

# Report of the Waitangi Tribunal on the Orakei Claim

## 04 The Winds of Change 1840-1869

### 4.1 The Treaty of Waitangi and Birth of Auckland

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Auckland was borne on strong northern winds. At 1840 Ngati Whatua held Tamaki under the mana of Te Kawau, but in fear of the next Ngapuhi raid. Years earlier tribal tohunga Titahi had foretold of hope in the winds of change, prophesying

He aha te hau e wawa ra, e wawa ra  
He tiu, he raki, he tiu, he raki,  
Nana i a mai te puputara ki uta.  
E tikina atu e au te kotiu,  
Koia te pou whakairo e tu ki Waitemata  
Ka tu ki Waitemata i oku wairangitanga,  
E tu nei, e tu nei!

Professor Kawharu updated the translation for us as follows

What was the wind that was roaring yonder?  
It was the north wind, the wind from the north  
It was indeed the north wind I was perceiving driving the puputara ashore.  
And then to my amazement there was the carved post standing by (the shores of) Waitemata, standing, standing thus.

Reed considers

It was a prophecy in 1780 and long remembered by the Maori people for, they said, the nautilus (puputara) represented the white man's ships, and the carved post was the flag of England (1955:15).

It would be consistent with tribal experience had Ngati Whatua interpreted the vision of a seer to determine upon an arrangement with new arrivals from a distant place. Several years before the Waitangi Treaty Te Kawau had learnt of a likely visit of the white-man's chiefs from another source, the missionaries. He was one of those who welcomed Rev Samuel Marsden to Kaipara in 1820 and who treated with other missionaries like Reverend Robert Maunsell at Port Waikato. Marsden met often with Te Kawau whom he described as 'an old friend'.

Some tribes had secured Europeans to live with them and their patronage was considered a good thing in raising tribal status and securing trade. The

missionaries prophesied that government arrivals would end the lawlessness of traders and the devastations of Maori musket warfare. It would have been consistent with his experience if Te Kawau had sought to add Hobson and his people, to his depleted tribe, gaining protection from enemies and the material advantages that those of the white tribes seemed able to give. He was not to know the white tribes were unaccustomed to communal sharing or the patronage of 'heathens' and that eventually, numerical strengths would change and patronage would be reversed. In any event, with hindsight 1840 was an important year for Ngati Whatua of Orakei. It was in that year that Te Kawau and other leaders signed the Treaty of Waitangi and the first sale agreement that led to the establishment of Auckland, in that order.

For Ngati Whatua, Te Kawau, Reweti and Tinana signed the Treaty of Waitangi at Manuka (Manukau) on 20 March 1840 with W C Symonds signing on behalf of the Crown. It was a Treaty that opened with reference to "Peace and Good Order" and the "necessary Laws and Institutions". But Te Kawau sought more than words to gain security against the northern tribes.

On one account he sent his tamaiti, Reweti, to the Bay of Islands to ask Governor Hobson to come to Tamaki. Reed, 1955:40 records

And then, a few days after the signing of the Treaty, seven chiefs from Orakei came to the Bay seeking protection against their old enemies the Nga Puhī, and asking the Lieutenant-Governor to take up his residence amongst them. They offered him land if he would live at Tamaki.

Hobson, anxious to find a more central location for his capital, agreed and made an inspection of the area on 23-28 February 1840. Popular Maori opinion is that he was welcomed at Orakei but no record of this can be found in the ships log. Whether Hobson did in fact visit Orakei on this occasion remains in doubt but of a later and more important visit to Okahu Bay, Orakei there is no question.

Subsequently Felton Mathew, Surveyor-General was sent to reconnoitre the area in May. Following his report, Hobson visited the area again on 6 July and by the end of the month a decision had been taken to establish Auckland.

Meanwhile the area was visited by a party under Doctor John Logan Campbell, later to be described as the father of Auckland. The occasion is described in Campbell's book, *Poenamo*. It was rumoured that the land would be the site of the future capital, and Campbell wished to buy there. The occasion has significance for us however as the first recorded indication that while Ngati Whatua sought a settlement on their lands, Orakei was specially regarded and was definitely not for sale. Reed records the account as follows

They rowed up the harbour close to the shore and, turning south, landed at the head of what was later known as Hobson Bay. They saw a small Maori village, but there was no sign of life, and as it was suspected that the inhabitants had gone on a shark-fishing expedition to the Manukau Harbour, the white men decided to follow them across the isthmus. When they reached the beach, they could see the Maoris

on the further shore at Mangere. They crossed by canoe and greeted the patriarchal chief of Ngati Whatua, Apihau [sic] Te Kawau, who had befriended Marsden twenty years before, and his son Te Hira.

The white men knew what they wanted - the land of Remuera where it slopes down to Orakei Bay. Unfortunately the Maoris were just as determined, and the answer was an uncompromising "No". They would sell land further up the harbour, but as for Remuera and Orakei-Kahore, kahore! [No, no!] (Reed, 1955:48).

On Friday, September 18, 1840, a party was sent to raise a flagstaff at a point which is now the top of Queen Street.

Captain Symonds read a preliminary agreement with the Maori land owners, by which the Ngati Whatua tribe agreed to cede to the Government an area of land of approximately three thousand acres temporarily (the later agreement of 1841 said "for ever and ever") until its purchase could be effected by a proper officer of the Crown. (Reed, 1955:54)

On 20 October George Clarke, the Protector of Aborigines who also had the responsibility of purchasing Maori land, followed up by formally effecting the purchase of some 3,000 acres of land running along the Waitemata foreshore from Hobson Bay to the Whau creek and inland to Mt Eden (Maungawhau), from Te Kawau, Reweti, Tinana and Horo. They received cash and goods worth £281 pounds, with a second payment of £60 pounds in 1842. Ngati Whatua were soon to receive a rude awakening to European commercial speculation when a mere 44 acres of that block were sold at public auction, six months later, for £24,275 pounds. The commercial lots were in turn quickly subdivided and resold at even greater profits as government officials, merchants and speculators scrambled for choice sites in what became the central business district of the new capital. A second auction of suburban and rural lots in October 1841 also fetched high prices.

Reed's account continues as follows

In January 1841 the remaining officials and all the documents and papers that the Government had accumulated were brought from Russell, but Hobson did not take up official residence until March 14. With this simple act Auckland became the capital of New Zealand ... There were two ceremonies to be observed when Hobson arrived, one for the Maoris and one for the pakehas. The Ngati Whatua people were glad to see the new arrivals, for the white man's guns spelt security. It will be recalled that a deputation had visited the Bay of Islands to extend a welcome to the Governor.

Hobson now repaid the visit, greeting Apihau [sic] Te Kawau on the foreshore at Okahu, later known as the Orakei Native Reserve. Over a thousand Ngati Whatua had assembled to meet the Governor. Te Kawau spoke for them all.

"Governor, Governor, welcome, welcome as a father to me! There is my land before you." He waved his hands towards the upper reaches of the harbour. "Governor, go

and pick the best part of the land and place your people, at least our people upon it!" (Reed, 1955:58).

Apart from occasional depressions, the new European settlement progressed steadily. The seat of Government was established there and as Titahi had prophesied, a new post stood at Waitemata. Auckland was off to a propitious start for the settlers came not as conquerors, not as interlopers, but as Te Kawau's invitees to share the land with Ngati Whatua.

Maori and Pakeha needed one another in those days. The Europeans were completely outnumbered. The 1840 census gave 2050 Europeans with 1200 in Wellington as New Zealand Company settlers and the remainder thinly spread in widely dispersed settlements. A return of the native population laid before the Legislative Council at Auckland in 1845 disclosed an estimated 70,000 natives within three hundred miles of Auckland. It led James Cowan to comment

Let it not be forgotten that had it not been for the true benevolence, the hospitality and the continued friendships of such men as Tamati Waka, Patuone, Te Kawau, Te Wherowhero and Te Puni the British flag might not be flying in New Zealand today (Cowan, Vol II 1922:6).

But conversely Ngati Whatua needed the settlers for the same return gave 2,000 Ngati Whatua (which included the Kaipara section) and Ngapuhi 12,000. It needs to be borne in mind that a further Ngapuhi raid seemed likely for many years. Heke and Kawiti were seeking support from other tribes for a combined attack on Auckland. In April 1846 it was rumoured Heke and 2000 men were about to descend but the attack never came. Potatau Te Wherowhero of Waikato made it clear he would stand against any attempt and Paora Tuhaere conveyed the same response from Ngati Whatua. But eventually peace followed settlement, tribal warfare became a thing of the past, and so all in all, the 'treaty' for the sale of Auckland was a good bargain.

But by 1845 the European population of 3,828 already far exceeded that of Ngati Whatua scattered over kainga at Okahu, Orakei, and at various localities around the Manukau harbour. By 1852 the European population of Auckland had risen to 9,159.

