TE UREWERA

PART II, VOLUME 1

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TE UREWERA

PRE-PUBLICATION

PART II

WAI 894

WAITANGI TRIBUNAL REPORT 2010

The cover design by Cliff Whiting invokes the signing of the
Treaty of Waitangi and the consequent interwoven development of
Māori and Pākehā history in New Zealand as it continuously
unfolds in a pattern not yet completely known
(Cover not included in this version)

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PREFACE

This is part 11 of a pre-publication version of the *Te Urewera* report and constitutes chapters 6 to 12 of the report. As such, parties should expect that in the published version headings and formatting may be adjusted, typographical errors rectified, and footnotes checked and corrected where necessary. Photographs and additional illustrative material may be inserted, and some maps may be modified, added, or replaced.

The Tribunal is releasing a pre-publication version of its report at the request of the Crown and claimants. The remainder of the pre-publication report will be released in further parts.

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The Honourable Dr Pita Sharples
Minister of Maori Affairs
Parliament Buildings
WELLINGTON

The Waitangi Tribunal
141 The Terrace
WELLINGTON

31 July 2010

E te Minita o nga Take Maori

Tena koe e tu nei i te kei o te waka.

On 6 April last year, we submitted the first five chapters of our pre-publication Te Urewera report to you. We ended with the conclusion of the war in the centre of Te Urewera, in 1871. We now submit a further seven chapters, as part 2.

This part of our report begins by stepping back in time from chapter 5. We turn to the period immediately after the siege of Waerenga-a-Hika at Turanga (Gisborne) in 1865. Its aftermath was a short and brutal war stretching broadly from Wairoa inland to Lake Waikaremoana, beginning in December 1865 and concluding in May 1866.

There were a series of engagements. The most significant, in January 1866, at Te Kopani near the southern shore of Lake Waikaremoana, involved the deaths of a minimum of 40–50 Maori. It ranks among the most grim battles in the New Zealand Wars, involving more deaths in battle than the entire campaign against Te Kooti in Te Urewera. We find that the Crown was wholly at fault, attacking people who were simply retreating or defending themselves. We cannot over-emphasise the reprehensible nature of the wholesale destruction and killing by Crown forces. Grave breaches of Treaty principle were involved in these events.

Three vignettes give us the flavour of the campaign. The first is a British officer expressing relish at the prospect of going 'into the niggers at once'. The second was recorded by a newspaper correspondent after the battle at Te Kopani had moved to the southern shore of the Lake: 'The men, women and children were now to be seen running for their canoes to make their retreat across the Waikare Moana lake . . . Thirty-three of the enemy killed were buried by our people, and eight were shot while in the water, making their escape to their canoes, and were seen to sink'. The third scene involves the summary execution, by pistol, of four Maori prisoners at Onepoto. These executions went unpunished.

The consequences of the conflict were immediately catastrophic. Some ten settlements were destroyed and the southern shore of the lake was effectively depopulated for the best part of a decade.

We turn next to one of the most complex subjects in the report – the loss to Maori of land in four large blocks immediately to the south east of Lake Waikaremoana. In 1875 the Crown purchased this land, totalling 178,226 acres. This was the final act in a series of events arising from the Crown's attempt to punish those whom it considered rebels in the war of 1865 to 1866. But there had been no rebellion.

In 1867, the Crown held a hui at Te Hatepe with Ngati Kahungunu (many of whose chiefs had fought alongside it). It sought cession from them of a block of land for military settlement, while asserting confiscation (under special East Coast confiscation legislation) in a manner that was aptly described at the time as 'begging with a bludgeon'. There is little in these events of which the Crown can be proud.

At this hui, the Crown promised those who were 'ceding' land, or who had assisted it in the war, that it would recompense them with land which it believed, mistakenly, it had confiscated. The story is riddled with misunderstandings on the part of officials. The Crown did not appreciate how its own new East Coast confiscation legislation worked (for the first time it allowed the Native Land Court to decide which land belonged to those considered rebels) – and it did not even know what the boundaries were, on the ground, where the Act applied.

As a result, officials convinced themselves over time that the Crown had confiscated far more land than had been discussed with Maori at Te Hatepe, stretching as far as Lake Waikaremoana. In 1872, the Crown signed an agreement (the Locke deed) purporting to confirm the land's 'return' to Maori, and dividing it into four blocks. This was customary, not confiscated, land, and it was land in which Tuhoe and Ngati Ruapani – who were not concerned with the Te Hatepe agreement at all – also had important rights and interests. From this point an intricate history unfolded. On the one hand, it involved the interplay between Tuhoe, Ngati Ruapani, Ngati Kahungunu who had supported the Crown, Ngati Kahungunu who opposed the Crown, and those Ngati Kahungunu who had been promised land for services to the Crown. On the other hand, the Crown operated in a bungling and self-interested manner.

The Crown's obvious intention to assert itself in the southern Waikaremoana lands led to growing tensions among all groups with interests there. Crown agents encouraged Tuhoe to go to the Native Land Court in the hope that a decision on the ownership of the land would ease the tension. The result, in 1875, was one of the strangest court hearings we know of. After it had begun, the Solicitor-General, on inquiry from the court, advised that the four

southern blocks had never been confiscated. This was completely contrary to what Crown officials had repeatedly told Maori. However, if the court case went ahead, the East Coast legislation would apply. This meant that the land of 'rebels' could in fact now be confiscated.

Facing this threat, Tuhoe and Ngati Ruapani withdrew from the court and sold their interests in the land to the Crown, salvaging some recognition in the form of a payment and small reserves. Ngati Kahungunu claimants also appeared in court, and were subsequently found to be the owners. They had already come under unfair pressure from Crown purchase agents, and the Crown now concluded its purchase from them. We found the Crown's actions in respect of these events to be in breach of Treaty principles.

Our next chapter picks up from the end of war in Te Urewera in 1871, and describes the affirmation of Tuhoe and Ngati Whare tino rangatiratanga, embodied in Te Whitu Tekau (the seventy) – the governing council of rangatira. Tuhoe and Ngati Whare today rightly regard this as mana motuhake in action. Te Whitu Tekau defined its boundaries and was resolute in its policy of opposing sales, leases, roads, the operation of the Native Land Court in its rohe, and surveys. Surveys, as they edged into the rohe, were a continuing source of conflict, which flared occasionally into minor violence and civil disobedience over the next thirty years. The Crown could and should have worked with Te Whitu Tekau in order to honour its Treaty guarantee of tino rangatiratanga. Promises that had been made at the conclusion of the conflict by Crown officials in 1871 heightened the Crown's obligation to respond positively to this tribal initiative. The Crown did exactly the opposite and can aptly be characterised as consistently chipping away at the power and structure of the council.

By the 1890s, both the Crown and the peoples of Te Urewera had a willingness to move on and discuss a form of self-government for Te Urewera. In our entire report to date, this is one of the moments where an accord of real promise was reached. In particular, as we see it, it is at this point that a genuine Treaty-based relationship was established between the Crown and Tuhoe. Premier Seddon, together with James Carroll, travelled the rohe, spoke with the leaders and then brought them to Wellington for negotiation and discussion. Agreement was reached, and in 1896 the Urewera District Native Reserve Act was passed. The Act embodied an arrangement unique in our history. The Crown saw itself as granting the peoples of Te Urewera real powers of self-government and collective tribal control of their lands. The Crown's purpose, often stated at the time, was to protect the lands of Te Urewera and ensure the future prosperity of its peoples. It is a matter of huge regret that the implementation of the legislation did not fulfil its terms, let alone its potential to give effect to mana motuhake. But the ultimate and sad fate of the Urewera District Native Reserve is a subject for future pre-publication chapters of this report.

At the same time as Te Whitu Tekau leadership asserted itself, and then the Urewera

District Native Reserve Act 1896 was passed and brought into operation, the Native Land Court was in full swing in the rim of lands surrounding what became the Reserve. From 1878 right through until 1894, approximately 377,000 acres were transformed from customary land to native land title and awarded to the claimants in our inquiry. By 1930, more than 82 per cent of that land had passed from Maori ownership. The Native Land Court was a highly effective engine for dispossession. A series of Treaty breaches by the Crown were involved in its establishment and operations. Cases could be forced through the court by an individual against the wishes of an overwhelming majority of the community. Land shares were individual property, and this imperilled the strength of Te Urewera kin groups, and their means of protecting their land. As such, they were particularly vulnerable to predatory purchasing – not least by the Crown, which had acquired nearly 65 per cent of the land awarded to claimants in our inquiry district by 1930. This dispossession was in large part paid for by the dispossessed, through the medium of survey costs, which in the case of some small blocks consumed the major part of the land. On top of that were court fees and the sheer inconvenience and cost of attending sometimes lengthy court sittings at a distance. The peoples of Te Urewera were never given the opportunity to manage these lands in a communal way recognised by the law, by trusts or incorporations such as presently operate.

The disgrace that was the Native Land Court is well-described by other Tribunals. The legislation that underpinned it was intensely complicated, changing almost yearly, and was difficult to understand for even the trained practitioner regularly concerned with it. The Crown was ever aware, but only in a superficial way, that it had an obligation to ensure that the peoples of Te Urewera were protected to some extent in their dealings with land. The mechanisms set in place were never well thought out, and were honoured in the breach or ignored.

The failure of the native land legislation is particularly illustrated in the tragic story of Ngati Haka Patuheuheu and the loss (through fraud) of their ancestral land. That hapu had always centred upon Waiohau, and particularly the land called Te Houhi, containing their major kainga and their wharenui, Tama-ki-Hikurangi. The story of loss was widely regarded as a disgrace at the end of the nineteenth century. It has largely been lost to the national memory, but is vividly remembered by Ngati Haka Patuheuheu.

The land was awarded by the court to two individuals on the basis of perjured evidence. The protection mechanisms did not work in this case and the Chief Judge wrongly refused to grant a rehearing or, indeed, to even hear the parties on the application for rehearing. The land was then conveyed through a series of transactions to the point where the last in the chain of buyers could say that they held the land as a bona fide purchaser for value and without notice of the fraud. As such their title was not tainted by the fraud and they could

hold the land and the law would remove Ngati Haka Patuheuheu from their ancestral home. This is a long story, involving predatory land dealers, complicated transactions, broken Crown promises, incompetent advice, and hard-hearted land speculators. A High Court judge, hearing one of the final parts of litigation, described the injustice in these terms:

> That they [Ngati Haka Patuheuheu] have suffered a grievous wrong is, in my opinion, plain. It is doubly hard that this wrong should have resulted from a miscarriage, which certainly ought to have been avoided, in the very Court which was especially charged with the duty of protecting them in such matters.

It was headline news in newspapers, with a photo appearing of the actual dispossession of the community in 1907. The Crown could and should have taken control of the matter. The legislation could and should have been tighter to protect Maori. A number of people were culpable in a general sense, but that does not dilute the fact that this is a major Treaty breach by the Crown inflicted upon this community.

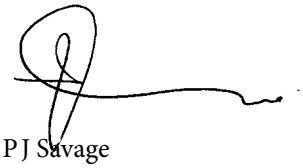
The final chapter in this part of our report deals with the management of lands in the eastern portion of our inquiry district in the first half of the twentieth century. These were lands consigned to a rescue scheme, a private trust, in the 1890s, after the failure of a series of East Coast ventures designed to assist Maori owners to develop and secure a return from their lands. The problems facing these ventures involved high costs, poor business decisions, and lack of Government assistance in the context of a financial blizzard that blew over the country in the 1880s. In 1902, the Government did finally come up with a rescue package that saw the East Coast Trust established, and (in 1906) management of all the lands by a sole commissioner for over 40 years. The problems of all the lands in the trust (which extended over a large part of the East Coast) were not fully resolved until the wool boom of the 1950s.

For Te Whanau a Kai, the grievances and the prejudice revolve around the sale of some 10,000 acres of their land without their consent (indeed, against their wishes). For Tuhoe, land was put in the East Coast trust without their consent and left undeveloped for 60 years; when it was finally returned to them. The Crown effectively prevented them from making any use of it. It was not until 1973 that they finally got any economic benefit, when this land was finally exchanged with the Crown for other forest land. For Ngati Kahungunu, the Crown refused to return some 800 acres of land wrongfully acquired by a sidewind when the Crown purchased interests in an unsurveyed block. While not large in the aggregate, these losses were felt keenly at a time when the tribes had lost the great bulk of their land in the rim blocks, and had little enough left on which to sustain themselves.

All of the Treaty breaches and resulting prejudice that we have identified remain

unaddressed by the Crown. We have refrained from making recommendations at this point in our inquiry except in relation to one particular piece of land at Onepoto, Lake Waikaremoana.

Heoi ano, naku na



P J Savage
Presiding Officer

ABBREVIATIONS

AJHR	*Appendix to the Journals of the House of Representatives*
app	appendix
ATL	Alexander Turnbull Library
BPP	*British Parliamentary Papers: Colonies New Zealand*, 17 vols (Shannon: Irish University Press, 1968–69)
ch	chapter
comp	compiler
DNZB	*The Dictionary of New Zealand Biography*, 5 vols (Wellington: Department of Internal Affairs, 1990–2000)
doc	document
DOC	Department of Conservation
ECLTIA	East Coast Land Titles Investigation Act
ed	edition, editor
fn	footnote
fol	folio
LINZ	Land Information New Zealand
ltd	limited
MA	Department of Maori Affairs file
no	number
NZPD	*New Zealand Parliamentary Debates*
NZLR	*New Zealand Law Reports*
p, pp	page, pages
para	paragraph
pt	part
RDB	*Raupatu Document Bank*, 139 vols (Wellington: Waitangi Tribunal, 1990)
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
sec	section (of this report, a book, etc)
sess	session
UDNR	Urewera District Native Reserve
UDNRA	Urewera District Native Reserve Act
v	and
vol	volume

'Wai' is a prefix used with Waitangi Tribunal claim numbers.

Unless otherwise stated, footnote references to claims, papers, and documents are to the Wai 894 (Te Urewera) record of inquiry, a copy of which is available on request from the Waitangi Tribunal.

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CHAPTER 6

NGA PAKANGA O WAIROA ME WAIKAREMOANA: WAR IN UPPER WAIROA AND WAIKAREMOANA, 1865–66

6.1 Introduction

In this chapter, our focus shifts from war in central Te Urewera to the Crown's military operations in the upper Wairoa and Waikaremoana regions a few years earlier. Fighting between Crown forces and Maori who lived in the district took place from December 1865 to April 1866. The hostilities were not directly related to those in the Bay of Plenty in the latter part of 1865. Rather, they stemmed from the siege of Waerenga a Hika pa in Turanga (Poverty Bay) by Crown forces in November 1865, in which some upper Wairoa Ngati Kahungunu participated. Crown forces arrived in the Wairoa district in December 1865. On 25 December, a major battle occurred at Omaruhakeke on the Wairoa river. This was followed by another battle on 12 January 1866 at Te Kopani, on the southern shore of Lake Waikaremoana. Further operations were conducted until in April and May; many upper Wairoa people surrendered. During this period, a number of people were killed, and homes and property destroyed. The Crown's conduct of hostilities has been a significant grievance for the Tuhoe, Ngati Ruapani and Ngati Kahungunu people who submitted claims on these issues.

The war in upper Wairoa and Waikaremoana of 1865–66 resulted in the loss of substantial tracts of customary land to the Crown over the next 10 years. It led first to an immediate 'cession' of land at Wairoa (the Kauhouroa block[1]) in 1867 by those Ngati Kahungunu who had aligned with the Crown, then ultimately also to the alienation of more extensive lands beyond this block, which became known as the four southern blocks. We address the post-war history of these lands in the next chapter.

We must draw attention here to the limits of our jurisdiction in respect of the history of the hostilities of 1865 and 1866, and the alienation of land to the Crown (including the Kauhouroa block and the four southern blocks). As we discussed in chapter 1, the Waitangi Tribunal must fix the boundaries of its inquiry districts by lines on a map, which creates problems for those whose rights and interests straddle the lines. One result is that the Wairoa district (including upper or inland Wairoa) is divided between two Tribunal inquiry

1. In the nineteenth century, both the block and the stream after which it was named were usually spelt 'Kauhauroa'. Today, both are spelt 'Kauhouroa', and most of the parties before us referred to it as such.

districts, Te Urewera and Wairoa. Ngati Kahungunu claims in this broad area fall largely, but not entirely, in the Wairoa inquiry district.

The boundary line as drawn meant that Ngati Kahungunu in general, and Ngai Tamaterangi in particular, were limited in the material that they could present to us. We do not have before us a comprehensive body of evidence dealing with their interactions with the Crown. Our vision of the action from their point of view is thus obscured. The same problem arises with assessing the prejudice that may have flowed beyond the time limit and beyond the lines on the map – for it goes without saying that prejudice is not confined within artificial boundaries.

The impact of this Tribunal's inquiry boundary on the issues addressed in this chapter meants that some of the hostilities of 1865 and 1866, notably those at Omaruhakeke, took place outside our inquiry district. We will not make findings on hostilities outside our district, but we cannot avoid some discussion of these matters. Although they occurred outside our boundary, they are vital to an understanding of the issues with which our inquiry is concerned. The research reports prepared by historians which are on our record of inquiry provided evidence on general Wairoa hostilities. It is true that we have not heard from the people of lower Wairoa, Mahia, or Nuhaka on the hostilities of 1865 and 1866; of this we are very conscious. But there is sufficient evidence before us to enable us to set the context for events which did occur within our boundary – and, where appropriate, to state our view of the significance of events outside it. We can and do make findings in relation to specific facts and events within the boundaries of time and place by which we are bound. With that in mind, we have heard and considered all that the various parties said. Our findings are now available to the Wairoa inquiry and to those parties.

With regard to the issues that we do consider, the Crown conceded the following points:

- Crown forces destroyed 10 settlements in the vicinity of Waikaremoana in January 1866, and took horses and cattle, and destroyed cereal crops. Although this was 'draconian', it was 'intended to undermine the logistical base of people in armed conflict with the Crown' and took place in the context of 'both sides attempting to undermine the other's ability to maintain logistical necessities for their armed forces'.[2]
- 'Maori forces were engaged in military activities on behalf of the Crown', and 'the execution of unarmed prisoners by Maori troops engaged in military activities on behalf of the Crown was a breach of the guarantee of the rights of British subjects under Article 3 of the Treaty of Waitangi'.[3]

It will become evident in the course of this chapter that these concessions fell well short of reflecting the Crown's culpability for and the brutality of the events discussed.

2. Crown counsel, closing submissions (doc N20), topic 4, p 11
3. Crown counsel, closing submissions (doc N20), topic 4, p 14

6.2 Issues for Tribunal Determination

The Tribunal must resolve two issues in order to decide whether the Crown's military operations in the upper Wairoa and Waikaremoana districts in 1865 and 1866 were in accordance with Treaty principle:

1. Was the Crown justified in launching military operations into the upper Wairoa and Waikaremoana regions in December 1865? How were those operations conducted, and was the Crown justified in continuing them until April 1866?
2. What was the impact of the Crown's military operations?

6.3 Key Facts

6.3.1 Conflict on the East Coast, 1865: the broader context

Hostilities in upper Wairoa and Waikaremoana from the end of 1865 were part of the broader conflict between the Crown and Maori in the North Island. Following war in Taranaki and Waikato, and occupation by Crown forces of extensive areas in both regions, the Pai Marire faith was carried by missionaries across the island to the Bay of Plenty, the East Coast, and Turanga. The message of deliverance offered by the faith was compromised by the killing of the Anglican missionary Völkner by Kereopa Te Rau at Opotiki in March 1865.

The arrival of Pai Marire missionaries on the East Coast soon afterwards was followed by sustained fighting among Ngati Porou, with those who opposed the new faith being assisted by forces supplied by the Crown. The fighting was over by mid-October 1865, and the Crown's focus shifted to Turanga (Poverty Bay) where there had also been enthusiastic support for Pai Marire. There had, however, been peace in Turanga over the preceding months. Tensions mounted only at the end of October, when a small kawanatanga Ngati Porou force arrived there, in pursuit of some of their defeated whanaunga who had fled south.

In November 1865 there was a major confrontation between the people of Turanga and Crown forces (including a substantial Ngati Porou contingent). Those forces laid siege to Waerenga a Hika pa and rapidly secured its capitulation. During the siege, support was received from local reinforcements led by young Rongowhakaata chief Anaru Matete, and from two upper Wairoa chiefs, Te Waru Tamatea and Te Tuatini Tamaiongarangi (Huruhuru Tuatini). Most of the hundreds of people inside Waerenga a Hika surrendered to Crown forces, but a number of the defenders escaped from the back of the pa and made their way to the upper Wairoa. Among them were Te Waru, Tamaiongarangi and their men returning home, and a group of perhaps 100 led by Anaru Matete.

Soon after these events, Major James Fraser, the officer commanding the local forces at Turanga, was instructed by the agent for the general government on the East Coast, Donald McLean, to 'take the field' against Turanga Maori who were stated to be 'under the

protection of the Hauhaus' of Wairoa district.[4] Fraser was appointed to command the militia at Wairoa from 4 December, and he arrived there on 20 December 1865.

6.3.2 Wairoa and Waikaremoana in 1865

The Maori of the Wairoa district in the 1860s numbered between 2000 and 3000. The most populous settlements were located towards the coast, by the lower Wairoa River, and on the coast itself. Maori settlement was 'dense' within the vicinity of the current town of Wairoa.[5] The population of the upper Wairoa district (north of what is now Frasertown) numbered between 500 and 1000. The Ngati Kahungunu peoples of the upper and lower Wairoa were descendants of Kahungunu's marriage to Rongomaiwahine through their eldest son Kahukuranui and his son Rakaipaaka and daughter Hinemanuhiri. They have been described as comprising 'a number of distinct tribal groups, all with autonomous leaders'[6]

Ngati Ruapani had long been established in the Waikaremoana region. In the 1820s they suffered heavy casualties in fighting with Tuhoe, and intermarried further with Tuhoe and with Ngati Kahungunu. Tuhoe also had an ancestral presence in the Waikaremoana region, and became more firmly established there as a result of the 1820s conflict and intermarriage. (See chapter 2 for a more detailed discussion.)

At this time, there was a fairly small number of Pakeha settlers in the Wairoa district. The first settlers at Mahia and the Wairoa river mouth were whalers. There were some 140 there in 1851; this number doubtless declined subsequently, as the industry declined. James Hamlin was the Church Missionary Society missionary there from 1844 to 1863. More settlers arrived by the late 1850s, hoping to run sheep on coastal land and the easily accessible parts of the river valley; Ms Gillingham states that there were at least '13 parties' squatting on Maori land by 1864.[7] Sections in the planned township of Clyde, however, had not yet been auctioned.

Wairoa, like other areas, was visited from 1859 on by Kingitanga representatives and Pai Marire missionaries, and rangatira there had debated how to receive them. The Treaty of Waitangi had not been taken to Wairoa, and when Charles Hunter Brown made an official visit through Te Urewera in 1862, 22 years later, he did not visit Waikaremoana.[8] The Crown finally sent a resident magistrate to Wairoa in 1863 – a year after Lieutenant-Colonel Andrew Russell, civil commissioner in Napier, reported that the district extending north of

4. Gillingham, 'Maori of the Wairoa District' (doc 15), p 127
5. Gillingham, 'Maori of the Wairoa District' (doc 15), p 20
6. Gillingham, 'Maori of the Wairoa District' (doc 15), p 29
7. Gillingham, 'Maori of the Wairoa District' (doc 15), pp 40–41
8. 'Report from C Hunter Brown, Esq, of an Official Visit to the Urewera Tribes', June 1862, AJHR, 1862, E-9, sec 4, pp 24–5

The Ngati Kahungunu Hapu of Lower, Upper, and Coastal Wairoa (1865)

At Wairoa, Ngati Kahungunu leaders included Pitihera Kopu[1] of Te Hatepe or Wharepu, the home of his Ngati Puku hapu; Paora Te Apatu of Waihirere; and Hamana Tiakiwai of Te Uhi (a joint Ngati Kahu and Ngati Kurupakiaka pa). Ngati Kurupakiaka and Ngati Puku were among hapu who resided on the eastern bank of the Wairoa River, but who also had interests on the west side.[2]

At Whakaki, on the coast between the Wairoa and Nuhaka river mouths, there were a number of hapu, descendants of Te Kapuamatotoru, through various lines, of Hinemanuhiri and Rakaipaaka.[3] At Nuhaka and Mahia, there were Ngati Rakaipaaka communities; at Mahia, the chief Ihaka Whaanga was prominent.

To the south and east of Lake Waikaremoana was the area generally referred to by government officials in the nineteenth century as the 'interior', 'inland', or 'upper' Wairoa, intersected by a number of large tributaries of the Wairoa River: the Waiau, Waihi, Waikaretaheke, Mangaaruhe, and Ruakituri Rivers.[4] Within this district, there were communities at Te Putere, Whataroa, Erepeti, and Te Reinga (which Colenso described as 'the principal village' of upper Wairoa district).[5]

In the upper Wairoa, the various Ngati Kahungunu hapu were descendants of Hinemanuhiri and her five children Tamaterangi, Makoro, Hinganga, Papuni, and Pareroa. (See chapter two for a discussion of Te Tokorima a Hinemanuhiri). Ngati Hinemanuhiri, Ngai Tamaterangi, and Ngati Hinganga, in particular, are hapu names that recur in the accounts before us.

Te Waru Tamatea (described as being of Ngati Hinemanuhiri, Ngati Hinganga, and Ngati Hika descent), was a key leader in the district. According to Professor Judith Binney, Erepeti was the main settlement of Ngati Hinganga (Ngati Hinemanuhiri), though Te Waru himself lived mainly at Whataroa (on the Mangaaruhe River) in the 1860s.[6]

Te Mokena was the leading chief at Te Putere, described as a gateway into Te Urewera, in the Waiau district. Nama was important at Marumaru (also on the Mangaaruhe River).[7] Another key chief was Te Tuatini Tamaiongarangi. Te Rakiora was the leader of Ngati Kohatu, who were located at Te Reinga.

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1. He was also known as Kopu Parapara. 'Pitiera' is a variant spelling of 'Pitihera', which was given in a number of nineteenth-century documents. But the inscription on his headstone reads 'Ko Pitihera Kopu': Thomas Lambert, *The Story of Old Wairoa and the East Coast District, North Island New Zealand* (Christchurch: Capper Press, 1977), p 347.
2. Gillingham, 'Maori of the Wairoa District' (doc I5), pp 20–21
3. Ibid, p 19
4. Cathy Marr, 'Crown Impacts on Customary Interests in Land in the Waikaremoana Region in the Nineteenth and Early Twentieth Century', report commissioned by the Waitangi Tribunal, 2002 (doc A52), p 12
5. Gillingham, 'Maori of the Wairoa District', p 17. The Te Putere kainga referred to here should not be confused with Te Putere in the coastal eastern Bay of Plenty, where the Crown established a reserve for Te Urewera peoples required to leave their homes from 1870, as the war proceeded: see ch 5.
6. Binney, 'Encircled Lands', vol 1 (doc A12), p 320
7. Gillingham, 'Maori of the Wairoa District' (doc I5), pp 17–27

Napier was 'little known and much neglected'.[9] In 1864, Donald McLean had embarked on a sustained programme of land purchase in the district, particularly on and near the coast. Certain rangatira, among them Pitihera Kopu, Paora Te Apatu, Ihaka Whaanga, and Te Matenga Tukareaho of Nuhaka, decided to align themselves with the Crown. They sold land (a number of blocks, amounting to about 185,000 acres across these districts), and established a relationship with Crown officials. During 1865 they were very aware of the fighting elsewhere on the coast and asked for arms and ammunition. But Kopu, of lower Wairoa, also maintained his relationship with the inland hapu who had supported the Kingitanga and adopted Pai Marire. The upper Wairoa rangatira, notably Te Waru Tamatea, met at hui with Kopu and other chiefs who did not approve of their support of the Kingitanga; they discussed and appeared to resolve their differences.

The fighting at Turanga, however, was close to home, and it increased tensions within the Wairoa communities. Kopu warned of the consequences of any involvement at Turanga by Wairoa leaders. As we have seen, however, some went to assist Turanga Maori against the Crown. When the siege of Waerenga a Hika was over, McLean instructed Fraser to move to Wairoa and, on his arrival there, to cooperate with 'friendly Natives'. Fraser met with Kopu and an expedition was immediately arranged against what was stated to be a large 'rebel' force. The expedition initially comprised military settlers under the command of Fraser and a force drawn from a number of local hapu. The total force numbered between 250 and 400. Subsequently, following a request by Fraser, McLean secured substantial reinforcements from Ngati Porou.

The campaign that followed – that is, its first phase – lasted about three weeks. The first engagement took place on Christmas Day 1865 at the kainga Omaruhakeke, about eight kilometres from Te Kapu (the present Frasertown). After a cursory attempt at negotiation, Crown forces opened fire and marched towards Omaruhakeke. Following heavy firing the defenders were put to flight up the Mangaaruhe River. There was intermittent skirmishing, but no sustained pursuit, because of Fraser's anxiety about the size of his force. But this changed with the arrival of Ngati Porou reinforcements, and a combined force numbering 520 set out from Wairoa on 10 January 1866. The second engagement took place two days later at Te Kopani, six and a half kilometres south of Lake Waikaremoana.[10] It ended in the rout of the defenders with heavy casualties. They fled towards Onepoto at Lake Waikaremoana, and some escaped across the lake by waka. Subsequently, several of those captured were executed. On 16 January Fraser told McLean that the Pai Marire were driven out of the country altogether, and on 21 January he reported that the fighting was

9. 'Report from C Hunter Brown, Esq, of an Official Visit to the Urewera Tribes', June 1862, AJHR, 1862, E-9, sec 4, pp 24–5; and AJHR, 1862, E- 9, sec 6, p 20

10. Many nineteenth century sources, such as newspapers, spelt this place 'Te Kopane'. Most parties before us, however, used 'Te Kopani'.

over. Subsequently, a number of men surrendered to various chiefs, and took the oath of allegiance.

In fact officials assumed that expeditions would continue until Te Waru Tamatea was killed or surrendered. As a result more fighting, on a small scale, did take place. The government reduced its troops at Wairoa, but supplied arms and ammunition to local chiefs, notably Kopu and Whaanga. There was a further attack by Crown forces on Mangarua village at Lake Waikaremoana in mid-March 1866. A larger expedition to the upper Wairoa, led by Whaanga, followed in the latter part of April. Fifty of the Pai Marire party were captured at Opouiti, including Nama, a close ally of Te Waru. By 28 April the whole of the Wairoa 'Hauhau' were reported to have surrendered, and three days later Te Waru surrendered too.

On 23 May, McLean arrived at Wairoa to receive the formal submission of those who had surrendered. The largest number whose affiliation was recorded were of Ngati Kurupakiaka hapu of Ngati Kahungunu. It was agreed that none would be sent into detention at Wharekauri (the Chatham Islands) – a strategy the Crown had adopted for those of the Turanga men it deemed most troublesome. Despite this, 16 men were sent; notably the rangatira Mourangi of Ngai Tamaterangi. Te Waru, however, was allowed to return to the Wairoa district. Most of the others who had surrendered were released, but some were kept under the surveillance of lower Wairoa chiefs.

6.4 The Essence of the Difference between the Parties

We summarise here the major differences between the claimants' and the Crown's interpretations of events relating to the war of 1865 to 1866.

6.4.1 Was the Crown responding to a rebellion?

The claimants and the Crown have opposing views on whether the Crown's undertaking and conduct of a series of military operations against Urewera and Waikaremoana iwi and hapu between December 1865 and April 1866 can be justified in legal or Treaty terms. At the heart of the issue is whether there was a rebellion and whether the Crown's response was appropriate.

Counsel for the claimants all pointed to the Turanga Tribunal's conclusion that Turanga Maori were not in rebellion because there is no evidence that those who escaped from Waerenga a Hika pa were seeking to overthrow the authority of the Crown. If events at Waerenga a Hika did not constitute a rebellion, and if the Crown's attack on the pa was unlawful (as the Turanga Tribunal concluded), then the subsequent pursuit of refugees

from Waerenga a Hika was equally tainted with unlawfulness, and the defensive response of the refugees cannot be categorised as rebellion.[11]

Counsel for the Wai 945 Ngati Ruapani claimants submitted that it had not been shown that the groups who came to the Waikaremoana area in the wake of Waerenga a Hika (who may not even have been participants in those hostilities, but may simply have been fleeing them) came because they had been invited, or because Ngati Ruapani and other groups were connected with events at Turanga. The attacks on Ngati Ruapani were not justifiable in any sense whatever; 'their crime seems to have been one of being in the vicinity of a Crown attack on people in flight'.[12] Counsel for the Wai 144 Ruapani claimants added that: 'Ruapani never left their rohe to attack the Crown'. Rather, the Crown and 'loyalist' Maori invaded the Lake Waikaremoana district.[13]

Counsel for the Ngai Tamaterangi claimants stated that the 'invasion' of Ngai Tamaterangi lands by Crown forces between December 1865 and January 1866 'cannot be justified or excused'. Counsel's submissions focused on the attack by Crown forces on their kainga (not a fighting pa) at Omaruhakeke. Though Omaruhakeke is just outside our inquiry district, this was understandable, given that it was a crucial event in Ngai Tamaterangi history: their world 'changed forever' when Crown forces attacked and destroyed their kainga.[14] Before the attack, counsel argued:

> No breakdown in law and order had occurred. No challenge had been made to state authority. No threat existed to lives and property. No Wairoa Maori were conspiring to overthrow the government by force of arms and no 'engagement' was required to ensure the security of the colony.[15]

Te Waru Tamatea and his supporters were entitled to take action in their defence against the 'unlawful Crown aggression'.[16]

The Wai 621 Ngati Kahungunu claimants submitted, in addition, that the hostilities between different Ngati Kahungunu groups within their own sphere of influence did not involve rebellion against the Crown but rather war within the iwi, which was within its tino rangatiratanga to resolve.[17] (This submission was rejected by counsel for Ngai Tamaterangi.)[18] Counsel argued that the 'Kahungunu ki te Wairoa' leadership and people adopted a 'neutral stance', 'do nothing to give reason for "Riri Pakeha" [the anger of the Pakeha] to become

11. Counsel for Wai 36 Tuhoe, closing submissions, Part B (doc N8(a)), p 35
12. Counsel for Wai 945 and 1033 Ngati Ruapani, closing submissions (doc N13), pp 7–8
13. The Wai 144 claimant is Vernon Winitana on behalf of himself and descendants of those on the 'Ruapani list' (317 owners listed at the time the Waikaremoana reserves were created). Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), p 39
14. Counsel for Ngai Tamaterangi, closing submissions (doc N2), p 19
15. Counsel for Ngai Tamaterangi, closing submissions (doc N2), p 28
16. Counsel for Ngai Tamaterangi, closing submissions (doc N2), p 30
17. Counsel for Wai 621 Ngati Kahungunu, written synopsis of closing legal submissions (doc N1), pp 31, 52
18. Counsel for Ngai Tamaterangi, closing submissions (doc N2), pp 17–18

an excuse for sustained settler initiated European style warfare'. This neutrality 'helped to solidify a general impression of the tribe as on the whole "loyal"'.[19]

The Crown's closing submissions presented the justifications for all its military actions from 1866 to 1868, whether in the Bay of Plenty or Wairoa region. Crown counsel submitted that the Crown's military response in both regions was appropriate and justified. While it was not explicitly argued that Crown forces in Waikaremoana and the upper Wairoa had been engaged in putting down rebellion, Crown counsel did present general submissions on rebellion. It was submitted that the Waitangi Tribunal has previously defined rebellion too narrowly as 'seeking or conspiring to overthrow the government, usually although not necessarily by force of arms'. The Crown supported a wider definition, arguing that in Wairoa and the Bay of Plenty, the Crown was 'under a duty to maintain law and order, and to defend its citizens from attack'.[20]

The Crown concluded that 'Whakatohea and Urewera groups, among others, were involved in actions that threatened the security and safety of European and Maori in the Wairoa and Eastern Bay of Plenty regions from late 1865 to 1868'.[21] All military actions undertaken from 1866 to 1868 'were in direct response to actual or expected attacks against loyalist Maori, settlers and troops during this period'. The government's approach to any military actions, it stated, was a cautious one.[22]

6.4.2 The conduct of the hostilities

In respect of the Crown's conduct of its expeditions, the claimants submitted that the military actions taken, which involved executions and large-scale destruction of property, were 'highly inappropriate'.[23] The executions would, at the time, have been regarded as war crimes.[24] Counsel for the Wai 621 Ngati Kahungunu claimants, however, suggested that the executions by Maori forces should be understood in the context of the delegation of power to commanders in the field. When the kawana engaged rangatira as allies, 'there was a delegation of the power to take life'. Conversely, counsel argued, in terms of tikanga, utu was important; the taking of life was necessary to restore the balance and enforce authority (rangatiratanga) within Ngati Kahungunu in the circumstances of that time.[25]

The Crown accepted that some 'draconian measures' took place, as Crown forces sought 'to undermine the logistical base of people in armed conflict with the Crown'.[26] These

19. Counsel for Wai 621 Ngati Kahungunu, written synopsis of closing legal submissions (doc N1), p 31
20. Crown counsel, closing submissions (doc N20), topic 3, p 28
21. Crown counsel, closing submissions (doc N20), topic 3, p 28
22. Crown counsel, closing submissions (doc N20), topic 3, p 29
23. Counsel for Wai 945 and 1033 Ngati Ruapani, closing submissions (doc N13), p 7
24. Counsel for Wai 36 Tuhoe, closing submissions, Part B (doc N8(a)), p 36
25. Counsel for Wai 621 Ngati Kahungunu, written synopsis of closing legal submissions (doc N1), p 52
26. Crown counsel, closing submissions (doc N20), topic 4, p 11

included the destruction of 10 settlements in the vicinity of Waikaremoana. The people there were treated as rebels, and their property sacked and destroyed. Moreover, some prisoners were executed by Maori troops, though it was not Crown policy of the time to allow its troops to do so. The Crown acknowledged that 'the execution of unarmed prisoners by Maori troops engaged in military activities on behalf of the Crown was a breach of the guarantee of the rights of British subjects under Article 3 of the Treaty of Waitangi'.[27]

6.4.3 The impact of the hostilities

Among impacts of the expeditions, claimants pointed to the fate of some Waikaremoana prisoners, and the Ngai Tamaterangi chief Moururangi, who were sent to Wharekauri after their surrender. Conditions there were 'harsh and were intentionally so', a fact reported by the Turanga Tribunal to have been accepted by the Crown.[28] Counsel for Ngai Tamaterangi pointed also to the long-term impact on the community of being 'wrongfully branded rebels'.[29]

The Crown does not contest the claim of extensive damage, destruction, and looting of property in 'settlements further inland'. Nor does it contest accounts of the dislocation of people 'for extended periods of time' and the possible long-term consequences of this 'in being unable to demonstrate ahi ka roa over lands'. It does argue that some of those sent to Wharekauri and detained there were captured in fighting outside the inquiry district; the evidence does not seem to point to people detained in engagements at Waikaremoana being sent to Wharekauri, with a few exceptions.[30] But the Crown conceded that the duration of detention on Wharekauri in the absence of a trial was a breach of the Treaty.

6.5 Tribunal Analysis

6.5.1 Was the Crown justified in launching military operations into the upper Wairoa and Waikaremoana regions in December 1865? How were those operations conducted, and was the Crown justified in continuing them until April 1866?

Summary answer: *Had there been rebellion in the region, or a threat to law and order reasonably requiring a forceful response, the Crown's launch of military operations would have been justified. But in late 1865 there was no emergency. Influential Ngati Kahungunu chiefs had been committed to maintaining peace throughout 1864 and 1865. They had succeeded in managing the tensions between communities who supported the Kingitanga and those who*

27. Crown counsel, closing submissions (doc N20), topic 4, p 14
28. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 194
29. Counsel for Ngai Tamaterangi, closing submissions (doc N2), pp 2, 30
30. Crown counsel, closing submissions (doc N20), topic 6, p 5

opposed it, and between those who accepted Pai Marire and those who opposed it. But this attempt to maintain a compromise position was, however, completely undermined by the Crown's hostilities at Turanga and its determination to quash Pai Marire. Chiefs such as Pitihera Kopu, anxious about the Crown's intentions, urged Wairoa people to abandon Pai Marire. Despite the chiefs' efforts, however, Crown forces arrived in Wairoa in early December 1865 in pursuit of two groups: the Turanga men who had escaped from Waerenga a Hika pa, and the upper Wairoa men who had gone to their assistance. Given the very limited prior relationship between the Crown and the people of upper Wairoa and Waikaremoana it may not be meaningful to assess their conduct in terms of rebellion. Even if we make such an assessment, however, we must conclude there was no rebellion at Waerenga a Hika or in the later hostilities in upper Wairoa and Waikaremoana. Nor was there, by late 1865, a breach of the peace in this area that required quelling by force. The conduct of the men returning from Waerenga a Hika revealed that they had no hostile intentions. There was no disturbance by the people of the area. Further, at this time, the balance of military power weighed heavily in favour of the Crown.

The Crown's military conduct was aggressive, harsh, and disproportionate to any threat allegedly posed by the people of upper Wairoa and Waikaremoana. There was no sincere attempt to negotiate peace – either at the outset, or after the upper Wairoa and Waikaremoana peoples had been routed at Te Kopani. Donald McLean failed to assure himself of the situation in the interior before sending his forces there, failed to offer terms in person to the people of upper Wairoa, and failed also to ensure that his officers were aware of the responsibilities attached to commanding Maori forces. Casualties were high – higher than for the entire campaign in Te Urewera against Te Kooti. Some prisoners were executed in front of a senior Crown military officer (Major Fraser). Rapata Wahawaha, who actually carried out the executions, was never censured. Settlements, houses, property, and extensive crops were destroyed. Moreover, the Crown's aggression reflected a determination to subjugate those deemed 'rebels', or 'Hauhau', while forces were available to the Crown, and the time seemed ripe. In the absence of rebellion or other emergency in Wairoa, there was no need for Crown military operations. If, alternatively, the purpose was to defeat and capture those deemed to have committed acts of rebellion at Waerenga a Hika (and we do not accept that such acts had been committed), then Crown forces still could not embark on broad military operations against all the communities in the district, and indiscriminately destroy their property.

(1) *Introduction*

The Crown's case, as we have seen, is that its military operations in upper Wairoa and Waikaremoana in 1865 and 1866 were justified by the unlawful conduct of the people of the area. At our hearings, the Crown did not assert directly that there had been rebellion in upper Wairoa, perhaps because it had an eye to the future and the restoration of

relationships with those who have for so long resented the stigma of being labelled rebels. But it was clear from its submissions in respect of the subsequent take of Wairoa lands, that the Crown did presuppose a rebellion. Counsel argued that confiscation took place 'only where land was actually taken in consequence of rebellion'. It was then submitted that 'in relation to the Wairoa cession [of 1867], rebel interests were confiscated'.[31] In other words, the Crown took the Wairoa land because it regarded certain owners as rebels. Moreover, the Crown's arrangements for cession at that time were based on the assumption that it could invoke the new East Coast legislation – and, as Crown counsel submitted to us, the prerequisite for application of the legislation was that there had been a rebellion.

A difficulty with the Crown's approach in our hearings is that it did not spell out exactly what conduct it considered constituted rebellion in upper Wairoa. The thrust of the Crown's case, however, seems to be that we should apply its broader definitions of rebellion to the situation in upper Wairoa in December 1865, and early 1866, and measure the Crown's response accordingly. This would bring us to the following propositions:

- A state of emergency existed in Wairoa at the end of 1865, in that law and order had broken down.
- The breakdown of law and order, in the context of the time, was properly considered rebellion.
- The Crown thus responded properly, and in accordance with its duty to its Wairoa citizens, by sending in military force and seeking the submission of those Maori who were in rebellion.

In addition, as was explained in chapter 5, we accept that the law allows the Crown to launch a military response where that is reasonably necessary to suppress a threat to law and order, even if that threat does not amount to rebellion, so long as that military response was conducted according to certain standards.

In accordance with these propositions, we examine events at Wairoa in the latter part of 1865. We consider whether lower Wairoa communities and settlers were under threat from those deemed rebels during the course of 1865, and whether they were still under threat at the end of that year, following the Crown siege of the Turanga pa Waerenga a Hika and the return to upper Wairoa of certain chiefs who had fought there. We conclude by analysing whether there was 'rebellion' or a breach of the peace such that the Crown was justified in launching military operations into upper Wairoa and Waikaremoana at the end of 1865.

(2) *Were there threats to law and order in Wairoa in the latter part of 1865?*

We note first that it is clear there had been tensions among the Wairoa communities in the course of 1865, following the arrival of Pai Marire missionaries in particular. We are struck, however, by the way in which those tensions were managed by the Ngati Kahungunu chiefs

31. Crown counsel, closing submissions (doc N20), topic 6, p 2

over this period. They did not escalate into open conflict – as had happened, for instance, among Ngati Porou.

This was the more remarkable, given the emergence of two opposing alignments in the Wairoa district by this time. On the one hand, interior communities in particular tended to be more favourable towards the Kingitanga.[32] Te Waru Tamatea, his brother Raharuhi, and the Ngai Tamaterangi chief Moururangi were strong supporters of the Kingitanga and its aims of protecting Maori autonomy and land.[33] Despite Whitmore (then the local civil commissioner) making it clear at a Wairoa hui that the Government would not tolerate the Kingitanga, Te Waru and Raharuhi had led a contingent to assist Ngati Maniapoto (to whom they were related through their father) in their defence against invading British forces at Orakau at the end of March 1864 (see box).[34] Dr Vincent O'Malley states this group fought alongside a larger group from Te Urewera which 'almost certainly' included some Ngati Ruapani.[35] The return of the upper Wairoa taua – having suffered heavy casualties – led to suspicions among lower Wairoa Maori, as well as among settlers there and in Hawke's Bay, that Wairoa, Mohaka, or Napier might be attacked. But as early as July 1864 Whitmore reported that there was no immediate need even for a blockhouse at Wairoa; and indeed, no attacks eventuated.[36]

On the other hand, as we have seen, a number of lower Wairoa chiefs eventually aligned themselves with the Crown, and sold land during 1864 and 1865 after McLean opened negotiations there. We comment only briefly on these purchases – which are outside our inquiry area – insofar as they show the development of policy on the part of the central government, the Hawke's Bay provincial government, and Wairoa rangatira. (We do not consider the purchases themselves.) Gillingham stated that both the Crown and the chiefs saw the purchases as having political and economic advantages. The rangatira, in broad terms, saw land sales as indicating support for the Government, while distancing themselves from the Kingitanga; they also hoped for economic benefits. McLean (chief land purchase commissioner, and also Superintendent of Hawke's Bay) hoped to obtain land that would advance Hawke's Bay settlement, and what he saw as the provincial government's defence. As land purchase officer Samuel Locke put it later in his *Reminiscences*:

> as will be shown [those purchases] tendered [*sic*] much towards the safety of this province through giving the government a hold on that end of the district, by which means we were

32. Marr, 'Crown Impacts on customary interests in land in the Waikaremoana region' (doc A52), p 69
33. Charles Cotter, brief of evidence (doc 125), p 15
34. Gillingham, 'Maori of the Wairoa district' (doc 15), pp 55–7
35. Vincent O'Malley, Summary of 'The Crown and Ngati Ruapani: Confiscation and Land Purchase in the Wairoa-Waikaremoana Area, 1865–1875', September 2004 (doc H6), p 5
36. Gillingham, 'Maori of the Wairoa district' (doc 15), p 63

> enabled to occupy the country for defencive [*sic*] and other purposes without reference to the native population.[37]

Locke also intended that sales would assist in organising coastal Wairoa Maori into a strong 'loyal' party in the hope of preventing the 'settled' portions of the district from 'becoming another Taranaki'.[38]

The chiefs, however, had their own concerns. Counsel for the Wai 621 Ngati Kahungunu claimants suggested to us, as we have seen, that 'Kahungunu ki te Wairoa leadership and people' saw themselves implementing a policy best described as one of neutrality; their focus was 'do nothing to give reason for Riri Pakeha' [the anger of the Pakeha] to become an excuse for sustained settler initiated European style warfare'.[39] There were also positive motives at work. That is, those leaders were generally 'traditionalist, tribalist and optimistic; still confident they could come to advantageous terms with settlers and the government'.[40] They had seen that the Kingitanga had not been able to hold Waikato lands against Crown forces, and many had been convinced that 'active resistance was futile and more could be gained by joining the Government and seeking to influence it through cooperation'.[41]

Given these alignments, the arrival of Pai Marire missionaries in Wairoa in the early part of 1865 was bound to create dilemmas. Here, as elsewhere throughout the region, Pai Marire found immediate support among those who, Marr explains, were less confident that they could benefit from cooperation with the Government, and who tended 'to regard resistance and defence of their lands as the best means of preserving their autonomy'.[42] Anaru Matete explained to a local settler that 'we have joined the Hau Hau because we think by so doing we shall save our land (Te Ao) and the remnants of our people.' (We note the Turanga Tribunal's comment on the phrase 'Te Ao', which conveyed a broader meaning than 'land', as it was translated at the time; rather it evoked a sense of 'the Maori way of life'.)[43] As that Tribunal noted, 'the teachings, the spiritual and self-determination messages of the Pai Marire, were compelling'.[44] Bishop Williams observed that the rituals had an intense impact: he wrote later of the 'profound and spiritual effect of the karakia and lamentations uttered by the visitors, particularly for those lost in battle at Taranaki and Waikato'. As he put it: 'There was a chord touched which vibrated in the native breast. It was that of aroha

37. Locke, 'Reminiscences', MS-Papers -0032–0007, ATL (cited in Gillingham, 'Maori of the Wairoa District' (doc I5), p 117)
38. Marr, 'Crown Impacts on customary interests in land in the Waikaremoana region' (doc A52), p 70
39. Counsel for Wai 621 Ngati Kahungunu, written synopsis of closing legal submissions (doc N1), p 31
40. Marr, 'Crown Impacts on customary interests in land in the Waikaremoana region' (doc A52), p 73
41. Marr, 'Crown Impacts on customary interests in land in the Waikaremoana region' (doc A52), p 72
42. Marr, 'Crown Impacts on customary interests in land in the Waikaremoana region' (doc A52), p 73
43. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, vol 1, Wellington: Legislation Direct, 2004, p 66
44. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 66

ki te iwi . . . and they could not resist it'.[45] Pai Marire was brought to Wairoa by the spiritual leaders Ponipata and Watene, whose message did not echo the violence which Kereopa had urged at Opotiki.[46] Niu at which Pai Marire services were conducted were soon erected at a number of pa. These included lower Wairoa pa such as Te Uhi, the Ngati Kurupakiaka pa on the north bank of the river; and coastal pa such as Whakaki and Nuhaka. As Gillingham underlines, it is misleading to assume that there was a clear split between interior and coastal peoples where acceptance of Pai Marire teachings was concerned.[47]

During this period, Pitihera Kopu played a key role at Wairoa. From what we know of Kopu – and we are very aware that we have not heard from the lower Wairoa hapu – this does not surprise us. He seems to have been keenly aware of the geopolitical position of Wairoa. People in the interior communities and within some coastal Wairoa communities were committed to the Kingitanga and to Pai Marire. To the north were the autonomous leaders of Turanga; to the south the powerful Kahungunu chiefs (many aligned with the Crown); and at Napier Crown power was concentrated in McLean. Two points may be made about Kopu's dealing with a potentially fraught situation. First, his main concern was to keep the peace. Secondly, he preferred to manage the situation himself, with minimal settler involvement.

At hui held between April and June 1865, the benefits and drawbacks of the new faith were discussed by both parties. While the hui took place, Kopu asked that armed settlers remain on their side of the river by their stockade. Kopu and other rangatira rejected Pai Marire – Kopu explaining at one April hui that he thought it would lead to 'disaster'.[48] At a subsequent hui, Te Waru Tamatea, defending his own choices, was reported to have remarked 'that there had as yet been no bloodshed at Wairoa and he should not commence it, but where ever fighting was going on he should go to it, his should not be a "Kohuru" but a "riri Awatea"'.[49] That is, he would not kill by stealth, but the fighting would be fair and open.[50] Those chiefs who were opposed to the faith understood that it offered protection for the people and their land – but feared the consequences of what they saw as the anti-Pakeha aspects of the new teachings (evident in the murder of Völkner). But Wairoa communities who had erected niu, and whose karakia were Pai Marire, were not interfered with.[51] Those who converted to Pai Marire were, we note, in a minority; Gillingham suggests their total

45. William Williams, *Christianity Among the New Zealanders*, London: Seeley, Jackson and Halliday, 1867, p 369 (cited in Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 66)
46. Gillingham, 'Maori of the Wairoa district' (doc 15), pp 104–111; Michael Belgrave and Grant Young, Summary of 'War, confiscation and the "Four Southern Blocks"', November 2004 (doc 13), p 4
47. Gillingham, 'Maori of the Wairoa district' (doc 15), p 129
48. *Hawkes Bay Herald*, 25 April 1865, in Gillingham, Supporting Papers for 'Maori of the Wairoa District' (doc 15(a)), p 197
49. Deighton to McLean, 23 April 1865, in Gillingham, Supporting Papers for 'Maori of the Wairoa District' (doc 15(a)), p 249
50. Gillingham, 'Maori of the Wairoa District' (doc 15), p 111
51. Gillingham, 'Maori of the Wairoa District' (doc 15), pp 106–111, 115–116

The Pai Marire Faith

Professor Binney explained the Pai Marire faith in these terms:

> The religion was essentially scriptural: it looked to a deliverance of the people from oppression (as they saw it), and the followers of the new faith prayed for that deliverance, communicating with the Holy Spirit through rituals constructed by Te Ua Haumene and conveyed by the emissaries. Unquestionably, there was an atmosphere of excitement generated by its arrival in new areas, and possibly a sense of an immediacy of divine intervention. These ideas derived from the biblical texts of Daniel and Revelation, where the Archangels Gabriel and Michael acted as the messengers of God to the people. But Te Ua did not preach or incite a war at the end of the world. He offered a theology of liberation, and a new generation of different Maori missionaries.[1]

According to the Tribunal's *Turanga Tangata Turanga Whenua* report, 'To many Maori, Pai Marire offered both spiritual salvation and the retention of their land and independence.'[2] That Tribunal also explained the pejorative origins of the term 'Hauhau':

> Professor Binney explained that 'Hauhau' was used by Maori themselves to refer to the 'breath of life' ('hau', in Pai Marire karakia) and 'the spirit within one that comes from God'. But the term came to be used in other senses. Those who took a strongly political stance, and who came into conflict with the Crown and with other Maori communities, became known popularly as 'Hauhau'. And the term also came to be used by settlers as a purely pejorative term, variously denoting 'rebel', 'troublemaker', or 'pagan' (the latter because Pai Marire beliefs were often assumed at that time to be unchristian).[3]

As we explained in chapter 5, by 1869 officials and officers were using the word 'Hauhau' to describe any Maori person or group who was perceived as an enemy of the Crown.

1. Binney, 'Encircled Lands', vol 1 (doc A12), p 86
2. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 40
3. Ibid, p 65

numbers in April, spread over several settlements, were from 300 to 350.[52] They were also probably aware of Governor Grey's proclamation, issued in April 1865, condemning the 'fanatical sect' in strong terms, and stating that the Governor would resist and 'suppress' – by force of arms if necessary – any 'fanatical doctrines, rites and practices' committed in the name of the faith.[53]

52. Gillingham, 'Maori of the Wairoa District' (doc 15), p 112
53. *New Zealand Gazette*, 29 April 1865

The understanding between these various parties in Wairoa was reinforced in mid-1865, when a dispute over the flying of a Union Jack at Te Uhi, (contested by the Pai Marire converts there) was resolved. At a hui convened by Locke, Kopu, and Te Apatu in June, arrangements were put in place 'for the maintenance of peace in the district'.[54] Locke explained to the 'Hauhau' that those who belonged to the 'Government party' were entitled to hoist the flag 'and that it was not intended as a challenge – but on the contrary that all the natives of this district as long as they behaved properly would not be interfered with in any way'.[55] He wanted the [Waikato] missionaries to leave; and they did so.[56] As Gillingham notes, this seems to suggest 'that Maori, at least, considered the influence of the Pai Marire emissaries from other districts as the trigger for potential disorder rather than the Pai Marire religion itself'.[57] But Locke, the local government official, seems to have accepted that the practice of the Pai Marire faith would continue. It is difficult to say whether this was because Kopu, who had considerable influence, urged restraint on him, or because it reflected McLean's own policy at about the same time of refraining from confrontation with visiting Pai Marire groups in Hawke's Bay, lest widespread conflict result.[58] Both factors may have been important.

But the outcome was peace in the district. Locke said so himself.[59] Dr John Battersby, the Crown's historian, gave evidence that: it was not the arrival of Pai Marire in the Wairoa region itself that caused problems . . . peace was maintained at Wairoa for most of 1865 with Hauhau and loyalist living peacefully in the same vicinity.[60] In his view, it was the arrival of Pai Marire missionaries much farther north at Waiapu that ultimately led to conflict in upper Wairoa and Waikaremoana.

We turn next to examine the impact of fighting in the latter part of 1865 on the East Coast, and at Turanga.

(3) *The impact at Wairoa of the siege of Waerenga a Hika, November 1865, and its outcome*

The arrival of Crown forces at Wairoa in December 1865, and their movement up the Wairoa River valley, followed key battles on the East Coast between those Ngati Porou who converted to Pai Marire and those who were strongly opposed to it. This conflict within Ngati Porou ended in the defeat of those who had adopted the new faith. Five hundred Ngati Porou prisoners had been taken and the 'ringleaders' sent to Napier and held in jail.[61]

54. Gillingham, 'Maori of the Wairoa District' (doc 15), p 116
55. Locke to McLean, 2 June 1865, in Gillingham, Supporting Papers for 'Maori of the Wairoa District' (doc 15(a)), pp 277–279
56. Gillingham, 'Maori of the Wairoa District' (doc 15), p 115–6
57. Gillingham, 'Maori of the Wairoa District' (doc 15), p 119.
58. Gillingham, 'Maori of the Wairoa District' (doc 15), p 116
59. Gillingham, 'Maori of the Wairoa District' (doc 15), p 116
60. John Battersby, 'Conflict in the Urewera and Bay of Plenty Districts: 1864–68', report commissioned by the Crown, January 2005 (doc B3), p 160
61. Waitangi Tribunal, *Turanga Tangata Turanga Wheuna*, vol 1, p 78

Te Waru Tamatea

Te Waru Tamatea was born in the mid-1820s – probably at one of the many kainga of the upper Wairoa, such as Whataroa or Erepeti, with which he was later associated. Although of Tuhoe descent through his father Rihara, his primary tribal affiliations were to Ngati Kahungunu, and the hapu Ngati Hinemanuhiri, Ngati Hinganga, and Ngati Hika. Te Waru had at least two brothers and a sister, and at least four children – all of whom played a significant role in the events of his life. He was tall and had a moko that was partly obscured by a small beard. He wore his hair long, drawn together at the top by a koukou (headdress of feathers). All these features are shown in a striking portrait photo of him from the period.[1]

By the early 1860s Te Waru had emerged as one of the most prominent leaders of the upper Wairoa communities. Like their lower Wairoa kin, the upper Wairoa peoples remained relatively untouched by European colonisation following the signing of the Treaty of Waitangi, but also remained separate from the Kingitanga following its formation in 1858. This position changed with the beginning of the Waikato war; Te Waru was at the centre of a flourishing support among his people for the King. By the end of 1863 Te Waru and his people had become committed supporters. In March 1864, he and a party of between 20 and 40 travelled to Waikato, where they joined a combined force of Waikato, Ngati Maniapoto, Ngati Raukawa, Tuhoe, and Ngati Whare, which numbered about 300. Their exact motivations for offering support are unclear, but it is likely to have been a combination of a political commitment to the Kingitanga and whakapapa ties. At Orakau they constructed earthworks and reinforced the pa. From 31 March to 2 April the pa was attacked by Imperial troops. On the third day the survivors fled out the back of the pa through a swamp. In total, half the defenders – about 160 people – were killed. This included the majority of the upper Wairoa contingent – some 30 people, according to one estimate. G S Whitmore reported that only six survived. Among those killed were Te Waru's brother, Raharuhi, whose four sons also died. Te Waru's son, Tipene, was shot in the arm and captured. His arm was amputated and he was later released.[2]

The other survivors, including Te Waru, returned to Wairoa. Their return sparked protests from some lower Wairoa communities who opposed the Kingitanga and wished to remain neutral. But leaders of these communities, such as Pitihera Kopu, sought dialogue with Te Waru. For his part, Te Waru wished to remain at peace – and signalled so throughout 1864 and early 1865.[3]

The arrival of Pai Marire missionaries in March 1865 escalated tensions among the various communities. A number of the upper Wairoa communities were converted to the faith at this time, including Te Waru. Fearing the consequences, however, Kopu told the emissaries to leave. But Te Waru remained in dialogue with the lower Wairoa leaders – and reaffirmed his commitment to peace at a number of hui. He stated clearly and repeatedly that he would not commence hostilities and would only go to assist where fighting had already begun. He remained true to his word and went in support of the Turanga peoples when fighting broke out at Waerenga a Hika in November 1865.[4]

As discussed in detail elsewhere in this chapter, his return to the upper Wairoa was followed by the arrival of Crown forces. He was shot in the forearm the day after the major battle at Omaruhakeke, but escaped. It is unclear whether he fought at Te Kopani, but by March 1866 he was known to be on the northern side of the lake. On 9 May he and 15 others surrendered and were taken to Wairoa where they took the oath of allegiance in the presence of Donald McLean. Unlike some who were sent to Wharekauri, following other battles in Hawke's Bay, Te Waru was allowed to return to Wairoa. He stayed under the guard of Tamihana Huata at Pakowhai for a few months, and was present at the Te Hatepe hui in 1867 (see chapter 7). Te Waru opposed the cession of any land. Such a cession, he stated at the hui, undermined his act of surrender the previous year and made redundant the peace he and his lower Wairoa kin had negotiated subsequently. Following the hui he returned to the upper Wairoa.[5]

The return of Te Kooti and the Whakarau from Wharekauri in July 1868 was a significant moment in Te Waru's life. In August he sent to Te Kooti a tiwha (gift) of his daughter, Te Mauniko (or Te Mautiki), and the greenstone mere, Tawatahi. This signalled his commitment to Te Kooti and his cause; Te Kooti's acceptance of the tiwha in turn meant their cause was one and the same. Te Kooti travelled to Puketapu on the eastern edges of Te Urewera, where he was joined by Te Waru and his people. At the end of September – unaware of his commitment – four lower Wairoa chiefs were sent to Whataroa in an attempt to prevent Te Waru joining Te Kooti. They were killed on the order of Te Waru's brother, Reihana. This event saw lower Wairoa communities lend their active support to the pursuit of Te Kooti, first at the battle at Ngatapa in January 1869, and later when he and the Whakarau returned to Te Urewera. But it was Te Kooti who struck first. In April 1869, Te Waru led a diversionary party to the Waiau River, where they encountered a force of lower Wairoa Kahungunu. Seven of his men were killed, but the diversion allowed Te Kooti to strike at an undefended Mohaka. Te Waru departed the upper Wairoa to rejoin Te Kooti at Waikaremoana; he never returned.[6]

Te Waru and his people sought refuge in Te Urewera during the Crown's first military expedition into the region in May 1869. He accompanied Te Kooti to Taupo, but returned to Te Urewera sometime in late 1869 – a quarrel is said to have caused a permanent rift between him and Te Kooti. The Crown's military operations around Lake Waikaremoana in mid-1870 saw him withdraw to Ruatahuna. But he was no longer welcome among Tuhoe, who feared the consequences of having him in their midst. Faced with few other options, Te Waru and about 40 of his people surrendered at Fort Galatea on 9 December 1870. They were taken to Te Teko, where they were held under surveillance, and were later sent to Maketu. In June 1874 a portion of eastern Bay of Plenty confiscated land at Waiotahe was selected as a place for their permanent residence. At Waiotahe he and his people became known as Ngati Tamatea. In August 1874 – at the same time as they were offered seed potatoes and tools for cultivating their new land – Te Waru was said to be willing to sell his interests in the four southern

blocks. This was followed through in September 1877, when the government paid his people £300. We discuss these events in more detail in the following chapter.[7]

Te Waru Tamatea died in April 1884. He had spent the last 15 years of his life in exile. He never returned to his ancestral lands in the upper Wairoa. Ngati Tamatea remain today on their land in Waiotahe, where their marae is Maromahue.[8]

1. Binney, 'Encircled Lands', vol 1 (doc A12), p 184, 319–320; Binney, *Redemption Songs*, p 98; Lambert, *The Story of Old Wairoa*, p 598; 'Maori Prisoners of War List', AGG-HB, 7/2b, NA, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc I5(a)), p 347; Wairoa minute book 11, p 4
2. Manu Hiokanui, Wairoa minute book 11, p 74; Gillingham, 'Maori of the Wairoa district' (doc I5), pp 23, 45, 58–59, 61; Cowan, *New Zealand Wars*, vol 1, pp 367, 373–374, 401–407
3. Gillingham, 'Maori of the Wairoa district' (doc I5), pp 59–62, 65
4.. Binney, 'Encircled Lands', vol 1 (doc A12), p 101; Gillingham, 'Maori of the Wairoa district' (doc I5), pp 110–111, 123–124
5. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, pp 91–93; Binney, *Redemption Songs*, pp 55–56; Binney, 'Encircled Lands', vol 1 (doc A12), p 113; Gillingham, 'Maori of the Wairoa district' (doc I5), pp 149–150, 181–183; Lambert, *The Story of Old Wairoa*, p 540; Deighton to McLean, 23 April 1865, HB box 6 65/69, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc I5(a)), p 249; Worgan to McLean, 30 September 1868, MS Papers-0032–0658, ATL
6. Binney, *Redemption Songs*, pp 97–98, 101–102, 142–146, 160–162; Binney, 'Encircled Lands', vol 1 (doc A12), pp 188, 201; Gillingham, 'Maori of the Wairoa district' (doc I5), pp 208–209, 226–227; *Hawke's Bay Herald*, 13 April 1869, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc I5(a)), p 692
7. Binney, 'Encircled Lands', vol 1 (doc A12), pp 206, 225–226, 234, 308–309, 318–320
8. Binney, *Redemption Songs*, p 614

The Crown forces – now with a substantial Ngati Porou presence – moved south to Turanga, where they besieged Waerenga a Hika pa from 17 to 22 November 1865.

Among those who went to the aid of the defenders were local reinforcements led by Anaru Matete, of Rongowhakaata, and the two upper Wairoa rangatira – Te Waru Tamatea, the prominent Ngati Hinemanuhiri chief of the period, and the high-born chief Te Tuatini Tamaiongarangi. Matete advanced with his men from a neighbouring pa to support their whanaunga in Waerenga a Hika on 19 November, and engaged with government forces in what was the major battle of the conflict; 34 were killed. Not a great deal is known about the participation of Te Waru and Tamaiongarangi at Waerenga a Hika. If they arrived during the siege, they may well have joined with Matete's reinforcements. Both parties would successfully evacuate at the rear of the pa at the time of the surrender. Matete led about 100 Turanga men in the evacuation who, according to Professor Binney, made their way to Te

Reinga; here they joined up with Te Waru.[62] Some remained in the upper Wairoa valley while others travelled farther inland to Lake Waikaremoana.

The question we must answer is whether these actions constituted rebellion, or a threat to law and order in Wairoa, sufficient to justify the Crown's military actions that followed. Battersby stated that 'there was no state of rebellion at Wairoa' until groups from there travelled to Waerenga a Hika and involved themselves in fighting; thereafter they continued in rebellion, in that they refused to submit to colonial forces.[63] Perhaps because of this assumption, Battersby gave us little detail about events leading to the Crown's operations in Wairoa. He noted the surrender of large numbers of Turanga people at Waerenga a Hika and the escape of a number of others from the pa, among them Te Waru and others from the Upper Wairoa and Urewera districts. Battersby referred to the arrival of Anaru Matete with about 100 people from Turanga at Wairoa by December 1865. He reported a correspondent of the *Hawke's Bay Times* writing of a gradual 'drawing to a state of war'. And he added that Kopu wrote to McLean for arms, expecting hostilities, then went to Napier, and returned 'less enthusiastic about becoming involved in the conflict.'[64] His analysis then moved on to the arrival of Fraser at Wairoa.

