

6. THE RISE OF THE LAND QUESTION, 1842–70

6.1 INTRODUCTION

The last chapter considered whether the Crown was obliged to relieve Moriori from enslavement. This chapter considers whether the Crown should have intervened to secure Moriori a fair share of the land.

More particularly, we will look at the following issues:

- ▶ Maori claimed the land by conquest, but, as the shackles loosened, Moriori claimed the land by ancestral right. Could the Crown have promoted a compromise?
- ▶ The Native Land Court had the power to decide the dispute on the basis of 'native custom'. Was this sufficient for the issues of justice involved or should the terms have been wider? And was a special inquiry needed?
- ▶ Previous Native Land Court decisions suggested that an unfavourable outcome was likely for Moriori. Should the Crown have intervened for Moriori or did the Crown want Maori to succeed?
- ▶ Lessees had leases from Maori. Was the Crown more concerned for their interests?

6.2 THE PRESUMPTION OF MAORI 'OWNERSHIP'

6.2.1 Land control

After the invasion, Maori controlled the land in all but one respect. The Moriori had been killed, brutalised, eaten, and enslaved, but Maori could not conquer the Rekohu gods. Moriori were called upon to intercede to remove the tapu from the land or to ensure safe passage over rough seas for fishing and birding.¹ For all temporal purposes, however, Maori had control.

6.2.2 Control of land alienations and land use

Europeans assumed that Maori control meant that Maori had the right to the land. Thus, the New Zealand Company claimed only through Maori for its alleged purchase of Rekohu.² The Moravian missionaries did the

1. 23 March 1840, Brodie journal (typescript), ATL (doc c3, vol 1.23)
2. Document A8, p 49

same in respect of their small purchase in 1843, and traders and settlers likewise took it for granted that only Maori should be dealt with on all matters relating to land and the use of resources.³ As at 1862, however, there were only 33 adult settlers on Rekohu, many of them transients.⁴

Maori presumed to apply their own laws to Europeans as well, as occurred in a dispute with the Moravian missionaries over land clearance. Engst wrote that they ‘all forgot they were christians and came with axe and fire and destroyed everything’.⁵ The missionaries packed their tools as though to leave but were then asked to remain. The issue flared again in 1858 when Archibald Shand proposed to buy missionary land from the missionaries. Some Maori intervened and some cattle were killed. Shand sought the protection of the Maori chiefs and thereafter dealt with them directly.⁶ Engst would later write that, in general, ‘titles or grants of land from Natives [were given] to White people’ who ‘take a woman from the natives’, but that that gave them ‘no claim to land except to cultivate it as long as they happened to live with the woman’. He added:

if they left the Island their claims were cancelled – if any dispute arose amongst the natives they did not dare to interfere and had to ask permission to cultivate or make any use of what was in the land that they might happen to want.⁷

The Maori action is explicable in terms of their own law, as was explored in the Tribunal’s *Muriwhenua Land Report*.⁸

3. Engst manuscript (transcript) (doc c3, vol 6.3, p 35)

4. William Seed, ‘Report on a Visit to the Chatham Islands’, October 1861, *New Zealand Gazette* (doc c35(c), vol 3.23, p 27); see also doc A16(a), vol 1.11

5. Engst manuscript (transcript), Stone Florence papers, Canterbury Museum, Christchurch (doc c3, vol 6.3, p 36)

6. Shand letters, NA, Christchurch (doc c3, vol 7.1, pp 214–215, 223–225, 241, 255–256)

7. Engst manuscript (transcript), Stone Florence papers, Canterbury Museum, Christchurch (doc c3, vol 6.3, p 34)

8. Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, pp 14–109

9. Shand letters, NA, Christchurch (doc c3, vol 7.1, p 44)

6.2.3 Control of stock

Maori custom was applied, though not very successfully, when Maori and settlers acquired horses, cattle, pigs, and sheep. By custom, if one’s animal strayed onto someone else’s plantations, it was liable to be maimed or killed, but in the past Maori had only had the dog to contend with. Shand reported in 1856:

There have indeed been outrages among the Natives themselves presuming on impunity because of their old laws and usages – to the extent of maiming Cattle found trespassing on their plantations, and killing pigs in satisfaction for trespass, which I have no power entirely to prevent.⁹

Shand's reports contained increasing references to muru raids (the formalised plunder of goods in retaliation for wrongs), and disputes were becoming intense.¹⁰ He reported difficulty in preventing actual violence and noted that the 'native referee' was scarcely more successful.

6.2.4 Control of pastoral lease agreements

Frederick Hunt introduced sheep to Pitt Island in 1842 under an informal lease from Maori. Being removed from the main island, he was relieved of the exigencies of native custom, at least for 19 years. In 1861, the lessor, Wiremu Wharepa, returned to the island with his brothers and began grazing on part of it. Hunt had a written lease and paid an annual rental of £5. He considered the Maori occupation an 'interruption of the agreement' and appealed to Shand for protection. The Maori action was entirely in accord with custom, for no one person had the right to all the resources in a large area and no one person could lease more than he had – that is, a right to share. None the less, Wiremu assured Shand that, apart from grazing, he would not, as Shand phrased it, be 'offending' further.¹¹

But Shand also considered that he could not interfere with the Maori insistence 'on sharing a right to a run for their own sheep'.¹² Hunt was dissatisfied and appealed to the Government for protection. In May 1867, he was informed that the Government did not have the power 'to help you into your title'.¹³ The land in question had first to be the subject of an investigation by the Native Land Court, he was advised, and it was uncertain when the court would hear land claims on Rekohu.

6.2.5 Third-party European interests in the land

The land dispute that later arose between Moriori and Maori was complicated by third-party interests.

A number of arrivals in Canterbury found the runs there fully taken up and moved on to Rekohu. Thomas Ritchie, James Hay, Walter Hood, Howel Pattison, and Edward Chudleigh arrived in early 1864. Many Maori were leaving for Taranaki when the farmers arrived (as will be seen), so leases could be readily arranged. Their arrival coincided also with widespread Maori indebtedness.¹⁴ During the boom years of the 1850s, Maori had borrowed and made purchases in advance of the sale of each year's potato crop, but when the crop of 1859 was left to rot for want

10. Ibid (pp 132, 172, 201–206, 211, 223, 230)

11. Shand to Colonial Secretary, 29 May 1861, Shand letters, NA, Christchurch (doc c3, vol 7.1, p 227)

12. Ibid; Chatham Island minute book 1, 1870–93 (doc c3, vol 8.1, p 54)

13. Halse, acting under-secretary, to Hunt, 1 May 1867 (doc F4(a), p 695)

14. Thomas journal (transcript), 16 May 1864 (doc F4(a), p 656); Engst manuscript (transcript), pt 2, Stone Florence papers, Canterbury Museum, Christchurch (doc c3, vol 6.3, pp 16–17)

of buyers, their debts remained unpaid. Pressed by creditors, they did not have enough sheep of their own to earn an income and they had no money to stock more. To lease the land for large runs, they had also to meet survey costs. It seems that to clear debts and meet costs they were dependent on advances from the prospective lessees. Engst described the mortgagees watching the mortgagors as ‘a spider watching a fly’:

As long as the fly strains the web to get out, the spider sits still in comfortable cover, till the fly has exhausted all means to work any longer, then comes the spider to suck the blood.¹⁵

It appears that soon after some sales were arranged, but these could not be completed until after the Native Land Court had settled the title.