Nevertheless, for a start, the relationship between Ngati Whatua and the Europeans was mutually beneficial. Both sides gained the security they needed against further Ngapuhi raids. Ngati Whatua benefited from a rapidly expanding market for their produce, and, in exchange, a supply of European goods. Other tribes, like Ngati Paoa and Waikato, moved closer to Auckland to enjoy the commercial opportunities. Yet, in time, they all had to pay their price, since increasing European settlement multiplied the demand for Maori land. Ngati Paoa, also gravely weakened by the earlier Ngapuhi raids, were next: in May 1841 they sold some 6,000 acres along the waterfront from Mission Bay to the Tamaki estuary for £358 pounds worth of cash and goods. A month later Ngati Whatua sold a second block of some 13,000 acres lying inland from the

original Waitemata block, from One Tree hill (Maungakiekie) to the Whau, for £389 pounds.

By this time all of the Waitemata foreshore of the Tamaki isthmus except Okahu Bay and the headland, had been sold. But Ngati Whatua retained their foothold on Waitemata, a strip of territory running back through Orakei and Remuera to Manukau and most of the land around the extensive Manukau harbour.

Their possession of this territory was soon put under threat. European settlers who resented the Crown's monopoly to purchase land, according to the second article of the Treaty, and having to pay a minimum price of 1 an acre for Crown Land, were soon agitating for the abolition of pre-emption. In March 1844 Hobson's successor, Governor FitzRoy, gave way and issued a proclamation which allowed settlers to buy land directly from the Maori owners, on condition that they paid a fee of 10/- per acre to the Government. Few were satisfied with the concession and only some 2,000 acres were purchased. The agitation was renewed and in October FitzRoy again gave way, this time reducing the fee to 1d an acre. There was then no hesitation and by the end of 1845 European settlers claimed to have purchased some 100,000 acres of Maori land, most of it in the neighbourhood of Auckland.

Then a new Governor, Captain George Grey, arrived with instructions to resume the Crown's right of pre-emption. He also began an inquiry into the purchases under FitzRoy's proclamations. They were, in due course, reduced to some 20,000 acres. Some of the surplus was returned to the former Maori owners, though much of that was later bought by the Crown. Some 16,000 acres however was retained by the Crown without compensation. (The 1947 Surplus Lands Commission, chaired by Chief Justice Myers, did recommend payment of compensation for this area, but members were divided amongst themselves over the amount - (AJHR 1947, G-8).

By 1850, as a result of Crown and private European purchases, Ngati Whatua were left with only one area of land on Tamaki isthmus. They called it Orakei though it was much larger than the Orakei block as we know it today. Nevertheless, it was assumed that it would gain in value from the European settlements that now surrounded it, and that Ngati Whatua would acquire the arts of civilization. Certainly they continued to derive advantages from their association with the Europeans of Auckland. A mission school had been established at Orakei since the 1830's and later the Anglican Church acquired a substantial foothold from the Crown around, of course, the adjoining Mission Bay. The Church had acquired other nearby lands too and St John's Theological College originally established at Waimate in 1842, was reopened at Meadowbank in 1844.

The Church taught more than a new religion. It taught a new way of life, how to read and write, health care, new techniques in house building and horticulture, animal husbandry, trade and industry and new modes of dress and manners. Ngati Whatua learnt eagerly of these things and formed a close alliance with the Anglican Church (though Bishop Selwyn was to convert the

school at Mission Bay to a training place for Melanesian rather than Ngati Whatua students). It was soon thought Ngati Whatua were more literate than most settlers. They grew maize, cabbages and potatoes for sale. They acted as merchants for other tribes supplying produce to Auckland, hosting at Orakei those who came by sea or land. W Swainson describes Maori economic growth in the 1850's mentioning

...In a single year 1,792 native canoes entered Auckland harbour bringing to market by this means alone 200 tons of potatoes, 1400 baskets of onions, 1700 baskets of maize, 1200 baskets of peaches besides very many tons of firewood, fish, pigs and kauri gum. (Swainson, 1856:66)

Their demand for coastal trading vessels was such that they formed the basis of a local shipbuilding industry, Governor Grey making loan advances to tribes to assist the purchase of vessels. By 1858, 53 trading vessels registered in the Port of Auckland were in native ownership. It was a natural development that Orakei became a place of inter-tribal deliberations as tribes gathered from places as distant as Gisborne, to discuss their common concerns en route to market.

Ngati Whatua joined also the settler society. They supplied produce, worked on building projects and became members of the Police force. Their horses were entered in race meetings, their chiefs attended balls at Government House (Platts, 1971:79, 185).

Naturally there were moments of misunderstanding. There was uneasiness in 1841 when Te Kawau sheltered one of his people convicted of larceny to prevent his incarceration. Te Kawau responded to criticism with a caution to the settlers - "the love of many is growing cold" (Great Britain Parliamentary Papers Relative to New Zealand, 1844 P. 40). There was further disquiet later when a huge inter-tribal feast was held at Remuera. But the differences were sorted out, Te Kawau protesting he misunderstood the settlers' ways and expressing a desire to accept the law and learn more about it (see FitzRoy, 1846 and Thomson, 1859). In fact, Te Kawau became committed to law and order, exhorting his people to settle differences through Courts and proper procedures. Ngati Whatua support for law and order, and for the Europeans in their midst is expressed in the recorded addresses of their chiefs, Te Kawau, Uruamo Whangaroa and Te Ara Te Tinana, in 1853 in farewelling Governor Grey as he returned to Britain. We quote here from Te Kawau's opening as translated into English, and move then to the substantive part to which we refer.

Friend, the Governor, salutations to you. This is our speech to you; do you hearken to it - we your people and your children, namely the Ngati Whatua, wish to bid you farewell....

We have never resisted your authority. It will be seen that the hands of the Ngati Whatua have not touched a gun to molest the Europeans. You will remember that the Ngati Paoa sought a quarrel with the Europeans and came to our place, but we rendered them no assistance. We put our lives in jeopardy when we sought out Mr

Meurant to take us to your presence, for we did not reflect that you were surrounded by troops: - no, we sought you out nevertheless.

This is our love - the love of the people who protect the Europeans, and you know that this statement is correct. (Davis, 1855:64).

Later, Te Kawau's authority passed to his nephew, Paora Tuhaere, for he had a better understanding of laws than Te Kawau's own son. Paora himself was a staunch supporter of the Governors and settler Governments, and until 1977, over 100 years later, Ngati Whatua were to use only proper channels for the resolution of their many grievances.

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### 4.2 The 'Land Treaties' of Ngati Whatua

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Though the Treaty of Waitangi has dominated Maori attention, as settling the broad blueprint for colonisation, many Maori point to other 'treaties' dealing with particular lands or claims. It has been our New Zealand tradition to regard these transactions not as treaties but as deeds of gift, sale, or settlement, and yet our counterparts in North America took an opposite approach. There the tribes were treated as separate sovereign entities and similar deeds are listed as treaties.

The separate approaches have led to different results. The documents in New Zealand have been construed according to English legal understandings and culture. As long as the deed is clear, oral evidence of what took place and Maori cultural understandings and oral tradition have been discounted. That has not been the case in North America as *R v Taylor and Williams* (1981) 62 CCC (2d) 227 demonstrates.

There, land was sold without any reservation of Indian hunting rights. Though the documents were not lacking for clarity, the Ontario Court of Appeal read into the arrangement a presumption that hunting rights were retained having regard to tribal understandings that were corroborated by Indian custom and surrounding circumstances.

If we too are not to apply mono-cultural assumptions to arrangements between two people, we also must look to the expectations of both parties in the light of their different experiences when considering the several 'land treaties' of Ngati Whatua, entered into after Waitangi. Some have already been referred to.

The earliest sales though seen by settlers as simple conveyances, may have been seen by Maori as treaties of cession of tribal lands to the intent that both parties to the agreement might belong to them. The Maori soon learnt the value Europeans placed on their lands and became better bargainers, but it is doubtful they knew the European understanding of the first sales. Conversely, there are doubts the Europeans appreciated or understand yet the nature of Maori transactions. The execution of early documents is not proof of a common intent and there are many instances where the oral tradition recording a people's understanding of an agreement, varies markedly from the words of the executed deed. To the early Maori it was proper to extend hospitality to new arrivals, to provide them with a place for their homes and cultivations and to expect gifts in exchange. It did not follow, in the customary perspective, that the land was irrevocably given for their exclusive use. Te Kawau referred to Auckland as "the township on our land", as though he had still an interest, as late as 1853 (Davis, 1855:65). It might also have been considered

the Treaty of Waitangi made the Crown the parent of both Maori and European so that a cession or sale to the Crown was a cession to the combined group of Maori and European. At the other end of the island Wakefield's policy of creating Maori reserves within each block sold, at least showed an intention to secure a place for the Maori within ceded lands and a share in increasing capital values.

Ward (1986:259) considers 'Maori hosts' may be a better term than 'Maori vendors' to describe early sales in the light of customary expectations. He considers not only the paramount right of the tribe, as distinct individuals, to engage in land transactions, but the Maori understanding of them, agreeing in that respect, with a reported statement of the present Governor-General, Sir Paul Reeves, that

There were marked differences between European and Maori conceptions of sale, gift or trust. A Maori gift was sometimes intended to create a continuing relationship and obligation.