It is difficult to be certain from Battersby's account what breaches of the peace had occurred there, or even if any threats against lower Wairoa communities had been made. Crown counsel, drawing on Battersby's research, said only that, in the wake of the movement of Pai Marire supporters towards Poverty Bay in October and November 1865, 'the political situation at Wairoa deteriorated. The deterioration was compounded when Te Waru Tamatea and his supporters went to the defence of Waerenga a Hika.'[65]

From other accounts it is clear that hostilities on the East Coast and at Turanga inevitably produced tension in Wairoa by October and November 1865. Rumours, not surprisingly, abounded. Whaanga requested government soldiers at Mahia to protect the residents, as they feared they would be killed 'by inland Pai Marire'.[66] Kopu reported to McLean in early October that Pai Marire of the inland region were discussing waging war on Turanga.[67] (Such rumours echoed those published by the *Hawke's Bay Herald* and the *Daily Southern Cross*, before Waerenga a Hika, that a large number of Ngati Porou of the Pai Marire party, refugees from the fighting there, had planned an attack on the Turanga kawanatanga party.)[68] Tension at Wairoa was exacerbated by news of the arrival of Crown forces at Turanga and the siege of Waerenga a Hika pa by Crown forces the following month. We note, however,

62. Binney, 'Encircled Lands', vol 1 (doc A12), p 110
63. John Battersby, Summary of 'Conflict in the Bay of Plenty and Urewera Districts 1864- 1868', March 2005 (doc M2), p 18
64. Battersby, 'Conflict in the Bay of Plenty and Urewera Districts' (doc B3), pp 160–161
65. Crown counsel, closing submissions (doc N20), topic 3, p 25
66. Gillingham, 'Maori of the Wairoa district' (doc I5), pp 121–122
67. Gillingham, 'Maori of the Wairoa district' (doc I5), p 121
68. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 80

that the Reverend Tamihana Huata of Pakowhai reported nevertheless (on 18 November) that all was quiet.[69] Kopu's initial response was to publicly discourage any Wairoa participation at Turanga; if he heard of any Maori who were implicated in the Turanga dispute, he stated at a hui convened at this time, he would imprison them and hand them over to the authorities.[70] Such statements were clearly designed also to impress on the Crown's representative (the resident magistrate) where Kopu's loyalties stood. Clearly he hoped to ward off Crown anger at any possible Wairoa involvement at Turanga.

(4) *Renunciation of Pai Marire*

Immediately after the fall of Waerenga a Hika on 22 November, Kopu took further steps. At another 'very large' hui held at Wairoa on 26 November, he urged local Pai Marire believers to give their allegiance to the Government to prevent the outbreak of war in the district.[71] According to a report of the hui in the *Hawke's Bay Times*, under the headline 'Large Native Gathering: Determination of the Hau-Haus to commence War!!', Kopu 'gave full explanations of the plans of the Government', and impressed on the Hauhau the foolishness of continuing 'in rebellion', and the importance of securing pardon – evidently for their conversion to Pai Marire teachings – by submitting; 'while if they began fighting again they would not only lose their opportunity, but also forfeit all their lands to the Government'.[72] It is not clear if any government official was present at the hui. Kopu may have been aware that McLean was due to arrive the following day, and that he would have to report to him.[73] It seems from what Kopu said at the hui that he concluded, or had been told, that the departure to Turanga of a small group from up-river would be sufficient to bring Crown retribution on the heads of all Wairoa communities. Meanwhile, Ihaka Whaanga also called a meeting at Mahia which was attended by people all along the coast and peninsula as far as Nuhaka. Locke reported that Whaanga sought to ascertain attitudes to Pai Marire, to make arrangements if 'rebels' should arrive there from other places, and to prevent any outbreak within his district.[74]

The result of these hui was that many took the oath of allegiance or declared their willingness to fight on the Government side. The communities of Nuhaka and Whakaki decided to renounce Pai Marire. This constant theme – the importance of giving up the faith to prove loyalty to the Crown – contrasts markedly with the understandings reached some months earlier that Pai Marire services could be held without antagonising the Crown. But it was a theme that reflected the recent turn of events on the coast.

69. Gillingham, 'Maori of the Wairoa District' (doc 15), p 123
70. Gillingham, 'Maori of the Wairoa District' (doc 15), p 123
71. Gillingham, 'Maori of the Wairoa District' (doc 15), p 125
72. *Hawkes Bay Times*, 11 December 1865, in Gillingham, Supporting Papers for 'Maori of the Wairoa District' (doc 15(a)), p 344
73. Gillingham, 'Maori of the Wairoa District' (doc 15), p 125
74. Gillingham, 'Maori of the Wairoa District' (doc 15), pp 125–6

(5) *The thrust of Crown policy, October–December 1865*

The Turanga Tribunal considered changes in Crown policy during this period, and we refer to them here because they provide a crucial context for evaluating the Government's decisions about Wairoa.

McLean, who was superintendent of Hawke's Bay province and was appointed agent for the general government in March 1865, had a major impact on the shaping of Crown policy. Until October, he had had only lukewarm central government support for his determination to intervene on the East Coast. But the new Premier, Edward Stafford, who took office in mid-October, was much more committed to McLean's aim of applying pressure to Turanga (once the 'rebels' had been quashed on the East Coast), which McLean deemed 'troublesome' and 'the greatest nest of disaffection on this side of the Island'.[75] JD Ormond, deputy superintendent of Hawke's Bay, encouraged Stafford to give McLean 'more latitude' with respect to Poverty Bay, arguing that 'no submission other than an actual & complete one should be allowed to be accepted'.[76]

Stafford's private view was that it appeared to be 'the best thing to do to put down Hauhauism in Poverty Bay while our forces are flushed with success, & the rebels correspondingly dispirited'.[77] He was gravely concerned about the colony's spiralling debt, and anxious that the 'Native difficulty' be laid to rest.[78] On 1 November he instructed McLean to bring an end to 'troubles' on the East Coast, to expel emissaries of the Hauhau from Poverty Bay, and to secure the oath of allegiance from adult males who were not accused of a specific crime. If Turanga Maori did not in future 'preserve the peace', part of their land would be confiscated, and military settlements established there.[79]

With Stafford's blessing, McLean moved with considerable speed. He arrived in Turanga with a large colonial and Ngati Porou force on 9 November. His approach to negotiations with the Turanga chiefs was inflexible – though the chiefs were anxious to keep the peace. In his communication with the chiefs just before hostilities began, setting terms for their surrender, he characterised 'Hauhau' aims in negative terms: 'It is well known to all that the aim of the Hauhaus is to murder and destroy: they have done this in many instances and have been punished'.[80] The Turanga Tribunal considered that there was no evidence to support the allegation that the aims of the Hauhau were generally violent and destructive; in

75. McLean to Stafford, 26 October 1865 (quoted in Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol, 1, p 79)
76. Ormond to Stafford, 26 October 1865 (quoted in Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 79)
77. Stafford to McLean, 3 November 1865, MS-Papers-0032–0584 (quoted in Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 110)
78. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, pp 79–80
79. Stafford to McLean, 1 November 1865, McLean papers, agent for the general government – Hawke's Bay, official letterbook, qms 12–14, ATL (cited in Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, pp 79–80)
80. 'Terms of Surrender', AGG-HB7 2E, Archives NZ (cited in Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 85)

Turanga, in fact, there had been no outbreak of violence during the eight months following the arrival of Pai Marire there. Despite this, McLean made what were ultimately allegations against the faith itself.[81] Though McLean's charges against Turanga Maori were broader than this (including, for instance, their threatening government supporters), it was clear that the Crown now regarded 'Hauhau' as an enemy, against whom Crown force might properly be turned.

When negotiations broke down, McLean left Turanga, instructing Fraser to begin military operations. Fraser laid siege to Waerenga a Hika, and the ending of the siege after five days was followed by the taking of many prisoners, and the eventual deportation of over 100 of them to the Chathams, where they were held without trial.[82] Stafford, signalling the hard line the Government intended to take with the prisoners on 7 December, wrote that: 'It is full time the Natives should know and believe that the Govt. will really do what it says. Pity tis that after some 26 years of our (I was going to say "rule" but won't) presence in the Colony, they have yet to find out that!'[83]

At the same time, McLean was preparing to send Crown forces on to Wairoa.

(6) Was there 'rebellion' *or a breach of the peace justifying military action in upper Wairoa and Waikaremoana at the end of 1865?*

The claimants' position, in brief, is that 'rebellion', properly understood, is more narrowly defined than the Crown contends, and that upper Wairoa and Waikaremoana Maori engaged only in defensive action, not rebellion, in late 1865 and early 1866. Therefore, they say, the military force the Crown brought to bear against the people of the area was unjustified, unlawful, and in breach of the Treaty of Waitangi.

The Crown's position is that 'rebellion' has a broader meaning than is argued for by the claimants, and that there was a state of rebellion to which the Crown was responding appropriately.[84]

Our analysis of the situation begins from a point made in chapter 5: because rebellion involves a renunciation of the allegiance owed by a subject to the Queen and the Queen's government, it is not appropriate to describe as 'rebellion' the conduct of Maori who had no prior relationship with the Government. In the case of upper Wairoa and Waikaremoana, it is difficult to say what kind of relationship communities there had with the Government by 1865. Though the Treaty had not been taken to Wairoa, Crown agents were sent to lower Wairoa twenty years later, from 1862. People from inland Wairoa attended some hui during 1864 and 1865, hosted by lower-river Kahungunu chiefs, at which Crown officials spoke about Government policy. There must thus have been some understanding of the role of

81. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 109
82. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, pp 122–123
83. Stafford to McLean, 3 December 1865, MS-Papers-0032–0584, ATL (cited in Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 122)
84. Crown counsel, closing submissions (doc N20), topic 3, p 16

the Crown – even if its opposition to the Kingitanga and determination to buy land near the coast would not have been well received by Kingitanga supporters. But, as Marr points out, 'there had virtually been no real Crown presence established in the Waikaremoana region' before Crown forces were sent in. 'Very few Pakeha had visited the district, Crown purchases had not extended that far inland, there were no Pakeha settlements, no Crown land and no active Crown institutions apparent in the region.'[85] The Premier's statement which we quoted above, acknowledging lack of Crown governance in Turanga, would apply equally in upper Wairoa and Waikaremoana. We have little evidence of any attempt by Crown officials to establish relationships with the upper Wairoa or Waikaremoana communities; overwhelmingly, officials' interaction was with the lower river and coastal chiefs. It does not seem that any upper Wairoa or Waikaremoana chiefs attended the Kohimarama conference in 1860. Nor is it clear whether representatives of all those communities attended hui at Wairoa. Tuhoe and Ngati Ruapani from the interior may not have done so. It is thus possible, as Marr suggests, that the first contact many people of the region had with the Government was being attacked by its forces.[86] That would make it inconsistent with the Crown's Treaty obligations for it to defend the use of military force against those people by relying on their 'rebellion'.

But even if there had been a prior relationship between the peoples of the area and the Crown sufficient to give rise to a duty of allegiance to the Queen, making it meaningful to analyse the situation in terms of rebellion, we would find that none was established. First, with regard to events at Waerenga a Hika, we note that the only relevant conduct that could plausibly be argued to be rebellion was the assistance rendered by Te Waru Tamatea, Te Tuatini Tamaiongarangi, and their men. In our assessment, that conduct was not rebellion. Our first reason is that, as the Turanga Tribunal found, the taua was assisting in the defence of a pa, in which there were hundreds of non-combatants, against unlawful aggression. In those circumstances, we consider the defence of self-defence applies equally to the assisting taua as it does to those being assisted: the Tauranga Moana Tribunal's analysis provides a sound basis for that conclusion.[87] Further, we note that the number of men who provided assistance at Waerenga a Hika was small; Te Waru Tamatea's party had already suffered heavy casualties in the fighting at Orakau. A small group was less likely to pose a genuine threat to peace when they returned from Turanga to the Wairoa area. Professor Brookfield has noted that the 1863 New Zealand Settlements Act was premised on there being such a substantial threat to future peace by the conduct of 'a tribe or a section of a tribe' that military settlements were the best means of protecting peaceful citizens (see chapter 5).

85. Marr, 'Crown Impacts on Customary Interests in Land in the Waikaremoana Region' (doc A52), p 80
86. Marr, 'Crown Impacts on Customary Interests in Land in the Waikaremoana Region' (doc A52), pp 80–81
87. Waitangi Tribunal, *Te Raupatu o Tauranga Moana Report: Report on the Tauranga Confiscation Claims*, Wellington: Legislation Direct, 2004, pp 112 – 116

6.5.1

While the 1866 East Coast legislation[88] was focused on use of the confiscated land to pay for the costs of the hostilities rather than providing for military settlement – it is implicit in the notion of rebellion that the scale of the activity involved poses a genuine threat to the Government and future peace. The scale of the activities of the Wairoa people would not, in our view, justify being regarded as rebellion.

The only other possible contender for conduct that could be argued to amount to 'rebellion' was the conduct of those who fought against the Crown forces in the upper Wairoa and Waikaremoana areas in late December 1865 and early January 1866. However, as we will see, the Crown was the aggressor in this conflict, in circumstances where the people who were attacked had offered no threat to law and order in the area or beyond. This supports the conclusion that there was no rebellion to which the Crown was entitled to respond with force.

We turn next to the point that we accepted in chapter 5 – that in the absence of rebellion, the Crown's use of military force might still be justified if a breach of the peace occurred that could be quelled only by the use of such force. In chapter 5 we found that the threat posed by Te Kooti and his followers in March and April 1869 was such as to justify a military response from the Crown. But our examination has revealed no such breach of the peace by the peoples of upper Wairoa and Waikaremoana. No attack had been made by the men of upper Wairoa after Waerenga a Hika, and there is no indication that one was expected. The fighting men who returned from Turanga did not pass through the coastal Wairoa settlements, but made their way directly overland to Te Reinga, and thence farther inland. (A letter written to McLean by a settler on 27 November offered information that 'about 200 Hau Haus' coming from Turanga had 'halted some distance up this River'.[89]) Nor does the evacuation of Waerenga a Hika by a substantial party of men from Turanga iwi in itself show that they intended to continue a fight with the Crown which they had not sought in the first place. The Turanga Tribunal noted that surrender and evacuation came after only five days of siege; it considered that those inside 'clearly had no stomach for war'; they were simply protecting themselves.[90] It was perhaps to be expected that many Turanga men would leave the pa rather than surrender. In the crucial days before hostilities there began, when the rangatira of Turanga were so anxious to talk to McLean, it was clear that they did not want to cross the river to lay down their arms before the large armed Ngati Porou force at McLean's back, thus placing themselves in a position of weakness. 'The ignominy – and the dangers – for Turanga Pai Marire would have been too great.'[91] The same would have been no less true when the pa surrendered. The Turanga men who evacuated Waerenga a

88. The East Coast Land Titles Investigation Act 1866, which provided a role for the Native Land Court in determining rebellion, and thus land confiscation, but not necessarily for military settlement (see chapter 7).

89. Thomas Pearce to Superintendent, 27 November 1865, in Gillingham, Supporting Papers for 'Wairoa of the Maori district' (doc 15(a)), p 325.

90. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 112

91. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 111

Hika took what must have seemed a prudent course of action, avoiding surrender of all their people to Crown forces largely composed of Ngati Porou, whose motives they distrusted.

Further, in assessing whether there was, or was likely to be, a breach of the peace at Wairoa, we note that the reactions of lower Wairoa Ngati Kahungunu are revealing. As we have seen, hui were held in lower Wairoa, and arms were sought by a number of chiefs. But the evidence is that Kopu and Whaanga, and those who took the oath of allegiance, were apprehensive of the Crown's intentions, rather than the intentions of their upper Wairoa whanaunga and the Turanga people who had fled there. Given the numbers of their own fighting men, we doubt that they considered their own whanaunga a threat with which they could not deal. Thomas Lambert stated that there were reported to be about 1000 fighting men 'within striking distance of the town', the 'great majority' classified as 'friendlies'. Though Lambert suggested 'many were slipping away . . . and joining the ranks of the Hauhaus' in 1865, we note that those who surrendered early in 1866 as the fighting drew to a close – many from upper Wairoa and Waikaremoana – numbered 300.[92] In other words, Lambert's figure – which sits fairly well with an overall Wairoa population of between 2000 and 3000 in the 1850s and early 1860s[93] – seems to underline the superior numbers of those who were not Pai Marire converts. Had there been any attack, Kopu, Whaanga and Te Apatu were more than able to defend themselves. In addition, the Government had built a strong blockhouse at Wairoa in September 1865 which could hold 100 men. There was 'no special disturbance' at that time, but it increased the local defensive capacity.[94] It is our view that Kopu and his fellow chiefs took the position they did in December 1865 both because they had already committed themselves to the Crown, and because they feared that land confiscation might be a consequence of Te Waru Tamatea's assistance at Turanga. (As events would show, they had very good reason to be nervous.) They were anxious to prove themselves active allies (as they would doubtless have seen it), perhaps to demonstrate to the Crown their ability to keep order in their own district, at a time when Crown forces were heading in their direction.

The Crown's responsibility, however, was to be certain that there was a tangible threat to Wairoa. A reporter for the *Hawke's Bay Times* reported on 19 December that: 'Rumor says that unless the strong body of Hau-haus now assembled at Manga-aruhi [*sic*] commits some acts of violence, no hostile expedition is to be taken against them' – this despite the past acts of hostility of some against the Crown, and the alarm of the settlers, and of Maori.[95] The tone of the overall piece was sardonic; but it is nevertheless a reminder that at the time, preconditions for a Crown attack on the 'Hauhau' were talked about. In fact, however, the Crown failed to assure itself that there was a genuine or even apparent threat, or any signs

92. Lambert, *The Story of Old Wairoa*, p 564
93. Gillingham, 'Maori of the Wairoa district' (doc 15), pp 18, 27–28
94. Lambert, *The Story of Old Wairoa*, p 561
95. *Hawke's Bay Times*, 19 December 1865

of hostility before it assembled its invading force. McLean had dealt with Turanga; now he turned his attention to Wairoa.

6.5.2 How did the Crown conduct its military operations, and was the Crown justified in continuing them until April 1866?

We turn now to consider the Crown's conduct of its military expeditions in upper Wairoa and Waikaremoana during the period from December 1865 to April 1866. We reiterate that the hostilities at Omaruhakeke fall outside our inquiry district boundary, and it is not our role to make findings on them, but they form part of the context for our analysis of the Crown's military operations.

In the Wairoa conflict it was the Crown, not those who lived in, or had taken refuge in upper Wairoa and Waikaremoana, which took active steps to initiate hostilities. The Crown's historian provided a narrative of events; and Crown counsel referred to the start of the 'first phase of fighting between Pai Marire and government forces led by Fraser', but did not consider the circumstances in which that fighting took place.[96] Those circumstances are, however, important to our analysis.

What was the purpose of the Crown's expedition? According to McLean's instructions to Major Fraser (who had led Crown forces at Turanga) of 4 December: 'The chief Kopu will co-operate with you in inducing those Hauhaus [from Poverty Bay] as well as the insurrectionary tribes of this district to subjection.' He was also to delay his advance until the 'friendly' Maori were supplied with weapons. Nearly two weeks later, McLean explained to the Colonial Secretary that Fraser had been instructed:

> To move to the Wairoa with a sufficient force to co-operate with the friendly Natives of that place in reducing the Hauhaus of upper Wairoa together with those of Poverty Bay to submission.

McLean, however, reported to the Government that he had first tried negotiations:

> Anxious to avoid further hostilities I deputed influential Chiefs to confer with the Hauhaus in the above districts in the hope that the punishment already inflicted at the East Cape, and Poverty Bay might be sufficient to convince them that it would be more wise to submit than continue a struggle in which they were sure [to] lose.
>
> They decline all terms, and there is no alternative but to carry on military operations against them.[97]

96. Crown counsel, closing submissions (doc N20), topic 3, p 25
97. McLean to Colonial Secretary, 16 December 1865, Ia1/1865/3492, A-NZ (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), pp 27–28)

Gillingham could not find any evidence of written instructions to the Wairoa chiefs to convince those who were Pai Marire to surrender. However, from the number of hui held in Wairoa and on the coast immediately after Waerenga a Hika, and the resulting decisions of some groups to take the oath of allegiance, Gillingham thought that the chiefs were carrying out McLean's request with respect to their own hapu.[98] But McLean referred to his having deputed chiefs to confer with 'Hauhau' of upper Wairoa. We agree with O'Malley that '[e]vidence of Government peace overtures of the kind described by McLean is . . . difficult to find'.[99] The one piece of evidence we do have – though it evidently postdates McLean's report to the Colonial Secretary – suggests an eagerness for engagement, rather than for peace. Kopu, according to Samuel Deighton:

> sent a note to the Rebels on the Waihau branch [the Waiau River] asking whether they meant to fight & if they did requesting them all to [come] over to the Wairoa branch & make one fight of it; he also informed them that if they did not go he should drive them out of their Pa at once.[100]

(1) *Omaruhakeke*

It is true that there were some negotiations when Fraser's force arrived at Omaruhakeke on Christmas Day 1865. Fraser, his officers and men had arrived at Wairoa on 8 December in the first steamer that had crossed the river bar, firing off their six pounder half a dozen times and pitching camp close to the blockhouse. Fraser and Captain Reginald Biggs went on to Napier. On 13 December Captain John St George reported a meeting with Paora Te Apatu and Whaanga 'as to the advisability of starting at once to pitch into the hauhaus'.[101] And by 17 December he was getting impatient for Fraser's return, so that 'we should then be able to go into the niggers at once'.[102] It was known that those who returned from Waerenga a Hika had split into two parties – one of which had gone to the upper Wairoa; the other to Lake Waikaremoana.[103] The initial focus, however, was the upper Wairoa. The force under Fraser's command marched to 'the front' on 23 December 1865, their 'native allies' having set out the previous day. Fraser, Biggs, Hussey and St George commanded the military settler

98. Gillingham, 'Maori of the Wairoa district' (doc 15), p 127
99. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 28
100. S Deighton to McLean, 21 December 1865, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), pp 364–5
101. J C St George, diary, 13 December 1865, MS –copy-Micro- 0514, ATL
102. J C St George, diary, 17 December 1865, MS-copy- Micro –0154, ATL
103. Locke to McLean, 18 December 1865, in Gillingham, Supporting Papers for 'Maori of the Wairoa district" (doc 15(a)), pp 352–354

forces, which numbered between 100 and 150 (the sources vary on this point).[104] The Ngati Kahungunu chiefs Kopu, Whaanga, and Karauria Te Iwirori led Maori forces. Estimates of their force ranged between 150 and 250.[105] The total force thus numbered between 250 and 400. The force camped a couple of miles above the junction of the Wairoa and Waiau Rivers, and remained there during 24 December primarily because 'the natives would not start on a Sunday'.[106]

The upper Wairoa people were neither entrenched nor did they come out to engage Crown forces. On a reconnaissance trip made a week before, St George had reported passing several 'deserted' pa before reaching Mangaaruhe (Te Waru Tamatea's pa) and Marumaru, which were on the right and left bank of the Wairoa respectively, with the kainga Omaruhakeke about a mile (1.6 kilometres) away at the junction of the Wairoa and Mangaaruhe Rivers. He reported that neither pa seemed very strong, though they were full of people.[107] A newspaper account written by another member of the party reported that there was 'no appearance of palisading of any kind, and their entrenchments must consist of earthworks only'.[108] When the forces arrived on Christmas Day, Fraser described the 'enemy' as having 'scattered', some to the 'kainga' Omaruhakeke, and others to the hills. Some of those who had abandoned the settlement on the left bank, however, had crossed the river. They were offered a flag of truce by Fraser, who was said to have sent it via a Maori woman, so that they could surrender; otherwise they would be attacked. Matthew Scott, the local medical officer who was surgeon to the force, stated however that it was the white handkerchief of F E Hamlin, the interpreter, that was hoisted. Fraser's flag of truce however was said to have been rejected 'with contempt'.[109] A lengthy korero across the river did take place, according to St George, between Te Waru's brother and Kopu, but it did not avert the attack as 'they would not give in'.[110] Scott wrote that:

> Fraser grew tired of the finessing, and sang out to Hamlin, who was the interpreter, 'Tell them to throw down their arms and surrender!' An evasive answer being returned, down came Hamlin's handkerchief, up went the Union Jack (ready bent on) [that is, ready to

104. Fraser, in his official report, said that 100 Pakeha set out from Wairoa. St George reported that there were 110 Pakeha of all ranks. Thomas Lambert, writing many years later, noted Fraser's figure but said that there were 80 men of the Taranaki Military Settlers, along with 60 or 70 of the Hawke's Bay Military Settlers. Fraser, 27 December 1865, AJHR 1866, A-6, p 7; J C St George, diary, 23 December 1865, MS-copy-micro-0154, ATL; Lambert, *Story of Old Wairoa*, p 569

105. Fraser himself gave two figures for the Maori force – 150 'trustworthy Natives' and 200 Maori. St George said there were 250 'native allies'.

106. J C St George, diary, 23–24 December 1865, MS-copy-micro-0154, ATL

107. J C St George, diary, 18 December 1865, MS-copy-micro-0154, ATL

108. *Hawke's Bay Times*, 28 December 1865, in Gillingham, supporting papers for 'Maori of the Wairoa District', (doc 15(a)), pp 366–367

109. Fraser to the Under Secretary for Colonial Defence, 27 December 1865, AJHR, 1866, A-6, p 6

110. J C St George, diary, 25 December 1865, MS-copy-micro-0154, ATL

> hoist], and simultaneously No 9 [Taranaki No 9 Company Military Settlers] gave fire with a tremendous crash . . .[111]

The bulk of the force then marched up river towards Omaruhakeke.

Several factors might account for the reaction of the defenders: the unacceptability of Fraser's terms of unconditional surrender (as he described them himself); the prospect of being made prisoners; the command of Fraser, who had led the forces at Waerenga a Hika; the absence of any government official to dignify the negotiations, as had been the case at Turanga (McLean had at least been present there in the initial stages, a fact which would have been known to Te Waru Tamatea). Gillingham, noting that an opportunity was given to the people to surrender, thought it 'debatable' whether it was adequate, given the nature of korero to which the various Ngati Kahungunu parties were accustomed on such weighty matters.[112] As counsel for Ngai Tamaterangi pointed out, McLean gave the occupants of Waerenga a Hika three days to consider written terms of peace: 'none were offered to the inhabitants of Omaruhakeke'.[113]

As the force advanced across the river towards Omaruhakeke, the defenders took up positions in the kainga. They were, Fraser reported, driven 'pellmell' before his assault; they 'fled in all directions', sustaining a number of casualties. That day and the next they were pursued in the bush by Kopu and Biggs; Te Waru was said to have been shot in the wrist in the encounter on 26 December.[114] Fraser noted that a large 'unfinished' pa was found in the hills[115] – which may indicate that the people of the district had hoped to be better prepared.

At Omaruhakeke, some 13 people were reportedly killed. This figure is derived from Fraser's official report to the Government, where he identified 'about ten' killed in the first attack, and three more in Kopu's pursuit – as opposed to two dead on the Government side.[116] However, it is possible that more were killed in battle. Lambert records in his history: 'The enemy suffered pretty heavily from the fire of the Europeans, but were not so hard pressed as to be unable to carry off their dead and wounded.'[117] In the absence of other estimates, however, we must accept Fraser's figure of 13 killed as a minimum. Fraser himself stated: 'I have no doubt that I am considerably underrating their loss'. Ngai Tamaterangi claimants identified Omaruhakeke as a Ngai Tamaterangi settlement; as we have seen, the pa of Te Waru Tamatea and Nama were within a mile of it.[118]

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111. James Cowan, *The New Zealand Wars: A History of the Campaigns and the Pioneering Period*, 1956 reprint, vol 2, (Wellington: Government Printer, 1923), pp 131–132
112. Mary Gillingham, written responses to questions (doc 153), para 4
113. Counsel for Ngai Tamaterangi, closing submissions (doc N2), p 23
114. Cowan, *New Zealand Wars*, vol 2, p 133
115. Fraser to the Under Secretary for Colonial Defence, 27 December 1865, AJHR, 1866, A-6, pp 6–7
116. Fraser to the Under Secretary for Colonial Defence, 27 December 1865, AJHR, 1866, A-6, p 7
117. Lambert, *Story of Old Wairoa*, p 570
118. Counsel for Ngai Tamaterangi, closing submissions (doc N2), pp 19–20

We note that the kainga Omaruhakeke was subsequently 'razed' by order of Fraser. Scott gave an account of the nature of the attack, and the destruction of property by Crown forces, whom he said did 'wild and terrible work' in attacking the village; they attempted to shoot those who tried to escape up the nearby hillside. Later they returned to destroy property: 'we burned ploughs and carts and carved houses, also much maize, and split up canoes and did other mischief'.[119]

This was 'bush scouring' in action – a 'new style of warfare' in New Zealand identified by Professor Belich as having emerged at this time.[120] Ms Marr explained that the aim of bush scouring:

> was to search out and attack assets highly valued by local Maori, generally crops and villages but sometimes also non-combatants. This forced local Maori to either flee the area and suffer severe moral and economic loss, or to stop and fight in an ad hoc fashion with small forces and from unsuitable positions.[121]

It was designed to clear the 'enemy' from the area.

(2) *Te Kopani*

At this point, there was a pause. Crown forces moved back down the Wairoa River and camped at Pakowhai, between the Wairoa and Waiau Rivers. Major Fraser wanted reinforcements before he proceeded, and McLean went up the East Coast in person to Tuparoa to secure the participation of those Ngati Porou who had played an important part in the hostilities at Waerenga a Hika. He took with him a letter from the Ngati Kahungunu chiefs Kopu, Whaanga, and Te Apatu. A force of 150 Ngati Porou returned with McLean, arriving at Wairoa on 4 January.[122] As Gillingham notes, no attack was launched by the upper Wairoa and Turanga fighters during this time.[123]

While waiting for the Ngati Porou contingent to arrive, the remaining force continued small-scale operations in the upper Wairoa. Instead of pursuing Te Waru and his people up the Mangaaruhe River, however, the force proceeded up the Waiau River in the direction of Lake Waikaremoana. On 1 January, Fraser, St George, Deighton, and 250 of Kopu's and Whaanga's men departed Wairoa (Pakowhai). The following day they moved up the Waikaretaheke River towards Lake Waikaremoana – in St George's words, 'some half dozen miles into the Urewera country'.[124] They did not meet any of the 'enemy', though there

119. Cowan, *New Zealand Wars*, vol 2, p 133
120. Belich, *The New Zealand Wars*, pp 213–215
121. Marr, 'Crown Impacts on Customary Interests in Land in the Waikaremoana Region' (doc A52), p 76
122. 'Maori account of the campaign against the Hauhaus on the East Coast 1865–70', undated, MS Papers 1187–006B, ATL, p 15
123. Gillingham, 'Maori of the Wairoa district' (doc 15), p 134
124. J C St George, diary, 2 January 1866, MS-copy-micro-0154, ATL (cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 111)

were sightings in the distance. According to a report in the *Hawke's Bay Herald*, the people entrenched themselves for a time on Tukurangi hill, but evacuated it during the night; there was no fighting. The people fled to the lake, and crossed it by canoe.[125] At some point before the forces withdrew to Pakowhai on 4 January, further destruction of settlements occurred, as well as large-scale appropriation of horses, cattle, and crops. This was described in the *Hawke's Bay Herald*:

> No fewer than ten settlements were taken possession of and destroyed; and in the vicinity of those settlements were large tracts of valuable land, hitherto wholly unknown to the European settler. Immense cultivations – the extent of which took the friendly natives completely by surprise – were found in the vicinity of the kaingas, as well as large numbers of horses and cattle. The cultivations comprised crops of all kinds of cereals, and are estimated to be worth, as they stand, a large sum of money. They were all taken possession of by the expeditionary force, and may not improbably form a valuable addition to the colonial commissariat.[126]

Binney states that this destruction took place 'in the vicinity of Waikaremoana,'[127] though exactly where is not clear. It is likely – given the troops had two days to scour the country before retiring on 4 January – that 10 settlements were found in a broad area along the southern and eastern shores of the lake. What is clear is that the destruction took place at Waikaremoana, not the upper Wairoa valley. Hostilities had now been extended to the communities on the lakeshore itself who had had no involvement at Waerenga a Hika at all.

On 10 January, after the Ngati Porou reinforcements had arrived, a further expedition started up the Waikaretaheke River under Fraser's command. It was 520 strong, and comprised mostly lower river and coastal Kahungunu hapu, and the Ngati Porou contingent led by Rapata Wahawaha and Te Hotene Porourangi.[128] According to Fraser, the purpose of the expedition at the outset was to proceed to Whataroa 'pa' or 'kainga' (on the Mangaaruhe River) to discover whether 'all the Hauhaus had evacuated the district', and also to give Ngati Porou the opportunity of acquainting themselves with what was unknown country to them. But en route, intelligence was received that the 'rebels' were still on the southern shore of the lake, and it was therefore decided to change their course. According to Fraser's report, it was after they had marched some 17 miles (27 kilometres), and reached

125. 'Retreat of the enemy upon Waikaremoana', *Hawke's Bay Herald*, 6 February 1866, p 3 (cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 111)

126. 'Retreat of the enemy upon Waikaremoana', *Hawke's Bay Herald*, 6 February 1866, p 3 (cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 111)

127. Binney, 'Encircled Lands', vol 1 (doc A12), p 111

128. Fraser explained in his official report that it was an 'expedition undertaken by the friendly natives of this place', which suggests there were no Pakeha troops, apart from a few officers. He gave the following numbers for the force: Kopu – 120; Ihaka Whaanga – 150; Karauria 50; Hotene, Ropata & Paura Pareau – 200; Total – 520. Fraser to the Superintendent of Hawkes Bay, 15 January 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), p 379)

the Waiau River, that 'the natives' decided to go to Waikaremoana, and the 'enemy's' pa at Te Onepoto.[129] Although Fraser was aware that some of the Waerenga a Hika refugees had fled to Waikaremoana before Omaruhakeke, he now seemed to distance himself from this major strategic decision.

By this time, many of the upper Wairoa Ngati Kahungunu peoples, along with Matete's group of Rongowhakaata, had retreated towards Waikaremoana. There they were joined by people from the Tuhoe and Ngati Ruapani settlements of the region (it is unclear how many).[130] It is likely that this group included a significant number of women and children. Fraser noted after Omaruhakeke that the women and children had been sent on to the lake, and that Matete's group sheltered there also.[131] On 12 January, the Crown force proceeded up the Waikaretaheke River.[132] Their progress was halted at Te Kopani – said to be about four miles (6.4 km) from Te Onepoto on the Waikaretaheke River – where they were ambushed while passing through a gully. In the distance, Fraser later reported, Crown forces could clearly see a pa – what they presumed to be the pa at Te Onepoto and the 'Hauhau stronghold'.[133] But those who had retreated towards Waikaremoana had entrenched themselves in earthworks covered in dense fern. As the column passed through the gully, they fired down on it from the pits.[134]

Why did they decide to lay an ambush? The size of the Crown column, it is evident, was such that the local and refugee force decided to do so in an attempt to blunt its strength before they were trapped between it and the lake. This was clearly a defensive action. St George said they had a good view of the 'retiring enemy' and there were about 150 men.[135] Fraser gave a figure of 200.[136]

Ihaka Whaanga was severely wounded in the first assault. The Crown forces found it difficult to penetrate the rifle pits. But Wahawaha's tactic of firing the fern cover saw the ambush finally fail, and the defenders flee as Wahawaha's men charged the rifle pits. About 20 of Wahawaha's men chased those who fled for the four miles (6.4 kilometres) from Te Kopani to Te Onepoto and Lake Waikaremoana. Some escaped across the lake in waka that lay waiting for them; others dispersed into the surrounding forests.[137]

129. Fraser to the Superintendent of Hawkes Bay, 15 January 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), p 380
130. Cowan, *New Zealand Wars*, vol 2, p 134; Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 162
131. Fraser to the Under Secretary for Colonial Defence, 27 December 1865, AJHR, 1866, A 6, p 7
132. Binney, 'Encircled Lands', vol 1 (doc A12), p 111
133. Fraser to McLean, 15 January 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), pp 380–381)
134. Binney, 'Encircled Lands', vol 1 (doc A12), p 111
135. J C St George, diary, 12 January 1866, MS-copy-micro-0154, ATL
136. Fraser to the Superintendent, 15 January 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15 (a)), p 383
137. Fraser to the Superintendent, 15 January 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15 (a), p 383

When they reached Te Onepoto the 'friendly natives' took fourteen prisoners, nine of whom were men.[138] Four prisoners were executed the following day by Wahawaha, who called them out of the whare where they were confined, seated them in a row, and shot them with his revolver 'one after the other'.[139] Among those executed were Te Tuatini Tamaiongarangi, who had fought at Waerenga a Hika, and Te Matenga Nehunehu, Tamaiongarangi's nephew, who was also stated to be a brother of the high-born chief Nama of Whataroa.[140] Two 'men of the Urewera' were also said to have been shot.[141] St George recorded that 'Fraser & the Chiefs held a runanga and decided on shooting 4 of the prisoners'; he thus clearly implicates Fraser in the decision-making.[142] Fraser, in his official report, made no attempt to pass over the executions, which he said followed a runanga held by the chiefs. In fact he justified them on the grounds that 'three [of the prisoners] came from other places to fight against the Government and . . . the . . . fourth . . . had previously fought against the Government at Turanga'.[143] Asked later to explain what had happened, Fraser said he could have done nothing to prevent it.[144] The Reverend Tamihana Huata believed Fraser was responsible for the four executions.[145] Wahawaha's account implicates Kopu and Te Apatu in the decision-making alongside Ngati Porou,[146] though Porter recorded that Kopu 'remonstrated' with Wahawaha.[147] St George, who accused Tamaiongarangi of baying for the blood of Pakeha and playing a key role in causing the 'natives to rise in Turanga', stated that he 'well deserved the death he received'.[148] A press correspondent, however, reported at the time:

> I regret to say that four prisoners, namely Huruhuru te Tautene [Te Tuatini Tamaiongarangi]. His [nephew] Matenga (a mere lad), together with 2 men of the Urewera, were slaughtered the following day (Saturday) in cold blood, with the sanction, it is said, of Major Fraser. This I cannot credit, as it would be an everlasting disgrace were it true.[149]

We will explore these matters further below.

In the wake of the executions, Wahawaha and a small party explored the surrounding countryside for those who had escaped. He encountered a small group in the woods and

138. J C St George, diary, 12 January 1866, MS-copy-micro-0154, ATL
139. Battersby, 'Conflict in the Bay if Plenty and Urewera districts' (doc B3), p 163
140. Binney, 'Encircled Lands', vol 1 (doc A12), p 112
141. *Hawke's Bay Times*, 22 January 1866 (cited in Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 163)
142. St George Diary, 13 January 1866, MS-copy-micro-0154, ATL
143. Fraser to the Superintendent, 15 January 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15 (a)), pp 383–384
144. Battersby, 'Conflict in the Bay of Plenty and Urewera Districts' (doc B3), pp 162–163
145. Gillingham, 'Maori of the Wairoa district' (doc 15), p 139
146. Battersby, 'Conflict in the Bay of Plenty and Urewera Districts' (doc B3), p 163
147. Thomas Porter, *History of the Early Days of Poverty Bay: Major Ropata Wahawaha: the Story of his Life and Times*, Gisborne, 1923, p 20
148. St George, diary, 13 January 166, MS-Copy-mirco-0154, ATL
149. *Hawkes Bay Times*, 22 January 1866 (cited in Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 163)

attacked, killing three before they escaped across the lake in two canoes that had previously been undiscovered by Crown forces.[150] In addition to this, according to St George, after the four men were shot the forces set about destroying the surrounding settlement at Te Onepoto. 'The Tuparoa natives had a grand war dance and after looting and burning the kainga we all returned and camped where we had stopped the day before.'[151]

There are widely varying accounts of the death toll at Te Kopani. We consider them further here, not only because of the importance of this issue to the claimants, but also because knowing the number of casualties is important to understanding why the latter stages of the conflict unfolded as they did. Fraser's figure of 25, given in his official report (unofficially, the following day, he wrote '25 or more'[152]) was the lowest figure; it evidently included the four who were executed by Wahawaha at Te Onepoto on 13 January, and the three his party killed 'in the woods'.[153] St George wrote in his diary that 35 had been killed.[154] A contemporary newspaper account, however, reported that 'forty-one Hau Haus were killed', and later raised this to 50.[155] Wahawaha himself stated that 'upwards of 60 people had been killed; this was given as between 60 and 80 people in Thomas Porter's biography of Wahawaha.[156] How do we account for such differences in what are three accounts from those present at the fighting?

Major Fraser's official report was sent to the Government just three days after the main battle, and it is evident operations continued after that. We might deduce that he had downplayed casualties, or simply that he was not altogether certain about his figures, as his report seems to indicate:

> 25 killed; wounded unknown (as far as can be ascertained).
> 'Friendly': 12 killed; 17 wounded[157]

As the commanding officer, he would have relied heavily on reports received after the attack, and on a count of bodies recovered. He was writing soon after the battle, in the context of ongoing operations at the lake, and it is conceivable that a full picture of the events of 12 and 13 January had not yet emerged. But even the day after writing his official report

150. Fraser to McLean, 15 January 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), p 384; Fraser, *New Zealand Gazette*, 31 January 1866
151. J C St George, diary, 13 January 1866, MS-copy-micro-0154, ATL (cited in Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 163)
152. Fraser to McLean, 16 January 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), p 404
153. Fraser to McLean, 15 January 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), p 384; Fraser report, *New Zealand Gazette*, 31 January 1866
154. Binney, 'Encircled Lands', vol 1 (doc A12), p 111
155. *Hawkes Bay Herald*, 6 February 1866
156. Rapata Wahawaha, 'Maori account of the campaign against the Hauhaus on the East Coast 1865–70', undated, MS Papers 1187–006B, ATL; Porter, *Major Ropata Wahawaha*, p 17
157. Fraser to Under-Secretary for Colonial Defence, 15 January 1866, *New Zealand Gazette*, 31 January 1866, no 10, p 61

he was beginning to revise his figures upwards. He wrote to McLean, 'We have killed 25 or more of the enemy'.[158] We note that St George, writing in similar circumstances, recorded in his diary that 35 had been killed.[159] It is interesting that the figure is higher than Fraser's, though he too may have been unaware at the time of the full picture.

The account later published in the *Hawke's Bay Herald* on 6 February 1866 was described as having originated 'from the pen of an eyewitness to the affair'. The paper's correspondent described the ambush and the storming of 'enemy' positions by the Kahungunu and Ngati Porou forces, 'causing total defeat of the enemy, who were seen flying in all directions'. Mostly the men made for their pa some five miles (eight kilometres) away, where 'men, women and children' had been sighted before the attack, at the niu. Later it was suspected that their activity was designed to distract attention from the hidden rifle pits; they might of course, have been invoking divine assistance.) According to the correspondent, the pa was 'carried by storm . . . The men, women and children were now to be seen running for their canoes to make their retreat across the Waikare Moana lake'. The day was fine, and the lake calm, the correspondent reported, which was the only reason many were able to get out of harm's way; the day before the sea had been heavy, and the canoes would have been useless. But though many got away, others were shot while running to the canoes. The correspondent described the results:

> Thirty-three of the enemy killed were buried by our people, and eight were shot while in the water, making their escape to their canoes, and were seen to sink, – making the ascertained number killed on the enemy's side, 41.[160]

This is the most detailed contemporary account of the pursuit to the lake we have, and it is hard to dismiss it. The reporter's account, and Fraser's, seem to differ on some of the details of the events. Fraser does not mention the storming of the pa (though he did report sighting it at the outset, and its flags flying at the niu), or the presence of women and children, though he had reported earlier that the Omaruhakeke people had sent their women and children on to the lake. It is possible that, while Fraser would not have sought to conceal the full number of fighting men killed or wounded, he was less confident about admitting the presence of women and children in the middle of a running battle. Fraser also wrote that only a 'few Hauhau', once they reached the lake, left by canoe, and the rest escaped to the woods. The *Herald* account, while also stating that those men who did not leave dispersed into the forest, implied that many more, including women and children, ran to their canoes – so that as many as eight were shot while attempting escape. Given the level of detail provided in the *Herald* account – detail which is supported by other sources but

158. Fraser to McLean, 16 January 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), p 404
159. Binney, 'Encircled Lands', vol 1 (doc A12), p 111
160. 'The Fight at Waikaremoana', *Hawke's Bay Herald*, 6 February 1866, p 3

that also enhances our overall picture of the battle – the figure of 41 is a more reasonable estimate for the number of deaths than Fraser's 25.

A subsequent report (dated 2 February) in the *Hawke's Bay Herald* of 6 February, provided the 'latest intelligence' on developments at the lake, and gave a revised figure for casualties: 'The number of rebels killed in the late engagement at Waikare-Moana is stated to be fifty. One of the rebel chiefs who was wounded in the affair has since died.'[161]

These two newspaper reports are the only accounts we have written soon after the events in question, but with enough distance for a full picture of the events to have emerged.

Rapata Wahawaha's account is contained in an undated manuscript.[162] He described how 'upwards of 60' people were killed at the Waikaremoana battle. Thomas Porter gave his own version of this account, emphasising Wahawaha's role. According to Porter, Wahawaha 'received inspiration that won the day', setting alight the fern and allowing the Crown forces to mount assaults on the left and right flanks with little opposition:

> In a few minutes volumes of smoke were rolling up the hillside, blinding and discomfiting the concealed enemy, behind which the now exultant friendlies, when they once gained the crest of the ridge and rifle pits, were enabled to decimate the Hauhaus, who retired with great loss upon Waikaremoana, leaving some 60 or 80 of their dead upon the field. No prisoners were taken, but it is said that many badly wounded crept into the thick fern to die, or perished miserably alone in the many caverns and concealments of that rugged country.[163]

Porter's is a somewhat dramatic account, focused on the exploits of Wahawaha – and first published in the 1890s, three decades after the events in question. His account of the wars is not particularly careful, and in fact provides two versions of the battle at Te Kopani. But the figure he gives of 60 to 80 dead would have reflected his own understanding of the full extent of casualties during and after the battle.

We add that Thomas Gudgeon and James Cowan, in their histories of the wars, both gave figures of those killed which were closer to Porter's than to Fraser's: Cowan's figure was 60; Gudgeon's was 'about 50' (in an appendix to his book he specified 54, evidently adding those executed to the total).[164] Both writers had the advantage of talking to those who had been present at the battle, as well as consulting published reports. Elsdon Best, in *Tuhoe: Children of the Mist*, supplied Porter's and Gudgeon's figures without providing his own assessment.[165] In his later publication, *Waikaremoana: The Sea of the Rippling Waters*, he

161. *Hawkes Bay Herald*, 6 February 1866, p 3
162. Rapata Wahawaha, 'Maori account of the campaign against the Hauhaus on the East Coast 1865–70', undated, MS Papers 1187–006B, ATL
163. Porter, *Major Ropata Wahawaha*, p 17
164. Thomas W. Gudgeon, *Reminiscences of the War in New Zealand* (Southern Reprints, 1986), p 103 and appendix; Cowan, *New Zealand Wars*, vol 2, p 135
165. Elsdon Best, *Tuhoe: Children of the Mist*, 2 vols (Wellington: A H & A W Reed, 1972), vol 1, p 590

was more forthcoming. Describing how the battle at Te Kopani resulted in heavy losses for the inhabitants of the pa, he wrote that they left:

> nearly eighty of their dead upon the field. It is certain, however, that this does not represent the enemy's loss, and even now the oncoming Pakeha often finds mouldering skeletons in gully and cave, with probably the remains of a gun by the side thereof.[166]

Thus, Best, on the basis of his oral sources, and of the finding of koiwi (human bones), was moving to a figure higher than that given by Wahawaha. The battle at Te Kopani, he had been told, was a bloody affair.

There is no way of knowing exactly how many people were killed at Te Kopani. All the first-hand accounts, however, described the rout of the pa in no uncertain terms. The occupants were utterly defeated from the right and left flank, and from the centre (Fraser described them as 'completely routed') and were then pursued for four miles (6.4 kilometres) to the lake before the remnants scattered to the forests or crossed the lake.[167] In these circumstances, and given that there were said to be from 150 to 500 or 600 'rebels' in the pa at the outset (this latter figure is Lambert's),[168] casualties of upwards of 50 seem very probable. Fraser, from his somewhat limited vantage point, was certain of half this number, but we conclude that his figure was simply too low. It is difficult to give a precise figure for the number killed while trying to cross the lake, or who died subsequently as a result of their injuries. We cannot discount the possibility that some women and children were killed. We conclude that a figure of 40 to 50 killed is a minimum, and it is probable that the casualties were higher.

(3) *Hostilities after Te Kopani*

In the wake of the fighting at Te Kopani and at Waikaremoana, most of those who escaped 'scattered in Te Urewera', according to Binney.[169] Fraser reported to McLean on 16 January that 'we have driven them [the "enemy"] out of the country altogether',[170] and on 21 January he referred to the fighting being 'over'.[171] At this point, McLean (who was then in Wairoa) wrote a terse demand to the 'Chiefs of the Hauhaus . . . residing at Waikare Moana or thereabouts' on 24 January 1866 that they should surrender now that 'the bravery of both parties has been displayed':

166. Elsdon Best, *Waikaremoana*, (Wellington: Government Printer, 1975), p 104
167. Fraser to McLean, 15 January 1866, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc I 5(a)), p 382
168. Lambert, *The Story of Old Wairoa*, p 580
169. Binney, 'Encircled Lands', vol 1 (doc A12), p 112
170. Fraser to McLean, 16 January 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), p 404
171. Fraser to Mclean, 21 January 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), p 407

6.5.2

> Therefore this is a word to you, that you should turn over to the Government, abandon your Hauhauism, take the Oath of Allegiance to the Queen of England, and deliver up your arms; In order that the conditions of peace, and terms on which your lives may be spared should be made known.'[172]

In short, they were to surrender themselves to the power of the Crown. McLean wrote to Governor Grey soon afterwards explaining that the 'Hau Haus [had] been driven from all their positions at the Wairoa and have retreated to the North End of the Waikare moana Lake' and that he was 'really anxious that peace should be established whenever it is possible to do so'.[173] McLean's messenger, Ihaka Papatu, was a man of rank (the brother of Tamihana Huata and Hapimana Tunupaura). He was captured, and was reported several weeks later to have been killed and decapitated.[174] Kopu sent a messenger to Waikaremoana at about the same time, who returned with news that the 'Urewera Hauhau' were fortifying their pa at Tikitiki to renew fighting. Kopu had sent an offer of peace, while at the same time seeking more guns himself from McLean.[175]

After this, during February, groups of people began surrendering 'at Wairoa'. McLean reported to the Colonial Secretary on 25 February that he had received no answer to his letter addressed to the chiefs;[176] but their response was evident in their various actions. In light of the Crown's unprovoked military operations, it is perhaps not surprising that these ran the full gamut from resistance (as is evident in the killing of Papatu) to submission. On 10 February, about a dozen people surrendered to colonial forces at Wairoa.[177] Another 30 surrendered on 16 February, and about 40 were reported to have 'come in' and taken the oath of allegiance on 21 February.[178]

The next two months were characterised by rumours of large numbers of 'Hauhau' gathering at various pa; by expeditions mounted by Kopu and Whaanga, and by surrenders,

172. McLean to Chiefs of the Hauhaus, 24 January 1866, in Binney, Additional Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), p 504

173. McLean to Grey, 26 January 1866, MS-Copy-Micro-535–006, fldr 19, No 25, ATL (cited in Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), pp 163–164)

174. The messenger was first reported missing by Ihaka Whaanga on 14 February 1866. On 6 March McLean wrote that the Waikaremoana people had 'made a prisoner of the messenger' At the end of March the *Hawkes Bay Herald* reported the discovery of his body. McLean used this information to justify Kopu's execution of a prisoner at Mangarua in March. Ihaka Whaanga to McLean, 14 February 1866, in Binney, Additional Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), p 505; McLean to Colonial Secretary, 6 March 1866, in Binney, Additional Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), pp 501–503; 'Wairoa', *Hawke's Bay Herald*, 27 March 1866; McLean to Colonial Secretary, 7 April 1866, in Binney, Additional Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), pp 495–496

175. Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 164

176. McLean to Colonial Secretary, 25 February 1866, IA 1 1866/634, Archives New Zealand

177. Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 164

178. The *Hawke's Bay Times* reported that 41 surrendered, whereas Deighton wrote that there were 42: *Hawkes Bay Times*, 1 March 1866, p 3 (cited in Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 164); Deighton to McLean, 23 February 1866, in Gillingham, Supporting Documents for 'Maori of the Wairoa district' (doc 15(a)), p 355.

which increasingly gathered momentum. The rumours continued throughout March and April. On 6 March McLean reported continuing hostility by the 'Hau-haus at Waikaremoana', who had made 'no signs of submission'. On 7 March Paora Rerepu reported 200 'Urewera' were gathered there and were coming to attack either Wairoa or Mohaka. (Earlier, on 4 February, he had reported rumours of 300 'Urewera', building three pa to prepare for fighting – but added that he was doubtful about this report).[179]

During April, there were many rumours. On 17 April, McLean advised that Kereopa was said to be at Maungapohatu, with a very large hostile force, and that an attack on Poverty Bay and Wairoa was being planned.[180] The *Hawke's Bay Herald* reported a few days later that the party Kereopa was rumoured to be bringing to Wairoa comprised 'Te Urewera, Waikato, Rongowakaata [*sic*], and Ngatikahungunu, and to number 800 men.' Even the paper was prepared to admit that the number might be exaggerated.[181] Kopu and Whaanga had offered to lead a force to capture him; the Government considered, however, that efforts to apprehend Kereopa should be undertaken by the East Coast Expeditionary Force. A few days later a man from Ruatahuna reported that Te Waru was at Ruatahuna, along with Rongowhakaata and Urewera people in large numbers, awaiting Matete, who was in Taranaki. Not long afterwards, Whaanga sent news that a Hauhau pa was being constructed at Te Reinga (though this turned out to be a false rumour).[182]

Meanwhile, a number of expeditions took place between February and April. Binney suggests, on the basis of draft instructions to Fraser dated 13 January, that it was decided that subsequent expeditions should be 'exploratory, not a full-scale military operation.'[183] The government, Fraser was told, did not have the resources for the expensive operation he proposed of 'surrounding the natives supposed to be at lake Waikari Moana.'[184] The result of this decision, in her view, was that control was shifted into the hands of 'Maori allied to the government'. It is clear that operations continued; the reality was that the Government, spurred on by the active support of coastal Kahungunu leaders, refused to halt expeditions before Te Waru was killed, captured, or had surrendered. Subsequent expeditions were led by chiefs, without European officers; they were not systematically reported, and thus disappeared from later historical accounts. We note, however, that there were at least periodic reports made to government officials, and that newspaper accounts were also published.

179. Paora Rerepu to McLean, 7 March 1866, AGG-HB 4/13, A-NZ (cited in Battersby, 'Conflict in the Bay of Plenty and Urewera Districts' (doc B3), p 165); Paora Rerepu to McLean, 4 February 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc I5(a)), pp 398–400

180. McLean to Colonial Secretary, 17 April 1866, in Binney, Additional Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), p 480

181. *Hawke's Bay Herald*, 24 April 1866 (cited in Battersby, 'Conflict in the Bay of Plenty and Urewera Districts' (doc B3), pp 167–168)

182. Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 168

183. Binney, 'Encircled Lands', vol 1 (doc A12), p 112

184. Colonial Defence Office to Fraser, 13 January 1866, in Binney, Additional Supporting Documents for 'Encircled Lands' vol 1 (doc A12(b)), pp 127–130

Paora Rerepu reported on 4 February that he had returned from Te Putere, where he had captured 10 Hauhau fugitives, whom he was keeping at his pa at Te Haki.[185]

After the rumours of Hauhau gathering at Waikaremoana, a further 'foraging' expedition, as the *Hawke's Bay Herald* correspondent described it, was made by Whaanga and Kopu to Te Onepoto in mid-March 1866. At a village called Mangarua, three miles (five kilometres) from Lake Waikaremoana, they surprised a group of 200 people engaged in Pai Marire karakia. Some, it appears, fled, and were fired on. According to the report, four men and an elderly woman were killed.[186] Those who remained promised to surrender. Binney says that a premature gunshot (perhaps fired as a warning) prevented the killing of more people; most were able to escape.[187] The *Herald* account went on to describe the recovery of the body of the 'missing native'– evidently McLean's messenger – and then the surrender and execution of 'an old man', the chief Rangikumapuao:

> An old man and woman surrendered to Kopu: the old man prayed hard to have his life spared; but Kopu, after listening quietly to all he had to say, shot him. This was rather too bad, as the old man could not have done the slightest harm to anyone; and the only excuse given is, that Kopu takes no prisoners.[188]

Fraser, in his report on the matter, stated that Rangikumapuao had been taken prisoner and shot about an hour later; he did not expand on the circumstances.[189] He was thankful, as he put it, that as he was not there no one could accuse him on this occasion of execution. Despite this, and despite McLean's reporting the murder of his messenger on 7 April 'in extenuation' of the executions carried out by Kopu, the Government expressed to McLean (for him to pass onto the chiefs) its disapproval 'in the strongest manner of the murder of prisoners in cold blood'.[190] Six people were killed at Mangarua: five as they attempted to escape an unexpected attack, and one after surrendering.

Later in April, there were rumours of a possible attack on Poverty Bay being planned by 'Hauhau's, then supposed to be in a pa near Waikaremoana lake'. The result was scouring operations by Whaanga and Te Apatu, with two forces – one of 120 men, and another of 170 men – in various directions around Marumaru. Whaanga offered the opportunity of surrender to a party of some 50 'Hauhau' whom they met – among whom were men of his own hapu and Te Apatu's. All took it except 10, who later changed their minds and also 'came in'. Nama, the Whataroa chief, and Himiona, a lower Wairoa chief, were among the

185. Paora Rerepu to McLean, 4 February 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), pp 398–400

186. *Hawke's Bay Herald*, 27 March 1866

187. Binney, 'Encircled Lands', vol 1 (doc A12), p 113

188. 'Wairoa', *Hawke's Bay Herald*, 27 March 1866, p 4

189. Binney, 'Encircled Lands', (doc A12), p 113; Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 166

190. Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), pp 167–168

first group. Fraser, having been informed by Whaanga of developments on 24 April, took a small force to join up with Whaanga at Opouiti (near Marumaru). He raised the question why the party – well armed – had come so close to Wairoa; and was told that they had come to surrender, though the chiefs were divided about doing so. There were further rumours of a strong pa at Te Reinga, but Whaanga's scouts found that there was no sign of a pa there. They did, however, bring in 'some more prisoners, chiefly old men and women' whom they found there. Fraser then sent 'Queen's natives with some Hauhaus' to go and try to 'bring in all the Hauhau remaining' from the kainga at Te Putere, where they were gathered. By the end of the week, he reported, 'the whole of the Hauhau, except Te Waru and his immediate followers about thirty in number were collected at Marumaru'.[191] Fraser, meanwhile, left with a force at the end of April for Te Reinga towards Turanga on an inland track, being uncertain 'that he had foiled the plans [for attack] that had earlier been reported'.[192] But he found no sign of 'Hauhau', and having reached Turanga concluded that there was no danger of an attack since the 'Hauhau' at Wairoa had all surrendered.[193]

Fraser reported later that 'the complete surrender of the Hauhau's belonging to the Wairoa and adjacent country' had concluded on 28 April at Opouiti.[194] On 7 May, McLean reported that 260 people had been captured by Whaanga – among them 'six or seven chiefs of some distinction', including Nama.[195] Some were kept under the surveillance of chiefs of lower Wairoa, but most were released once they took the oath of allegiance. Te Waru Tamatea and about 15 others finally surrendered on 9 May; they were received by Kopu at his pa on 10 May. Two weeks later, Te Waru 'and the Hauhaus' took the oath of allegiance in McLean's presence.[196] Fraser reported on 26 May, when he returned from his expedition, that a total of 300 men had surrendered.[197] A list of Wairoa 'prisoners of war' compiled about this time – evidently incomplete – gives 97 names, divided into three parties: Te Waru's (13), Ngati Kurupakiaka (65), and Nama's men (19).[198] Te Waru was said to have been sent to Napier, though he was later allowed to return to Wairoa. At Napier, 'the worst' were selected to be deported to the Chathams.[199] Ultimately, a small group who were from Wairoa was sent to Wharekauri.[200] (We discuss this further below.)

These events effectively marked the end of the upper Wairoa and Waikaremoana fighting. Despite McLean's continued urgings that Kereopa Te Rau and Patara Te Raukatauri should

191. Fraser to Under Secretary for Colonial Defence, 26 May 1866, AD 1 1866/2334, Archives New Zealand
192. Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 168
193. Fraser to McLean, 7 May 1866, in Gillingham, supporting papers for, 'Maori of the Wairoa district' (doc 15(a), pp 450–451
194. Fraser to Under Secretary for Colonial Defence, 26 May 1866, AD 1 1866/2334, Archives New Zealand
195. McLean to Colonial Secretary, 7 May 1866, IA 1 1866/1467, Archives New Zealand
196. Binney, 'Encircled Lands' (doc A12,) p 113; Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), pp 168–169
197. Battersby, 'Conflict in the Bay of Plenty and Urewera districts', (doc B3),p 170
198. Gillingham, 'Maori of the Wairoa district' (doc 15), p 149
199. Lambert, *The Story of Old Wairoa*, p 582
200. Gillingham, 'Maori of the Wairoa district' (doc 15), p 141

be captured, and that it was necessary to 'reduce the Ureweras to submission if they continued as at present to threaten our outposts at Wairoa and Poverty Bay', the hostilities were by then over.[201]

6.5.3 Treaty analysis and Findings

We have established already that there was no rebellion in Wairoa, or even a breach of the peace. The result is that the Crown was not justified in sending its forces into upper Wairoa and Waikaremoana. But because it did so, we have asked whether it was justified in continuing military operations until April 1866; and we have examined the Crown's military operations in the area to assess whether they were conducted in a manner consistent with the principles of the Treaty of Waitangi.

In chapter 5, we have considered the Treaty and other standards that apply to the Crown's conduct of its military expeditions. In summary we found that:

- The Crown in the 1860s considered itself bound to act according to some, at least, of the accepted laws and usages of war. It accepted that, by these standards, prisoners should not be summarily executed, that non-combatants should not be killed, and that women and children should not be treated as prisoners.
- The Crown is entitled by law to use appropriate force during a state of emergency. Even in those circumstances, however, fundamental Treaty rights endure, such as the rights, guaranteed by article 3, not to be arbitrarily deprived of life or to be punished outside the law.
- The fundamental Treaty principles of active protection of the lands and property of Maori, of good government, and the obligation to act in good faith, apply to the conduct of the Crown's military expeditions in Te Urewera.

We consider first whether the Crown was justified in continuing operations into the first few months of 1866. We note that, from the outset, Crown forces were dealing with communities who were on the defensive. In our view, this remained the case throughout the conflict. As the forces marched up the Wairoa valley, they reported abandoned or unfinished pa. When they destroyed 10 settlements in the vicinity of Waikaremoana in early January, there was no mention of armed opposition. When the fighting men of Waikaremoana and upper Wairoa turned and laid an ambush at Te Kopani on 12 January, they were facing a very large Crown force. Tactically, ambush was their best option: they must have concluded that it was simply too risky to take the brunt of a full-scale attack on the shores of the lake. Their casualties were high enough, as it turned out, in conditions where initially they had had the upper hand.

201. McLean to Colonial Secretary, 30 May 1866 (cited in Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p169)

Nor were any attacks made on Wairoa or other towns – despite rumours of possible attacks by 'Hauhau' parties throughout the period. The killing of McLean's messenger stands as the exception. Fraser was still voicing his suspicions that an attack might be made in April, even as surrenders were under way; he was doubtful of the intentions of a party of 50 men at Marumaru because they were armed, despite McLean's demand that arms should be brought in to be given up by those 'coming in'. We note also, towards the end of the Crown's operations, the taking by surprise of those gathered at Mangarua who were holding karakia when Whaanga's men arrived; many simply ran. And the final descriptions of those who were rounded up at Te Reinga, or capitulated at Te Putere, convey no evidence of defiance, let alone armed resistance. The Turanga Tribunal found that Turanga Maori had not sought hostilities, and had no wish for active involvement in the hostilities that were visited on them in November 1865; hence their surrender after only a few days of the siege of their pa Waerenga a Hika.[202] The same, we find, is true of the communities of upper Wairoa and Waikaremoana.

We are not surprised – given the stated purpose of the Crown's operations – that Crown forces continued those operations as far as the lake, and into January and beyond. The mopping-up operations underlined the Crown's determination to secure the complete subjugation of the interior peoples. But we cannot think they were justified. Fraser, writing to the Government in May, was full of praise for the chiefs who had assisted him as they 'fought and conquered a powerful foe equal if not superior in numbers to their own'.[203] But those whom Crown forces pursued were hardly an aggressive foe; if 'powerful' they did not set out to demonstrate their power by mounting attacks on Crown forces, or on the pa of Crown-aligned Ngati Kahungunu, or on townships. Rather, they simply retreated before the Crown forces.

Given that there were no signs of an aggressive enemy at the outset, there would appear to have been every opportunity for Crown negotiation with the upper Wairoa leaders. But it seems clear from McLean's own absence (compared with his prominence at Turanga in the early days of the confrontation there) that he was not interested in a political solution before Crown forces had been sent in. At Wairoa, he left the conduct of affairs solely to his military commander, Fraser, enjoining him to work with the chief Kopu. And in the course of the operations, it seems that Fraser increasingly left the force's conduct to the chiefs on whom he relied so heavily for support. There was, as we have seen, some negotiation initially at Omaruhakeke; but, compared with Turanga, little enough time was granted the defenders to consider Fraser's terms. In any case, given the aftermath of Crown successes on the East Coast and at Turanga, unconditional surrender was not an attractive option. Ultimately however – in the wake of its dispatch of a much larger force to Lake Waikaremoana, the infliction of substantial casualties, and constant harassing to pressure

202. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 112
203. Fraser to Under Secretary for Colonial Defence, 26 May 1866, AD 1 1866/2334

those who remained in the district – the Crown succeeded in securing such surrenders on its own terms. McLean's written offer of unconditional surrender in late January 1866 might have averted further large-scale casualties, but casualties might have been averted altogether had negotiations been conducted the previous month. The life of McLean's messenger, Papatu, might not have been on the line had the Crown's military operations (and the execution of chiefs) not aroused such resentment. While we cannot excuse such a killing – particularly that of a messenger – this was perhaps the single act of aggression committed by those whose lands had been invaded, and communities devastated.

In respect of the Crown's conduct of its hostilities, we find that it was undiscriminating. Crown forces were sent into a district where there were a number of different tribal communities, whose identities – let alone their involvement in any previous hostilities – were not clear to the Crown. We consider there was a heightened onus on the Crown, in the circumstances, to proceed cautiously. Having made few efforts in the previous 25 years to establish a relationship with the people, although it regarded them as citizens to whom it owed Treaty obligations, the Crown was obliged to ensure that they understood the Crown's role and intentions and, equally, that the people's role and intentions were understood by the Crown. Only then could the risk of misunderstanding, mistrust, and hostilities based on mistaken premises be minimised.

The retreat of Te Waru Tamatea, and of Anaru Matete, held to be rebels, was evidently sufficient to justify either the casting of a wide net (to capture them), or wide-ranging punishment for communities which now stood accused of rebellion – or its identical twin, in Crown parlance, 'Hauhauism'. The Crown's duty of good government obliged it to be certain who its forces were attacking, and why. The Crown failed in this most basic duty. In the absence of such certainty, a strategy designed to render whole districts uninhabitable, was particularly indefensible. As we have found in chapter 5, the destruction of property that served no military purpose was in breach of the plain meaning of articles 2 and 3 of the Treaty of Waitangi, and of the principle of active protection. The Crown's wide-ranging and draconian raids were conducted without concern for the welfare of non-combatants. They could not be justified on the grounds that either the Turanga men or Te Tuatini Tamaiongarangi and Te Waru Tamatea had committed killings for which they needed to be held to account. They could not be justified on the grounds that belief in Pai Marire teachings was akin to rebellion (though McLean's insistence in January 1866 that Pai Marire beliefs be given up when people surrendered to the Crown implies that this was the position the Crown took). They could not be justified on the basis that such communities were offering, or might offer, assistance to upper Wairoa 'rebels'; and therefore stood condemned as rebels also. We have found that Te Waru Tamatea and Anaru Matete were not in rebellion against the Crown when they resisted its attack at Waerenga a Hika.

Belgrave and Young argued that 'the degree of sustained violence deployed during the armed conflicts of 1865 and 1866 was more limited when compared to the fighting between 1868 and 1872 which followed'.[204] Although this statement is true so far as the duration of the conflicts is concerned, we cannot accept that what occurred in the upper Wairoa and Waikaremoana was anything less than what occurred during the Crown's later military operations in pursuit of Te Kooti. The number of those killed in this brief five-month period – perhaps upwards of 70 – eclipsed the total death toll of the period from 1869 to 1871. The death toll at Te Kopani was among the highest of any battle during the New Zealand wars. And while the destruction of property was conducted without the same stated determination to deprive the local people of a means for survival, and thereby punish them, the effect was the same. Crown forces destroyed settlements such as Omaruhakeke and Te Onepoto wholesale when they were captured, and scouting parties eliminated other cultivations when they were found. This was conducted without thought to the welfare of non-combatants.