HH Travers wrote that nearly the whole island had been burnt off when he arrived later that year.¹⁶ Halse was told during his visit to Rekohu in 1867 that not less than 120,000 acres, or about 60 per cent of the island, had been leased to Europeans.¹⁷

The pastoralists took political initiatives to protect their interests. In April 1866, the Honourable JBA Acland of Canterbury, a member of the Legislative Council, asked whether the Government intended to extinguish native title in the Chatham Islands and if it would recognise prior agreements for the sale or lease of native lands there. The Honourable J Johnston replied that, since the Chatham Islands were ‘an integral part of the colony’, the Government intended to ‘leave them in the operation of the Native Lands Act’.¹⁸

When the Native Land Court sat in 1870, the lessees had as much interest in the determination of the title as the Maori and Moriori.

6.2.6 The Crown interest in the land question

The Crown had but a small, direct interest in the outcome – it had leased the land on which the resident magistrate’s house was situated. In arranging that lease, however, the Crown had also assumed that only Maori had an interest in the land.

The Crown had a very large political interest in the land question, however, in order to settle the competition for land between Maori and Europeans in Taranaki. We will refer to this in a moment.

15. ‘An Early History of the Chatham Islands and its Inhabitants’, RS Florence papers, box 2, Archives, Canterbury Museum Library (doc c3, vol 6.3, pt 2, p 31)

16. HH Travers, TPNZI, 1868, vol 1 (doc F4, vol 6.87, p 125)

17. Henry Halse, ‘Report on the Chatham Islands’, AJHR, 1867, A-4, no 4 (doc A16(a), vol 1.14, p 6)

18. NZPD, 1866, 771 (cited in doc A10, p 60)

6.3 THE RISE OF THE MORIORI CLAIM

The Native Lands Act 1862 proposed that the Native Land Court determine the ownership of Maori land and award titles to suit. As the shackles loosened and Maori left for Taranaki, for reasons later described, Moriori made it clear that they claimed half of all the land. The essential developments were:

- ▶ As early as 1858, Shand reported that Maori were willing to make reserves for Moriori but that Moriori sought ‘to divide with them share and share alike the lands which the Maori conceive themselves fully entitled to by right of conquest’.¹⁹
- ▶ William Seed then reported in 1861 that Maori maintained ‘a most suspicious vigilance’ over Moriori but that the latter clung to the belief that the Government would restore them to freedom and ‘some portion’ of their land.²⁰
- ▶ In 1862, Shand reported a further Moriori complaint that Maori had ‘sold’ land without their concurrence.²¹ Presumably, this refers to purported sales to run-holders.
- ▶ Moriori met at Te Awapatiki in June 1862 and sent a petition to Governor Grey. This argued the illegitimacy of Maori claims based on conquest, described the enslavement and the dreadful loss of Moriori lives, and sought the support of English law, which, they believed, would not recognise the claims of a violent and cannibalistic people.²²
- ▶ The first Native Lands Act was passed in 1862 and Thomas called meetings to explain it the following year. Hirawanu Tapu saw him privately on behalf of Moriori and Thomas reported: ‘They evidently wish to be considered the predominant owners of the soil, altho they are clearly not so, [and] are anxious for Europeans to come & take the place of the Maories’. He later recorded that two Moriori had come with a letter signed by three or four of them, ‘stating as far as I could perceive that they were the owners of the soil’.²³
- ▶ In February 1864, Thomas recorded that he had sent to the Governor a letter from Tapu ‘offering half the land of the Islands to the Queen, which I remarked the Maoris had no cognizance of neither would acquiesce in’.²⁴
- ▶ Moriori remained uneasy over the proposed new law, but Maori agreed with it and, at Thomas’s request, put their acceptance in

19. Shand to Native Secretary, 10 September 1858, Shand letters, NA, Christchurch (doc c3, vol 7.1, p 179) (cited in doc F3, p 86)

20. William Seed, ‘Report on Visit to the Chatham Islands’, October 1861, *New Zealand Gazette* (doc c35(c), vol 3.23, p 27)

21. Shand to Colonial Secretary, 3 April 1862, Shand letters, NA, Christchurch (doc c3, vol 7.1, pp 247–248)

22. G Mair, ‘The Early History of the Morioris: With an Abstract of a Moriori Narrative’, TPNZI, 1904, pp 158–161; Shand to Colonial Secretary, 3 April 1862, Shand letters, NA, Christchurch (doc c3, vol 7.1 p 247)

23. 2, 28 September 1863, Thomas journal (doc c35(b), vol 2.15, pp 353, 357) (cited in doc F3, p 110)

24. 13 February 1864, Thomas journal (doc c35(b), vol 2.15, p 381) (cited in doc F3, p 116)

writing.²⁵ Meanwhile, Thomas, perhaps presuming on the outcome, negotiated with Maori to buy land for a doctor's residence.²⁶

- ▶ By 1864, as shall be seen, the Government hoped to keep the Chathams Maori out of Taranaki, where they competed with European settlers for land, by denying them land there but securing them land on Rekohu. But what would the Government do with the Moriori? The Native Minister wrote to Tapu:

As it is not known what title the Morioris have to the Chatham Islands and as they are said to be living in a state of servitude to the Maoris Mr Fox wishes you to ascertain whether they would like to be removed to the neighbourhood of Auckland.²⁷

Shand responded to the Government enclosing a letter from Tapu 'signifying a desire of the Morioris to remain here'.²⁸

- ▶ Later in 1864, Thomas was advised that:

the Government does not consider it desirable to introduce that Act into a district like the Chathams at once, where there are few Europeans and the Maoris would not have the benefit of competition.