Sales, unknown to the Maori, were likely seen as involving an exchange of gifts to bind both parties in common cause. Ward considers it necessary to examine the terms 'hoko' and 'homai', which illustrate the customary preference for reciprocity and continuing obligations, shedding light on what the Maori signatories may have understood by 'hokona' in the Maori version of the Treaty (or 'sale' in the English text).

In those days, apart from the period when the pre-emptive right was lifted, these 'treaties' were effected by direct negotiation between government agents and those persons whom the agents thought to be the leaders of those tribes who were thought to be the owners.

That 'title' to Maori land lay basically with 'tribes', not individuals, was a conclusion reached by a Board of Inquiry appointed by Governor Browne in 1856 under the Surveyor-General, C W Ligar. It is of interest that the Board went on to note that certain individuals of "Ngatewatua" had sold land around Auckland to Europeans during the waiver of the Crown's right of pre-emption, and subsequently to the Crown itself but

no after claims have been raised by other members of the tribe. . this being a matter of arrangement and mutual concession of the members of the tribe.

There are real doubts however that Te Kawau saw it that way and considerable evidence that Maori individuals were dealt with to circumvent customary tribal controls.

After the initial sale of land for settlement Te Kawau and his people felt the need for caution. It was soon apparent the 'treaties' did not mean a sharing in the land at all. It was also obvious that one had to bargain for a proper price. As we have seen, the original sale of 3,000 acres taking in what is now central Auckland was for cash and goods to the value of £34 pounds. That was cheap even in those days but at that time the price was not as important as obtaining

security, learning and prosperity through an association with the new settlers. Within nine months the Crown had sold 44 of those acres in 119 allotments for £24,275 pounds, a per acre increase of over 8,000 times. This profit met the initial cost of those things that go with good order and government - roads, buildings and services. It also provided more money to buy more land.

As land sales continued Te Kawau became concerned not only with the prices obtained but with the absolute loss of land. By the end of the 1840's Ngati Whatua held only Orakei, or 'Orakei Reserve' as it was also called. As we have seen it was several times larger than the 700 acres called the Orakei block today and it included part of what is now Remuera. The larger problem was whether the law-abiding Ngati Whatua could lawfully retain what was still theirs.

In 1850 the Government started to nibble at the Orakei reserve when H T Clarke bought 700 acres on the Remuera side. Years later, Clarke admitted that the chiefs had set that land aside as 'a nest egg for their children', that they had then demanded £12,000 pounds for the land, but, after 'prolonged and wearisome interviews', he had beat them down to £5,000 pounds. Certainly this was much more than the Crown had paid in the early 1840's, but there was still an enormous profit on re-sale. One third of the block was sold immediately for £32,000 pounds and, according to Clarke, the whole of it realised £100,000 pounds.  
(Clarke, 1901:7).

Te Kawau had reluctantly acquiesced in the later sales. The Land Purchase Officers were threatening the control of chiefs by dealing only with those willing to sell, without prior tribal meetings, and many chiefs sought to maintain their mana by joining in rather than be seen as having lost land without their approval. Unfair tactics in the wholesale acquisition of Maori lands, although occurring mainly after the establishment of the Native Land Purchase Department under D McLean in 1853, have been well documented (see Sinclair 1957:53-58). The purchasing officers, tended increasingly to deal only with the sellers of a tribe, though they were but a few, ignoring chiefs and others as though the few were solely entitled.

For his part, and from at least the early 1850's, Te Kawau urged his people not to sell more lest they fall into a position of inferiority, but he also urged the Government not to buy, and to protect the Maori from the ill effects of unregulated acquisitions. He became determined to hold to the Orakei lands, stating in his farewell address to Governor Grey in December 1853

Friend, when you arrive on the other side, tell the Queen about the good arrangements you have made in regard to the formation of a township on our land and let this land [Orakei] be reserved for our own use for ever and let us have a Deed for it so that it may be safe (Davis, 1855:65)

Te Kawau's song, composed for that occasion, may be read as referring to both his sense of loss at the Governor's departure and his fear of losing Orakei

The clouds in yonder horizon  
Across the sea, are playing with  
The winds, whilst I am here  
Yearning and weeping for my son - Ah! he's  
More than a son to me; he's my heart's blood...!  
(Davis, 1855:64).

Nonetheless, in 1854 the Crown purchased two more blocks in Orakei now known as Meadowbank, but called Pukapuka 1 and 2, for £770 pounds.

Ngati Whatua of course, had been effectively funding the cost of developing Auckland from the resale of their lands. Their concern resulted in a ten percent clause in their later land sale 'treaties' by which ten percent of the resale price was to be returned to Ngati Whatua in cash or services. More particularly, according to the Maori translation, it was

...for the founding of schools in which persons of our race may be taught, for the construction of hospitals in which persons of our own race may be tended, for the payment of medical attendance for us, for annuities for our chiefs, or for other purposes of a like nature in which the Natives of this country have an interest - ten percent, or ten pounds out of every hundred pounds, out of moneys from time to time received for land when it is resold.

The principle of the clause may have been a good one but it led to arguments that the ten percent was not in fact being returned, or that the services provided were not principally for their benefit. CBC Chittenden, who conducted research into the matter, was called by the claimants to explain his findings. They are not complete but he thought it obvious there had not been a full accounting to Ngati Whatua or a proper return to them. Where ten per cent monies were used they were marginally for Ngati Whatua's benefit. The Orakei bridge linking Remuera to the southern portion of Orakei was built in 1862 entirely from ten per cent monies though it benefited as much, or more, the settlements at Mission Bay, Kohimarama, St Heliers and beyond, there being no link road to the Maori settlement at Okahu which in any event relied on water transport. Most went for hospitals and schools and only about 32% of the fund was returned to Ngati Whatua in cash.

Still, for some twenty years ten per cent of the profits on the resale of different parts of the land were set aside in the way described, whereafter the system was abandoned (Heaphy to Lewis, 29 May 1874, MA 13/32, National Archives).

Ngati Whatua complaints over non-payment after 1874 were referred to the 1927 Royal Commission on Confiscated Lands. The Commission calmly accepted Crown counsel's argument that over the years, Government had spent more than £2,000,000 for educational and health services for Maoris (nationally) and that 'this expenditure ought to be treated as a performance of the obligation created by the covenants' (AJHR 1927, G-7,p 33). We shall see that an inability to see Ngati Whatua as other than simply 'Maoris', has plagued the

Orakei people throughout this century and with the most serious consequences for them.

The deeds had provided for expenditures for 'persons of our race' ('nga tangata maori' in the Maori versions) and had not referred specifically to Ngati Whatua. Obviously the Commission did not consider that a bicultural approach might be needed for the interpretation of such documents, or that some enquiry should be made as to the Ngati Whatua understanding of the arrangements. It kept instead to the letter of the law as the Commission saw it. There is no doubt however that after 1874, at least, Ngati Whatua were denied payments which they had hitherto received.

The claimants questioned the propriety of the early sales and the implementation of conditions but did not challenge them. They referred to the sales not

because they dispute them but because they show, in their view, that Ngati Whatua met the initial cost of establishing Auckland, and because, in their opinion, Auckland ought now help them retain a part of the Orakei lands that should have been kept as theirs forever. For by the mid-1850's the real concern was not the price or the principle of peace and prosperity. Ngati Whatua had sold most of Auckland. From 1854 all they had left was the 700 acre Orakei block containing the principal marae and villages of the Ngati Whatua people. The Pukapuka sales of 1854 were to be their last - at least until 1913. It was clear by then that what was left had to be kept in perpetuity. As Clarke had acknowledged, it was meant to be 'their nest egg'.

No part of the 700 acre block was in fact sold under the old land purchase system. That system fell into disuse and discredit in the 1850's as disputes over the ownership and sale of land merged amongst other tribes. Instead, only small parts of the Orakei block were to be acquired, first to provide for a mission school and church, and secondly to provide for defence.

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### 4.3 The 'Treaty' to Provide for a Church

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If the North American bi-cultural method of treaty interpretation has application to Maori deeds, the approach has special significance in the case of gifts. In pre European times sales were unknown but gifts were commonplace and a variety of customary laws applied. Many gifts created reciprocal obligations of a kind unknown in English law, the essential element being the duty of the receiver to honour the giver, so that an ongoing relationship was established. In every case the obligation was to the donor tribe, certainly not 'all Maoris' especially since that could include old rivals. It was the mana of the giver that had always to be respected.

This needs emphasis because most of the deeds of gift, drawn by only one party to them, reflect not Maori culture but the English concept that a gift once given is gone forever and no strings are attached. The Maori way was to create ties with the social objective of binding people together. It follows that it was not impolite for a Maori to ask for a gift - be it an article, land, or a child - and somewhat impolite to refuse.

The difficulty that a Maori account of a gift may depend on a recollection of events well removed in time, is not such a problem with the Orakei gifts, for there is at least some contemporary writing corroborative of the current Maori view.

