

## CHAPTER 3

# BACKGROUND

A knowledge of the early colonial history of the Rangitaiki district assists an understanding of the Ngati Awa reactions that led to the confiscation of their land. Unlike other hapu closer to European settlements, those of Ngati Awa had little experience of European expectations. In their area at the time of the wars, only Maori law applied. Their prior experience of European matters was somewhat limited to the power of guns and trade with Europeans.

### 3.1 MUSKET WARS

Muskets came to Ngati Awa territory with the Nga Puhi invasions of the 1820s and early 1830s under Hongi Hika, Korokoro, Pomare, and Panakareao. The Maori of the Bay of Plenty, Rotorua, and Urewera were unable to withstand the invaders, who had previously acquired muskets. The invaders drove deep into the hinterlands of the Bay of Plenty in annual expeditions, causing widespread destruction and devastation, and some of Ngati Awa were captured and taken as slaves to Northland. It was not until 1833 that the tide turned, when Ngati Awa obtained muskets and Panakareao was repulsed at Whakatane.<sup>1</sup>

Paradoxically, the introduction of guns eventually led to peace and prosperity through the growth of trade with Europeans. The early trade in dressed flax in exchange for guns was to lead to much more. Initially, however, the possession of guns escalated local warfare. The battles between hapu of the different descent groups mainly concerned the control of Ohiwa Harbour. The fighting appears to have ended around 1836, following the defeat of Ngati Awa at the hands of Tuhoie in the battle at Te Kaunga, the reversal of that at a subsequent battle at Te Teko, and the negotiation of a peace at Ohui.<sup>2</sup>

A significant side-effect of the musket wars, from the first Nga Puhi invasions, was a greater degree of hapu collaboration for security. Ngati Awa and Ngati Pukeko, for example, had been substantially separate groups, but they fought together at this time and stand together today in the Ngati Awa runanga.

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1. These expeditions are described in S Percy Smith, *Maori Wars of the Nineteenth Century*, Christchurch, Whitcombe and Tombs, 1910

2. See Elsdon Best, *Tuhoie: The Children of the Mist*, Auckland, AH and AW Reed, 1972, pp 355–389 (cited in doc A17, pp 55–57)

### 3.2 TRADERS

Unlike other districts in Northland, Auckland, Taranaki, Whanganui, and Wellington, there were no European settlements anywhere near the Ngati Awa homelands. There were also no more than a handful of traders, the first being Phillip Tapsell, who married into Te Arawa and established a trading station at Maketu around 1830.<sup>3</sup> Those who based themselves at Whakatane, later moving inland and marrying local Maori, were Bennett White, George Simpkins, and James Melbourne.

The initial trade in flax and pigs soon expanded, and by 1840 large areas were reported to be planted in wheat, potatoes, European vegetables, and fruits. Though we have no particulars specific to Ngati Awa, it is indicative that at 1849 Maori between Whakatane and Maraenui (near the mouth of the Motu River east of Opotiki) owned 22 schooners shipping produce to Auckland. From there, it was taken as far afield as the Californian and Victorian goldfields. In the 1860s, which were war times, water-driven flour mills were constructed over a wide area at Poronui, Te Umuhika, and Otipa.<sup>4</sup> Following the land confiscations, however, and the settlement of large numbers of European farmers near to the main towns, this golden period of Ngati Awa expansion came to an end.

A few traders were involved in pre-1840 land transactions that were later confirmed as conveyances by the old land claims commission. We doubt that Maori saw these as Europeans saw them: that is, as land sales involving the severance of all forms of Maori interest and authority. Maori had a very clear philosophy about land, which could not by nature depart from its ancestral associations. They also had a distinctive view about the incorporation of outsiders, especially valued outsiders like traders, whose residence amongst the hapu made them subject to Maori authority, and whose receipt of resource use rights carried with it obligations to the local rangatira. These matters were explored in the *Muriwhenua Land Report*, and appear to have application here.<sup>5</sup>

There were few such transactions, however, and no Crown purchases to introduce European concepts of land enclosures, absolute ownership, and land saleability to the region.