We presume that the competition was to come from prospective buyers and tenants.²⁹

- ▶ Tapu then resolved to put his case personally to the Minister. He visited the mainland between November 1864 and February 1865 and met Walter Mantell, who replaced Fox as Native Minister in December 1864. Thomas was subsequently informed by letter of 17 February 1865 that 'Mr Mantell has conversed with Tapu, and is much pleased with him. I am also instructed to assure you that the case of the Morioris will be carefully and favourably considered'.³⁰

6.4 THE RISE OF THE NATIVE LAND COURT

The Native Lands Act 1862 established a court that facilitated the appointment 'of panels of important chiefs in each district meeting under the chairmanship of a Pakeha magistrate'.³¹ The Act never really got off the ground, except in the Kaipara district. The chief judge-elect thought the

25. 10 October 1863, Thomas journal (doc c35(b), vol 7.1, p 360) (cited in doc F3, p 111)

26. 12 July 1864, Thomas journal (doc F4(a), vol 4.34, pp 657–658, 660)

27. Native Secretary to resident magistrate, Chatham Islands, 9 July 1864, P506, letter 411, general English letterbook, 11 March 1864–31 December 1864, MA4/6 (doc F4(a), vol 4.35, p 672) (cited in doc F3, p 124)

28. Thomas journal, 21 November 1864 (doc F4(a), vol 4.34, p 662) (cited in doc F3, pp 123–125)

29. Henry Halse, Acting Native Secretary, to H H Thomas, resident magistrate, Chatham Islands, 4 October 1864, P570, letter 549, MA4/59, letters to resident magistrate and civil commissioner, 6 March 1863–31 December 1864 (doc F4(a), vol 4.35, p 673)

30. Acting Native Secretary to resident magistrate, Chatham Islands, 17 February 1865, P27, letter 63, MA4/60, letters to resident magistrate and civil commissioner, 3 January 1865–30 December 1865 (doc F4(a), vol 4.35, p 677)

31. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Canberra, Australian National University Press, 1974, p 152

panel would be unworkable. He was appointed to draft what would eventually become the Native Lands Act 1865, which provided for a more European-style court and placed the decision-making firmly in the hands of a European judge.

We have seen that the Government was minded to defer a sitting of the court on the islands, but events in Taranaki, shortly to be described, made it imperative that Chathams Maori should receive land there in lieu of land in Taranaki. We pick up the salient points from there.

- ▶ In 1866, Thomas was sent copies of the Native Lands Act 1865 in Maori with instructions to make it generally known. He was also to advise of the survey requirements. A Government surveyor would be available, but ‘the cost will of course have to be defrayed by the Natives’.³²
- ▶ In 1867, Henry Halse was also sent to advise and report. He was also directed to discourage more Maori from returning to Taranaki. He met with different groups and described the conflict between Moriori and Maori over land rights.³³
- ▶ But there was also conflict about the surveys. Some Maori were not prepared to meet the cost of the survey until they knew who owned the land, for why pay if someone else owned it? There were also disputes amongst Maori as to which families were properly interested in certain leases. Some did not want a survey or even a court hearing in case the court decided that the land they had leased should pass to another family and they would thus lose the benefit of the lease. There were also disputes about where the lease boundaries were.
- ▶ Moriori were simply opposed to ‘the system of leasing’, for it assumed ownership and prejudiced their case. They were opposed to surveys for that reason and thought that the general issue of who owned the land, as between Maori and Moriori, should be settled before anyone was charged survey costs.³⁴
- ▶ Halse reported, however, that he eventually obtained the consent of everyone for surveys and for a court hearing. Historical researchers strongly disputed whether Halse had made a full and proper disclosure of all the pertinent facts necessary for one to make an informed decision. We conclude this section by referring to that possibility and to a suggestion that Halse was biased.

32. Rolleston, Under-Secretary of Native Affairs, to HH Thomas, resident magistrate, Chatham Islands, 8 October 1866, P469–71, letter 772, MA4/61, letters to resident magistrate and civil commissioner, 2 January 1866–31 December 1866 (doc F4(a), vol 4.35, p 689) (cited in doc F3, pp 134–135)

33. Henry Halse, ‘Report on the Chatham Islands’, AJHR, 1867, A-4, no 4 (doc A16(a), vol 1.14, p 3)

34. *Ibid* (p 4)

6.4.1 Was Halse biased?

The claimants argued that Halse was biased towards Maori and encouraged them to think that the land was theirs, but the notes of the meetings do not support this view. Tapu complained that Maori had presumed to own the land when they leased it, prompting calls to Halse from both sides to say who owned the land. However, Halse recorded that he made it clear that that was for the court to decide.³⁵

Halse did report as well that he was taken to see a piece of land that Maori had given to the Government for the resident magistrate. He reported that it would eventually become valuable, and that the Government should secure the land when Maori had obtained a title for it.³⁶ At most, Halse presumed upon the outcome of the hearing, but that does not suggest that he expressed to those present what the outcome might be.

Halse also reported that he emphasised to Maori the benefits of not returning to Taranaki, as on Rekohu they had good land, a good harbour, plenty of provisions, and many horses and cattle.³⁷ This did not indicate the likely result, as we see it, for at that point Moriori were not claiming the whole of the land.

Halse also met separately with Maori and Moriori, but there is nothing improper in that. For one thing, it ensured a fair hearing for Moriori who were dominated at the joint meeting (69 Maori ‘men’ to 22 Moriori ‘men’).³⁸

We note that, at the Moriori meeting, Halse heard the Moriori account of the Maori incursion and its horrific denouement. Halse reported: ‘I asked how the Maoris treated them at the present time. Mina replied “They are kind to us now, because they think you Pakeha would support us”’.³⁹

6.4.2 Was there a full disclosure?

Halse claimed to have the consent of all to the Native Land Court settling the land question. Researchers King and Gilling submitted on behalf of Moriori that, from their Taranaki experience, Maori knew all about the land court (or, more strictly, the Compensation Court, but the judges in each were much the same). In Taranaki, the precedent was set that ownership was to be determined as at 1840, when Britain assumed sovereignty, a time when Moriori were enslaved. Halse did not inform them of this, and it was argued that, had they known, Moriori would not have agreed. We

35. Henry Halse, ‘Report on the Chatham Islands’, AJHR, 1867, A-4, no 4 (doc A16(a), vol 1.14, p 3)

36. Ibid (p 3)

37. Ibid (p 6)

38. Ibid (p 3)

39. Ibid (p 6)

deal with the so-called ‘1840 rule’ in a later chapter (ch 8), but for now we accept that the proposition stated by King and Gilling was broadly correct.⁴⁰

It cannot be said that Halse knew of the ‘1840 rule’, but certainly the Government did (there was intense interest and debate) and it did not instruct Halse on the matter. We accept that the Government should have done so, were it to have acted honestly and openly, but we would make little of the matter. The process of seeking consents was a formality (apart from paying for surveys). The court would have come anyway. Throughout the country, there were Maori opposed to the court, and some stopped the judges from entering their districts, but only a single individual had to make a claim in order to precipitate a court hearing. If no one appeared to oppose the claim, judgment was given on the evidence, the court sitting outside the district if need be. Of all the areas that we know of that opposed the Native Land Court system, the court determined the land issues sooner or later. Here on Rekohu, Maori were willing to make claims. The only cost to Moriori was any survey contribution that they may have paid.