In the 1830's the main clusters of Maori homes on the Orakei block were in settlements called Orakei and Okahu respectively. A chapel was built at Orakei, the fifth suburban church in the Archdeaconry of Waitemata, from equal contributions from the Anglican Church and Ngati Whatua. It was dedicated St James in 1837. By 1844 a school was operating under Wiremu Hopihana Te Karore, a native teacher described as "excessively tattooed" in the journals of Rev V Lush (Barnett, 1976) and as the spiritual teacher of Ngati Whatua by C O B Davis (Davis, 1855:64). As was usual the chapel and school were staffed by local Maori under the supervision of a visiting circuit priest. They were, in law and fact, the chapel and school of the people for it was not at first thought necessary for the Church to own the land from which the Word was pronounced in order to spread it.

Apihai Te Kawau was considered a faithful Christian (Martin, 1884:144). Indeed, Te Kawau Te Tawa, as he was formerly known, was baptised Abishai (Apihai) Te Kawau, in the same St James Church. In 1858 Te Kawau and other leaders conveyed to the Crown 4.25 acres in the south west including the chapel and school, in order that the land could be entrusted to the Church.

Because of later events there is need to examine the gift. (We have been assisted in this examination by the research of R M Ross for the Anglican Church, in 1981, and kindly made available to us by the Church.) The Deed was in Maori. It was executed pursuant to the New Zealand Native Reserves Act 1856 which enabled Maori land to be given for Church purposes through the Crown. In Maori, the Deed (or Treaty) acknowledged the purpose of the gift, to provide for a chapel, a burial ground and THE school. (The EMPHASIS here and below has been added). The official translation changed this to read "a site for a church, for a burial ground and for the ENDOWMENT of a school...". That was the basis on which the land was said to pass to the Crown, but when conveyed to the Church in 1859, by Crown Grant No 14422, the land was vested in the Bishop of New Zealand "upon trust as a site for a Church and Burial Ground and as an Endowment FOR SCHOOLS FOR THE BENEFIT OF THE ABORIGINAL INHABITANTS OF THE COLONY OF NEW ZEALAND. As was noted by Bishop Gilbert in his submissions to us in 1986, "the particular had become the general". The grant followed the form of others made at that time but it did not follow the pact with Te Kawau and nor did it follow Maori custom. In the Maori way of thinking the land would have been given to secure a church and a school for the people, not a church and a school for the Church, and 'people' in this case, would have meant Ngati Whatua, not all Maori. The grant did not match the reality on the ground either. To all outward appearances the chapel and school still belonged to the people for they helped build it and continued to maintain it. Some of the villagers then erected homes on the church grounds. Later they had difficulties in finding a lay officiant or priest amongst their own number and from 1860 to 1863 subscribed funds to secure a salaried preacher from outside, though without success.

That was the position when shortly after, Orakei village was largely abandoned following a major fire. According to the evidence of A Cutler in 1938, given in the Supreme Court, there had till then been "as many as 150 Maoris living in raupo whares". The villagers joined with those at Okahu Bay, where the greater number lived, and a new church site was provided there, where the present church in Okahu Park now stands. The Orakei church, school and some of the homes on the site were destroyed by later fires, but some families continued to live on the old site, and later, more homes were built there. In customary lore, the land still belonged to the people. Once vacated by the Church, it became 'returned'. In English law that was not the case as the occupiers were to find in 1926 when the Church sold the site to the Crown and the occupiers had to vacate.

## 04 The Winds of Change 1840-1869

### 4.4 The Defence Treaties

#### 4.4 The Defence Treaties

There is need to look at other transactions too because of other claims made later. In 1859 the Port of Auckland was thought to be threatened by an imminent Russian invasion. On 5 August Te Kawau and others agreed that nine acres at Takaparawha Point (7.5 acres plus 1.5 acres access) be given to the Crown on condition that the land revert to the people if it were no longer needed for military defence. The actual words were

The conditions upon which we surrender this land are these - that it is to be held by the Government for purposes of military defence and that in the event of the Government ceasing to require it for such purposes of military defence it shall not be disposed of to private individuals but shall revert to us, upon which conditions we hereby surrender the aforesaid piece of land without receiving payment for the same.

We need to examine closely what happened because later the military never built there but on the opposite headland now called Bastion Point. It was thought the Government paid no compensation, but took the Bastion Point land in exchange for the 9 acres at Takaparawha. That is not what in fact happened but that impression was likely conveyed by the course of events.

In the first place the 1859 deed was not registered, as it could have been, for the military built its battery closer to the city and did not take up the 9 acre offer. Later, in 1869, the Native Land Court issued a title for the Orakei block to include the 9 acres as Maori land, because the Crown had elected not to use it and had not registered the deed.

Later the Defence Department decided to establish another battery reserve, selecting for the site the opposite headland at Orakei called then Kohimarama but now, Bastion Point. Fort Bastion was built there in 1885. Soon after the 13 acres affected (11 acres reserve and 2 acres access) was taken from the Orakei block by proclamation dated 26 August 1886. (New Zealand Gazette No 47 p 1091). At that time Paora Tuhaere was trustee for the Orakei block. Almost immediately after the Public Works Notice, on 21 October 1886, Tuhaere lodged a claim with the Compensation Court, seeking extensive damages of £5,000. The Government Land Purchase Officer, T Mackay, had not anticipated such a large claim and sought to delay a hearing. What had happened was that Tuhaere had completed a major survey of the Point for residential development on one acre allotments and had arranged with his local member, the Hon Dr Pollen, to promote an Orakei Native Reserve Bill that would enable Tuhaere to lease the sections to settlers on 60 year terms, to build access wharves and construct roads. He sought compensation based on the subdivision then in train.

It was then the Defence Department 'discovered' the 9 acre deed and had it registered in the Deeds Office Auckland (on 24 June 1887 as Deed No 103920). Then, while Tuhaere's Bill was before the Private Bills Committee, the Public Works Department proposed an amendment to the Bill, to the effect that the 13 acres at Bastion Point, said to be worth less than the 9 acres at Takaparawha, would be taken in exchange, thus obviating the need for a settlement with Tuhaere. On 7 June 1887 the Private Bills Committee postponed its consideration to the next session. It came before the Legislative Council again in November 1887 and was again referred to the Local Bills Committee to be considered in November and December whereupon the Committee, apparently willing to accept the proposed amendment, called for an amended Crown Grant for the Orakei block with full survey. Tuhaere responded to the Crown's initiatives by withdrawing the Bill altogether and demanding a hearing by the Compensation Court. The hearing, which did not take place until July 1889, was fully reported in New Zealand Herald 26 July and 5 August 1889. The award was £1,500. The land was taken and Tuhaere's proposals were thwarted.

It was then argued that Tuhaere's title was doubtful. Could he receive the compensation when he was only a trustee, it was asked and who were the beneficiaries, twelve others named on the Deed or the whole tribe? To resolve the impasse, as far as the Public Works Department was concerned, the money was paid not to Tuhaere but the Public Trustee (in 1890). Tuhaere however had incurred considerable survey and other costs relating to his aborted project so the money was eventually paid to his lawyer and set off against outstanding legal costs and disbursements. Tuhaere died in 1892.

So it is, we know now that an exchange did not take place, and compensation was paid. The people may never have known that for an exchange had been publicly promoted, cash was not distributed but applied to the costs of a wasted subdivisional exercise, and Tuhaere died before the matter was finally settled.

Meanwhile the Crown's claim to Takaparawha Point was dropped. It continued as Maori land while the Crown held to the Battery Reserve and work progressed. During the course of that work it was found necessary to cut Kohimarama Rock, which limited the range from the Battery, to a height of six feet above high water. The rock, a coastal outcrop occupying 13 perches off the Point was an important landmark and mooring facility for Ngati Whatua and was part of the Orakei title. It deserves mention for that reason but also because the compensation question has been confused with this matter. The rock was taken separately, when Ngati Whatua sought compensation, by a proclamation of 26 October 1901. It was stated that nothing had been done to prevent the Maori use of it for fishing and mooring. "We shall not stop Maoris landing on the islet so long as it does not interfere with defence matters ... " it was said, and on that basis compensation of £18 (only) was awarded - for division amongst the 26 owners then on the title. The levelled rock is now occupied by Tamaki Yacht Club.

Then the Crown was interested again in Takaparawha Point, and again for defence purposes, but this time it was neither gifted or taken but sold. It was purchased, in 1916, by what is called the meeting of assembled owners procedure whereby owners are asked to vote on an alienation, votes being counted according to shareholding. Eleven voted for sale, fourteen were against, but the sellers won as they held the most shares.

And so both headlands (and the rock) legally passed to the Crown and not by gift or exchange but for cash; but none of it passed with general approval. In June 1928 the Army notified Crown Lands it no longer needed the Battery Reserve at Bastion Point, but it was not until June 1935 that that was officially announced in the papers; whereupon, Judge Acheson of the Native Land Court reported in 1936, he was "waited on by a deputation of natives who informed me that the Orakei people had a claim to this eleven acres" (Lee, 1936) It was alleged then, many years after the event, the Battery Reserve had been taken in exchange and without compensation. That allegation was never investigated or explained and that in turn reinforced in the minds of Ngati Whatua, the propriety of their view. The defence status was finally revoked in 1941 and the area handed to the City Council to administer as a Reserve.

Shortly after the Army advised it no longer needed the Takaparawha Reserve either and that reserve became vested in the Auckland City Council to administer in 1946.