### 3.3 MISSIONARIES

The missionary influence was not nearly as strong here as elsewhere. Henry Williams, the head of the Church Missionary Society in New Zealand, visited Whakatane and Ohiwa Harbour in 1826 and 1828. Urgent requests were made of him for guns, but he declined them. No missionaries were appointed, and it was not until the 1840s that a

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3. Phillip is sometimes referred to as Hans, but his son was more commonly called this: D M Stafford, *Te Arawa: A History of the Arawa People*, Auckland, Reed, 1991, pp 192–196; see also W T Parham, ‘Phillip Tapsell’, DNZB, vol 1, pp 425–426, T11

4. A Van der Wouden, ‘Maori Shipowners and Pakeha Shipbuilders in the Bay of Plenty, 1840–1860’, *Historical Review: Bay of Plenty Journal of History*, vol 33, no 2, pp 91–100

5. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, chs 1 (esp pp 3–6), 2, 3

Roman Catholic priest was established at Whakatane. Even then, there were still too few missionaries to cover the area. The greater evangelising may have come from Ngati Awa returning from bondage in Northland, where they were instructed and later released by the many missionaries there. Nothing is known of their theology, however. Northland missionaries reported an extraordinary Maori interest in theological matters but noted that Maori tended to conceptualise biblical accounts in their own terms.<sup>6</sup>

### 3.4 THE SIGNING OF THE TREATY OF WAITANGI

It is important to recall, in reviewing the New Zealand wars and confiscations in proper context, that at all prior times Maori law and authority applied throughout this part of the Bay of Plenty. In the language of the day, it was said that the Queen's writ had still to run there. It is only on paper that the assertion of British sovereignty can be said to have introduced a different regime.

The Maori text of the Treaty of Waitangi was affirmed at Whakatane on 16 June 1840 by 12 persons associated with Ngati Pukeko, probably on behalf of themselves and others whom they may have represented. On paper, it was declared that the Governor was empowered to make laws as necessary for peace and good order. Loyalty to the English Crown was implied.

It is difficult to assess today the impact of the Treaty at the time of its signing. Much depends on the extent to which it was memorialised by some extravagant action, Maori tending to create some drama to ensure that significant occasions enter oral tradition through being oft spoken of later. No particular incident is recalled in respect of the Treaty's execution at Whakatane. In this case, the impression created may have been transient.

To the extent that the Treaty may have been recalled, its significance may not have been seen exactly in terms of its words. If the message was similar to that conveyed in Northland and elsewhere, as shown by the record of the debates, Maori would have been especially attracted to the Governor's undertaking to establish peace and good order. This was not only or even mainly because of problems between Maori and Pakeha, to which the Treaty itself refers, but because of the wars between Maori after the introduction of guns.

The missionaries reported, with regard to other places, that the prospect of peace between Maori weighed heavily with them when the Treaty was signed. The missionaries had already been successful, shortly before the signing, in reducing Maori warfare and sorcery and in virtually eliminating cannibalism, slavery, infanticide, and summary executions from Maori society. The same practices appear to have

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6. L M Rogers, 'Henry Williams in the Bay of Plenty in 1826 and 1828', *Journal of the Whakatane Historical Society*, vol 15, no 1, pp 28–30; L G Keys, *The Life and Times of Bishop Pompallier*, Christchurch, Pegasus Press, 1957 (cited in doc A18, pp 13–18); James Belich, *Making Peoples: A History of New Zealanders from Polynesian Settlement to the End of the Nineteenth Century*, Auckland, Allen Lane and Penguin Press, 1996, p 168

abated in this district too, although the missionary presence was not great. Even so, the Governor's law for the maintenance of peace and good order was seen as a valuable reinforcement.