6.5 THE BOND WITH TARANAKI AND THE PRIORITY OF STATE POLICY

6.5.1 Background

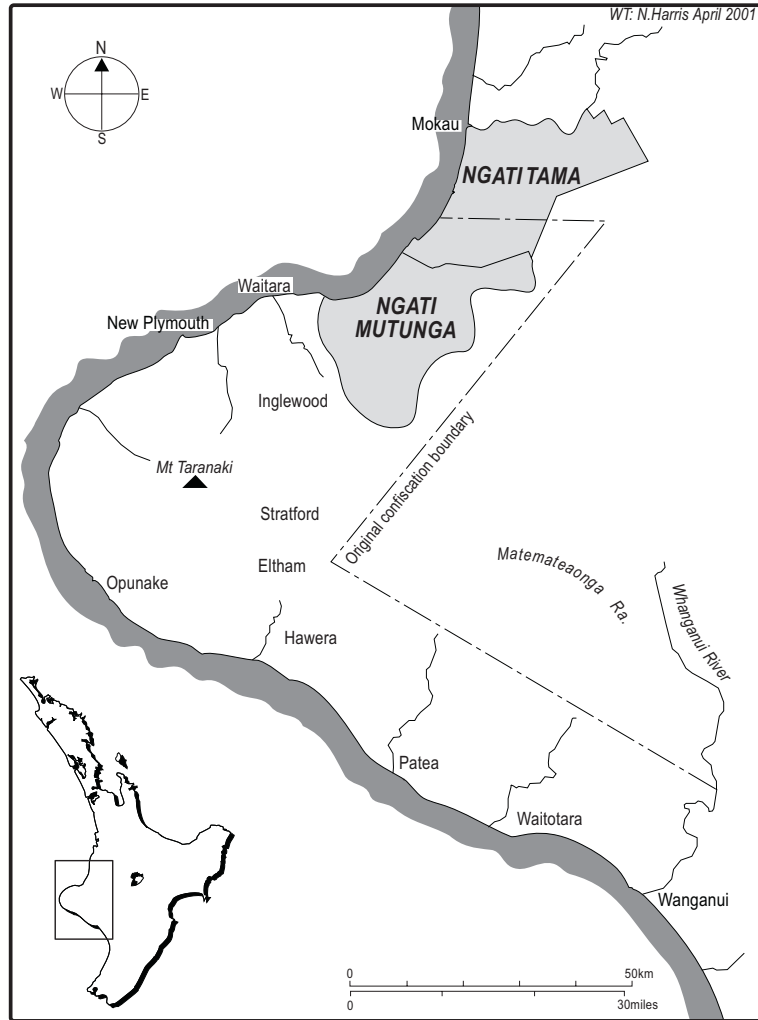
Government policy in Taranaki, to our mind, was the single most important factor that could have influenced the final outcome in respect of the Rekohu land question. Much would depend upon the Government’s response to any decision that the Native Land Court might make, for the Government developed a record of intervening on particular decisions of that court. To consider the facts, to the extent that history allows, we must now go back in time.⁴¹

The ancestral home of Chathams Maori was northern Taranaki. We first note as follows.

- ▶ *Ngati Tama’s role*: Ngati Tama stood at the northern gateway into Taranaki and bore the brunt of several attempted incursions into Taranaki by northern tribes. Each was successfully resisted, and Ngati Tama became famous as an unrelenting, warrior people who gave no quarter in protecting the Taranaki frontier.

40. Dr Gilling’s view is set out mainly in document A14. We note that the Tribunal’s agreement is with the broad proposition as outlined in the text above, and not necessarily with the particulars of Dr Gilling’s arguments.

41. The following narrative is drawn largely from the Waitangi Tribunal’s *Taranaki Raupatu Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, and document J6.



Map 4: Ngati Mutunga and Ngati Tama traditional boundaries as stated by them to the Taranaki Tribunal against the Taranaki confiscation line

Ngati Tama were on the first boatload to Rekohu. It was also put to us by Tony Walzl in his submissions and during oral examination that, though all were present when the killing began, some chiefs were more involved than others and Ngati Tama may have been the prime movers.⁴² We think there is evidence of that. However, there is no independent evidence that Ngati Mutunga tried to intercede, though they have long asserted that they did. Ngati Tama are not on Rekohu today, only Ngati Mutunga. Originally, the latter were

42. See esp docs C37, F12

located well back from the Taranaki frontier, closer to what is now New Plymouth.

- ▶ *Musket impact*: Despite their prowess, Ngati Tama could not withstand the musket, which came in the 1820s. The northern Taranaki tribes were driven south and went to Port Nicholson to seek arms.
- ▶ *Enslavement*: Many Taranaki Maori did not go south but were captured in the fighting and enslaved in Waikato. They were eventually released through missionary interventions and returned home in 1839.
- ▶ *Absenteeism*: Most Taranaki Maori were absent from Taranaki for about 40 years. They planned to obtain muskets, develop alliances with Europeans and a trading base at Wellington, and regather strength before returning home. However, small sections began returning from at least 1839, once the missionaries had largely put an end to tribal warfare.

The Taranaki bond and subsequent events in Taranaki explain the evacuation of Rekohu by Chathams Maori in the 1860s. The main points are:

- ▶ *European settlement*: The planned colonisation of Taranaki began at New Plymouth in 1840. Several hundred persons arrived in shiploads over a short period and spread mainly towards the north. To safeguard their land interests, Wellington and Kapiti coast Maori marshalled to return home. The Governor sought to keep them away, dispatching a naval vessel to Waikanae to destroy their canoes and to bombard any persons attempting to journey along the beach. But, in spite of this, many groups successfully returned.
- ▶ *War*: War broke out in north Taranaki in 1860 over the Government's acquisition of land, and it soon engulfed the whole of Taranaki (and beyond). The main fighting ended with the retreat of Titokowaru in 1869, but skirmishes continued and military action did not end until the invasion of Parihaka in 1881, 21 years after the war began.
- ▶ *Confiscation*: During the wars, the Governor confiscated nearly the whole of Taranaki for European settlement, leaving only the outer rims. That was in 1865. The legal authority to confiscate the land was contained in the New Zealand Settlements Act 1863. That same Act established the Compensation Court, which was to sit in areas where land had been confiscated and had the power to award land to Maori who had not taken arms against the Crown.