It appears the Maori understanding of the 'treaties' relating to the Church and defence sites was that the lands were merely held on trust, to be returned if no longer required for the purpose intended so that the Orakei block would be held intact. That view can be readily explained in customary terms. In the case of the Church site the customary view was expressed but not transcribed in the legal documentation.

It is not necessary to give any stress to these opinions at this point for it is more relevant to later events. In the 1850's no Maori saw the need to express the view, for although there was a growing disquiet over the continual arrival of more settlers, and some dissatisfaction with the transactions and events of earlier years, there still seemed to be a place for the Maori view in the overall laws and policies of the country. There was still a concept of 'one country - two people' even although demographic changes showed the former Maori power base had passed. (The European population increased seven fold in less than two decades - from 11,500 in 1843 to 79,000 in 1860 by which time the declining Maori population had been surpassed). Still a particular place for the Maori was provided for in the Treaty of Waitangi and affirmed by the Imperial Government in the New Zealand Constitution Act 1852. It was not until a home Government was established, and war followed that it was patently apparent the place of the Maori was not in fact secure. We therefore leave Orakei to consider initial policies and the change that came with Responsible Government and the Wars.

## 04 The Winds of Change 1840-1869

### 4.5 The Main Treaty, Initial Policy and Constitution

#### 4.5 The Main Treaty, Initial Policy and Constitution

New Zealand was settled in enlightened times. Political thinking had been influenced by the Evangelicals, the Humanitarian Movement, and the decisions of Chief justice Marshall of the United States Supreme Court on the rights of indigenous inhabitants in new colonies. An 1837 report of a Select Committee of the British House of Commons on aborigines in British settlements also had an enormous impact. It revealed the appalling effects of contact and strengthened British resolve to provide greater protection. The Colonial Office generally insisted that New Zealand Governors provide punctillious recognition of Maori rights, and, after execution of the Treaty in 1840, that the Treaty's terms be scrupulously upheld.

The Treaty of Waitangi reflected these policies and concerns. It is sufficient to say here (for the Treaty is examined fully in chapter 11 of this report) that it opens and ends with the conferral of a "Royal Protection" on the native people.

To Te Kawau it must have seemed a good arrangement. It appeared to promise not just the retention of Maori land by Maori people but the ownership of that land in accordance with customary tribal tenure. We find that that was indeed the case, for reasons given in chapter 11. That finding is important in assessing subsequent developments at Orakei.

More importantly, though the Ngati Whatua leaders may have assumed the point, the Treaty envisaged a British settlement in which a place would exist for both people. Read with the undertaking of protection and the prevailing British policies of the time, as is also more fully explained in chapter 11, the Crown's Treaty right of pre-emption carried an obligation to buy wisely, so as not to leave tribes landless or without a sufficient endowment for their future needs. That finding also bears heavily on the subsequent history of Orakei.

At a more mercenary level, but not without humanitarian concern, the exclusive right of pre-emption was seen as a valuable tool for meeting the cost of colonisation by buying cheaply and selling well. The Maori people would profit in the long term from the increased value of their unsold lands through the development of that ceded (see the instructions to Captain Hobson from Secretary of State Lord Normanby quoted later, in chapter 11).

The key to the success of that policy lay in the presumption that the Maori would in fact retain a good sized area of land for if they had none there was nothing from which to profit a capital gain. Accordingly, (as is more amply explained at 11. 9) the exclusive right of pre-emption was seen to carry duties and responsibilities not only to ensure that the tribes wished to sell, but to

see that they sold only those lands excessive to their needs and retained a sufficient endowment for themselves.

The Courts at that time reflected the official Imperial policy, Chapman J stating, in *R v Symonds* (1847) [1840-1932] NZ PCC 387, 391 that the rule of preemption

...necessarily arises out of our peculiar relations with the native race, and out of our obvious duty of protecting them, to as great an extent as possible from the evil consequences of the intercourse to which we have introduced them, or imposed upon them. To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the natives in a very short time.

The doctrine he saw as securing to the Maori

All the enjoyment from the land which they had before our intercourse, and as much more as the opportunity of selling portions, USELESS TO THEMSELVES, affords. (*R v Symonds* supra at 391 but with emphasis added).

The Court considered, however, it was simply recognising established principles, it being said in that respect

...The Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.

The Crown moved to institute an exclusive right of pre-emption even before the Treaty, in a proclamation of January 1840 issued by the Governor of New South Wales to prohibit wholesale trafficking in native lands. It was promulgated again in Act 4 Vic No 7 of the New South Wales legislature in August 1840 and then enacted for New Zealand as a separate colony in the Land Claims Ordinance of 1841. For a brief period from 1844 to 1846 the Crown's exclusive right of pre-emption was lifted (by Governor FitzRoy) but with that exception it was retained until 1862 (when the right was finally disbanded).

Sinclair (1957:50-53) considers the right of pre-emption was a basic tenet of contemporary British colonial policy to prevent the native inhabitants from being swindled for while it limited the tribes chances of selling for the best price, it also limited their ability to sell (see also Robson 1967: 10). The brief waiver of the pre-emptive right followed complaints from settler buyers and Maori sellers alike but Sinclair states "according to FitzRoy, settlers offered large rewards to agitators to stir the Maoris into protest against the Crown's pre-emption."

Wards (1968:170) reviews the Colonial Office policy of the time and its instructions to Governors to "honourably and scrupulously" fulfil the conditions of the Treaty of Waitangi and to adhere to its stipulations "as a question of honour and justice no less than of policy". The Imperial Government itself, while New Zealand was still a Crown Colony, strove to maintain that policy,

agreeing to such things as Governor FitzRoy's waiver of the pre-emptive right only on FitzRoy's advice that that was necessary to prevent war. Sinclair (1967:20) adds

...it was the almost invariable insistence of successive British Governments that Maori interests were not to be subordinated to those of the settlers

adding, with reference to a dispatch of 1859

The Imperial Government had declared unequivocally that even colonization must be a subordinate consideration to the duty of maintaining the substantial rights of the aborigines ... (p147).

The broad principle in the Treaty of Waitangi that the Maori people might retain their own lands in accordance with their own customs and their own customs to govern their dealings with each other, found expression in the New Zealand Constitution Act 1852. It was an Imperial statute to introduce Representative Government to the Colony. Section 71 provided for native laws to govern native people and native districts in which those laws would be supreme.

The principle was important for Maori people. Our history is marked by continuing Maori attempts to assert tribal law and autonomy, both before and after the Constitution Act 1852. There is good reason to believe native laws would have adapted and developed had tribal autonomy and native districts been allowed. In fact, they were not. The colonists were wedded to a view of one law for all, which was of course to be their law. The Colonial Government was to move very strongly to assert British law over Maori people, Maori lands and Maori society and there was never any support in the General Assembly for applying section 71. Still, it was not until our times, in 1986, that section 71 was formally repealed and a new Constitution was introduced without provision for Maori law at all.

## 04 The Winds of Change 1840-1869

### Section 73 of the Constitution Act acknowledged the communal nature of

native land ownership and affirmed the Crown's right of pre-emption. The colonists were equally anxious to overturn this provision too. By the end of the decade the settlers, resentful of the inability of the Crown's Land Purchasing Officers to acquire sufficient Maori land, campaigned for the abolition of pre-emption. In 1859 the General Assembly passed a Native Territorial Rights Bill to that end but it was disallowed by the British Government (which had still the control of native affairs at that time) as an infringement of the Treaty of Waitangi (see Sorrenson 1963:38). Eventually however, in 1892 section 73 was repealed.

The right of the tribes to retain their lands in accordance with their own customs, and not to be exposed to settler pressure to sell them was soon abrogated in domestic laws. The election of the first House of Representatives in 1855 was rapidly followed by overt War (1860-1867), the relinquishment of Imperial control of Native Affairs (1861), the confiscation of Maori lands (1863), and the individualisation of remaining Maori titles (1865). The general view of the Colonial Office, that laws should not contravene the Treaty of Waitangi, suffered a sudden decline.

Seen from a Maori perspective the position was even worse. The Treaty that to their mind should have been the fundamental law and was a constitution in itself, was effectively overturned by a settler population no longer a minority. Maori powerlessness to influence the unfettered authority of the newly established Parliament, was affirmed in 1867. Maori parliamentary representation was limited to four seats in the House, when fourteen or fifteen seats were due on a population basis.

The trouble was also that the Imperial policy had rarely been applied at the frontier in the manner intended. From the beginning Government Land Purchase officers were more intent on buying all they could see than ensuring the tribes retained sufficient for their needs. In fact Ngati Whatua were down to their last 700 acres, the Orakei block, and Te Kawau was not convinced that even that was safe. As Sinclair drily comments

[the British Government's] solicitude for the welfare of the Maoris was not shared by many of the colonists, whose aim in sailing so far from home was to benefit themselves (Sinclair 1957:1).

The settlers then had not sought the 1852 constitution in order to advance their responsibilities to the Maori and nor did they welcome it for the opportunity to provide for Maori laws and districts. They had sought instead, and had soon gained, self Government freed of Imperial controls. Still the broad principle that the tribes or tribal individuals should retain sufficient land

for their needs did find expression in many policies and statutes of New Zealand's own Government (see 11.9).