In respect of the execution of prisoners, the Crown has conceded that 'the execution of unarmed prisoners by Maori troops engaged in military activities on behalf of the Crown was a breach of the guarantee of the rights of British subjects under Article 3 of the Treaty of Waitangi'.[205]

We have found that there are no circumstances in which such acts could be justified. The Crown at the time considered itself bound to act according to some, at least, of the accepted laws and usages of war. It accepted that prisoners should not be summarily executed. This is evident both in the explanations sought from Major Fraser after the Government received reports of such executions after Te Kopani, and in the formal admonishment he received from the Native Minister for not preventing 'the unnecessary and unlawful execution' of the four prisoners. The Minister further recommended to the Governor that he point out to the chiefs concerned:

> however loyal their intentions may have been, yet that the putting these men summarily to death without regular trial and without the signification of the Governor's assent was an unlawful act, and is repugnant to the feelings and customs of civilised people.[206]

And, after the execution of the chief Rangikumapuao in March 1866, McLean was instructed to reprimand Kopu and others, informing them 'that the Government disapproves in the strongest manner of the murder of prisoners in cold blood'.[207]

It has to be said, however, that such concerns were less evident among the officers. Fraser himself clearly considered that being in arms against the Crown – even in the course of

204. Belgrave and Young, 'War, confiscation and the 'Four Southern Blocks'' (doc A131), p 6
205. Crown counsel, closing submissions (doc N20), topic 4, p 2
206. Crown counsel, closing submissions (doc N20), topic 4, p 13 (citing Haultain memo for the Governor, 2 February 1866, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), p 402)
207. Crown counsel, closing submissions, (doc N20), topic 4, p 13

past hostilities – was sufficient reason to deprive a prisoner of any right of due process and then execute him. St George thought Tamaiongarangi, who according to rumour was anti-Pakeha, and had incited rebellion at Turanga, 'deserved' to be shot. In his diary, St George matter-of-factly recorded Fraser's presence at the runanga that decided the fate of the four prisoners. We consider that St George's account of Fraser's presence is reliable. In any case, from Fraser's own statements it seems that he neither tried to stop the executions nor thought them unjustified.

Despite his reprimand by the Minister, there was no inquiry into the circumstances of the executions; nor was Fraser court-martialled. The Crown evidently failed to impress on Fraser the seriousness with which executions were regarded, since we must conclude that he failed to impress this on the chiefs. As a result of this failure, a fifth prisoner was later executed. Given that military operations were continuing, the Crown was culpable. Counsel for the Wai 621 Ngati Kahungunu claimants put it to us that rangatira who were 'engaged as allies' by the Governor understood that they were delegated the legal power to take life in time of war. In the circumstances of war in Wairoa, utu (the restoration of social balance) was sought by those rangatira who upheld the 'dominant Kahungunu political line of neutrality', as counsel put it. This stance, counsel suggested, had been disrupted by those Kahungunu who would not accept it; therefore the right and duty of Kahungunu rangatira who stood by it was to exercise the social sanctions available to them. Utu required the execution of some whanaunga.[208] But we are not certain that there was a customary obligation on rangatira to accept a 'dominant' political line. On the contrary, rangatira were accustomed to adopting and acting in accordance with positions which best suited the interests of their own hapu. It seems unlikely that utu should have been taken solely because some Kahungunu rangatira had adopted a different political stance from that of the majority. In any case, the taking of life as a customary sanction was no longer acceptable for those – like the lower Wairoa chiefs – who had accepted kawanatanga and the Treaty.

Gillingham records that after Ngati Porou arrived at Wairoa in early January, they and Ngati Kahungunu held talks 'to discuss aspects of their military strategy', including the fate of prisoners captured. According to the Ngati Porou leader Te Hotene Porourangi, they agreed before starting that if Nama, Tamaiongarangi, and 'several others' were captured they should be executed, but that Te Waru should be spared. This strategy was 'apparently widely understood by the assembled Maori'.[209] There was no evidence that Fraser was aware of the agreement, and it is possible that he did not know in advance that the executions were to take place.

We are certain, however, that chiefs who fought for the Crown could not in fact operate outside the laws of war observed by the Crown. Crown counsel, while arguing that

208. Counsel for Wai 621 Ngati Kahungunu, written synopsis of closing legal submissions of Wai 621 Counsel (doc N1) p 52

209. Gillingham, 'Maori of the Wairoa district' (doc 15), p 135

'Maori troops acted in a reasonably autonomous manner at times, and the chain of command between them and the commissioned troops they fought with is unclear', accepted that Maori forces were engaged in military activities on behalf of the Crown, though they were not Crown troops.[210] Given that it was not Crown policy at the time to allow its troops to execute prisoners, the Crown accepted that there were a series of failures in the events at Wairoa: in providing appropriate instructions to troops before military actions took place, and in ensuring any illegal actions were penalised. We would add that it was incumbent on the Crown's commanding officers to ensure that chiefs fighting in the Crown's forces understood and observed such instructions. Major Fraser failed to fulfil his obligations in this respect. We reiterate the Turanga Tribunal's argument that it was:

> of the utmost importance that the Crown did not succumb to the instinct for revenge. The moral authority of the Crown to require its subjects to comply with a standard prescribed by law, depended on the Crown itself adhering to the same standard.[211]

The treatment of the prisoners who were deported to Wharekauri (the Chatham Islands) was an issue raised by the claimants. In particular, Ngai Tamaterangi spoke to us about their rangatira Mourirangi. Mr Charles Cotter, whose great-grandmother Pukehuia Rangi was Mourirangi's sister, told us that Mourirangi was imprisoned on the Chathams, and became a follower of Te Kooti.[212] The Crown raised some doubts about the number of prisoners taken in fighting at Waikaremoana who were deported to Wharekauri. Citing Binney's clarification of this issue, Crown counsel stated that though a number of Ngati Kahungunu were sent there on the *St Kilda*, most appear to have been captured in Hawke's Bay. On its face, the evidence does not identify people detained as a result of the fighting at Waikaremoana who were sent to Wharekauri, other than perhaps three Ngati Kahungunu men 'said to have been captured at Te Wairoa'.[213] Counsel accepted, however, that the evidence is not clear, given Kopu's arrangement for all the Wairoa prisoners to be taken to Pakowhai by Tamihana Huata.

In respect of the detention of these three Kahungunu men on Wharekauri, we record the Crown's acceptance that the detention of the prisoners held there – from Turanga, Wairoa, and Hawke's Bay – 'with the passage of time . . . began to assume the character of indefinite detention without trial . . . The duration of detention in the absence of a trial was a breach of the Treaty.'[214]

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210. Crown counsel, closing submissions, (doc N20), topic 4, p 14
211. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, pp 246–247
212. Charles Manahi Cotter, brief of evidence, (doc I25), paras 10.5 and 13.3.
213. Crown counsel, closing submissions (doc N20), topic 6, p 4; Binney, B1(a), pp 44 – 45. Crown counsel, citing evidence of Charles Cotter, also states that Mourirangi (Mr Cotter's tipuna) was captured in Hawke's Bay following the fighting at Petane and Omarunui. Mr Cotter's brief of evidence, however, does not state where Mourirangi was captured. Charles Cotter, brief of evidence, undated (doc I25), p 15
214. Crown counsel, closing submissions, (doc N20), topic 6, p 5

We must note, however, that the greater number of prisoners were not deported, and it seems that many were released after they had surrendered and taken the oath of allegiance. The Crown thus spared them the added indignity and injustice of indefinite detention.

We find the Crown to have breached the principles of autonomy, good government, and active protection, and also the plain meaning of the Treaty:

- in making war upon the peoples of upper Wairoa solely for the purpose of subjugating them, when there was no rebellion and no threat to law and order justifying the use of force.
- in continuing the war and carrying it to Waikaremoana, again without justification and for the purpose of subjugation.
- We also find the Crown in breach of its duty actively to protect Maori and their lands, when it destroyed their property and food supplies in the district without the shadow of a justification.

Finally, we find the Crown in breach of the article 3 guarantees, and the principle of good government, for the killing of non-combatants and the execution of prisoners.

We turn next to consider the prejudicial impacts of these serious Treaty breaches.

6.5.4 What were the impacts of the Crown's military operations, December 1865–April 1866?

Summary answer: *Maori who defended their upper Wairoa and Waikaremoana lands against invading Crown forces from December 1865 to April 1866 suffered heavy casualties. At least 59 people (nearly all those we know of were men) were killed; more probably the figure was 69, and it may have approached 100. It is difficult for us to say how many of these were Ngati Kahungunu losses – including Ngai Tamaterangi and Ngati Hinemanuhiri – and how many were Tuhoe or Ngati Ruapani. Pa and kainga on the southern shores of the lake and on adjoining lands were destroyed, and settlement disrupted. Most, if not all, the people living on Waikaremoana lands, including Ngati Kahungunu, Ngati Ruapani, and Tuhoe, evacuated the land to seek safety elsewhere. Subsequent Crown expeditions into the wider Waikaremoana lands in the context of the war in Te Urewera compounded the situation; and it does not seem that the southern communities were re-established at that time. The disruption of settlement created difficulties for those who had to defend their rights against a range of Crown actions (the subject of the next chapter) which soon impinged on the south-east Waikaremoana lands. Politically, the Crown's determination to destroy the influence of Pai Marire on the East Coast was a key factor in the decision of lower and coastal Wairoa chiefs to support the Crown in the hope of proving themselves good allies and to fight their Pai Marire whanaunga with whom they had previously kept the peace. The hostilities of 1865 and 1866, and the way in which*

they were conducted, laid the basis for support for Te Kooti among those whom Crown forces attacked.

(1) *Introduction*

The Crown's military intervention had immediate impacts on the people of upper Wairoa and Waikaremoana: loss of life, destruction of pa and kainga, and looting of property. The bitter note the hostilities brought to relations between the Crown and upper Wairoa and Waikaremoana Maori was underlined by the execution of several prisoners, on more than one occasion, and the sending of some to detention in the Chatham Islands. The Crown's determination to secure land in the wake of the conflict, and the impact on all the peoples of Wairoa and Waikaremoana of the mode by which it acquired such land brought further long-term resentment, and resulted in claims which are addressed in the next chapter. Here, we consider the prejudicial effects of the Treaty breaches we have identified in relation to the war.

(2) *Social, economic, and cultural impacts*

(a) *Loss of life:* The conflict that began in the upper Wairoa on 25 December 1865 resulted in considerable loss of life for the Ngati Kahungunu people of upper Wairoa and Waikaremoana, and also for Tuhoe, and Ngati Ruapani. There may also have been casualties among the Turanga men who had evacuated Waerenga a Hika.

Thirteen people were killed at Omaruhakeke; at Te Kopani a minimum of 40 to 50 people (the figure may have been higher, up to 80); and at Mangarua, six. The total minimum figure is thus 59; more probably it was 69; but the number who died may have approached 100. Most of these died in combat, or while fleeing Crown forces; it is probable that an unknown number died as a result of wounds they sustained. Five were summarily executed.

It is difficult for us to say how many of those killed in upper Wairoa and Waikaremoana were Ngati Kahungunu, and how many were Tuhoe or Ngati Ruapani. Certainly there must have been many Ngati Kahungunu losses. At Te Kopani, we assume that the casualties must have included Ngati Hinemanuhiri, Ngati Hinganga, and Ngai Tamaterangi; we know that those who escaped from Omaruhakeke had retreated towards the lake, and must have taken refuge at Te Kopani. Te Wao Ihimaera of Ngati Ruapani, Ngati Hinekura, and Tuhoe gave evidence in the Maungapohatu appeals before the Urewera commission (in 1906) that some of the 'appellants' – that is, Ngati Kahungunu – were killed during the fighting at Te Kopani. Others, he said, were buried at Waikaremoana; though some were 'afterwards taken up and removed, ie Te Tuatini and others, and Waata'.[215] Given the number of Ngati Kurupakiaka who later surrendered to Crown forces, it seems likely that they too must have suffered losses in the fighting. Crown-aligned Ngati Kahungunu also suffered losses

215. Belgrave and Young, 'Customary Rights and the Waikaremoana lands' (doc 129), p 116

– at least one at Omaruhakeke, 12 at Te Kopani and perhaps a further 12 in a battle during March. Hemi Huata, son of Tamihana Huata, giving evidence in 1946 before the Appellate Court in the Lake Waikaremoana title investigation, spoke of fighting in this period, stating that 'The Hauhaus were finally defeated but not until a lot of blood had been spilled by the Kahungunu people'.[216]

The impact of the conflict on the interior hapu of Ngati Kahungunu such as Ngati Hinemanuhiri and Ngai Tamaterangi was undoubtedly great. We have noted earlier the heavy losses suffered by Te Waru's people at Orakau; on top of these came the casualties at Omaruhakeke and Te Kopani. In addition, Ngai Tamaterangi took a blow to their leadership, with the death of their principal rangatira Te Tuatini. Estimates of the upper Wairoa population – based on observations of kainga populations and numbers who gathered for tangi – ranged from 250 to 1000.[217] No such estimates were given to us for the post-war population. However, a total loss of upwards of 75 from the battle at Orakau to the conclusion of hostilities in May 1866 can be seen as significant. Speaking of Omaruhakeke specifically, Ms Gillingham stated that while there is 'little direct evidence of deaths and destruction resulting from the attack', it was likely that there was a significant impact 'given the proportion of those killed to the size of the community populations and apparently wholesale destruction of their resources'.[218] Speaking of what occurred at Te Kopani, Gillingham accepted that death and destruction of property would have resulted in a significant impact on the people. She noted that Fraser reported a shortage of food in August 1866.[219]

Tuhoe and Ngati Ruapani suffered casualties as well. There is clear evidence to show that the 'Urewera', as they were termed in official and newspaper reports, fought in and suffered losses during the battle at Te Kopani. McLean, in April 1866, stated that Potutu, 'a chief of the Uriwera tribe' surrendered at the same time as Te Waru, along with his followers.[220] Te Whenuanui is also recorded in oral tradition as having participated in the battle of Te Kopani.[221] In March 1875, according to Binney, McLean 'both brutally and inaccurately' told Te Whenuanui that his participation at the battle of Te Kopani had been the 'cause' of Tuhoe's land having being taken.[222] A letter written by the Wairoa chief Paora Rerepu identifies the Tuhoe chief Hakaraia Te Wharepapa among those who were killed in the fighting there. Rerepu also stated, on the basis of what he had been told by people he had captured at Te Putere, that while twenty of 'the Ureweras' were building a pa at Waikare, 'the main part of the Ureweras [were] killed in the fight at Waikare'. (Unfortunately, we do not

216. Belgrave and Young, 'Customary Rights and the Waikaremoana lands' (doc A129), p 188
217. Gillingham, 'Maori of the Wairoa district' (doc I5), p 18
218. Gillingham, written answers to questions (doc I53), para 2
219. Gillingham, written answers to questions (doc I53), para 6
220. McLean to Colonial Secretary, 6 April 1866, IA 1 1866/1098, Archives New Zealand
221. Pou Temara, 'Te Whenuanui', *The Dictionary of New Zealand Biography*, vol 2 (Wellington: Department of Internal Affairs, 1993), p 529
222. Binney, 'Encircled Lands', vol 1 (doc A12), p 114

have a Maori text of this letter. We take it, however, that Rerepu meant most Tuhoe who died in the conflict were killed at Te Kopani.) He distinguished 'Ureweras' from those Ngati Kahungunu who were fighting against Crown forces.[223] The correspondent of the *Hawke's Bay Times* stated that among those executed after the battle at Te Kopani were '2 men of the Urewera'.[224] We have no evidence regarding the identity of those killed at Mangarua.

The 60 to 70, or more, who were killed in the upper Wairoa and Waikaremoana conflict thus included numbers of Tuhoe and Ngati Ruapani men. Tuhoe would have counted the dead among their 200 killed in the New Zealand wars as a whole. We have seen in chapter 5 how these losses were swiftly followed by a remarkable population recovery in the 1870s and 1880s. Nevertheless, their male population suffered a terrible blow in the war years; and the Waikaremoana conflict made its contribution to those losses.

For Ngati Ruapani, Mr Vernon Winitana told us that they believed the Crown's actions and, as he put it, the 'collusion of Maori with the Crown', led almost to the 'complete and utter destruction of Ruapani as a people with a form of genocide, a scorched earth policy that our elders term "kohuru"'.[225] As we have seen in chapter 5, we do not consider genocide the appropriate term in this context. Genocide was not what was intended; nor was it the result. But it is perhaps not surprising that Ngati Ruapani have arrived at such a view given their losses in the two conflicts of 1865 to 1866, and 1869 to 1871. In 1875, Tamarau Te Makarini told the Native Land Court that there were only 50 Ngati Ruapani left.[226] Their survival into the twentieth century was not always guaranteed.

(b) ***Disruption of settlement:*** As well as the deaths of many people, the Crown's military actions in late 1865 and early 1866 also resulted in very considerable destruction of kainga and homes and appropriation of livestock and crops. The short-term impacts of such losses on the well-being of those communities affected would obviously have been devastating. It was reported in August 1866 that the 'Ureweras' were short of food, and had crossed Lake Waikaremoana to the Wairoa side to obtain seed potatoes. Though they secured some, Fraser then extracted an agreement from Te Waru Tamatea to ensure that they would get no more.[227]

The longer-term impacts of the conflict of 1865 and 1866 were also dramatic. The conflict marked the first stage of a process which ended in the loss to the Crown of the lands to the south and east of Lake Waikaremoana. The successive stages of this process are outlined

223. Paora Rerepu to McLean, 4 February 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc I5(a)), pp 398–400

224. *Hawkes Bay Times*, 22 January 1866 (quoted in Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 163)

225. Vernon Winitana, brief of evidence (doc H27), p 2

226. Napier Minute Book 4, pp 78–79 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 128)

227. Gillingham, 'Maori of the Wairoa district' (doc I5), p 151

in chapter 7. Here we focus on the disruption by war of settlement patterns and customary rights in these lands.

All the historians who gave evidence to us pointed to impacts of this kind. Binney argued in her report that the wars had a marked effect on peoples' settlement of the land, even before the alienation to the Crown of the four southern blocks. She stated that those Te Urewera hapu who had been living on the blocks lost 'access to the resources of these lands'.[228] Marr also argued that the population in the interior was disrupted. As a result of 'the destructiveness and indiscriminate nature' of Crown bush-scouring, many Ngati Kahungunu left the interior lands and relocated to live with their whanaunga in coastal areas. Tuhoe and Ngati Ruapani communities 'also appear to have withdrawn from the upper reaches of the Waikaretaheke River and areas further out from the lake for protection and easy escape into Te Urewera country'.[229] Gillingham likewise pointed to the 'repatterning of the Maori population in the district', as Ngati Kahungunu abandoned the interior, and their kainga were deserted.[230] She noted that in the short term Major Fraser exercised his authority to ensure that those who had surrendered remained down-river. Some of those who were based at Pakowhai seem to have visited their homes inland, but 'their movements were monitored'. In August 1866 he sought to ensure that crops were not planted 'at such a distance from the settlement as to render [them] available for Mr Anaru Matiti [*sic*] when he makes his threatened attack'.[231] Fraser reported later that, as far as he knew, Maori had complied with his request. The following month he called a meeting of local Pai Marire believers, intending to order them to remain near Pakowhai and prohibiting their visits inland.[232] It was probably in this context that some went into hiding. Katarina Kawana told us that her tipuna, Peta Hema, was forced into hiding when Crown soldiers attacked at Omaruhakeke and Waikaremoana.[233] This prohibition on movement was lifted after the Te Hatepe hui in April 1867. Upper Wairoa Maori, including Te Waru Tamatea, were allowed to return to their settlements (outside the Kauhouroa block) without restriction.

Belgrave and Young agreed that the impact of the wars on occupation and customary rights to Waikaremoana lands was significant. (We consider in the next chapter the complex issue of the short- and long-term impacts on customary rights, and the terms in which those rights were later debated and defended in courts and commissions.) Belgrave and Young referred to what they called the Waikaremoana 'clearances'. After 1867, they said, the Waikaremoana lands were 'vacant lands', and occupation by Ngati Kahungunu and Tuhoe

228. Binney, 'Encircled Lands', vol 1 (doc A12), p 387
229. Marr, 'Crown Impacts on customary interests in land in the Waikaremoana region' (doc A52), p 84
230. Gillingham, 'Maori of the Wairoa district' (doc 15), p 150
231. Gillingham, 'Maori of the Wairoa district' (doc 15), p 151
232. Gillingham, 'Maori of the Wairoa district' (doc 15), pp 150–151
233. Katarina Kawana, brief of evidence (doc 129), para 23

> *Our ancestors who were murdered by Government troopers, were taken completely by surprise because they did not know what wrong they had committed against the Crown and the Government. The troopers deliberately burnt the Hapu's homes, their canoes, all their resources, including the huge vegetable gardens, except for the food that was stolen for the troopers' own benefit. The Hapu of Waikaremoana were left distressed, gouged with pain, bereft of food, bereft of resources, bereft of everything, except absolute poverty. On top of all this, they were forcefully removed by the Government from their land, from their bathing and cherishing waters, from their life giving springs.*
>
> Rose Pere, brief of evidence, 18 October 2004 (doc H41(a)), pp 5–6

was subsequently limited.[234] '[M]ost if not all the people living on the Waikaremoana lands, including Ngati Kahungunu, Ngati Ruapani, and Tuhoe who were not involved in the fighting, evacuated the land to seek safety elsewhere'.[235] It was clear also that in subsequent generations 'only a small number of people returned to occupy the land in a sustained way'.[236] By the early twentieth century, according to Belgrave and Young, people had difficulty providing evidence in court of their own long-term permanent occupation. Thus in the specific case of the Lake Waikaremoana title investigation (1915–1916), Ngati Kahungunu witnesses could demonstrate their grandparents' occupation two generations earlier, and knowledge of sites handed down to them; but could not show that they had permanently occupied land at the lake.

Although Belgrave and Young confined their discussion to the broader Te Urewera conflicts of 1868 to 1872, it seems clear to us that the 'Waikaremoana clearances' must be seen as a result of the fighting of 1865 and 1866 as well as of the later hostilities. We have referred above to evidence of destruction of villages in 1865 and 1866. Although, as noted above, Belgrave and Young argued that the destruction caused was significantly less than that which took place at Waikaremoana in 1870 and 1871,[237] we do not agree. The damage done to settlements on the southern side of the lake in the earlier fighting was proportionately as great.

Later evidence of witnesses in early Native Land Court hearings testifies to the extent of the disruption of Maori settlement in the wider district. Hapimana Tunupaura, of Ngati Kahungunu hapu Ngati Puta and Ngati Taunoa 'by Waikare Lake', spoke at the 1875 land court hearing, claiming that he had cultivations at Maungamauku and all over the

234. Belgrave and Young, summary report of 'Customary Rights and the Waikaremoana lands', November 2004 (doc 12), p 23
235. Belgrave and Young, summary report of 'Customary Rights' (doc 12), p 22
236. Belgrave and Young, summary report of 'Customary Rights' (doc 12), p 22
237. Belgrave and Young, summary report of 'Customary Rights' (doc 12), p 22

Tukurangi block; he had 'only stopped cultivating with the land war'.[238] Tamihana Huata, at the same hearing, made a similar statement; he named a number of Ngati Kahungunu hapu in the region of Mangaaruhe, and Te Reinga, and stated that they had cultivated there until they joined the Hauhau: 'We are not cultivating now, it was when we joined the Hauhaus that we ceased cultivating, part joined and part remained loyal.'[239] Tamarau Te Makarini, who also gave evidence, stated that he had lived on Tukurangi lands before Christianity had come; 'about 200 Urewera' had lived at the pa at Tukurangi. He had also cultivated on the lands adjacent to the Waihi stream 'up to the time of the war' of the 1860s.[240]

Crown forces also destroyed pa at and near Lake Waikaremoana, as we have seen. We refer in more detail to the history of two key pa – Te Pou o Tumatawhero and Te Tukutuku o Heihei – on which we received evidence. It is probable that at least one of these pa was destroyed at this time. Because of the early alienation of the land in question (in circumstances which we consider below) and modification of the land in the twentieth century, particularly during hydro development, one of the issues before us was the location of the two pa. Yet there is no question of their importance before the hostilities of 1865 and 1866.

Te Pou o Tumatawhero was located on the promontory on the eastern shore of Te Onepoto bay.[241] It was built – according to Tuhoe oral tradition – by Tumatawhero, brother of Te Purewa, after the tatau pounamu between Tuhoe and Ngati Kahungunu. Ngati Ruapani tradition describes how they joined Tumatawhero in the construction of this pa, as he had married Hinemare, a Ngati Ruapani woman.[242] Detailed evidence about the pa was given by several Tuhoe and Ngati Ruapani witnesses – suggesting to us that memories of the pa left a strong mark in Tuhoe and Ngati Ruapani oral tradition.[243] We were told that Tuhoe built Te Pou o Tumatawhero to defend their southern gateway. Mr Anaru Paine's description of the area suggests the location of Te Pou o Tumatawhero was important in protecting the abundant resources of the area. From the hill Raekohu there was a direct line from Kiriopukai lake through to Te Kopani. 'In this one place', he said, 'are gardens, bird hunting areas, eel netting places, forts, and caves for interring the bones of our ancestors.' Paine explained the significance of the pa in terms of its proximity to these resources: 'Therefore the fort Te Pou o Tumatawhero was used as a station to repel invaders who wanted to take this area of unique abundance.'[244] Evidently the pa succeeded in its purpose, as there were no further

238. MLC-Napier, Minute Book 4, pp 75–76 (cited in Marr, 'Crown Impacts on customary interests in land in the Waikaremoana region' (doc A52), p 194)

239. Napier Native Land Court, minute book 4, 4 November 1875, fol 81 (cited in Belgrave and Young, 'Customary Rights and the Waikaremoana Lands' (doc A129), p 44)

240. MLC-Napier, Minute Book 4, pp 78–79 (cited in Marr, 'Crown Impacts on customary interests in land in the Waikaremoana region' (doc A52), p 197)

241. The Crown agreed that this was the likely location of Te Pou o Tumatawhero. Crown counsel, closing submissions (doc N20), topic 28, p 24

242. Rapata Wiri, brief of evidence, 19 October 2004 (doc H52), p 11

243. See Hirini Paine, brief of evidence, 18 October 2004 (doc H20); Irene Huka Williams, brief of evidence, 18 October 2004 (doc H23); Anaru Paine, H39; Robert Wiri, brief of evidence (doc H52)

244. Anaru Paine, brief of evidence (doc H39), pp 3–4

hostilities. We add that Elsdon Best recorded Tutakangahau (who was born in the early nineteenth century) talking about the area above Te Onepoto bay, possibly referring to Te Pou o Tumatawhero: 'In my young days, when I lived on the further shore, I could see that the hill above One-poto was covered with large whares (houses), and the great himu (posts) were standing.'[245]

The pa Te Tukutuku o Heihei was located above the lake shore, to the east of Te Pou o Tumatawhero.[246] According to Mr Sidney Paine: 'In 1863 Tuhoe again took measures to strengthen the Waikaremoana from attacks arising from the East Coast.'[247] It was, he said, 'a very strategic location for a fortified pa in that area by reason of the panoramic view towards Wairoa and the "gateway" to those more eastern lands.'[248] The pa was built, according to Tutakangahau's account to Elsdon Best, after a challenge from Ngati Kahungunu, but again, care was taken to avoid fighting:

> Ngati-Kahu-ngunu built a *pa* (redoubt) at Tuku-rangi, with the intention of seizing Wai-kare Moana. A party of us, including persons of Tama-kai-moana, Ngai-Te Kahu, Ngai-Tama and Ngati-Rongo, went and built a *pa* near Wai-kare-taheke. Some of that party were Pihopa, Tipihau II., myself, Kewene, Te Hawiki, Puta, Pei, Peka, Kereru, Numia, Te Ahi-tahu and Te Iwi-kino. While we were at Te Rara, Ngati-Kahu-ngunu came. Some of our people wanted to fire on them, but the chiefs and catechists and Tamehana of Ngati-Kahu-ngunu, preserved peace. Hence the trouble ended without bloodshed. Then we left there and build a *pa* named Te Tukutuku-o-heihei above the lake shore, a little way east of One-poto (just east of Te Pou o Tu-mata-whero). That *pa* was built in order that we might hold those lands.[249]

It is likely that, in his evidence before the Native Land Court in 1875 (referred to above), Te Makarini was talking of Te Tukutuku o Heihei when referring to a pa where 200 people lived. Tamihana Huata acknowledged as much in his evidence, stating that he visited a pa with the Anglican missionary James Hamlin.[250]

We acknowledge that it is possible both these pa were not occupied in the mid-1860s. We agree with Crown counsel that there is 'conflicting evidence as to whether Te Tukutuku-o-Heihei was built before Te Pou o Tu-mata-whero'.[251] Te Tukutuku o Heihei may have been constructed in the mid-1860s; if so it could have been built as a replacement for Te Pou o

245. Best, *Waikaremoana*, p 94
246. Crown counsel noted that 'the evidence indicates that both pa were built close to one another' and cited the evidence of Sidney Paine describing the location of Te Tukutuku o Heihei as just to the east of Te Pou o Tumatawhero. Crown counsel, closing submissions (doc N20), topic 28, pp 24–25
247. Sidney Paine, brief of evidence (doc H20), p 6
248. Sidney Paine, brief of evidence (doc H20), p 9
249. Best, *Tuhoe*, vol 1, p 517
250. MLC-Napier Minute Book 4, folio 82, 4 November 1875 (cited in Belgrave and Young, 'Customary Rights and the Waikaremoana Lands' (doc A129), p 44)
251. Crown counsel, closing submissions (doc N20), topic 28, p 24

Tumatawhero which was nearby. But it seems probable that at least one of the pa was in existence and was occupied by a significant number of people when Crown forces arrived at the lake shore on 12 January 1866. The destruction referred to by St George in his diary likely included this pa.

We refer to these pa because the histories before us are a graphic reminder of the forcing of communities from the district – in this case, Tuhoe and Ngati Ruapani. There is no record of people residing on the southern shores of the lake between 1866 and the laying out of reserves in the 1870s and 1880s. When Colonel Herrick arrived at Te Onepoto in 1869 as part of the first expedition in pursuit of Te Kooti, there were no visible signs of settlement. Though he captured horses, there were no houses and no cultivations of any significance – no sign that any Maori group used the area as a place of settlement as they once had.[252] Herrick's troops erected a camp on what had probably been the site of Te Pou o Tumatawhero.[253] A redoubt was constructed on the land, and the site was later set aside in the Locke deed (1872) as a military reserve.

A further powerful reminder of the kind of cultural destruction involved in the wasting of kainga and pa was provided by the evidence of Te Awekotuku and Nikora. They drew attention to a dramatic carved gateway at Te Onepoto, which Colenso had described on his visit to Te Urewera in 1841:

> The gateway was, as is often the case, embellished with a pair of huge and boldly-carved human figures, besmeared with shining red pigment, armed with spears, and grinning defiance to all comers. These were not only seen to advantage through being elevated above the horizon, but their eyes (or rather sockets), instead of being set with glittering Haliotis shell (according to the usual national custom), were left open, so that the light of the sky streamed through them, and this was yet more particularly manifested owing to the proper inclination given to the figures, looking down, as it were, on all toiling up the narrow steep ascent into the well-fenced village.[254]

Such taonga, as they noted, might be destroyed or appropriated by attacking forces during the wars: 'Huge boundary markers, gateways, carvings, simply disappeared.'[255] We note here the entry in St George's diary on 13 January 1866, recording the 'looting and burning of the kainga' at Te Onepoto by the Crown's forces. While we do not have explicit evidence

252. Herrick, AJHR 1869, A-10, p 66. Binney says that Herrick captured 'houses', but there is no record of this in his letter. Binney, 'Encircled Lands', vol 1 (doc A12), p 205

253. Best, *Waikaremoana*, p 105

254. William Colenso, 'Notes and Reminiscences of Early Crossings of the Romantically-situated Lake Waikaremoana, County of Hawke's Bay, of its Neighbouring Country, and of its Peculiar Botany; performed in the Years 1841 and 1843', Transactions and Proceedings of the New Zealand Institute, 27 (1894), p 366 (cited in Te Awekotuku and Nikora, 'Nga Taonga o Te Urewera' (doc B6), pp 54–55)

255. Te Awekotuku and Nikora, 'Nga Taonga o Te Urewera' (doc B6), p 54

to show that the gateway was taken or destroyed at this time, it is hardly drawing a long bow to conclude that this was when the gateway met its fate. Similar destruction certainly occurred at Omaruhakeke, as was recorded by medical officer Scott in his account. Pa and kainga were not only homes, but were the inheritance of communities. Carved houses and gateways were repositories of peoples' histories and traditions; smaller taonga also carried their own histories.

(3) *Political impacts*

The outcome of the conflict of 1865 and 1866 in upper Wairoa and Waikaremoana was a deterioration of relationships between Tuhoe, Ngati Ruapani and the Crown, and between interior Ngati Kahungunu and the Crown. Relationships within Ngati Kahungunu were also strained.

For Tuhoe, the attacks on their pa and villages in the early months of 1866 followed soon after their first experience of the Bay of Plenty conflict. We have shown in chapter 4 that Tuhoe were 'caught up in the edges of the conflict in the eastern Bay of Plenty' after the killing of Carl Sylvius Völkner and James Te Mautaranui Fulloon, the flight of Kereopa Te Rau and his party to Te Urewera, and the arrival of Crown forces in the district. Tuhoe were not involved in those killings, and were not directly involved in the conflict that followed, in which Crown forces targeted Ngati Awa and Whakatohea. The conflict ended in mid-October 1865. But between January and May 1866 there was still a period of 'uneasy peace' in relations between the Crown and Tuhoe in the Bay of Plenty. As we explained in chapter 4, East Coast Expeditionary Force officers were anxious to capture Kereopa Te Rau (despite the conviction in March 1866 of four men for Völkner's death – none of them Tuhoe), and Tuhoe leaders were nervous of the garrison stationed in Opotiki, and its unpredictable forays into their rohe. The situation stabilised by mid-1866 when the Crown abandoned its attempt to secure Kereopa Te Rau, and reduced its garrison at Opotiki. Yet the outcome of the killings and the hostilities that followed would be the inclusion of Tuhoe lands in a confiscation which was not aimed at them.

In Waikaremoana, Tuhoe (and Ngati Ruapani) became caught up similarly in the aftermath of events which had occurred outside their own lands. Kereopa Te Rau had taken refuge in Te Urewera; Anaru Matete and the Turanga men took refuge from the Crown forces which had attacked Waerenga a Hika. Tuhoe and Ngati Ruapani had not even been involved at Waerenga a Hika. But their kainga and pa lay in the path of the Crown forces which proceeded up-river from Wairoa, and because of that, and because of the defence mounted by their fighting men, they were destroyed. We refer in chapter 4 to the legacy of the unaddressed grievance of the raupatu of half the most productive lands of Tuhoe which were arbitrarily included in the Bay of Plenty confiscation. By September 1867, Tuhoe understood that they had failed to secure the return, through Crown processes, of any of their unjustly taken lands. We concluded chapter 4 by saying that the hostility of Tuhoe

leaders had immediate consequences following the arrival of Te Kooti in Te Urewera After Te Kooti sought refuge in Te Urewera, following his defeat at Ngatapa, Tuhoe would join him in large numbers early in 1869.

We add here that confiscation was not the only trigger for Tuhoe support of Te Kooti. The further grievance of unprovoked Crown attacks on their people and homes at Waikaremoana, the number of men killed – including two who were executed – and their being driven from their lands, must be counted among the reasons that made Te Kooti's teachings so compelling to Tuhoe.

For upper Wairoa peoples, the same was true. We have shown that the attacks on their pa and kainga at Omaruhakeke and elsewhere were not the result of rebellion or breach of the peace. Though we do not know if other Ngati Kahungunu hapu in the path of Crown forces joined Te Kooti, it is well known that Te Waru Tamatea and Nama did. Similarly, Moururangi of Ngai Tamaterangi joined Te Kooti while in detention on Wharekauri. Tei Ruawai Hema expressed the Ngai Tamaterangi resentment at the treatment of his tipuna, Moururangi: 'The Crown treated members of my family as rebels. Hirini Moururangi was sent to prison on the Chatham Islands without a trial.'[256]

Te Amo Kapene of Ngai Tamaterangi was 'also considered a rebel', according to his descendant Lillian Tahuri, and he fought alongside Te Kooti.[257] Mr Cotter stated that the losses suffered by their tipuna when their lands were invaded by Crown forces led to their support of Te Kooti – which brought with it new costs. They had been attacked in the first place because they were called 'rebels';[258] and the label stuck after they had fought in support of Te Kooti. As Charles Kapene put it:

> I understand that much of our history has been lost as the old people were afraid to talk about their involvement with Te Kooti and the land wars. This is because it was known that if you were a descendent of a rebel then you would be punished and your lands taken.[259]

To protect themselves and their lands, and 'confuse the Crown', members of the family of Tei Ruawai Hema took their father's first name.[260] The descendants of Te Amo Kapene did the same, we were told by Lillian Tahuri.[261]

For these Ngati Kahungunu hapu of the interior, the attacks would be followed by the 'cession' of Wairoa land, and the threatened loss of land beyond the block taken by the Crown. (We address this issue in the next chapter.) But their bitterness against the Crown had its roots in their experiences of the conflict of 1865 and 1866, in which they lost many of their men, while those who survived were either captured or obliged to surrender. Their homes

256. Tei Ruawai Hema, brief of evidence (doc 127), para 8.2
257. Lillian Tahuri, brief of evidence (doc 131), para 6
258. Charles Cotter, brief of evidence (doc 125), para 3.8
259. Charles Kapene, brief of evidence (doc 126), para 2.5
260. Tei Ruawai Hema, brief of evidence (doc 127), paras 8.3–8.4
261. Lillian Tahuri, brief of evidence (doc 131), para 6

> *We want the truth about what happened to Ngai Tamaterangi to be told and for the Crown to be held to account.*
>
> *We also seek the opportunity, where wrongs were done, to put these wrongs right.*
>
> *This is a claim about loss and the suffering of our people who have suffered dreadfully at the hands of the Crown.*
>
> *It is about the suffering of our people who as 'rebels' had our lands invaded by Crown forces.*
>
> *It is about the suffering of our Tipuna who were killed and wounded by those very same Crown forces.*
>
> *It is about the suffering of our people who had our villages destroyed and Tipuna imprisoned without trial.*
>
> Charles Cotter, brief of evidence, undated (doc 125), pp 4–5

were destroyed, and they were forced to abandon their lands. Though some returned to Whataroa and Erepeti after the Te Hatepe hui of 1867, others do not appear to have returned to their land in the upper Wairoa valley until their resettlement on reserves in the 1870s.

More broadly, throughout the Wairoa district the Ngati Kahungunu polity suffered a blow. As we have seen, the arrival of Kingitanga representatives, and then Pai Marire missionaries, had posed challenges to the chiefs. But though the new faith divided communities, the divisions were managed, and there was a broad commitment among Wairoa Ngati Kahungunu to remain at peace. We accept Gillingham's argument that, 'Peace in the Wairoa district was . . . grounded in the local balance of chiefly power, particularly between Kopu of Te Wairoa and Te Waru Tamatea of Whataroa.'[262] This balance was shattered by the determination of the Crown to equate Pai Marire observance with rebellion, and to quash it along the whole of the East Coast. The outbreak of hostilities at Turanga, the support of Te Waru Tamatea and Te Tuatini Tamaiongarangi for the Turanga defence, the arrival of refugees from Turanga in the upper Wairoa district, and the nervous reaction of the lower Wairoa chiefs to these events, 'set the pro-government and Pai Marire Maori of the Wairoa district at loggerheads'.[263] The lower Wairoa chiefs had invested over the past two years in a political and economic future to be based on a relationship with the Crown and the arrival of settlers in the district. The choice they saw before them at the end of 1865 was to abandon that future, or to fight their whanaunga. In our view, that was a choice they should not have had to make. But it was enforced by a Crown intolerant of religious beliefs and observances that were deemed savage, and hostile to what were seen as political challenges.

262. Gillingham, summary report (doc 114), p 5
263. Gillingham, summary report (doc 114), p 6

6.5.4

As we will see, the tensions caused by the hostilities of 1865 and 1866 would reverberate in the subsequent history of land 'cession' and in the history of the four southern blocks. But they date from this conflict. We consider the political impacts of the events which culminated in the loss of the blocks in the next chapter.

CHAPTER 7

NGA WHENUA NGARO: THE LOSS OF THE FOUR SOUTHERN BLOCKS

7.1 Introduction

The conflict of December 1865 to April 1866 brought with it substantial loss of life and large-scale disruption of settlement in the regions of the upper Wairoa river and Lake Waikaremoana. But these events had other far-reaching ramifications. Of lasting significance for the peoples of this region and their land, was the Crown's decision to punish those who had fought against it by securing land in the Wairoa district for military settlement. The circumstances in which this decision was implemented had consequences that could hardly have been foreseen at the conclusion of hostilities – and which are still difficult today to understand. Our purpose in this chapter is to unravel the complex chain of events which began with the Crown's initial acquisition of land at Wairoa in 1867 by way of 'cession' and ended in 1875 with its acquisition of 178,226 acres of land extending to the southern shores of Lake Waikaremoana. We refer to the four blocks involved – Waiau, Tukurangi, Taramarama, and Ruakituri – as the 'four southern blocks', a term which describes the land in relation to the Te Urewera inquiry district.

The circumstances in which these lands passed from Maori ownership have been a lasting source of grievance to claimants before us: Tuhoe, Ngati Ruapani, and Ngati Kahungunu. And those circumstances are extremely complex. Rarely have we encountered such pervasive misunderstanding, among officials and contemporary observers, of agreements that the Crown made with Maori. As a consequence, it remains difficult today to make sense of what happened. But a theme that is constant throughout the story of the four southern blocks is that Crown power was misused and unrelenting pressure was applied to induce the Maori owners to part with their lands.

The Crown acquisition of the four southern blocks ten years after the beginning of conflict in the upper Wairoa and Waikaremoana regions, was the culmination of a series of key events. The first was the signing of the Te Hatepe deed in 1867, between the Crown and those Ngati Kahungunu who had fought alongside it during the recent hostilities. This deed, named after the upper Wairoa pa where it was said to have been negotiated, involved the

'cession' of land in the upper Wairoa in an area known as the Kauhouroa block.[1] At the same time the Crown stated that it abandoned its claims to land under the new East Coast confiscation legislation. In return for 'ceding' the Kauhouroa block, the 'loyal' signatories to the Te Hatepe deed were promised land of their 'rebel' kin in an area east and west of the block.

But the Crown's promise was not immediately implemented, and this led to the signing of another deed in 1872. This is known to us as the 'Locke deed' – named after the principal Crown official who negotiated its terms, Samuel Locke. The deed referred to, and seemed designed to fulfil, the terms of the Te Hatepe deed: it promised to divide the land to the north and west of the Kauhouroa block into four blocks, and identified the owners who would receive Crown grants. Locke said, wrongly, that the land had been confiscated under the East Coast legislation and 'returned to Natives'. Thus, the Locke deed designated the land – for the first time – as four blocks. They extended as far as the southern shores of Lake Waikaremoana, and involved a significantly different area from that defined in the Te Hatepe deed. Most of the land was in fact outside the boundaries of land to which the East Coast confiscation legislation applied.

At this point Tuhoe and Ngati Ruapani – who claimed rights in the land to the south of the lake – became caught up in the events, and one of their chiefs signed the Locke deed alongside all the Ngati Kahungunu signatories. The chiefs submitted lists of owners to Locke who was to secure Crown grants for them. But the majority of Tuhoe leaders were angered at the Crown's apparent assertion of authority over their lands and in 1874, at the suggestion of officials, they applied for a Native Land Court hearing in the hope of protecting their tribal rights. Meanwhile the Crown began to purchase interests in the land from those among Ngati Kahungunu whom it considered owners, further angering Tuhoe. The 1875 court hearing of the four blocks was an unusual one, as we will see. It was complicated by the judge's question as to whether the land before him had in fact been confiscated, and the referring of the matter to the Solicitor-General. The case ended with Tuhoe and Ngati Ruapani withdrawing from the proceedings, and the blocks were therefore awarded solely to Ngati Kahungunu, the only claimants left in the court. The Crown then completed its purchase of the blocks from Ngati Kahungunu, and also (despite the fact that they were not owners recognised by the court) from Tuhoe and Ngati Ruapani, and by 1877 the blocks were Crown land.

In this chapter we consider the claims of various Tuhoe and Ngati Ruapani claimant groups, as well as two Ngati Kahungunu claimant groups: Wai 621 Ngati Kahungunu (who described themselves as Ngati Kahungunu ki Wairoa) and Ngai Tamaterangi (a hapu of Ngati Kahungunu, who described themselves as incorporating 'all . . . the descendants of Hinemanuhiri . . . who wish to be included'[2]).

1. In the nineteenth century both the block and stream after which it was named were usually spelt 'Kauhauroa'. Today both are spelt 'Kauhouroa'. Most of the parties before us referred to them as such.
2. Counsel for Ngai Tamaterangi, closing submissions (doc N2), p 6

There are a number of points of disagreement between claimants and the Crown over the events surrounding the loss lof the four southern blocks' from Maori ownership. Many of these disagreements stem, we believe, from the sheer complexity of the issues. The primary point in dispute between the parties is whether the Crown acquired the four southern blocks through coercion or as the result of voluntary sales. The claimants alleged that a series of wrong assumptions on the part of the Crown, beginning with the Te Hatepe deed and continuing with and beyond the Locke deed, unfairly influenced the course of events. The Crown, however, downplayed the significance of the Te Hatepe and Locke deeds, suggesting that no lasting prejudice resulted from any misunderstandings that occurred. The claimants also alleged that they were subject to significant pressure following the signing of the Locke deed, which resulted in the alienation of the four blocks. For Tuhoe and Ngati Ruapani, a threat of confiscation suddenly confronted them when they took the land to the Native Land Court in 1875. For Ngati Kahungunu, there was the pressure of debt and uncertainty about the outcome of the court's proceedings. For all parties there was pressure from the Crown's insistence that a tribal boundary be defined in the blocks. The Crown argued that evidence for a threat of confiscation is limited, and implied that any pressure to sell the land was not created by the Crown.

No concessions of Treaty breach were made by the Crown in connection with its acquisition of the four southern blocks. Nor was any evidence led by the Crown on what has proven to be one of the most complex series of events brought before this Tribunal and in which we have found there to be numerous and serious breaches of Treaty principle.

Our purpose is to explain the relationship between the Crown's initial decision to seek a cession of land at Wairoa in the wake of hostilities, its later assertion that the four southern blocks had been confiscated but would be returned to Maori, its confused and failed attempt to do that, and its final decision to purchase the blocks. We ask also why Tuhoe, Ngati Ruapani and Ngati Kahungunu came to sell their land in 1875, and whether the loss of the land was prejudicial.

It is important to record at the outset that there are two matters closely connected to the events examined in this chapter but which are outside our jurisdiction. At the outset of the Te Urewera inquiry, this Tribunal decided to hear Tuhoe claims to the four southern blocks so that all Tuhoe claims could be heard in their entirety. With one exception, Tuhoe claims to the blocks relate to the events up to 1875, when the blocks were alienated to the Crown. The exception relates to Tuhoe and Ngati Ruapani reserves in the blocks. We decided, therefore, to hear claims to the four southern blocks up to the time of their alienation in 1875, except for claims to the Tuhoe and Ngati Ruapani reserves, which would be addressed without limitation as to time.[3] The boundaries set for the Te Urewera Inquiry District mean

3. See Presiding officer, memorandum and directions, 12 April 2002 (paper 2.32), p 9

that the following matters are outside our jurisdiction and so we cannot examine or reach conclusions about them:

- the loss of the Kauhouroa block through the Te Hatepe deed; and
- all issues relating tothe Ngati Kahungunu reserves in the four southern blocks.

The first of those matters – the 'cession' of Kauhouroa – is central to the Te Hatepe deed, which itself is crucial to understanding the four southern blocks issues within our inquiry district. Inevitably then, we discuss the 'cession' of Kauhouroa in this chapter but, as noted, make no findings on it.

Finally, we note that while all issues concerning the Tuhoe and Ngati Ruapani reserves in the four southern blocks are within our jurisdiction, we will present our examination of most of those issues in later chapters. The matter of the adequacy of the reserves – originally 2500 acres – is, however, included in this chapter's discussion of the impacts upon the claimants of the loss of the four southern blocks.

7.2 Issues for Tribunal Determination

There are three key questions to be answered in this chapter. The first is:

> *How and why did the Crown acquire the four southern blocks? How informed or willing was Maori participation in the process by which the blocks were acquired?*

We have structured our analysis around three major sub-questions:

(a) Why did Maori and the Crown enter into the Te Hatepe deed (1867) and what was its effect?
(b) Why did Maori and the Crown enter into the Locke deed (1872) and what was its effect?
(c) Why was there a Native Land Court hearing for the four southern blocks in 1875 and what were its outcomes?

Our analysis of question 1 closes with a series of conclusions and Treaty findings on the main issues.

Our second key question is:

> *What were the impacts of Crown acts and omissions in its acquisition of the four southern blocks?*

We address cultural, social, economic, and political impacts in turn.

We also consider a related claim about two pa sites at Onepoto (on the southern shore of Lake Waikaremoana) that have been acquired by the Crown. We received specific claims on this issue, so we consider it separately. The question we ask is:

How did the Crown acquire and use the pa sites Te Pou o Tumatawhero and Te Tukutuku o Heihei?

We make a specific recommendation to the Crown in connection with Te Pou o Tumatawhero. This marks an exception to our general approach – that it is premature for this Tribunal to make remedial recommendations before the completion of our inquiry into all Te Urewera claims. In our view, the circumstances of Te Pou o Tumatawhero are such as to justify a remedy that is independent of other Treaty settlement arrangements.

The blocks of land, and the wider areas, involved in the events discussed in this chapter are not readily depicted. At the very end of the chapter we have included a section entitled 'Explanatory Note: Te Hatepe Deed, ECLTIA and Four Southern Blocks Maps'. This explains a number of historical mapping issues relating to the origin and history of the four southern blocks and contains depictions of the relevant land areas. Readers are advised to refer to this section throughout the chapter.

7.3 Key Facts

7.3.1 The Te Hatepe hui: the cession of the Kauhouroa block, 1867

Following the conclusion in 1866 of hostilities between Crown forces and Maori of upper Wairoa and Waikaremoana, preparations were made for the taking of land in the district. Donald McLean (who was at that time Agent for the General Government in Hawke's Bay and member of parliament for Napier) made it clear, when he visited Wairoa in May 1866, that land would be confiscated there. By the following year, the Crown had available to it newly passed legislation, the East Coast Land Titles Investigation Act (ECLTIA) 1866, which was designed to refine the process of confiscation by targeting only those who were found to have been in rebellion. Unlike the process under the New Zealand Settlements Act 1863, the Native Land Court would be involved. It would determine the customary rights of all Maori who claimed land, but the interests of those found to be rebels would be forfeit to the Crown. The Government intended to use the legislation throughout the East Coast region to punish 'rebels', and secure land. It was rapidly discovered, however, that separating out the interests of 'rebel' and 'loyal' Maori was unlikely to work in practice as the Government hoped it would. The Government would secure a mere patchwork of land plots, instead of a block of considerable size.

Rather than using the new East Coast confiscation legislation at Wairoa, therefore, the Government decided to insist on a cession of land. It dealt directly with the Ngati Kahungunu leaders who had assisted it in the fighting of 1865–66, and succeeded in securing the land it wanted for military settlement at a major hui at Te Hatepe in April 1867. The hui was attended by 1500–2000 Maori from the region, including the chiefs of Ahuriri.

McLean, Reginald Biggs, Samuel Locke, J C Richmond and G S Whitmore attended on behalf of the Crown. Tuhoe and Ngati Ruapani chiefs were not present. Government speakers emphasised that confiscation had already been decided on; the only point at issue was which lands should be taken.

A deed recording the agreement, known as the Te Hatepe (or 'Wairoa Block') Deed of cession, was signed by 153 Ngati Kahungunu. The Crown agreed in the deed to withdraw all its claims to certain land within the schedule of its new East Coast Land Titles Investigation Act. Instead, it would accept a cession of 40,000–50,000 acres within this area. This land would become known as the Kauhouroa block, and the Crown proceeded to locate military settlers on it. In return for the land, the Crown made a number of promises to Ngati Kahungunu. Among them – though not recorded in the deed – was a promise that 'rebel' land within the area defined in the deed should be granted to those Ngati Kahungunu who had lost their rights in the block through cession; and also to those who had no rights in that block but who had provided military assistance to the Crown, as payment for their services. A Crown official, Biggs, later took the deed to the Native Land Court, evidently assuming it could be 'confirmed' under ECTLIA. He later reported to Richmond that the deed had been confirmed, though there is no record of this in the court minutes.

7.3.2 The Locke deed: the creation of the four southern blocks, 1872

By 1872 the Crown had not yet delivered on its undertaking to divide 'rebel' lands among 'friendly Natives', in return for the cession of the Kauhouroa block. Ngati Kahungunu chiefs had signalled their concerns about this at least as early as 1869. Samuel Locke, who had conducted many of the Crown's purchases in lower Wairoa in 1864–65 before hostilities broke out, represented the Crown in making a new agreement in 1872.

By this time, five years after Te Hatepe, a great deal had changed. There had been war in Te Urewera, and further hostilities in the Waikaremoana district. In mid-1868 the upper Wairoa Ngati Kahungunu leader Te Waru Tamatea committed himself to Te Kooti, the Ringatu spiritual leader. Te Kooti had been taken prisoner after the battle at Te Waerenga a Hika, and sent to Wharekauri (the Chatham Islands), where he and many others were detained illegally without trial. After their escape in July 1868, return to Turanga, and failure to secure safe passage through to their intended destination at Taupo, Te Kooti – accompanied by a large party of upper Wairoa men – attacked settlers living in the outlying district of Matawhero; among those killed was Biggs. After being defeated at Ngatapa by Crown forces, Te Kooti took refuge in Te Urewera. The earlier killing of four lower Wairoa chiefs in October 1868, along with Te Kooti's attack on Mohaka, resulted in Ngati Kahungunu forces being involved with other Crown forces in the pursuit of Te Kooti. We have surveyed the hostilities that followed in chapter 5. Crown forces had conducted operations at

Waikaremoana during April-July 1870 at the time of the pursuit of Te Kooti, which were directed at 'Hauhau' settlements on the Lake and resulted in the destruction of kainga and crops in upper Wairoa and on the northern shores of the Lake. The Ngati Kahungunu forces took no further part in the fighting from the end of 1870. Tuhoe submissions to the Crown began in July 1870; Te Waru and his people of upper Wairoa also surrendered in December 1870. Few of this hapu had survived. Those who had were sent to Te Teko and were later granted land by the Crown at Waiotahe. They did not return to their lands in upper Wairoa. The pursuit of Te Kooti extended to the Whataroa district of upper Wairoa in August 1871, and was followed by further destruction on the northern side. A redoubt was also established at Te Onepoto. After some months of negotiation, the Crown and Te Urewera leaders concluded peace in December 1871.

In the wake of this peace, Locke was authorised to conclude the Crown's arrangements in the upper Wairoa, and to sign a new deed. On 3 August 1872 he met Maori at a large hui at Wairoa, and on 6 August the 'Locke deed' was signed by 18 chiefs, mostly Ngati Kahungunu. The signatories on this occasion included one chief of Tuhoe and Ngati Ruapani descent, Tamarau Te Makarini.[4] Some but not all of the Ngati Kahungunu signatories had previously signed the Te Hatepe deed. The purpose of the agreement was to settle the question of what Locke described as 'old confiscated lands'.[5] He explained that after the Crown took possession of the Kauhouroa block in 1867; the rest of the area defined in the Te Hatepe deed, which was subject to the East Coast Land Titles Investigation Act, was returned to Maori. This land, he said, extended inland to Lake Waikaremoana. The Government had promised to divide the land into four blocks and decide who would have their names inserted in the Crown grants, but because of 'the unsettled state of the district' since that time, had not been able to carry out its promise. The agreement Locke entered into gave effect, in his view, to these promises. The 'Lands retained by the Natives' were to be subdivided into several blocks – in other words the land was now designated for the first time as four blocks: Te Waiau, Tukurangi, Taramarama, and Ruakituri.[6] These blocks (when they were eventually surveyed) comprised 178,226 acres.[7]

4. Te Makarini was known by several names, including Makarini Te Wharehuia and Tamarau Waiari.

5. Locke to Ormond, 19 August 1872, AJHR, 1872, C4, p 30

6. In the Schedule to the Locke deed, a portion of the Taramarama Block, identified as 'Waikaretaheke', has its own list of owners, a few of whom are also listed in the Taramarama Block.

7. This figure is derived from a number of sources. Mary Gillingham, 'Maori of the Wairoa District and the Crown, 1840–1880', report commissioned by the Crown Forestry Rental Trust, 2004 (doc I5), p 261; Vincent O'Malley, 'The Crown and Ngati Ruapani: Confiscation and Land Purchase in the Wairoa-Waikaremoana Area, 1865–1875', report for the Patunamu State Forest (Wai 144) claim, October 1994 (doc A37), pp 141–142. Counsel for Wai 36 Tuhoe and Professor Binney stated that the blocks totalled 'just over' 172,500 acres, but this figure excludes 6145 acres that were left out of the original calculations (an area, according to O'Malley, 'set aside for Maori use but remaining in Crown ownership'). Counsel for Wai 36 Tuhoe, closing submissions, part B, 30 May 2005 (doc N8(a)), p 41; Judith Binney, 'Encircled Lands, Part One: A History of the Urewera from European Contact to 1878', report commissioned by the Crown Forestry Rental Trust, April 2002 vol 1, (doc A12), pp 285, 315

The overall area with which the Locke deed was concerned in fact differed significantly from the area defined in the Hatepe deed. Despite Locke's statement that the Te Hatepe deed area extended as far west as the shores of Lake Waikaremoana, it included very little of this land; it actually extended eastwards as far as the coast. A significant portion of the four blocks also fell outside the boundaries defined in the schedule to the ECLTIA and its amendments. The Locke deed stated that the four blocks were to be inalienable. In another schedule to the deed, the names of those to whom the new blocks were to be granted by the Crown were listed. More than 200 people were listed, many in more than one block. The great majority were Ngati Kahungunu, though a small number were Tuhoe and Ngati Ruapani. The Crown was to secure two further blocks within the deed area, of 50 acres and 250 acres respectively, at Te Kopani and Onepoto.

7.3.3 The Native Land Court hearing, 1875

Soon after the Locke deed was signed, Tuhoe chiefs signalled their anger – both at the terms of the deed (which they interpreted as an alienation of the Waikaremoana lands, and contrary to Te Whitu Tekau policies of land retention) and at Te Makarini for signing it. In mid-to-late 1873 leases of the four new blocks were granted by those who were listed in the schedules (mostly Ngati Kahungunu), to several Pakeha lessees. Tuhoe became more incensed when they discovered the land was being leased. Te Makarini initially withdrew his consent to the terms of the deed, but later signed one of the leases along with other Waikaremoana chiefs. In March 1874, Locke attended an important Te Whitu Tekau hui at Ruatahuna. Here he again advised (wrongly) that the current position with the four southern blocks was that the Government had returned to Maori lands that had earlier been confiscated. To settle the title to those lands, Tuhoe should take the blocks to the Native Land Court jointly with Ngati Kahungunu. Tuhoe filed applications for hearings of the four blocks in May 1874; each application was made on behalf of Tuhoe and Ngati Kahungunu.

In November 1874, and despite the terms of the Locke deed specifying that the blocks should be inalienable, the Crown formally decided to purchase the land. Officials began to buy out the Pakeha leaseholders from 1874, and also to make payments to some Ngati Kahungunu. By September 1875, just before the land court hearing of the four blocks began, most of their arrangements with Ngati Kahungunu had been completed (with the exception of those who had given military service to the Crown, and Te Waru Tamatea's community living in exile in the eastern Bay of Plenty).

The land court opened at Wairoa on 28 October 1875. It then adjourned so that Locke could meet with those of Ngati Kahungunu, Tuhoe, and Ngati Ruapani who had gathered for the court hearing. Locke hoped that the parties could agree out of court about their respective rights to the land, and the court could then order its awards accordingly. He

hoped the Crown would then be able to finalise its purchase of the blocks. A great hui was held at which Tuhoe, Ngati Ruapani and Ngati Kahungunu chiefs discussed – in frank terms – their respective rights to the lands around Lake Waikaremoana. The outcome was that the iwi agreed to continue with title investigation by the land court.

The hearing that followed was an unusual one. From 4–6 November representatives of Tuhoe and Ngati Ruapani presented their claims to Tukurangi and Ruakituri blocks, while various Ngati Kahungunu groups appeared as counter-claimants. On 6 November Tuhoe and Ngati Ruapani representatives stated that the evidence for Taramarama and Waiau blocks was identical, and the court stated that there was little point continuing. During the hearing the judge had raised the question whether the land before the court was confiscated; Locke replied that it was, but telegraphed McLean (who, by then, had become the Native Minister). McLean sent a telegram paraphrasing the opinion of the Solicitor-General on the point, stating that it 'appears these lands have never been actually confiscated'. It was also stated that the determination by the land court of the rights of the parties 'will . . . be subject to' the special East Coast legislation then in force, the East Coast Act 1868. This act required the land court to refuse to order a certificate of title to issue to anyone who had been in rebellion.

On 12 November, a week after the court had adjourned the four blocks cases, they were recalled, and Wi Hautaruke and Hetaraka Te Wakaunua appeared in court and stated that they would not pursue 'Te Urewera claims' further as they had reached agreement with Ngati Kahungunu. With the withdrawal of the claimants, the Ngati Kahungunu counter-claimants, represented by Toha Rahurahu applied immediately for court orders in favour of the lists of owners which they submitted. The court ordered memorials of ownership to issue for all four blocks, thus recognising Ngati Kahungunu as the sole legal owners. On the same day, a deed of purchase was drawn up by which the chiefs and people of Tuhoe and Ngati Ruapani conveyed all their rights and interests in the four blocks to the Crown for £1250, and were promised a permanent reserve of 2500 acres. On 17 November the Ngati Kahungunu owners listed on the memorials of ownership signed four separate deeds of conveyance to the Crown (one for each block) for £9700. Provision was made in each of the deeds for the exclusion from sale of named reserves. These totalled 8400 acres. In January 1876 a further deed signed by the 'loyal' chiefs, Ihaka Whaanga and 400 others – none of whom was named on the court's memorials of ownership – conveyed their rights in the four blocks in return for a smaller payment. They released the Crown from further obligation in respect of their 'services rendered during the rebellion'. The Crown also entered into an agreement with Te Waru Tamatea and his hapu extinguishing their claims to the four blocks for £300, and completed the extinguishment of the rights of settler lessees. In August 1877, when the Crown had completed its transactions, the four southern blocks were proclaimed waste lands of the Crown.

7.4 The Essence of the Difference between the Parties

7.4.1 How and why did the Crown acquire the four southern blocks? How informed and willing was Maori participation in the process by which the blocks were acquired?

(1) *Why did Maori and the Crown enter into the Te Hatepe deed and what was its effect?*

The first difference between the claimants' and the Crown's positions on ECLTIA, the confiscation legislation, relates to whether there had been a rebellion by land owners in the area of the four southern blocks. The point is important in this context because the prerequisite for application of the East Coast legislation was that there had been a rebellion. And, although the Crown did not directly invoke the legislation, the Te Hatepe deed arrangements, and the later Locke deed, were based squarely on the assumption that it could do so.[8] Crown counsel acknowledged that those arrangements 'took place against the backdrop' of the legislation.[9]

The next points of difference relate to the meaning of the East Coast confiscation legislation and the impact of Crown agents' statements to Maori, at Te Hatepe and later, about the effect of that law. Ngati Kahungunu claimants submitted that Crown agents' misinformation about the operation of the confiscation law caused the signatories to the Te Hatepe deed to assent to its terms. This meant that the cession of Kauhouroa block was not made voluntarily but was, in effect, forced.[10] In addition, the claimants submitted that at the time of the Te Hatepe deed, the East Coast legislation was defective so that, even if there had been a rebellion, the Crown could not have relied on it to confiscate any land.[11]

The Crown's submissions were based on the premise that the Te Hatepe deed arrangement (by which the Crown obtained the Kauhouroa block) was a legitimate alternative to the Crown invoking ECLTIA to confiscate 'rebel' land. It was submitted that the Te Hatepe deed arrangement was preferable for the Maori signatories, in part because it gave them more control over the situation than if the Native Land Court had applied the confiscation legislation. The Crown also argued that those who ceded the Kauhouroa block would have known that the East Coast legislation was designed to protect the land of 'loyal' Maori and so would not have been unduly threatened by the Act's application.[12] As a result, the Crown submitted that the Maori signatories to the Te Hatepe deed understood the arrangements and agreed to them sufficiently to place the cession at the 'voluntary' end of what the Crown called 'the continuum', from voluntary to forced, along which land cessions occur.[13]

The parties differed on the reasons for the Crown's failure to fulfil its promise, made at Te Hatepe to those Ngati Kahungunu who had fought alongside it, that they would obtain

8. Counsel for Wai 36 Tuhoe, closing submissions, part B (doc N8(a)), pp 37–38
9. Crown counsel, closing submissions, June 2005 (doc N20), topic 6, p 8
10. Counsel for Ngai Tamaterangi, closing submissions (doc N2), pp 37–38; Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 54–55
11. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 54
12. Crown counsel, closing submissions, June 2005 (doc N20), topic 6, p 8
13. Crown counsel, closing submissions (doc N20), topic 6, p 10

the land of 'rebels' in a defined area. Ngati Kahungunu claimants submitted that the Crown rendered the Te Hatepe arrangement unworkable, thereby seriously prejudicing the Maori signatories and other intended beneficiaries, by failing to provide a means by which the 'loyal' Maori could obtain 'rebel' land in the area.[14] The Crown submitted that the problem stemmed from the Native Land Court's unwillingness to 'rubber stamp' the 1867 cession arrangement.[15]

(2) *Why did Maori and the Crown enter into the Locke deed (1872) and what was its effect?*

In respect of the Locke deed of 1872, claimant counsel submitted that it was in many ways deeply flawed. Counsel for Wai 36 Tuhoe said that the deed was negotiated 'without adequate consultation with Tuhoe'. The most significant consequence of the Locke deed for Tuhoe was that they had 'little option' but to take the lands to the Native Land Court. Tuhoe and Ngati Ruapani claimants criticised the changes made, in October 1867 by amendment to ECLTIA, to the boundaries of the area within which the confiscation Act applied. The claimants submitted that it was improper for the area to be extended, and so to include their lands, for reasons unconnected to the hostilities that had inspired the legislation.[16] Counsel for Wai 621 Ngati Kahungunu submitted that divisions between Tuhoe and Ngati Kahungunu were perpetuated by the Locke deed putting them together in large blocks the boundaries of which were natural features rather than tribal boundaries. In addition, 'Locke displayed negligence in assuming the power to determine owners of lands, which were not wholly included in the boundaries of the East Coast confiscation area'.[17]

The Crown did not address key claimant concerns about the Locke deed. It stressed the Government's changed priorities in 1872: its wish to see peace firmly established in the region, and conciliate the chiefs who were considered former rebels. It submitted there was 'limited evidence' available to consider whether consultations leading to the agreement were adequate. But it considered the terms of the deed 'relatively clear', other than on the matter of implementation. Obviously, it said, the agreement would have to be implemented through Native Land Court investigation. It contended (without further comment) that Locke clearly considered the areas that became the four southern blocks were included in the schedules to the East Coast legislation, and were the lands referred to in the Wairoa (Te Hatepe) deed of cession. It added that the agreement was 'not formalised', and was 'effectively superseded by the negotiations for purchase of the four blocks'.[18]

14. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 41
15. Crown counsel, closing submissions (doc N20), topic 6, p 9
16. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36 & Te Kopani 37 (Wai 1033), closing submissions, 30 May 2005 (doc N13), p 25
17. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 46
18. Crown counsel, closing submissions (doc N20), topic 6, pp 10–11

7.4.1

(3) *Why was there a Native Land Court hearing for the four southern blocks in 1875 and what was its outcome?*

The key issues here are whether Ngati Kahungunu, Tuhoe, and Ngati Ruapani entered freely and without pressure into negotiations for the Crown's purchase of the four southern blocks. Did Tuhoe and Ngati Ruapani freely consent to withdraw their claims from the Native Land Court? And were the prices paid by the Crown fair?