- ▶ *Chathams evacuation*: To secure their lands, most Chathams Maori returned to Taranaki between 1866 and 1868 (though there were also returns before and after those dates). Their position was that they had not taken part in the war and that all their Taranaki land should be returned to them. However, some Chathams Maori had returned before then, and it is not possible to say that not one of these particular Ngati Tama or Ngati Mutunga participated in the war. The Government appears to have assumed that they had. We set out some relevant history.

The evidence of small returns before 1866 begins with Bishop Selwyn's pastoral letter of August 1855, which refers to Chathams Maori being in Taranaki at that time.⁴³ In 1856, the Government sent the Wellington chiefs Te Puni and Wi Tako to Rekohu to seek the agreement of Chathams Maori to land sales and Shand recorded small groups 'visiting' Taranaki thereafter.⁴⁴ He recorded also that, in June 1859, the chiefs on the islands received an appeal from Wiremu Kingi of Waitara to 'throw up their allegiance to the Queen's laws'.⁴⁵ Shand copied the letter to the Government and advised it that the chiefs would not be taking up Kingi's 'suggestion'. However, in January 1859, Robert Parris, a land purchase officer, reported that 21 Maori had returned to Waitara from Rekohu.⁴⁶

The Government also monitored trade links between Rekohu and Taranaki. In 1857, the Attorney-General wrote to Shand expressing concern about the export of arms and ammunition to Taranaki and instructed Shand to do what he could to prevent it. Such were the delays in getting letters from Auckland to Rekohu that Shand did not receive this directive until April 1859, but he was able to reply that he had succeeded in 'preventing Fire arms from being conveyed to Taranaki by Natives removing thither'. He felt it necessary to add, however, that:

the Coasting Vessels here have great opportunities of secreting contraband;—and Traders with the Natives for produce are under great temptation to Conciliate them by any possible means.⁴⁷

Concern built up on Rekohu after the passage of the New Zealand Settlements Act 1863, news of which was conveyed to the islands in August 1864. The Runanga o Wharekauri (a Chathams Maori council) dispatched a party to 'Taranaki via Wellgtn to see the

43. Pastoral letter from Bishop Selwyn, 30 August 1855, p9, ATL (doc F4, vol 6.95, p 1098) (cited in doc F3, p136)

44. Carkeek to Shand, 16 January 1856, AJHR, 1856 (doc c3, vol 6.6, pp5–6)

45. Shand to Native Secretary, 15 June 1859 (doc c3, vol 7.1, p 198)

46. Parris to McLean, 10 January 1859, McLean papers, MS32, folder 493 (doc A8, p 76)

47. Shand to Attorney-General, 4 April 1859, Shand letters (doc c3, vol 7.1, p 192)

Government about their lands in NZ'. Thomas added that they had 'fixed to sell some land' on Rekohu. Thomas also instructed the master of the *Flying Cloud*, on which the party was to travel, to inform the customs office immediately on arrival in Wellington if he found any firearms or ammunition on board. Twenty-eight Maori left Rekohu on the *Flying Cloud* on 28 November 1864.⁴⁸

Moriiori seized the opportunity. Hirawanu Tapu, as we noted earlier, visited the mainland early in 1865 to see the Premier about returning the Rekohu land to Moriiori.

A further boatload of 97 Maori left Rekohu in 1866.⁴⁹

The confiscation of land and the decisions of the Taranaki Compensation Court had a crucial bearing on land rights on Rekohu and eventually led to many of Ngati Mutunga returning to the islands. The essential points as we see them are as follows:

- ▶ *European occupations*: As the wars progressed, large numbers of Europeans continued to arrive from England and settled throughout northern Taranaki, taking up most of the land. The Government's military strategy was gradually to expand a circle of frontier redoubts and to secure the land behind the forts by immediately placing military and civilian settlers there. The result was that, when the Compensation Court sat to hear the claims of Rekohu Maori, most of their land had already been taken, with the exception of the Ngati Tama people of the northern Taranaki perimeter. The confiscation line cut through their land, but the Government was not prepared to cut deep into the heart of the territory of the warlike Ngati Tama, and the military did not move much beyond the line. Accordingly, about half the land of Ngati Tama was spared. In the result, Ngati Tama were not so badly placed and they never returned to Rekohu. The main problem concerned Ngati Mutunga – nearly all their useable land had been settled.
- ▶ *Political considerations*: Ngati Mutunga would not take cash and wanted instead to keep their land.⁵⁰ In the competition between Maori and Europeans for the land, it would clearly have suited the Government if Ngati Mutunga could have been kept out of land in Taranaki, but awarded land on Rekohu on which to live, as suggested by Bryan Gilling.⁵¹
- ▶ *Compensation Court decisions*: First up for hearing, in 1866, was the Oakura block of 27,500 acres, on the fringe of the Ngati Mutunga

48. Extracts from Thomas journal, 23 November 1864 (doc F4(a), pp 660–663)

49. Russell to Shand, p109, MA4/61; letters to resident magistrate and civil commissioner, 2 January 1866–31 December 1866 (doc F4(a), vol 4.35, pp 685–686)

50. Rolleston, under-secretary, to resident magistrate, Chatham Islands, 2 January 1865, p1, letter 2, MA4/61; letters to resident magistrate and civil commissioner, 2 January 1866–31 December 1866 (doc F4(a), vol 4.35, p 685)

51. Document A10, pp 35–68

heartland.⁵² The Maori claimants numbered 872, of which 158 were Ngati Mutunga. The court dealt with the matter in this way. It was held that Maori were entitled to only 7400 acres. We think this is because the rest was claimed as having been sold before the wars. But of the 7400 acres, Europeans had taken all but 2500 acres. Then, 188 Maori were judged to have been ‘rebels’. That left 684 with some three acres each of the residual lands, and three-acre allotments were uneconomic. It was not considered that the Europeans should be moved. The court then found that those or their forebears who were absent at 1840 were deemed to have lost all land rights as they were not on the land when sovereignty was proclaimed. This excluded a further 569, leaving just 115. All of Ngati Mutunga were thus excluded, for they were not on the land at 1840. The precedent having been set, Ngati Mutunga were then excluded from their other lands.⁵³

So began the ‘1840 rule’. All rights would be fixed at that date.