An important question in this case therefore, in assessing the fortunes of Ngati Whatua against the principles of the Treaty of Waitangi, is not whether they willingly sold land, but whether the Crown took sufficient steps to guard against excessive alienations and ensure that the tribes retained a proper land endowment.

Such a policy was little match for the settlers' impatience for more land. The 'one country - two people' concept was decidedly inconvenient. Amalgamation became the predominant policy and while many early legislators promoted it with the best intentions for the Maori race, for others 'amalgamation' was used to rationalise overt policies to acquire all that could be got. Those were the conflicting policies when New Zealanders went to war with one another.

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## 04 The Winds of Change 1840-1869

### 4.6 Land Wars and Land Laws

#### 4.6 Land Wars and Land Laws

Though the New Zealand Wars had little to do with Ngati Whatua, they were severely affected by the laws that resulted.

The old land purchase system was unsatisfactory. Some Maori sold land they did not own and there were continual arguments as to who had the right to sell. But some of the more powerful tribes pulled their people together to forbid the sale of tribal lands. Things came to a head in 1859 when Teira assumed an individual right to sell land in Taranaki and Wiremu Kingi imposed a tribal veto. Governor Gore Browne backed the seller and a war started. In Waikato the tribes refused to sell at all and the war went there, and soon, to other places as well.

We need not go into the wars for with only one known exception the Orakei people were not in them. They were nonetheless concerned with the events for with over 11,000 settlers in Auckland it was perfectly clear Ngati Whatua had lost the position they once enjoyed. Still, while Maoridom became divided, at Orakei there was total co-operation with the Government. Te Kawau remained committed to peace, law and order and the belief that the Government would afford protection for his people and their remaining block of land. As the war progressed in Taranaki, and tribes rallied to the Maori King the Governor sought a conference of chiefs to isolate the Taranaki tribes and weaken the King movement. As a tribe considered solidly loyal, Ngati Whatua of Orakei were asked to host the hui and in July 1860 a conference of chiefs from throughout New Zealand met at Kohimarama. There, two hundred chiefs expressed loyalty to the Queen, faith in the Treaty of Waitangi and a desire to end the division created by the election of a Maori King. But the Government was also sharply criticised. Some spoke of the Government's failure to include Maori representatives in the recently established institutions of State. Others referred to the Government's inaction on land claims, fishing rights, and the maintenance of customary law (see Kohimarama Conference AJHR 1860, E-9).

Governor Gore Browne was there and also Donald McLean, Native Secretary and Chief Land Purchase Officer. Te Kawau was there too. He repeated his request for a deed to reserve and protect the Orakei block for all time.

There was in fact not a great deal of difference between the loyalist Maori and King movement supporters, as New Zealanders shaped up for war. Paora Te Ahura stated the vision of the latter, at a Maori King conference at Rangiriri in 1857

The King on his piece; the Queen on her piece; God over both; and Love binding them to each other (Sorrenson 1963:36)

Significant, for Te Kawau, were the laws that came from the fighting in the south, for it was from those laws that he got his deed. But looking back on those laws, the protection of the Maori in the ownership of his land seems hardly to have been the objective.

To deal with the problem of suspect sellers, a Native Land Court was appointed to determine ownership prior to any sale. To deal with the problem of tribes unwilling to sell, the Court was to apportion the land to individuals who might then be individually dealt with. To deal with the wars and those who fought against the Crown, lands were confiscated, and to deal with a major cause of the war, the settlers need for more land, policies were established to expedite the rapid acquisition of Maori land for European settlement. These policies continued well into the 20th century. At Orakei they went so far the people became totally landless - and yet these people did not join the War.

F Hackshaw explained in her submissions that it was following the wars and the relinquishment of Imperial control that attitudes changed within the Courts too. In *Wi Parata v The Bishop of Wellington* (1877) 3 NZLR 72 the Supreme Court of Prendergast C J and Richmond J held that the Maori had only those rights expressly given by statute and that the Treaty was "a simple nullity". The wars had left their own scars, deepened by the ferocity of battle, or as Belich suggests in his account of the wars, by the narrowness of victory (Belich, 1986). In *Wi Parata* (supra) the Court no longer spoke of "aboriginal natives" or "Maori New Zealanders" as Chapman J had done thirty years before, but of "savages" and "primitive barbarians".

The Privy Council challenged these views in *Nireaha Tamaki v Baker* (1901) (1840-1932) NZPCC 371. It considered the 1841 Ordinance declaring the title of the Crown subject to "the rightful and necessary occupation of (the Maori) a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi". Other instructions from the Colonial Office and Imperial Acts of the British Government, including the New Zealand Constitution Act 1852, were considered to acknowledge the Maori right to hold land and administer their own affairs in accordance with custom. In the Privy Council's view *Wi Parata* "went too far" and it was "rather late in the day" not to take cognizance of aboriginal and customary rights. The Privy Council affirmed its view in *Wallis v Attorney-General* [1903] AC 173, strongly criticising the New Zealand Court of Appeal. Our Courts responded with a formal Protest of Bench and Bar (1903) (1840-1938) NZPCC 370, implying that the right of appeal to the Privy Council should be done away with. Thereafter, and although the decisions of the Privy Council were meant to be binding, the New Zealand Courts pursued the *Wi Parata* view. It seemed sufficient to say, as Stout CJ said in *Hohepa Wi Weera v Bishop of Wellington* (1902) 21 NZLR 655 that the Privy Council "did not seem to have been informed of the circumstances of the Colony". A host of subsequent cases show the view was soon entrenched in legal opinion, that the Maori

people have no particular aboriginal rights, save those conferred by statute, and the Treaty of Waitangi no persuasive let alone legal status.

The Native Lands Act 1862 was the first relevant statute. It provided for the investigation of customary lands and the grant of freehold titles to specified native owners. The Act was barely used. It did not limit the Crown's power to acquire uninvestigated land by purchase or cession and the Act was to be applied only in such districts as might from time to time be proclaimed. The first proclamation of a district was not until December 1864 and the first claim was not heard until June 1865.

Dr D V Williams pointed out in his submission

not surprisingly, it was blocks of land belonging to the Ngati Whatua in the near vicinity of Auckland which were the subject of the first cases for the new Court. Before the procedures of the 1862 Act were completed in these first cases, the law was superseded by the Native Lands Act 1865, and it was this 1865 Act which laid the foundation for the work of the Native Land Court in the ensuing decades.

The 1865 Act also provided for the individualisation of native titles and the grant of freehold titles to specified native owners. But this Act went further to prohibit the sale or leasing of Maori land unless the title had been investigated and a certificate of title had issued. Once a title had issued, the land could be sold, or leased, and to anyone. There was now an incentive to use the Act. A permanent Native Land Court was established to promote it and did so with success.

Many Maori claimants, stimulated by the direct offers from settlers and speculators, had begun to resort to the Native Land Court which was soon adjudicating on customary land at the rate of three-quarters of a million acres a year (Ward, 1974:212).

The rationale for the Native Lands legislation, as seen at the time, is apparent in the preamble to the legislation and the statements of the early politicians. The preamble to the 1862 Act, while purporting to give better effect to the Treaty of Waitangi, declared

. . .it would greatly promote the peaceful settlement of the Colony and the advancement and civilization of the Natives if their rights to land were ascertained defined and declared and if the ownership of such lands when so ascertained defined and declared were assimilated as nearly as possible to the ownership of land according to BRITISH LAW (with the emphasis as appearing in the Act).

The preamble to the 1865 Act stated the objective

to encourage the extinction of (native) proprietary customs.

In 1870 the Honourable Henry Sewell declared in the House of Representatives

The object of the Native Lands Act was two-fold: to bring the great bulk of the lands in the Northern Island which belonged to the Maoris, and which, before the passing of that Act, were extra commercium - except through the means of the old purchase system, which had entirely broken down, within the reach of colonisation. The other great object was the detribalisation of the Maoris - to destroy, if it were possible, the principle of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Maori race into our social and political system. It was hoped by the individualisation of titles to land, giving them the same individual ownership which we ourselves possessed, they would lose their communistic character, and that their social status would become assimilated to our own. [IX NZPD:361 (1870)]

Opposition to tribal ownership was nothing new. Governor Gore Browne considered the destruction of the tribal system would be as beneficial for the Maori as, he believed, the destruction of clanship and chieftainship had been for the Scottish Highlanders after the rebellion of 1745. (Turton Report 20 November 1861, AJHR, E-5A pp7-8)

Today virtually every acre of Maori land in New Zealand has been through this 'individualisation' process. The legislation also established the Native Land Court (which continues to this day). It will be seen at once that tribal ownership and tribal authority and control were each done away with. Land was awarded to individuals and those individuals could sell their individual shares without reference to the tribe.