To the extent that loyalty to the Crown was required, it has to be borne in mind that the Maori text of the Treaty conveyed no notion of fealty, but those who drafted it were clearly conscious of the strong jealousy that Maori had for their autonomy and thus created more the image of a partnership or alliance. Maori acknowledged the status of the Queen to make laws, and the Queen acknowledged the rangatiratanga, or independent authority, of the hapu. Acting on historical evidence of the execution of the Treaty, the Court of Appeal found in the 1980s that the Treaty conveyed the notion of a partnership.<sup>7</sup>

Again, if the concerns and oral promises recorded elsewhere in the Treaty debate had any parallel in Whakatane, Maori would also have been anxious to maintain their own law, and the right to do so would have been acknowledged. As noted in earlier Tribunal reports, oral undertakings were expressly given that Maori law and custom would be respected.<sup>8</sup> We do not know if that was discussed in this case. However, this is implicit in the Maori text from the acknowledgment of the Queen's sovereignty and Maori rangatiratanga. This implies that, to the extent practicable, the legal principles affecting both peoples would need to be respected.

In practice, however, the British policy was to introduce English law gradually, with the expectation that Maori law would eventually be replaced. In his instructions to Lieutenant-Governor Hobson, Lord Normanby advised him that, until Maori 'can be brought within the pale of civilised life, and trained in the adoption of its habits, they must be carefully defended in the observance of their own customs, so far as these are compatible with the universal maxims of humanity and morals'.<sup>9</sup>

### 3.5 LAW

In districts where Maori law predominated, Governor Gore-Browne and his successor Governor Grey sought to introduce English law and to provide some administration for local affairs through the adaptation of the traditional Maori runanga.<sup>10</sup>

7. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA)

8. See, for example, *Muriwhenua Land Report*, pp 112–114; see also Claudia Orange, *The Treaty of Waitangi*, Wellington, Allen and Unwin, 1987, p 53; David Williams, *Te Kooti Tango Whenua: The Native Land Court, 1864–1909*, Wellington, Huia Publishers, 1999, pp 117–118; Alan Ward, *A Show Of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Canberra, Australian National University Press, 1974, p 45

9. Normanby to Hobson, 14 August 1839, *Speeches and Documents on New Zealand History*, W D McIntyre and W J Gardiner (eds), Oxford, Clarendon Press, 1971, p 15 (citing Colonial Office United Kingdom file 209/4, pp 251–281). In a circular letter to chiefs of 27 April 1840, Hobson wrote, 'The Governor will ever strive to assure unto you the customs and all the possessions belonging to the Maoris' (cited in Ward, p 45). In 1840, it was recognised that, 'without some positive declaratory Law authorising the Executive to tolerate such customs, the Law of England would prevail over them, and subject the Natives to much distress and many unprofitable hardships': Russell to Hobson, 9 December 1840, BPP, vol 3, pp 145–169. As to the statutory expression of policy, see the preamble to the Native Exemption Ordinance 1846, section 10 of the New Zealand Government Act 1846 (UK), and section 71 of the New Zealand Constitution Act 1852 (UK).

10. Ward, pp 104–105, 125–126, 132

The traditional runanga was a forum for settling tribal policy, managing resource allocation, or resolving disputes utilising traditional processes. Runanga met not at regular times and places but as occasion required or allowed, and they could take place at the level of the hapu, or several hapu together, or at the level of different descent groups, as with the planning of an expedition of some sort. Their formality was evident in settled understandings about appropriate conduct and the form and order of speaking.

Speaking of the country as a whole, we cannot be sure how extensively the scheme operated. The somewhat grandiose descriptions of new runanga structures in various divisions of a district appear to have existed only on paper in many cases. Nor is the record of large numbers of Maori assessors an indication that the scheme was in full operation. Several rangatira were appointed as assessors and received an assessor's salary, but the Governor also used the scheme to buy the loyalty of rangatira, revoking their positions and terminating their pay if they ceased to support him. The appointments are not evidence that the appointees actually performed an assessor's function.<sup>11</sup>