- ▶ *Political pragmatism*: The most influential to complain were the Ngati Awa chiefs of Wellington, who were amongst those excluded. They were Government allies and their continued support was needed. Soon after the Oakura decision, the ‘rebel’ leader Titokowaru gained the upper hand in south Taranaki. He pushed through to the hills above the Wanganui settlement with a very large force, and it seemed that he could not be stopped. There were rumours that he intended to invade Wellington, so the Government granted Taranaki land to the Wellington chiefs.⁵⁴

But then there was a risk that Ngati Mutunga would join the ‘rebels’, and they were thus promised that land would be given to them so long as they remained ‘loyal’. This, they did (or so they claimed) and they also stayed on to await their land grant.

These matters are recounted in the Tribunal’s *Taranaki Report*, but here we add some of the history more pertinent to the people still on Rekohu. The Government decided to negotiate with Ngati Mutunga with the aim of getting them to ‘abandon their claims’ and accept compensation, either in cash or in land elsewhere.⁵⁵ Thomas was directed to tell the Maori remaining on Rekohu that, as ‘absentees’, their claims would get ‘fair consideration’, but not to the same degree as those who had remained in ‘constant occupation’:

52. *The Taranaki Report*, p 145; see also Fenton, ‘Narrative of the Events of the Sittings of the Compensation Court at New Plymouth’, AJHR, 1866, A-13, pp 5–6 (doc 118, p 90)

53. *The Taranaki Report*, p 146; see also Fenton, ‘Narrative of the Events of the Sittings of the Compensation Court at New Plymouth’, AJHR, 1866, A-13, pp 5–6 (doc 118, p 90)

54. *The Taranaki Report*, pp 167–168

55. Rolleston to Atkinson, Crown agent, Taranaki, 10 September 1866, P266, letter 458, MA4/8, general English letterbook, 2 January 1866–31 December 1866 (doc F4(a), vol 4.35, p 683)

You will be good enough to explain this to the Natives telling them that the Government cannot entertain claims for specific blocks of land but that when the number of claims is ascertained they will be determined upon some general plan of compensating them.

It will be necessary for them to appear personally and they will be communicated with again when further action has been taken.⁵⁶

However, some on Rekohu decided to join their relatives in Taranaki and simply occupy any vacant land.⁵⁷ Thomas was instructed to warn Maori that their claim to compensation ‘would be diminished by the attempt to occupy any part of the land within the confiscated blocks before obtaining the assent of the Govt’.⁵⁸ Halse was also instructed to reinforce this on a visit to the islands in 1867. He reported that he emphasised to them the benefits of remaining where they were: good land, a good harbour, plenty of provisions, and many horses and cattle. The response of Pamariki Raumoā was that they would return, ‘because Taranaki is the land of our forefathers’.⁵⁹

Reverting to the main points:

- ▶ *Expectations*: At this stage, the Government clearly expected that Rekohu, or at the very least a reasonable share, would pass to Maori hands. The Government needed for that to happen, for Ngāti Mutunga were clearly an embarrassment in Taranaki.
- ▶ *Consideration of Rekohu land rights*: To help resolve matters, the Government decided to bring forward the judicial determination of land rights on Rekohu. In 1864, the Attorney-General had informed Thomas that it would be ‘premature’ to enforce the Native Lands Act 1862 in Rekohu because of the small number of Europeans living there. However, in October 1866 he was instructed that the Native Lands Act was ‘in force in the Chatham Islands’ and he was to ‘make it generally known among the Wharekauri Natives’.⁶⁰ Halse went to Rekohu early the next year to arrange surveys and to prepare for a Native Land Court hearing.⁶¹
- ▶ *Final evacuation*: However, most of the Maori still on Rekohu then went to Taranaki: 126 in 1867 and 148 in 1868.⁶² This left only 76, of whom more would leave later. Those remaining were mainly elderly, and many died in an influenza epidemic. From this point, Moriori,

56. Rolleston, under-secretary, to resident magistrate, Chatham Islands, 18 October 1866, P471-2, letter 773, MA4/61, letters to resident magistrate and civil commissioner, 2 January 1866–31 December 1866 (doc F4(a), vol 4.35, p 691)

57. Henry Halse, ‘Report on the Chatham Islands’, AJHR, 1867, A-4, no 4 (doc A16(a), vol 1.14, p 6)

58. Rolleston, under-secretary, to resident magistrate, Chatham Islands, 12 November 1866, P518, letter 862, MA4/61; letters to resident magistrate and civil commissioner, 2 January 1866–31 December 1866 (doc F4(a), vol 4.35 p 691)

59. Henry Halse, ‘Report on the Chatham Islands’, AJHR, 1867, A-4, no 4 (doc A16(a), vol 1.14, p 6)

60. Rolleston, under-secretary, to resident magistrate, 8 October 1866, P469-71, letter 772, MA4/61, letters to resident magistrate and civil commissioner, 2 January 1866–31 December 1866 (doc F4(a), vol 4.35, p 689)

61. Document A16, pp 21–22

62. Resident magistrate to Native Secretary, 20 April 1883, JCC1 1/1, resident magistrate’s record book, 20 April 1868–30 June 1883 (doc F4(a), vol 4.35, pp 740–742); resident magistrate, Chatham Islands, to Minister of Native Affairs, 9 November 1868, letter 126, JCC1 1/1, resident magistrate’s record book, 20 April 1868–30 June 1883 (doc F4(a), vol 4.35, p 745)

whose numbers were estimated by Thomas at around 80, began to predominate numerically on the islands.⁶³

- ▶ *Intention of Maori emigrants:* We think that Ngati Tama intended to leave permanently, arranging to sell their land, but later we consider the importance of establishing Ngati Mutunga intentions in the context of land rights and Maori custom. With regard to them, we think that the evidence is inconclusive. They did not arrange sales in the same way as Ngati Tama. In evidence to the West Coast Commission in 1880, Wi Naera Pomare linked the returns to the Compensation Court decision, but that sheds no light on this issue.⁶⁴ Thomas thought, at the time of the second departure in 1868, that no one would return unless to sell land.⁶⁵ Engst wrote that an earthquake struck when they left, which confirmed in Maori minds the 'rightness' of their decision 'to go away forever'.⁶⁶ Farmer Thomas Ritchie recalled that those leaving sold horses and cattle to him to pay for their passage. But we have nothing more to go on, and we think that there is insufficient evidence on which to establish Ngati Mutunga intentions, even although they were away for at least 20 years.
- ▶ *Honouring promises:* After the promise of 1866, no land passed to Ngati Mutunga until 1884. Before then, it was reported that they were destitute, and the Government paid £100 to them, provided they gave labour in return.⁶⁷ Later, they were allowed to occupy some poorer land not taken up by Europeans. In 1880, the West Coast Commission recommended that they receive 10,000 acres.⁶⁸ However, there was not enough land, and in 1884 this amount was reduced to 1420 acres. This award was given not to all but to 135 'loyals', being 16 acres each.⁶⁹ Those living at Parihaka under Te Whiti may not have been seen as loyal, but the people were dispersed from there when the place was sacked in 1881.
- ▶ *Return to Rekohu:* In 1870, the Native Land Court had awarded 97 per cent of the Rekohu mainland to Maori (and later all of the outer islands). Still, Ngati Mutunga insisted on staying in Taranaki for the land that had been promised. They did not return to Rekohu until after the land was given, in 1884. It was clearly insufficient for all, and not all were included in the title. Census figures suggest that a further group of over 100 then returned in 1886, 16 years after the Rekohu land decision and almost 20 years after the majority had gone to Taranaki.⁷⁰ Others appear to have returned to Rekohu later.