Ward (1974:213) considers "the worst consequence of the new system ... was probably the marked decline in responsibility and trust between members of a kinship group formerly bound by reciprocal ties" as the Court favoured one witness over another, and did not so much enquire as act on such evidence as was presented to it irrespective of the deponent's tribal status. The consequences were far reaching. Individual claims and individual ownership exacerbated family disputes, always present but formerly controlled through the influence of chiefs and elders. The individual assumed an unaccustomed authority and traditional leadership waned, in Orakei, as elsewhere.

Yet all this was rationalised by the policy of amalgamation, which was reany assimilation, and the oft cited maxim of the day that there should be 'one law for both races' with the implied presumption that that law should of course be the English one. Maori communities came to place reliance on tribal members thought to have knowledge of the new laws and systems. Sometimes these 'agents' were not at all well versed. Sometimes they were simply dishonest. As the authority of traditional leaders diminished so also did hopes for tribal self determination.

In addition the individuals could now sell to anyone. The Crown's pre-emptive right removed in 1862 was not restored. It may be argued that this was repugnant to section 73 of the New Zealand Constitution Act 1852, (for the section was not repealed until 1892 and see section 2 of the New Zealand Constitution Amendment Act 1857, UK, preventing its repeal) but it may also

be argued that section 73 was to be construed as affirming the pre-emptive right only in respect of customary land. That fine point need not be determined. It is more significant that earlier, in 1859, when Britain had still the control of native affairs, local legislation to do away with the pre-emptive right was disallowed by the Imperial Government as an infringement of the Treaty.

The tribes were opposed to the new land legislation but inexorably they were drawn into it. There were petitions to have titles vested in the tribes as a whole as some sort of corporate entity (see for example the memorandum to the House of Representatives by W L Rees in 1884 with regard to the East Coast Tribes).

Many chiefs sent petitions direct to the Queen or the United Kingdom Parliament but the former had no real power to intervene and the latter had relinquished control of Native Affairs. King Tawhiao and a Waikato party sought personal audience with the Queen seeking Maori control of Maori lands. In England Sir John Gorst kindly counselled Tawhiao to put his petition to the New Zealand House of Representatives, which he did, in May 1886, drawing attention to section 71 of the Constitution Act 1852 and asking for a tribal council for his district and an end to surveys, the Native Land Court, "and the many other things that create evil".

Heke, the member for Northern Maori took up the Maori call introducing, in 1894, a Bill for the establishment of Maori Councils to administer Maori land, but his additional proposal for an overriding body, effectively, it was considered, a Maori Parliament, drew immediate fire. Heke was armed with numerous petitions, one from twenty chiefs representing different areas and others with some 6000 Maori signatories. The House took the unusual course of hearing a representative, Te Wahanui of Ngati Maniapoto, who said

I do not wish the action of the Native Land Court to be brought into force over my lands... [they are] ancestral lands and the hands of the Europeans have never touched them. No whiteman's foot has trodden upon these lands, nor has any European obtained authority over them, either by lease or otherwise ... we should have the administration of those lands (NZPD, 1894:).

Heke's Bill faced enormous opposition. Members spoke emphatically of the need for one law, and not unkindly, of the amalgamation of the Maori with European people as speedily as possible. In 1894 the Bill was defeated by the simple expedient of members vacating the House, and when Heke re-introduced it in 1896 it was formally lost by 5 for and 36 against.

Only the Tuhoe people appear to have met with a measure of success. Their petition of 1895 for tribal control of their lands resulted in the Urewera District Native Reserve Act 1896 but that Act never really worked. In other areas more direct action was taken. The Court was boycotted in some cases. The Te Arawa people physically prevented the Court from sitting at Maketu. It was to no avail. The Court would sit at a distance. Any one Maori could bring a claim to ownership. The Court acted on the evidence put to it. It took only one person to attend to create a run on the Court, for one had either to be there or miss

out and there were several complaints of people being left out who were actually resident on the land. Bitter divisions developed. Some people had lived on the land for years with the implied consent of the group as a whole. Formerly people were not threatened by such arrangements for occupation by one person did not represent a denial of the rights of others or the group as a whole. But once it was proposed to formalise arrangements, whether to award titles to occupants or to the members of a group, people were threatened and arguments arose as to which family group held sway over what area, who were its members and whether occupations had been properly authorised by the appropriate group. In a short time people were compelled to submit to divisive Court procedures and to pay for lawyers and surveyors. The chiefs had now to submit to the authority of the Court.

In a report to the Native Secretary in 1871, Colonel Haultain noted that from 1865 to 1870 the Native Land Court heard 3,489 applications for investigation of title in the North Island and had ordered certificates or Crown grants in 2,619 cases for an area of more than 2,400,000 acres. (Appendix to Return Relative to the Working of the Native Land Acts AJHR 1871 A-2A p 24).

Two years after the passing of the 1865 Act the legislature yielded to pressure to allow for a form of tribal representation. Section 17 of the Native Lands Act 1867 specifically enabled titles to be awarded to individuals to hold for all the members of a tribe. It was required that each member of the tribe be named and listed in the records of the Court but at least it was possible to put in the name of everyone. The trouble was, as shall be seen, this was rarely done. Some who knew of this provision considered it was still part of the unwanted individualisation process, for individual beneficiaries could thereafter partition their interests, but at least it was a half-way position. The main trouble is that most Maori people did not know of section 17 and the Courts rarely told them or gave effect to it. We need to consider not just the statutory tools that were available but how they were seen and used by the first Native Land Court Judges.

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## 04 The Winds of Change 1840-1869

### 4.7 Operation of the Native Land Laws

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This section begins with a broad overview of what happened at Orakei, and then reassesses that overview in the light of specific evidence on the operation of the Native Lands Act, for it is crucial to a consideration of the Orakei claim. After Te Kawau's repeated requests over some fifteen years for a Deed to "make safe" the Orakei land, it was the Orakei people's turn to have their remaining lands investigated, in 1868. By then Te Kawau was on his deathbed and the Orakei block was all the land that remained. Given that the tribe then numbered over a hundred people, it would not be unreasonable to expect that more than a hundred people would have been found entitled and had their names recorded in a separate record of the Court. In fact thirteen were held entitled and no other names were recorded. Given that only thirteen were held entitled it would not be unreasonable to presume that they were meant to be trustees only. In fact, in later succession and partition orders the Native Land Court presumed they were not trustees and the partitions were later upheld in the Court of Appeal. In the ultimate result the land was lost to both tribal and Maori ownership.

Consequently the old complaint survives, that the land ought to have been vested in the tribe as a whole. That states the case clearly enough but the issue is obscured by arguments over whether or not the Court meant to appoint trustees only.

It was Chief Judge Fenton of the Native Land Court who investigated the Orakei title. Some say the Chief Judge sought to give effect to the Maori preference by awarding title to trustees (only) to hold the land for the tribe. That claim was referred to the Courts by certain of the Orakei people many years ago. There it fell to be considered within the strict confines of law and within those confines it failed. That did not prevent the continuance of the claim in petitions to Parliament, submissions to Courts and Commissions, and in popular debate. The debate continues and has continued for over one hundred years.

That is not to say everyone agreed with the implied trust claim. Some benefited from the view that they were absolute owners. Divisions developed between some of the few who got a lot and the many who got nothing, and some of those who got, had reason to get rid of it as soon as they could or for so long as the debate continued. Accordingly the issue, not of what should have been done, but of what was in fact done, has been a most bitter contention within the tribe. The survival of that contention, and the argument that Chief Judge Fenton intended the land to be held for the tribe, compels a close look at what happened in the past and the implementation and operation of the early native lands legislation. In doing that it seems patently clear that Chief Judge Fenton

did not intend to create a trust in favour of the tribe as a whole, despite the expectations of the people. It is necessary to consider why he did not, for to revert to the real issue, it is patently clear that the award to a few, to the disinheritation of many was demonstrably wrong.

For some reason it had been decided that native land titles under 5000 acres could not be awarded to more than ten persons (section 23 Native Lands Act 1865). It is not certain why this was so. One view is that the land could be more readily alienated if there were no more than ten owners to deal with. Another view is that the provision reflected a prevalent but fallacious colonial opinion, still apparent sometimes, that only chiefs counted in Maori society and that there should never be more than ten of them to a tribal group. Another view is that it was thought undesirable to clog titles with too many names. At this time administrators favoured what was known as 'the Torrens system' of land recording (a system now fully integrated into our current land law). The early forerunner to the Torrens system, the Land Registry Act 1860, had recently been introduced to provide for the orderly registration of titles, and it may have been thought then, as it is thought today, that too many owners on titles would make the system unworkable.

In any event the 'ten only rule' was established from the beginning. The principle of it survives today. The District Land Registrar may still retain the title to Maori land on the provisional register if there are more than ten owners, and different rules apply to the alienation of such lands (see sections 165(2) and 215 Maori Affairs Act 1953).

The 'ten only rule' was a major cause of grievance to Maori especially since it was applied even to blocks measured in miles (see Haultain to McLean, Report 18 July 1871, AJHR 1871 A-2A p 4). It led to the alienation of the majority from their lands and to substantial sales for the enrichment of a privileged minority (see for example, the sale of the 250,000 acre Umutarora Block of the Rangitane tribe in 1870 described by Sinclair, 1981:1).

