as such; although in reality it has generally had to make the natives some additional payment. Still, in a great number of cases no possession has been obtained by any one; the natives disputing the ownership of the land in the absence of the claimants, or the insecurity of the titles that hold preventing the latter from attempting to enforce their supposed rights.

33. Dr Martin, *Martin's New Zealand*, p 183; *Southern Cross* 30 December 1843

34. F D Bell, report, AJHR, 1862, D-10, p 18

35. BPP, vol 4, pp 408-409 (doc A1, sub-doc B31)

There is some evidence that officials in Governor Grey's time likewise led Panakareao to believe that the surplus land would return to Maori. James Berghan, it was reported, had translated into English a letter for Panakareao, which was published in the *New Zealander*. In this, Panakareao, following standard rhetoric, stated a belief 'that the Queen was going to take away, first, the land of the missionaries, and then the land of the natives', a clear reference to the surplus land. The official response was to reassure Panakareao that the Government had no intention of depriving Maori of their land, but:

Grey's position

with respect to the missionaries, that it was in contemplation to take away a portion of land from individuals who had procured . . . larger quantities than they could use, to the exclusion of other Europeans, and reserve the portion taken away for the use of the natives.³⁶

At the very least governors and officials wavered over the surplus lands, assuming alternative positions at different times.

In our view, the resurrection of the Government's claim to the surplus land, in 1856, was flawed. The first error was in the assumption that the land had been unconditionally sold. The second was in the assumption that the doctrine of tenure, as described earlier, in section 4.3, was applicable to the circumstances of New Zealand. We do not see that it was. All the land belonged to Maori, the English legal doctrine had not been agreed upon when the Treaty of Waitangi was signed, and the underlying title was already spoken for.

Flaws in the Government's approach

It should be noted, too, that, as a result of the doctrine of tenure, the Government had no need to prove its acquisition of Maori land.³⁷ Whatever the legal theory that the Government must prove the valid extinguishment of native title, in practice the Government had no need to produce a conveyance or other instrument. Its assertion that it had extinguished native title, by *Gazette* notice or otherwise, either was conclusive in court, as shall be seen later, or left Maori having to prove the land was still theirs.

Consistently, Maori have described the surplus land taking as 'confiscation'. Regularly, governments and commissions have said it was nothing of the sort. To the Maori mind, however, when the Government claimed the surplus land

Surplus as confiscation

36. Nugent to Colonial Secretary, 2 January 1848, enclosed in Grey to Earl Grey, 17 March 1848, no 35, BPP, vol 6, pp 99–100

37. Compare, however, Lord Davey in *Nireaha Tamaki v Baker* (1901) AC 561, 576: 'the assertion of title by the Attorney-General in a Court of Justice can be treated as a pleading only, and requires to be supported by evidence'; and Kent McNeil, *Common Law Aboriginal Title*, Oxford, Clarendon Press, 1989, pp 84–85 (and see also pp 92–93): 'The Crown cannot, on the strength of its fictitious original title, require a person who is in possession of land to prove his right by producing a royal grant . . . The Crown must prove its title like anyone else'. In practice, however, the method by which the Crown became possessed of Maori land has remained a mystery to Maori, and, since the Crown has not been obliged to keep a title of its own properties, ready access to information about its acquisition has not been available from the Lands and Deeds Office. Where Maori have sought to obtain an answer by proceedings in the Maori Land Court for ascertainment of title, statutory provisions have prevented the Maori Land Court from inquiring without the Government's consent.

because it held the underlying title, it was confiscating the underlying title of the tribe; and when it took the surplus without an arrangement with Maori, it was abrogating the rights and obligations Maori considered they had contracted for with the Europeans.

Summary In summary, the Government's derivative claim to the surplus lands was contrary to Maori law and to the Maori contractual terms. There was no agreement with Maori that the Government was entitled to the surplus land, and the Maori affirmation of the pre-Treaty transactions in Muriwhenua was on the express condition that the surplus would return to them.

The 1946 commission We depart in this respect from the previous opinion of the Royal Commission of Inquiry on Surplus Lands under Sir Michael Myers, the former chief justice, in 1948. That commission considered that compensation was due to Maori, but for other reasons. The difference, however, is one of fact. Counsel for the Maori petitioners, counsel for the Crown, and the commission itself, all worked from the erroneous advice given to the commission that the transactions had been fully investigated by both Godfrey and Bell, and that the transactions had been affirmed as absolute sales.

Surplus lands and moral imperatives Professor Oliver drew attention to a moral imperative that was also not considered in the previous debate.³⁸ Should the Government have been holding the surplus land in any event, if Maori were already prejudiced through the excessive alienation of their land? It would have been a simple matter to write into the legislation governing Bell's inquiry that the commissioner should consider the lands retained by each hapu, whether they had retained sufficient for their present and future needs, and whether provision should be made for them from out of the surplus land. Such an arrangement was within the ambit of the Governor's Treaty exhortation that 'lands unjustly held would be returned', but no inquiry of the Maori circumstance was made.

5.8 THE PROCESS AND MAORI AUTONOMY

The land commissioners' inquiries have been described, and observations have been made that there was never an inquiry into whether valid contracts had formed. The further concern, however, is that the process as a whole was wrong. It demeaned Maori as supplicants before a foreign court where their actions would be judged on foreign terms. To adopt the Maori metaphor used in the Treaty debate, the process put the Governor up and Maori down. We can see more clearly now how important it is that, when two cultures meet, their joint affairs must be resolved in a way that treats both as equals, and allows for differences to be mediated between them.

The colonisers, presuming to be superior as a race, imagined matters should be managed on their terms. Maori, who were no less independent as a people,

38. W H Oliver, 'The Crown and Muriwhenua Lands: An Overview' (doc L7)

equally assumed that their government of their own districts would continue. Subservience to another cultural regime was so outside their experience, and so contrary to that to which any free people would knowingly subscribe, that any act of diminution imposed upon them would not necessarily be seen as such until some time afterwards, if at all. Accordingly, while we have examined matters in terms of the land claims inquiry process, we do not thereby say that any part of that process was appropriate. Consistently behind Maori claims is the Maori expectation, legitimate in Treaty terms, that they should control their own affairs, transact with others on their own terms, and have their own cultural expectations respected.

Nor do we imply, in examining the Government's process, that Maori acquiesced in it. It is doubtful whether it was even understood. In any event, there were two processes at work when Godfrey was sitting: his own, and that of Maori. In the Maori process, which went first, it was declared that the eastern and central transactions would not be submitted for investigation but the Europeans would be advised which transactions were approved. At Kaitaia, the terms and conditions for acknowledging the transactions were declared, and the rangatira would 'exercise all their ancient rights and authority of every description, as heretofore'.

Thus two processes applied, each valid in its own legal terms, and the two parties were to act as though their own process prevailed. The eventual outcome thus depended on who had the ultimate power. Again, in these circumstances, an adjustment of power was really required between the Governor and the rangatira, with the mediation of jointly agreed policies for the sharing of the Muriwhenua land.

The need for some alternative arrangement may be more apparent now than it was then, but it does not follow that alternative modes of operating were unknown in those early days. Previously, certain missionaries had imagined a form of Maori rule using missionary advisers, the British Resident James Busby had promoted a political confederation of tribes with British advisory opinion, and the Treaty of Waitangi had presaged a partnership. In the new emerging world, several options were possible.