The Tuhoe and Ngati Ruapani claimants submitted, in broad terms, that the Crown interfered with the Native Land Court's proceedings in order to force the withdrawal of their application, their acquiescence in the Crown's purchase of the blocks, and their acceptance of a payment worth less than their interests in the blocks. Counsel submitted that compelling 'circumstantial' evidence points to the conclusion that Tuhoe and Ngati Ruapani did not enter freely into purchase negotiations. Among the pressures on Tuhoe, counsel for the Wai 36 claimants argued, were the respective status of Tuhoe as 'rebels' and that of Ngati Kahungunu as 'primarily loyalists'; Tuhoe were 'outsiders', whereas Ngati Kahungunu were not. Between 1866 and 1875 Crown officials clearly understood that the four southern blocks had been confiscated; no doubt this perception had been conveyed to Tuhoe; moreover Locke stated it clearly at the hui in 1875. Tuhoe's withdrawal of their claim to the lands after the land court hearing had begun, but before judgment was given, was unique; on no other occasion did they do so. This can only be explained by 'significant pressure from the Crown, manipulation of the Court process and collusion of the Court itself.' Crucial to this pressure was the Solicitor–General's opinion that the inquiry would be subject to the East Coast Act, which meant Tuhoe were now in the invidious position of not being able to gain recognition of their customary rights because of their perceived status as 'rebels'. It was submitted that the land court hearing was adjourned to allow the Crown to continue to press for Tuhoe's withdrawal of their claim; the Crown's pressure was 'unrelenting'. Counsel for Wai 945 Ngati Ruapani similarly argued that Ngati Ruapani withdrew from the court's proceedings under threat of confiscation.[19]

Counsel for Ngai Tamaterangi also pointed to the Crown's acting as if the blocks had been confiscated, and to 'rebels' being prevented from obtaining title in court; thus so-called 'rebels' such as Ngai Tamaterangi would have been prevented from being awarded interests in the blocks, and there was little point in their pursuing claims in the court.[20] Counsel for Wai 621 Ngati Kahungunu argued that 'Crown policy facilitated the forced sale of Kahungunu interests' in the four southern blocks.[21]

In light of this chain of events, and the 'de facto' confiscation of the four southern blocks, counsel for the Wai 36 Tuhoe claimants submitted that the question whether the Crown

19. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36 & Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 26; Counsel for Wai 36 Tuhoe, closing submissions, part B (doc N8(a)) pp 40–41

20. Counsel for Ngai Tamaterangi, closing submissions (doc N2), pp 41–42

21. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 73

paid for all the land it acquired under the deed was 'almost irrelevant'. It is clear however that the transaction was for an area of 157,000 acres, yet the actual area was found when a later survey was done to be 172,500 acres.[22] The Wai 621 Ngati Kahungunu claimants submitted that the amounts paid to the various Maori groups for their interests in the blocks were inadequate.[23]

The Crown denied any improper intervention in the Court's proceedings. It submitted that there is very limited evidence on which to base a judgment on the question of Crown pressure on Tuhoe to withdraw their claims to the land court, and to sell their interests in the blocks. The Crown did state however that: 'There is evidence that both Ngati Kahungunu and Urewera Maori felt under some pressure to sell to the Crown. The Crown was certainly presenting its purchase of the four southern blocks as an attractive alternative to address the significant boundary issues between the parties.'[24] But on the key question of whether the Solicitor-General's advice to Government agent Locke led to a threat of confiscation in respect of the blocks, or part of them, the Crown stated that there was no direct evidence that this was the case. There was no evidence that the Native Land Court was acting under the East Coast legislation. The Solicitor-General's advice was minuted after the court was adjourned. It would have to be inferred that his opinion was relayed to the parties, and that Government officials took a different approach in the negotiations after the land court's deliberations to that taken in negotiations in 1872 and during the pre-land court meeting on 29 October 1875. Crown counsel suggested that there was another possible rationale for the actions of the Tuhoe and Ngati Ruapani claimants: given that the process of title investigation was not proceeding smoothly for either party, the Government's agreement to allocate reserves south of Waikaremoana and thus recognise the customary interests of Urewera Maori may have been sufficient incentive.[25]

7.4.2 What were the impacts of the Crown's acts and omissions in its acquisition of the four southern blocks?

The impacts were 'self evident', submitted counsel for the Wai 36 Tuhoe claimants: the fee simple was acquired by the Crown and Tuhoe were reserved to a handful of enclaves within the four southern blocks'. Tuhoe's domain was 'substantially undermined'. Tuhoe and Ngati Ruapani claimants submitted that the loss of the blocks denied them important and valuable forests, kainga and rivers as well as the opportunity to participate in the pastoral economy, and the exotic forestry industry, that were to occur in the area later.[26]

22. Counsel for Wai 36 Tuhoe, closing submissions, part B (doc N8(a)), p 41
23. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 62
24. Crown counsel, closing submissions (doc N20), topic 6,p 17
25. Crown counsel, closing submissions (doc N20), topic 6, pp 16–17
26. Counsel for Wai 144 Ngati Ruapani, (doc N19), p 167; Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36 & Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 344

7.4.2

The full range of socio-economic and political consequences suffered by claimants as a result of land loss both by confiscation and the Crown's acquisition of the four southern blocks, was summarised to include: the privation caused by food shortages, worsened by lack of access to traditional supplies; the loss of hapu authority, which adversely affected hapu values and economic development opportunities; and the damage to tribal relationships, internally and externally, and to the relationship between the peoples of Te Urewera and the Crown.[27]

The Tuhoe and Ngati Ruapani claimants were particularly concerned about the impact of the outcome of the court hearing of 1875 on the recognition of their customary claims in the wider area. They argued that lasting prejudice arose because of the manner of Crown purchase of the interests of Te Urewera and Waikaremoana iwi and hapu, and because of the exclusion of those interests from the titles issued by the land court. In particular, there was prejudice to the recognition of customary interests to the bed of Lake Waikaremoana in later litigation. The Wai 621 Ngati Kahungunu claimants submitted that the Tuhoe and Ngati Ruapani claimants who withdrew their claims from the court had done so freely, and that there was no resulting prejudice to their interests in later litigation.[28] The Crown's position, in effect, was that the Crown had not drawn on the circumstances or judgment of the 1875 land court sitting in later proceedings about the bed of Lake Waikaremoana so as to prejudice the case of Tuhoe-and Ngati Ruapani. Though the decision of the Native Appellate Court in 1947 is claimed to wrongly portray the circumstances of the Native Land Court sitting in 1875, and of the subsequent purchase of Tuhoe and Ruapani interests, the Crown had no role in this. The appellate court's judgment appears to be based on its view of the facts and case put before it.[29]

For Tuhoe and Ngati Ruapani, a key prejudice arising from the Crown's acquisition of the four southern blocks was the inadequate reserves made at the time of purchase. Counsel for Wai 144 Ngati Ruapani claimants submitted that the reserves allocated by the Crown to Ngati Ruapani were 'wholly inadequate for their present, let alone future, needs'.[30] Counsel for the Wai 36 Tuhoe claimants stated that there was 'clear evidence' that those of Tuhoe and Ngati Ruapani who lived on the reserves 'suffered significant deprivation because of the poor quality and quantity of the land.'[31] Crown counsel submitted that the reserves were awarded to 45 individuals, which equates, in broad terms, to 236 acres per person. This, the Crown contended, was not unreasonable at the time, given that the formula then was 50 acres per head. 'Subsequent events and population growth obviously qualify this statement.' The Crown acknowledged also, responding to Mr Winitana's statement that only 1300 acres

27. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36 & Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 341–342
28. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 56 – 58
29. Crown counsel, closing submissions (doc N20) topic 6, pp 17–18
30. Counsel for Wai 144 Ngati Ruapani, closing submissions, 3 June 2005 (doc N19), appendix A, para 76
31. Counsel for Wai 36 Tuhoe, closing submissions, part B (doc N8(a)), p 42

of the 2500 acres reserved for Tuhoe and Ngati Ruapani were retained today, that 'Ngati Ruapani do not appear to have significant land holdings elsewhere'.

7.5 Tribunal Analysis

7.5.1 How and why did the Crown acquire the four southern blocks? How informed was Maori participation in the process by which the blocks were acquired?

(1) *Introduction*

The Crown's acquisition of the four southern blocks (Waiau, Tukurangi, Taramarama, and Ruakituri) in the wake of the fighting in the upper Wairoa and Waikaremoana regions is a major issue before us. We focus here on the circumstances in which the blocks were created in 1872, the Crown's motives in later acquiring the blocks, and the processes by which it did so. The blocks were not created until 1872, but the land included within them was affected (or thought to be affected) by an agreement reached in 1867 between the Crown and Crown-aligned Ngati Kahungunu chiefs. By this agreement at Te Hatepe – the pa of Ngati Kahungunu leader Pitihera Kopu, located on the Wairoa river – the Crown secured from the chiefs a cession of Wairoa land for military settlement (see explanatory note). We consider why this cession was made, and why the Crown sought a cession rather than using the processes set out in custom-designed legislation (ECLTIA) which had recently been passed to facilitate confiscation on the East Coast, through the agency of the Native Land Court. This Crown decision would be crucial for the fate of the land nearer Lake Waikaremoana. The Te Hatepe deed invoked the boundaries of lands set out in the schedule to ECLTIA. The Crown's view was that it gave up its rights to confiscate some of the land within the ECLTIA boundaries in return for the cession of a smaller block (also within those boundaries) by those chiefs who had supported its military operations. But, recognising obligations to the chiefs, the Crown promised lands beyond the ceded block to them. We consider how far these lands extended, their relationship to the ECLTIA boundaries, and why a further deed was signed with Ngati Kahungunu chiefs and one Tuhoe chief in 1872 by which the Crown promised to make to them grants of land extending to Lake Waikaremoana. This land was divided into four blocks. We examine the meaning of this second deed, the reasons why grants to the blocks were not issued (though the deed indicated they would be), and the circumstances in which Tuhoe sought a title investigation of the blocks in the Native Land Court. Finally we examine the circumstances in which Crown officials bought up interests in the blocks both before and after the land court hearing, and completed its acquisition of the four southern blocks by 1875.

We address three subsidiary questions, namely:

7.5.2

(a) Why did Maori and the Crown enter into the Te Hatepe deed (1867) and what was its effect?

(b) Why did Maori and the Crown enter into the Locke deed (1872) and what was its effect?

(c) Why was there a Native Land Court hearing for the four southern blocks in 1875 and what was its outcome?

7.5.2 Why did the Crown and Maori enter into the Te Hatepe Deed (1867) and what was its effect?

Summary answer: *The Te Hatepe Deed arranged for the Kauhouroa block to be ceded to the Crown by those Ngati Kahungunu who had fought alongside the Crown in the 1865–66 hostilities. The most significant promise made in return was that the Crown would relinquish its claims to 'rebel' land in the remainder of the area covered by the Deed. It was envisaged that 'loyal' Ngati Kahungunu would be granted that 'rebel' land. The arrangement was premised, first, on there having been a rebellion in 1865–66 and, second, on Government assertions that 'rebel' land in the entire area covered by the deed had been confiscated (or 'as good as' confiscated). This gave the Crown bargaining power to negotiate with the customary owners an arrangement for the 'rebel' land that suited its purposes. The Crown's purposes were to use confiscation to punish the 'rebels' in the 1865–66 hostilities, to create a sizeable block in a strategic position as a site for military settlement and to enable grants of land to be made to reward the Ngati Kahungunu who had fought alongside the Crown in the 1865–66 hostilities.*

In fact, the premises on which the Te Hatepe arrangement was based were false, yet Mäori had no means to counter the Crown's assertions about those matters. They therefore acquiesced in the Crown's plans for the land covered by the Deed because they saw no alternative. It seems that the Kauhouroa block passed to (or was assumed to have passed to) the Crown as a result of the Te Hatepe Deed. This was despite the fact that there was no genuine consent by those whose lands were to be taken: those who had supported the Crown did not wish to give up land; and those who were considered to be 'rebels' did not sign the deed at all and, as the Crown has acknowledged, thus had their lands confiscated. In addition, the reciprocal arrangement for 'loyal' Ngati Kahungunu to obtain 'rebel' lands within the overall Deed area was based on false premises. The Crown assumed that it could in fact bypass the procedures laid down in the East Coast Land Titles Investigation Act, so long as the land court approved the arrangements it made at Te Hatepe. It is not certain however that the court did approve the arrangements; and legally, it could not have. There had been no hearing to determine who among Ngati Kahungunu were rebels, and whose land could therefore be confiscated by the Crown, as laid down by the Act. The land in the Te Hatepe deed area outside the ceded Kauhouroa block thus remained in customary title.

These difficulties with the Te Hatepe deed were compounded by the failure of the Crown to record there its verbal undertakings to make over rebel lands within the Deed area to Crown-aligned Ngati Kahungunu. Thus the lands designated at the time for return to Ngati Kahungunu were not clearly described in the deed. This left the way open for Crown officers to misinterpret the agreement, and to proceed on the basis that lands well outside the Te Hatepe Deed area, and well outside the schedule of ECLTIA, extending even to Lake Waikaremoana, had been so designated. The Crown was thus poised to make its own arrangements to dispose of lands to the south east of the Lake where tribal rights were complex, and over which it had not purported to establish any authority at Te Hatepe.

(1) *Introduction*

From the outset, the Crown was determined to take land in order to punish those who it considered to have been in rebellion in upper Wairoa and Waikaremoana – and to establish a military settlement. McLean had stated this publicly as early as May 1866 when he arrived at Wairoa to administer oaths of allegiance to those captured or surrendered: he was reported to have said 'I hold your land in my hand'.[32] The land, he said, 'must of course be confiscated, as it is well understood that all persons who rebel against the Queen must suffer the loss of their lands, which will be disposed of as the Government thinks proper'.[33] At the end of May he reported that he had made preliminary arrangements to locate military settlers at 'the Wairoa', and that the block he had in mind could be confiscated under the New Zealand Settlements Act.[34] Subsequently however the Government passed new legislation, the ECLTIA 1866, which was intended to give it a more precise tool than the settlements legislation by which to effect confiscation throughout the East Coast region (see sidebar over). The Act was intended to enable the separation of rebel from loyal interests in customary land, so that only the former would be confiscated.

The Te Hatepe deed of 1867 was the first agreement entered into between Maori and the Crown in the wake of hostilities in upper Wairoa and Waikaremoana, by which the Crown secured the land it was determined to take and undertook to compensate 'loyal' Maori with other land. The surprising thing on the face of it is that it did not use the processes prescribed by its new East Coast legislation. Instead, ministers attended a great hui with Ngati Kahungunu and reached an agreement with them. Ngati Kahungunu, by that agreement, ceded two blocks of land to the Crown, divided by the Wairoa river, which would become known simply as the Kauhouroa block.

32. 'Wairoa', *Wellington Independent*, 2 June 1866, in Gillingham, Supporting Papers for 'Maori of the Wairoa district', (doc 15(a)), p 458

33. *Hawke's Bay Herald*, 12 June 1866, cited in Battersby, 'Conflict in the Bay of Plenty and Urewera Districts 1864–68', (doc B3), p 170

34. McLean to the Colonial Secretary, 30 May 1866, in Gilligham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), pp 444–445

Key Provisions of the NZ Settlements Act and the ECLTIA Contrasted

New Zealand Settlements Act 1863	East Coast Land Titles Investigation Act 1866
The Act is of general application, anywhere in New Zealand.	The Act applies only to the East Coast lands described in the Act's schedule. (This Act, being enacted later in time, ousts the application of the New Zealand Settlements Act to the East Coast lands.)
The Governor-in-Council is to decide whether there has been 'rebellion' in a 'district' (an area defined by the Governor-in-Council).	The Native Land Court, upon application or its own motion, is to identify the land of 'rebels', which term include all persons described in section 5 of the New Zealand Settlements Act.*
Section 5 describes, by their conduct, persons to whom compensation is *not* payable for land confiscation: these are, in effect, 'rebels'.	
The Governor-in-Council decides which land within the district is to be confiscated. No distinction is drawn between the land of 'rebels' and others. All land within a district can be confiscated.	Only 'rebel' land can be confiscated. This is done by means of a Native Land Court certificate identifying 'rebels' as owners of certain lands, which are then deemed to belong to the Crown. (If land is co-owned by 'rebels' and others, the others are assigned their 'just portion' of the land.)
Land is confiscated by means of Proclamation by Governor-in-Council.	
No compensation is due to persons who have committed acts identified in section 5; compensation is payable to others whose lands were confiscated.	
Provision is made for confiscated land to be used for military settlement.	No provision in the Act for confiscated land to be used for military settlement.

* This is the effect of section 2 of the Act once the fundamental error in its drafting was corrected by the 1867 amendment Act.

As we have noted above, the Crown's decision to secure land in this way would have long-term consequences for all those who had customary rights and interests in the lands extending to Lake Waikaremoana. We need to understand why this decision was taken, why Ngati Kahungunu chiefs signed the Te Hatepe deed, and the long-term consequences of the Crown's later attempts to give effect to its undertakings to the chiefs at Te Hatepe.

The questions we ask are:

- Why did the Crown seek a cession of Wairoa land, instead of using ECLTIA processes?
- Why did Ngati Kahungunu agree to the cession? Was their agreement freely given, and well-informed; or was it to any extent coerced?
- What was the effect of the Te Hatepe deed, and the Crown's undertakings given to Crown-aligned chiefs at Te Hatepe? What did Crown agents think the effect of the deed was?

(2) *Why did the Crown seek a cession of Wairoa land, instead of using ECLTIA processes?*

We consider here the reasons for the Crown's crucial decision to seek a cession at Wairoa, early in 1867, rather than using the processes laid down in its own legislation, the East Coast Land Titles Investigation Act 1866. Its intention to take land there had been flagged in the early part of 1866, at a time when it would have had to use the New Zealand Settlements Act to confiscate land. Later in the year, however, parliament passed the new legislation, specially designed for the entire East Coast region. The boundaries within which ECLTIA 1866 applied were badly described in the schedule to the Act (to the point that it was unclear where they were), and amending legislation in 1867 which clarified the boundaries, also altered them to include more land (see explanatory note). Though the Crown did not use the ECLTIA processes, the legislation was nevertheless important in shaping its approach to securing land in Wairoa.

The origins of ECLTIA lay in events in Turanga, which were examined in detail by the Turanga tribunal. We refer readers to that report, and here note only that the Government was persuaded by the arguments of Whitaker, Superintendent of Auckland province (who hoped to secure Turanga 'rebel' lands containing oil springs), that new confiscation legislation should provide a 'level of precision' in the treatment of 'loyal' and 'rebel' owners that was not provided by the New Zealand Settlements Act.[35]

Whitaker's proposals also had the advantage for the New Zealand Government of appearing to meet at least some of the grave concerns of the Imperial Government about confiscation. As we have seen in chapter 4, the Colonial Office in London expressed these concerns at the outset: among them was the danger of alienating Maori who had not 'actively promoted or violently prosecuted' rebellion but had been, by circumstance 'unwillingly drawn into it' or had 'on the whole adhered to the British cause'.[36] The possibility that the

35. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 163
36. Cardwell to Grey, 26 April 1864, AJHR, 1864, E-2, p 21

lands of these people could be confiscated was 'calculated to alarm our friends' and 'drive to despair those who are but half our enemies'.[37] Their lands should not be taken, even where they were joint owners with rebels, unless that was absolutely necessary – a decision to be taken with the greatest of care.[38] And it would not be justifiable for the Government to appropriate land against the will of innocent persons merely because it was in the same district as rebel property, and could 'conveniently be used for purposes of settlement'.[39] For these reasons, Secretary of State Cardwell had, in 1864, urged Governor Grey and General Cameron that appropriation of land in the wake of rebellion should take 'the form of a cession imposed by [the Government]' and only if that course were 'found impossible', should the 1863 New Zealand Settlements Act be used.[40] By 1866, as we saw in chapter 4, the Colonial Government was under further pressure from the Colonial Office: it was critical both of the Government's extension of its confiscatory powers under the New Zealand Settlements legislation for another two years, and of new legislation (the Outlying Districts Police Act 1865) which provided new grounds on which Maori lands might be forfeit to the Crown. The Stafford government thus had a further strong reason to contemplate a different approach to confiscation.

By the end of September 1866 Stafford was committed to new legislation to deal with the East Coast lands. Whitaker himself drafted the East Coast Land Titles Investigation Bill 1866. The bill was passed through the House, without amendment, and virtually without debate, on 3–4 October, at the tail end of the parliamentary session.[41] Under the Act, lands whose owners could include 'rebels' were to be dealt with by the Native land court, even though the owners did not seek a title hearing; a 'just portion' of the land was to be awarded to the 'loyal' owners while the portion certified by the court to belong to those 'engaged in the rebellion' would be deemed to belong to the Crown. Thus, the East Coast legislation was intended to protect the land of 'loyal' Maori and confiscate only 'rebel' land. In parliament in 1868, Richmond (the de facto Native Minister) stressed that the Act of 1866 was:

> intended to be an improvement on the New Zealand Settlements Act, and to enable the Government to confiscate land in a way apparently less harsh as regarded [*sic*] those who had not been in any way concerned in rebellion than they could otherwise have done [*sic*]. The desire was that confiscation should extend to none but those who had actually participated in rebellion, and that we should not take away from friendly Natives and afterwards give them back other land, but merely take from those who were actually in rebellion . . .[42]

37. Cardwell to Grey, 26 April 1864, AJHR, 1864, E-2, p 20
38. Cardwell to Grey, 26 April 1864, AJHR, 1864, E-2, p 22
39. Cardwell to Grey, 26 April 1864, AJHR, 1864, E-2, p 22
40. Cardwell to Grey, 26 April 1864, AJHR, 1864, E-2, p 22
41. 4 October 1866, NZPD, 1864–66, pp 1039–1040
42. J C Richmond, 3 September 1868, NZPD, 1868, vol 3, p 145

Once the new legislation was passed, we might expect that it would have been used on the East Coast (including Wairoa). Section 3 of the 1866 Act empowered the Native land court to investigate and determine the title to 'all and any land' within the district to which the Act applied. That process could be initiated by the court itself: it did not require an application from an interested party. The Government in fact anticipated an early land court sitting; Chief Judge Fenton was instructed to take steps to proceed under the Act, and on 31 October issued notice of his intention to investigate titles within the Act's schedule as soon as surveys were completed.[43] In November 1866 the Government also appointed Captain Reginald Biggs, who had settled at Matawhero after fighting with the colonial forces on the East Coast, to implement confiscation on the coast. Biggs was instructed to act as counsel for the Crown in the Native Land Court within the entire district described in the schedule to the East Coast Land Titles Investigation Act. He was also to conduct preliminary inquiries into the tribes and hapu owning land within the 'block' of land, and the names of individuals; and to oversee the preparation of a sketch plan of the whole block for the use of the court.[44]

But despite these initial moves to implement ECLTIA, the Government rapidly changed its mind. There seem to have been several reasons for this crucial shift.

First, the Government concluded that ECLTIA was 'not likely to work well in practice' – as the minister told the House in 1868; it would be much better to obtain cessions of land 'to be afterwards confirmed under the Act'.[45] The influence of Biggs, the man on the ground, seems to have been crucial to this decision. Biggs did not think ECLTIA would work, because it was based on the totally unrealistic assumption that the claims of 'loyal' and 'rebel' Maori could be separated out. Obtaining cessions of land from Maori, in his view, was a more practical proposition. Biggs's most immediate concern was to secure land for the Crown at Turanga (Gisborne). In Turanga, he reasoned that the Government should decide what block of land it wanted *before* the land court sat, and define its boundaries; 'loyal Natives' with 'indisputable claims' inside those boundaries could then be compensated. Biggs hoped that Turanga Maori would, if pressed, agree – though in fact they objected to the size of the cession he sought, and would not cooperate.[46] Nevertheless, Biggs's strategy at Turanga would also shape his proceedings at Wairoa.

Secondly, cessions of extensive tracts would suit the Crown's purposes better. At Wairoa Biggs sought to acquire a large area of land for the Crown within which a block suitable for military settlers could be designated. Such an area was most unlikely to be obtained through

43. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 143; 'Order in Council', 27 November 1866, *New Zealand Gazette*, 1866, no 61, p 440

44. F. Haultain, memo for Captain Biggs, private, not dated. c. Nov 1866 (cited in Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 144)

45. J C Richmond, 3 September 1868, NZPD, 1868, vol 3, p 145

46. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 144; O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 75

the application of ECLTIA. Even if 'rebel' lands could be separated from 'loyal lands' and made over to the Crown, the result might be a patchwork of small areas of land. As Biggs put it to Wairoa leaders at the Te Hatepe hui, such small pieces would be 'of no material value to any one.'[47] It seems clear however that his concern was that the Crown should not be left with 'small pieces'. The Government wanted to be able to pick its own land. McLean had flagged the region he had his eye on in discussions with the chiefs at the end of 1866.[48] The land he described, which he estimated was about 40,000 or 50,000 acres, was divided by the Wairoa river.[49]

It was fortunate for the Government that the body of Wairoa rangatira who had aligned themselves with the Crown over the past two to three years were more inclined than Turanga leaders to listen to what the Government wanted. Thus Kopu and Paora Te Apatu agreed, according to McLean, about which land would be confiscated:

> they distinctly recognise the boundary of land to be confiscated as commencing at a place called Putahi on the left bank of the Wairoa River back to the Waka Puhake [*sic*] ranges inland, and up the river beyond Reinga.
>
> Within the District referred [to] there can be no difficulty in selecting the land for the Military Settlers.[50]

At the Te Hatepe hui, McLean reiterated, according to one newspaper account, that what was wanted was 'a piece of land for the settlement of the soldiers who were engaged in suppressing the Hau Hau rebellion'; the matter had 'long been talked of, and it was agreed that a *place conveniently situated in the midst of the district* should be selected for that purpose' (emphasis added).[51] When Government speakers were challenged at the hui to explain why the Crown had taken the good places for itself, Biggs responded that the locality had in fact been chosen to cut off communications between the 'Hauhaus' of Wairoa and those of Waikato and Te Urewera.[52] Whether we accept this explanation or not, it is clear that the Crown sought a cession because it was the only way of securing a substantial block of suitable land for its own purposes.

Thirdly, the Crown sought a cession both because it evidently considered ECLTIA gave it certain powers over the lands delineated in the schedule, and because it saw no incompatibility between the processes laid out in the Act, and the agreement it made with Maori

47. *Hawke's Bay Herald*, 23 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district', (doc 15(a)), p 206
48. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 77
49. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 79
50. McLean to Deighton, 7 December 1866, RDB, vol 136, pp 52251–52252 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 77)
51. *Wellington Independent*, 20 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a), pp 371–372
52. *Hawke's Bay Herald*, 23 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a), p 206

at Te Hatepe. That is, it believed it need not follow the exact processes outlined in the Act. This is evident from Richmond's statements, and Biggs's actions. Richmond referred in the House during the second reading of the East Coast Land Titles Act Amendment Bill, in September 1867, to an 'elaborate ageement' about the lands to be taken by the Crown made with the 'friendly Natives in Wairoa' which 'required to be carried out *by order of the Native Lands Court*' (emphasis added).[53] As we will see, Biggs assumed that he could get the Te Hatepe deed rubber-stamped in the land court. We consider the Crown's assumptions later.

(3) *Why did Ngati Kahungunu agree to the cession? Was their agreement freely given, and well-informed; or was it to any extent coerced?*

It is our view that Ngati Kahungunu agreed to a cession of land at Te Hatepe because they saw no alternative. McLean, as we have seen, had signalled at an early stage that rebellion would be followed by confiscation. This message was underlined at the 1867 hui: there had been rebellion at Wairoa; a Crown taking of land was not negotiable.

The Government, as we have seen, preferred to achieve this by cession. It chose to seek a cession from the Crown-aligned chiefs; and it was they who faced the Crown's moral pressure. This was despite the fact that it was those who were deemed rebels who, by the Crown's own criteria, should have felt that pressure first. Yet the Crown representatives addressed themselves at the hui to the chiefs who, with their men, had fought as part of its own forces – or who had on occasion largely constituted its forces. We note that it was a high-powered delegation that arrived at Te Hatepe – the minister JC.Richmond, McLean (Superintendent of Hawke's Bay province), lieutenant colonel Whitmore (who headed the Napier militia at Omarunui), and Government officials Biggs, and Locke – underlining the Crown's anxiety to secure the agreement of the Ngati Kahungunu rangatira. Between 1500 and 2000 Maori were present. As O'Malley points out, the key chiefs of Ahuriri – Karaitiana, Tareha Te Moananui and Te Hapuku – also led a large group at the hui;[54] and Henare Potae (who had led Ngati Porou Crown forces at Waerenga a Hika) and Hirini Te Kani (who had tried to play a mediating role in Turanga) from Te Tai Rawhiti were present. It appears, from their various speeches, that they saw their role as supporting the Crown in achieving its aims. Te Hapuku, for instance, stated that 'the Pakeha is right when he claims land, the owners of which he has conquered by his bravery . . . the country above [lower Wairoa] must be given in compensation for the killed of both Pakeha and Maori.'[55]

53. J C Richmond, 3 September 1867, NZPD, p 693 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 89)
54. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 78
55. *Hawke's Bay Herald*, 23 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), p 203

Where Was the 1867 Hui Held?

Contemporary accounts state that the 1867 hui was held at Te Hatepe – the kainga and pa of lower Wairoa leader Pitihera Kopu. Te Hatepe, it seems, was located on the banks of the Wairoa river just north of the current township of Wairoa. However, Richard Niania stated in his evidence that this was not the precise location of the hui: 'we believe the korero and debate took place over towards what is today Campbell Street park, Rauwa, the river flats leading down to the river mouth'. According to Niania, the name 'Te Hatepe' became associated with the agreement because of the wider 'event' which occurred around the hui. This 'event was hosted over a three week period and nearly exhausted all food supplies and stored crops'.[1]

1. Richard Niania, brief of evidence (doc 138), p 21

Crown pressure was evident also in the refusal of Richmond, the key speaker for the Crown, to discuss whether confiscation was justified – despite the fact that it was evident at the outset that local Ngati Kahungunu wanted such a discussion. We have two newspaper accounts of the speeches made at the hui. From both, it is evident that when the key matter of the cession was raised (on 4 April) McLean spoke first. Each of the the two accounts gives a different emphasis to McLean's remarks. According to *The Wellington Independent* report, he spoke of the need to settle the 'land question', and the Government's 'wish' to have land for military settlers; he asked the chiefs to 'acquiesce' in the boundaries of the land chosen.[56] The *Hawke's Bay Herald*, however, reported McLean as saying that he and Richmond 'had determined that two blocks of land should be retained by the government; but that the other portions of Hau Hau land (which must be considered as all confiscated) should be returned to the loyal natives. . . . He told them that at the deliberations of the government in Wellington it was decided that no more should be taken than these two blocks'.[57] (The reporter noted that McLean spoke at greater length, but such was the 'buzz and comments' made by those around him that he could not catch the rest.) The press reports both give similar versions however of Richmond's speech – which followed Tamihana Te Huata's response to McLean. *The Wellington Independent* recorded Richmond's 'agitation' and evident anger as he replied: 'The land is gone. It is too late. These questions have passed the Assembly of New Zealand. We are not here to discuss the merits of the question as to the

56. *Wellington Independent*, 20 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a), pp 371–372

57. *Hawke's Bay Herald*, 23 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a), pp 205

Hau Haus. Their land is gone absolutely, passed [*sic*] praying for."[58] The *Hawke's Bay Herald* report was on similar lines:

> The Hon J C Richmond here said that there appeared to be a mistake in the native mind from beginning to end. . . . It had been decided by the government at Wellington that land should be taken; it might therefore be said that it was gone. We did not, he said, come here to consider the thoughts of men upon this question.

Richmond was not recorded as referring explicitly to ECLTIA; the thrust of what he said, however, was that Ngati Kahungunu were being offered the chance to assist in the settlement of the matter before the land went to the land court and ended up being 'spotted over by small claims'. He added that the Government 'did not wish, nor could they force any one to accept the proposal now made, with reference to these particular blocks'.[59]

Despite this disclaimer, however, the main thrust of Richmond's speech was an uncompromising insistence that there was no room for debate about the Crown's taking of Wairoa land. Biggs underlined this in his own speech, stating that: 'The fact is (and there is no use disputing the matter) all the Hau Hau land in the river is gone. What we want now to do is to have an amicable settlement.' And he added that if the chiefs would not agree to an arrangement such as the Government proposed, 'it will be my business to take the whole of the Hau Hau land for the Government . . . leaving none behind', and the land 'would then be cut up into small pieces of no material value to any one.' An arrangement must be reached, or it would be 'worse for you'.[60] This brings to mind the words of Hugh Carleton in Parliament in September 1868, when opposing the Government's plan to introduce a Bill that would become the East Coast Act 1868. Carleton wanted to see ECLTIA repealed altogether. The Government's plan, however, was to repeal it but then re-enact its central confiscatory provisions (and empower the Native Land Court to award 'rebel' land to 'friendly' Maori). Since the central provisions of the proposed Bill matched those of ECLTIA, Carleton's colourful description of the Crown's use of the new law could equally have been applied by him to the Crown's role at Te Hatepe (see sidebar over).

The land court – and the provisions of ECLTIA – were thus implicitly held up as a threat. Given that the new process in the land court was untried, and its purpose and outcome uncertain, this was doubtless effective. It is not surprising that when Biggs later sought instructions as to whether he should 'portion off' the rebel land himself, or leave it to the land court, he added that he thought it would be 'better to let it go into Court all settled as

58. *Wellington Independent*, 20 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), pp 371–372

59. *Hawke's Bay Herald*, 23 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), pp 205–206

60. *Hawke's Bay Herald*, 23 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), pp 205–206. The *Wellington Independent* report of these remarks of Biggs was very similar. *Wellington Independent*, 20 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a), pp 371–372

'Begging with a Bludgeon'

The honourable member pleads, in mitigation of his Confiscation Bill, the desire of the Government to go down to the East Coast to open up the lands by peaceable means. This is called in common parlance 'begging with a bludgeon.' He holds the Confiscation Act over the heads of the Natives, and says, 'If you do not cede the land to us, we will take it.'

Hugh Carleton, member for Bay of Islands, speaking on 3 September 1868 to the East Coast Land Titles Investigation Act Repeal Bill, NZPD vol 3 1868, p 158

it seems the Natives wish it arranged out of court'.[61] Ngati Kahungunu did not know what the relationship was between the East Coast Land Titles Investigation Act and the cession they were asked to make – or which process might have protected their interests better. They could not have known, because Crown agents did not understand that relationship themselves.

A cession at least offered certainty about which land the Crown was taking. But we cannot agree with Crown counsel's argument that it also offered Ngati Kahungunu chiefs some control over the Crown's land take. The Crown observed at our hearing that any cession of land obtained against the backdrop of confiscation law could be described as pressured or forced to some extent. It argued, however, that it would be unduly harsh for the Tribunal to conclude that a cession was forced, and so not voluntary, purely because it was made against the backdrop of such a law. Rather, the Crown contended, there is a continuum along which such cessions should be placed – ranging from voluntary to forced – and cessions at the 'voluntary end' of the continuum might well withstand challenge on legal and Treaty grounds. Counsel acknowledged that the Turanga cession was forced because, as the Turanga tribunal found, it took place at a time when the Crown threatened to remove its protection from both Maori and Pakeha in the 'climate of fear' caused by Te Kooti's killings at Matawhero and Oweta. But she argued that the cession effected by the Te Hatepe deed was at the voluntary end of the continuum for two reasons. The first was that the East Coast land title law protected the signatories' interests, which meant that its potential operation did not pose a threat for them. The second reason was that the deed's terms were beneficial to the Maori signatories.[62]

61. Biggs to McLean, 12 August 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), p 553
62. Crown counsel, closing submissions (doc N20), Topic 6, pp 8–10

From the accounts we have of the speeches at Te Hatepe, we cannot say that Ngati Kahungunu were given an explanation of the East Coast legislation that would have assured them it would protect the interests of 'loyal' Maori. Rather, there were oblique references to the role of the native land court which, it was implied, could only be detrimental to the rights and interests of 'loyal' Maori.[63] And Ngati Kahungunu were also given contradictory messages about the basis on which the Kauhouroa lands were taken. McLean said that 'we only intend to take the Hau Hau lands'; then characterised 'the whole of the land from this spot [Te Hatepe] to Waikari Moana' as Hauhau land, while adding that it 'rests with the Government to return such portions as may belong to other men.'[64] In other words, he was at least prepared to admit the possibility that he might be wrong, and that some of the land might not belong to 'Hauhau'. Further, the general land confiscation law (the New Zealand Settlements Act 1863) did not operate to protect the interests of 'loyal' Maori either. By the time of the Te Hatepe hui, the 1863 legislation had been applied in several parts of New Zealand. Among the large gathering at Te Hatepe there would have been Maori who knew that its effect was to confiscate both 'rebel' and 'non-rebel' lands. Crown counsel accepted that, whatever Crown intentions were, Maori 'who had remained loyal . . . elsewhere did not have a very good tale to tell about how they had been unaffected by confiscation [under the Settlements Act].'[65] We cannot agree with the Crown therefore that the signatories to the Te Hatepe deed would have known that the East Coast confiscation legislation posed no threat to their own landholdings.[66]

The Crown argued that the terms of the Te Hatepe deed were beneficial to the Maori signatories because, as a party to an arrangement with the Crown about their lands, the signatories had some degree of control over the outcome. By contrast, it was said, they would have had no control if the Native Land Court had applied the East Coast confiscation law to their situation.[67] Further, counsel suggested that it was beneficial to the Maori signatories, as well as to the Crown, that the Te Hatepe deed arranged for their respective land interests to be consolidated rather than being scattered across a much larger area.[68] And the Government accepted that it had to recompense in land those loyal Maori whose interests fell within the Kauhouroa block; this would be the basis of their participation in the consolidation.[69]

We are not persuaded by those arguments – which echo those put by Crown agents to Maori in 1867. First, as we have seen, at the Te Hatepe hui, Crown-aligned Ngati Kahungunu

63. *Wellington Independent*, 20 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), pp 371–372
64. *Hawke's Bay Herald*, 30 April 1867, p 4
65. Michael Belgrave, cross –examination by Crown counsel, draft transcript 29 November 2004, (doc 4.12), p 89
66. Crown counsel, closing submissions (doc N20), Topic 6, p 10
67. Crown counsel, closing submissions (doc N20), Topic 6, p 8
68. Michael Belgrave, cross –examination by Crown counsel, draft transcript 29 November 2004, (doc 4.12), p 91
69. Mary Gillingham, cross-examination by Crown counsel, 1 December 2004 (doc 4.12), p 213

did not have a genuine choice either to refuse a cession or to influence the terms of the arrangement that was made, including the location and area of the affected land. (We note Richmond's statement to the House, when he sought the passage of the ECTLIA amendment bill only a few months after the Te Hatepe deed had been signed, that 'the temper of the natives in the district [Wairoa] was such, that if this agreement were broken it would be hard to make another equally satisfactory'; this seems to us an admission that the agreement had been pushed through in the particular circumstances of the hui.[70]) Secondly, our finding that there was no rebellion means that there was no basis for the confiscation *or* cession of Maori land. It is thus an empty contention of the Crown's that Maori would have more control over their land if one of those things occurred rather than the other. Similarly we think the Crown's argument that Maori signatories would benefit from having their land interests consolidated, so as to separate them from the Crown's newly acquired interests, is a red herring. The point is that there was no justification for the Crown's acquisition and thus no reason to change the customary ownership of the land. Further, even had there been a rebellion, that fact would not have altered the bargaining position of the Crown-aligned Ngati Kahungunu who signed the Te Hatepe deed.

It is clear that because of the inflexible approach adopted by Crown representatives, and their determination to secure Ngati Kahungunu land, feelings ran high at the hui. The *Wellington Independent*'s reporter conveyed the deep concern of Kopu, and the agitation and forthrightness of the Reverend Tamihana Te Huata, an Anglican deacon.[71] Both were critical of the Crown's policy. Both pointed to the price Ngati Kahungunu had already paid in the fighting. As Kopu put it: 'we had beaten our enemies, we made friends and lived together in concord and unity. But you . . . are not satisfied with the men, you must have the land also'.[72] The Hauhau who were present, he said, were no longer enemies. (This echoed what he had said to McLean in May 1866: 'Those [whom they had fought] who were fated to die are dead and the remainder are here, and we wish to make them our friends and to live in peace hereafter'.[73]) Te Huata also stressed the prominent role taken in the fighting by Ngati Kahungunu: 'we fought and beat the Hau Haus at Waikare Moana, when but one or two of you, the whites, were present'.[74] Maori, whether 'Hau Haus or Government natives', had been the casualties of the fighting. Both speakers also challenged the need for a military settler presence among them. Kopu stated that there was no fear of further Hauhau 'outbreaks', implying that there was no need for military settlers.[75] Te Huata stated outright

70. JC Richmond, 3 September 1867, NZPD, p 693
71. *Wellington Independent*, 20 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc I5(a)), pp 371–372
72. *Hawke's Bay Herald*, 23 April 1867 (cited in Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 75)
73. *Hawke's Bay Herald*, 12 June 1866 (cited in Battersby, 'Conflict in the Bay of Plenty and Urewera districts' (doc B3), p 170)
74. *Hawkes Bay Herald*, 23 April 1867
75. *Hawkes Bay Herald*, 23 April 1867

that the people did not want the settlers, but if the Government was determined to bring them in it had already acquired plenty of land on which it might locate them. (He referred, we assume, to the Wairoa and coastal land (including Mahia and Nuhaka) the Crown had bought in 1864–65 before the fighting in the region. Gillingham gives figures showing that Government purchases in that district amounted to 179,370 acres.[76]) Or the settlers could be sent up to Waikaremoana. If the Crown proceeded with the taking, it would, in the words of Tamihana Huata, 'pick the heart out of the country'.[77]

Huata and his brother Hapimana Tunupaura also objected to the Crown's choice of land. Tunupaura, denying that the 'Hauhau' had any land of consequence in the blocks, charged that the Crown, 'our allies', should have asked first which land belonged to the 'Hauhau'. Te Huata urged that the land from Mangaaruhe to the Waiau was that of his 'tribe and relatives', and his brother stated that the Hauhau had 'no land of any consequence here'.[78] McLean appears in fact to have made enquiries about those who had rights; he reported in December 1866 that Mary (Mere) Karaka and Te Waaka Turei were key claimants to the land who had not been involved in rebellion, and added that the Reverend Huata and his brothers were also claimants 'to a small extent' to some of the land.[79] But whether his inquiries were well informed or not, the point is that whichever land the Government decided on in the vicinity, it was bound to include the interests of those who had fought either for the Crown forces, or against them – or who may not have fought at all. (One newspaper report referred to oppposition to the block cession proposal by 'those men who belonged to the Hau Hau tribes, but who had never taken any active part in the war.'[80]) And chiefs who challenged the Government's selection of land now found themselves in the uncomfortable position of being accused of minimising 'Hauhau' interests in the land simply in order to protect it. McLean's response, as reported in the press, was that they would not be permitted to 'ignore the Hau Haus altogether, and lay claims to the whole of their land'; in his view all the land from Te Hatepe to Waikaremoana was Hauhau land, and the Government was exercising restraint in seeking only two small blocks of it.[81]

The impact of Government pressure at Te Hatepe is evident in the anger and disquiet expressed in the chiefs' korero. This was perhaps not surprising. As we have seen, the policy of those who aligned with the Crown had all along been shaped by their assessment of the benefits of such an alignment, in particular the hope that it would protect their land.

It is clear from the way some of them spoke at Te Hatepe that they considered the Government had not taken their whole-hearted commitment to the Crown into account at

76. Gillingham, 'Maori of the Wairoa district' (doc 15), p 115
77. *Wellington Independent*, 20 April 1867 (cited in Gillingham, 'Maori of the Wairoa district' (doc 15), p 176)
78. *Hawkes Bay Herald*, 27 April 1867
79. McLean to Deighton, 7 December 1866, RDB, vol 136, pp 52251–52 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 77)
80. *Hawke's Bay Herald*, 30 April 1867, p 3
81. *Hawke's Bay Herald*, 27 April 1867

all. Kopu made it clear at the hui that preserving the land was of the utmost importance to him. Evidently insulted by the tenor of at least part of Richmond's opening remarks (which excused the Pakeha from responsibility for the decrease in Maori numbers, and urged sobriety, refraining from promiscuity, and the importance of education of their children), Kopu responded that these were not the questions at issue. He spoke poignantly of his own sickness (within a week he would pass away); 'his sickness was a deadly one, an ailment of the heart . . . His sickness was the land.'[82] At Te Hatepe, he had to come to terms with the fact that the Crown's expectation was that Ngati Kahungunu should deliver the sizeable block of land it sought, whoever its owners were. Richmond put it to them that the 'pieces taken were on account of the wrong doings of all the Hau Haus of each hapu'. In other words, the land represented the price which had to be paid by Ngati Kahungunu, rather than the claims of 'rebels' themselves.[83] Belgrave and Young state that Kopu was 'subject to harsh criticism for agreeing to give up the land'.[84]

In the end however, the Crown-aligned rangatira agreed that in view of Government assurances to respect the claims of those who had been loyal, they would accept the cession. As they bowed to the inevitable, their assent was expressed in terms of the exercise of mana. The high-born chiefly woman Mere Karaka made the offer to the Crown, giving the boundaries of the blocks, and stating that many had claims to the land. She alone however possessed the power of surrendering it to the Pakeha – 'and this she was about to do for the sins of her people'. Kopu, the following day, gave his own acquiescence; he would give up his claims in the blocks 'as a reparation for the evils committed by the Hau Haus.'[85] Mere Karaka also expressed the determination of her people to maintain their relationship with the Crown, even at the cost of the land in question. Her name headed those of the 153 'loyal signatories' to the deed, and the Crown undertook to make a reserve for her and her hapu at Pakowhai.

Clearly the rangatira wished the Government representatives to understand that the land was given to the Crown because they accepted responsibility for the 'sins' of the Hauhau – rather than because it was necessarily the land where Hauhau claims were concentrated.

There was one further reason why Ngati Kahungunu signed the Crown's deed. In the midst of the Government threats, there were promises made to those who had aligned with the Crown: a thousand acres of reserves divided into twenty 50-acre sections for those on the left bank of the Wairoa River; a payment and a 400 acre reserve for those on the right bank of the river; and an undertaking of recompense in land covered by the deed but outside the Kauhouroa block. The latter promise was crucial because without it, Crown-aligned Maori with customary interests primarily or solely in the 42,438 acre Kauhouroa

82. *Wellington Independent*, 20 April 1867
83. *Hawkes Bay Herald*, 27 April 1867, p 2
84. Belgrave and Young, 'War, Confiscation and the 'Four Southern Blocks'', (doc A131), p 31)
85. *Hawke's Bay Herald*, 30 April 1867, p 4

block would have been disadvantaged compared with those whose interests were primarily or solely outside that block.[86] With it, both groups stood to acquire further interests in land and thereby reach an outcome that was equitable as between the groups.

The fact that the promise was not explicitly mentioned in the Te Hatepe deed does not seem to have been a difficulty for those who signed. Claimant historians Belgrave and Young argued for the importance of an 'oral agreement' made between the Crown and Ngati Kahungunu; this 'second part to the agreement . . . one not included in the written deed signed by the parties' reflected the Government's assertion that the lands of 'rebels' outside the Kauhouroa block were confiscated, and that those lands would be given to the 'loyal' signatories.[87] Richmond's final speech, for instance, dealt with the question of the rest of the land beyond the blocks 'proffered' by Ngati Kahungunu. All the hapu were entitled to land here, he said, and if the people agreed, Biggs would come back and arrange the claims 'in just proportion'.[88] Biggs's communication to the Government soon afterwards, reporting the finalisation of the cession, echoed this: Maori were anxious for him to return to Wairoa and 'portion off the rebel land to them as soon as it is surveyed.'[89] Belgrave and Young suggested that 'there is strong Maori evidence to support a Maori understanding of [the oral agreement]'.[90] We accept this argument, and will return to it later in the chapter. There was an oral agreement also, Belgrave and Young argued, as to provision for 'rebels' whose land was taken; they would be entitled to the support of their relations. McLean stated 'that . . . the loyal natives . . . could invite the Hau Haus to live with them under their guardianship . . . – otherwise the government would fix localities for their residence.'[91] Biggs suggested that land might be allotted to them at Mahia.[92] The Crown, we note, had power under ECLTIA to make reserves for 'rebels' anywhere in the district which had become Crown land as a result of the operation of the Act. Mahia, however, was outside the ECLTIA boundaries.

Crown counsel accepted that the promise to return land was made; she suggested that its existence and significance were in fact referred to obliquely in the deed, in the passage where one purpose of the arrangement is identified as being to consolidate the interests of 'loyal' Maori in the area outside the Kauhouroa block.[93] On either view, it is clear to the Tribunal that the promise was essential to the Te Hatepe arrangement and that it induced the 'loyal' signatories to sign.

86. O'Malley states that this was the approximate acreage of the block. 'The Crown and Ngati Ruapani', p 32
87. Belgrave and Young, summary report of 'War, confiscation and the "Four Southern Blocks"', (doc 13), pp 7–8
88. *Hawkes Bay Herald*, 30 April 1867, p 4
89. Biggs to McLean, 12 August 1867 in O'Malley, supporting papers for 'Report on the East Coast confiscation legislation', (doc A34(b))
90. Belgrave and Young, summary report of 'War Confiscation and the "Four Southern Blocks"', (doc 13), p 8)
91. *Hawkes Bay Herald*, 23 April 1867 (cited in O'Malley, 'The Crown and Ngati Ruapani', (doc A37), p 79
92. Belgrave and Young, summary report of 'War Confiscation and the "Four Southern Blocks"', (doc 13), p 8
93. Belgrave cross-examined by Kerr for the Crown, 29 November 2004 (doc 4.12), pp 89–90. The deed states that the purpose of the arrangement is 'to consolidate the claims of Her Majesty under the said Act and of the several hapus to which the said undersigned Chiefs and natives [that is, those aligned with the Crown] belong'.

7.5.2

We conclude that the Crown's offer of land outside the Kauhouroa block to those who had fought in its forces is evidence of some feeling of responsibility towards them. But the Government took a limited view of how that responsibility might be met. It did not extend to offering Crown-aligned Ngati Kahungunu the protections of the new legislation. Nor were they offered a choice as to which land might be ceded. On the contrary, Government representatives did not shrink from making quite explicit threats if the chiefs failed to cooperate in the course of action that had already been decided on. And the Crown failed, when it drew up the deed of cession, to record clearly its undertaking to make over to Crown-aligned Ngati Kahungunu, lands outside the Kauhouroa block. There is no doubt that such an undertaking was given; and we are at a loss to account for its omission from the Deed.

(4) ***What was the effect of the Te Hatepe deed, and of the Crown's undertakings given to Crown-aligned chiefs at Te Hatepe? What did Crown officers think the effect of the deed was?***

If we are to understand the creation of the four southern blocks, it is crucial to understand the effect and significance of the Te Hatepe deed. Here we address two main issues. First, what was the legal status of the cession recorded in the deed given, in particular the terms of ECLTIA, and did Crown representatives believe it was lawfully made? Secondly, what were the Crown's obligations in the wake of the undertakings its officers gave to Crown-aligned Ngati Kahungunu about land to be given to them as recompense for the cession of the Kauhouroa block? What did Crown officers understand those obligations to be in 1867?

(a) ***The legal status of the cession:*** First, was the cession recorded in the Te Hatepe deed lawfully made, given the terms of ECLTIA? We have already stated that we do not accept that there had been a rebellion justifying any confiscation, or cession, of land in the Wairoa and Waikaremoana areas. Yet the effect of the Te Hatepe deed was to punish Ngati Kahungunu: those who resisted the Crown, those who fought for it, and those who had done neither, for the alleged rebellion of some of them.

We consider the position of those deemed rebels first. Not only did the Crown acquire Ngati Kahungunu land without justification, but its insistence on a cession denied alleged rebels any protection of their rights. They were not party to the cession (even if at least some of them were present at the hui).[94] The Kauhouroa block was ceded by some who had customary rights in the land – and, it seems, by some who may not have had any customary rights there at all. (It is difficult for us to reach a conclusion on this matter, as the Kauhouroa block is outside our inquiry district and we did not receive comprehensive tangata whenua evidence on customary rights in this land. In 1875, many more Ngati Kahungunu were named on a separate list of those whose service to the Crown entitled

94. Te Waru Tamatea was present at the hui and spoke opposing the cession.

them to payment when the blocks were sold.[95]) Crown counsel, considering the right of those who made the cession to do so, conceded that 'rebels' with interests in the Kauhouroa block did not consent to its cession and so their interests in the block were confiscated rather than ceded.[96]

Not only this, but the cession denied the benefit of the Crown's own legislation to 'rebel' Ngati Kahungunu. The Land Court – a creation of statute – could do only what it was authorised to do by legislation. The East Coast Land Titles Investigation Act 1866 set out very plainly what the Court could do in the wake of rebellion. It prescribed a complex procedure, dependent on decisions of the Land Court, by which the Crown could confiscate Maori land in the district defined by the Act. The primary reason for the novel process was to protect Maori whose land rights were not liable to be confiscated: the legislation recognised that confiscation should only apply to Maori who had been in rebellion. In addition, however, by requiring the Court (rather than the Governor, for example) to identify rebels and their land, an opportunity was provided to those who might otherwise have been deemed rebels, to participate in the court's process and argue, and present evidence, against the court reaching that outcome. Crown counsel also suggested that, there may have been advantages for rebels in court determination of the interests – as opposed to cessions of land – though she did not think the outcome would have differed greatly: 'Either way, they were to be punished for their rebellion by losing their interests in lands.'[97]

But Crown officers circumvented the procedures laid down in the Act. The Te Hatepe deed described a process very different from that prescribed by the Act and the Crown's aim was to reach an outcome very different from that which would be achieved by adhering to the Act. Despite those fundamental points of difference however, key Crown officers involved in the Te Hatepe deed's design and implementation seem to have believed (wrongly) that their new process was somehow authorised by ECLTIA and that the outcome of that process could be validated under the Act. Thus, the Te Hatepe Deed referred to the Act and the powers of the land court under it, and officials spoke and behaved as if the court could use the jurisdiction given to it by the Act to approve the alternative arrangements that were being made. In this way, they relied on ECLTIA.

The question we must ask is what Crown officers understood to be the effect of the deed of cession at the time. When they promoted this alternative process, and told Maori, wrongly, that 'rebel' land in the district had *already* been confiscated – or must be considered as having been confiscated – were they deliberately misleading Ngati Kahungunu? When they threatened that the outcome of taking the land to the court would be unusable patchworks of land for Kahungunu who received awards, was this also misleading?

95. We note Gillingham's point that 'loyal' claimants who did not also have customary interests in the blocks were poorly represented in the Locke deed schedules. In 1873 Whaanga and 11 others complained that they were represented there by only one name. Gillingham, p 243

96. Crown counsel, closing submissions, (doc N20) Topic 6, p 2

97. Crown counsel, closing submissions, (doc N20) Topic 6, p 8

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We note first that, at the time the Te Hatepe deed was signed, the defect in s 2 of the 1866 Act had not yet been corrected, so ECLTIA could not have been used by the Crown to achieve any sort of confiscation. Thus threats that confiscation by means of the court process would produce unusable patchworks of small pieces of land were empty. But even had that defect not existed, the Native Land Court would have struck serious problems, possibly insurmountable in the absence of Maori co-operation – as Crown counsel acknowledged[98] – trying to distinguish the land of 'rebels' and 'non-rebels', which was the prerequisite to the confiscation of 'rebel' land. Therefore, had the land gone to the court and the Act been applied, it was likely either that no land would be identified as belonging to 'rebels', thus no confiscation would occur, or that the court itself would have had to make an arbitrary decision as to how to separate the land of those it found to be 'rebels' from those it found to be 'loyal'.

If Crown agents had been aware at Te Hatepe in April 1867 that the 1866 Act was unworkable, it would have been dishonest of them, not merely wrong, to say that land had already been confiscated under the Act or that the Crown could rely on the Act to have the Native Land Court determine 'rebel' interests. But we have seen no evidence to suggest that Crown officers were aware at that time of the error in s 2 of the 1866 Act. Indeed, the Turanga tribunal has recorded that Chief Judge Fenton of the Native Land Court pointed out the defect in June 1867, and it seems that the Judge was the first to notice it.[99] It was after this, when Richmond was speaking during the second reading of the ECLTIA amendment bill, that he told the House that the 'arrangements' had been made with the 'friendly Natives' in Wairoa at a time when the 'flaw' in the Act – clearly a reference to s 2 – was not known.[100]

The more far-reaching question however is, if Crown officers knew that the land court process was unlikely to deliver to the Crown a continuous swathe of 'rebel' land where they wanted it – and it seems certain that this was the case – why did they not abandon plans to confiscate land in the area and make that fact known to Maori? They could then have sought to negotiate with all who had customary interests in the land they wanted. Why instead did they inform Ngati Kahungunu that land had already been confiscated under the 1866 East Coast Act, and that the only remaining issue was which land the Crown would retain and which it would return to loyal Maori? Did they genuinely not know that, under the Act, no land was confiscated until the land court reached a determination and certified particular land to be 'rebel land' at which point it was deemed to belong to the Crown? Or did they appreciate that fact but rely on Maori ignorance of it in order to gain leverage for their proposal that the Kauhouroa block be ceded?

Certainly, some of the Crown officers involved should have known that before the Court issued a certificate in respect of 'rebel' land, all the land in the district covered by the Act

98. Crown counsel, closing submissions, (doc N20), Topic 6, p 7
99. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1 p 149
100. J C Richmond, 3 September 1867, NZPD, p 693

remained in customary ownership. That is what the Act says. Richmond, a lawyer, was in the House and a member of the Government at the time of its passing. He should have been aware of the grave Imperial concerns about the 1863 confiscation legislation, which the 1866 Act was designed to assuage. He later said, however, that he 'very imperfectly appreciated the bearing of the [ECLTIA] measure', having just joined the Government after a ministerial upheaval.[101] Nevertheless, it would be entirely reasonable to expect Richmond to have become conversant with the Act's scheme by the time he authorised Biggs to make arrangements under it. Certainly, since Richmond attended the Te Hatepe hui, it would be reasonable to expect he would have read and understood the Act's key provisions before Biggs signed a deed that indicated there was an important connection between the deed's arrangements and the court's powers under the Act.

On the other hand, there is evidence that the Crown agents involved genuinely did not understand the 1866 Act's process and believed that 'rebel' land in the district had already been confiscated, or as good as had been, before the Te Hatepe hui. One example is Biggs's report to the Native Secretary shortly after the Te Hatepe deed had been signed, about the proceedings at Wairoa 'relative to the confiscation of Hau Hau land in that district under the 'East Coast Land Titles Investigation Act 1866', as he put it.[102] Although the Te Hatepe arrangement was an alternative to confiscation, Biggs's description of the hui suggests he did not see it that way. We also have evidence of Richmond's thinking on how the Government would proceed. In January 1867, he wrote a memorandum stating that Biggs should have a sketch made of the land described in the schedule to the Act, and make arrangements with friendly Natives before he went to court. In court he should seek interlocutory orders for the award of blocks to Friendly Natives, and those 'to be handed over to the Crown'. Once such orders were secured, the Government would carry out surveys and seek final court awards.[103] Again, in July 1867, when he gave evidence to the public petitions committee on a Turanga petition which complained of Biggs's proceedings there, Richmond stated that 'the Government had decided that, *under the East Coast legislation*, arrangements should be made between the Government's agent, Biggs, and the claimants to consolidate 'the shares of the Rebels and the Loyal Natives' (emphasis added).[104] This approach, he added, had worked at Wairoa.

It is thus apparent that Crown officers believed that a cession of land such as was arranged in the Te Hatepe Deed was perfectly legitimate as long as the Native Lands Court approved it; and that they believed the court could perform that role under ECLTIA. There are repeated statements by those officers to that effect. The final words of the Te Hatepe deed – that the parties agree that the arrangement 'may be made a rule of the said Native

101. J C Richmond, 3 September 1868, NZPD, 1868, vol 3, p 145
102. Biggs to Native Secretary, 16 April 1867, RDB, vol 131, p 50377
103. JC Richmond, memo "E. Coast Land Titles Act", 17 January 1867, RDB, vol 131, p 50396
104. Evidence of JC Richmond, 26 July 1867, Le 1 1867/13, Archives New Zealand (cited in Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 151)

Lands Court'– also indicate their belief that the lawfulness of the arrangement depended only on the Court's confirmation of it.[105] Richmond told the House in September 1867 that under ECLTIA the Government had entered at Te Hatepe into an 'elaborate agreement, which required to be carried out by order of the Native Lands Court'.[106] If the 1866 Act was repealed and nothing comparable was enacted in its stead, the government might be unable to justify its ownership of the Kauhouroa block. And in September 1868, Richmond stated that the Kauhouroa block 'was ceded, subject to the decision of the Lands Court'.[107]

Biggs's actions bear out these statements. When the land court sat at Wairoa in September 1868, he appeared for the Crown and claimed the land named in the Te Hatepe deed for the Crown. Because the 'Wairoa natives' had agreed to 'cede' the land 'he would not prefer [make] any claim on behalf of the Govt. to any other land affected by the East Coast Titles Investigation Act South of a line from Paritu to te Reinga thence to Mangapuata, then along the range to Waikaremoana.'[108] (We return to the significance of this statement in the next section.) He read the agreement out in court. A number of signatories (including Tamihana Te Huata and Paora Te Apatu) were in court and expressed their satisfaction with the arrangement outlined in the deed. This is hardly surprising, as in the wake of the cession it was in their interest that the Crown's undertakings be fulfilled.

Biggs believed he had obtained confirmation of the deed's arrangement, although the Court did not issue any order or make any record that would have borne out his belief. He sent a telegram to Richmond the following day which included the information that the 'confiscated block of land at Wairoa' had been 'confirmed' by the land court; Richmond read the telegram aloud in the House a few days later.[109] The Crown, in other words, was evidently confident throughout this period that the East Coast legislation empowered the court to approve an arrangement made out-of-court for land subject to the Act, even if the arrangement was fundamentally different from that which the court could reach in the exercise of its powers under the Act. In our inquiry, Crown counsel made the same argument, submitting that the reason the Te Hatepe Deed was not fully implemented was that the court failed to 'rubber stamp' it.[110]

But the Crown was quite wrong. If it sought to confiscate land in the district covered by the East Coast legislation, it had to follow the prescribed procedure –which required key decisions to be made by the Native Land Court – and which was designed to be fair, especially to those whose lands were not liable to be confiscated. The 1866 Act did not provide that, as an alternative option more favourable to the Crown, the Court could approve an arrangement by which the Crown made its own decision about who were 'rebels' and

105. In our view, the word 'rule' (of the court) must have been intended to mean 'ruling' of the court
106. JC Richmond, 3 September 1867, NZPD, p 693
107. JC Richmond, 3 September 1868, NZPD, 1868, vol 3, p 147
108. Wairoa Minute Book 1, p 25 (cited in O'Malley, 'The Crown and Ngati Ruapani', (doc A37), p 100)
109. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), pp 100–101
110. Crown counsel, closing submissions (doc N20), Topic 6, p 9

then dealt with their land in a manner that was completely different from anything that the Court could order.[111] This was in fact pointed out at the time. The Auckland paper the *Daily Southern Cross*, which was critical of the Government's confiscation policy generally, and queried whether the ECLTIA was even intended to apply to land in the Wairoa district, wrote:

> Even supposing that the East Coast Land Titles Investigation Act had been in force in the district, it is no part of the duty of a Minister of the colony, to interfere with the administration of the law. The Act itself (albeit a very arbitrary one) provides that the Native Lands Court shall *take evidence* as to the loyalty or otherwise of the claimants to certain lands, and not that any member of the Ministry, and a Superintendent of a province, might go down and take any land which would be most desirable in their eyes, deem the owners of it rebels, and consequently never let them rest until they had driven a bargain with them more by intimidation than anything else.[112] [Emphasis in original.]

It is apparent that if the confiscation legislation proved difficult or impossible to implement to achieve the Crown's purposes, the proper course would be for the Crown to secure amendments to it, enacted by the legislature. It would not be proper for the Crown to seek to achieve its intentions by a completely different process unless two conditions were met: the other process provided the owners with protections equivalent to those provided in the legislation; and the owners fully understood and agreed to the use of the other process. Neither of those conditions was met by the process that culminated in the Te Hatepe Deed.

Lastly we address the question of the Crown's undertakings made to Crown-aligned Ngati Kahungunu in the deed of cession, and at the Te Hatepe hui. What lands did the Crown promise to make over to those chiefs in return for their cession of the Kauhouroa block? And what did Crown officers understand the Crown's commitments to be at the time of the agreement? It is important that we distinguish between what the Crown officers involved thought the agreement meant at the time, and what other Crown officers came to believe the agreement meant as a result of understandings that emerged afterwards.

In our view the nature and effect of the Te Hatepe agreement are quite clear, insofar as it related to the grant of lands to Ngati Kahungunu outside the Kauhouroa block (and that is our concern here). First, the agreement leaves no room for doubt that the Kauhouroa block was only part of the land involved in the overall transaction. As we have seen, Ngati Kahungunu were given oral undertakings about recompense in land covered by the deed but outside the block. Crown counsel suggested that the promise was in fact referred to obliquely in the deed. We note also that a press report of the meeting at the time stated that:

111. We note that our view is at odds with the majority view of the 1927 Sim Commission, which was that although the Crown obtained rebel interests in the Kauhouroa block unlawfully, this did not merit redress because the 1866 Act 'practically confiscated' the rebels' land and all the Crown had to do to complete its title was obtain a certificate under section 4. AJHR 1928, G 7, pp 4, 24–29, 36–40.

112. *Daily Southern Cross*, 26 April 1867, RDB, vol 89, p 34395.

7.5.2

> It was arranged at the meeting that two blocks, containing about 30,000 acres, should be set apart for the location of military settlers and other purposes, and that the remainder of the rebel land should be made over to the friendly natives, who gave such valuable aid in suppressing the East Coast rebellion – the friendly natives to be also compensated, in land or otherwise, for any of their lands included within the boundaries of the rebel territory so taken.[113]

Secondly, there is in our view little doubt about which land outside the Kauhouroa block was designated for Crown-aligned Ngati Kahungunu, or about Crown understandings as to which land that was. The deed cited ECLTIA 1867 and its schedule, and stated that, except for the land that became the Kauhouroa block, the Crown withdrew its claims under the Act to an area within the Act's schedule, and further specified in the deed, extending to the east and the west of that block. Any commitments the Crown made in the Deed for disposal of lands beyond the Kauhouroa block to Crown-aligned chiefs, could not have been construed as extending beyond the boundaries given in the schedule of the Act. Crown official Biggs, writing after the hui, is clear on that point: 'The Hau Hau land without [outside] the block taken for the Government and contained within the boundaries named in the schedule to the "East Coast Land Titles Investigation Act 1866" is to be divided amongst the friendly natives for their services during the war.'[114] (We note his correct reference to ECLTIA 1866, and conclude from this that the reference to ECLTIA 1867 in the Te Hatepe deed was simply a mistake.[115]) Biggs's statement seems to us unequivocal. In light of this, we must conclude either that Richmond and McLean also knew which land was to be made available to 'loyal' Maori, or that they were party on behalf of the Crown to an agreement which they barely understood.

The sketch plan attached to the deed, the Crown's visual representation of the land involved in the agreement, is further crucial evidence of the Crown's understanding *at the time* of the extent of that land, and of the ECLTIA boundaries.[116] The deed area comprises land primarily in the Wairoa region; at the centre of which was the Kauhouroa block. The boundaries of the Te Hatepe deed itself are difficult to reconstruct on modern maps, but three pieces of information show which area was intended to be included:

- The deed itself stated that the deed area was all the land inside the ECLTIA boundary south of the Ruakituri river and a line from Te Reinga to Paritu on the East Coast.

113. *Hawke's Bay Herald*, 30 April 1867, p 3

114. RN Biggs to Rolleston, 16 April 1867, RDB, vol 131, pp 50379–50380

115. The 1867 amendment Act had not been passed at the time of the Te Hatepe Deed (April 1867). While it is possible that the amendment Act was expected to be passed (because it had been known for some time that the statement of boundaries in the schedule to the 1866 Act needed to be clarified and corrected), and that the reference to it in the deed is deliberate, we agree with those historians who consider it to have been a mistake.

116. It is not entirely clear whether the sketch plan was attached to the deed at the time it was signed, or completed soon afterwards. The copy we reproduce however is that filed with the original of the deed.

- The boundary of ECLTIA defined both the southern and western boundaries of the Te Hatepe Deed area: the southern boundary was the 39th parallel from the coast to 'Maungaharuru'; the western boundary of ECLTIA ran from 'Maungaharuru' north east to 'Haurangi'; the Te Hatepe deed boundary followed this as far as the Ruakituri river.
- The sketch plan shows the southern boundary intersecting the Wairoa River near the junction of the Kauhouroa River, and the western boundary crossing the headwaters of the Mangakapua stream; and Lake Waikaremoana is shown as being well outside the boundaries of the Te Hatepe Deed area.

It is clear from this evidence that the Te Hatepe Deed area extended inland from the eastern coast, and did not extend west and north as far as Lake Waikaremoana or its adjacent lands. The plan shows the area agreed to by the parties at Te Hatepe in April 1867. Despite the difficulties of reconstructing the Te Hatepe Deed boundaries on a modern map, two possible reconstructions we have made show that the greater part of the land which later became the four southern blocks remains outside those boundaries. Readers are referred to our explanatory note at the end of this chapter.