Very little prospect existed of introducing English law in any substantive way at any time prior to the Ngati Awa confiscation. There was only one European to implement the scheme for the whole of the districts of Tauranga, Rotorua, and Whakatane when Resident Magistrate Thomas Henry Smith was appointed to Rotorua in 1852. He was withdrawn in 1856 and not replaced. Then Henry Tacy Clarke was appointed resident magistrate in Tauranga in 1859. Thereafter, civil commissioners were appointed over the resident magistrates with instructions to establish a system of local administration and justice based on Maori runanga. T H Smith held that office for the whole of the Bay of Plenty from March 1862, and was stationed in Maketu. This was well after the war had broken out in Taranaki.<sup>12</sup>

Grey proposed to introduce English law through runanga meeting on a more regular basis under European magistrates with leading local Maori as assessors, or with Maori assessors alone if no magistrate was available. In the latter case, it was expected that Maori law would apply at first but that, gradually, English law would be brought in.<sup>13</sup>

There was some attempt to get the system going amongst the Ngati Awa hapu. In May 1862, Smith passed through the district. He claimed to have had some support for the runanga system amongst Ngai Te Rangihouhiri, Ngati Hikakino, and Te Tawera at a meeting at Matata, but it was qualified support at best. Te Hura, the leading speaker for Ngai Te Rangihouhiri, is reported to have said that:

he was quite satisfied to accept the Governor's system; he saw nothing in it to excite suspicion, and should it hereafter appear that they had been deceived, he could easily renounce his connection with the Government as he now entered into it, and he would not scruple to do so. Meanwhile he was willing that the thing should be tried.<sup>14</sup>

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11. Ibid, pp 142-144

12. Ibid, pp 80, 130

13. Ibid, pp 125-126

14. Smith to Mantell, Minister of Native Affairs, 28 May 1862, AJHR, 1862, E-9, p 20 (RDB, vol 15, p 5647)

Smith reported that there was support from Rangitukehu at Te Teko, but that generally there was also considerable suspicion of English law. He was unable to get approval for the system at Whakatane because the leaders were away, and neither did he gain support upriver at Kopeopeo.<sup>15</sup>

There is evidence that runanga were operating at various places soon afterwards, including Te Runanga o Te Horo at Whakatane, where Wepiha Apanui was a member, but these appear to have been traditional runanga and there is no evidence that they were established for the purpose of applying English law. They in fact reported to the civil commissioner but were also used for local administration. Funds were channelled through them to assist in agriculture or the development of flour mills and the like, and they appear to have cooperated with the civil commissioner for that purpose. No resident magistrate was appointed for the district, however.<sup>16</sup>

The position of Bay of Plenty Maori during the wars was summed up by retired chief justice Sir William Martin, who said that they had not ‘assented to our dominion’ and were therefore in the position that North American Indians were recognised as being in – ‘small communities entitled to the possession of their own soil, and the management of their own internal affairs’.<sup>17</sup>

It appears to us that, prior to the confiscations, the Ngati Awa hapu were on the outer edge of Pakeha commerce, Christianity, and colonisation. There were a few traders at the river mouths, there were no missionaries before 1840 (and only a few thereafter), and no Government officials closer than Maketu or Opotiki. Although in 1858, shortly before the outbreak of war, the number of European settlers in New Zealand had grown to outnumber Maori and some Maori near the main centres had accepted or been bound to accept English legal rules, in this far-flung corner of the British Empire there were very few Europeans and the law was distinctly Maori.

It was peaceful none the less. During the wars in Taranaki and Waikato, no Europeans felt the need to move. Loyalty to outsiders, including Europeans, depended not on any particular predisposition but upon a history of good relationships and working alliances. No doubt loyalty to the Queen was seen in the same way – a beneficial relationship needed to exist in practice, not just on paper.