To ameliorate the effect of that rule the Court was empowered, if the claimants agreed, to divide the land into several allotments and award each lot to not more than ten (section 24 Native Lands Act 1865). In practice the claimants did not agree. It admitted more people to the title but fragmented the tribal estate, and above all, added substantially to the survey costs the Maori claimants were obliged to bear, even assuming they could pay.

As earlier described, section 17 of the Native Lands Act 1867 empowered the Court to vest title in not more than ten as tribal representatives provided that the Court had to maintain in a separate record the names of each and every member of the tribe, and provided it was specified on the title, that the grant was issued under that section.

Thus by 1867 there were four options. They must be kept firmly in mind

(a) To award the whole block to not more than ten as absolute owners - section 23 Native Lands Act 1865

(b) To divide the block into lots and award each allotment to not more than ten-section 24 Native Lands Act 1865, or

(c) To award the block to not more than ten, as tribal representatives, the names of each and every member of the tribe being then recorded in a separate record of the Court and the title noting that the grant was pursuant to the enabling section - section 17 Native Lands Act 1867.

(d) To award the block to a tribe, but since that applied only to blocks in excess of 5000 acres, it has no application here.

We now examine the steps taken by the Court to dispose of claims, for it is necessary to know the procedures to understand what happened at Orakei.

As a first step the Court determined the tribe or hapu entitled on evidence as to actual occupation or other customary entitlement as at 1840. As a second step the Court determined the persons in whom the land, or various divisions of it, would be vested. The method chosen was to call upon the claimant group, or the successful group in the case of a contest, to submit its own list of names. At this point the advice of the Court was important. Would it alert those present to the three options? There is evidence that in many cases the Court did not and sometimes claimants were directed to settle a list of names not exceeding ten as though that were the only option (AJHR 1871, A-2A). If there was a dispute over names the parties were urged to settle the matter amongst themselves. Settlements happened in most cases. The result is Maori Land Court records contain a wealth of data on the determination of tribal entitlement, but very little on how individual entitlement was settled.

Difficulties have arisen from the failure of the Court to determine who should take title or to even record the basis or reasons for any selection or settlement. Subsequent allegations that the wrong people made the choice, that key people were not at the discussion, or the like, can be neither proved nor disproved. Original owners remain unsucceeded to this day, because they cannot be identified and no-one knows who put that name in. (In one case it was unsuccessfully argued that a person submitted six names for a family, each being an alias for himself. To this day five 'names' remain unsucceeded to.)

In the Orakei case there are problems in determining who was put in for which family, whether there was an exchange deal, and whether it was intended to include a father and son for a full share each.

It is also necessary to consider the principal actors upon the stage of the Court. They too have a bearing on the operation of the first laws.

Chief Judge Fenton was the first appointee to the Native Land Court. He settled its rules and procedures and gave the imprint that was to survive long after him. He was a political person. Fenton began his career in the Registry of Deeds writing numerous memoranda to politicians and Government officials on Maori affairs and Maori lands. He was appointed Resident Magistrate to a

native area in 1853, was briefly Native Secretary in 1856, and shortly after Resident Magistrate again. In that capacity Fenton made two circuits into Waikato in 1857 and 1858, on the appointment of Governor Gore Browne and under a policy of extending British law to Maori districts. It was seen as an attempt to undermine tribal land titles and customary law and Fenton merely stirred up opposition, finally goading the Waikato tribes into the selection of a Maori King as an answer to Fenton's magistracy and all that it implied (see Sorrenson. 1963:41-53). On McLean's advice Fenton was withdrawn but while still a Magistrate and later as an assistant law officer, Fenton drafted and promoted laws for the Maori.

Fenton held strong views on what native laws should be. They led him into lasting conflicts with Government officials (notably Native Secretary McLean) and Governments of the day. In 1865 he was appointed the first Chief Judge of the Native Land Court and of the Compensation Court set up to apportion confiscated lands. He was to administer Acts he had helped draft. For a year, 1869 to 1870, Fenton was Chief Judge and a member of the Legislative Council at the same time and in the latter capacity, introduced the Native Reserves Bill. As Chief Judge he submitted draft bills and law reform suggestions to Native Ministers and Government Members. As both Chief Judge and a Crown agent he promoted the division of Maori lands for European township settlements. On his retirement he acquired, divided and settled Ngati Whakauae lands to create the township of Rotorua.

Fenton has been described as "ambitious, conceited and fractious". A contemporary politician warned that Fenton "may neutralise the best Act that can be passed if it does not originate in his brain." A brother judge asserted that the Native Land Court tended to ask "not what is right or is constitutional but what does the Chief Judge say" and a Native Court Assessor complained "it would appear, when a block was going through the Native Land Court, as if the land was owned by the Court itself and not by the litigants" (see Ward, 1974:94,181,212-7,251-5).

This background has particular significance for the Chief Judge was the author of the 1865 Act, and following his appointment to the Bench, an opponent of any amendment. Ward (supra) considers Chief Judge Fenton intentionally negated the operation of the tribal representation provision in section 17 of the 1867 Amendment. It amended the Act the Chief Judge had drafted. He favoured the law as it was awarding large blocks, undivided, to ten persons only as absolute owners. Ward writes

...Fenton arbitrarily adopted the practice of awarding whole blocks, unsubdivided, to ten of the principal owners. Moreover they were named as absolute owners, not as trustees. The chiefs naturally welcomed this process and traditional values inhibited rank-and-file kinsmen at this time from pressing themselves forward to be added to the list. Maori communities were also anxious to avoid the expenses of subdivision surveys. They did not realise that the ten nominated owners would soon be drawn into mortgaging or selling the patrimony of their hapu who were without legal means of redress ... (1974:213)

Reform in Maori land law was frustrated to a considerable extent by the wilfulness and self-aggrandisement of Chief Judge Fenton. There was truth in Fenton's contention that the prestige and acceptability of the Court depended upon its being entirely independent of Governments. But Fenton extended this to independence from Parliament also, to the extent of deliberately trying to frustrate legislation. He not only objected to the power accorded to the Government by the 1866 Act to postpone Court sittings if they threatened the peace of a district; he objected to the whole attempt by Richmond in 1866 and 1867 to place legislative restrictions on alienation ... (1974:216)

There were claims from Maori people that they never knew of section 17 and that the Court led them to believe they could do no more than submit ten names for their tribal estates. Some of those complaints are collated in the Appendix to Return Relative to the Working of the Native Land Acts, AJHR 1871, A-2A, together with the opinion of the Chief Judge (at p 40) as given in open Court at Auckland on 7 April 1868. Ward writes

As for section 17 of the 1867 Act, requiring all owners to be listed on the Court records, Fenton claimed that he had a 'discretion' whether or not to apply it and continued to issue Certificates of Title to ten owners as if they were the only claimants. He made no effort to explain section 17 to Maori applicants and as late as 1871 Hawkes Bay hapu did not even know of its existence. In Parliament Richmond reported that the Government, finding themselves foiled by the unwillingness of Mr Fenton to cooperate with them, had sent hurriedly round to discover cases where the 17th Section had been overleaped by the Court and to obtain declarations of trust on the part of those Natives who had received grants for their tribes'. Fenton himself later claimed that when he perceived that the ten nominated owners were alienating the patrimony of their hapu, he urged upon the Government the necessity of getting trust deeds executed. This was a bare faced lie. He had known of the excessive alienations in 1867 and opposed the introduction of restrictions; he continued to foster the ten-owner system, publicly expounding the view that the principal men of each hapu should be established in property and allowed to live as gentry, while the remainder were compelled to labour for a living; and in 1880 he was still resisting the argument that the ten owners should be regarded as trustees, stating: "The whole theory of the Native Lands Act, when the Court was created in 1862, was the putting to an end to Maori communal ownership. To recognise the kind of agency contended for would be to build up communal ownership, and would tend to perpetuate the evil instead of removing it." (Ward, 1974:213-216).

Dr D V Williams referred us to a letter from Chief Judge Fenton given to supplement his evidence to a Commission of Inquiry on Native Lands in 1891. By then the Chief Judge had been retired for several years. He wrote

I think the practice originated in this way: At the period of the early Courts there was a great demand for land, and most frequently land was purchased by a European paying the cost of the survey. The clause limiting the number of owners in the certificate to ten compelled the Court to refuse titles until the estates were reduced by division to ten. By arrangement out of Court ten names were selected, and described to the Court as the owners, the object being to avoid the expense of

divisional surveys ... The natives fell rapidly into this system (Correspondence, AJHR 189 , G-1, p 86).

In 1891 the former Chief Judge was still defending his use of the 'ten only' rule to create absolute owners, but by then as a matter of convenience and practice and with the insistence that the Court was compelled to follow the course it did. But earlier, in his response to the complaints of 1868, the Chief Judge was clearly opposed to the use of the section 17 option for policy reasons and held to the opinion that the Court was not obliged to use it. The Chief Judge's response was written and minuted in a Court Minute Book at Auckland on 7 April 1868. That was the very time the Orakei case was before him, and as we shall see, the complaints had done nothing to cause a change of heart.

So it is to Orakei we now return to consider the decision given there in 1869. For Ngati Whatua it was the beginning of the end.

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