But the Te Hatepe deed provided no protection for the Ngati Kahungunu signatories in respect of the lands which it had been agreed they were to receive outside the Kauhouroa block. That part of the agreement was not recorded in the deed. No mechanism was outlined for delivering the agreed lands to the signatories – which left them in a vulnerable position. Above all, the boundaries within which those lands were to be found were not recorded – which meant that there was no guarantee they might not subsequently be changed. In the next section, we examine how and why the boundaries did change – and how these changes in the aftermath of the 1867 agreement came to impact on iwi who had not been involved at all at Te Hatepe.

7.5.3 Why did the Crown and Maori enter into the Locke deed and what was its effect?

Summary answer: *The Crown entered into the Locke deed in 1872 in an attempt to meet its obligations under the Te Hatepe deed to provide land to 'loyal' Maori in compensation for their loss of rights in the ceded Kauhouroa block, or for their service to the Crown. By this time Crown officials had come to assume, mistakenly, that the area referred to in the Te Hatepe deed as coming under the provisions of ECLTIA stretched as far as Lake Waikaremoana. This meant that lands claimed by Tuhoe and Ngati Ruapani were also considered to have been included in the Crown's confiscation. Samuel Locke evidently acknowledged this, and the Crown's new relationship with Tuhoe following the peace, since the leading Tuhoe chief at Waikaremoana signed the deed alongside the Ngati Kahungunu signatories. In the deed, the Crown agreed that lands to the south and east of Lake Waikaremoana – in an area substantially different from that dealt with in the Te Hatepe deed – would be 'retained' by 'loyal' Maori, subdivided*

into four named blocks, and made inalienable; the names of those to receive Crown grants were appended to the deed. The Crown would 'retain' two small blocks within the Locke deed area, amounting to some 300 acres: one at Waikaremoana, and one at Te Kopani.

The Locke deed, however, created more problems than it solved. Locke, assuming that he was dealing with confiscated land, imported into the deed features of a quite different arrangement made for Mohaka lands which had in fact been confiscated under the New Zealand Settlements Act. These fundamental errors and anomalies make the Deed's purpose unknowable and its effect unfathomable. Accordingly, the different Maori groups involved in the arrangement cannot have understood what benefits the Crown would actually deliver to them. Crown officials evidently did not know either. The Locke deed promises of Crown-derived titles to those listed as owners could not be and were not implemented, and those who had signed the deed remained uncertain of their rights in the land. Despite the Crown's undertaking that the four blocks would be inalienable by sale, the deed turned out to be only a stepping stone to the Crown's eventual purchase of individual interests, followed by a land court hearing of the blocks, and finally the Crown's acquisition of all the land.

(1) *Introduction*

Five years after the signing of the Te Hatepe deed, a new deed was signed between Maori leaders of the Wairoa and Waikaremoana region, and the Crown. This deed dealt with lands extending substantially beyond the boundaries of the Te Hatepe Deed lands, as far as Lake Waikaremoana, which were divided into four named blocks (Waiau, Tukurangi, Taramarama, and Ruakituri), using the rivers as boundaries (see explanatory note). Here we consider the reasons why the Crown decided a new deed was necessary, why Maori were prepared to accept it, to what extent it achieved the Crown's aim of fulfilling the obligations to Ngati Kahungunu that it had entered into at Te Hatepe, and how it impacted on all those who had rights in the southern Waikaremoana lands.

(2) *Why did the Crown decide on a new deed in 1872?*

We lack a copy of the instructions given to Crown agent Samuel Locke for the Wairoa negotiations; in fact we lack any record of official discussions of the decision to enter into a new agreement with Maori. We must therefore deduce the Crown's motives from the circumstances in which it found itself in 1872, from the meagre details in Locke's subsequent report on his negotiations, and from the wording of his deed itself. (We note that the Mohaka tribunal made a very similar complaint about lack of information regarding the 1870 Mohaka deed which Locke also negotiated; we refer to this deed further below.)[117]

In the first place, it is obvious that the situation in the region had greatly changed since 1867. As we have seen, Te Kooti's escape from Wharekauri with all those detained there by

117. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, 2 vols, (Wellington: Legislation Direct, 2004), vol 1, p 231

the Crown, his eventual attacks on settlers at Matawhero and on his own whanaunga in his home Turanga had led to the siege of his people by Crown forces at Ngatapa, his defeat, and his retreat into Te Urewera. The Crown had mounted military expeditions from 1869 to pursue Te Kooti and punish those who had sheltered him and joined in attacks outside Te Urewera. The process of peace-making had begun in 1870, and peace was finally achieved at the end of 1871. In the meantime, a number of military expeditions had been mounted from Wairoa into Waikaremoana. The 1869 Wairoa expedition to Onepoto – the third column involved in the assault of Crown forces on Te Urewera – became bogged down and was withdrawn without hitting its intended targets across the lake. In 1870 however a column under Hamlin and Witty attacked Waikaremoana and though it met with little resistance, destroyed all pa, kainga and food supplies in the lake region –starting in the Whataroa/Ohiwa region, and eventually crossing to the northern side of the lake. And in August 1871, after Te Kooti returned briefly to the Waikaremoana district, Crown forces searched for Te Kooti in the Whataroa district; later Rapata Wahawaha moved to the northern side of the Lake, sacking a pa there and destroying houses and cultivations (see chapter 5 for more details).

By the end of 1871 the Crown and Tuhoe leaders had reached agreement on terms on which the last Crown forces under Wahawaha were to withdraw from Te Urewera, and it seemed, on the basis of a relationship which might underlie a lasting peace. In the wake of the peace Tuhoe formed Te Whitu Tekau, the runanga of the 'Seventy', in June 1872. The determination of Tuhoe leaders to safeguard their mana motuhake and restore the people in the wake of war led them to adopt policies of resistance to roads, and the leasing and sale of land. Those policies would shape Tuhoe reaction to Crown moves affecting the lands to the south east of Lake Waikaremoana.

By 1872 the New Zealand Government was anxious to put the wars of the past 12 years behind it. As Belgrave and Young pointed out, under Vogel it had already embarked on a period of large-scale development, based on a massive increase in immigration and the expansion of infrastructure. In that context, Associate Professor Belgrave suggested, '[t]he last thing the government actually wants is references to warfare and conflict.'[118]

This was the broad context in which the Government approached the unfinished business of its Wairoa confiscation. The more immediate trigger was the growing impatience of the Ngati Kahungunu chiefs who had been promised land in return for their military assistance, and their surrender of the Kauhouroa block to the Crown in 1867. Biggs's appearance in the land court in September 1868, accompanied by the chiefs, and his advice to the Government that the deed had been 'confirmed' by the court, had not been followed by any action on the part of the Crown. Ihaka Whaanga, Te Apatu and others had been concerned about this in October 1869, when Samuel Locke (Resident Magistrate for Taupo, and Wairoa,

118. Belgrave cross examined by Boast, 29 November 2004, transcript, (doc 4.12), p 109

Waiapu-Poverty Bay) reported that according to the 1867 arrangements, 'the portion of the confiscated block not taken by Government should be returned with the Government certificate, to those loyal chiefs who fought for us at the Wairoa.'[119] This comment seems to indicate that Locke thought, since the court had 'confirmed' Biggs's deed, that the Crown could issue a grant or grants for the land. McLean had replied in November 1869 that after three years had passed the matter ought to be settled 'without further delay'.[120] We may accept that events overtook the Government at that time; in fact it would not reopen the matter till peace in the region seemed well assured. O'Malley suggests that an application by people of Ngati Hinehika hapu of Ngati Kahungunu for investigation of title to the 'as yet undefined Ruakituri block' lands in October 1870 may have prompted the Government again, along with its wish to establish a garrison at Onepoto and its interest in establishing settlers in the region.[121] But the further delay after this suggests that the Government preferred to wait until the safety of settlers could be assured.

Thus when peace was established, it was decided in mid 1872 to finally complete the arrangements signalled at Te Hatepe five years before. The Government sent in Locke – who had already been involved in renegotiating the terms of the Mohaka-Waikare confiscation with Maori. Locke's involvement there was important because, as we will see, it influenced what he did at Wairoa.

The Government evidently hoped to achieve several aims with a new deed. In particular it would enable it to honour its 1867 promises for recompense in land to those Ngati Kahungunu who had fought for it in 1865–1866, and who had been involved in the cession of the Kauhouroa block. But because – as we shall see – Crown officials had come to assume that the lands within the Crown's power to dispose of extended as far as Lake Waikaremoana, one purpose of the deed was also to recognise that Tuhoe, 'the people of the Urewera tribe', had interests in the southern Waikaremoana lands. According to Locke's later report, a key purpose of the deed was to carry out the Government's promise 'to subdivide the land and decide on persons to appear in [the] grants'.[122] But it is evident that grants were no longer to be restricted to those who had been promised land in 1867. In the new circumstances of the early 1870s, Tuhoe and Ngati Ruapani – and Ngati Kahungunu who had previously been regarded as unfriendly, or 'rebels' – were to be accommodated, at least to some extent.

(3) *What was the significance of the Locke Deed?*

On 6 August the 'Locke deed' was signed by 18 chiefs, nearly all of whom were Ngati Kahungunu, some of whom had previously signed the Te Hatepe Deed. There was one

119. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p106
120. McLean to Ormond, 18 November 1869 (cited in O'Malley, 'The Crown and Ngati Ruapani', (doc A37), pp107)
121. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p107
122. Locke to Ormond, 19 August 1872, AJHR, 1872, C-4, p30

signatory of Tuhoe and Ngati Ruapani descent – Tamarau Te Makarini.[123] The complex and even impenetrable provisions of the deed are matched by the nebulous and often erroneous factual and legal assumptions on which it was based. Locke, as we noted above, later described the deed as settling the question of 'old confiscated lands' in the Wairoa district. He outlined the taking of the Kauhouroa block in 1867, and stated that the 'remainder of the block then brought under consideration, under the provisions of the East Coast Land Titles Investigation Act', which he described as extending as far as Lake Waikaremoana, was returned to Maori. The Government promised at the time to divide the land into blocks, and decide which persons would have their names put in the Crown grants for the blocks. But because of the subsequent hostilities, it had not been able to carry out its promise until now.

The new deed recorded in four separate schedules:

- first, the original description of the Kauhouroa block, that is land retained by the Crown in 1867 at the time it withdrew all claims to land comprised in the schedule to the East Coast Land Titles Investigation Act 1867;
- secondly, the lands 'retained by the Natives' (or, as worded elsewhere, 'conveyed to the loyal claimants') in accordance with the earlier agreement, which was now reiterated in 1872; it was 'finally agreed' that all the lands described in the schedule (which extended as far as Lake Waikaremoana) would be retained by 'loyal claimants of the said lands'; and
- thirdly, the land which would be 'retained' by the Government from the lands it described as being 'retained' by Maori; the Government lands were two blocks within the deed area, of 50 acres and 200 acres respectively, at Te Kopani and Onepoto. (We discuss the Crown's retention of this land in question 3 of this chapter.) The Government also reserved the right to enter on 'any portion of the whole block' (that is, of the four southern blocks) to fell and remove timber which it might need for road, telegraph or other purposes.
- With the exception of the land 'retained' by the Government, the rest of the land was to be subdivided into four blocks (as described in the fourth schedule). This schedule specified the block names for the first time – Te Waiau, Tukurangi, Taramarama, and Ruakituri – and listed the 'names in Crown grants', that is, the names of those whom the new blocks were to be granted.[124] More than 200 people were listed (many named in more than one block). The great majority were Ngati Kahungunu, though a small number were Tuhoe and Ngati Ruapani.

123. Te Makarini was known by several names, including Makarini Te Wharehuia and Tamarau Waiari.

124. In the Schedule to the Locke deed, a portion of the Taramarama Block, identified as 'Waikaretaheke', has its own list of owners, a few of whom are also listed in the Taramarama Block.

- The whole of the land would be made inalienable, and would be held in trust 'in the manner provided, or hereafter to be provided, by the General Assembly for Native lands held under trust'.[125]

In fact, as we noted above, the Te Hatepe agreement included very little of the land which Locke stated was subject to the provisions of the East Coast Titles Investigation Act. A significant portion of the four southern blocks also fell outside the area defined in the schedule to ECLTIA and its amendments.

We consider here what the provisions of the Locke Deed may actually have meant, and why they are so difficult to unpack. We focus on three questions:

- Why was it assumed that the four southern blocks, extending to Lake Waikaremoana, were confiscated land that the deed could return to Maori?
- What were the Maori signatories' expectations of the Locke deed and was their decision to sign informed?
- What rights did the Locke deed secure to the signatories, and to those named in the lists for Crown grants?

(a) ***Why was it assumed that the four southern blocks, extending to Lake Waikaremoana, were confiscated land that the deed could return to Maori?:*** This question raises two issues: how the Crown's agreement with 'loyal' Maori came to involve the southern Waikaremoana lands, and how it came to be assumed that these lands had been confiscated (but Maori might henceforth retain the greater part of them). The deed states that with the exception of 'Land retained by Government', the whole block described in the schedule would be 'retained by' or 'conveyed to' loyal Maori; both terms are used.[126] Either way, the wording of the deed, and of Locke's report on his proceedings, makes it clear that the Crown believed it was already possessed of the land, and thus chose to keep some, and to return the rest.

The four southern blocks were not in fact confiscated land. They were moreover lands that fell only partly within the Te Hatepe deed area, which had been designated by the Crown in 1867 for 'loyal Maori'. We have shown in the previous section that the land affected by the provisions of the Te Hatepe deed was primarily in the Wairoa region, extending inland from the eastern coast to a western boundary defined by the schedule to ECLTIA 1866, running from Maungaharuru north east to 'Haurangi' and a northern boundary along the Ruakituri River, and a line drawn between Te Reinga and Paritu; the sketch plan attached to the deed shows the western boundary crossing the headwaters of the Mangakapua stream (see, also, our explanatory note about maps). Yet the Locke deed purported to be dealing with the unfinished business of the Te Hatepe agreement. The Crown did not, and could not, state explicitly in 1872 that it was giving effect to the promises set out in the Te Hatepe deed to grant land outside the Kauhouroa block to 'loyal' Maori because, as we have noted, no such

125. Deed of Agreement, enclosed in Locke to Ormond, 19 August 1872, AJHR, 1872, C-4, p 31–32.
126. Enclosure in Locke to Ormond, 19 August 1872, AJHR, 1872, C No 4, p 31

promises were set out there. This underlines the significance of the Crown's failure to record its promises in 1867: the switch to recompensing loyal Maori in largely different lands did not need to be recorded or explained.

On the face of it, this new focus in the Locke deed on lands largely outside the boundaries of the Te Hatepe deed area, and its assumption that the Crown had secured the right through earlier confiscation to treat with Maori about their disposal, is inexplicable. It was a shift crucial to the history of the southern Waikaremoana lands which (with the benefit of hindsight) can be seen as a precursor of their alienation from Maori ownership. We consider here whether it can be explained as the outcome either of a simple mistake, or series of mistakes; or of a more deliberate assertion of Crown authority over lands nearer the Lake. Either way, by 1872 it is clear that Locke himself was quite certain that the lands extending to the Lake had been confiscated.

Some evidence – in particular the activities of surveyors in the district – seems to suggest that Crown officers may have acted on the assumption, soon after the signing of the Te Hatepe deed, that Crown authority extended to the Lake. Claimant historians suggested that Crown officials assumed right from the time of Te Hatepe that the boundaries of the confiscated land extended as far as Waikaremoana, that surveys conducted to the Lake soon after Te Hatepe reflected this belief, and that these lands were to be transferred to 'loyal' Maori.[127] But we do not think the evidence on this matter is conclusive.

It seems to us, for instance, that McLean's statements at Te Hatepe are ambiguous. He outlined the boundaries of the 'two pieces' of land 'chosen' for the purpose of military settlement (i.e. the Kauhouroa block); then stated that 'the remainder of the lands will go to the chiefs of the district who have served the Government'.[128] He did not say which lands these were. He stated that: 'The Hau Haus have gone and their land must follow them. It rests with the Government to return such portions as may belong to other men. In my opinion the whole of the land from this spot to Waikari Moana is Hau Hau land. The two pieces which we claim I consider to be very small indeed.'[129] In the context of the Te Hatepe deed (with its attached plan), these statements do not seem to us to amount to assertions of confiscation as far as the Lake. (Our reasons for reaching this conclusion are explained more fully in our explanatory note.)

Nor do we think the evidence of the activities of Crown surveyors is persuasive.

- O'Malley suggested that Government surveyors were working before the end of 1866 on 'what they refer to as the confiscated lands as far back as Lake Waikaremoana.'[130] This appears to be a reference to a statement in a letter from Haultain to Captain A C Turner – instructing him to complete a sketch survey of the block 'recently brought

127. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 83; Binney, Encircled Lands, vol 1 (doc A12), pp 183–184
128. *Wellington Independent*, 20 April 1867, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), p 371
129. *Hawke's Bay Herald*, 27 April 1867, p 2
130. O'Malley cross-examined by Kerr for the Crown, draft transcript (doc 4.11), p 18

under ECLTIA', and noting that there was already a 'partial survey of Wairoa as far back as the Lake Waikare Moana, and the country between Waiapu and Poverty Bay' which he could draw on.[131] O'Malley concluded from this statement that the Waikaremoana lands 'had already been earmarked for confiscation'.[132] But we do not think Haultain's statement need be read in this way. It does not necessarily indicate that all the land included in what was evidently an earlier survey was earmarked for confiscation – though it may have been undertaken to assist the selection of such land.

- Further evidence about surveying may however lend more weight to claims of early Crown extension of the Te Hatepe deed boundaries. We note some letters from George Burton, a local settler, to McLean written after the Te Hatepe deed had been signed. Binney stated that Burton, 'a surveyor who also managed McLean's herds in the Hawke's Bay and was in his personal employ, was instructed to carry out the survey of the 'external Boundaries of all the confiscated land' up to Waikaremoana'.[133] On 1 May 1867 Burton stated that he had 'taken in hand to carry out all the native surveys in this district".[134] In July 1867 he wrote that as there was no hurry to finish the military settlers' sections, he was 'busy with the survey of the external Boundaries of all the confiscated land which will I hope not take long'. He added that he would write as soon as he returned from Manga Haruru and Waikare Moana Lake.[135] At the same time, Worgan senior reported to McLean that Burton had given his son a 'very extensive piece of country to survey extending many miles up the river[s] permeating the Urewera country'; it would take several months.[136]
- In August 1867 WA Richardson, a military settler, recorded that: 'The position of the Uriwera is imminently hostile in the Waikaremoana. Burton the Surveyor has been warned not to cross any portion of their land. The Waiau natives urged him not to go & Captain Biggs also strongly advised him not to attempt it at present, but he is an obstinate character and intends running all risk in getting the back line of the confiscated country carried through."[137]
- In November 1867 however, Biggs reported to McLean that Burton had acted in a 'most stupid manner' by 'taking more land for the government than was agreed upon on' and causing considerable Maori dissatisfaction; he had told both Ngati Kahungunu

131. Haultain to Turner, 20 November 1866, AD1/1866/5322, RDB, vol 136, pp 52254–52255

132. O'Malley, 'The Crown and Ngati Ruapani', (doc A37), p 76. These instructions were cancelled when Richmond made alternative arrangements

133. Binney, 'Encircled Lands', vol 1 (doc A12), p 183

134. Burton to McLean, 1 May 1867, McLean Papers (private correspondence), Folder 192, ATL (cited in OMalley, 'The Crown and Ngati Ruapani' (doc A37), p 86)

135. Burton to McLean, 26 July 1867, object 1024540, MS-Papers-0032–0192, ATL

136. Worgan to McLean, 30 July 1867, object 1014709, MS-Papers-0032–0657, ATL

137. Richardson to McLean, 22 August 1867, object 1022091, MS-Papers-0032–0532 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A 37), p 87

and Burton that the Te Hatepe agreement would be 'strictly adhered to'.[138] Tamihana Te Huata complained in the land court in September 1868 that 'all [had] agreed to cede the block of land described in it, but that a mistake had been made by Mr Worgan the Surveyor in setting off the West boundary. It should run to the source of the Mangapuaka [Mangakapua] stream and not along the range as shewn on the map.'[139] And Biggs, explaining the 'disputed boundary at the Wairoa' to McLean shortly afterwards, wrote that it was caused by 'Burton having gone to the top of a hill' where he 'struck a line from the junction of the Waikaretaheke with Waiau instead of taking the line from the source of a creek.'[140] Biggs thought the change might affect one (settler) section.

It is difficult to know what to make of the series of letters relating to the surveys. On the one hand they may be read as indicating no more than survey activity which we might have expected following the Te Hatepe deed and the proposed extension of ECLTIA boundaries in 1867. Burton's 'external boundaries' might have been those of the Te Hatepe deed; and he might have been at Maungaharuru and Waikaremoana simply in the course of establishing the lie of the land. His letter of 24 July 1867 cited by Binney does not in fact state that he had been instructed to survey the boundaries of the confiscated land as far as Waikaremoana;[141] that is her inference. Richardson's reference to Burton's determination to get 'the back line of the confiscated country carried through' may be a reference to work undertaken to assist clarification of the ECLTIA 1866 boundaries.

On the other hand, the letters taken overall may indeed indicate that Burton was pushing the surveys further inland than he should have, as Marr suggested.[142] Biggs's comments about Burton's taking more land for the Government than had been agreed on, and about the 'disputed boundary' at Wairoa certainly indicate that he was not averse to doing this – though our reading of Biggs's letters suggests that Burton's stretching the boundaries, on what was either one or two occasions, may be counted more a localised problem (though this is not to diminish its importance to Ngati Kahungunu). Biggs's references to the source of the Mangakapua stream, and to the junction of the Waikaretaheke and Waiau rivers, echo the Kauhouroa block boundaries, and it appears that he was referring to survey errors either at the western boundary of the Kauhouroa block, or at the western boundary of the Te Hatepe deed area (the two are fairly close at that point – see explanatory note). What is interesting is that Biggs himself kept a close eye on Burton, and told him to take greater care not to stray over the agreed boundaries. The other evidence referred to above, however, may be read as suggesting a more wide-ranging extension of the surveys. If so, it may have been because Burton hoped to substantially extend the Te Hatepe boundaries, or because

138. Biggs to McLean, 6 November 1867, object 1016504, MS 0032- 0162, ATL
139. Wairoa Minute Book 1, pp 25–26 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 100
140. Biggs to McLean, 28 September 1868, object 1015186, MS papers –0032- 0162, ATL
141. Burton to McLean, 26 July 1867, object 1024540, MS Papers 0032–0192, ATL
142. Marr, 'Crown impacts on customary interests in land' (doc A52), pp 119–120

he considered he had license to survey as far as the Lake because the 'Hauhau lands' that far inland might be needed by the Government, or indeed had been promised to friendly Ngati Kahungunu. Biggs told McLean that he had written to Locke, whom he referred to as the 'responsible person', about Burton's errors – which raises the question whether Locke had been encouraging Burton in extending his surveys. (We have no direct evidence that this was the case.) It is possible that the Government was anxious to get better surveys made of a largely unknown district, and took the opportunity presented by Burton's being on the ground. It is also possible however that the surveys did mark the start of a process of expansion of the area claimed to be under the Crown's authority by virtue of the Te Hatepe agreement, including the oral undertaking to Ngati Kahungunu. If so, was this a deliberate distortion of the Te Hatepe deed agreement, or was it the result of a confused reading of the deed? We were unable to reach a conclusion on this point.

What we can say is that the revision of the ECTLIA boundaries towards the end of 1867 may have been crucial in official misinterpretation of the Te Hatepe deed boundaries. The amending act was passed in October 1867. At the same time, the boundaries in the schedule were extended (as had been flagged from the start of the year, when the minister became aware that they did not include all the East Coast land that had been intended). (See our explanatory note.) Biggs himself appears to have revised his view of the boundaries by 1868, which is somewhat perplexing, given his criticisms of Burton. Subsequently he referred to the Te Hatepe boundaries in terms which echoed the 1867 (rather than the 1866) ECLTIA boundaries. When he appeared in the land court in September 1868 to present the Te Hatepe deed, he reported the Crown's 'agreement with the Wairoa natives in respect of a portion of land within the boundary given in the Schedule to the 'East Coast Titles Investigation Act', by which they agreed to cede a block of land to the Government[,] the boundaries whereof were described in the Deed . . . that in consideration of the cession he would not prefer any claim on behalf of the Govt. to any other land affected by the East Coast Titles Investigation Act South of a line from Paritu to te Reinga thence to Mangapuata, *thence along the range to Waikaremoana*' (emphasis added).[143]

Only part of this boundary (the line from Te Reinga to Paritu) is named in the Te Hatepe deed. Why was the rest different? It seems probable that Mangapuata is Maungapohatu[144]; while the mention of the range extending to Waikaremoana (the Huiarau range) references the boundaries in the ECLTIA 1867 schedule. In our view Biggs may have been referring not to the actual ECLTIA 1867 boundaries, but to what he thought they were. We note that Biggs used Maungapohatu as a marker in survey sketch plans that he prepared to indicate the extent of the Turanga cession he proposed in 1867 (his primary concern at the time); he also suggested it to the Government as a marker in January 1867 when he put forward

143. Wairoa Minute Book 1, pp 25–26 (cited in O'Malley, 'The Crown and Ngati Ruapani', (doc A37), p 100
144. Biggs himself spelt the name Maunga Powhatu; but the statement he made in court was recorded by a clerk.

revised ECLTIA boundaries.[145] What is also important in Biggs's statement to the court is his mention of Waikaremoana. However we construe the geography of the statement he made, Waikaremoana had now made its appearance in an official statement about the Te Hatepe deed boundaries. Soon afterwards Biggs – who had been primarily responsible for seeing the Te Hatepe arrangements carried out – was killed by Te Kooti's kokiri at Turanga, and the task of interpreting the Te Hatepe deed and its boundaries passed to others.

We return now to the Locke deed. The deed begins by citing the ECLTIA 1867, and its schedule, as if it was the Act which had always been intended to apply to the Te Hatepe agreement. But the deed itself, and Locke's report, makes a further leap. The report defines the block which is the subject of the deed 'under the provisions of the East Coast Land Titles Investigation Act' as 'lying between the Waiau and the Wairoa River and Ruakituri Stream, stretching inland to Waikaremoana Lake'.[146] Yet it is clear from a mapping at that time of the ECLTIA 1867 boundaries in relation to the Locke deed boundaries that only a portion of the four southern blocks lies within the ECLTIA 1867 boundaries – both in terms of the actual geographical features as we understand them today, and as officials understood the boundaries at the time. (See our explanatory note at the end of this chapter for further discussion of these issues.)

Despite this, from 1872 Locke consistently referred to the lands stretching to the Lake as 'confiscated', as Belgrave and Young point out. At the Wairoa hui in 1875 (which we refer to below) he stated that:

> This land – that is, up to Waikaremoana Lake – was confiscated during the time of the rebellion . . . On the restoration of peace, some little time elapsed, when the Government relinquished its hold to a large tract of country so confiscated, *in favour of the Natives of the district who had throughout preserved their allegiance to the Crown.* [Emphasis added.][147]

And, as he put it in a later speech at the same hui:

> This land was first confiscated after the first fight at Waikare. A meeting was held at the Hatepe for the purpose of coming to a final settlement of the interest of the Government Natives in the land confiscated . . . payment was made to them in liquidation of their claims to the portion taken over by the Government. The Government then became sole proprietor of that land . . . The remainder of the land, being that which is now under discussion, was returned . . .[148]

Both these statements, it will be noted, refer to an earlier confiscation, but a subsequent return to loyal Maori of the land beyond that 'taken over by the Government' (the

145. See for instance the map of "Biggs' proposed cession", reproduced in Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 146
146. Locke to Ormond, 19 August 1872, AJHR, 1872, c-4, p 30
147. Locke to McLean, 17 December 1875, AJHR, 1876, G 1A, p 1
148. Locke to McLean, 17 December 1875, AJHR, 1876, G 1A, p 8

Kauhouroa block). This raises further questions. Why did Locke think there had been an earlier confiscation – and why, if he thought that the Crown had already returned land beyond the Kauhouroa block, did he assume the Crown still had rights to dispose of such land as it thought fit?

Belgrave and Young, addressing the first issue, considered the possibility that Locke 'deliberately used the idea that the land had been confiscated and was therefore Crown land to be returned as a major bargaining tool'; but initially rejected it on the grounds that Locke was simply confused. Though his confusion may have misled Maori, he did not deliberately mislead them.[149] Under cross-examination, Professor Belgrave seemed to resile from this position, agreeing with counsel for the Wai 36 claimants that there was not enough evidence to be certain either way.[150]

In our view, however, the evidence points either to Locke's simple failure to understand the past history of the Crown's dealings with Wairoa lands, or the status of the lands; or the fact that he was not properly instructed. We think, first, that he was certain he was dealing with confiscated lands; after all, he referred in his report to Ormond to issues arising from the 'old confiscated lands' at Wairoa that he had been sent to resolve.[151] It is likely that this phrase reflected McLean's phrasing in (as yet undiscovered) written instructions, or an oral briefing. Or it may have reflected instructions from Ormond (perhaps passed on from McLean). McLean, of course, should have known what the Te Hatepe agreement said; Ormond may not have. As we have seen, even Biggs was revisiting the Te Hatepe boundaries by the time he got to the land court late in 1868. In such circumstances what Locke needed were very clear instructions. Either he did not get them (and so relied on his own understanding of the situation); or he did (and they were either minimal – as had happened at Mohaka – or were wrong).

Secondly, however, we think that Locke was certain that the Crown retained the right to make arrangements for lands which it had earlier 'returned' to Maori. As he put it in his report after signing the 1872 deed:

> The remainder of the block [that is, beyond the Kauhouroa block retained by the government] then brought under consideration, under the provisions of the East Coast Land Titles Investigation Act, lying between the Waiau River and the Wairoa River and Ruakituri Stream, stretching inland to Waikaremoana Lake, was returned to Natives, with the promise that the Government would divide it into blocks . . . and also decide on the persons to be inserted in grants for the same.[152]

149. Belgrave and Young, summary report of 'War, Confiscation and the 'Four Southern Blocks'' (doc 13), p 10
150. Belgrave cross examined by counsel for Wai 36 Tuhoe, 29 November 2004, transcript, (doc 4.12), p 101
151. Locke to Ormond, 19 August 1872, AJHR, 1872, c-4, p 30
152. Locke to Ormond, 19 August 1872, AJHR 1872, c-4, p 30

It is also our view that Locke's understanding of the situation was shaped by his experience with the Mohaka confiscation. This confiscation had a complex history. Following the taking of Mohaka lands in January 1867 by proclamation under the New Zealand Settlements Act, the Crown decided on an approach not dissimilar to that used at Wairoa. The Mohaka confiscation had been followed not by Compensation Court hearings but by Government negotiation of out-of-court settlements with Maori over which land should be retained by the Crown, and which should be returned to Maori. Two successive Mohaka deeds were signed – the second following negotiations conducted by Locke in 1870[153] There was thus a precedent for the renegotiation of the terms of a deed of this kind. (We discuss this further below.)

An out-of-court settlement was to be reached about which lands the Crown should retain and which lands might be returned to Maori. In December 1867 (eight months after Te Hatepe) the Under Secretary of the Native Department, William Rolleston, advised Hamlin (who was appointed to make the settlement) that 'a deed or deeds of the same character as the Wairoa deed would meet the case. That deed as you are aware was an agreement on the part of the natives to withdraw all claims to one part of the block in consideration of the gift by the Government of another part'.[154] McLean himself then conducted the negotiations, resulting in a deed signed in May 1868. But the deed was not implemented before Te Kooti arrived in the district. The details of the deed, and the reasons why it was renegotiated in 1869–70, do not concern us here. But it is important that Locke was sent to do the job.

In the absence of a copy of Locke's instructions for Wairoa, we note that at Mohaka, he had to negotiate without a copy of the previous agreement negotiated by McLean – despite being told to complete the arrangements outlined there. McLean's instructions to him for Mohaka were confined to an exhortation to finally adjust and dispose of questions arising from the confiscation, to effect as 'equitable a settlement with the Natives as possible', and to make 'large Reserves' for their use.[155] At Mohaka, as at Wairoa, Locke was left with a large discretion.

Locke concluded the Mohaka Waikare agreement in November 1869. And several elements of it were echoed, or imported into the Wairoa 1872 deed (see sidebar over).

Some of the mysteries of the Locke deed are thus better understood in the context of the Mohaka deed: at Wairoa, Locke drew on what he had done at Mohaka. He said so himself to Ormond when he wrote enclosing a tracing of the Wairoa district, showing Government reserves and the deed of agreement, 'with names of persons to be inserted in grants attached thereto, by which you will perceive it has been dealt with in a similar way to the Mohaka Waikare Block'.[156]

153. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, pp 227–241
154. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 228
155. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 232
156. Locke to Ormond, 19 August 1872, AJHR, 1872, C-4, p 30

7.5.3

Key Clauses in the Mohaka Waikare Agreement, November 1869

- Blocks of land to be retained by the Crown were listed, including two sites of redoubts.
- The rest of the land (with the exception of land already purchased) was to be 'conveyed to the loyal claimants'.
- The whole area was to be subdivided into several 'portions' (shown on tracings); 13 blocks were named.
- The Government was to grant certificates of title for those portions to the Maori who were listed in an accompanying schedule (many more Maori were listed in the block lists than signed the 1868 or 1870 agreements).
- The whole of the land was to be made inalienable 'both as to sale and mortgage', and was to be held in trust 'in the manner provided, or hereafter to be provided by the General Assembly for Native Lands held under Trust'.
- The Government reserved the right to enter any other returned land to take timber required for roading, telegraphic or other purposes.[1]

1. Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, pp 235–236

But Wairoa was different from Mohaka in one crucial respect: the Mohaka Waikare lands had been confiscated under the New Zealand Settlements Act; the Wairoa lands had not. The Mohaka lands were thus Crown land; the four southern block lands were not. Locke simply failed to observe that distinction. He was aware that at Wairoa the provisions of ECLTIA, rather than the New Zealand Settlements Act, applied. But we have to assume that he read the provisions of ECLTIA, which he recited at the head of his deed, to mean that because of rebellion by Wairoa and Waikaremoana Maori, their lands had become Crown land. He doubtless knew that Biggs had been to the Land Court in 1868 and had reported that the Te Hatepe deed was 'confirmed', which would have strengthened his belief that the provisions of the Act had been complied with. We must assume that he either concluded or had been told that the Wairoa and Waikaremoana lands had thus all become Crown land. Thus even if those lands had been 'returned' to Mäori in a general sense, the Crown retained rights to ensure their final disposal.

Ultimately, then, the Crown's agent entered in 1872 into an arrangement with Wairoa and Waikaremoana Maori based on the false premise that the lands both including Kauhouroa and stretching well beyond that block had been confiscated, which entitled the Crown at that time to make final arrangements respecting the lands it had earlier promised to 'loyal'

Maori. He wrongly assumed that the Crown had the right to dispose of these lands, and to settle their ownership.

(b) ***What were the Maori signatories' expectations of the Locke Deed and was their decision to sign informed?:*** The deed was signed by 18 Maori signatories. The list was headed by Ihaka Whaanga, Hamana Tiakiwai, Tamihana Huata, Ihakara Horoeata, and Hapimana Tunupaura (of Ngati Kahungunu); and the final signatory was Te Makarini Te Wharehuia of Tuhoe. Nine of the Ngati Kahungunu signatories had signed the Te Hatepe deed. Two (in addition to Te Makarini) would later be described as rebels.[157] The most notable absence from the signatories was Mere Karaka; Pitihera Kopu, it will be remembered, had passed away shortly after the Te Hatepe deed was signed.

Given our conclusions above, it is obvious that the decision of Maori to sign the deed cannot have been an informed one. The Crown's agent himself, as we have seen, was misinformed about the status of the land which he designated by four block names in the deed; he was certain that it was confiscated land being returned to Maori. The whole basis of his explanations to Maori therefore was wrong. And – as we shall show – Locke cannot have understood how some crucial terms of the deed relating to the future tenure of the land were to be given effect to (even if he thought he knew). The terms of the deed remain difficult to understand today. The explanations Locke gave Maori about the grants they would receive can only have been misleading.

We face considerable difficulties in determining Maori expectations of the deed. We do not know what was said at the hui. We certainly have no reports of the speeches such as we have for the Te Hatepe hui. (The *Hawke's Bay Herald* reporter was foiled in his intention of giving an account of Locke's speech by the departure of the mail.) Locke's report is singularly unhelpful; it sheds little light on the important discussions that must have taken place. He simply states that the arrangements were settled '[a]fter a full explanation and careful consideration.'[158] We note that a very large number of people had gathered in Wairoa, knowing that Locke was expected- the newspaper reported 1000 Maori. On 31 July a ceremony was held at which Ihaka Whaanga was invested by Locke with a sword, in honour of his 'unswerving loyalty'. The Armed Constabulary were present, and Whaanga, in moving to the table to receive his sword, walked over 'a large Hau Hau flag' captured at Kairomiromi pa on the East Coast in 1865, which lay on the ground. Major Cumming, who paid tribute to Whaanga's service, added that his standing on the flag 'illustrates the inevitable downfall of anarchy and wrong when antagonistic to order and right.'[159] The discussions about the

157. At the time of the Sim Commission. See Belgrave and Young, 'War, Confiscation and the 'Four Southern Blocks' (doc A131), p 76

158. Locke to Ormond, 19 August 1872, AJHR, 1872, C-4, p 30

159. *Hawkes Bay Herald*, 13 August 1872

new Crown agreement took place shortly after this on 3 August – the same day that the deed was signed.

We consider first why Crown-aligned Ngati Kahungunu – those who had been promised recompense for their customary rights in the Kauhouroa block, and those who had been promised reward for their military service – may have entered into the agreement with Locke. On the face of it, it seems that the Crown delivered less to all of them than it had promised. In submissions later presented to the Sim Commision, it was argued by counsel for loyal groups that 120 Ngati Kahungunu 'rebels' (as opposed to about 86 'loyal people') had been included in the block lists, designating those who would receive Crown grants; some Tuhoe and Ngati Ruapani, of course, were also included (though we now know that there were relatively few).[160] We cannot comment on the number of Ngati Kahungunu who had earlier been deemed to be rebels ; nor do we know whether the inclusion of Ngati Kahungunu 'rebels' in the block lists was at the instigation of Locke – or was at the suggestion of their Crown-aligned whanaunga. It was suggested by the Chairman of the Sim Commission that as the great majority of those who signed the Locke Deed were Ngati Kahungunu 'loyalists', they 'must have consented to their 'rebel' kin being included in the schedule of owners.'[161] In our inquiry, however, counsel for the Wairoa-Waikaremoana trust board drew our attention to Mr Niania's statement that he 'would prefer an interpretation which acknowledged that Maori were well able to construct their lists which acknowledged custom, i.e. ancestral right, [and] use the Crown labels of owner to avoid the labels then of loyalist and rebel.'[162] Getting the lists of owners right, in customary terms, we take it from his comment, was more important to Ngati Kahungunu in 1872 than their various alignments during the period of hostilities. This seems to suggest that tensions within Wairoa Ngati Kahungunu may have abated by 1872 – though Mere Karaka and also Paora Te Apatu were said to have refused to sign because 'rebels' were included among the signatories (and in Mere Karaka's case, because 'rebels' were also listed among the grantees).[163] It is not clear whether Paora Te Apatu did refuse to sign, since one of the signatories' names is recorded as Ipora Apatu –which may be a transcription mistake. But there were complaints from Mahia Ngati Kahungunu within a couple of years that they were not well enough represented in the Locke deed block lists, which are evidence of their disappointment.

We assume however that the Ngati Kahungunu chiefs who signed the deed did so on the basis that it was an acceptable resolution of their claims on the Crown stemming from the Te Hatepe deed – or that they hoped it would be. The designation by boundaries of the blocks to be granted to them, and the drawing up of lists of names for each block must have assured them that they might soon derive tangible benefits of ownership – whether

160. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 108

161. MA 85/2, RDB vol 49, pp 19051–19052 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 108)

162. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 45–46; Richard Renata Niania, brief of evidence (doc 138), p 27

163. Sim Commission minutes of evidence, 3 May 1927 RDB, vol 49, p 19052

in compensation for lost rights in Kauhouroa, or for military service. Marr suggested that the Crown's 'unilateral withdrawal of the boundary back from Maungapohatu and the Huiarau to Erepeti and then across to the Lake' must have been an 'unpleasant surprise' for the Ngati Kahungunu chiefs.[164] We are not convinced that this would have been so. The evidence Marr cites is a statement by Hapimana Tunupaura at the 1875 hui to the effect that Ngati Kahungunu were uncertain about the boundaries of the 'second' confiscation, and were not aware of the extent of land taken by the Government. They had now discovered that 'the land was no longer ours'.[165] This may be read more as a statement of surprise that the Government claimed to have confiscated all the land to the Lake. Tunupaura's brother Tamihana Huata had after all earlier acknowledged the western boundary of the Te Hatepe deed area as being well south of Lake Waikaremoana, rather than a more far-flung boundary point.

If the deed seemed to afford Ngati Kahungunu some comfort – in that it was a positive Government move after a long period of inaction – it is less immediately apparent why Tamarau Te Makarini, a 'senior chief of Tuhoe and a member of Te Whitu Tekau'[166] should have put his name to the agreement. He found himself in difficulty with other Tuhoe leaders soon afterwards for doing so. We have been unable to establish the circumstances in which he attended the hui – but it seems most probable that Locke invited him to come. Belgrave and Young note that 'it is likely' that the meeting was well publicised, given Locke's ride over the land before the meeting as he looked for suitable boundaries for the blocks.[167] They state that 'Tuhoe from Waikaremoana' were present at the meeting – based on the inclusion, and self-identification, of Tuhoe owners in the block lists.[168] This seems a reasonable deduction; the less likely alternative is that Te Makarini himself inserted the names. Professor Binney suggested that Te Makarini was 'dragooned into signing'. He might have been pressured at a time when he was 'isolated in the company of influential government-allied chiefs'; or persuaded by promises of benefits such as a road, the military presence at Onepoto, a school; or threatened by direct confiscation if he did not sign, without receiving any benefits at all.[169] Or, as he said himself later, he might have been concerned to ensure that the 'Urewera' were acknowledged as being owners of the lands.[170]

We think Te Makarini's own explanation should be accorded considerable weight. He later said: 'The land was confiscated, but the Government returned it to us. The basis of our claim, therefore, depends upon the gift made to us of the land'.[171] Professor Milroy, Te

164. Marr, 'Crown impacts on customary interests in land in the Waikaremoana region' (doc A52), p 143
165. 'Notes of a meeting held at Wairoa', 29 October 1875, AJHR 1876, G 1 A, p 7
166. Tama Nikora, 'Waikaremoana', (doc H25), p 38
167. Belgrave and Young, 'War, Confiscation and the Four Southern Blocks (doc A131), p 69
168. Belgrave and Young, 'War, Confiscation and the Four Southern Blocks (doc A131, p 71
169. Binney, 'Encircled Lands', (doc A12), pp 284–285
170. Binney, 'Encircled Lands', (doc A12), p 285
171. 'Notes of a meeting held at Wairoa', 29 October 1875, AJHR 1876, G 1 A, p 4

Makarini's direct descendant, gave it as his view that Te Makarini would have signed the agreement because he thought 'he was deriving a deal beneficial to his hapu/iwi . . . [and] was keeping his hapu/iwi interests maintained in areas where Kahungunu were being listed as claimants'.[172] The mana of his Tuhoe hapu and iwi interests in Waikaremoana, as well as other parts of the Tuhoe Rohe Potae, was paramount to him.[173] The four blocks, we add, were now defined for the first time, and Te Makarini's concerns would immediately have been aroused. Mr Nikora also interpreted Te Makarini's words to mean that 'under the 1872 deed, the Government had acknowledged Tuhoe's interest in what Te Makarini had believed was confiscated land, and moreover, had 'returned' it to them. He also implied that Ngati Kahungunu, in signing the 1872 agreement, had at least acknowledged Tuhoe interests'.[174] In other words, it was important to Te Makarini that both the Crown and Ngati Kahungunu recognised Tuhoe rights.

Such recognition was afforded not only by Te Makarini's signature on the deed, but by the inclusion of the names of a number of Tuhoe and Ngati Ruapani people in the "schedule of names in Crown grants" appended to the Deed. Professor Milroy stated that he could identify with certainty 13 names on the block lists as 'Tūhoe and either Ngati Hinekura, Ruapani, Te Whānaupani, Ngai Te Riu, Te Urewera and Ngati Tāwhaki': these were Te Whenuanui, Ani Wairama, Tuahine Tuahie, Makamaka, Erueti Te Whareparoa, Tamati Tipuna, Te Koari, Rewi Tipuna, Wi Tipuna, Te Hapimana, Hori Whararangi, Te Makarini Wharehuia, Wi Hautaruke.[175] The block under which most of these were listed was Ruakituri; a smaller number were in Tukurangi, and one each under Taramarama and Waikaretaheke. For the Ruakituri and Tukurangi blocks, therefore, the Tuhoe evidence is that Tuhoe names were about one seventh of the total on the lists.

It may well be the case that the Crown's agent Locke was anxious to secure a Tuhoe signature to the deed – since there was evident Crown recognition of Tuhoe rights in the south eastern Waikaremoana lands now the subject of the deed – for the sake of completeness, lest any doubt be cast on the Crown's title now that peace had been made – and that he was either very persuasive (perhaps stressing that the deed afforded recognition of Tuhoe's interests), or (as Binney implied) was not entirely scrupulous in the arguments he used. We are aware that later, at the 1875 Wairoa hui, Locke told the 'Urewera Natives' that had the Crown acquired the land before peace had been made with them, their claim would not have been recognised at all:

> The Government were evincing no small consideration for the Urewera Natives in sanctioning at all the investigation of the claim put forth by them, considering the grounds upon

172. James Wharehuia Milroy, written answers in response to questions (doc H71), p 3
173. James Wharehuia Milroy, written answers, (doc H71), pp 2–3
174. Tama Nikora, 'Waikaremoana' (doc H25), p 38
175. James Wharehuia Milroy, written answers, (doc H71), pp 4–5

which they assert their right, being as they were at the time in rebellion when the land was confiscated and dealt with.[176]

It is possible that Locke used similar arguments in 1872, when (given that peace had just been made with Tuhoe) they could have seemed intimidating. Te Makarini may have feared that Tuhoe could yet be left out of the Government 'gift' ('return') of the land. Tuhoe and Ngati Ruapani were not of course 'in rebellion' in 1867. They had not committed any breach of the peace. They had done no more than defend themselves when Crown troops arrived in upper Wairoa and Waikaremoana – at the cost of heavy casualties. The official view was that they were rebels, and we think it likely that Te Makarini's fears – whether or not fanned by Locke – may have been a factor in his signing. This would be consistent with the view that he was anxious to protect his people's rights.

(c) ***What rights did the Locke deed secure to the signatories, and to those named in the lists for Crown grants? Were the signatories to be trustees?:*** A key question before us is what the Locke deed actually delivered to those who signed it. What arrangements were made for the grant of land in the four southern blocks to them?

The deed sets out complicated arrangements for the land to the south east of the Lake (the four southern blocks) that are very different from the arrangement described in the 1867 Te Hatepe deed. The problems begin with the categorisation of the parties to the deed. The two parties to the Te Hatepe deed (153 Ngati Kahungunu who fought with the Crown's forces, and the Crown) become one party to the Locke deed. The other party to the Locke deed, Wairoa Maori generally, includes those whom the Crown earlier regarded as 'rebels'. The term 'rebel', however, is not used. We note also that while in the body of the deed 'loyal claimants' to the confiscated lands are distinguished from Wairoa Maori generally, the signatories themselves are not differentiated in any way. Presumably Locke would have considered this impolitic, given the Crown's overall aims in concluding the deed. Given that the lands are to be returned to 'the loyal claimants', however, this increases the confusion over the status of the signatories.

The deed specifies that all the land (the 'whole block' designated in the schedule) was to be 'subdivided into several portions [4 blocks] to the Natives mentioned in the . . . schedule.' The land was to be held in trust in accordance with legislative provisions.[177] This brings us to one of the more baffling aspects of the deed. Ms Marr suggested that the chiefs who signed the deed may have thought they were agreeing to transfer the land to themselves and other loyal chiefs 'as both trustees and owners' – at least half of the signatories, after all, were also

176. 'Notes of a meeting held at Wairoa', 29 October 1875, AJHR, 1876, G 1 A, p 8
177. Deed of Agreement, enclosed in Locke to Ormond, 19 August 1872, AJHR, 1872, C-4, p 31

named in lists of owners. But, as she notes, there is no mention in the appended names for Crown grants that those listed were to be subject to 'trusts'.[178]

Nor in fact is there any provision in the deed of agreement that the signatories were to be trustees for those listed for Crown grants. It simply states that 'the whole of the land shall be . . . held in trust in the manner provided, or hereafter to be provided, by the General Assembly'.[179] It is likely however, that the signatories thought they were to be trustees – if that is what Locke told them. It is very possible that he did. McLean told a hui of Ngati Kahungunu leaders in Napier, in November 1873 (when he was under some pressure from Hamana Tiakiwai as to the rights of the 'Hau Haus' in the lands, that 'The land is vested really in you, the chiefs. The names of Hau Haus are inserted, but you hold that land for their benefit.'[180] And at the 1875 Wairoa hui, Locke stated that the 'remainder of the [confiscated] land had been returned earlier,' 'with the proviso that the principal chiefs on the side of the Government be appointed to look after the land'.[181] We note that the Crown had foreshadowed the idea at Te Hatepe of 'loyal' Maori landowners acting as 'guardians' by allowing their 'rebel' kin to live with them on the land. Seventeen of the eighteen signatories were in fact Ngati Kahungunu – which may have meant that the later official explanations seemed plausible. At the same time it is also likely that those named on the lists thought they were to receive Crown grants (and thus become owners, rather than beneficiaries). But the deed itself did not resolve the manner in which the 'conveyed' lands were to be held. We return to this point shortly.

The reference to how the trust would operate is perplexing. We have seen that it was copied from the earlier Mohaka deed that Locke had negotiated. As Belgrave and Young note, the clause invokes existing or future legislative provisions, suggesting that Locke had specific arrangements in mind. But none of the provisions of existing Native Reserve legislation would have fitted the circumstances outlined in the Locke deed.[182] The Crown could not help us in identifying relevant legislation; nor could we find any.[183]

We conclude that if the signatories thought their rights as trustees were secured to them, this was clearly not the case. This was not even spelt out in the deed; and the reference to legislation to create a trust was at best the result of Locke's being poorly informed. If however he had no real basis for suggesting that the law provided, or would soon provide a basis for the kind of trust he had in mind, it was entirely misleading to refer to it in the agreement he put before Maori.

178. Marr, 'Crown impacts on customary interests in land in the Waikaremoana region' (doc A52), p 150
179. Deed of Agreement, enclosed in Locke to Ormond, 19 August 1872, AJHR, 1872, C-4, p 31
180. 'Notes of Native Meetings', 29 November 1873, AJHR, 1874, p 2
181. Locke to McLean, 17 December 1875, AJHR, 1876, G 1A, p 8
182. Crown counsel, closing submissions (doc N20), Topic 6, p 13
183. It is possible that Locke knew a new law was pending – the Native Reserves Act 1873, which contained broader provisions for reserve land. But this seems an unlikely interpretation, especially since Locke had used exactly the same clause in the Mohaka deed, two years earlier.

As we have noted, the drawing up of lists of people who would receive Crown grants further confuses the issue of the role of trustees. We do not know what process there was for drawing up the lists. We do not know why some names were included and others excluded. We cannot agree with the Crown that the naming of people on the Crown grants indicates that a 'reasonably detailed exploration of those with interests in the blocks was conducted.'[184] The lists of owners subsequently put in by both Tuhoe and Ngati Kahungunu at the Land Court hearing in 1875 were much longer. We do not know whether Locke explained at the time how the Crown grants were to be actioned. We do not know what he thought himself. Since he doubtless knew that Biggs had reported that the Te Hatepe deed had been confirmed by the land court, he may have assumed that because of the East Coast legislation his own deed could be similarly confirmed. Or perhaps he assumed that special legislation could be passed for Wairoa, as it had been in Mohaka. The Mohaka and Waikare District Act 1870 validated the Mohaka agreement, and empowered the Governor to cause Crown Grants to be issued to the persons entitled by that agreement.[185] Whatever the case, the clause in the Locke deed about the issue of Crown grants was ineffective. The Crown made no attempt after 1872 to take the Locke lists to the land court to secure the grants for which lists of names had been drawn up.[186]

We conclude that at the very least, Locke's superiors took little care to apprise him of the legal position – and the legal difference between the Mohaka and Wairoa lands – before he was sent to make a final agreement about the four southern blocks. The result was that he entered into what can only be described as unworkable, indeed meaningless, arrangements. Yet to Maori, the deed must have seemed a solemn agreement.

7.5.4 Why was there a land court hearing for the four southern blocks in 1875 and what were its outcomes?

Summary answer: *Hearings to determine the ownership of the four southern blocks began in the land court in October 1875, after Tuhoe applied for title determination. Their decision to apply to the court, surprising on the face of it (given Te Whitu Tekau policies), was the result of developments following the Locke deed. Many Ngati Kahungunu whose names were recorded as owners in the appendix to the Locke deed, and some who were signatories, entered into leases of the newly designated blocks to settlers, which angered the wider Tuhoe leadership. Given the choice Locke offered them in 1874 between agreeing to the leases or going to the land court, Tuhoe chose the court; perhaps because they trusted Locke and his arrangements with*

184. Crown counsel, closing submissions (doc N20), Topic 6, p 12

185. If this was what he relied on, it was not a good precedent. It seems that by 1881 Crown grants still had not been issued to Mohaka Maori. (A provision was included in the Native Land Acts Amendment Act 1881 to enable the land court to determine who was entitled to the land, and to order certificates of title accordingly so that the Governor could issue Crown grants.) Waitangi Tribunal, *The Mohaka ki Ahuriri Report*, vol 1, p 241

186. Marr, 'Crown impacts on customary interests in land in the Waikaremoana region' (doc A52), pp 153–154

Ngati Kahungunu less, and hoped the court might protect their rights in the blocks. Tuhoe suspicions of Locke were increased when the Crown – despite the guarantee in the Locke deed that the land should be inalienable – began to buy up Ngati Kahungunu interests in the blocks, even though the court had not yet determined who the owners were. Right up until the beginning of the hearing they resisted Crown attempts to get them to agree an out-of-court settlement with Ngati Kahungunu, and to take their share of Crown purchase money.

Ngati Kahungunu sold because they were under pressure, or were concerned about future returns from the land. There was widespread indebtedness among them – such that a local storekeeper, R D Maney (a lessee of two of the blocks), had already been able to start buying interests. Those Ngati Kahungunu to whom promises had been made in the Te Hatepe deed had waited a long time for some tangible return – and had only recently begun to receive lease money. A looming court hearing meant that their returns might not be secure. Some – notably the Mahia chiefs whose rights seem to have derived solely from their assistance to the Crown – were unhappy anyway about the share of the lease money they received; to them, the promise of the Locke deed and the leases had not been fulfilled.

Ngati Kahungunu were also under pressure because of growing tension with Tuhoe and the insistence of Crown officials that they should draw a straight boundary line between them to settle what officials erroneously believed was an age-old 'boundary dispute'. Faced with this odd proposition, the two iwi – each feeling backed into a corner – were unable to agree on where such a line might be drawn. Instead each claimed a boundary which represented the furthest reach of their interests. Officials failed to perceive that the increased tension between the iwi arose from Crown acts: the delineation of four blocks in the Locke Deed which cut across the complex pattern of rights of all the affected communities, followed by leases which angered those whose rights were not recognised. By the end of 1874 officials, realising that Maney had started to buy up interests (which he could lawfully do, despite the court not yet having determined the owners), moved to retain Crown control of the purchasing process. Purchase, in officials' view, would solve the 'boundary dispute', and solve the disputes within Ngati Kahungunu about the distribution of lease rentals, as well – as well as facilitate Pakeha settlement. At the end of 1874 officials made an agreement with Maney that he should continue to buy on behalf of the Crown, and embarked on determined purchase of Ngati Kahungunu interests up till the hearing began.

The 1875 court hearing unfolded in a most unexpected manner. It resulted in the revelation (after a question from the judge, and a resulting opinion from the Solicitor-General), that the four southern blocks land had never been confiscated, and that the hearing should proceed under the East Coast Act 1868. This was the first time a legal opinion on the status of the land had been sought. Under that Act, the lands of those the court found to be rebels would be confiscated, if the court should also find that they were owners. Subsequently the 'Urewera' withdrew their claims from the court, and it ordered memorials of ownership

to issue to those whose names were put in by the Ngati Kahungunu 'counter claimants' (the only remaining claimants before the court). The Crown immediately purchased the interests of Tuhoe and Ngati Ruapani and signed separate deeds of purchase with those Ngati Kahungunu whom the court had found to be owners. It entered into a further agreement with those Ngati Kahungunu who had assisted it in the Upper Wairoa/Waikaremoana fighting, made a small payment to Te Waru Tamatea's people (by then living in exile), and completed its purchase of the rights of the settler lessees.

Tuhoe and Ngati Ruapani representatives, who before the hearing had been determined not to sell, signed the Crown's deed of sale because of the threat that the East Coast Act posed to their rights (they feared they could not escape being found to be rebels). They therefore sold under pressure, in order to retrieve something from a situation which should never have arisen. First, the East Coast Act, with its confiscation provisions, had not been enacted so that there could be new confiscations in the region after 1868. Secondly, given the instructions of the Imperial Government, the Act should not have been in force in 1875. Thirdly, the greater part of the southern lands (nearest the Lake) was in fact outside the area to which the Act applied. Officials did not even attempt in 1875 to clarify those boundaries or to explain them to Te Urewera leaders; For Tuhoe and Ngati Ruapani, the court hearing which they had hoped would protect their interests ended instead in a Crown purchase which they had tried to avert. But in the end they saw it as the only way of securing some recognition of their rights. The purchase also extinguished all their customary rights in the four southern blocks, leaving them with four reserves totalling 2500 acres.

(1) *Introduction*

We turn here to the final events which culminated in the alienation of the four southern blocks: the leasing of the blocks following the signing of the Locke deed, the start of Crown purchasing of interests of those it deemed owners, the subsequent investigation of title to the blocks in the Native Land Court and the circumstances in which Tuhoe and Ngati Ruapani withdrew from the proceedings before they had been completed. In the wake of the Tuhoe withdrawal, the court issued its judgment in favour of Ngati Kahungunu, and the Crown completed its purchase of the blocks from all parties. Ngati Kahungunu claimants stated they were pressured to sell their interests in the wake of the signing of the Locke deed. Tuhoe and Ngati Ruapani claimants, as we have noted, are critical of the circumstances in which the blocks were purchased. Specifically they argued that they withdrew from the land court hearings under threat of the application of the confiscation legislation. The Crown submitted that the evidence is 'very limited' for forming a judgment on the issues.

7.5.4

(2) *Why did Tuhoe and Ngati Ruapani apply for a land court hearing?*

In the wake of the signing of the Locke deed there were two key developments which precipitated Tuhoe's decision to apply to the court for title investigation. First, Tuhoe chiefs Kereru Te Pukenui and Hetaraka Te Wakaunua protested to the Government on 15 September 1872 about Te Makarini's signing the deed. Binney states that the chiefs were 'deeply angered', and expressed their opposition in strong terms.[187] The signing of the Locke deed followed shortly after the formation of Tuhoe's governing council, Te Whitu Tekau, in June 1872 (see chapter 7). At that time Tutakangahau wrote to the Government stating Te Whitu Tekau's objects, which were 'to ban the Land Court, surveying of lands and claiming of lands'.[188] Te Makarini, who was on the spot, had understood the possible value to Tuhoe of its participation in the negotiations; but we are not surprised that more distant chiefs had difficulties with the significance of the agreement. In particular, they seem to have thought that Te Makarini had parted with Waikaremoana, and had compromised Tuhoe rights rather than protected them. Te Pukenui stated: 'I am objecting to this disposal of Waikaremoana as I know that it is still mine.' Te Wakaunua wrote of 'Te Urewera' dissatisfaction with Te Makarini 'for his having parted with Waikaremoana' ('Ko te rarurarau o te Urewera ki a te Makarini mo te tukuna a te Makarini i Waikaremoana.').[189] It was another year, however, before a Government agent (Ferris) was sent to talk to Tuhoe – and it was mid 1874 before he reported at hui he had attended he had explained to Tuhoe 'all the clauses of the [Locke] deed, viz timber, trust &c.'[190]

In the meantime there had been a further development. Some Ngati Kahungunu decided to enter into leases of the newly-designated blocks. The listing of owners in the schedule to the Locke deed, as Marr explains, gave certainty to settler lessees, providing 'a very good basis on which to make a lease'.[191] In total there were four lease agreements – one each for the Tukurangi and Waiau blocks with the same group of lessees, and one each for the Ruakituri and Taramarama blocks with one lessee. These leasing arrangements, following so soon after the signing of the Locke deed, aroused Tuhoe opposition further and, ultimately, led to Tuhoe's application to the court.

(a) *Waiau and Tukurangi block leases:* The details of the various leases are important for understanding why Tuhoe came to make this application. The first lease agreements were signed nearly a year after the signing of the Locke deed. On 28 July 1873, Percival Barker, Allen McDonald, Henry Cable and Duncan Drummond leased the Tukurangi block (estimated at 37,000 acres), but excluding a 500 acre reserve for the lessors 'their Successors and

187. Judith Binney, written statement in response to Statement of Issues 3,4,6 & 7 (doc B1(a)), p 48
188. Tuawhenua Research Team, 'Te Manawa o Te Ika', vol 1 (doc B4(a)), p 270
189. Kereru Te Pukenui to Ormond, 15 September 1872, and Te Wakaunua to Ormond and the Government, 15 September 1872 (cited in Binney, 'Encircled Lands', vol 1, pp 285–286)
190. Ferris to Locke, 21 July 1874 (quoted in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 115
191. Marr, 'Crown impacts on customary interests in land in the Waikaremoana region' (doc A52), p 154

their respective Hapus' for 21 years at £100 per annum.[192] On the same date, they also leased the Waiau block, similarly for 21 years at £100 per annum.[193]

The lease documents for the Waiau and Tukurangi blocks were set out with some formality. It was recorded that each of the deeds (which were in English) had been translated and explained to groups of lessors 'in the presence of J P Hamlin Lic'd Interpreter' and in each case this was attested by a witness. Despite this, the leases were void under the Native land legislation, because title to the blocks had not been determined by the land court, and no title documents had been issued.[194] The Native Lands Act 1865, which was in force at the time the leases were entered into, provided that every transfer or conveyance of Native land made before a certificate of title was issued should be void. (s 75) This did not mean, however that such transactions were illegal, as the Turanga Tribunal has found in its consideration of the similar provisions of the 1873 Act. Nor were such transactions discouraged. Settlers could take the risk of making payments to Maori for leasing or purchase, anticipating that Maori would not renege once their land came to be considered by the court.[195]

Marr states that 'it is not clear who actually negotiated and authorised' the deeds, or who received the rentals. She suggests that the 'trustees' – meaning those who were signatories to the Locke deed – took the leading role, since the 'loyal' chiefs had been most anxious to lease the land.[196] The lease documents for the Waiau and Tukurangi blocks provide some clues. The Waiau block document contained a list of 37 lessors. Their names match the 37 designated owners ('names in Crown Grants') listed in the schedule to the Locke deed.[197] Of these, 36 signed the lease document or attached their mark, as did a further 15 who were not listed at the head of the deed as 'lessors'.[198] We note that two of the Waiau block lessors, Maraki Kohea and Te Pirihi Paata, were also signatories to the Locke deed. An addition was made to the lease document in October 1873 – a sworn statement by JP Hamlin – that he had been 'present' with 25 of the signatories on 28 July 1873 and had 'carefully read over interpreted and explained to them the Deed of Lease'. Hamlin's statement was witnessed. Thus, even though the lands had not yet passed through the court, it seems there was an attempt to ensure the lease conformed at least in part with s 62 of the newly enacted Native Lands Act 1873 (which came into effect on 1 January 1874); it required the terms of a lease to be

192. Deed of lease – Tukurangi Block; Toha Rahurahu and others, 28 July 1873, Deed AUC 838-D
193. Deed of lease – Te Waiau Block; Paora Rerepu and others, 28 July 1873, Deed AUC 838-F, in Marr, Supporting Papers for 'Crown impacts on customary interests in land in the Waikaremoana region' (doc A52(a)), pp 20–24
194. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 110
195. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 1, p 441
196. Marr, 'Crown impacts on customary interests' (doc A52), pp 154–155
197. Schedule to Locke deed, AJHR 1872, C-4, p 32
198. Only 35 signed or marked the lease, but Toha was said to have signed for Katarina Tupato. The missing signatory was Ahipene Taumara.

explained to the lessors by an interpreter.[199] Hamlin went on collecting signatures well after the lease had come into effect. Another of his 'declarations' was added to the lease in April 1874. This stated that on four dates in March 1874 he had interpreted the terms of the Waiau block lease to eight lessors, who executed the lease deed in the presence of witnesses. The remainder of the signatures to the lease were probably gathered at this time.[200] Evidently not all of the lessors had signed the lease when it was said to have come into force on 28 July 1873. Potential lessors may have been unaware of the lease, or absent from the region, or may have refused to sign at the time. But by the following March all but one had put their names to the lease.

The Tukurangi block lease document was similar to that for the Waiau block, but differed in several crucial respects. Forty names were listed at the head of the document as 'lessors' of the block. Of those, 36 were the owners of the Tukurangi block as listed in the schedule to the Locke deed. Of the additional four lessors, two were signatories to the Locke deed: Ihaka Whaanga and Hamana Tiakiwai. The other two did not appear either as owners on the Tukurangi block list or as signatories to the Locke deed.[201] At least 45 people signed or made their marks on the Tukurangi lease deed. Eight of those listed as lessors did not sign, and 13 who did sign were not listed as lessors.[202] As with the Waiau block, additions were made to the document. The first (in October 1873) stated that 10 of the signatories had been present in July 1873 when Hamlin interpreted the terms of the lease. Another addition in January 1874, indicates that Hamana Tiakiwai executed the lease in July 1873 – though there is some doubt on this score as the lease document itself shows the date 31 December 1873 pencilled next to his signature. A further addition, in March 1874, stated that 11 individuals had signed the lease, after it had been interpreted and explained to them, over five dates in January and March 1874. These included Ihaka Whaanga on 10 March and Te Makarini on 14 March. These later additions proved to be significant: the Tukurangi block lease was thus approved by the Mahia section of Ngati Kahungunu and at least one section of Tuhoe.

(b) ***Taramarama and Ruakituri block leases:*** Further leases for the remaining two southern blocks were entered into at this time. By November 1873, the Frasertown storekeeper Richard Maney had acquired a lease of the Ruakituri and Taramarama blocks (totalling an

199. s62 of the Native Land Act 1873 provided that no lease was valid unless all owners assented. The Court was to satisfy itself of this and of the 'fairness and justice' of the transaction. A specimen form appended in the schedule to the Act setting out a Memorandum of Lease included a provision, signed by a judge or resident magistrate and any other 'male credible witness', that 'the contents [of the lease] had been explained to them [the lessors] by an Interpreter of the Court', and that they had appeared 'clearly to understand the meaning of the same'. s62 and Schedule, Form 3, Native Land Act 1873

200. The uncertainty on this point arises because the signatures are listed without dates on one page of the lease, and the attestations on the following page.

201. These were Toha Rahurahu and Heremia Wakatoko.

202. An additional two of the signatures are illegible, so we are unable to comment on these.

estimated 82,000 acres) for £500 per annum.[203] We have not sighted the lease documents but assume that each block was leased separately. It is possible that officials were not as involved in facilitating these leases, as they were with those of the other two blocks, and that the documents were less formal. The extent of the Crown's later intervention in Maney's leasing arrangements – specifically, its efforts to acquire his leases – would suggest that officials had been unaware of their terms. It is likely that Maney had access to the lists of owners for the two blocks in the schedule to the Locke deed, either through his local contacts or because they had been published in the AJHRs, and that these were the basis of his leasing arrangements. Officials who later discussed the terms of Maney's leases (namely Burton, J H H St John and J D Ormond) did not specify which individuals, hapu or iwi were the lessors. But subsequent events would suggest that the leases were negotiated with a section of Wairoa Ngati Kahungunu – to the exclusion of Tuhoe and Ngati Ruapani, and of Mahia Ngati Kahungunu chiefs.