### 3.6 PRINCIPLES OF THE TREATY OF WAITANGI

While the Treaty may have had little influence on Ngati Awa minds during the first 20 years after its execution, some of the Ngati Awa leaders were reminded of it when war with Europeans broke out in Taranaki in 1860. At that time, Maori throughout the country were marshalling under the banner of the Maori King. To isolate the King and gain Maori support for the Government, Governor Gore-Browne summoned a

15. Smith to Mantell, Minister of Native Affairs, 28 May 1862, AJHR, 1862, E-9, pp 20–22 (RDB, vol 15, pp 5647–5649)

16. Sewell to Smith, 14 December 1861, AJHR, 1862, E-9, pp 3–4; Sewell to Smith, 3 March 1862, AJHR, 1862, E-9, pp 17–18; Smith to Mantell, 28 May 1862, AJHR, 1862, E-9, pp 20–22 (RDB, vol 15, pp 5630–5631, 5644–5645, 5647–5648)

17. Martin to Native Minister, 23 December 1865, AJHR, 1866, A-1, p 70

‘Maori Parliament’ at Kohimarama near Auckland, where the first item on the agenda was to reaffirm the Treaty of Waitangi and loyalty to the Queen.

Leading Maori from throughout the country attended, including five representatives of Ngati Awa.<sup>18</sup> The Treaty and loyalty to the Queen were affirmed without dissent. The general Maori position was that they had not departed from the terms of the Treaty. Greater significance may have lain in the fact that the Governor had chosen to resurrect the Treaty and thus had implicitly reaffirmed it himself.

It is also clear, however, that Maori understood the Treaty in terms of a partnership between Maori and the Queen, where the Queen’s sovereignty and Maori autonomy had both to be respected. To an extent, the Governor himself gave credence to this view by summoning that which he called a Maori parliament, as though Maori too would have a say, at a national level, on that part of the governance of the country that particularly affected them.

It followed as a result that, while the Governor gained support for the Treaty, he did not gain support for his action in starting the war in Taranaki or for his opposition to the Maori King. Most Maori thought that the Governor was in the wrong and was acting contrary to the Treaty.<sup>19</sup> Amongst those who took this view were those who spoke for Ngati Awa.<sup>20</sup>

As will shortly be seen, the war begun in Taranaki soon spilt over into Ngati Awa territory and resulted in the assertion of Maori law and the slaughter of a Crown official by a section of Ngati Awa. In time, this would lead to the confiscation of land from all the Ngati Awa hapu. There are major questions in terms of the Treaty of Waitangi. Could land be taken by force in a wartime situation? Given the state of affairs in Ngati Awa territory at the time, to what extent were Maori obliged to respect the Governor’s law and to what extent was the Governor obliged to respect the law of Maori? Were there in fact areas of cooperation that ought to have been acknowledged and developed?

The Treaty guaranteed:

to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

In addition, it was stated during the execution of the Treaty that Maori law would also be respected. As discussed in the *Muriwhenua Land Report*, the issue was distinctly raised and an unequivocal assurance given.<sup>21</sup>

Also, as found in earlier reports, a tribe’s right to hold possession of its traditional resources carried with it the right to possess in terms of its own laws and preferences according to how they existed then or might develop over time.<sup>22</sup> We emphasise the

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18. *Te Karere*, 1860 (cited in doc A18, p 39)

19. Ward, pp 115–118, 272

20. *Te Karere*, 1860 (cited in doc A18, p 39)

21. *Muriwhenua Land Report*, pp 112–114

22. See, for example, Waitangi Tribunal, *The Whanganui River Report*, Wellington, GP Publications, 1999, pp 25–26

developmental aspect. There is a European tendency to see Maori law as custom, and custom as static. We think it right, however, to emphasise instead that Maori law was in a continual state of development and that it is the right of all peoples not only to have their own laws but to develop them over time. Maori law is no different from European law in that it simply reflects the values of a community, and values change.

We have already noted major changes made to accommodate missionary views even before the Treaty was signed. New attitudes developed to sorcery, slavery, cannibalism, and infanticide, for example. More significantly, the missionaries introduced a new god and the New Testament value system. Yet, despite the scale of these changes, the Maori value system was not impaired. On close analysis, the missionaries' effect was to augment Maori law rather than replace it. Many Maori values were in sympathy with Christian ethics in any event, though, as with Christian ethics, they were not always perfectly practised. The Maori philosophy on appropriate relationships between people and between people and environmental gods survived substantially intact.<sup>23</sup>

In Treaty terms, the Maori right to possess according to laws of their own was conditioned only by the Crown's need for laws 'to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order'.