63. Resident magistrate, Chatham Islands, to Minister of Native Affairs, 23 November 1868, letter 129, JCC1 1/1, resident magistrate's record book, 20 April 1868–30 June 1883 (doc F4(a), vol 4.35, p 747)

64. AJHR, 1882, G-2, no 16 (cited in doc J6, pp 33–34)

65. Resident magistrate, Chatham Islands, to Minister of Native Affairs, 1 October 1868, letter 116, JCC1 1/1, resident magistrate's record book, 20 April 1868–30 June 1883 (doc F4(a), vol 4.35, p 745)

66. 'Early History of the Chatham Island and its Inhabitants', R S Florence papers (doc C3, vol 6.3, pt 2, p 17)

67. Assistant Under-Secretary to civil commissioner, Taranaki, 19 September 1868, P113, letter 338, MA4/64, letters to resident magistrate and civil commissioner, 31 July 1868–30 October 1869 (doc F4(a), vol 4.35, p 709)

68. AJHR, 1880, G-2 (cited in doc A10, p 58)

69. *The Taranaki Report*, p 164. Smaller reserves were actually granted in 1884.

70. Document J6, p 47

- ▶ *Continuing Taranaki link:* As mentioned, during the Taranaki sojourn, Ngati Mutunga became followers of the spiritual and political leader Te Whiti, who maintained a last bastion of Maori independence at Parihaka and who maintained hope that one day the land would be returned to them and the pain would be eased. Many Ngati Mutunga had taken to living at Parihaka, which became something of a home for the landless. Though Parihaka was sacked and the residents were forced to leave, the place was rebuilt, Te Whiti returned from prison following the sedition trials, and the movement lived on.

The many who returned to Parihaka after it was rebuilt received food and money from Rekohu for many years, well into the twentieth century. Te Whiti acknowledged the kindness and adopted the albatross feather from Rekohu as the symbol of his movement. It is still worn when Taranaki Maori gather, and we understand that some Chathams Maori remain linked to the Te Whiti movement to this day.

Te Hono ki Te Whiti ('the bond with Te Whiti') affected developments on Rekohu for many years. For example, Te Whiti advised his followers not to send their children to Government schools (he was not averse to church schools) and not to pay rates until the day that the rest of the Taranaki land was returned. We think he referred to Parihaka rates, not Rekohu rates, but as we shall see in a later chapter, others may have understood it differently.

6.5.2 Preparation for hearing

(1) *Moriori predominate*

After the migrations to Taranaki, the Maori population on Rekohu was reduced to 20 people, some of them old and others ill, and Maori were for the first time in more than 30 years outnumbered by Moriori.⁷¹ Moreover, of course, the Moriori were free. Before leaving, Maori had set aside some land for Moriori, but it appears that after they left Moriori presumed to occupy other parts as well. In 1870, matters progressed to a hearing. Michael King wrote that at 1870 the Moriori population totalled just under 100 people scattered in settlements ranging from two households to 10 at Manukau, Waihi, Hawaruwaru, Whareama, Moreroa, Rangatira, Waikaripi, and the Tuku. All the households cultivated their own

71. R Richards, 'An Historical Geography of the Chatham Islands' (doc c3 vol 9.1, p 62) (cited in Michael King, *Moriori: A People Rediscovered*, Auckland, Viking, 1989, p 109)

vegetable plots and many also ran small numbers of hens, sheep, and cattle. As well, some had horses. A small number of Moriori worked for their keep and wages at the Ritchie brothers' farms at Kaingaroa and Owenga, and Edward Chudleigh also occasionally employed Moriori for farm work or shearing.⁷²

(2) Preparations for the court hearing begin

In 1867, soon after Halse left, the Government commissioned S Percy Smith to complete the surveys. Earlier survey work had been undertaken for Maori for leasing purposes, but Smith finished a survey of the whole of the Chatham Islands in September 1868.

The next question was where the court would sit. Some Maori preferred Taranaki, but some on the islands preferred Rekohu. The Government thought it best to encourage Maori to return to Rekohu, and thus it was settled as the venue in 1869.⁷³

In order that Maori in Taranaki could get to the hearing, the Government agreed that the vessel taking the judge there would call at Taranaki. However, Maori had to pay their own passage.⁷⁴

(3) An impartial court?

The chief judge of the Native Land Court proposed that it might be 'a good thing' if the Government were to buy the claims of Ngati Mutunga and then contest the title of Moriori.⁷⁵ Needless to say, this suggestion was not taken up. The court that the chief judge constituted was hardly impartial either; he appointed Judge John Rogan, who had sat with the chief judge on the Oakura case that introduced the '1840 rule'. Before then, Rogan had been a Government land purchase commissioner. He had also worked with the main Ngati Mutunga claimant (and leader), Wi Naera Pomare, who had been appointed as a native assessor to assist the Native Land Court in Taranaki. Following the court's decision, Pomare would become the principal owner of Rekohu.

We do not know how the litigants prepared, but we can say that counsel were not instructed. It appears to have been settled that Ngamunangapaoa Karaka and Hirawanu Tapu would be the main spokespersons for Moriori and that, on the Maori side, family heads would each speak for 'their' blocks, but with Pomare leading for Ngati Mutunga overall.

72. King, *Moriori*, p 123

73. Cooper, under-secretary, to chief judge, Native Land Court, 30 March 1869, P444/5, letter 122, MA4/12, general English letterbook, 22 September 1868–29 September 1869 (doc F4(a), vol 4.35, p 711)

74. Halse to Fenton, chief judge, Native Land Court, 9 May 1870, P401, letter 113, MA4/13, general letterbook, 30 September 1869–21 October 1870 (doc F4(a), vol 4.35, p 714)

75. Memorandum from Fenton, 8 January 1870, Fenton papers, NA (doc F4(a), vol 4.36, p 763) (cited in doc F3, pp 141–142)

(4) Prospect of out-of-court settlement

Of more interest is whether Moriori and Maori could have reached their own agreement. The leases had proven contentious, as was apparent during Halse's visit, a lease implying that those granting it owned the land. But some Maori were prepared to share part of the rents with Moriori. One of the principal Ngati Mutunga rangatira, Pomare, so asserted at the court hearing.⁷⁶ One Moriori claimed that when Ngati Mutunga began to lease the land they agreed that Moriori might participate, but no rents were forthcoming.⁷⁷ Other Moriori considered that Maori short-changed them badly on the rent distributions, but obviously some rents were paid.