(c) ***The aftermath of the southern blocks leases:*** growing tension within Ngati Kahungunu, and with Tuhoe: Maney's leasing arrangements appear to have been the cause of tensions among the Ngati Kahungunu leaders. In November 1873, Ihaka Whaanga and twelve other chiefs complained about the unfair division of the rentals derived from the leases. In a letter to McLean, the chiefs requested payment for services to the Crown in armed combat – a fulfilment of the terms of the Te Hatepe deed.[204] George Burton, McLean's agent, explained that 'the Mahia section consider themselves wronged in as much as they have only one [designated person] in the grants [lists of owners in the Schedule to the Locke deed] while the Wairoa section have over two hundred'.[205] Clearly he was referring to Wairoa names across all the blocks. Gillingham states that the single designated Mahia owner was probably Te Otene Tangihaere, a chief listed in the deed's schedule as an owner in the Waikaretaheke section of the Taramarama block.[206] What the Mahia chiefs' letter shows is that they had expected some kind of benefit from the leases. Ihaka Whaanga, who signed the Locke deed but was not a listed owner, had received nothing. And as we have seen, Whaanga did not sign the Tukurangi block lease until March 1874. Burton commented to McLean that 'the govt [*sic*] has nothing to do with the matter' – the only alternative being to place the blocks

203. Burton to McLean, 13 November 1873, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), pp 817–819; Minute, 20 November 1874, St John memorandum, 25 November 1874, MA-MLP 3/1874/483 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 110; Copy of agreement between R D Maney and J D Ormond, 18 November 1874, MA – MLP 1 1881/373, filed by counsel for Wai 621 Ngati Kahungunu claimants, 14 April 2005 (doc L31)

204. Ihaka Whaanga and others to McLean, 10 November 1873, in Gillingham, Supporting Documents for 'Maori of the Wairoa district' (doc 15(a)), p 791

205. Burton to McLean, 10 November 1873, in Gillingham, Supporting Documents for 'Maori of the Wairoa district' (doc 15(a)), p 790

206. Gillingham, 'Maori of the Wairoa district' (doc 15), p 243

'on equal tenure'.[207] This presumably meant that all the parties to the Locke deed – both those listed as owners and those who were signatories – would be considered owners of the land entitled to derive an equal share of the rentals.

The tensions within Ngati Kahungunu were evident when McLean met with Ihaka Whaanga, Hamana Tiakiwai and other Ngati Kahungunu chiefs at Napier in late November 1873. Tiakiwai complained about their rights under the Locke deed, as opposed to those of Hapimana Tunupaura's people: 'Hapimana got all his people, who were chiefly Hau Haus, inserted in the deeds' he alleged; 'while only four of us, Ihaka, Maraki, Paora, and myself, were nominally inserted in the deeds.' McLean reassured Tiakiwai of their rights under the deed (as McLean understood them): 'The land is vested really in you, the chiefs. The names of Hau Haus are inserted, but you hold that land for their benefit.' In response Whaanga suggested that each party should have received an amount of land proportionate to the number of men who had fought alongside the Crown (as opposed to a suggestion by Burton that the chiefs should receive a greater share). McLean replied that as Whaanga's party comprised 319 men, they should receive £2,942 15s. 6d (at £9 4s. 6d. each).[208] These exchanges, as we have already noted, demonstrate the confusion that persisted in the wake of the Locke deed. Ngati Kahungunu signatories to the deed had clearly misunderstood their entitlements; now this was causing friction between various sections of the iwi. And while McLean made his reassurances to the chiefs, he was beginning to contemplate a payment to the Mahia contingent to settle their claims to the land.

News of the four southern block lease arrangements also caused renewed opposition from Tuhoe. Charles Ferris, sub-inspector in the Armed Constabulary, wrote to Locke following a hui at Ruatahuna in November 1873 at which Tuhoe anger had surfaced. Wi Hautaruke had read out a letter to the Wairoa people in which he advised them he had completed a 'ngakinga kai' ('a plot of land for food cultivation', according to Binney) near Tukurangi, and that the Wairoa people were to remove their tupapaku (their dead). According to Binney, Hautaruke's 'statement [to his own people] announcing the violation of tapu was intentionally provocative' – he was anxious to rouse Tuhoe to defend their rights.[209] In this he succeeded. The following day Tuhoe penned a 'formal complaint' (as Ferris put it) about the leases, but this time about the 'opposite side of the Waikare Taheke' – the Taramarama block – which had only recently been leased to Maney. Ferris wrote that the complaint concerned the leases granted by the 'Wairoa people' which had 'taken in a great portion of what the Urewera's call their land'.[210] The letter was signed by Te Makarini – whose name had been included in the lease deed for the Tukurangi block but who, at this point, had not signed

207. Burton to McLean, 10 November 1873, in Gillingham, Supporting Documents for 'Maori of the Wairoa district' (doc 15(a)), p 790

208. 'Notes of Native Meetings', 29 November 1873, AJHR 1874, G-1, p 2

209. Binney, 'Encircled Lands', vol 1 (doc A12), p 288

210. Ferris to Locke, 3 November 1873, in Binney, Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), pp 639–641

the lease. According to Binney, '[h]e had withdrawn his consent' to the Locke deed.[211] Ferris then advised Tuhoe to apply for a land court hearing. He told them 'to take no further notice of it [the lease], [other] than to simply make a complaint that any lease now made would not hold good, as the land is not yet settled, and that if the present lease even did come into the boundary which might hereafter be fixed for them, it would not then hold good unless they so desired it, they are satisfied with this.'[212] This was the first time an official had mentioned the land court in connection to the four southern blocks – and he made the suggestion to Tuhoe, not to Ngati Kahungunu.

The leases, therefore, had been the catalyst for a host of problems. Crown officials, passing over the underlying causes, put the problems down to what they called 'the disputed boundary' between Tuhoe and Ngati Kahungunu. (We address this matter further in the next section.) In November 1873 McLean 'appointed' the Hawke's Bay Ngati Kahungunu chief Tareha Te Moanunui as a mediator between Wairoa Ngati Kahungunu and Tuhoe. McLean stated that he wished Tuhoe and Ngati Kahungunu to 'settle' the 'boundary' between the two iwi.[213] Tareha facilitated a hui at Waiohiki in January 1874 in which (according to Locke) the 'disputed boundary between Ngatikahungunu and Uriwera [*sic*] at Wairoa' was discussed. Locke wrote that the hui 'ended satisfactorily' and they would resume their discussions at Ruatahuna.[214] Tareha later wrote a letter to Tuhoe seeking to delay their intended meeting to the end of March so that Locke and Ngati Kahungunu could attend. And Ngati Kahungunu leaders did accompany Locke when he travelled to Ruatahuna to meet with Te Whitu Tekau leaders at the beginning of April.

There was some evidence at this time that difficulties over the leases might in fact be easing. Firstly, Ihaka Whaanga and other Ngati Kahungunu chiefs signed the Tukurangi block lease deed; Hamana Tiakiwai (as we noted above) may have signed in December 1873. This suggests that the opposition of the Mahia chiefs had been overcome. Secondly, the Tukurangi block lease had received at least some support from the Waikaremoana leaders. Te Makarini – who did not attend the Te Whitu Tekau hui of late March and early April 1874 – also signed the lease at this time, along with the Tuhoe and Ngati Ruapani leaders Wi Hautaruke and Hori Wharerangi. (Of the four Tuhoe leaders who were listed as lessors on the Tukurangi block lease, only Te Whenuanui did not sign the lease. We can confirm, from other evidence submitted to us, that Te Makarini's signature on the deed is in his hand.[215]) Binney says the 'marked absence' of the Waikaremoana chiefs from the March and April

211. Binney, 'Encircled Lands', vol 1 (doc A12), p 288
212. Ferris to Locke, 3 November 1873, in Binney, Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), p 641
213. 'Notes of Native Meetings', 29 November 1873, AJHR 1874, G-1, p 2
214. Locke to McLean, 10 January 1874, MS-Papers-0535–027 (folder 90), ATL
215. See, for example, Te Makarini to Cumming, 22 September 1871, in Binney, Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), pp 366–368

Ruatahuna hui was due to the 'running argument over the southern Waikaremoana land.'[216] It is possible that the chiefs saw some benefits that could be derived from leasing; whereas the majority of Te Whitu Tekau remained steadfast in their opposition.

But the wider Tuhoe leadership remained concerned about the impact of Ngati Kahungunu activities on their own rights in the four southern blocks lands, and they took the matter up with Locke when he attended the Ruatahuna hui at the beginning of April. The result was that Locke, like Ferris, suggested that Tuhoe take their concerns to the land court. In his view the dispute between the two iwi was about 'division of the rents'. Locke, according to a record of the hui made by Richard Price, suggested 'two ways of settling the matter': 'either to lease the land and come to an arrangement for dividing the money, or take the lands through the Native Lands Court, and there divide it'.[217] In other words, if the court found they had rights in the land, a boundary might be drawn, and Tuhoe might partition out the land to which they were granted title. In his own subsequent report, Locke said that he had found Tuhoe suspicious 'that the desire of the Europeans is to get possession of their lands'. They wanted to secure the return of their lands 'included in the confiscated blocks'. But Locke told them that this would not happen; and that 'to settle the disputed title' to the land at Wairoa and Waikaremoana 'handed back' by Biggs 'they and the Ngatikahungunu had better take it through the Native Lands Court'.[218]

It appears therefore that by early 1874 the Crown had tacitly acknowledged some of the difficulties with the Locke deed, but still hoped to facilitate an outcome that saw the main provisions of the deed maintained. Officials had not yet admitted that the deed was fundamentally flawed. They appeared to have met with some success with the Waikaremoana leaders and with reducing the tensionswithin Ngati Kahungunu. But they had not been able to reconcile the wider Tuhoe leadership to the leases which were the outcome of the deed; and they saw the origins of the lease problems simply in disputes over customary rights. They failed to acknowledge the divisive effect of the Crown's actions over the past nine years, and Locke's creation of four blocks with arbitrarily defined boundaries on lands with a very complex history. The officials' solution was to suggest that Tuhoe took the land to the court. The court could arbitrate differences between the iwi. At the same time, court-awarded title would also have the advantage of replacing the unworkable arrangements embodied in the Locke deed for 'names in Crown grants'.

Officials' concerns about Tuhoe opposition may explain why they made the first suggestion to Tuhoe rather than Ngati Kahungunu that applications for the four blocks be proceeded with; in the circumstances, this may have been deemed a politic move. But they cannot have taken such a step without contemplating various outcomes. They may have thought it possible that Tuhoe claims would be dismissed. This would mean that the Crown

216. Binney, 'Encircled Lands', vol 1 (doc A12), p 291
217. Robert Price, *Through the Urewera Country*, (Napier: Daily Telegraph, 1891), p 45
218. Locke to the Native Minister, 30 May 1874, AJHR, 1874, G2, p 20

could keep its promises under the Te Hatepe deed, allowing Ngati Kahungunu to lease the land unimpeded. But there was also a possibility that Tuhoe might be awarded part of the land (as Locke had already admitted) secure a partition in the court, and disrupt the carefully-arranged leases. Or they might be awarded all the land. Either of those latter outcomes would jeopardise the Crown's ability to fulfil its promises to various groups of Ngati Kahungunu – unless it began purchasing Tuhoe interests. There was a further danger too. If Ngati Kahungunu claimants were awarded title this would imperil the recent arrangements whereby Hamana Tiakiwai and Ihaka Whaanga would receive a share of the Tukurangi lease returns. A court award of all or part of the blocks to the customary owners – similar to the lists in the schedule to the Locke deed – would presumably have excluded them. In November 1873, as we have seen, McLean maintained the fiction of the Locke deed by assuring the loyal Ngati Kahungunu chiefs that the land was really held by them; but he was also contemplating other options, suggesting that they might instead receive a payment for their services. It is likely, therefore, that even if the Government had not begun active planning for purchasing the land at this point, it was already contemplating purchase as a potential solution to various problems.

(d) ***The Tuhoe application to the land court:*** In what was a remarkable turn of events, Tuhoe decided to accept the advice of officials and make an application to the court. On 5 May four separate applications for investigation to the Ruakituri, Taramarama, Tukurangi and Waiau blocks were lodged.[219] The applications were gazetted in the Kahiti on 5 October 1874. Each was stated to have been made on behalf of Ngati Kahungunu and Tuhoe. They show that the named applicants for each of the blocks (with the exception of Wi Hautaruke, who appeared as a claimant in both Tukurangi and Ruakituri) were different; that the tribes listed in each case were Ngati Kahungunu, and Tuhoe; and that the descriptions of the boundaries were unusually spare, referring simply to the two rivers which bounded each block.[220] Wi Tipuna, one of the chiefs who identified as Ngati Kahungunu, and who was listed as an applicant, later publicly stated that he had not consented to his name being included in the application by Wi Hautaruke.[221] It is possible, therefore, that other Ngati Kahungunu names had been inserted in the applications; but no other objections were made. By the time of the court hearing, Ngati Kahungunu parties appeared as counter-claimants.[222] Whatever the case, it is clear that the applications were instigated by Tuhoe.[223] And they were made not only by the

219. O'Malley, 'The Crown and Ngati Ruapani', (doc A37), p 114
220. Kahiti o Niu Tireni, 5 Oketopa 1874, p 40
221. 'Notes of a meeting held at Wairoa', AJHR, 1876, G1-A, p 7
222. Napier Minute Book 4, 4 November 1875, p 66
223. Other speeches from a hui held at Wairoa in October 1875 (discussed below) suggest this was so. Toha Rahurahu, for example, said that it was 'the Urewera' who had 'decided that the matter should come before the Land Court, to which course I will acquiesce'. 'Notes of a meeting held at Wairoa', AJHR, 1876, G1-A, p 4

Waikaremoana chiefs, but by a broad range of the Tuhoe leadership, including Te Pukenui, Te Makarini, Tamaikoha, Hori Wharerangi, Wi Hautaruke, and Tutakangahau.

This decision by the wider Tuhoe leadership was all the more remarkable given Te Whitu Tekau's policy opposing the operation of the Native Land Court in their rohe. How then might we explain it? We have seen that there was continuing discussion among Tuhoe about how to resolve the situation: the Waikaremoana leaders decided to give their consent to the leases in return for promised benefits, whereas other Tuhoe leaders remained steadfast in their opposition. Locke presented them with an option of either simply agreeing to the leases or going to the court. Both options were in conflict with Te Whitu Tekau's policies. But if Tuhoe agreed to the leases they would be putting their trust in Locke, whom they viewed primarily as an ally of Ngati Kahungunu. They mistrusted Locke, it seems, more than the court; caught between a rock and a hard place, they chose the court, which might at least give them a fair hearing. Hori Wharerangi later gave other reasons for making the application: because of concerns over the various boundaries laid down by the Government, Tuhoe desired to have their rights clarified by an independent body. 'Judging from the many interests apparently involved, we deem it advisable to have the matter dealt with by the Court.'[224] Tamati Kruger addressed the dilemma Tuhoe faced in his evidence: 'No matter where you turn there is trouble. If trouble was to befall you, that is a Tūhoe saying; the suspending of the patu. That is why they were so vociferous in talking to the "Maori Land Court" to carefully scrutinize the ownership of those lands.'[225] Tuhoe was not uneasy simply about the leases Ngati Kahungunu had initiated; their wider concern was to protect their rights in the land. We agree with counsel for Wai 36 Tuhoe, who said that the Tuhoe application was ultimately the result of the flawed terms of the Locke deed. Tuhoe had 'little option' but to take the lands to the court.[226]

The applications to the court however did not reduce tensions. Tuhoe opposition to the leases remained, and officials continued to apply pressure for them to cooperate with the Government. In July 1874 Charles Ferris travelled through Te Urewera to discuss matters with the leaders. In a subsequent letter, he stated that 'the Urewera' were 'very bitter' toward Ngati Kahungunu due to 'land leasing', and 'threatening language had passed' between the iwi. 'They are anxious that the boundaries should be adjusted as speedily as possible.' Ferris reported further:

> After a great deal of explanation I managed to get them to understand the difference between the land at Waikaremoana and papatipu [land under customary title], I explained to them all the clauses of the [1872] deed, viz timber, trust &c, and told them that if the Govt. had desired they could have given the land to any other tribe, and ignored both them and

224. 'Native meeting, Wairoa', AJHR, 1876, G-1A, p 2
225. Tamati Kruger, transcript of addition evidence at Waikaremoana (English), undated (doc H72(a)), p 6
226. Counsel for Wai 36 Tuhoe, closing submissions (doc N8(a)), p 39

Ngatikahungunu, so that instead of quarrelling about it they ought at once to drop into the Government's views concerning it. I hope to have something very satisfactory to report to you after their next meeting.'[227]

Despite the Tuhoe application to the court, officials seem still to have hoped that an alternative solution would be reached and that the wider Tuhoe leadership could be pressured into agreeing to the leases.

(3) *Why did the Crown decide to purchase the land?*

By the end of 1874, however, officials changed tack, and embarked on the purchase of the blocks. They had decided not to wait for the land court process to take its course. They had also evidently decided that the Crown's guarantee to Maori in the Locke deed that the land was to be inalienable by sale, could be ignored. Officials now began to buy up interests; even though they were not certain who the owners were, and knew that a court hearing to determine ownership was imminent. As the Turanga Tribunal observed, s 87 of the Native Land Act 1873 made pre-court individual dealing void for private purchasers, but it did not bind the Crown.[228] Such pre-title negotiations were common Crown practice at the time. Previous tribunals have condemned the practice on a number of grounds, among them the fact that it left purchase agents to identify and negotiate with those they identified as having rights in the land 'without the benefit of any independent ascertainment of their interests'.[229] One of the reasons why the land court had been established was precisely to ensure that Government agents could not pick their own owners, so to speak, and ignore those who might not wish to sell.[230]

Our reading of the evidence is that the Crown made the decision to purchase the blocks in late 1874 – and not before. We do not accept Binney's view that the Crown adopted a deliberate strategy from as early as 1866 that led to alienation, and that from 1873 McLean was intent on forcing the purchase.[231] In October 1874 Burtonhad changed his mind about how the Mahia chiefs' complaint over the division of lease rentals should be handled. Earlier he had suggested that McLean 'do nothing'. Now he recommended that McLean purchase the blocks for the sum of £8000 or £9000, so as to avoid further 'unpleasantness' among Ngati Kahungunu.[232] (Although this followed Te Waru Tamatea's offer to sell his interests in the blocks in August 1874, we cannot think that Te Waru's offer influenced Burton, or that it triggered the Crown purchases. Te Waru's people were in exile at Waiotahe and, as will see, the Government finally made them a small payment only when it had paid all others whose

227. Ferris to Locke, 21 July 1874, in Binney, Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), pp 562–564
228. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 441
229. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 591–592
230. Waitangi Tribunal, *He Maunga Rongo*, p 463, 466
231. Binney, 'Encircled Lands', vol 1 (doc A12), pp 189, 286, 307–318
232. Burton to McLean, 17 October 1874, in Gillingham, Supporting Papers for 'Maori of the Wairoa district' (doc 15(a)), p 787

rights it recognised.) This was despite what appeared to be a solution to this problem in March, when Ihaka Whaanga signed the Tukurangi block lease. It is possible that disagreements persisted, and Burton took the view that the only solution was to begin purchasing.

McLean, the Native Minister, subsequently visited the region in November 1874, and adopted Burton's recommendation. The reasons for the Crown's decision to start purchasing the blocks were spelt out in a memorandum recording McLean's arrangements for land purchases in Hawkes Bay.[233] We comment on each point in turn.

First, it referred to the 'unsettled state of the Wairoa natives' which was attributed to 'complications connected with their lands' but also, interestingly, to the influence of the so-called 'repudiation movement'. This was a Hawke's Bay-based movement which led resistance to the land court in the wake of the bad reputation it had achieved in the district, and the extent of land alienation which had followed its work.[234] The movement was led by Henare Matua, who travelled to hui throughout the wider region and gathered support among Maori. The memorandum drew a direct link between 'uneasiness as to the future tranquillity' of Wairoa, and the need for Government intervention to keep the peace before further negotiations took place between private individuals and Maori. It is unclear to us why officials thought that land purchase would counter repudiation –though they may have wished to buy before the movement got any stronger.

Secondly, the memorandum referred to further 'jealousy' within Ngati Kahungunu between those who had assisted the Government in the recent fighting and had lands assigned to them, and the original owners of the lands. As we have seen, this particular tension eased, but perhaps not entirely – and the land court hearing risked reviving them. McLean would hardly have needed Locke's reminder, once the land court hearing started, about the position of 'loyal east coast natives [to whom promises had been made] . . . who have no ancestral claim . . . on the land[,] therefore their names will not appear in the grantees or memorial of ownership'.[235] The approaching court hearing would make it impossible to maintain the Locke deed fiction of the status of the 'trustees'.

Thirdly, the memorandum emphasised the mutual antagonism between 'the Uriwera' and the 'Wairoa natives' over what was said to be 'the undefined state of the boundary' between them. Officials had already tackled this by suggesting that Tuhoe go to the Land Court – but they were aware that an award of part or all the blocks to Tuhoe posed dangers, from the Government's point of view, to the leases of the blocks – and thus to its relationship with some groups of Ngati Kahungunu.

Fourthly, the memorandum recorded what seems to us a crucial trigger: that a 'large extent' of the lands at the centre of the 'complications' had been leased or partly purchased

233. Minute, 20 November 1874, St John memorandum, 25 November 1874, MA-MLP 3/1874/483 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), pp 116–117)
234. Gillingham, 'Maori of the Wairoa district' (doc 15), p 249
235. Locke to McLean, 5 November 1875, MA 1 1915/2346, box 172, NA

by RD Maney, the storekeeper at Frasertown. The Native Minister decided therefore that Maney's interests in six blocks (including the four southern blocks) should be bought out. (We consider Maney's purchases below.)

The memorandum concluded by expressing the hope 'that the Government having once obtained possession of that part of the Country will be enabled to deal equitably with the natives interested, and to acquire, with due regard to the claims of native owners, a large extent of Country for the purposes of settlement.' What was missing in the Crown's account was any acknowledgement that Crown acts and policies underlay the 'unsettled state' of the Wairoa people referred to in the memorandum. Although officials may have believed that the problems with the four southern blocks which they identified were real, and could only be resolved by purchase, they painted a very incomplete picture. Despite the reference in the Crown's memorandum to the importance of settling the land, we do not think this explains the Crown's decision to embark on its purchase. The overwhelming reason, in our view, was that through the Te Hatepe deed and the Locke deed arrangements, and through officials' assumption that the confiscated lands extended as far as the shores of Lake Waikaremoana – that is, into lands claimed by Tuhoe and Ngati Ruapani – the Crown had created a raft of problems which would not go away. Purchase must have seemed an ideal solution to officials because all those with rights and interests could be paid. And from November 1874, McLean and other officials made various arrangements to expedite the purchase of the blocks.

(a) ***Maney's purchase of interests in the southern blocks:*** Maney's purchasing activity was a new factor in the situation – and it seems probable that it tipped the balance for the Crown. His activity appears to have been primarily in the Hangaroa block – to the north east towards Turanga – but was also conducted in two of the four southern blocks. Since the blocks had not yet been before the court, Maney's purchasing was void, but not illegal. Section 87 of the Native Land Act 1873, as the Turanga tribunal pointed out, 'made pre-court individual dealing unenforceable, but did not *ban* it."[236] In fact the section was not intended to stop individual dealing. Like other settler purchasers, Maney took the risk that those whom he paid for their interests might not be awarded title, or that if awarded title they might renege onthe sale – but it was clearly a risk he believed would pay off. When he was ready, he could have gone to the court with a majority of owners who had sold their interests and subsequently received title to some or all of the land. His purchasing activity therefore constituted a significant danger to the Crown and the promises it had made to Maori of the region.

The Crown's first step was to buy out Maney's leasing arrangements and other interests, and to turn him into an agent for the Crown to assist in the land purchases. A formal agreement signed with J D Ormond on 18 November 1874 set out the terms by which

236. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 441

the Government would 'purchase all the estate interest and goodwill' of Maney in the four southern blocks and in the Hangaroa and Waihau blocks.[237] The agreement shows that officials were willing to take advantage of the situation to achieve their aim of acquiring the blocks. Maney was not simply removed from the picture so that Crown purchasing could begin; rather, by the terms of the agreement, he was to be brought into the Crown's employ to conduct purchase negotiations. The knowledge acquired by Maney through his purchase and leasing arrangements would thus be used to the Crown's advantage in its acquisition of the blocks.

The agreement had six clauses. The first clause dealt only with Maney's advance purchase payments. In essence, it provided that, upon Maney supplying a full statement of the sums he had advanced to native proprietors, the Government would purchase, for £3000, all the 'proprietory rights' Maney had so acquired. Although the schedules to the agreement indicate that Maney had made advance purchase payments only in the Hangaroa block,[238] other evidence shows that he had also begun advancing sums in the Ruakituri and Taramarama blocks.[239] The second clause dealt with Maney's leases of the Waihau block, and of two of the four southern blocks – Ruakituri and Taramarama.[240] He was to 'convey and assign' to persons appointed by the Government 'all his estate, interest and goodwill whatsoever' in those blocks, and hand over 'all leases agreements and other documents in his possession' relating to them. Thus, Maney was to transfer to the Government all his rights under the leases. The third clause of the agreement stated that Maney would assist the Government in negotiating with the Native proprietors for the lease or purchase by the Government of all the lands subject to the agreement. The payments to Maori would be made not by Maney but by a Government officer, to be appointed. Clause four then provided that, in return for transferring his rights under the leases, and for assisting in the Government's lease and purchase negotiations, Maney was to be paid a commission on the completion of any lease 'containing a purchasing clause to the government', and on every 'conveyance' to the Government of any portion of the lands. The amount of the commission was to be proportionate to the area of land involved, to a maximum of £3000 in the event that the whole of the lands dealt with in the agreement were leased or conveyed to the Government. The fifth clause of the agreement allowed Maney to keep sheep on land subject to the agreement for two years, free of charge, unless the Government gave him notice that it needed

237. Copy of agreement between R D Maney and J D Ormond, 18 November 1874, MA – MLP 1 1881/373, filed by counsel for Wai 621 Ngati Kahungunu claimants, 14 April 2005 (doc L31)

238. The third schedule stated: 'Lands not passed the Native Lands Court and not held under any lease but on which advances have been made by RD Maney'. The schedule identified the Hangaroa block (exclusive of the Waihau block, which was said to be within the Hangaroa block), and estimated at 170,000 acres.

239. St John to McLean, 23 April 1875, MA 1 1915/2346, NA-W (cited in Belgrave and Young, 'War, Confiscation and the four southern blocks' (doc A131), p 99)

240. The Tukurangi and Waiau blocks were said to have been 'leased to McDonald'. Second Schedule, Copy of agreement between R D Maney and J D Ormond, 18 November 1874, MA – MLP 1 1881/373, filed by counsel for Wai 621 Ngati Kahungunu claimants, 14 April 2005 (doc L31)

any portion of the land for settlement. The final clause contained the Government's promise to pay Maney for any permanent improvements he had made to the land, their value to be determined by arbitrators.

The complexity of the November 1874 agreement and of Maney's involvements in the lands to which it applied was such that subsequently there was considerable confusion about what had in fact been agreed. There was a clear distinction in the schedules to the agreement between three areas: the Hangaroa block lands (170,000 acres), in which Maney had purchased interests; the Ruakituri and Taramarama blocks (82,000 acres), which were 'leased to RD Maney at an aggregate yearly rent of £500'; and lands in Tukurangi and Waiau (75,000 acres) which were 'leased to McDonald'. Despite this distinction, officials said they only discovered after the agreement was signed that Tukurangi and Waiau were leased to others (that is McDonald, Barker, Cable, and Drummond). In April 1875, after a meeting between Maney, JHH St John, Locke and Hamlin, St John reported to McLean that Maney insisted he had no interests in Tukurangi and Waiau and so had not agreed to sell them to the Government. When St John had put to Maney that the agreement recorded he had interests in those blocks, Maney had replied that such a reference must have been included in error[241] In fact, it appears that St John was confused: the agreement contains no reference to Maney having interests in Tukurangi or Waiau.

It is not entirely clear how the Crown's payments to Maney were resolved. St John had evidently hoped that the Crown would get, for £3000 under clause 1 of the agreement, all Maney's interests in Hangaroa and in all four (not just two) of the southern blocks. Therefore, unless Maney could prove he should receive £3000 for what he had actually purchased (outside Tukurangi and Waiau), the amount paid to him should be reduced. By April 1875, however, Maney had not supplied the details of the moneys he had advanced to Maori. Then in May 1875, Maney wrote to McLean asking that the 'balance' of his commission payment be paid as soon as the boundaries of reserves were marked off.[242] Maney was reminded by RJ Gill, the Under-Secretary of Native Affairs, that the maximum amount of commission (a further £3000) was payable only upon the Government obtaining clear title to all four of the southern blocks and to Hangaroa and Waihau – an area of 327,000 acres. It had been discovered, however, that two of the southern blocks (Tukurangi and Waiau), totalling 75,000 acres, were leased to Cable and McDonald. Since the Government was negotiating separately to purchase those blocks, Maney's commission would be reduced.[243] In July 1875 Maney was reported to be substantially in debt, and pressing for another £7000 to be advanced to him – evidently to recover the debts Maori owed him. But Ormond told

241. St John to McLean, 23 April 1875, MA 1 1915/2346, NA-Wellington (cited in Belgrave and Young, 'War, confiscation and the four southern blocks' (doc A131), pp 98–99

242. Maney to McLean, 22 May 1875, MA 1 1915/2346, NA-Wellington (cited in Belgrave and Young, 'War, Confiscation and the Four Southern Blocks' (doc A131), p 99)

243. Gill to Maney, 22 May 1875, MA 1 1915/2346, NA-Wellington (cited in Belgrave and Young, 'War, Confiscation and the Four Southern Blocks' (doc A131), p 99)

Maney the Government would insist on paying Maori directly; and the storekeeper must wait until they paid him themselves.[244]

In the wake of Ormond's agreement with Maney, the Crown signed a further agreement to buy out the lessees of the Waiau and Tukurangi blocks, Barker, MacDonald, Cable and Drummond in May 1875. For the sum of £1500 Barker and his co-lessees were to 'execute assignments' of those blocks to the Queen for all the 'interests' they had acquired by virtue of the deeds of lease (though they could purchase 5000 acres in the vicinity of their homestead once the native title had been extinguished).[245] In 1877 they were paid a further sum of £1500 in extinguishment of the promise that they could repurchase 5000 acres.[246] Thus, as O'Malley pointed out, Barker and his co-lessees had secured £3000 for lands 'to which they held no legal title, and on which they cannot have paid more than a few hundred pounds in rent.'[247]

These transactions – and particularly Ormond's formal agreement with Maney – show how determined the Government was by this time to acquire the four southern blocks. It was able to take advantage of advance payments already made by Maney; and at once offered him a commission to assist the Government in its aim to acquire, by lease (with purchasing clause) or purchase, all the land.

At the end of 1874 Josiah Hamlin was commissioned to arrange purchases of the land at Wairoa, under the direction of Agent for the General Government JD Ormond.[248] As well as £2.2.0d a day, he would receive a commission of a halfpenny per acre on all lands handed over to the Government with 'a clear title'. In his instructions to Hamlin, Clarke stated that he was 'not to enter into negotiations for blocks of land, or make advances upon them without having first reported upon them stating their quality and price, and obtained the approval of the Government to the purchase'.[249] Hamlin's instruction makes it clear that officials saw the circumventing of the land court's title investigation functions in this way as quite unremarkable.

The Crown's strategy during 1875 was to make payments to Ngati Kahungunu first, and then to tackle Tuhoe and Ngati Ruapani. By the end of May 1875 Hamlin had paid £302.7.0d to Maori for their interests in Ruakituri and Taramarama; and the same amount

244. Ormond to McLean, 8 July 1875 (quoted in Belgrave and Young, 'War, Confiscation and the Four Southern Blocks' (doc A131), p 100

245. The price to be paid for purchasing these 5000 acres was said to be 'at a rate proportionate to the total cost' incurred by the Crown in buying these 2 blocks with an 'additional 10 percent' and in estimating such total cost the £1500 shall be included. Memorandum of Agreement between P Barker and others and S Locke, 25 May 1875, in Supporting Papers for submission of Duncan Moore on Panekiri Maori Trust Board at Patunamu State Forest (doc A45(b)), pp 47–49

246. Deed of conveyance, 7 August 1877, in Supporting Papers for submission of Duncan Moore on Panekiri Maori Trust Board at Patunamu State Forest (doc A45(b)), pp 50–52

247. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 118

248. St John memorandum, 20 November 1874, MA-MLP 3/1874/483

249. Clarke to Hamlin, 8 December 1874, Native Land Purchase Department, Outwards Letterbook, MA-MLP 3/1, National Archives (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 117)

on advances for interests in the Waiau and Tukurangi blocks. Although he did not specify to whom the advances had been paid, O'Malley states it is clear that the money had gone to Ngati Kahungunu, who had 'consented to the alienation of the lands'.[250] But Hamlin understood that these were not the final payments to be made to Ngati Kahungunu. In mid-June he visited Waikaremoana where he talked with a number of 'Urewera' chiefs and arranged for them to travel to Wairoa. Subsequently he asked McLean whether he should 'settle about the price for [the] blocks with the other natives' should he fail to come to an agreement with the 'Ureweras'.[251] Although no response has been uncovered, he met with the chiefs in Wairoa in early July. The reports of this meeting and those that followed indicate that pressure was being applied to Tuhoe and Ngati Ruapani. Hamlin told a settler, JG Kinross, that the 'Uriwera' were 'very troublesome in disowning all alienations of their lands which the Wairoa natives had parted with'.[252]

Hamlin then accompanied the chiefs to Napier where they met with Ormond. On 8 July, Ormond reported to McLean that:

> The last two or three days I have been engaged with the natives about the Wairoa purchases & the Urewera have pretty well given in. They were rather inclined to bounce when they commenced the talk & asked what right you had to deal for the Blocks with Ngatikahungunu without their presence & assent. I walked into them & told them they owed everything to your clemency – now they only ask a little time to explain matters to the Tribe & the survey of the reserves is to be made at once.[253]

In other words, Crown recognition of Tuhoe and Ngati Ruapani rights to lands in the south eastern lands – evident in Te Makarini's participation in the Locke deed, the inclusion of Tuhoe names in the block lists in 1872, the discussions with Tuhoe and Ngati Ruapani over a sustained period, and the encouragement they had received to seek a land court hearing – was conditional. When the Crown was ready to impose its own solution to the dilemmas it had created, Tuhoe and Ngati Ruapani could be reminded of that fact: they might be entitled to take their case to the land court, and to receive payment but, they were told, this was a concession on the part of the Crown. In fact, this was quite wrong: the land was customary land. Only the Crown's mistaken extension of the so-called confiscation boundaries into the district by the Locke deed had resulted in its assumption of authority over the land, and had placed Tuhoe and Ngati Ruapani in a vulnerable position.

250. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), pp 118–119
251. Hamlin to McLean, 17 June 1875, MS-papers-0032–0096, ATL (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 119)
252. Kinross to McLean, 2 July 1875, MS-papers-0032–0380, ATL (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 119)
253. Ormond to McLean, 8 July 1875, MS-papers-0032–486 (cited in O'Malley, 'The Crown and Ngati Ruapani', (doc A37), p 119). See chapter 5 for an explanation of the verb 'bounce'.

7.5.4

(4) *Was there an intractable 'boundary dispute' between Tuhoe and Ngati Kahungunu?*

The Crown argued before us that its offer to purchase the land providedan 'attractive alternative' to Ngati Kahungunu and Tuhoe, who were struggling to resolve their 'significant boundary issues'.[254] Here we pause to consider this argument in the light of events as they unfolded after the Crown's decision to purchase the land, and before the land court hearing.

The land court hearing of the four blocks was set down to begin on 28 October 1875, and was advertised in the Kahiti of 18 October by notice dated 14 September.[255] By this time Hamlin had reported to his superiors that he had settled the price for the purchase of the blocks with those Ngati Kahungunu the Crown considered to be owners. On 9 October he reported that the price for the Waiau and Tukurangi blocks would be £4700, plus 2000 acres of reserves in each block. Three days later he reported having settled the Ruakituri and Taramarama blocks for £5100 and 3000 acres of reserves.[256] Ormond then requested funds from McLean – an advance of £9800 – and told him that Hamlin and Locke were attending the land court on 28 October 'to see Wairoa blocks passed through the Court and then to complete purchase'.[257] McLean approved the request.

By this time Crown officials simply hoped to wrap up the purchase of the blocks. Yet there was one major outstanding matter – despite Hamlin's suggestions that the arrangements for the purchase had been completed. As we have seen, the Government had hoped that Tuhoe had 'given in' and would take their payment. But this did not happen, and the court hearing approached without a resolution to their issues. As Tuhoe and Ngati Ruapani arrived in Wairoa en masse, officials still wanted the question of ownership resolved out of court; the court might then rubber-stamp the arrangements. When the case was called on Thursday 28 October, Hamana Tiakiwai (probably on Locke's advice) applied for an adjournment. The following day a major hui took place between Locke, Ngati Kahungunu, and 'Tuhoe or Urewera tribes'. According to a reporter, the meeting was held on a large expanse of grass in front of the drill shed where the court sat. 700 to 800 Maori were assembled, with Locke, Ormond, and Hamlin among others, seated on forms in the middle.[258]

Locke looked upon the hui as an opportunity to resolve the issue of ownership and so hasten the purchase of the blocks. His official notes of the meeting stated that it was called 'with reference to land claims and disputed boundaries at the Upper Wairoa', before being brought before the land court for 'final settlement'.[259] And in making his opening address to the hui Locke reduced the question to be decided to one of sale: 'With whom rests the

254. Crown counsel, closing submissions, (doc N20)Topics 8 -12, p 17

255. Ko Te Kahiti o Niu Tireni, 18 Oketopa 1875, No 15, p 120

256. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 122; Belgrave and Young, 'War, confiscation and the four southern blocks' (doc A131), p 101

257. Ormond to McLean, 21 October 1875, MA 1 1915/2346, NA-Wellington (cited in Belgrave and Young, 'War, confiscation and the four southern blocks' (doc A131), p 101)

258. *Hawke's Bay Herald*, 9 November 1875

259. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G 1A, pp 1–2

power of legally conveying the land to the Government?' Given the arrangements finalised with Ngati Kahungunu, it might seem that what he was really asking was whether 'the Urewera' were to be paid at all. Locke hoped that the parties would be able, as a result of their discussions, to 'relieve the Court of any further action, beyond ordering a memorial of ownership in favour of those persons acknowledged to be entitled to the land.'[260] In other words, he wanted to present the court with a fait accompli. The goalposts had been shifted some distance since Ferris advised Tuhoe to clarify their title in the court. Given the pressure earlier applied to Tuhoe and Ngati Ruapani, it is not surprising that they resisted such an approach, and insisted on a hearing in the court.

The hui lasted for many hours. We have reports of a number of the key speeches, but it is clear that these cannot be full reports. (*The Hawke's Bay Herald* reporter, in giving his own summary, noted frankly that it was only a 'skeleton' of very 'voluminous' proceedings, 'rendered in far too rapid and pure Maori' to allow him to do more.[261]) The korero was spirited and to the point: Ngati Kahungunu, Tuhoe, and Ngati Ruapani speakers debated their respective rights to the land encompassed by the blocks, couching their korero in terms of:

- The identification of boundary points and the assertion of tribal boundaries based on these points. Tuhoe speakers identified Mangapapa, in the south-east of the Tukurangi block, as their southern-most boundary point; Ngati Kahungunu speakers identified the Huiarau range as their northern boundary
- The establishment by ancestors of boundary posts (often referred to as 'rahui' in the meeting notes)
- The assertion of rights based on ancestry; both in general terms and by reference to specific ancestors
- The assertion of rights based on conquest; both in general terms and by reference to specific battlesl; and counter-assertions of conquestDenial of the opposing party's rights; and denial of the opposing party's stated tribal boundary
- Challenges to the opposing party to identify claims based on ancestry or conquest
- Statements of ownership of particular lands

The hui concluded without resolution; both sides agreed to take their cases before the court the following day.

(a) ***The 'boundary dispute' between Tuhoe and Ngati Kahungunu:*** 'Classic debatable lands'?: Our comments on this hui focus in particular on the light it sheds on the so-called 'boundary dispute' between Tuhoe and Ngati Kahungunu. (We do not refer specifically here to Ngati Ruapani because they were seldom mentioned in the sources separately before 1875; but we do not assume from this that they did not play a role in discussions at this time. They are referred to by name at the 1875 Wairoa hui, and in the purchase deed of November

260. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G 1A, p 2
261. *Hawkes Bay Herald*, 9 November 1875

1875. The generally used Government term was 'the Urewera', and we assume from the contexts in which it was used in 1875 that the term included Ngati Ruapani.) As we have seen, the Crown had a range of motives for opting to begin purchasing the blocks in late 1874. But the boundary issue was high on its list, and it was the primary issue for discussion at the Wairoa hui. The korero at the hui is crucial because of the importance that the boundary issue assumed – both then, and subsequently. It underlay a general view held by officials that the dispute between 'the Urewera' and Ngati Kahungunu was insoluble. It has often been assumed that the 'boundary' was a long-disputed one.

We think it is important, however, to consider the debates at the Wairoa hui in the broader historical context. We referred in Chapter 2 to the important evidence of Young and Belgrave. Though their focus was the customary rights of Ngati Kahungunu, they also discussed the relationship between Tuhoe and Ngati Kahungunu. As we have seen, they couched their overall argument in terms of what they called 'classic debatable land': land that had been subject to contestation over many generations between two powerful competing iwi – each of whom asserted absolute and exclusive claims. 'Classic debatable land could never be conquered, either in reality or in narrative.' The long history of military conflict and resolution between the two iwi continued into the colonial period, where these competing histories informed the nature of the claims argued in fora such as the Native Land Court. Such claims were not just disputed; rather, each iwi completely rejected the claims of the other. Iwi and hapu asserted tribal boundaries: these boundaries were not a line cut in the ground, but rather a 'negotiated space' which reflected generations of debate between the iwi. Over time layers of different boundaries formed which reflected the essential nature of classic debatable land. The 'essence of custom', they argued, was an ongoing relationship: thus it was impossible to find a final or 'correct' narrative. In reality, groups had rights to use and occupy classic debatable lands, but use-rights were subject to change and occupation was often marginal.[262] (In reply to a tribunal question, Dr Belgrave stated that classic debatable lands was 'not incompatible' with Professor Mead's 'whenua tautohetohe', or the concept of a buffer zone, similar to a 'no man's land'.)[263] The Waikaremoana lands, Young and Belgrave said, were 'classic debatable lands': disputed between Tuhoe and Ngati Kahungunu over a long period, from traditional times up to 1840, through the Wairoa hui and the Native Land Court hearing in 1875, and on to later fora such as the Urewera Commission and the Appellate Court.[264]

(b) ***Early conflict in the southern lands:*** Although the concept of 'classic debatable lands' may be applicable to other areas in New Zealand, we are not convinced that it applies to the

262. Young and Belgrave, 'Customary rights and the Waikaremoana lands' (doc A129), pp 20–21
263. Belgrave questioned by tribunal, 29 November 2004, draft transcript (doc 4.12), p 86
264. Young and Belgrave, 'Customary rights and the Waikaremoana lands' (doc A129), pp 20–22

Waikaremoana lands.[265] We do not think Young and Belgrave have shown that conflict between Tuhoe and Ngati Kahungunu was endemic over generations, or that the debates at Wairoa were a simple continuation of traditional disputes. Though the evidence they cite is full of accounts of hostilities, the great majority of their examples come from the 1820s. They come, in other words, from a period when there was dramatic conflict in many parts of New Zealand; when large scale taua, some multi-iwi, ranged over great distances, often armed with muskets. As elsewhere in Aotearoa this involved taua both from neighbouring iwi and from distant parts. Utu was exacted for recent or for long–unavenged injuries; many captives might be taken (to expand the labour pools of those who were victorious, and thus their capacity to trade); on occasion, new coastal bases were established for the same purpose.

The examples cited by Young and Belgrave – reflecting the examples given by Tuhoe and Ngati Kahungunu speakers in fora from the Wairoa hui of 1875 onwards – focus on a series of conflicts which are known to have occurred over a decade from 1819. Our analysis of the battles recorded by Elsdon Best and Thomas Lambert from the oral traditions relayed to them, reveals that over 30 battles took place in this period in which Tuhoe and Ngati Kahungunu fought on opposing sides. We refer readers to the sidebar over detailing some of these battles, both as described by speakers at the Wairoa hui and other fora, and as later recorded and dated by Best and Lambert.

Although speakers may have disagreed about the details of the battles, and particularly who emerged as victor, it is clear that the battles they spoke of occurred in one somewhat narrowly defined period, rather than across generations. In our view therefore these hostilities may be seen less as an episode in a long-continued conflict between two iwi, and more as part of a pattern of widespread upheaval across Te Urewera in the early nineteenth century.

This regional conflict was brought to an end by the tatau pounamu negotiated between Tuhoe and Ngati Kahungunu, dated variously at 1828 and 1830. The tatau pounamu, as we noted in chapter 2, involved the selection of two maunga (Kuha-Tarewa and Turi-o-Kahu) as symbols of the peace. This provided for the restoration of balance in relationships so that the iwi could resume normal interactions with one another, and normal exercise of rights to land. A tatau pounamu marked a lasting peace; it could not be broken. And though the peace may not entirely have erased the tensions that erupted in fighting over the preceding years, it did hold. Between 1828–1830 and the arrival of Crown forces in December 1865 over 35 years passed during which Tuhoe, Ngati Ruapani and Ngati Kahungunu had lived side by side without fighting. Hapimana Tunupaura, for example, stated (at the Waipaoa block

265. Other areas Young and Belgrave gave as examples are Orakei in Auckland, Te Aroha on the Hauraki plains, Horowhenua in the Manawatu and the northern South Island. Young and Belgrave, 'Customary rights and the Waikaremoana lands' (doc A129), p 20

Was there Inter-generational Conflict between Tuhoe and Ngati Kahungunu?

Elsdon Best and Thomas Lambert record some 33 battles between Tuhoe and Ngati Kahungunu that occurred between 1819 and 1828 or 1830. The first battle appears to have been in 1819, following an apparent insult when the Ngati Kahungunu chief Te-Kahu-o-te-Rangi did not receive a gift of preserved birds, which he had expected. This incident led to a series of reprisals on both sides.[1]

At around the same time a series of conflicts occurred in the Te Papuni region, which followed the killing of Mahia by Whakatohea and the breaking of a rahui placed on the region by Mihikitekapua. We have detailed these events, which resulted in several battles between Ngati Kahungunu and Tuhoe, in chapter 2. Tutakangahau referred to these conflicts at the 1875 Wairoa hui and again before the Urewera Commission in 1901, and they were later recorded in Best, who dated the first round of battles in the Te Papuni region at 1819 and 1820.[2]

Conflict appears to have intensified around 1824. At the 1875 Wairoa hui and in the Native Land Court some speakers located the origins of the conflict between Tuhoe and Ngati Kahungunu in events from this time. Speakers referred to the killing of Toroa – a Waikato tohunga – and battles that ensued. Tutakangahau stated at the Wairoa hui that 'warfare became initiated among us' in consequence of the murder of a woman, involving Waikato who sought vengeance. 'One war brought another until we found ourselves embroiled with Ngati Kahungunu.' Tutakangahau described the battle at the pa Te Rahui-a-Mahia (presumably named after the earlier battles) as an outcome of these events. Best dates Te Rahui-a-Mahia as occurring in 1824.[3] Tamihana Huata gave a Ngati Kahungunu perspective on these events in the 1875 land court hearing: 'Formerly the Urewera and Kahungunu lived on peaceable terms, latterly they quarrelled. The fights occurred principally in the days of our fathers, the cause was murder. Ngatikahungunu committed the murder. Toroa was killed he belonged to the north, fighting then commenced about the land, and continued till the time of the quarrel with the Mohaka people, about three generations ago. We have fought all over the inland part of this country as far as Huiarau, and Maungapohatu. Peace was made before the Missionaries arrived.' Best explains that Toroa and a party of Tuhoe followers were killed by Ngati Kahungunu at Orangiamoa (in the valley of the Waikaretaheke River) in 1824. Tuhoe launched a series of reprisal attacks, including the battle at Te Rahui a Mahia.[4]

Although these battles do not appear to have marked the beginning of the broader series of conflicts between Tuhoe and Ngati Kahungunu, they did mark a watershed in the hostilities. Their significance in oral tradition (as recorded in the korero of Tutakangahau and Tamihana Huata) might

1. Lambert, *The Story of Old Wairoa*, p 312
2. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G 1A, p 7; Young and Belgrave, 'Customary rights and the Waikaremoana lands' (doc A129), p 88; Best, vol 1, pp 479–484
3. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G 1A, p 7; Best, *Tuhoe: Children of the Mist*, vol 1, pp 484–487
4. 5 November 1875, Napier Minute Book 4, pp 81–82 (cited in Young and Belgrave, 'Customary rights and the Waikaremoana lands' (doc A129), pp 44–45); Best, *Tuhoe*, vol 1, p 535

be explained by what followed. It was after the death of Toroa, and the resulting intensification of fighting, that Tuhoe sought alliances with several tribes (notably Ngati Maru and Ngapuhi) who possessed muskets. Until this time guns had not been a feature of the fighting. Tuhoe lacked access to coastal traders who supplied guns to other iwi in exchange for goods. But with the assistance of these tribes Tuhoe launched attacks on Ngati Kahungunu that did not see a proper resolution until peace between the iwi was reached between 1828 and 1830 (see below).[5]

More importantly, the korero of Tutakangahau and Tamihana Huata confirm the broader point that by and large there was no sustained conflict between the tribes before this time. They were, in Huata's words, 'on peaceable terms' before the 'days of our fathers'. Hukanui Watene of Ngati Kahungunu made the same point giving evidence to the Native Land Court in 1916: 'There was no clash between N'Kahungunu and Tuhoe about [the] lake till shortly before the advent of the Pakehas.'[6]

5. Best, *Tuhoe*, vol 1, pp 520, 536
6. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G 1A, p 7; Wairoa Minute Book 27, 22 August 1916, fol. 297

hearing in 1889) that there was no fighting after peace had been made.[266] When tensions flared again in 1863, the considerable efforts made to defuse them were successful.[267] These decades, in our view, may be interpreted not as a lull in the inevitable and endless conflict between two large tribes, but as a time of readjustment following an end to an unusual period of constant battles and upheaval (sometimes involving outside iwi).

(c) ***Customary rights and the southern lands:*** Because of the importance placed by Maori speakers on locating a 'tribal boundary' – both at the 1875 Wairoa hui, and in later fora where title was investigated- we need to consider what the tatau pounamu might have meant in the context of those discussions. The tatau pounamu has been seen as establishing one type of boundary between iwi 'in accord with the level of tolerance of the parties and their influence or mana in the area', as Tama Nikora put it. Mr Nikora told us that although the Tuhoe and Ngati Kahungunu tatau pounamu did not constitute a boundary in the surveying sense, 'it did most certainly signify a boundary' which both iwi acknowledged.[268] 'Land, and land-markers, he said, had enormous significance to Maori and the placing of a tatau pounamu in a certain place or the marrying of certain mountains was

266. Marr, 'Crown impacts on customary interests in land' (doc A52), p 251
267. Best, *Tuhoe: The Children of the Mist*, vol 1, pp 517–518
268. Tama Nikora, written answers to questions from Crown counsel, 30 March 2005 (doc H26(a)), p 1

meant to have not only symbolic significance but also significance on the ground.'[269] This raises a broader question: how did customary rights operate in these lands, both before the tatau pounamu and after? When Maori at the Wairoa hui and in later title inquiries spoke of other 'boundary points' what did they mean, and what was the significance of such boundary points in relation to the exercise of customary rights?

In various fora, from the time of the Wairoa hui, speakers often revealed how rights operated on the ground in the Waikaremoana region. When not presenting evidence in support of a regional claim on behalf of their iwi, which in these late nineteenth century title inquiries inevitably featured assertions of 'tribal boundaries', kaumatua spoke about how rights operated as between hapu. They might well acknowledge the rights of those they seemingly opposed when broader tribal rights were debated. Such acknowledgements challenge the accepted view of tribal communities who were at loggerheads with one another. Instead, the evidence suggests that on the ground communities constantly negotiated their rights with one another in the normal course of events. Although this evidence, as Young and Belgrave acknowledge, was likely to have reflected the impact on regional occupation of the conflicts with Crown forces that occurred from 1865–1866 and then again from 1869–1871 – it still vividly portrays customary rights in action.

Generations of settlement and the exercise of authority over resources built up a pattern of rights in the land south of Waikaremoana – the land that was later designated as the four southern blocks. Speakers before the land court referred to settlement and cultivation in particular locations within these lands. Ngati Kahungunu witnesses before the court in 1875, for example, identified quite different places of residence and cultivation in the Tukurangi block from the Tuhoe and Ngati Ruapani witnesses.[270] The specificity of this evidence suggests land that was intimately known. Tuhoe and Ngati Ruapani place-names tended to be towards the north and west, whereas Ngati Kahungunu names were towards the south and east. This suggests that within the blocks, different rights were acknowledged in different areas. Tamihana Huata, for example, acknowledged the place of the 'Urewera' on the southern shores of Lake Waikaremoana (at the pa 'Tukutuku o te Heihei' and in cultivations from Kuha back to the lake), even though he denied their exclusive claim to the Ruakituri block.[271] And even allowing for the steep terrain of the land south of Waikaremoana, it is remarkable that the places where different rights were recognised might be only a matter of a few kilometres apart.

269. Nikora, written answers (doc H26(a)), p 2

270. For Ngati Kahungunu, see evidence of Ihakara Tuatara, Hapimana Tunupaura, Toha Rahurahu, and Kiri Paura. The kainga and cultivations they identified included: Pikaungaehe, Whatarangi, Ahi Kuha Kuha, Mangamauku, and Kahotea. For Tuhoe and Ngati Ruapani, see evidence of Hori Whareangi and Tamarau Te Makarini. They identified Te Reinga o Whero, Whekenui and Mekenui as specific places within the block, along with other areas of cultivation described in general terms. Napier Minute Book 4, 4 November 1875, pp 74–78

271. Napier Minute Book 4, 5 November 1875, p 82

Some places, such as Te Papuni in the Ruakituri block, were common hubs of activity – central locales that were the meeting points between hapu. The acknowledged rangatira of the region, Wi Tipuna, who spoke for Ngati Kahungunu but who also had kin links to Tuhoe, revealed as much at the Ruakituri block hearing. Despite the adversarial setting of the court, he stated that he had seen 'some of Te Urewera there at Te Papuni, not as a tribe but [as] individuals'.[272] Although Wi Tipuna may have considered Te Papuni as primarily a place of residence for Ngati Kahungunu, it accommodated whanau from a range of iwi. And although the lands south of Waikaremoana may not have been as heavily settled as others in the region, they were certainly the homes of several communities who moved seasonally between resources but who also maintained several central areas of settlement. These places could be found on the southern shores of Lake Waikaremoana (in the area around Onepoto); in the south of the Tukurangi block near the maunga Tukurangi; in the upper reaches of the Mangaaruhe river (around Ohiwa and Whataroa); and further to the east on the Ruakituri river (where Erepeti, Te Papuni and Te Reinga were located). The communities accessed the resources they needed, which seem to have been located throughout the blocks, from these main areas of settlement. (We consider the types of resources available to them later in this chapter).

This pattern of settlement and resource use can be explained by the nature of kinship-affiliation and the extent of intermarriage among kin groups over successive generations. Wi Tipuna himself was a product of this history. His grandmother was the famous Tuhoe leader, Mihikitekapua. But his primary affiliations, according to the East Coast leader Wi Pere, were with the hapu Ngati Hingaanga, Ngati Hinemanuhiri and Ngai Tapuae.[273] Wi Hautaruke – who was born at Waikaremoana, and who identified himself in 1875 as belonging to 'the Urewera'[274] – was another rangatira with wide-ranging kin links. Hautaruke was Tipuna's cousin – even though they spoke on opposing sides at the 1875 Wairoa hui and in the land court.[275] Hapi Tukahara of Ngati Ruapani (who was related to both Tunupaura and Wi Tipuna) told the court that Hautaruke's 'mother belonged to Heretaunga and his father to the Uriweras'.[276] In the context of the Waipaoa block hearing, Tuhi and Hautaruke were adversaries – arguing the respective cases on behalf of the iwi of their primary affiliation. Paora Kingi, similarly, was a significant Tuhoe leader; but Wi Pere also claimed him as a leader of Ngati Hinaanga.[277] Te Waru Tamatea was another notable leader with multiple lines of descent. He was one of the principal leaders of upper Wairoa Ngati Kahungunu over

272. Napier Minute Book 4, 5 November 1875, p 83
273. Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), p 55
274. Wairoa Minute Book 3B, 1 April 1889, p 108; Napier Minute Book 4, 5 November 1875, p 79
275. Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), p 68
276. Wairoa Minute Book 3B, 12 April 1889, p 149 (cited in Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), p 69)
277. See evidence of Wi Pere and Tapine Ruinga, in the Tahora block hearing, summarised in Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), pp 55–56

a long period before his exile to Waiotahe, but he also had Tuhoe whakapapa through his father's side.[278] These individuals were key cultural mediators and negotiators of customary rights. Affiliations went both ways: Tuhoe could be found at Te Papuni as Ngati Kahungunu could be found at Maungapohatu. Evidence suggests that many Ngati Kahungunu were buried at Maungapohatu; many Tuhoe were also buried at Te Papuni. And this pattern of intermarriage appears to have been established before the major conflicts of the 1820s. As the Tuawhenua report explains, Mahia (the father of Wi Tipuna) had been raised to be a leader of both Tamakaimoana and Ngati Hingaanga.[279]

Leaders such as these, whose whakapapa connected them to many hapu, were crucial to the patterns of customary rights in the region. As we explained in chapter 2, rights to land and resources were held at hapu level. Speakers appearing in the court sometimes discussed their rights in relation to specific hapu, often referring to particular areas, and to ancestors from whom they drew their tribal identity and their rights. Tamihana Huata, for example, gave evidence on places occupied in the Ruakituri block by the hapu Ngati Hinaanga, Ngati Tamaiourarangi, Ngati Poa, and Ngati Kohatu. Each, he said, had its own ancestor.[280] Although some hapu were primarily associated with one iwi, the extent of intermarriage in these border areas meant that there were others that identified with more than one iwi. For example, Hapimana Tunupaura was recorded as saying of Ngati Hika that 'part belonged to Uriwera side & part to our side'.[281]

In this context we return to the concept of 'boundaries'. Speakers at the Wairoa hui and other fora spoke of particular boundary points established by their ancestors, which also established the rights of the tribe in the land. These points were often advanced as part of a larger 'tribal boundary'. Hurae Puketapu stated before a later commission that an 'ancient boundary' had traversed the western side of Lake Waikaremoana and north to the Huiarau ranges. He noted that since that time long ago, new ancestral rights had been established through the acts of various tupuna (Pakatoe, Hinewhao, and Pukehore).[282]

The term used for these points was 'pou' – translated in court minutes as 'posts'. Often, more than one pou was set up by an ancestor, or several ancestors. Thus, rights could be established across a broad extent of land, and across successive generations. Hori Wharerangi, in response to Wi Pere's assertion that a tribal boundary between Tuhoe and Ngati Kahungunu ran along the Huiarau range, stated that the tupuna had only ever set down specific points, not a continuous boundary; and that these points were named for a

278. Binney, 'Encircled Lands', vol 1 (doc A12), p 319
279. Tuawhenua Research Team, 'Ruatahuna: Te Manawa o te Ika', vol 1 (doc B4(a)), p 115
280. Napier Minute Book 4, 5 November 1875, pp 80–81 (cited in Young and Belgrave, 'Customary Rights and the Waikaremoana lands' (doc A129), p 44)
281. 8 March 1889, Wairoa Minute Book 3A, p 386 (cited in Young and Belgrave, 'War, confiscation and the 'four southern blocks'' (doc A131), p 122)
282. Marr, 'Crown impacts on customary interests' (doc A52), p 318

variety of purposes, such as to warn off war parties and to mark special events.[283] Pou rahui, which warned against the use of resources in particular areas and at particular times, were assertions of rights by the group who placed them. The breaking of rahui might well trigger retaliation. This occurred in the southern lands in the 1810s, with tragic consequences, when a rahui set by Mihikitekapua, following the death of her son, was broken by Ngati Hinaanga. In other words, these pou denoted specific rights, at specific times. Pou could also be renewed by a descendant of the original ancestor, as one witness before the second Urewera commission explained.[284]

Conflict, however, was the exception, not the norm. Within Maori communities relationships were sustained through whakapapa, and discussions and understanding of one another's rights. In times of peace they negotiated their rights in potentially disputed areas, including the use of resources, and the rules for their use. Our point is not that there was no concept of tribal boundaries in customary terms. In the land court era of surveys and blocks, the term 'boundaries' masked the operation of rights in border areas at hapu level. But in customary terms, boundaries, or rohe, could never be strictly defined or located on the ground. Rohe were indicators of a tribe's understanding of the extent of its rights. But in this context, tatau pounamu may be seen as such a boundary, indicating a separating space. To this extent we accept Mr Nikora's assessment about its having significance on the ground. But the Tuhoe and Ngati Kahungunu tatau pounamu, it seems to us, was more about the restitution of relationships – as symbolised in the marriage of the mountains and reinforced by a series of chiefly marriages. It certainly did not create a no man's land where people feared to tread. Following the tatau pounamu, communities were able to resume their normal exercise of rights to the land. This had to be carried out with due regard to other communities of the region, with the appropriate acknowledgements of those communities' areas of occupation.

The evidence before us leads to several clear conclusions about the operation of customary rights in the lands to the immediate south and east of Lake Waikaremoana, both before and after the tatau pounamu. The tatau pounamu bot restored relationships between the iwi, and also marked the emergence of a new set of relationships among the various communities in relation to these lands. This was undoubtedly a border region between two large iwi, with the added presence of another strong and distinctive tribal group, Ngati Ruapani. Each had known areas of settlement and cultivation within the southern Waikaremoana lands. But there were also shared areas, where rights to resources were mediated. Many of these points were acknowledged by Young and Belgrave in their evidence. They underlined the importance of 'complex relationships between different kinship groups within the three tribes [Ngati Kahungunu, Tuhoe, and Ngati Ruapani] which arose out of interaction

283. Marr, 'Crown impacts on customary interests' (doc A52), p 324
284. See the evidence of Hori Wharerangi, summarised in Young and Belgrave, 'Customary Rights and the Waikaremoana lands' (doc A129), p 116

over land.'[285] They acknowledged the importance of relationships, and their complexity in practice: 'Maori customary rights to land were fundamentally about relationships: how people interacted with each other over access to resources and land.'[286] Even between two large tribes 'there would exist groups whose level of intermarriage would have for some purposes promoted an association with Tuhoe and for others with Ngati Kahungunu.'[287] In other words, relationships on the ground – and at hapu level – were dynamic, and were influenced by changing circumstances in successive generations. Consequently, they said, it was 'impossible to establish clear boundaries between different kinship groups on land because their interests were shared and overlapping based on occupation, use rights and whakapapa.'[288]

But Belgrave and Young, in our view, while acknowledging dynamic relationships on the ground, did not show how this was consistent with their argument that Waikaremoana land was largely uninhabited as a consequence of its being a border region between two iwi. They argued that one of the characteristics of 'classic debatable land' was sparse occupation: 'People had rights to use and occupy classic debatable land, but those use-rights were always subject to change as the relationship between two tribal groups developed through a regular and constant cycle of conflict, peace-making, and intermarriage. However, occupation was often marginal for these very reasons and this is another important characteristic of classic debatable land.'[289] The 'vast majority' of kinship groups found it difficult to demonstrate 'regular and constant occupation.'[290] We infer from this that customary rights in these lands were less significant compared with other regions because of the nature of occupation. Young and Belgrave qualified their argument, stating first that not all of the Waikaremoana lands (including land to the north, east and west of the lake[291]) were 'classic debatable lands', and secondly that hapu still 'had rights to areas through occupation that gave them a superior claim to others, despite the exclusive claims and competing narratives over tribal boundaries.'[292] But they appear to have made their comment on the sparse occupation of 'classic debatable lands'with the four southern blocks lands in mind. This picture of marginal or unsustained occupation of those lands does not accord with our analysis of the evidence. Because we cannot agree that the history of the region was characterised by endless cycles of conflict and peace making, we cannot agree either that tribal 'use rights' were accordingly subject to constant change.

285. Young and Belgrave, 'Customary Rights and the Waikaremoana lands' (doc A129), p 203
286. Belgrave and Young, Summary of 'Customary Rights and the Waikaremoana lands' (doc 12), p 5
287. Belgrave and Young, Summary of 'Customary Rights and the Waikaremoana lands' (doc 12), p 15
288. Belgrave, Young and Deason, 'Answers to Questions of Clarification from counsel' (doc 123), p 20
289. Young and Belgrave, 'Customary Rights and the Waikaremoana Lands (doc A129), p 21
290. Young and Belgrave, 'Customary Rights and the Waikaremoana Lands (doc A129), p 91
291. Belgrave and Young, summary report of 'Customary Rights and the Waikaremoana Lands' (doc 12), p 6
292. Belgrave and Young. summary report of 'Customary Rights and the Waikaremoana Lands' (doc 12), p 5

Customary rights in the lands south of Waikaremoana were established over many generations. Young and Belgrave described this in terms of '[l]ayers of different boundaries'.[293] We prefer to understand the history in these regions in terms of layers of rights. If not classic debatable lands, then these were certainly what we might call classic negotiated lands. Nowhere in the four southern blocks could a clear, hard-line boundary be established. Such a boundary was not compatible with the way customary rights were understood and exercised. As Young and Belgrave acknowledge themselves, Maori customary rights to land were fundamentally about relationships.

(d) ***The emergence of a tribal 'boundary dispute' in the wake of Crown acts affecting Wairoa and Waikaremoana lands:*** We are left, after our discussion, with a further issue. If, as it seems to us, relations between Tuhoe and Ngati Kahungunu were not characterised over many generations by conflict, and if hard-line boundaries were not a feature of customary rights, how do we explain the kind of debates that took place at the Wairoa hui? It is our view, in light of our understanding of the history of relationships among the communities of upper Wairoa and Waikaremoana, and of Crown actions from the 1860s, that the nature of the debate at the hui – and in particular the emphasis placed on defining a boundary between the iwi – was shaped by more recent events. Of particular most importance were the boundaries that had recently been laid down in the region: namely, the Te Hatepe deed and Locke deed boundaries. These boundaries, and their implications for customary rights, had created continuing concerns among the iwi about those rights. This was particularly the case after the Locke deed's extension into the southern Waikaremoana lands. These concerns placed immense pressure on the tatau pounamu. Developments from 1865 seem to us to underline the fact that the so-called 'boundary dispute' between Tuhoe and Ngati Kahungunu emerged in the form it did because of recent events, rather than reflecting cyclical traditional disputes over rights to the Waikaremoana lands.

We point first to Tuhoe and Ngati Kahungunu discussions in the wake of the 1865–1866 conflict and the Te Hatepe deed about the impact of war and the arrangements made with the Crown. Leaders from both iwi considered how recent events might impact on their respective rights. In November 1867 the Tuhoe leader Paerau Te Rangikaitupuake travelled to Napier to make peace with Donald McLean. Although the Government rejected these overtures (see chapter 5), it appears that Tuhoe and Ngati Kahungunu conducted their own discussions at this time about the impact of the Te Hatepe deed. As Tamihana Huata explained in 1875, Ngati Kahungunu assured Tuhoe that the Te Hatepe agreement did not affect Tuhoe customary interests:

> After the fight at Kopani, and when a proclamation of peace was issued, then it was that you, the Urewera, travelled through the country to Mangapapa on your way to Napier. At

293. Belgrave and Young. summary report of 'Customary Rights and the Waikaremoana Lands' (doc 12), p 21

> a meeting held subsequently thereto, Paerau te Rangi went to Whenuanui and said to him that Ngatikahungunu could retain the confiscated land, and give back to him (Paerau) the land that was not seized. To this I assented, but no further action was taken.[294]

Mangapapa, as Tama Nikora told us, is directly between the maunga Kuha-Tarewa and Turi-o-Kahu – and therefore was of great significance in terms of the 1828 tatau pounamu.[295] It was also located very close to the north-western border of the Te Hatepe deed area. Eria Raukura later (in 1915) referred to the agreement between Tuhoe and Ngati Kahungunu, which he said was made in the presence of McLean in 1867, where they agreed to a 'boundary' between the tribes.[296] But Huata added that a meeting was held subsequently at Onepoto 'and our arrangements that were formerly agreed to were here annulled. The subject devolved upon the Government, for among ourselves we evinced no ability to satisfactorily dispose of the difficulty, even when we sought to abide by our own ancient customs.'[297] It seems to us that, given his reference to Government involvement, Huata probably meant the Locke deed arrangements. Paerau appears to have mentioned the agreement between the iwi leaders again after the signing of the Locke deed. Te Makarini wrote at that time to the Wairoa chiefs –Tamihana Huata, Hapimana Tunupaura and Paora Te Apatu – stating that Paerau was 'coming to turn away these Europeans through Mr Locke's and your talk.'[298] And to A C inspector Cumming at Onepoto, Te Makarini wrote:

> He kupu ke tenei e ra a Paerau e haere mai ki wai kare nei te take he peki i nga pakeha nei mo te korero a Raka. Te kupu a paerau he rohe ano kei roto o wai kare taheke puta atu ki ona wahi katoa me tuku ano atua nei o te rohe kia hau atu ana o te rohe kia kahu.[299]
>
> Here is another word. Paerau is coming to Waikaremoana to turn away the Europeans because of Mr Locke's talk. Paerau's word is that there is a boundary line at Waikaretaheke extending to all is [*sic*] parts this side of the boundary is to be turned over to me the other side to Kahu[ngunu].[300]

The so-called 'boundary line' was not the Waikaretaheke river itself – which at that point had become the dividing line between the Tukurangi and Taramarama blocks – but rather cut through the Waikaretahake and across the southern land. Thus Paerau seems to have been referring to the boundary line that was the north-western border of the Te Hatepe deed area. This 'boundary' also seems to have informed the Te Whitu Tekau boundary laid

294. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G-1A, p 2
295. Nikora, written answers (doc H26(a)), p 2
296. Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), pp 158–159
297. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G-1A, p 2
298. Te Makarini to Tamihana Huata, Hapimana Tunupaura and Paora Apatu, 13 September 1872, in Binney, Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), p 371
299. Te Makarini to Cumming, 13 September 1872, in Binney, Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), p 337
300. Te Makarini to Cumming, 13 September 1872, in Binney, Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), pp 372–373

down at this time. As given in 1872, the southern Te Whitu Tekau boundary named pou rahui at Nga Tapa; Kahotea (a point on the junction of the Waihi stream and the Waiau river; the maunga Tukurangi; and Te Ahu–o-te Atua (to the south of Whataroa, near the Mangaaruhe river.)[301] It thus was very near Mangapapa.