The Maori text of the Treaty put beyond doubt the right of Maori to their own law, save for cases where the Governor was obliged to intervene to ensure the maintenance of universal standards. The Maori text assured Maori full authority, or rangatiratanga, over their lands, their homes, and all their taonga or treasures, the word 'taonga' being by no means confined to objects. Authority necessarily includes law. The usual Maori word for this authority was 'mana', but the Treaty coined a new word, 'rangatiratanga', in view of the equal association of mana with personal qualities.

In the light of subsequent history, as reviewed in earlier Tribunal reports, Maori saw the retention of their rangatiratanga as the Treaty's pivotal point. In their traditional thinking, the respect paid to the independent mana or rangatiratanga of all groups was the key to keeping the peace.<sup>24</sup>

Maori saw rangatiratanga as applying to all people located on their customary lands, irrespective of the English invention of sales and land titles. As was discussed in the *Muriwhenua Land Report*, land rights were given with the customary expectation that newcomers would respect the tribe's continuing interest in the administration of land resources.<sup>25</sup>

If the Treaty's terms are analysed from an English point of view, it is arguable that rangatiratanga applies only in respect of Maori-owned land, and so did not apply once land was sold. If examined from a Maori point of view, that is not sustainable. Maori did not read the text in that prescriptive way; no doubt because their customs had no place for the English title and land transfer system. Their rights applied to

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23. See *Muriwhenua Land Report*, pp 50–52