We think that, with a little further thought, it might have been obvious to both sides that each had an interest in the land. Had that been accepted as a principle, then the issue would have focused on the proportion of land that each was to receive. However the court itself was not attuned to encouraging such compromises. The tendency of that court, when considering historical conquests, was to identify winners and losers.

6.6 CONCLUSION

We now ask: What were the issues under consideration and could the Native Land Court deal with them?

In our view, the issues went far beyond those that the court could deal with, restricted as it was to deciding on the basis of its own particular view of native custom. Involved were major issues of justice – justice in the broader political sense. We refer to some of them:

- ▶ *Moriori law versus Maori law*: Whose culture applies when cultures conflict? We refer to the Maori law of conquest rights (though, later, we challenge the court's perception of that law) and Nunuku's law for peace. Could they be reconciled? The court's decision did not address that issue, though it was raised.
- ▶ *Ancestral rights versus conqueror's rights*: Maori recognised rights both by ancestry and by conquest. How are these rights to be reconciled when they conflict?
- ▶ *Custom versus equity*: Should one be able to rely on the customs of conquest and enslavement when, even amongst Maori, they had ceased to represent acceptable conduct?

76. Document c3, vol 8.2, p 22

77. *Ibid*, p 12

- ▶ *Occupation versus absenteeism*: Was the justice of the case affected by the fact that most Maori had returned to their ancestral land and Moriori now predominated on Rekohu? Or that Ngati Tama, at least, had no intention of returning?
- ▶ *Lease rights versus ownership rights*: Though strictly speaking the lessees had no rights, legislation prohibiting land from being leased before the title to that land was settled, the reality was that the lessees were there, they enhanced the local economy, and no one wanted to be rid of them. Was it possible to accommodate their interests as well? Might the parties agree that whoever took the land would take it subject to existing leases?
- ▶ *Civil rights versus slavery*: How are civil rights to be adequately restored after conquest, land grab, and enslavement? We think that was the main question. We know how questions of that kind are dealt with today, at least under the Treaty claims process in this country, but what was the thinking then?

We think that the broader questions of justice were understood as well in 1840 as they are today. The evidence for that is the Treaty of Waitangi. Who would have committed themselves to such promises if justice was not highly regarded at that time? However, the Native Land Court was not called upon to consider how the Crown might best discharge its responsibilities in the light of Treaty principles.

In all, we consider that the Native Land Court was not an adequate instrument to deal with the real issues in this case.

6.6.1 A principled approach to the issues

In our view, the Treaty of Waitangi called for a principled approach, not a simplistic answer like deciding upon the basis of a court-derived and European-adjudged native custom. We think the answer to the land question really depended upon a principled approach being taken from the beginning of Crown administration once the Moriori circumstances were made known. We so concluded at the end of the last chapter. Short of direct intervention, if that were impractical, it should have been made clear to Maori that the situation would have to change, that emancipation was required under the Crown's law, and that, eventually, Moriori must have a reasonable share of the land.

True emancipation could have required no less. We presume that there would have been resistance, but at least the ground would have been laid for mindsets to change.

We think that Maori knew that instinctively. Once it was apparent that the Government was taking a direct interest in the Rekohu land and the war in Taranaki loomed, the Maori attitude to Moriori began to change. ‘They are kind to us now,’ said the Moriori Mina to Halse, ‘because they think you Pakeha would support us.’⁷⁸ Maori began to talk of sharing the rents, which was close to saying they would share the land, and they began to set aside reserves. These were niggardly, but it was a beginning and it showed that a mental shift had been made. It needed only a push from the Crown (a push that should have come from the start).

Instead, the Native Land Court said in effect that Maori were in the right. The mindset was established in 1836, and, following that decision, it seems not to have changed. At least, that was the impression given by some of the Maori evidence presented to us, despite the passage of time, and from Maori attempts to stop this Tribunal’s inquiry from proceeding.

6.6.2 Inquiry or a negotiated solution?

We do not think that in 1870 it was too late to have adopted a principled approach, even though it would have been far better had such an approach been taken from the start. At the very least, an inquiry into the justice of the case could have been instituted. Such inquiries were not unknown at the time, even on issues of Maori land as in Poverty Bay after the land cessions in 1868 or in the Bay of Plenty. At this time, a commission of inquiry was also proposed for Taranaki and would soon be constituted.

And either with or without such an inquiry, a negotiated solution was feasible. Maori had shown some signs of a willingness to share, and sharing had long been the Moriori position. In any event, the justice of the case demanded that negotiations, under Crown supervision, be tried.

6.6.3 The Taranaki solution

Above all, however, the whole matter was capable of settlement. The so-called ‘Taranaki problem’ was not a problem, in this instance, and instead held the key to the solution. The Taranaki events could only have

⁷⁸ Henry Halse, ‘Report on the Chatham Islands’, AJHR, 1867, A-4, no 4 (doc A16(a), vol 1.14, p 6)

disposed the Crown to favour the Ngati Mutunga claim to Rekohu, but the potential was there to favour everybody, the Crown included. Ngati Tama had land in Taranaki. Certainly, they were aggrieved over the part confiscated, but there was room for a settlement with them, at least in regard to Rekohu. They were seeking to sell the Rekohu land and did not wish to return. This was known at the time. Then, it was entirely feasible that Ngati Mutunga should be left with the greater part of that which they claimed. What was required was the negotiation of compensation with Ngati Tama so that the Ngati Tama share of Rekohu could pass to Moriori. This would have gone some way to satisfying the Moriori claim to one half of the land. While the Ngati Tama share did not equate to a full half and was confined mainly to one region of the island, we think that there was space for negotiation and the opportunity for all to have had a fairer share by this means.

If that could not have been made to work, then the fact remains that the wrong in Taranaki could not justify another wrong on Rekohu, and the Government had to deal with Rekohu on its own terms.

We conclude that the Crown should have promoted a special inquiry or a negotiated solution. Such a solution was feasible. From the beginning of the Crown's administration of Rekohu to the time that the Native Land Court sat, all that was lacking on the Crown's part was the will to be adequately involved.