When he replied to Paerau on this occasion, Te Huata also referred to their earlier agreement. And he stated that the 'confiscated lands taken by the Government are returned' (reflecting Maori understandings of the Locke deed, and the 'return' of 'confiscated lands'):

> Friend I am not objecting to the claim of the Urewera here as I told you at Matiti and I was quite clear about it. There was no particular rule to be adopted. The only thing was we were all Maoris or our being Maoris together and we were united as one. Our bodies were one and therefore ours and Ureweras claims is clear. All I have to say to you.[302]

These letters, and the tribal discussions they referred to, show tribal leaders struggling to deal according to tikanga with the impact on their respective rights – of Government acts – and boundaries, which had introduced difficult new factors into the equation.

The growing tensions between Tuhoe and Ngati Kahungunu must be understood above all in the context of the Crown's assertion of authority over the lands extending to Lake Waikaremoana and Locke's statement of the 'government boundary' in 1872, his laying down of the boundaries of the Government blocks, and his record of (incomplete) lists of owners, for those blocks. Counsel for Wai 621 Ngati Kahungunu pointed out to us that Tuhoe and Ngati Kahungunu were thus put together in large blocks, whose boundaries were natural features rather than tribal boundaries.[303] We accept his general point that tribal rights in these lands were complex and layered, and that Locke's proceedings, asserting – out of the blue – the right to draw boundaries through the southern Waikaremoana lands, as well as the Government's involvement in deciding owners, made things very difficult for all those with rights there – particularly because the recent fighting had shattered normal patterns of settlement and the exercise of rights.

The Crown, however, oblivious to the impact of its own intrusions into the district, saw this as a traditional dispute that could only be resolved by drawing a line on the ground between the iwi. As we have seen, this began with Ferris' comments on a hui at Waikaremoana in November 1873, where Tuhoe had complained about the Tukurangi and Taramarama block leases. This filtered back to McLean, who told an assembly of Ngati Kahungunu chiefs in November 1873 that '[t]here is one question which ought to be settled, that is, the boundary between you and the Urewera; it ought to be done, if possible, this summer.'[304] He appointed the rangatira Tareha Te Moananui to assist (as he had on other

301. Binney, 'Encircled Lands' (doc A12), vol 1, pp 273–277, 393
302. Tamihana Huata to Paerau and Te Whenuanui, 27 September 1872, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), pp 793–794
303. Counsel for Wai 621 Ngati Kahungunu (doc N1), p 46
304. 'Notes of Native Meetings', 29 November 1873, AJHR 1874, G-1, p 2

occasions), evidently hoping that this would expedite matters. Te Moananui did attend hui with the Wairoa and Urewera leaders, with Locke – which were reported to have started off well.[305] But Tuhoe concerns remained, and in July 1874 Ferris reported that Tuhoe were bitter against Ngati Kahungunu and were 'anxious that the boundaries should be adjudicated as speedily as possible'.[306] In November 1874, the memorandum outlining the Government's reasons to begin purchasing the blocks stated that there was a 'feeling of irritation on account of the undefined state of the boundary between the Uriwera [*sic*] and the Wairoa natives'.[307] This culminated in the Wairoa hui of late 1875, where the official stated purpose was to settle the 'disputed boundary'.

Over this period, then, the inter-tribal boundary was constantly referred to. In these circumstances, it does not seem surprising that at the instigation of Crown officials Tuhoe and Ngati Kahungunu leaders dealt with the escalating tribal tensions by calling for the definition of a strict, straight-line iwi boundary – like the Crown boundaries defined in the Te Hatepe and Locke deeds. By the time of the Wairoa hui, the discussions between the iwi leaders revolved around settling a boundary between the iwi. Kereru Te Pukenui picked up this theme at the hui, calling for a boundary to be laid down: 'We desire the line dividing the land of the Urewera from that of Ngatikahungunu being clearly laid down.' He then immediately stated his objection to the purchase of land beyond Mangapapa, because this was his (Tuhoe) land. Hori Wharerangi of Tuhoe, giving the reasons why Tuhoe had applied to the land court to have the title settled, stated: 'first on account of the Government boundary, then on account of the Ngatikahungunu boundary, and furthermore owing to the boundary which we, Tuhoe, had ourselves laid down.'[308] These statements were also influenced by a Tuhoe concern that Ngati Kahungunu leaders who 'occupy the country towards the coast' (doubtless a reference to chiefs like Whaanga who had signed the Locke deed-with its promise of land- on the basis of their assistance to the Crown), were becoming involved in land matters at Waikaremoana, where Tuhoe regarded them as having no rights. Ngati Kahungunu, on the other hand, reacted to such concerns by asserting that the tribe was one, and that 'all have the same right'.[309]

The result was that both sides began discussing their rights in increasingly stark terms. Tuhoe set the southern most point of their 'tribal boundary' at Mangapapa. Marr pointed to the later evidence of Hurae Puketapu of Ngati Ruapani and Tuhoe (given before the Barclay Commission in 1907) about a hui held at Mataatua marae in Ruatahuna whare in 1874 where possible Tuhoe and Ngati Ruapani boundaries were discussed. Some Ngati Kahungunu chiefs were also present. It was decided then, according to Marr, that 'Tuhoe

305. Locke to McLean, 30 January 1874, MS-Papers-00332–0090, ATL
306. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 115
307. Minute, 20 November 1874, St John memorandum, 25 November 1874, MA-MLP 3/1874/483 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 116)
308. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G-1 A, pp 2–3
309. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G-1 A, p 3

would establish a southern boundary taking in their interests in the northern part of the blocks. This was designed to protect all land within this boundary from being sold or surveyed so that 'mana Maori' should continue within it.'[310] In other words, this was a line within which Tuhoe interests fell. Speakers at the Wairoa hui asserted this tribal boundary based on ancestry and conquest, and specifically the acts of tupuna in the 1810s and 1820s. Ngati Kahungunu, similarly, bridling at their challenge, set their own line across the lake, at the Huiarau range. This they based on ancestral rights: the travels of the tipuna Hinganga, Makoro, and Tamaterangi. In the circumstances of the time, both Ngati Kahungunu and Tuhoe were seeking recognition of a line so that their interests might be protected.

But there were also indications in the discussions of the origins of this proposal: speakers discussed their concerns about the relationship between the 'government boundaries' and their own rights. Te Makarini, for example, stated early in the hui that he would 'eschew any comment on the action of the Government with regard to the boundaries fixed upon by them.' He urged the removal of Ngati Kahungunu's boundary, and he wished to confirm his own boundary 'irrespective of the Government lines'.[311] Hapimana Tunupaura later said: 'The government boundary is at Waikare; mine is at Huiarau.'[312] Towards the end of the hui the main subject for discussion moved away from the tribal 'boundary' to the Government's role in the events of previous years. The Ahuriri Ngati Kahungunu leader Karaitiana Takamoana enquired about where the 'disputed boundary' was located. Tunupaura stated that, 'The Government defined their own boundaries when they confiscated the land.'[313] The concern that emerged over the 'boundaries' defined by the Government saw Locke draw the hui to a close, stating that the Government was 'endeavouring to amicably settle the long outstanding dispute between these contending tribes that have been for generations at war'.[314] This was, of course, a mistaken assumption; and it obscured his and the Crown's role in shaping the dispute.

It is because of this history of the impact on Maori understandings of Crown statements and acts in respect of the Waikaremoana lands, that we are cannot interpret the korero at Wairoa in 1875 as a continuation of a generations-old dispute. As we have suggested, the Waikaremoana lands were not 'classic debatable lands'. Thus we cannot agree that in the 1870s the Crown intervened in a generations-old dispute, as Young and Belgrave appear to argue. And we cannot agree with the Crown's position – then and now – that such intervention in the form of Crown purchase of the rights of all owners offered Tuhoe and Ngati Kahungunu a helpful solution to an intractable dispute. Rather, the debate was shaped by

310. Marr, 'Crown impacts on customary interests in land in the Waikaremoana region' (doc A52), p 167
311. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G-1 A, p 2
312. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G-1 A, p 6
313. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G-1 A, p 7
314. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G-1 A, p 8

tribal concerns over the north-western boundary of the Te Hatepe deed area, and knowledge of the boundaries that had been laid down for the four southern blocks. These debates remained unresolved, and we return to consider the aftermath of this in the impacts section.

In sum, the 1875 land court hearing of the four southern blocks proceeded in the wake of the Locke deed arrangements which purported – on the basis of a wrongly-asserted confiscation – to mark block boundaries in the southeastern Waikaremoana lands and decide the owners of these blocks. The lands were in fact in customary title. The majority Ngati Kahungunu listed owners then leased the lands, arousing Tuhoe anger. Tuhoe were advised by Crown agents to seek a land court hearing – which they did. Crown agents, seeing the developing tensions between Tuhoe and Ngati Kahungunu, initially sought a solution in marking a boundary between them. Iwi leaders, themselves preoccupied with securing recognition of their rights in the new circumstances of Government intervention in the lands, also turned to setting boundaries as a solution. The Crown, in the meantime, rather than waiting for the land court hearing, began to buy up Ngati Kahungunu interests, asserting that purchase would end the tribal dispute. Crown purchase, the Government asserted, was the only way forward. This was in our view a self-serving position which entirely ignored the tensions caused by the Crown's own unwarranted intervention in delineating blocks on the southern Waikaremoana lands and purporting to confer rights on designated owners, then – once leases had been entered into by Ngati Kahungunu (to the anger of 'the Urewera') – buying out the leaseholders and embarking on the purchase of interests from the (very largely Ngati Kahungunu) lessors before Tuhoe had their day in court. Tuhoe, further angered, insisted on continuing with the land court hearing. Given the proceedings of Crown purchase agents, they evidently saw the court as their hope of securing a fair outcome.

We turn now to proceedings in the court.

(5) *How did the Native Land Court hearing (October-November 1875) proceed?*

The hearing of the four southern blocks is one of the stranger cases in land court history. This reflected the unusual circumstances in which the cases came before the court – a product of tensions arising from Crown attempts to make good its ill-thought out promises to 'loyal' Maori. The immediate outcome of the hearings was the withdrawal of Tuhoe and Ngati Ruapani from court proceedings, and the sole award of the blocks to Ngati Kahungunu, the only claimants left in court. This was hardly what Tuhoe and Ngati Ruapani had expected at the outset; they had been anxious for a full investigation of their claims. Tuhoe and Ngati Ruapani claimants argued that they withdrew from the court and sold their interests under threat of confiscation; the Crown, in contrast, argued that evidence for such a threat is limited.

What happened in court? When the parties returned after the hui, evidence was given for only two of the four blocks. From 4 to6 November Tuhoe and Ngati Ruapani representatives presented their claims to the Tukurangi and Ruakituri blocks. Ngati Ruapani claims were represented in the court by Hori Wharerangi, who identified himself as 'the head man alive of Ngatiruapani'. He and Tamarau Te Makarini gave evidence of Ngati Ruapani occupation. Witnesses from a number of Ngati Kahungunu-affiliated hapu spoke as counter-claimants.

On the first day of the hearing Wharerangi introduced the Tuhoe and Ngati Ruapani take to the Tukurangi block through 'our ancestors and conquest' and submitted a list of 216 owners. The list appears to have included a broad range of Ngati Ruapani and Tuhoe names; including many of the key Te Whitu Tekau rangatira. The counter-claimants outlined their cases, briefly. The following day (5 November) Hori Wharerangi presented his case, supported by Tamarau Te Makarini and two other witnesses. Their evidence also was brief, and the Ruakituri case was called on immediately afterwards. The evidence of the claimants and counter-claimants continued for the rest of the day.[315]

On 6 November Wi Hautaruke put in a list of 61 owners for Ruakituri, and Tutakangahau gave further brief evidence for 'the Urewera'. At this point the court stated that 'the two statements made by the claimants and counter claimants were totally at variance with each other and were exceedingly contradictory'.[316] Privately, as O'Malley explained, Judge Rogan informed McLean – his close friend and colleague over many years – that either the 'Urewera' or the Wairoa people 'lie with the effrontery unparalleled even in a Native Land Court'.[317] This seems a rather dramatic overstatement, a result also of the judge's being uninformed of the history of conflict in the early nineteenth century, and relationships among the iwi since that time – not to mention the recent conflicts in 1865–1866 and again in 1869–1871, which had played havoc with established occupation. While the parties challenged one another's occupation, particularly on the Ruakituri lands – at Erepeti, Mangaaruhe, Whataroa and Ohiwa – it may be concluded from other evidence given in court that rights were exercised in a number of discrete locations on the blocks; and that there was also some mutual admission of rights (as discussed above).

The case was recorded as closed. The Taramarama and Waiau blocks were then apparently called together, at which point the parties stated that their claims to the two blocks were 'identical with the last'. This was an odd statement in itself. The Ngati Kahungunu claimants had claimed the Tukurangi and Ruakituri blocks under different ancestors; so also had Tuhoe. And while Tuhoe claimed Tukurangi through ancestry and ancestral conquest, Tutakangahau – who gave evidence for Tuhoe regarding the Ruakituri block – claimed

315. Napier Minute Book 4, 4–5 November 1875, pp 65–83, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), pp 297–315

316. Napier Minute Book 4, 6 November 1875, p 86, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), p 318

317. Rogan to McLean, 6 November 1875, McLean Papers (private correspondence), MS-Copy-Micro-0535–086 (folder 543) (cited in O'Malley, 'The Crown and Ngati Ruapani', (doc A37), p 130)

Locke's Reply to the Court about the Status of the South-eastern Waikaremoana Lands, 4 November 1875

This land was confiscated under the East Coast Land title investigation Investigation [sic] Act 1867, by deed of Agreement dated 5th April 1867 between R M Biggs Esq on the part of the Government and the loyal Natives of the district, the Govt had retained a portion at the mouth of Waiaua [sic] at Kauhauroa, situated between the Wairoa and Waiau, the remainder of land between Waiau and Ruakituri was abandoned by the Government to the original owners.

Napier Minute Book 4, 4 November 1875, p 77,
in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), p 309

those lands through a particular defeat of the people he called Ngati Kotore who lived at Te Papuni, and through gift from Te Mihi, who married Hikawai.[318] The basis of the Tuhoe claim to the lands in these two blocks was different (as we would expect); and it is hard to explain why the parties might have said their take to two other blocks was 'the same' as in Tukurangi and Ruakituri (though we might assume that the nature of their dispute over their respective rights was the same). The court nevertheless responded that there was little point in 'going over the same evidence again', and that because the evidence was so conflicting 'some one' should go over the ground. But in any case no judgment could be given till a survey had been made and a plan put in. This raises the question why a survey had not been undertaken before the court proceeded to hearing, as required by law – given that there had been a long wait before it took place. It is true that it was not unusual for claimants to go to court with only a sketch plan; but the boundaries of the four blocks that were listed in the gazetted notice of the court hearings were so minimal that we might wonder that they had not attracted the judge's attention. It is possible that the Tuhoe claimants were not properly advised – and that perhaps this reflected the fact that the Crown continued to hope the cases never got to court. As events turned out, as we shall see, the judge ended up issuing orders for memorials of ownership even though he had no survey plan.

We turn now to a remarkable development during the court hearing. At the end of the first day's hearing on 4 November, the court asked Locke, as District Officer, whether the land before the court was confiscated land?[319] Locke said that it was – though it had

318. Napier Minute Book 4, 6 November 1875, p 85, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), p 317

319. Napier Minute Book 4, 4 November 1875, pp 76–77, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), pp 308–309

McLean's Reply to Locke about the Status of the Four Southern Blocks, 5 November 1875

Your request about proclamation of Wairoa blocks will be duly attended to.[1] *I have taken the opinion of the Solicitor General as to the jurisdiction of Native Lands Court over the lands comprised in the Schedule to the East Coast Act 1866, subsequent Act [sic] it appears these lands have never been actually confiscated. The object of the Acts seem thereby to have been to give the Native Land Court a further jurisdiction than it possessed. In fact a sort of inquisitorial jurisdiction so that it might distinguish between the titles of local natives [?loyal]*[2] *and of those who had been in rebellion. This being so I think the NL Court [sic] has jurisdiction to inquire into the title of the lands mentioned. Such enquiry will of course determine the rights of the parties claiming the land and be subject to the East Coast Act 1868. I have given you almost verbatim the opinion of the Sol R General [sic] and will send you fuller information tomorrow.*[3]

1. Locke's request led to a proclamation under the Immigration and Public Works Act Amendment Act 1871, permitting the Government to negotiate valid purchases of the four blocks before an award by the Land Court, and to exclude private parties. (See text below)
2. The word 'loyal' has been written above 'local' in another hand, with a query. It seems clear that this is what McLean meant.
3. Napier Minute Book no 4, 5 November 1875, p 90

'abandoned by the Government to the original owners'. As O'Malley pointed out, Locke's reply was not consistent with what he had said at the Wairoa hui shortly before the hearing. Then he said that the land was returned to those who had been loyal to the Crown; in court, he said it had been 'abandoned . . . to the original owners.'[320] We assume that once he was in the land court, which could only determine customary title, he thought more carefully about his terms. But this small shift underlines the problems a land court hearing posed for the Crown.

Despite this seemingly confident statement to the Court, Locke then sent a telegram to McLean. We have been unable to find a copy of Locke's telegram, but we assume that he requested clarification of the status of the land. McLean's reply, dated 5 November, was copied into the Minute Book at the end of proceedings on 8 November, and a note to that effect was made in the margin beside the relevant statement of Locke to the court in the minutes of 4 November. McLean paraphrased an opinion he had received from the Solicitor General stating that it 'appears these lands have never been actually confiscated'. It was also stated that the land court's determination of the rights of the parties would be subject to the East Coast Act 1868. This was a statement of great significance. The 1868 Act had replaced

320. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), pp 122, 128

ECLTIA and had continued not only the key confiscation provisions of the 1867 Act but also the schedule defining the area within which rebels' land could be confiscated. The general assumption at the time was that all the land within the four blocks fell within the schedule to the Act. Therefore, were the land court to proceed under the 1868 Act, the land of those found to be rebels would be confiscated.

It is not clear when McLean's telegram arrived at Wairoa. O'Malley says 5 November – which was certainly when it was dated.[321] Given, however, that Locke's telegram may not have been received in Wellington till 5 November, and that McLean then referred it to the Solicitor-General, it may have been 6 November before his own reply was delivered. The minutes do not state that McLean's telegram was read out in court. We note however that it was on 6 November that the parties showed a lack of interest in giving further evidence on the two blocks that had not yet been heard, and the court stated that 'it was needless going over the same evidence again.' On Monday 8 November the court went on with other cases.

On 12 November, a week after the court had adjourned the hearing, Wi Hautaruke and Te Wakaunua reappeared in court and stated that they had withdrawn 'on the part of Te Urewera' their claims to all four blocks; 'we have arranged our disputes with Ngati Kahungunu'.[322] Immediately afterwards Toha Rahurahu of Kahungunu applied for court orders in favour of the named owners, and put in lists of names for all four blocks. He gave 10 names for Waiau, 10 for Tukurangi, 13 for Taramarama, and 23 for Ruakituri. The judge issued no judgment, but ordered Memorials of Ownership to issue for all four blocks 'as per lists above written'; then adjourned until the survey should be completed, for later subdivision.[323] We note that there were a number of differences in the names given, in each case, from those recorded in the Locke deed block lists. In both the Native land court list and the Locke list, most names were given for Ruakituri. But the land court lists were generally short, and we assume that, as happened elsewhere, this was done to ease the completion of the purchase process. On the same day that Tuhoe and Ngati Ruapani withdrew their claims to the court, they sold their rights and interests to the Crown.

(6) *How did the Crown complete its purchases of the blocks?*

The Crown completed its purchase of the blocks through a number of transactions. From the Crown's point of view, the main transaction was with those Ngati Kahungunu who were found to be owners by the Native Land Court. But because of the unique circumstances surrounding the origins and purchase of the blocks – beginning with the Te Hatepe and Locke deeds – the Crown also had to follow a number of steps before it could acquire title. It had to extinguish the rights of groups other than those listed on the memorials of ownership

321. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 131

322. Napier Minute Book 4, 12 November 1875, p 94, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), p 319

323. Napier Minute Book 4, 12 November 1875, pp 94–96, in Gillingham, supporting papers for 'Maori of the Wairoa district' (doc 15(a)), pp 319–321

who were considered to have 'interests' in the blocks. As it turned out, this meant three separate transactions with Maori and one with the group of lessees of the Tukurangi block whose interests had not been fully extinguished at the point of sale. The reserves specified in the deeds of purchase then had to be surveyed. The final step was to declare the blocks 'waste lands' of the Crown. A chronology of these steps is as follows:

- On 12 November, the same day that the 'Urewera' claim was withdrawn from court, a deed of sale was drawn up, by which the 'Chiefs and people of the tribes of Tuhoe, Urewera, Ngati Ruapani and of those people related to the Urewera tribe, who appeared as claimants before the Native Land Court' sold to the Crown all their 'right, title and interest in all of the said lands' – that is in all four blocks. Waiau was estimated at 38,000 acres, Tukurangi at 37,000 acres, Taramarama at 30,000 acres, and Ruakituri at 52,000 acres, making a total estimate of 157,000 acres. The vendors were to be paid £1250, and they were promised a reserve of 2500 acres (see box). The signatories (some 60 in all) were headed by Hetaraka Te Wakaunua, Kereru Te Pukenui, Tamarau Te Makarini, Tamihana Rangiaho, Wi Hautaruke, Te Whenuanui, Teihana, and Te Kauru.[324]
- On 17 November the Ngati Kahungunu owners listed on the memorials of ownership signed four separate deeds of conveyance, one for each of the blocks, to the Crown for a total of £9700.[325] To the Crown, these were the key transactions in the transfer of ownership of the blocks. They conveyed the Taramarama block (some 30,000 acres) for £2400, excepting a number of named reserves amounting to 1700 acres;[326] the Tukurangi block (some 37000 acres) for £2350,[327] excepting 3800 acres of reserves; the Ruakituri block (some 52000 acres) for £2600, excepting 2920 acres of reserves;[328] and the Waiau block (some 38,000 acres) for £2350.[329] In each block except Waiau the reserves were individually named, and the acreage of each given.
- On 15 January 1876 the Ngati Kahungunu chiefs Ihaka Whaanga, Hamana Tiakiwai, Karauria and some 440 others, entered into a memorandum of an Agreement 'for, and on behalf of their respective Hapus' with the Queen, by which they conveyed 'all their right, title and Interest' in the Waiau, Tukurangi, Taramarama and Ruakituri blocks, and agreed 'to release Her Majesty the Queen from any further Claims for services rendered during the Rebellion' from 1865 to 1876. They received £1500. Only one of

324. Deed 841 – Tuhoe, Urewera and Ngati Ruapani purchase deed, 12 November 1875, in Marr, Supporting Papers for 'Crown impacts on customary interests, (doc A52(a)), pp 36–39

325. We have compared the lists of memorials of ownership with three of the conveyance deeds and can confirm that for two of the blocks (Tukurangi and Taramarama) the names are the same. The deed of conveyance for the Ruakituri block included one extra name than on the equivalent memorial of ownership.

326. Deed 840 – Taramarama block purchase deed, 17 November 1875, in Marr, Supporting Paper for 'Crown impacts on customary interests' (doc A52(a)), pp 33–35

327. Deed 838 – Toha Rahurahu and others Tukurangi block purchase deed, 17 November 1875, in Marr, Supporting Papers for 'Crown impacts on customary interests, (doc A52(a)), pp 25–27

328. Deed 839 – Ruakituri block purchase deed, 17 November 1875, in Marr, Supporting Papers for 'Crown impacts on customary interests' (doc A52(a)), p 30

329. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 136

these signatories (Maraki Kohea) was listed in the court Memorials of Ownership for the blocks. Those who put their name to the agreement are grouped by hapu or by their main settlement.[330]

- In mid-August 1877, Te Waru Tamatea and his people negotiated with George Preece to sell their interests in the blocks. The circumstances of these negotiations are explained below. The document formalising this agreement (headed 'Whakaaetanga' in the te reo version) was not signed until 6 September 1877, after the blocks were declared waste lands of the Crown. It is clear that the signing of the agreement was timed to coincide with the 'waste lands' proclamation, and it is possible that delays prevented its signing before the proclamation was made. The 'Whakaaetanga', made on behalf of Te Waru Tamatea and 'other chiefs also of the hapu of Tamatea a section of Ngati Kahungunu', was however not stated to be with the Crown, as the other transactions were. Rather the signatories acknowledged their receipt of £300 from the Government, and in return they gave up 'all their claims' in the four blocks, as well as to certain portions of Hangaroa marked on an attached plan.[331]
- The purchase of the four southern blocks was concluded with the final transactions with the lessees. On 4 August 1877 a deed was signed by Henry Cable on behalf of the Waiau and Tukurangi block lessees (that is, Cable, Drummond, Barker, and MacDonald).[332] As we explained earlier, the deed extinguished the right of these lessees to purchase 5000 acres in the Tukurangi block.
- On 30 August 1877 the four blocks were proclaimed 'waste lands' of the Crown.[333] The proclamation was issued under the Immigration and Public Works Act 1871 which provided for the exclusion of private buyers where the Crown needed land for certain specified purposes. However, none of them covered the Wairoa situation. We assume that the Government must have relied on the stated purpose of 'special settlements', despite the fact that there is no evidence that special settlements were planned, and none was subsequently established. The proclamation was also issued retrospectively, despite the requirement in the legislation that the Crown publicise its intent *before* beginning negotiations. In other words, the Crown's proclamation did not meet the requirements of the legislation. It was however evidently sufficient to keep private purchasers away.

In summary, the immediate outcomes of the court hearing were thus as follows:

330. These were: Ngati Puku, Ngati Hine, Ngati Maewhare, Matawhaitini, Ngati Kapuamatotoru, Ngati Mihi, Ngati Iwikatea, 'Nuhaka Natives', 'Nukutaurua Natives', Ngati Pahauwera, and Ngati Kurupakiaka. Memorandum of agreement between the Crown and Ngati Kahungunu, 15 January 1876, in Marr, supporting papers for 'Crown impacts on customary interests in land' (doc A52(a)), pp 43–58

331. Te Waru and others of Ngai Tamatea southern blocks purchase deed (and Hangaroa), 6 September 1877, deed 841, in Marr, Supporting Papers for 'Crown impacts on customary interests in land in the Waikaremoana region in the nineteenth and early twentieth century' (doc A52(a)), pp 40–42

332. Deed of conveyance, 4 August 1877, in Supporting Papers for submission of Duncan Moore on Panekiri Maori Trust Board at Patunamu State Forest (doc A45(b)), pp 50–52

333. *New Zealand Gazette*, 13 September 1877, pp 928–929

- A legal opinion was sought, evidently for the first time, on whether the lands before the court had in fact been confiscated. The response from the Solicitor-General, reported by McLean and copied into the Native Land Court minute books, was that the land had not been confiscated, but remained subject to the provisions of the East Coast Act 1868. This Act outlined a process by which the court would inquire into customary ownership, award title, and identify who of the owners had been in rebellion. Those considered 'rebels' would have their land confiscated.
- The Solicitor-General's opinion was totally at odds with Locke's understanding of the position, and with what he had consistently told Ngati Kahungunu, Tuhoe and Ngati Ruapani.
- The cases for the four blocks were closed on 6 December, despite the fact that no evidence had been given for two of the blocks. The court adjourned but did not deliver a judgment, pending a viewing of the land and the production of a survey plan.
- On 12 December, some six days after the telegram conveying the Solicitor-General's opinion to Locke had been received in Wairoa, and before judgment had been given, Tuhoe and Ngati Ruapani withdrew from the hearing, citing an arrangement they had reached with Ngati Kahungunu.
- The four blocks were all awarded to those Ngati Kahungunu counter-claimants who lodged claims and appeared in court
- Tuhoe and Ngati Ruapani immediately entered into a transaction by which the Crown purchased all their rights in the blocks; and five days later, the Crown and the Ngati Kahungunu owners listed on the court's memorials also entered into a formal deed
- Though the Crown would later make further payments to other parties it considered to have rights in the land (including Maori, and Pakeha lessees), it had, to all intents and purposes, acquired the four southern blocks by the end of 1875.

(7) *What was the significance of the Solicitor-General's opinion?*

The question we consider in this section is whether the Solicitor-General's opinion altered the course of the land court investigation into the titles of the four southern blocks. Answering this question is crucial to understanding whether the Crown acted in good faith in respect of the land court hearing, and particularly whether Tuhoe and Ngati Ruapani were pressured to sell their rights and interests in the land. Counsel for Wai 36 Tuhoe claimants and counsel for Ngati Ruapani argued before us that the arrival of the Solicitor-General's opinion after the court's proceedings were under way – and the threatened application of the East Coast Act and its confiscatory provisions – was the key factor that saw them withdraw from the court.[334] Only because of this was the Crown able to complete the purchase of Tuhoe and Ngati Ruapani rights to the land. Counsel for Ngai Tamaterangi

334. Counsel for Wai 36 Tuhoe, closing submissions, Part B (doc N8(a)) pp 40–41

argued that a similar threat applied to those Ngati Kahungunu who fought against the Crown.[335] Crown counsel, on the other hand, submitted that there was little direct evidence that indicates the effect of the Solicitor-General's opinion.[336] We address these arguments in this section, before turning to consider the broader question of whether Tuhoe and Ngati Ruapani were pressured to sell.

We must ask first whether it is possible that the unfolding of events before and during the court sitting were choreographed by the Crown. In other words, did Crown officials know before the hearing began that the East Coast Act 1868 (which replaced the East Coast Land Titles Investigation Act) would apply, and that claimants whom the court deemed rebels thus faced the possibility of being cut out of any court award? This was because, under the provisions of the Act, all the land recognised as belonging to 'rebels' could be declared Crown land or awarded to 'loyal' Maori (see sidebar opposite).

Crown counsel suggested to Ms Marr in cross-examination, that at the Wairoa hui of 1875 there was 'no indication' in what Locke said that the Government was 'intending to exclude Urewera from title in respect of those four southern blocks in this meeting, at least'. Marr agreed that there was no such indication.[337] We take it from Marr's answer that she had considered the possibility that Locke might, at least immediately before the court sitting, have had an ulterior motive in encouraging Tuhoe to take their claims to the court. It is clear that she rejected the possibility.

We reject it too. As we have said, Locke clearly believed that the lands had been confiscated and then returned to Maori. That is what he told them. At the hui he spoke several times of the role the land court would play in deciding the 'boundary' dispute between Tuhoe and Ngati Kahungunu and investigating title to the land. It is true that he hoped the leaders of the two parties might resolve the matter outside court, and leave the court only with the task of 'ordering a memorial of ownership' in favour of those deemed to be the owners.[338] But Locke knew that even if an agreement was reached outside the court, it would not be one which saw Tuhoe giving up all their claims to the blocks. Thus we do not entertain the possibility that after the two iwi had failed to reach agreement, he looked around for another weapon to use against Tuhoe in court, in the hope of seeing their claims defeated there. And we note that he clearly considered the court would order a memorial under the 1873 Native Land Act (rather than operating under the East Coast Act 1868, as the Solicitor-General subsequently said must be the case). The claimants drew attention to this; and none argued that Locke was acting duplicitously when he expressed his wish for the land court hearing to proceed, or that he might have suggested to the court that a well-placed question on the status of the land would assist the Crown. In any case, we must

335. Counsel for Ngai Tamaterangi, closing submissions (doc N2), p 42
336. Crown counsel, closing submissions (doc N20), Topic 6, pp 16–17
337. Marr cross-examined by Crown counsel, 30 November 2004, draft transcript (doc 4.12), p 128
338. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G-1A, p 2

The East Coast Act 1868

Preamble:

Whereas a considerable portion of the aboriginal Natives who now own or heretofore owned according to Native custom land in the district of the Colony comprised in the Schedule to this Act have been heretofore or are now in Rebellion against Her Majesty and it is proper that they should be deprived of their interest in such land as a punishment for such their Rebellion . . .

Key provisions:

The land court was 'required' to refuse to order a certificate of title to issue in favour of any person who had 'done any of the things described . . . in the fifth section of The New Zealand Settlements Act 1863'.

If the court decided that 'any number of the owners of the land' had been rebels it could choose either to:

1) order a certificate of title in favour of the loyal owners, or
2) divide the land and order a certificate of title for part of the land to loyal owners, and a certificate for part to rebel owners, which had the effect of making that part Crown land, or
3) certify that rebels were the customary owners of all of the land, whereupon all the land became Crown land.

The Governor might reserve 'for the use and maintenance of specified aboriginal Natives' any part of land which became Crown land in this way.

assume that the Solicitor-General's opinion must have come as a shock to Locke, who had so often publicly stated the opposite – that the land had been confiscated, but returned to Maori. And he had encouraged 'the Urewera' to proceed with a court hearing.

The claimants' main argument focused instead on the pressure under which Tuhoe and Ngati Ruapani found themselves following the Judge's question about the status of the land, and the arrival of the Solicitor-General's opinion that the hearing must be held under the East Coast Act. Counsel for the Wai 36 Tuhoe claimants emphasised to us that McLean's telegram to the Native Land Court was a 'critical piece of evidence confirming the Crown's intervention to convince Tuhoe to withdraw its claim.'[339] The claimants and the Crown were at odds, as we have seen, on whether Tuhoe and Ngati Ruapani withdrew their claims from the court as a result of their discovery that if they were heard under the East Coast Act, they would find themselves deemed rebels, and thus lose their land to the Crown – or to loyal

339. Counsel for Wai 36 Tuhoe, closing submissions Part A (doc N8), p 29

Maori. They thus differed on whether Tuhoe entered freely into negotiations for the purchase of their land. The Crown argued that there was no direct evidence that the telegram led to a 'threat of confiscation in respect of the southern blocks or parts of them' in the subsequent negotiations.[340]

But we have to agree with the claimants that the circumstantial evidence is 'compelling'.[341] It seems clear that there was no reason for anyone to think when the cases were first called that they would be heard under the East Coast Act. Despite the requirements of the law, there is no evidence that other cases within the East Coast legislation schedule had in fact been heard under the act – other than in Turanga (a special case because Maori had ceded the land there to the Crown).[342] Judge Rogan did not state at the outset that the Wairoa court was proceeding under the East Coast Act (as he had when he presided over the brief Turanga hearing involving the Act). In Turanga, the court's jurisdiction had been challenged on the grounds that the land before it was not customary land – and proceedings were abruptly adjourned.[343] This is doubtless why the judge was anxious to clarify the status of the land, once he became aware that it was generally regarded as confiscated (but returned to Maori).

On this point, we cannot consider the timing of the Judge's request for clarification as sinister. We might be surprised that the judge's doubts as to the status of the four southern blocks lands had not surfaced till the end of the first day's hearing; he might after all have sought clarification during the previous adjournment of the cases. But it may have been that he was not alerted to a problem with his jurisdiction until reports of the hui (which was held right outside his courtroom) reached him; and that he took some time to consider the matter. His question as to whether the land before him was confiscated was a valid one, given that he may by then have been as confused as anyone about whether a confiscation had in fact occurred – and therefore about his jurisdiction.

In any case, there was a general understanding at the outset that the court was conducting a full investigation of title to the blocks; and Tuhoe and Ngati Ruapani were anxious for this to proceed because they clearly hoped that the court would recognise their rights. We thus consider that McLean's answer to Locke, conveying the opinion of the Solicitor-General that the Court should determine the rights of the parties subject to the East Coast Act, must have come as a bombshell. We assume that the parties were made aware of the contents of the telegram and the implications of the 1868 Act's application. It is very probable that the

340. Crown counsel, closing submissions (doc N20), topic 6, p 16
341. Counsel for Wai 36 Tuhoe, closing submissions, part B (doc N8(a)), p 39
342. The Turanga cases were mainly heard by a special body, the Poverty Bay Commission; the 1870 land court hearing proceeded after the Government was advised by the Attorney-General that the court could hear claims to the ceded lands under the Act. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 348
343. Parliament passed special legislation, the Poverty Bay Land Titles Act 1874, to validate Crown grants issued in the wake of the hearing, after doubts were raised about them. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, pp 347–348

court was in possession of the telegram before the case was closed on 6 November. If that were so, we assume that the judge found himself in an awkward position. If he had read the telegram out, he would then have had to state that he was now proceeding under the East Coast Act. In this scenario, he would have been obliged to alter the direction of his inquiry when the hearing was well advanced. Given the universally held official view that Tuhoe and Ngati Ruapani had earlier been in rebellion, the judge would then expect the hearing to proceed, and if they were found to have rights, their lands would be confiscated. This sudden change of direction would not have reflected well on the court – particularly given the context in which the four blocks came before it; nor on the Government. Peace had been made, peaceful relations with the iwi restored, and their engagement with the court encouraged. Out of the blue, they were now to face the very real possibility of inquiry into their acts during hostilities of the past decade, and of confiscation. The judge's alternative was to ensure that the news was passed on to the parties informally; which would give Tuhoe and Ngati Ruapani more options. This would also have been the case, had the telegram arrived after the court adjourned.

Counsel for the Wai 36 Tuhoe claimants submitted that: 'Whether the content was disclosed in Court or otherwise is not of any great moment.'[344] We agree that the point was whether people knew what the telegram said – and what it meant for their cases. Crown counsel stated that: 'An inference must be drawn that the facts relating to the Solicitor-General's opinion were relayed to the parties', and that Government officials then took a different approach in their negotiations.[345] In the context of these submissions, this was a concession; and we proceed on the basis that the telegram was disclosed.

But the Crown would go no further than this. In counsel's view: 'There is no direct evidence from the period when the negotiations were conducted' that there was a threat of confiscation in the subsequent purchase negotiations.[346] We take a very different view, however. We consider that Tuhoe and Ngati Ruapani, and any Ngati Kahungunu claimants before the court who might have faced allegations of rebellion, had every reason to fear they faced the threat of confiscation. We say this for two reasons. The first is that, if proceedings continued, the court would determine their cases under the East Coast Act. This was, after all, the opinion of the Solicitor-General. This meant that the court would be unable to make orders for certificates of title until it had inquired into who among the claimants might be considered 'rebels'. (In the Native Land Court hearing under the Act in Turanga claimants were challenged either by other claimants or by a Crown agent on the grounds of alleged rebellious acts; if challenged they had the right to speak in court, and they were examined by the court, which then decided whether to strike their name off the lists of titleholders

344. Counsel for Wai 36 Tuhoe, closing submissions in reply (doc N31), p 6
345. Crown counsel, closing submissions (doc N20), topic 6, p 16
346. Crown counsel, closing submissions (doc N20), topic 6, p 16

submitted.[347]) The Act, as we have seen, specified what should happen if the court found that land belonged under custom to those it deemed rebels, they stood to have their lands either granted to 'loyal' Maori, or declared Crown land.

The second reason is that Tuhoe, Ngati Ruapani, and those Ngati Kahungunu who had fought against the Crown were well aware that they were considered 'rebels' by officials of the region. Locke, as we have seen, had told the Wairoa hui just before the Land Court hearing: 'This land – that is, up to Waikaremoana Lake – was confiscated during the time of the rebellion, the principal owners of the land having allied themselves with the enemy of the Government.' And later the same day, he added: 'Had the Goverment acquired and retained this land before the restoration of peace with the Urewera, no claim of theirs would have ever been heard of to the land in question. The Government were evincing no small consideration for the Urewera Natives in sanctioning at all the investigation of the claim put forth by them, considering the grounds upon which they assert their right, being as they were at the time in rebellion when the land was confiscated and dealt with.'[348]

Maori must have been advised what the significance of the telegram was: that under the East Coast Act, claimants before the court could still be held accountable for earlier rebellious acts, despite the fact that peace had been made with Ngati Kahungunu in 1867, and with Tuhoe in 1871. If the contents of the opinion were divulged then its significance must also have been conveyed. It strains credulity – given that the opinion was of such moment, that the judge had publicly sought an answer from Locke about the status of the land, and that the receipt of that answer was recorded in the minute book – to assume otherwise.

We accept the possibility that the contents of the telegram may not have been made known till after Tuhoe and Ngati Ruapani agreed not to give evidence on the Taramarama and Waiau blocks – that is, on 6 November. It is much more likely, however, that the news influenced their decision not to proceed with this evidence. It was most unusual for claimants in the court to make such a decision. Either way, the position on 6 November was that the court stated that no judgment would be given until the land was viewed and a certified survey plan had been produced. This is the only reason recorded in the minutes for the court's decision to delay giving judgment. The implication was that the delay would be of some duration. Locke in fact believed that the surveys would take at least three months.[349] But six days later, Tuhoe and Ngati Ruapani leaders returned to court to state that they would proceed no further. They thus forfeited their opportunity to hear the court's judgment on their claims. But they also avoided being subjected to a process of inquiry into their past role in the wars, knowing that their 'rebellion' would be a given, whatever the circumstances in which they had fought in 1865 and 1866 or after 1869. And they removed the

347. Turanga Tangata Turanga Whenua, vol 1, pp 361–2
348. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G-1A, pp 1, 8
349. Locke to Native Minister, 6 and 7 November 1875 (telegrams), MA1 1915/2346 (box 172), NA-W (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 130

risk that, if their claims were upheld, they would see title to the blocks pass either to 'loyal' Maori (in this case, Ngati Kahungunu), or to the Crown.

The receipt of the Solicitor-General's opinion epitomises the haphazardness of the Crown's approach to the four southern blocks, and its complete disregard for the interests of the Maori owners. The East Coast Act 1868, which had suddenly materialised – at centre-stage – was not enacted so that future confiscations could take place and, in light of the Imperial Government's instructions that confiscation legislation must be short-lived, should not still have been in force in 1875 (see box over).

In the result, it was a cruel irony that the 1875 court hearing provided the opportunity for the 1868 East Coast Act to be applied to disentitle those whom the Crown had regarded as 'rebels' in the past. The Act had been passed as an aid to implementing the Te Hatepe Deed cession, but had not been invoked by the Government for that purpose in the intervening years. Now, seven years later and in the wake of the Locke Deed – itself an effort to implement the Government's promises at Te Hatepe – the 1868 Act was presented, out of the blue, as holding the key to the course of the court proceedings.

The Solicitor-General's opinion that the 1868 Act would apply to the land court's investigation of title to the four southern blocks did not make reference to the boundaries defined in the schedule to the Act. We assume, given the importance of the question before him, that he would have sought clarification of the relationship between the boundaries of the four blocks, and the boundaries of the district within the schedule. It appears from the evidence before us that if he had, he would have drawn a blank. There was no up-to-date plan. Had the 'Chapman map' of 1870 (see 'explanatory note') been put in front of the Surveyor-General, he would have noted the limits of the ECLTIA boundaries as they were understood then; they did not of course extend to Lake Waikaremoana. But this was 1875, and official knowledge of the district had substantially increased in the past few years. The Locke deed had created four new blocks, and surveyors had been operating in the area. Yet, despite the fact that the East Coast Act remained of such importance on the East Coast, and might result in the confiscation of land before the court, the Crown had failed to map the district within which it applied. Thus at a crucial moment, the Solicitor-General had (we must assume again) to leave it to the judge in the case to clarify the various boundaries involved. His opinion, as relayed by McLean, related to the jurisdiction of the court over the land delineated in the Act's schedule. He did not comment on the boundaries himself. But the judge, in turn, would have to make a decision in the absence of an up-to-date map. The judge assumed (or was advised) that the entire southern blocks fell within the boundaries. But, as we have seen, a substantial part of the land did not.

These successive failures to clarify the status of the land or the court's role in determining ownership to land in the region thus seriously compromised the position in court of Tuhoe and Ngati Ruapani. We consider the position of those Ngati Kahungunu who had not supported the Crown, or had fought against it during the conflict, below. Officials had

Why was the East Coast Act 1868 Passed?

The East Coast Act 1868, which repealed and replaced ECLTIA 1867, had been enacted for two main reasons. First, it was hoped it would be an improvement on the 1867 Act for achieving the goal of rewarding, with 'rebel' land, the 'friendly Natives' who had assisted the government in putting down 'rebellion'. The need to implement the Crown's promises in the Te Hatepe Deed was in JC Richmond's mind when he announced in parliament his intention to introduce the Bill that would become the 1868 Act. His opening comments are remarkable: the subject of the proposed legislation, he said, was one that the House 'is already very much tired of' and 'which unhappily, after all our efforts, we have never been able to make otherwise than obscure'.[1]

Richmond explained that the main difference between ECLTIA and the 1868 Bill (which had been drafted by Chief Judge Fenton) was that the new law would empower the Native Land Court to award 'rebel' land not only to the Crown but, as an alternative, directly to 'friendly' Maori. This new power, it was thought, would remove from the Native Land Court the stigma of being the agent of Crown confiscation.

> The Court is not called upon to hand over, unless it sees fit, any land whatever to the Government. The government does not appear in the transaction at all, unless it should be the opinion of the Court that some cases exist where the rebellion of the mass of the tribe makes it expedient that their property should be transferred to the Government.[2]

Richmond had misgivings about the 1868 Bill. He thought a better way of achieving the Government's purpose of 'rewarding their allies, and punishing their enemies' was to finalise the cessions that the Government was attempting to obtain from Maori.[3] But the second reason he gave Parliament for the new law was the one that had convinced him of its necessity. He explained that if ECLTIA was repealed and not replaced with other legislation that authorised confiscation, the Government would have to pay the 'friendly Natives' otherwise than in 'rebel' land, and it would be unable to defend its ownership of lands that had been ceded to it:

> I do trust that the House will see that it is inexpedient to repeal the Act [ECLTIA] without making other provisions in its place. To do so, must entail further expense on the Colony which it can ill afford. It would be impossible to repeal the law without paying money to those who supported us in the campaign of 1865, and besides that, I do not see how we could get out of paying a large sum for the block at Wairoa. [Kauhouroa] If we do not give the Natives there their own terms, the

1. NZPD, 1868, vol 3, p 145
2. Ibid, p 146
3. Ibid

only alternative will be to compensate the one hundred and fifty military settlers now occupying it. Between these two stools we sit.[4]

In answer to a question about the Kauhouroa land, Richmond spelt out his understanding of the situation:

> It was ceded, subject to the decision of the Lands Court, and there is no security for the Government, if the Act is repealed, that the Court will recognise our title at all. It is a mutual cession – on the part of the Government of claims which they have under the Act, and on the part of the Natives, of their original claims to the land; but if the Act is repealed, the claims of the Government lapse altogether, and, therefore, the Native Lands Court would have no right to certify in favour of the Government, and there would be no titles whatever. The Court would have no alternative but to declare that the Government title was not a good one, for want of consideration for the cession.[5]

Our analysis earlier in this chapter reveals that Richmond's concerns were misdirected: the cession should never have occurred and the Native Land Court had no role under ECLTIA to approve it.

The point here, however, is that the east coast legislation should not still have been in force in 1875, years after peace had been established in the region. The Imperial Government's firm view that confiscation legislation should be short-lived was well-known. Lord Cardwell had informed Governor Grey in April 1864 that the New Zealand Settlements Act 1863 could have been disallowed because of its harsh terms and lack of a 'sunset clause'. It was only because circumstances in New Zealand were so critical at that time, he said, that Her Majesty's Government had decided to allow the Act to remain in force 'for the present'.[6] But a time limit on its operation had to be put in place immediately:

> A measure should be at once submitted to the Legislature to limit the duration of the Act to a definite period, not exceeding, I think, two years from its original enactment – a period long enough to allow for the necessary inquiries respecting the extent, situation, and justice of the forfeiture, yet short enough to relieve the conquered party from any protracted suspense, and to assure those who have adhered to us that there is no intention of suspending in their case the ordinary principles of law.[7]

4. Ibid, p 147
5. Ibid
6. Cardwell to Grey, 26 April 1864, AJHR, 1864, E-2, p 22
7. Ibid

As a result, the New Zealand Parliament had legislated in December 1864 to put a time limit on the Act, to 31 December 1865, and then had to legislate again, to extend the Act's operation to 3 December 1867.[8]

It was anomalous, therefore, in light of the established principle that confiscation legislation should be short-lived, that the 1868 Act was still in force in 1875. (In fact it was not repealed until 1891.) The reason the Act was not given a limited life, we consider, derives from the ongoing confusion about the effect of ECLTIA. It was widely-thought among Government officers that the 1867 Act had already confiscated the east coast lands. In light of that, Parliament would have regarded the 1868 Act as a 'mopping-up' measure, enacted in the wake of a confiscation that had already occurred, rather than a confiscation law in its own right. The fact that the 1868 Act conferred power on the Court to award 'rebel' land directly to 'loyal' Maori could have seemed to support the view that the Act merely provided a means to give effect to post-confiscation arrangements. Certainly Richmond explained the intent of the proposed legislation in terms that gave no hint that it would authorise a future confiscation of East Coast lands. The reason he gave for continuing ECLTIA's confiscation provisions was that the Crown's retention of Kauhouroa depended on it.

8. The New Zealand Settlements Act 1864, 13 December 1864, NZ Statutes 1864–1865, p 11; The New Zealand Settlements Amendment and Continuance Act 1865, 30 October 1865, NZ Statutes, 1864 – 1865, pp 245–248

encouraged claimants into the land court without carefully ascertaining the legal status of the land (which only they were in a position to ascertain), or the complications that must arise for claimants because of an outmoded piece of legislation which nevertheless gave the court its jurisdiction. The result was that Tuhoe and Ngati Ruapani – having heard Locke's repeated statements that the Crown had returned the land to them, after confiscating it – now found themselves in the position where the land court could confiscate any lands in which they were found to have rights. This was a turn of events which can only be described as bizarre. It is impossible to believe that the claimants would have entered into the court had they known of the full ramifications of the process under the East Coast Act. As Professor Belgrave rightly put it, referring to the land court hearing: 'what kind of process are people going to be involved in where the outcome is to have one's lands confiscated?'[350]

(8) *Were Tuhoe and Ngati Ruapani pressured to sell?*

Our next question is whether Tuhoe and Ngati Ruapani were subject to pressure to sell over this period, in light of their understanding that the East Coast Act would be applied by the

350. Belgrave cross-examined by counsel for Wai 36 Tuhoe claimants, 29 November 2004, draft transcript (doc 4.12), p 105

court. We conclude that there is no other credible explanation for their withdrawal from the court case and immediate acceptance of payment from the Crown, and reserves, for their interests in the four southern blocks.

Thus far we have detailed the proceedings inside the court. But it is clear that at the same time there was considerable activity relating to the four southern blocks outside the court – and that the court itself played a role in events beyond its doors. O'Malley has outlined a number of developments which show that the Crown's immediate response to the court's adjournment was to offer to pay Tuhoe and Ngati Ruapani for their rights and interests in the land, and to suggest one or more reserves. On 7 November Locke reported to McLean that he had been 'trying to compromise' with Tuhoe and Ngati Ruapani by offering them between £1500 and £2000. He had 'consulted' with Judge Rogan 'who says comprise [compromise] if you possibly can'.[351] The following day Locke was more specific:

> re adjournment of court [:] the delay would cost large extra cost to govt and then settlement doubtful, so I have been trying to compromise. this could be done by giving uriwera [*sic*] one of the reserves and two thousand pounds . . . this would run price of the land up to fourteen thousand pounds [:] neither urewera or Govt. Natives have been considered in Hamlin's arrangement[:] neither are they in any way named in his agreement. The matters might be settled completely and for ever now perhaps for one thousand less than above named. By delay it will cost much more. Please let me get answer in the morning as urewera are returning.[352]

We share O'Malley's uncertainty as to why an adjournment of the court would lead to a 'large extra cost' to Government; and agree that perhaps Locke was referring to a possibly increased cost of settling the claims of the 'Uriwera' if it were not attended to at once.[353] But it is clear that Locke's immediate reaction to the events in court was to put an offer on the table. Ormond thought a total of £14,000 was too high; and later told McLean that Locke was authorised to go £3000 above the terms Hamlin had offered Ngati Kahungunu, taking the total price to £13,000. (It is likely this sum included the amount to be paid to the 'loyal' Ngati Kahungunu who were being considered for payment at this time for their military services, and who later signed the January 1876 memorandum of agreement).[354] It is also clear that 'the Urewera' were concerned (as they were reported to be 'returning'; and that the Judge himself had a view on what should be done. On 9 November Ormond reported that 'Rogan strongly advises settlement of question by purchase as the two tribes

351. Locke to McLean, 7 November 1875, MA 1 1915/2346, box 172 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 132)

352. Locke to McLean, 8 November 1875, MA 1 1915/2346, box 172 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), pp 132–3

353. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 133

354. Ormond to McLean, 8 November 1875, McLean Papers, 0032–0099, ATL (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 134)

very hostile over it'.[355] According to Ormond, Judge Rogan had adjourned the court on 6 November after the reported 'great difference' between 'Urewera & Wairoa natives'; and Rogan had then adjourned 'giving as reason imperfect survey'. We take it from this that Ormond, based on what Locke told him, thought the survey was not the actual reason for adjournment; rather the judge had ground to a halt because he did not know what to do with evidence which he had decided was highly disputed, and was looking for a reason to buy some time. We take it from Ormond's statement of 9 November that the judge thought the time would be best spent finalising a purchase. By then Locke, according to his own statement, had 'the Wairoa question . . . thoroughly in hand', and expected to bring it to conclusion within a few days.[356] And indeed on 12 November Tuhoe and Ngati Ruapani signed a deed, as we have seen. Hori Wharerangi and Kereru Te Pukenui wrote to the Judge informing him that they had (according to O'Malley) 'yielded all their interests' in the four blocks to the Government.[357] They also appeared in court.

Ormond's account makes no reference to the use of the East Coast Act. It is possible Locke had not referred to it in the account he sent Ormond. It might have been considered impolitic to draw attention to the fact that the judge was trying to find a path through the difficulties that the Solicitor-General's opinion had created for him, and for the Government. Alternatively, Locke might have preferred to gloss over the fact that he himself did not come out well of events in the court. He might have left it to McLean to decide how to explain what had happened to Ormond.

What is clear is that the judge was free with his own views on what should now be done: he advised that the Government should push ahead with purchase. Had he done so simply on the basis of disputed evidence before him, in a hearing held under the native land legislation, this would have been an extraordinary move. The Native Land Act 1873 did not require the court to order that the blocks be awarded to one group of claimants or the other; rather it was to enter on a Memorial of Ownership the names of all those found to be owners. Moreover the Act provided for the claimants and counter-claimants to enter into voluntary arrangements in respect of the shares to be granted to each, and partitions of the land – and for the court to take account of such arrangements.[358] Why, then, could the judge not have proceeded to order that Tuhoe, Ngati Ruapani and Ngati Kahungunu names all be entered on the memorials? He might then have left it to the Crown agents to attempt to complete their purchases from Tuhoe and Ngati Ruapani; or, under the Act, he might have partitioned the blocks if all the owners did not wish to sell.[359] Partitioning would not neces-

355. Ormond to McLean, 9 November 1875, McLean Papers, 0032–0099, ATL (cited in O'Malley, Responses to Questions of Clarification (doc H64), p 26)
356. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 134
357. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 134–135
358. The Native Land Act 1873, ss 46, 47
359. The Native Land Act 1873, s 65

sarily have been easy, particularly in a block such as Ruakituri; but there was no reason why it could not have been attempted.

But once the judge had been notified that he must proceed under the East Coast Act – an Act whose application would result in the confiscation of the rights of the claimants before him in lands within its boundaries – the stakes were significantly raised. He then found himself in a position where he must either pass over the 'Urewera' (as rebels), refusing to issue them a certificate of title; or divide the land between loyal and rebel owners and determine whether the Crown or the loyal owners should be awarded the 'rebel' land. He might have feared at that point that he would be unable to separate the interests of 'rebels' and 'loyals' as the Act required (particularly perhaps in Ruakituri), such that he could confiscate the former without prejudicing the latter. The matter was complicated by two factors. The first we consider particularly worrying. The judge might have realised that in fact part of the blocks – the part nearer Lake Waikaremoana – fell outside the East Coast Act schedule; which would have complicated his task greatly. How would he explain to the claimants before him that because of a line drawn on a map (which he could not show them) they might face confiscation of some of their land, but not the rest? How indeed could he properly apply the Act, if he did not know himself where the boundary fell? Secondly, there were the Crown's payments already made to Ngati Kahungunu before ownership was determined. This meant that if the court chose to grant a large part of any block – or all of it – to Tuhoe, the land would effectively become Crown land, and the Crown might forfeit the moneys it had paid to Ngati Kahungunu (unless it sought to retrieve them from those who had been paid.)

Such remarkable circumstances, in our view, do explain the judge's willingness to urge purchase of the land – that is to say, completion of the Crown purchase – where other circumstances do not. And it is hard to avoid the conclusion that the judge's view must have carried considerable weight with the Crown's agents – and strengthened their resolve to try and bring Tuhoe and Ngati Ruapani to a sale. Whether his view was also conveyed to Maori we do not know. We must assume that it was, alongside the information claimants were given about the East Coast Act and its effect, if the agents thought it would help their cause. And doubtless they considered that the judge's view of a suitable path out of the dilemma 'rebel' Maori now found themselves in would carry weight.

For Tuhoe and Ngati Ruapani also, the unforeseen circumstances in which they found themselves after a few days' hearing also explain an otherwise inexplicable reversal of their earlier position on sale of the land. As the claimants pointed out, Tuhoe had been adamant up till the time when the hearing began, that they did not wish to sell it. Locke stated before they arrived at Wairoa that he expected the 'Urewera' to 'object in every way to dealing with any rights they may have.'[360] Kereru Te Pukenui admitted at the hui on 29 October that they

360. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 121

had received some money 'paid on account of the purchase of our land'; but he had come to return it. Tuhoe would accept no money for land inland of Mangapapa which, he said, was theirs. Hori Wharerangi spoke to the same effect, adding that he would 'not part with the land'.[361] Yet two weeks later, they had both changed their minds.

We might of course accept McLean's official explanation that the 'Urewera', whom he described as 'considerable owners' in the blocks, brought their claims into the land court 'with some hesitation'. They were, he wrote, 'well satisfied with the result; and yielding to the persuasion of the co-claimants of other tribes, joined in the sale, and received their share of the money.'[362] Or we might wonder whether McLean's account has any internal consistency: how could the claimants be described as 'well satisfied' if – being 'considerable owners' – they left the court without the legal recognition of their rights which they had come to secure? Payment of course did afford them some recognition; but in their earlier statements Tuhoe had been consistent in their wish to secure a land court decision. Instead they saw Ngati Kahungunu secure both legal recognition, and a larger payment than was made to them. We might wonder too why, when McLean had himself conveyed the Solicitor-General's opinion to Locke that the East Coast Act must be applied – which would have the effect that rebels' land would be confiscated – he made no mention of this in his report.

We conclude that Tuhoe and Ngati Ruapani must have been informed about the consequences of the Solicitor–General's opinion (because we do not see that the opinion could have been withheld from them); and that they then undoubtedly found themselves in an unanticipated and very difficult position. We are struck also by the point made by claimant counsel that: 'This is the only time that Tuhoe chiefs ever collectively withdrew a claim in the Native Land Court.'[363] The choice they faced on this occasion was whether to risk returning to court in the hope of securing a favourable judgment, and successfully defending themselves against charges of rebellion; or to withdraw and take the Crown's offer on the table: a payment and 2500 acres of reserves. The risk of being declared rebels, and however must have been considered too high.

Two later statements by Tuhoe leaders attest to the pressure Tuhoe felt themselves under in 1875. Hurae Puketapu stated to the Urewera Commission in 1906 that:

> In the year 1875 Tuhoe & N. Kahungunu arose & sold all the lands to the south and east of Waikaremoana. The Tuhoe chiefs endeavoured to prevent this sale, the chiefs who made the attempt to prevent it were Te Wakaunua, Te Whenuanui, Kereru te Pukenui, & ors [*sic*]; Paerau stood up & slapped his knees [in a haka] and sang a song to the effect that the sale

361. 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G-1A, p 3–4
362. McLean, 'Statement relative to land purchases, North island', AJHR, 1876, G-10, p 3
363. Counsel for Wai 36 Tuhoe, closing submission, Part A (doc N8), p 29

wd [*sic*] be proceeded with, & the land was sold, even though the Urewera generally did not desire the sale to take place.[364]

And in 1917 Eria Raukura, speaking for Tuhoe, (a contemporary of the 1875 settlement, as claimant counsel pointed out), spelt out the reason for the sale in these terms:

> Tuhoe & Ruapane got blocks within the area enclosed by these boundaries of a total area of 157000 acres. The Govt. told us we would have to sell or else it would be taken from us. Tuhoe & Ruapane agreed to sell. There were 60 persons who signed the deed of sale. We got £1250 and 2600 [*sic*] acres were set aside as reserves. The deed was signed 12–11–1875. Hamblin [*sic*] was interpreter & agent.[365]

But in all of this we are bothered most by the fact that the general official assumption – and therefore the assumption conveyed to Tuhoe and Ngati Ruapani – was that the application of the East Coast Act would mean the confiscation of any land found to be theirs within the four blocks. Yet there was no up to date map available which demonstrated that that was the case.

All of this evidence, albeit circumstantial, adds up to a compelling case for Tuhoe and Ngati Ruapani's acceptance of a payment for their interests under threat of confiscation. Their application for a court hearing occurred in extraordinary circumstances, but their determination to see the hearing through from that point cannot be doubted. It follows, then, that their sudden withdrawal from the court and sale of their interests to the Crown could also only have been the result of extraordinary circumstances. Informed of the Solicitor-General's opinion (either inside or outside the court) they went away to consider their options – knowing full well that if they were to proceed with the hearing their land would be confiscated. At this time Locke was on hand to take advantage of the situation in a way that expedited the finalisation of purchase negotiations. The Solicitor-General's opinion showed up Locke's ignorance of the significance of Crown agreements with Maori – in one of which he was the key player – but it certainly played into his hands as far as resolving the situation was concerned. Under considerable pressure, and with no other options left to explore, Tuhoe and Ngati Ruapani accepted the offer of £1250 and reserves totalling 2500 acres.

It is almost redundant to add that the amount of money they received was inadequate; but the point should be made. £1250 and four reserves was paltry, especially in comparison to the amount of money paid to the lessees.

364. Barclay Urewera Commission Minute Book 1, 18 December 1906, p 61, in Binney, supporting papers for 'Encircled Lands', (doc A12(b)), p 677 Binney, 'Encircled Lands' vol 1 (doc A12), pp 314–315

365. Wairoa Minute Book 29, 26 July 1917, p 47 (cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 315

The Creation of the Tuhoe and Ngati Ruapani Reserves

The deed alienating the 'rights and interests' of 'Tuhoe, Urewera, [and] Ngati Ruapani', signed on 12 November 1875, included an undertaking from the Crown to establish for 'the Chiefs and people of the tribes' with whom the deed was made 'a permanent reserve for us on part of the abovenamed blocks of an area of two thousand five hundred acres (2500)'.[1] These were the only terms in which a reserve was mentioned. We note that:

- The reserve was to be created by the Crown, on land over which native title had been extinguished; it was not land withheld by the sellers.
- The essential character of the reserve is indicated by its intended beneficiaries: 'the Chiefs and people of the tribes of Tuhoe, Urewera, Ngati Ruapani'. In the te reo Maori version of the deed this was recorded as: 'nga iwi me nga rangatira me nga tangata katoa o Tuhoe ara o te Urewera o Ngati Ruapani'. In other words, the reserve was to be for the tribal community. Some kind of tribal title could therefore have been expected by the Tuhoe and Ngati Ruapani people who signed the deed.
- The reserve was to be 'permanent' ('whakatuturutia'); in other words inalienable.
- The deed implied that only one reserve of 2500 acres was to be set aside for Tuhoe and Ngati Ruapani. This was stressed in the te reo Maori text of the deed: 'tetahi wahi o ana whenua kua whakahuatia a konei'.
- No mention was made as to the location of the reserve or the process by which its location would be determined.

Although the deed indicated that only one reserve would be established, it seems that four reserves were contemplated either at the time of its signing or soon afterwards. In the English version of the deed, the four figures 300, 800, 300 and 1100 have been written in the margin next to the description of the promised 2500 acre 'reserve'. These figures correspond to the size in acres of the four reserves that were later established. It is unclear when the four figures were added to the deed, or whether Tuhoe and Ngati Ruapani chiefs were consulted about the change.

Four reserves were finally marked out:

- Te Kopani (800 acres), in the Tukurangi block, about two miles from the lake on the south bank of the Waikaretaheke river;
- Whareama (300 acres), also in the Tukurangi block, the only one of the reserves located on the lake shore;
- Te Heiotahoka (1100 acres), in the Taramarama block, about three miles from the lake; and
- Ngaputahi (298 acres), in the Waiau block, and about four miles from the lake.

1. Deed 841 – Tuhoe, Urewera and Ngati Ruapani southern blocks purchase deed, 12 November 1875, AUC 841-A, in Marr, supporting papers for 'Crown impacts on customary interests' (doc A52(a)), pp 36–37

The four reserves were surveyed over the course of 1877; all had been 'marked off' by July.[2]

On 30 August 1877, shortly after the surveys were completed, the four southern blocks, excepting 28 'native reserves', were proclaimed 'waste lands of the Crown'. The notice was published in the gazette of 13 September 1877.[3] The proclamation listed the number of native reserves 'excepted' in each block, together with their area 'as delineated on the plan of the block in the office of the Chief Surveyor of the Provincial District of Auckland'. There were 12 reserves in the Ruakituri block (totalling 2,975 acres); 8 in Taramarama (totalling 2,800 acres); 7 in Tukurangi (totalling 4,427 acres); and 1 in the Waiau block (300 acres).[4] The 28 reserves included the four for Tuhoe and Ngati Ruapani, though tribal names were not specified in the proclamation.

2. Locke to Gill, 16 July 1877, MA 1 1915/2346, NA-W (cited in Belgrave and Young, 'War, confiscation and the four southern blocks' (doc A131), p 109)

3. Belgrave and Young, 'War, confiscation and the four southern blocks' (doc A131), p 110; *New Zealand Gazette*, 13 September 1877, pp 928–929. The Proclamation was issued under s 17 of The Waste Lands Administration Act 1876.