24. See, for example, *Muriwhenua Land Report*, pp 110–115

25. *Ibid*, pp 21–29

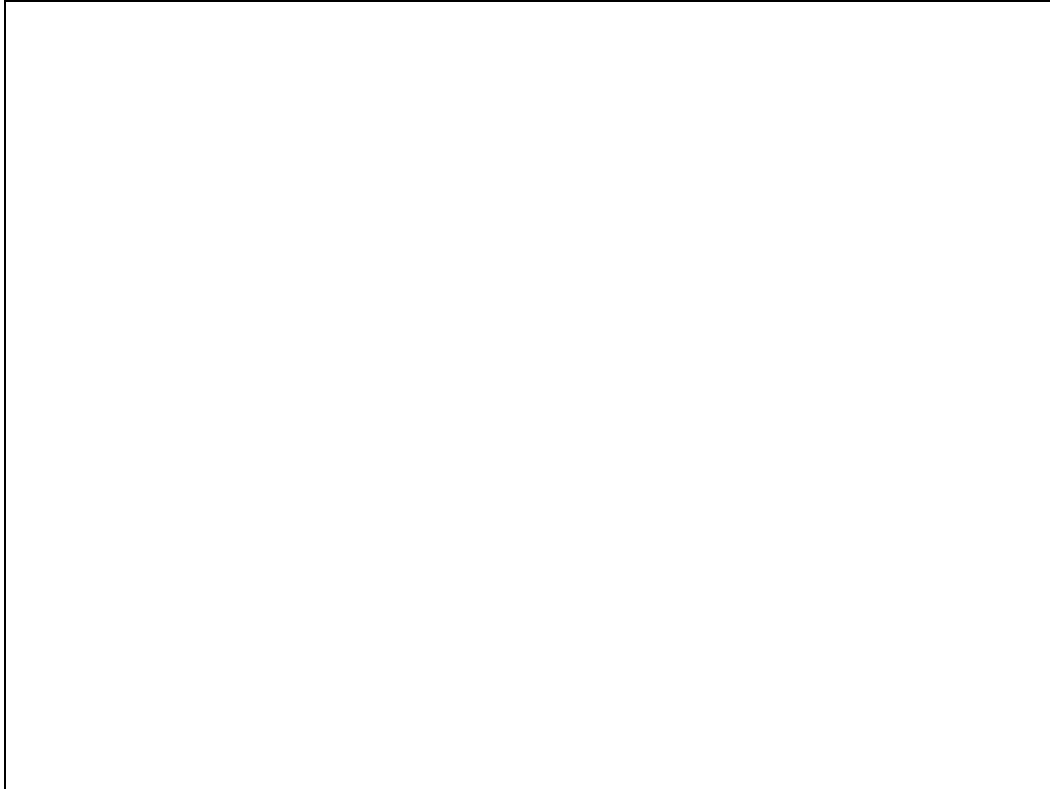


Photo 2: Maize harvesters at work, Whakatane district.  
Photo courtesy Whakatane District Museum and Gallery (D965-1).

ancestral land and that which was ancestral land must always be ancestral land, for ancestral association is an unalterable, historical fact.

The following Treaty principles and terms appear to us to be relevant to this case:

- the Governor could make laws for peace and good order in the country;
- Maori law was to be respected;
- the loyalty owed by Maori to the Crown was no more nor less than the duty owed by the Crown to respect the rangatiratanga of Maori; and
- the Treaty guaranteed to Maori the possession of their land for so long as they wished to retain the same.

A question in this case is whether, having regard to the circumstances, the guarantee in respect of land could be set aside by the Crown and Maori land confiscated. We address this question later.

A second question concerns the extent to which Maori or English law should be acknowledged in any situation. The claimants stressed that the small extent of European influence before the wars, as discussed in this chapter, was relevant to the later killing of a Crown official. That killing led to the assertion of English law, with the arrest of the alleged offenders and their trial for murder. The argument from the claimants was that Ngati Awa were acting by their own law, as they were entitled to do, that the killings were justified by Maori standards, and that the English criteria were not known to them.

The first question is whether the Governor knew or ought to have known of the Maori law prohibiting entry to the territory and whether the Crown official deliberately ignored it. The second is whether those implicated in the killings ought reasonably to have expected retribution in this instance. A further question is whether there was too much emphasis on war, and a blanket labelling of all of Ngati Awa as warmongers, and insufficient emphasis on legitimate spheres of autonomy and significant areas of cooperation.

We are satisfied that Ngati Awa were no different from Maori throughout the country in expecting that their own traditional authority would continue to prevail. In this district, nothing had happened to compromise that authority prior to the war.

It does not follow, however, that there was an unwillingness to work with Europeans. On the contrary, it appears that many were eager to do so. When war came, there were divisions on this point, and from that stage onward there is an increasing danger in talking of the Ngati Awa hapu as though all were of one mind.

The impression to be gained from the evidence as a whole is that there were leaders like Rangitukehu at Te Teko and Wepiha Apanui at Whakatane, and whole hapu like Ngati Pukeko at Whakatane, who were consistent in advancing a working relationship with European settlers and Government officials, even in times of crisis. It does not follow that this compromised their independence. The more likely thought was that this would advance it.

This is stressed because later lands of all the Ngati Awa hapu would be confiscated and Ngati Awa would be spoken of as though all were in opposition to the Government. That was clearly not the case. In fact, on looking at the names of those later charged and the principal persons involved, we think no more than three of the 30 Ngati Awa hapu were involved.<sup>26</sup>

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26. The claimants refer to there having been 30 hapu: doc A17, p 89. They also write that in 1865 the Ngati Awa–Ngati Pukeko alliance had 34 hapu (p 68). As to the number of hapu involved, T H Smith wrote in July 1865 that ‘The tribes concerned in this murder were Te Rangihouhiri, Hikakino, and Te Patutetahi’: Smith to Mair, 30 July 1865, MS papers 3330, T H Smith papers, ATL (cited in doc 11, p 44). In 1928, Sim noted that ‘a few only of the twenty hapus of the Ngatiawa Tribe took part in the rebellion’: see AJHR, 1928, G-7, p 21.