4. *New Zealand Gazette*, 13 September 1877, pp 928–929

(9) *Were Ngati Kahungunu pressured to sell?*

The Ngati Kahungunu owners also sold their interests in the blocks, as we have explained. Purchase of the land by Crown agents began before the court hearing with advance payments to individuals in early 1875 and finished with a series of deeds and agreements between November 1875 and August 1877. Counsel for Wai 621 Ngati Kahungunu and Ngai Tamaterangi both argued that Ngati Kahungunu were pressured to sell for a variety of reasons, including: the faulty process established from the Te Hatepe and Locke deeds; the Crown's assumption that the land was confiscated; the threat of further confiscation under the East Coast Act 1868; the purchasing of interests which began before proper investigation of title had occurred.[366] Counsel for Wai 621 Ngati Kahungunu argued that 'Crown policy facilitated the forced sale of Kahungunu interests' in the four southern blocks.[367] Historians offered other reasons, notably the debt incurred by Ngati Kahungunu.[368] In the case of Te Waru Tamatea and his people, who had been exiled after the wars, counsel submitted that they were not party to meaningful negotiations and merely received a small payment after the sale had been virtually completed.[369] Crown counsel accepted that there

366. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 55, 59–60 and 73; Counsel for Ngai Tamaterangi, closing submissions (doc N2), p 41

367. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 73

368. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 120; Belgrave and Young, 'War, confiscation and the four southern blocks' (doc A131), pp 13, 99–100

369. Counsel for Ngai Tamaterangi, closing submissions (doc N2), p 43

> *The land comprised within the boundaries just repeated by me is in the hands of the Government. In vain have I endeavoured to regain that land. The Urewera, too, have made the same fruitless effort.*
>
> Hapimana Tunupaura, 'Notes of Meeting at Wairoa', 29 October 1875, AJHR, 1876, G-1A, p 2

was pressure to sell, but submitted that this derived solely from 'significant boundary issues' between Ngati Kahungunu and 'Urewera Maori'. In these circumstances, counsel argued, the Crown's purchase of the blocks was presented as an 'attractive alternative' to address the boundary issue.[370]

Belgrave and Young, summarising the issues, suggested that the Tribunal should decide 'whether these four blocks were acquired from their customary owners through some degree of coercion or whether they were, on the other hand, a sale between willing sellers and a willing purchaser.'[371] We examine the question by looking at the three groups within Ngati Kahungunu who sold their interests:

- First, those Ngati Kahungunu who had earlier signed leases of the blocks in 1873 (those listed in the Locke deed schedule as 'owners'), who sold their interests before the court hearing, and those who were listed on the memorials of ownership, whom the Crown then bought out after the court hearing in four separate deeds of purchase.
- Secondly, those Ngati Kahungunu who had served the Crown and had been promised land as part of the Te Hatepe agreement for military services. This included Ihaka Whaanga's people of Mahia and other coastal peoples, who were assumed by the Crown not to have customary interests, and whose names with one exception were not included in lists of owners in the schedule to the Locke deed.
- We also consider those Ngati Kahungunu who had interests in the blocks but who were not party to the main negotiations. We look at the history of one of these groups – Te Waru Tamatea and his people who were by this time exiled from upper Wairoa to Waiotahe, and who sold their interests in 1877 – in a separate text box.

We have referred above to the leases which Ngati Kahungunu entered into with various settlers in 1873: those of the Tukurangi and Waiau blocks (Barker, MacDonald, Cable and Drummond) and later of the Taramarama and Ruakituri blocks (Maney). Although these leases raised the ire of Tuhoe and Ngati Ruapani, Ngati Kahungunu took this course for their own reasons. Many of their leaders had been waiting for several years to derive some tangible benefit from the promises made in the Te Hatepe deed. Leasing the land provided a significant income, totalling £700 per annum across the four blocks. But within a year the

370. Crown counsel, closing submission (doc N20), topic 6, p 17
371. Belgrave and Young, Summary report of 'War, confiscation, and the four southern blocks' (doc 13), p 2

Crown had begun negotiating to purchase the land from the same people who were receiving these rentals. Why, having finally established a significant annual income from this land, did Ngati Kahungunu contemplate permanently alienating their interests in the land only a year later? In our view there are several reasons.

First, many Ngati Kahungunu were heavily in debt. This explains why they were desperate to enter into leasing arrangements soon after the signing of the Locke deed. But it also goes some way to understanding why they were willing to offer their interests for sale the following year. Ms Gillingham pointed us to startling evidence of the debts Wairoa peoples had accumulated by this time. Her summary of this evidence is worth quoting in full:

> the amount of debt carried by Maori and the apparently easy credit arrangements with some storekeepers appears to [have] made indebtedness among Maori widespread by the second half of the 1870s. In 1877, Dr Ormond estimated that every Maori in the Wairoa district was £10 in debt, with some individuals owing £200 to £500. Those living around Te Reinga, Ngati Kohatu, had also run up debts with Poverty Bay storekeepers. Ormond commented that their debts were so great 'it seems difficult to see how they are to pay them, £2,000 being put down as one chief's liabilities alone'. During the 1870s, many of these debts resulted in civil prosecutions of the Maori debtors in the Resident Magistrate Court. In one sitting of the Resident Magistrate's Court at Mahia in October 1877, for instance, Walker and Bendall claimed amounts from Maori defendants for goods supplied varying from £3 14s to £20. According to Dr Ormond, Maori invariably found the money to pay such debts '[w]hen forced to do so.'[372]

Here the complicated undertakings between the Crown and Maney in 1874 are significant. According to Belgrave and Young: 'By 1875 Maori in the region were very substantially in debt to European store holders and, in particular, to R D Maney, the major beneficiary from the sale of the blocks.'[373] As we have explained, by 1874 Maney was said to have acquired 'interests' in the blocks. This did not merely mean the leases he had acquired for the Taramarama and Ruakituri blocks; he had also been actively involved in buying out the individual interests of those listed in the Locke deed schedule. The Crown then paid Maney sums of money in exchange for his leasing arrangements, proprietory interests and assistance to the Crown in further purchasing of the blocks. But why had Maney begun purchasing Maori interests? Clearly the debt incurred by Ngati Kahungunu was such that his rental did not cover all of their debts. He had been able to advance purchase payments for the Ruakituri and Taramarama blocks, and he would have felt confident that he could continue to purchase customary interests. After the sale of the blocks had been completed Ormond acknowledged that 'leaders had come off badly because they did not have enough funds

372. Gillingham, 'Maori of the Wairoa district' (doc I5), p 263
373. Belgrave and Young, 'War, confiscation and the four southern blocks' (doc A131), p 13

to cover their debts'.[374] In these circumstances, we are not surprised that Ngati Kahungunu also later contemplated the alienation of their interests to the Crown. As Marr pointed out, 'Even if they had been reluctant to sell, many of those approached must have felt considerable pressure to do so or risk losing out altogether.'[375] Belgrave and Young considered that because of the 'major problem' of debt, 'Ngati Kahungunu were selling land to meet their responsibilities'.[376] For Ngati Kahungunu, they stated, it was a 'much more significant factor' in the decision to alienate their interests than the 'conflict' over customary rights that had arisen.[377]

The second reason was the apparent disputes that arose between various Ngati Kahungunu groups because of the division of the rentals. As we have seen this emerged as an issue in November 1873 when Ihaka Whaanga and twelve other chiefs complained to McLean about the pitiful amount they received due to the fact that only one of their people was a listed owner. For these chiefs, the terms of the Te Hatepe deed had gone unfulfilled. The uncertainty surrounding the rentals derived from the leases, both for those Ngati Kahungunu who initiated the leasing arrangements and those who were initially left out, would have certainly contributed to general anxieties about debts. If the rentals had to be spread more widely, the return to the original lessors would be smaller. A further factor which must have made sale seem a better option to both groups of Ngati Kahungunu was the looming land court hearing. For Ngati Kahungunu Wairoa leaders it was an unwelcome development – particularly because of the so-called 'boundary dispute' that had become such an issue. The decision of Tuhoe and Ngati Ruapani to oppose the leases was, as we have seen, framed by officials as a long-standing traditional dispute which the court could resolve. Only a few months after negotiating the leases, therefore, Ngati Kahungunu were suddenly faced with the prospect of proving their title before the Native Land Court and, potentially, losing their long-sought after income from the rentals. O'Malley argued that Ngati Kahungunu were selling lands 'to which they had at best disputed . . . title' in order to clear their debts to Maney[378] – an argument disputed by Belgrave and Young[379] We agree that it cannot be shown that Ngati Kahungunu saw an opportunity to clear their debts by taking the opportunity to sell land they knew did not belong to them. Ngati Kahungunu's customary rights in the blocks, as we have seen, were considerable – of this there is no doubt. But it seems clear that the dispute over title must have influenced the thinking of Ngati Kahungunu Wairoa leaders. Given their indebtedness, the uncertainty created by the 'boundary dispute' and the continuing tensions with Tuhoe, the prospect of a land court hearing must have weighed on them, and increased the pressure to sell. And for coastal

374. Belgrave and Young, 'War, confiscation and the four southern blocks' (doc A131), p 104
375. Marr, 'Crown impacts on customary interests' (doc A52), p 163
376. Belgrave and Young, 'War, confiscation and the four southern blocks' (doc A131), p 100
377. Belgrave and Young, summary report of 'War, confiscation and the four southern blocks' (doc 13), p 10
378. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 120
379. Belgrave and Young, 'War, confiscation and the four southern blocks' (doc A131), p 100

Ngati Kahungunu, the looming court hearing would also have been an unexpected threat. Those who had no customary rights in the four southern blocks land, or who feared their rights might not be recognised by their whanaunga when the lists of owners were drawn up, would have felt increasingly insecure.

Finally, Ngati Kahungunu believed – because they had been told as much – that the land had been confiscated. Counsel for Ngati Tamaterangi drew our attention to this point in his discussion of the circumstances in which the blocks were sold. Counsel implied that these circumstances tainted the sale of the blocks.[380] Indeed, because they had been told the land had been confiscated (as if confiscation had proceeded under the New Zealand Settlements Act 1863) and then had been 'returned', Ngati Kahungunu were placed at a distinct disadvantage when it came to negotiating with the Crown. Given that they were therefore under the impression that they held the land because of a magnanimous act of the Crown, they may have felt at a distinct disadvantage in challenging the Crown's decisions about the land – even after its 'return'.

Given all these circumstances, we conclude that there were significant pressures on Ngati Kahungunu to sell their rights to the four southern blocks. Although there is no evidence of direct official pressure, officials quickly sought to convert the situation into an opportunity to purchase the land. This was land which the Crown had promised only a few years before should remain inalienable. Officials took the easy way out; they did nothing to investigate alternatives by which the land could remain in Maori ownership. Purchase was presented as the only solution, not only for Ngati Kahungunu indebtedness and for tensions arising as a result of the rental distribution, but also for the 'boundary dispute' that officials themselves wrongly diagnosed in the wake of the Locke deed and the inter-iwi tension over leases. They did so by offering cash advances before a proper investigation of ownership in the Native Land Court, tactics employed elsewhere in the country that have come in for heavy criticism by other tribunals. The amounts received by various Ngati Kahungunu groups in four deeds of sale totalled £9600. Counsel for Wai 621 Ngati Kahungunu argued that the land was acquired 'at less than fair value (less than 1s 8 3/4 d. an acre), given that some of the lands were at that time being leased for 700 pounds per annum'.[381] A total of 42 names appeared on the memorials of ownership, which appear to have been by and large the same names that appeared on the deeds of sale. Based on this, each individual would have received, on average, £228. But we do not know how the money was distributed – or how widely. There were considerably more names on the lists of owners in the schedule to the Locke deed. It is likely therefore that the money was spread across a rather larger number of those with interests in the land. As mentioned above, Ormond commented that the amounts were not adequate to cover all the leaders' debts. It is disquieting to compare the amounts paid to the settler lessees with the payments made to Maori. We note that the Crown paid to the

380. Counsel for Ngai Tamaterangi, closing submissions (doc N2), p 41
381. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 62

Ngati Kahungunu owners of the Waiau block an additional £540 in 1892. That payment was for an extra 7200 acres (over and above the acreage estimated in 1875) that were shown by survey to be in that block. No other payments were made for additional acreage in the other blocks. But – as we observed above in our discussion of the amount received by Tuhoe and Ngati Ruapani – the sum received by Ngati Kahungunu is, we believe, incidental to the main point about the way in which the land was alienated. The land should never have been purchased at all. Rather, the Crown should have respected its own guarantee that the land would beinalienable.

The second group of Ngati Kahungunu to receive payment at this time were those 'loyalists' who had been promised land in the Te Hatepe deed in exchange for their military assistance to the Crown. This was a substantial group – 441 Maori, who were listed by hapu or place of residence in the 'memorandum of agreement' that was signed on 15 January 1876.[382] This group was generally considered to have no customary rights in the four southern blocks – and indeed only one of the signatories to this agreement (Maraki Kohea) was listed in the memorials of ownership. But some of them may have had rights in the Kauhouroa block, and would have been due compensation for their loss of land as well as their military service. Despite this, leaders of this group had had to push to get a larger share of the rentals from the leases. And once a land court title investigation went ahead, they faced exclusion altogether. Ultimately, the Crown could not fulfil its promise to them made at Te Hatepe. Ihaka Whaanga appears to have accepted this in November 1873, when he suggested a money payment. McLean told him at that time that as their party comprised 319 men they should receive £2,942 15s. 6d (at £9 4s. 6d. each).[383] But the £1500 they did receive, therefore, was almost half of this suggested payment, and with an additional 122 people added to the list, this came to £3 10s. per person. Ngati Kahungunu were paid off at what was clearly a low rate for the time, judging by the offer made informally by McLean. We might conclude that the size of the payment was less important to the leading signatories of this deed than ensuring that all who had fought for the Crown were recognised, and their names recorded.

It is possible that some Ngati Kahungunu were excluded from negotiations, and therefore were unable to secure even a small payment for their rights in the blocks. Counsel for Ngai Tamaterangi argued that there were many Ngai Tamaterangi who were considered to be 'rebels' by the Crown but who did not pursue their interests in the land court because of threats of confiscation under the ECLTIA and subsequent legislation.[384] We are not inclined to accept this argument. As we have seen, all parties including officials and Maori from the time of the Locke deed up until the Land Court hearing believed the land had been legally

382. Memorandum of Agreement between the Crown and Ngati Kahungunu to convey interests in southern blocks, 15 January 1876, AUC 841-D, in Marr, Supporting Papers for 'Crown Impacts on customary interests in land in the Waikaremoana district' (doc A52(a)), p 44

383. 'Notes of Native Meetings', 29 November 1873, AJHR 1874, G-1, p 2

384. Counsel for Ngai Tamaterangi, closing submissions (doc N2), pp 41–42

confiscated but had been 'returned'. There may have been some Ngati Kahungunu who participated in the land court hearing who, as we have noted, were placed under pressure following the Solicitor-General's opinion regarding the status of the four southern blocks land. Those who may have been deemed 'rebels' had they been required to give evidence to a court exercising its jurisdiction under the East Coast Act 1868 may have felt their rights in jeopardy, and may have withdrawn their names from the lists of owners entered onto the memorials of ownership anyway.

Finally, we note the particular case of Te Waru Tamatea. Te Waru and his people, without a doubt, sold because as exiles from their homes in upper Wairoa, they had no real choice at all; and the payment they received in 1877 – last of all those made by the Crown – was the smallest sum it paid to any group. Yet they had strong customary rights in the land.

Because their exile from the Wairoa region to the eastern Bay of Plenty was the outcome of a wider set of circumstances – Te Waru's turning to Te Kooti following the Crown's actions in upper Wairoa from the end of 1865 – we address the events leading to the sale of his people's interests in the blocks separately (see sidebar over).

In summary:

- Events following the signing of the Locke deed clearly increased tensions among Ngati Kahungunu; notably there were difficulties over rent distribution (a product of the Crown's inept attempts in the deed to give effect to its promises in the Te Hatepe deed). The leases also led to increasing tensions with the Tuhoe leadership, who saw them as a challenge to their own rights in the land.
- Although there is no evidence of direct official pressure upon the various Ngati Kahungunu groups to sell, officials exploited divisions within Kahungunu, high levels of debt, and Ngati Kahungunu apprehension as the land court hearing approached that their economic return from the leases might be in jeopardy, to embark on purchase of the land. Ngati Kahungunu were under heavy financial pressure. The impending court hearing carried risk that they were not in a position to take. These factors certainly coerced them, and made them vulnerable to the encouragement and inducements of the Crown. While we cannot call this a 'forced sale' we do not think they were 'willing sellers'. Rather, the various groups within the iwi found themselves in a situation where sale seemed by far the best way out of their dilemmas.
- The Crown's argument, that purchase was presented as an 'attractive alternative' to resolve the 'boundary issues' between Tuhoe and Ngati Kahungunu,[385] does not sufficiently account for its role in embarking on acquisitionof this land through a process that was highly dubious and in circumstances that were extremely unfair. We do not believe that purchasing these blocks was the only avenue available to the Crown to resolve problems it had created.

385. Crown counsel, closing submission (doc N20), topic 6, p 17

Te Waru Tamatea Relinquishes the Rights of his Hapu in the Land

Te Waru Tamatea and his people were exiled to land in the eastern Bay of Plenty following their surrender at Fort Galatea in December 1870. They were taken initially to Te Teko, where they resided under the surveillance of Ngati Awa, before being sent to Maketu and finally in June 1874, to Waiotahe. The idea of relocating the hapu permanently to land in the eastern Bay of Plenty appears to have originated with Te Waru himself. In 1877 he told GA Preece, 'It was on my request to Sir D M [McLean] that this land was given to me here [Waiotahe] and I have remained quiet since.'[1] As Te Waru referred to meeting McLean at Whakatane, it was likely that this request was made at the April 1872 hui where McLean instructed the exiles to return to their home lands (see ch5). But it was not until March 1874 that this proposal was acted upon, when the official Brabant recommended that the community be relocated to Waiotahe.[2] It is likely that Te Waru sought relocation because of lasting tensions between his people and other Wairoa Ngati Kahungunu in the wake of war and land loss in the district. These tensions appear to have been real: Te Waru did not attempt to return to Wairoa before he died in 1884. But one of the chiefs of his hapu, Hukanui, said in 1877 that while they had moved to Waiotahe because of the tensions, this occurred at the Crown's initiation. '[T]he Govt [*sic*] have decided to keep us here on account of the ill feeling between us and Ngatikaha Nganga [*sic*].'[3] Although the weight of evidence suggests Te Waru suggested the relocation to Waiotahe, the move also certainly suited the Crown's aims at this time. Although purchasing the blocks had yet to be proposed in 1874, officials had witnessed much of the confusion that had ensued following the leases, and were beginning to deal with the fallout from this. It was in the interests of these officials that Te Waru and his people did stay away.

Te Waru was reported to have offered to sell his interests in the blocks in August 1874 – only a few months after he and his people were relocated to Waiotahe.[4] This was the first time the possibility of sale of land in the blocks was raised.

Mary Gillingham suggested that in offering his interests for sale Te Waru may have been asserting his 'mana whenua over lands in the Wairoa interior' and the lower Wairoa chiefs.[5] In other words, he made the first offer *because* he was in exile, to remind both Ngati Kahungunu and the Crown of his unquestionable rights. Professor Binney, however, argued that the circumstances in which Te Waru made this offer shows he had been placed in an 'invidious position', and felt pressured to sell his interests in the land.[6] She noted the circumstances in which Te Waru and his people came to

1. G A Preece, notebook, undated, NZMS108, Auckland Public Libraries, in Binney, supporting papers for 'Encircled Lands', vol 1 (doc A12(b)), p 804)
2. Binney, 'Encircled Lands', vol 1 (doc A12), p 308
3. Preece notebook, in Binney, supporting papers for 'Encircled Lands', vol 1 (doc A12(b)), p 803
4. Brabant to Native Department, 12 August 1874, MA 1/1874/4413, Maori Affairs Inwards Correspondence Register, NA (cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 308)
5. Gillingham, 'Maori of the Wairoa district' (doc I5), p 247
6. Binney, 'Encircled Lands', vol 1 (doc A12), p 308

be at Waiotahe and argued that this was not a move of their own choosing: they had been forced away in war and had been offered land to cultivate in the eastern Bay of Plenty where they had no customary associations or knowledge of the resources that could be utilised. She also directed our attention to the record of letters Brabant sent, in which he noted that bullocks, seed potatoes, and tools had been given to the community thereby making it self-sufficient.[7] According to Binney, 'it is no coincidence' that the letter in which Brabant indicated he had organised tools for the community was sent on the same day as Te Waru's offer to sell his interest in the land.

The broader circumstances surrounding the finalisation of the purchase, which did not occur until three years after Te Waru's initial offer, explain to us why Te Waru accepted payment at this time. By the middle of 1877, Te Waru's people, who had by then taken the name Ngati Tamatea, had about 50 acres under cultivation at Maromahue in the Waiotahe valley. According to Binney, they were awarded Lots 19, 386 and 388 Waiotahe, which totalled 324 acres. The smallest lot was a fishing station at the mouth of the Waiotahe River.[8] Binney notes that Te Waru had been excluded from negotiations with other Ngati Kahungunu to sell the blocks, and in this context he 'insisted that a government representative be sent to him' in January 1876, though for what purpose she does not state. Finally, in August 1877, G A Preece travelled to Waiotahe and 'pressed Te Waru and his brother Reihana to endorse the sale of the four southern blocks'.[9]

We learn about Te Waru's view of the sale primarily from the record of this hui with Preece. This hui probably took place sometime in mid to late August, before the deed of sale was signed on 6 September 1877. Although Preece's notes are difficult to follow, it appears that Te Waru began the korero by acknowledging Preece, stating that it was fitting he had come to 'settle' their land questions, as it was Preece to whom Te Waru had surrendered in December 1870. He stated that it had been his idea to resettle at Waiotahe. He discussed the sale of the land as a fait accompli, but asserted his own mana: 'let the Wairoa natives sell the land but that my mana over it may be kept over it that the land may go but I must retain my influence.' Thus Te Waru harked back to the political balance in the Wairoa district before Government forces arrived there at the end of 1865: 'it was Kopu at the coast and Te Waru inland in the old days before fighting.' Thus, he said, things had taken the course they did in the Native Land Court (in 1875) only because he – whose mana was so widely acknowledged – was not there: 'If I was in the Court the other natives would have nothing to say.' Although he accepted that the four southern blocks were now gone, he strove to retain his interests in the land to the north and west: namely, Waikareiti and Waipaoa 'up to Maungapowhitu [*sic*]'. And he made

7. Brabant to Native Department, 16 July 1874, MA 1/1874/3956, Maori Affairs Inwards Correspondence Register, NA; Brabant to Native Department, 12 August 1874, MA 1/1874/4408, Maori Affairs Inwards Correspondence Register, NA (cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 308)
8. Binney, 'Encircled Lands', vol 1 (doc A12), p 309
9. Ibid, p 318

one further request: 'All I ask for is let me go for the bones of my children and bring them here or take them on to my other land'.[10]

Preece returned to Waiotahe to sign the deed with Te Waru and his people on 6 September. As we have already noted, this was after the proclamation declaring the blocks 'waste lands' of the Crown. The agreement was signed by 30 people, headed by Te Waru and his brother Reihana Horotiu. Many who made their mark were women; few men of the community had survived the war.

As payment for their interests in the four southern blocks and the Hangaroa block, Preece had offered £200. By any standards, this was a questionable amount. The customary interests of Te Waru and his people spanned the eastern regions of the blocks. This offer was rejected: instead a counter offer of £400 was made.[11] Ultimately a final figure of £300 was reached, which Preece reported that he had paid 'in full satisfaction' of their claim.[12]

In our view Te Waru had no alternative but to accept the Crown's money. Although he managed to negotiate an increase in the Crown's initial offer of £200, both that and the counter-offer of £300 demonstrated how little the Crown believed it had to take account of his rights – as he would have been acutely aware. When Te Waru departed Wairoa for the final time in 1869, it is likely he knew he would never return. Relationships with lower Wairoa peoples had been shattered over the previous four years of fighting. In 1865–1866 he had fought against Crown forces when they marched from Wairoa into the interior, despite having successfully maintained the peace with lower Wairoa chiefs over the previous year and a half. Upon surrendering in May 1866 he believed he had arrived at peace with honour, only to discover Ngati Kahungunu land was to be confiscated. This was surely foremost in his decision to join Te Kooti, which had disastrous consequences for both peoples of upper and lower Wairoa. The Crown had done little in the intervening years to mend its fences with the peoples of upper Wairoa and Waikaremoana against whom it had fought. Instead it actively encouraged divisions among Ngati Kahungunu, beginning with its decision to quash Pai Marire in late 1865 through to its pursuit of Te Kooti which employed lower Wairoa Ngati Kahungunu among its forces.

On top of this, Te Waru and his people were left out in the cold when the Locke deed was negotiated in 1872. By the time the Locke deed was signed, Te Waru and his people had already left their homes. At that crucial moment in the history of the land, they were unable to protect their interests. Though so much of their land lay within the Locke deed boundaries the list of customary owners given to Locke excluded the entire hapu. They had thus been totally marginalised by 1872. In summary, while Te Waru initiated the sale of his interests in the mid-1870s, he was indeed – as Binney says – in an 'invidious position'. He and his community had been relocated to land that they were unfamiliar with and where they had few resources to develop. At the hui with Preece, Reihana summarised the feelings of resignation and despair which led them to participate in the sale of their

10. Preece notebook, in Binney, supporting papers for 'Encircled Lands' (doc A12(b)), pp 803–804, 806
11. Ibid, p 803
12. Binney, 'Encircled Lands' (doc A12), p 319

ancestral land in return for a very small payment: 'I wish to sell my whole interest in all land in Wairoa both surveyed and unsurveyed let me eat the proceeds'.[13] By 1877, Te Waru and his people could do little more than secure some small recognition of their rights in their ancestral lands.

At some point during the hui, the women of Ngati Tamatea sang a waiata tangi, or apakura, grieving over the loss of their ancestral lands:

> Go my lands go to
> the sea go
> Taramarama
> go Waiau go
> Ruakituri, go
> Tukurangi go
> Like our hunters
> of old – gone for
> ever like the
> wind which strikes
> Maunganui[14]

As Professor Binney aptly said, 'Their song echoes other lamentations in Te Urewera'.[15]

13. Preece notebook, in Binney, Supporting Papers for 'Encircled Lands' (doc A12(b)), p 803
14. Ibid
15. Binney, 'Encircled Lands' (doc A12), p 322

7.5.5 Conclusions on the Crown's acquisition of the four southern blocks

(1) *Why and how did the Crown and Maori enter into the Te Hatepe deed (1867) and what was its effect?*

The signing of the Te Hatepe deed, and the terms on which the cession of the Kauhouroa block was made, ultimately proved to be the first stage in the complex history of the creation and alienation of the four southern blocks.

The basis of the Te Hatepe deed was that, in return for the Maori signatories' cession of the Kauhouroa block, the Crown would not press its claims to confiscate 'rebel' land in an area believed to be subject to the East Coast confiscation legislation. The underlying assumption of the deed was that there had been a rebellion which justified the Crown's confiscation, which was a fait accompli – or virtually so; Crown officers had gone to Te Hatepe only to discuss which lands would be taken. That this was the Crown's view was made very plain to Maori at the hui that preceded the deed's signing. Faced with the Crown's insistence,

7.5.5

Ngati Kahungunu had little bargaining power. By the Crown's own word, any opposition to its desire to obtain the Kauhouroa block by means of a cession from its 'loyal' owners could be overridden by the operation of the law. And who better than the Crown to know its own legal right to confiscate?

Our analysis has revealed that the Crown's assumptions were wrong. There was no rebellion and so there was no basis for invoking East Coast confiscation legislation. Since those same wrong assumptions underlay the negotiations for the Te Hatepe deed, the arrangements made by that deed also lacked any basis. Quite simply, the Maori signatories were not correctly informed about the context for those arrangements and the misinformation they received was fundamental. We believe that if it had been known by Maori that the Crown could not confiscate any land in the area and yet wanted a large tract of land for a military settlement, the Maori signatories would not have agreed to part with the Kauhouroa block on the terms set out in the Te Hatepe deed. Maori participation in the Te Hatepe deed was in short seriously compromised by the Crown's own conduct.

More than that, however, even if the Crown had been correct in its assumption that there had been a rebellion justifying its reliance on the East Coast legislation, our analysis has revealed that the legislation was ineffectual to achieve the Crown's purposes. Quite apart from the defect in s 2, which would have prevented any use of the 1866 Act before its amendment in October 1867, the task the Act set for the court – to separate out 'rebel' and 'loyal' land – was very likely incapable of performance. As the Turanga Tribunal pointed out,

> the legislation laid bare the false premise on which the Crown's confiscation policy was based: namely, that it was possible to separate the interests of 'friendly' and 'rebel' Maori, and take the lands of the latter without inflicting injustice on the former. The advantage of cession was that it removed all the risks of experimental legislation including, as we saw from the crucial error in the 1866 Act, simple incompetence.[386]

Thus, at the time of the Te Hatepe deed, the Crown had no leverage at all to obtain a cession of land in lieu of invoking the confiscation legislation.

And more than this, even if the Crown believed (wrongly) that it had confiscatory rights which it could 'trade off' for a cession of land, in all conscience, it would at least need to protect 'non-rebels' who did not consent to the cession, just as they were protected by the law. The East Coast confiscation law provided that only 'rebel' land, as identified by the Native Land Court, could be confiscated. The principle of protecting 'non-rebel' land was fundamental to the novel scheme of the East Coast legislation – as Richmond spelt out in 1868: the Government's wish was that only the lands of those who had rebelled should be confiscated, 'and that we should not take away land from friendly Natives and afterwards give them back other land'.[387] In those circumstances, any alternative or negotiated

386. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua Report*, vol 1, p 166
387. Richmond, NZPD, vol 3, 3 September 1868, p 145

arrangement could not ignore the law's protection of the land of those who could not be shown to be 'rebels' and achieve a taking of such land unless there was genuine consent by those whose lands were to be taken. We have already found that no such consent was possible, or given, in the circumstances surrounding the Te Hatepe deed. Moreover, McLean's initial investigation of the land to be taken indicates that he was, at the end of 1866, already making decisions as to who held the key interests there, and which of them were 'rebels', though no formal investigation had been held. This by-passing of the Crown's own newly legislated processes characterised subsequent Crown actions at Te Hatepe. To some extent Crown officers misled Ngati Kahungunu, implying concern for the fragmentation of their lands should they be brought before the land court, when it is clear that the overwhelming Crown concern was to avoid fragmentation of the lands it might be granted. But in our view, those officers were also confused about the law's meaning – and pressed their misguided views of it upon Maori. They consistently expressed the view that a cession was consistent with the provisions of ECLTIA, as long as the land court confirmed it.

In all the circumstances, the Crown's conduct at Te Hatepe could justifiably be described as 'begging with a bludgeon'.[388] Our analysis has revealed that the Crown's bludgeon was unlawfully wielded but that the Crown did not believe that and the signatories to the Te Hatepe deed had no way of discovering it. Overborne by the Crown's claim to a far superior bargaining position, Ngati Kahungunu who had assisted the Crown were persuaded to assent to the proposal that they cede one substantial tract of land, to represent the 'rebel' interests in the entire area to which the Crown said it was entitled. In return they would acquire the 'rebel' interests in the rest of the lands described in the Te Hatepe deed. For this, the Ngati Kahungunu signatories were dependant on the good faith of the Crown. We note that, despite Ngati Kahungunu statements that the Kauhouroa block would represent all the 'Hauhau' interests, those who had fought against the Crown, or had not fought at all, and had rights in the block, not only lost their rights there, but also stood to lose their rights outside the block, in the broader Te Hatepe deed area.

The outcome of the 1867 agreement was the Crown secured the land it wanted (the Kauhouroa block). From the time the court supposedly approved the deed, the Crown treated the Te Hatepe deed as valid to transfer the block to Crown ownership – as if it were fully entitled to do so. But to meet its reciprocal obligations to those Ngati Kahungunu chiefs who had agreed to the cession, the Crown had to recompense them in land within the broader Te Hatepe deed area. We are at a loss to explain why this crucial part of the agreement, outlining which land would be given to 'loyal' Ngati Kahungunu, was not written into the deed; Biggs, after all, articulated it clearly in his report. But because it was not, there was no apparent or actual mechanism to implement the Crown's promise. And above all, there was no official statement of those designated lands to guide Crown agents who in

388. Hugh Carleton, NZPD, vol 3, 3 September 1868, p 158

subsequent months and – as it turned out – years, were charged with implementing it. As we will see in the next section, the lack of certainty on this point meant that other views were asserted – and accepted. This was the origin of the four southern blocks – created on lands to the south east of Lake Waikaremoana, where tribal rights were complex.

A number of fundamental Crown errors generated the confusion surrounding the negotiation of the Te Hatepe deed. Primary among them was the Crown's mistaken assumption that it could ignore the processes prescribed by its own confiscation legislation in order to achieve a result entirely different from the one authorised by that law. Having misinformed Crown-aligned Ngati Kahungunu about the effect of the confiscation law, Crown agents then pressured them to atone for the rebellion of their kinsmen by ceding to the Crown a well-located tract of land. It promised, in return, money, reserves, and the award of 'rebel' land in a part of the district subject to the East Coast confiscation legislation. But there was no legal mechanism to give effect to that last promise. The Crown thus obtained the land it wanted (which is outside this Tribunal's inquiry district) without delivering on its major promise to those who signed the Te Hatepe deed.

The Crown conceded that the effect of the deed was to confiscate the land of 'rebel' owners in the Kauhouroa block, for they did not consent to its 'cession'. The deed's adverse consequences were much further-reaching, however. Whereas the East Coast confiscation law was designed to protect non-'rebel' Ngati Kahungunu from losing their land as a result of the rebellion of their kin, the Crown achieved the opposite outcome in the Te Hatepe deed but promised to make it up to the Maori signatories with other 'rebel' land. Its subsequent ineffective efforts to make good on that promise served not only to compound the injustice of the situation for Ngati Kahungunu but to ensnare Tuhoe and Ngati Ruapani without reason, but with grave and enduring consequences. The lasting legacy of the Te Hatepe deed – besides the loss of the Kauhouroa block – was that it created the first in a series of misunderstandings that ultimately culminated in the loss of the four southern blocks.

(2) *Why did the Crown and Maori enter into the Locke deed and what was its effect?*

The Locke deed was, as the claimants argued, a deeply flawed Crown arrangement which was the result of a Crown attempt to meet obligations to Ngati Kahungunu chiefs which it had entered into five years earlier. Samuel Locke, the agent sent to negotiate the agreement, was either inadequately or wrongly briefed. It is not clear whether Crown officers acted on the assumption, soon after the signing of the Te Hatepe deed, that Crown authority extended to the Lake. The evidence of surveying activities after May 1867 is ambiguous; it may be read as indicating the start of a process of expansion of the area claimed to be under the Crown's authority by virtue of the Te Hatepe deed, but we cannot say that for certain. It seems however that revision of the ECLTIA boundaries in October 1867 may have been crucial in official misinterpretation of the Te Hatepe Deed boundaries. The inland boundaries

in particular were so vaguely described in the schedule to ECLTIA that it is hard even today to be certain where they are. At the same time even Biggs, who had been quite clear about the limited extent of the Te Hatepe deed area in 1867, seems to have revised his view of those boundaries by September 1868 when he appeared in the land court. In presenting the Te Hatepe deed to the court, he referred for the first time to a boundary of the Te Hatepe deed area which appears to include Maungapohatu, as well as Waikaremoana – these were not boundaries in the ECLTIA 1867 schedule, but Biggs may have thought they were. Biggs's murder shortly afterwards by Te Kooti, at Turanga, meant that the task of interpreting the Te Hatepe deed fell to others.

After the war in Te Urewera of 1869–1871, the Government renewed its attention to the chiefs of Wairoa, and to its arrangements for the lands in the district, and at this time it is clear that the original terms of the Te Hatepe deed had been lost sight of. Locke asserted Crown authority over lands stretching to the shores of Lake Waikaremoana where the Crown in fact had no rights at all. These were confiscated lands, he said – though they had never been confiscated, and remained in customary ownership. They were lands quite outside the terms of the Te Hatepe agreement. They were also lands in which iwi who had no part in the Te Hatepe agreement had rights, yet they found their lands caught up in the Crown's arrangements. The very fact that Locke included one Tuhoe rangatira, Te Makarini, as a signatory to the deed, is evidence that he admitted those rights; yet few Tuhoe and Ngati Ruapani names appear in the lists of block owners appended to the deed.

We are surprised that the Crown made no concession before us in respect of these actions of its agent. It did acknowledge that 'Locke was wrong in his statements concerning the confiscation', but qualified this by adding that he 'also made it clear that in the Government's mind the time was past for an application of that policy'.[389] This was a reference to the fact that Locke agreed to 'convey the block to the people'.[390] But the Crown stated without further discussion that Locke considered that the four southern block lands were included in the Schedules – evidently of both the 1866 and 1867 East Coast Land Title Investigation Acts – and were also the lands referred to in the Wairoa deed of cession.[391] Nor did the Crown make much comment on the shortcomings of the deed itself; it stated only that there was 'limited evidence to show what mechanism was intended for implementing the Deed of Agreement'.[392]

If the Crown assumed that the Deed did not matter because it was not implemented, we cannot agree. Locke's actions in designating four blocks in the southern Waikaremoana lands, and laying down boundaries in a district where tribal rights were complex and where sustained conflict with the Crown from 1865–6, and 1869–71 had played havoc with

389. Crown counsel, closing submissions (doc N20), Topic 6, p 17
390. Crown counsel, closing submissions (doc N20), Topic 6, p 12
391. Crown counsel, closing submissions (doc N20), Topic 6, p 11
392. Crown counsel, closing submissions (doc N20), Topic 6, p 13

community occupation, were to have long term effects (as we shall see). And while we remain uncertain as to how Locke took the boundary of these lands to Lake Waikaremoana, we are certain that he thought the Crown could assert authority over them as if they had been taken under the New Zealand Settlements Act (even though his deed cited the provisions of ECLTIA). We think that this confusion arose because of Locke's experience with the Mohaka-Waikare lands, where he had earlier negotiated a settlement with Maori in the wake of a different confiscation. He drew attention himself to the fact that he had been guided by the Mohaka deed. And in fact a number of features from that deed were imported into his Wairoa deed (including 'retention' by the Crown of blocks of land, including redoubt sites; and subdivision of the rest of the land into blocks to be granted to Maori whose names were listed in a schedule).

But for Maori, the deed forced their acceptance of the Crown's wrongheaded view that the southern Waikaremoana lands had been confiscated, and that the Crown had the authority to decide who might henceforth be designated their 'trustees' and their owners. It purported to confer rights on those 'trustees' and owners, without in fact doing so. No mechanism was available to the Crown by which it could confer such rights. Tuhoe and Ngati Kahungunu were each left with different expectations of the agreement, and before long there would be tension between them. Ultimately, the Locke deed laid the basis for the alienation to the Crown of the four southern blocks it created. This was especially ironic, as the deed stated categorically that the lands were to be inalienable by sale.

It was the fundamental deficiencies in the Crown's arrangements at Te Hatepe that created the context in which serious mistakes were made later by Crown agents as to the whereabouts of the 'rebel' land that had been promised to Crown-aligned Ngati Kahungunu. The East Coast confiscation district was not clearly defined, and never surveyed; and the Te Hatepe Deed did not specify precisely the location of the 'rebel' land that had been promised. Thus, by the time of the 1872 Locke Deed, the Crown had come to believe that it had confiscated, and could dispose of, land extending all the way to the south-eastern shores of Lake Waikaremoana. This went far beyond the area over which the Crown had purported to establish authority at Te Hatepe, and into an area where tribal rights were particularly complex. It was at this time that lands of Tuhoe and Ruapani became embroiled in the Crown's plans. The Locke Deed's definition of the four southern blocks, using rivers and other natural features as block boundaries, was an arbitrary division of an extensive area in which there were no clean divisions of rights, let alone divisions along the expedient lines drawn by the Crown on a map. So garbled are the terms of the Locke Deed, however, that to this day its exact objective is bewildering. It did, however, result in further layers of confusion (adding to those created by the Te Hatepe deed) that ultimately resulted in the Crown's decision to acquire the land for itself.

(3) *Why was there a land court hearing for the four southern blocks in 1875 and what were its outcomes?*

The last unhappy stages of the four southern blocks story were played out from 1872 to 1875. The Locke deed, as we suggested above, set the scene for the final alienation of the blocks. It formalised the Crown's position – which had evolved since 1867 – that its 'confiscation' under the East Coast legislation had extended all the way to Lake Waikaremoana; hence also its right to 'return' the southern lands to those whom it deemed entitled. This false assumption drew the lands of Tuhoe and of Ngati Ruapani into the Crown's arrangements. As a result of this, and the leases of the blocks which Ngati Kahungunu entered into (read by Tuhoe as an assertion of their authority over them), tension between Tuhoe and Ngati Kahungunu increased.

In this context, Crown officials took the mistaken view that an age-old (and insoluble) dispute over customary rights was the problem, and that it could be solved by setting a straight line boundary between the iwi. Iwi leaders, concerned to protect their respective rights in the new situation that the Crown's Te Hatepe and Locke agreements (each with their own new boundaries) had produced, also increasingly spoke of a boundary line. But the Crown's proposition was an odd one, which did not sit comfortably with the complex pattern of customary rights in the region, and the iwi were unable to agree on where the line might be drawn. This issue also increased tension between them. It came to dominate the discussions held up till the time when the blocks were heard in the Land Court. In our view, it was also an underlying theme in the evidence given in the court itself.

At the same time, Crown officials Ferris and Locke sought to defuse Tuhoe anger over the leases by advising their leaders to go to the land court for a determination of their rights. Tuhoe did not trust Locke, but finding themselves between a rock and hard place, evidently decided the court might be the better option, and filed applications for a hearing of the blocks. Despite this, however, and despite its undertaking to Maori that the four blocks would be inalienable by sale, the Crown decided towards the end of 1874 to buy up Maori interests, without waiting for the title hearing. There were several reasons for this decision. Underlying the Locke deed had been a Crown assumption that it could control decisions about the four southern blocks (because of its asserted confiscation and the authority it thus had over the lands). It had hoped that the leases to settlers would bring some returns to those who signed the Locke deed, or were listed in the block lists of owners, and thus discharge its obligations under the Te Hatepe deed. But it became apparent toward the end of 1874 that this could not happen. Disputes within Ngati Kahungunu about the distribution of the rents – between those who had been promised recompense for their customary rights in the Kauhouroa block, and those who had been promised rewards for their military service – were stilled for a time, but did not go away. Officials must also have considered that if Tuhoe were awarded title to all or part of the blocks by the court, the leases would be destabilised.

7.5.5

Nor would the court award title to those Ngati Kahungunu, such as the Mahia people who had fought alongside the Crown in the wars, who might not be able to prove customary rights to the land. Even if some Ngati Kahungunu were awarded title to all or part of the blocks, the coastal leaders would forfeit their share in the rents. Finally, in the latter part of 1874, officials discovered – or thought they had discovered – that RD Maney, the Frasertown storekeeper, had begun to acquire interests in six blocks in the district, including at least two of the four southern blocks. Such purchases before title was determined in the land court were possible – and were widespread in many districts – because of the Crown's own legislation (which provided that such transactions were void, but not illegal) A private buyer might gain title to a block of land if his sellers subsequently secured an award of title in the court. The Locke deed moreover had no legal force, so Maney could ignore it.

In these circumstances, the Crown decided to move to begin purchase of the blocks itself – and thus retain sufficient control to enable it to attempt to pay all those to whom it had given undertakings. We have endeavoured to show why we do not accept that the Waikaremoana lands were 'classic debatable lands', contested between powerful iwi over generations. We therefore do not accept the Crown's position that purchasing the blocks was the only option available in the face of an intractable customary dispute. The Crown's first move, after removing the settler lessees from the picture, was to make payments to all those Ngati Kahungunu who would sell, then to apply pressure to 'the Urewera' – Tuhoe and Ngati Ruapani. Ngati Kahungunu, many of whom were known to be heavily in debt, were under considerable pressure as they saw faced the court hearing, and the possible loss of their rentals. By the time the court hearing begun, officials reported that they had bought all their interests. Some Tuhoe evidently accepted payment too – but the chiefs stated before the court hearing that they had come to return that money, and did not wish to sell. Thus matters stood at the time the hearings began.

The hearings of the four blocks in court were brief – and in fact evidence was presented for only two of them. After the first day's hearing the judge raised the question whether the lands had been confiscated – and by that very question cast some doubt on the Crown's long-established position, and its assumptions that it had retained the right to manage the land, and thus its alienation. Doubtless because of this, and because he was also aware that the Crown had yet to finalise its purchase arrangements with those Ngati Kahungunu who had agreed to sell, Locke's immediate reaction was to protect the Crown's position. Thus when he telegraphed McLean seeking an answer to the judge's question, he also asked for a proclamation to exclude private buyers from the four blocks. McLean got such a proclamation signed almost at once, although the reasons for it, and its timing, were not within the terms of the relevant legislation.

As things turned out, this turn of events was very useful. The Solicitor-General's opinion that the land was not confiscated (without specifying which land) and that the East Coast

Act should apply, must have come as a bombshell. The Act required the court to inquire into the status of those before it – whether or not they were rebels – and to refuse to issue certificates of title to rebels. It created difficulties for the court (which had already heard evidence without signalling that it was exercising jurisdiction under the confiscation legislation), for the Government (which had consistently said the land *had* been confiscated, hence its exercise of rights over it), and most of all for 'the Urewera', who stood to lose the opportunity of being granted title to the lands (they were well aware that they were generally labelled rebels). We note that there is no evidence that the Solicitor-General's opinion was read out in court; and that a loud silence in the records followed its receipt at Wairoa. Nevertheless, given the judge's public posing of the confiscation question in court, the recording of the Solicitor-General's opinion in the land court minutes, and the interest of all parties in that opinion, we must assume that Maori were advised of it. The alternative would be to assume that the Government's agent was quite irresponsible in keeping it to himself.

The significance of the opinion is nevertheless open to question. Though the East Coast Act remained on the statute books, and was the origin of the court's jurisdiction whenever sittings were held affecting land within the act's schedule, the Crown had still not surveyed the boundaries of the scheduled district. Given that the Act was still in force (although it should not have been by 1875, several years after peace had been made in the region) a survey plan of its district boundaries should at least have been available to the judge. Nor had the four blocks themselves been surveyed before the cases were heard (despite the legal requirement that they should have been surveyed). The result was that the judge cannot have been clear as to how much of the land within the blocks fell within the East Coast Act district. The Solicitor-General evidently left it to the sitting judge to decide the finer points of the application of the Act, in light of his presumed knowledge of the various boundaries; but the judge must have found himself hamstrung. To apply the Act, he would have had to inquire in court into the rebel status of the claimants before him. But because he had no survey plan of the East Coast Act district, he would have been unable to explain to the claimants how their lands might be affected by the results of such inquiries. He might have suspected that some of the lands toward Lake Waikaremoana fell within the boundary of the Act's district, and that some – perhaps the greater part – did not. In these unique circumstances, it is perhaps not surprising that the judge took a course of action which can only be described as inappropriate, and urged the Crown's agent to try to complete purchase of the land.

Tuhoe were not of course the only party before the court who risked being deemed rebels if the hearings continued. Those Ngati Kahungunu who had fought against the Crown, or who had not fought at all, and who might otherwise have expected their names to be inserted on lists of owners for the southern blocks if the court's judgment favoured or included Ngati Kahungunu, would doubtless have been nervous. If they were aware that any

lands in which they might be found to have interests could be awarded to their 'loyal' kin under the act, they might not have found that reassuring. Te Waru Tamatea and the remnants of his community, in the wake of the wars, had been removed from their lands altogether, and despite their undoubted rights in the blocks, were not even a party before the court. Tuhoe, however, were the claimants in the cases, and their position was an exposed one. We have no record of what was said to them in the negotiations that undoubtedly followed the receipt of the crucial telegram from Wellington – which in itself is telling. We would expect the Crown's agent to have recorded the circumstances in which an offer was made, and accepted. We know only the outcome: the Tuhoe and Ngati Ruapani decision to withdraw from the court, and to take the Crown's payment for their rights in the land – an outcome they had previously made it clear they were anxious to avoid. They had come to Wairoa to seek recognition of their rights by the court – and had intended to retain any lands they were awarded.

We must conclude that the Tuhoe change of approach was the result of a totally unexpected development: that the court was required to sit under confiscation legislation, and that this would undoubtedly affect their position before the court. We further conclude that had the Crown's official, and the court, been in possession of better information about the boundaries of the East Coast Act in relation to the four southern blocks, Tuhoe might have been informed that the impact on their case was not as great as they might at first have feared. The Crown, because of its own negligence over preceding years, was however unable to give them such an assurance. In any case, it had decided well in advance that its best course of action was to purchase all the lands; and we have to think that the new developments would have suited it. They could certainly be turned to Crown advantage. The purchase of all the interests in the blocks would be seen to mean an end to a messy political situation as between Tuhoe and Ngati Kahungunu: there would be no further need to delineate a 'boundary' between them; and potential difficulties because of Tuhoe's wish to avoid sale of the lands would be avoided. In addition, the Crown's completion of the purchase on its terms would allow it to make payments to those Ngati Kahungunu whom it wished to reward for their services to the Crown.

But Tuhoe (and with them, Ngati Ruapani) should not have been put in this position; nor should Ngati Kahungunu some of whom stood to be accused as rebels if the court sat under the East Coast Act. Given that peace had been concluded some years since, they should not without warning have found themselves facing confiscation of their lands when cases which they had been advised to take to the land court by Crown officials were well advanced. Crown officials should have clarified the position in respect of their lands before they went before the court. Their failure to do so was in keeping with the lack of care that had characterised all the Crown's dealings with the upper Wairoa and Waikaremoana lands since the first take of land at Te Hatepe in 1867. Ironically, that failure included the neglect to repeal

the East Coast Act, which – had it been understood by parliament to be an Act under which future confiscationas could be made – would have to have been repealed years earlier.

We note finally that in the rush to finalise the arrangements for the purchase of the four blocks after Crown officials moved to capitalise on the uncertainty of Tuhoe and Ngati Ruapani, the estimates of the acreage of each block were taken as the basis for payment to all with whom the Crown dealt. The Crown did not wait for the surveys to be completed (which by law should have been done even before the cases were heard.) The payment itself was no more than 1/6 per acre. Later the surveys would show that three of the blocks were substantially larger than the estimates, though one (Ruakituri) was smaller. The overall difference was 15,581 acres. Ngati Kahungunu later complained about 7500 acres of the Waiau block for which they had not been paid, and the Crown made an additional payment for 7200 acres. (The 300 acres deducted was for a reserve in the block – which was a Tuhoe and Ngati Ruapani reserve). No further payment was offered to Kahungunu. Tuhoe and Ngati Ruapani did not receive any further payment at all. The exact amount of land the Crown acquired over and above the arrangements made with Ngati Kahungunu, and with Tuhoe and Ngati Ruapani, varies according to whether the 28 reserves are included in the calculations or not. However the sums are done, however, the Crown's failure to account for all of the difference between the estimated and surveyed acreage of the four blocks does not reflect well on it.

The greater wrong to Tuhoe and Ngati Ruapani however was the pressure they came under to choose between pursuing their cases – and risking the loss of lands they claimed without any compensation or reserves – and accepting the Crown's offer, which at least gave them something tangible. In the face of this pressure, they gave up the opportunity of securing a judgment from the land court, and possible inclusion in the lists of owners. Instead, they surrendered their rights to the blocks themselves, selling them to the Crown.

For Tuhoe and Ngati Ruapani, the result has been particularly unfair. Indeed, it has marked similarities to Tuhoe's experience of raupatu. They became caught up in others' issues, but lacked the legal knowledge or political power necessary to challenge the situation and the Crown's position. Then the Crown's position shifted, without good cause and to the further disadvantage of Tuhoe and Ruapani and, ultimately, they lost the land they had consistently vowed to retain. Their particular experience explains why Tuhoe and Ruapani claimants referred to the four southern blocks as being lost by means of 'raupatu' or 'de facto confiscation' and why they seek redress from the Crown on that basis.

7.5.6 The Tribunal's Treaty findings

The complex and protracted chain of events that culminated in the purchase of the four southern blocks was riddled with fundamental misunderstandings on the part of the

Crown agents involved. As a result, neither the Crown nor Maori understood the basis or the effects of the various arrangements that it sought to make. The inconsistencies and illogicalities that characterise those arrangements explain the confusion and sense of grievance that has been left, ever since, in their wake. In our experience of the history of Te Urewera, unravelling the events that explain the Crown's acquisition of the four southern blocks has been the most convoluted of tasks. And it has yielded very little of which the Crown can be proud.

Central to our consideration of the Treaty principles' application to this series of events is the fact that an extensive tract of land was, ultimately, removed from Maori ownership. To the extent that the customary owners of the four southern blocks wished to retain their rights in the land but Crown conduct was instrumental in causing its alienation, the Crown will have acted inconsistently with the Treaty principle of active protection. This principle, it will be recalled, assures Maori of their tino rangatiratanga over their land and other taonga for as long as it is their wish to retain that control. Crown conduct that aims, or serves, to undermine tino rangatiratanga cannot be consistent with the principle of active protection. And more than that, to the extent that Crown agents' conduct was inconsistent with the law or careless of Maori customary property rights, the Crown will very likely have breached the Treaty principle of good government. It requires the Crown's approach to issues of importance to Maori to be developed, and implemented, with care. This is of particular importance when Crown policy and conduct affects Maori land, which is a basis of Maori society.

Our analysis reveals that the Crown's conduct in connection with the events that led to the alienation of the four southern blocks was repeatedly in breach of Treaty principles.

The Crown failed signally to meet its Treaty obligations to the tribal communities of upper Wairoa and Waikaremoana. It breached the principles of good government and active protection in that it:

- failed to ensure that an official sent to conclude a major agreement with Maori leaders in the region in 1872 was familiar with the terms of the earlier agreement (the Te Hatepe deed) to which he was to give effect by awarding 'rebel' land in a part of the district defined by the East Coast legislation, as compensation to those who had ceded land (the Kauhouroa block) at Te Hatepe
- failed to define or survey the area within which its East Coast confiscation legislation applied, and simply assumed that it extended to Lake Waikaremoana, when it did not
- failed to scrutinize the agreement Locke entered into and to censure him, though he asserted that the Crown had confiscated a major tract of land when it was in fact still in customary title and his agreement purported to confirm the 'return' of the greater part of the land to Maori

- on the basis of this wrongful assertion of authority, created four blocks in the lands south and east of Lake Waikaremoanawhile the lands were still in customary title, and purported to decide owners, though customary rights in the lands were complex, thus exacerbating tribal tensions failed to inquire into the confusing, ambiguous and unenforceable terms of the Locke deed, and to take steps to remedy its deficiencies.

The Crown further breached the principles of good government and active protection, and the plain meaning of the guarantees in article 2 of the Treaty in that it:

- encouraged Tuhoe to apply to the court for title determination without taking account of the fact that its own legislation, the East Coast Act 1868, was still in force –despite peace having been made- that the court would proceed under the Act, and that the outcome of such a hearing, given the official assumptions that the four southern blocks were within the Act's schedule, would be the confiscation of the lands of the applicants;
- embarked on the pre-title purchase of the land in the four southern blocks from many of those Ngati Kahungunu it considered owners when a land court investigation was imminent, hoping to pressure the Tuhoe and Ngati Ruapani claimants to abandon their claims to the court and sell their interests so that the Crown purchase could be completed;
- pursued this course of action for a range of reasons deriving from the terms of the flawed Locke deed: including tension within Ngati Kahungunu – those who had been promised recompense for their customary rights in Kauhouroa block, and those who had been promised rewards for their military service – about the distribution of rents from the lands; and tension between Tuhoe and Ngati Kahungunu over the same leases, reflecting Tuhoe suspicion of the Locke deed and the rights it seemed to bestow on Ngati Kahungunu;
- failed to consider any solution to these tensions, particularly those between Tuhoe and Ngati Kahungunu (which it wrongly characterised as a 'boundary dispute') other than purchase of the land, which served its own interests but sacrificed those of all the communities whose land it was;
- failed to repeal the East Coast Act by 1875 even though the period within which its confiscation provisions could be justified had long since passed;
- having failed to define or survey the area within which its East Coast legislation applied, was unable to advise the court on this matter when it sought clarification of the status of the land during the 1875 hearing, so that the court remained unaware that much of the land was in fact outside the boundaries of the legislation;
- left Tuhoe and Ngati Ruapani to assume that because the court must proceed under the East Coast Act they faced confiscation of lands awarded to them; thus immediate sale to the Crown was the only way of securing some recognition of their rights, and some reserves; and

▶ thus secured its purchase from Tuhoe and Ngati Ruapani under threat of confiscation.

We turn now to consider the prejudice that the claimants have suffered as a result of these serious Treaty breaches.

7.5.7 What were the impacts of Crown acts and omissions in its acquisition of the four southern blocks?

Summary answer: *The loss of the four southern blocks, had marked social, cultural, economic, and political impacts on Tuhoe, Ngati Ruapani and Ngati Kahungunu.*

The way in which the Crown acquired the blocks caused significant damage to relationships among iwi of the region. The events from the signing of the Te Hatepe deed, rather than re-opening a generations-old 'boundary dispute' over the land, ignited a new dispute between Tuhoe and Ngati Kahungunu. Leaders of each iwi couched the defence of their rights in the language of custom, but this disguised tensions that had in fact emerged in the wake of the Crown's assertion of authority over the four southern blocks lands, as spelt out in the Locke deed. The terms of debate set at this time had enduring effects on the terms in which claims were advanced about other Waikaremoana land – and the lake bed itself – in all subsequent title inquiries. Some court decisions about Tuhoe and Ngati Ruapani rights in particular were influenced by complete misunderstanding of the circumstances in which the Crown acquired the four southern blocks. . The hurt arising from the resulting denial of their customary rights is still evident today. The loss of the blocks, and the circumstances in which they were lost, had a range of consequences for customary relationships in the region – notably for those of the border people Ngati Ruapani with both Tuhoe and Ngati Kahungunu. They had consequences not only for all those involved in the events of the 1860s and 1870s, but also for their descendants.

The disruption to Maori settlement caused by the military conflict of 1865–1866, and exacerbated by the Crown's military operations between 1869 and 1871, was made permanent through the alienation of the blocks. Alienation severed long-standing customary associations with the land and its resources. Although the region had not been as densely populated as some others in traditional times there were numerous settlements and mahinga kai sites, all of which were lost when the blocks were alienated. Their loss was deeply felt. For Tuhoe and Ngati Ruapani, the allocation of reserves did little to compensate for this loss. The loss of the four southern blocks also had significant economic impacts. Although the land was not of the highest quality in the region, it also presented some opportunities for development in the late nineteenth and twentieth centuries, particularly in pastoral development. In the context of other alienations in the Wairoa region, the loss of this land left a number of Ngati Kahungunu groups with a considerably diminished land base. For Tuhoe, this loss followed the northern raupatu in the eastern Bay of Plenty in 1866, and was another blow to the economic resources of the iwi. This loss was even more severe for Ngati Ruapani, who were confined to a smaller rohe in the

vicinity of Lake Waikaremoana. The reserves that were allocated to Tuhoe and Ngati Ruapani were subsequently whittled away and did little to meet their economic needs in the long term.

Through its impact on the relationship between iwi of the region and the Crown, the loss of the blocks also had political consequences. For many Ngati Kahungunu, there was little in the events leading to the loss of the blocks that helped build a positive relationship with the Crown after the arrival of Crown forces in 1865–1866, and the Crown's securing of a 'cession' from those who had fought alongside its forces. One of the causes of Te Waru Tamatea's commitment to Te Kooti was the effective confiscation of his land through the Te Hatepe deed and its aftermath. His people's lasting exile at Waiotahe is symbolic not only of the distance of many upper Wairoa Ngati Kahungunu from their land, but also the distance between them and the Crown. In short, the decade from 1865 was fraught with consequences for many Ngati Kahungunu in the region. Some had negotiated with the Crown in an attempt to protect their land, but were pressured into selling their remaining interests. Others – who had been labelled as 'rebels' and attacked in their homes – were ultimately forced into exile. This was the worst possible beginning for a relationship with the Crown.

The relationship between Tuhoe, Ngati Ruapani and the Crown, severely damaged by the military operations in the upper Wairoa and Waikaremoana (1865–1866), which extended conflict into their lands without justification, was further harmed by the alienation of the four southern blocks, and the manner of that alienation. But the creation and alienation of the four blocks also occurred at a time when Tuhoe and the Crown were beginning to develop a relationship after the war of 1869–1871. Tuhoe's governing council, Te Whitu Tekau, established policies against leasing, the Native Land Court and sale of land. In the short term, the events leading to the Crown's purchase of the land would only have strengthened their commitment to these policies. The loss of the blocks contributed to a notable cooling in the relationship between Te Whitu Tekau and the Crown in the late 1870s, though tribal leaders determinedly revived it during the 1880s.

As with the military operations it conducted in the upper Wairoa and Waikaremoana in 1865–66, the Crown has failed to acknowledge the extent of prejudice to the peoples of Te Urewera arising from its acts and omissions in acquiring the four southern blocks. This too has had a lasting effect on the relationships among the various parties down to this day.

(1) *Introduction*

We have established the Crown's Treaty breaches in the preceding section, and turn here to consider the impacts on the claimants of those breaches. In what ways were they prejudiced by the Crown's conduct? We examine the social, cultural and economic effects of the loss of the blocks on Tuhoe, Ngati Ruapani and Ngati Kahungunu, before turning to look at the broader political impacts.

7.5.7

(2) *Social, cultural, and economic impacts*

Crucial to our consideration of prejudice flowing from the loss of the four southern blocks is an understanding of customary rights in the upper Wairoa and Waikaremoana lands, and the impacts of Crown acts and omissions on those rights. We consider first the impact on contests over rights in later title inquiries, and how these impacted on iwi relationships. The Crown's various acts from 1865 also had a profound and lasting effect on the exercise of customary rights in the land and people's relationships with it. We look at the impact on these rights in a separate section. We then consider the economic impacts of the loss of the blocks. Finally, we turn to the four Tuhoe and Ngati Ruapani reserves made in the wake of the Crown's purchase.

(a) *Impact on subsequent title inquiries and decisions, and tribal relationships:* One of the lasting impacts of the loss of the lands to the south and east of Lake Waikaremoana, and the manner in which they were lost, is evident in the continuing contest over rights between Ngati Kahungunu, Tuhoe and Ngati Ruapani, conducted in a number of subsequent title inquiries as lands to the north, the west and east of the Lake – and finally, the bed of the Lake itself – were investigated. Sometimes these contests have been fraught, and they have left their mark on relations between the iwi.

Counsel for Wai 36 Tuhoe submitted that the effects of events culminating in the Crown's purchase of the four southern blocks were felt primarily in terms of the tribe's ability to secure recognition of their rights in later title inquiries. The circumstances in which Tuhoe lost 'title to the land', and the fact that the 'issue of the Tuhoe and Ngati Kahungunu tribal boundary remained unresolved' would have ramifications in Native Land Court hearings, the Barclay commission, and the Native Appellate Court. For Tuhoe, he said, the hostilities of the 1860s, the 'strategic alliance of Ngati Kahungunu with the Crown', and the events of 1875 – the withdrawal of Tuhoe from the court proceedings, and the purchase of their rights by the Crown under threat of confiscation – led to the 'Tuhoe domain being substantially undermined.'[393] Tuhoe regard all those events, from the time of the war, as having undermined their ability to defend their rohe.[394] Counsel for Ngati Ruapani also argued that by withdrawing their claims to the four blocks in 1875, 'following the threat of losing all their rights', Ngati Ruapani 'ended up losing their rights in years to come' because their withdrawal was seen as weakening their claims to lands.[395]

It is clear that tension over where the tribal boundary between Tuhoe and Ngati Kahungunu was, reverberated through subsequent generations in the hearings before various bodies charged with title determination. We have indicated our own view above – that we do not have evidence before us of prolonged hostilities between Tuhoe and Ngati

393. Counsel for Wai 36 Tuhoe, closing submissions, part B (doc N8(a)), pp 41, 43
394. Counsel for Wai 36 Tuhoe, closing submissions, part B (doc N8(a)), pp 43–4
395. Counsel for Wai144 Ruapani, closing submissions in reply (doc N30), p 14

Kahungunu over generations, that hostilities occurred only during a brief period in the early nineteenth century (in the context of a widespread regional upheaval), to be followed by a peace which was maintained until the arrival of Crown troops in the region in late 1865. The Crown's actions between 1865 and 1875, we found, were crucial in shaping the context within which the tribal communities of the district sought subsequently to defend their rights. These actions included:

- the disruption by the Crown's forces of settlement and the exercise of customary rights
- the Crown's assertion of authority over lands stretching to the Lake and its mistaken extension of the confiscation boundary there
- the Locke deed's demarcation of the four southern blocks in 1872 in lands where customary rights were complex and overlapping – and at a time when there had been little chance of re-establishing settlement and the exercise of rights after a period of turmoil, and
- the Crown's insistence upon setting a hard line boundary between Tuhoe and Ngati Kahungunu.

The degree of uncertainty about rights led, in our view, to determined insistence upon them, and denial of the rights of others. At one level, this was simply a human reaction to a period in which the normal exercise of rights had not been possible; but it was also a reaction to very considerable Crown pressure on the lands after the war, and its insistence on demarcating those lands. In these fraught circumstances – with the parties poised to enter the land court for title determination – the first korero about the southern lands since the creation of the four southern blocks took place among iwi. From this time, there was an increasing tendency to express the extent of tribal rights in stark terms -although speakers from both sides continued to acknowledge the rights of others when discussing specific areas. The Tuhoe boundary was asserted at Mangapapa, and that of Ngati Kahungunu at Huiarau; and the role of tribal tipuna in laying down boundaries was emphasised. In the Native Land Court hearing of the four southern blocks, which followed immediately after the Wairoa hui, Tamarau Te Makarini spoke of 'the boundary between the Urewera and Kahungunu', running from Tukurangi to Waihi and then along the Waihau stream.[396] Ihakara Tuatara and Tamihana Huata both argued that a 'boundary' existed between Ngati Kahungunu and 'Te Urewera', which was located at the Huiarau range, or along a line from Ruakituri to Maungapohatu.[397] The positions adopted by tribal speakers at this time would be echoed in the courts and commissions over the decades that followed.

These included the Tahora 2 and the Waipaoa block hearings in the Native Land Court in 1889, and the Ngati Kahungunu appeals to the Barclay commission against the Urewera commission's finding on the Maungapohatu and Waikaremoana blocks. These bodies also couched their decisions in terms of the location of the 'tribal boundary' – often as if this

396. Napier Minute Book 4, 5 November 1875, p 79
397. Napier Minute Book 4, 4–5 November 1875, pp 74, 81–82

were the defining issue in understanding tribal rights in the region. In the original litigation over ownership of the bed of Lake Waikaremoana, Judge Gilfedder referred in his interim decision (1917) to the 'main question in dispute' being the boundary line between Ngati Kahungunu and Tuhoe. He decided, however, to avoid the issue.[398] Recognising the complexity of tribal relationships among Tuhoe, Ngati Ruapani and Ngati Kahungunu, and the extent of intermarriage between them, he avoided committing himself on a tribal boundary and instead decided to receive lists of owners based on occupation.[399] A majority of Tuhoe and Ngati Ruapani shares were awarded. Thirty years later the Native Appellate Court would be critical of his decision, and decide that the boundary between Tuhoe and Ngati Kahungunu – as found by the 1906 commission – was at the Huiarau Range.[400]

A further outcome of the unusual circumstances in which Tuhoe and Ngati Ruapani withdrew from the court in 1875, and of the purchase of the blocks by the Crown, was that some later court decisions proceeded from an incorrect understanding of these events. For Tuhoe and Ngati Ruapani the result was further denial of their customary rights in the four southern blocks lands, compounding their forced withdrawal from the court, and inability to secure recognition of their rights by the court. The Barclay commission, in making its 1907 recommendations on the inclusion of certain groups of Ngati Kahungunu in the Waikaremoana block, referred to 'the sales to the Crown [by Ngati Kahungunu] of the lands immediately outside this land' – that is, the four southern blocks (outside the Waikaremoana block) – among those which it took into account when making its recommendation.[401]

In some ways the 1946 decision of the appellate court on the lake bed (about Ngati Ruapani appeals relating to lists of owners), epitomises the legacy of the four southern blocks court case, its aftermath, and the alienation of the land to the south east of the Lake. We do not revisit the decision insofar as it relates to mana whenua issues, but we make the following comments.

The court dwelt specifically on the significance of the circumstances of the sale of the four southern blocks in 1875. It was critical of the decision of the lower court (in 1917) for having been mistakenly influenced by 'taking it to be a fact that the Tuhoes were permitted to sell to the Crown some 157,000 acres to the South of the Lake in which four reserves were set apart for them.' This, the appellate court said, was not the case. The judge had not had the relevant official papers before him. These showed that in fact Ngati Kahungunu had made the sale. They negotiated to sell the blocks, and then arranged to put the blocks through the court to secure title, and enable the sale to go ahead. Only after this had 'certain members of the Tuhoe tribe arrived and demanded inclusion in the titles' – a demand which Ngati Kahungunu had resisted, 'refusing to associate Tuhoe with the sale.' The court

398. Young and Belgrave, 'Customary Rights and the Waikaremoana lands' (doc A129), p 164
399. Marr, 'Crown impacts on customary interests in land in the Waikaremoana region' (doc A52), p 165
400. Raupatu Document Bank, vol 59, p 22410
401. 'Report of the Urewera District Native Reserve Commissioners', AJHR, G 4, 1907, pp 11–13

considered the payments made to Tuhoe and the reserves set aside in 1875 were simply a way of avoiding a contested hearing in the land court that 'would have delayed a matter which the Government was keen upon completing'. It referred to a 'deed of arrangement' signed by Tuhoe and Ngati Ruapani as buying off the personal opposition of individuals, rather than an acknowledgement of tribal rights.[402]

We appreciate that the Appellate Court (in its turn) may have had limited evidence on 1875 in front of it. But the result was an outline of the events of 1875 which – as our analysis has shown – was entirely at odds with the facts. For Tuhoe and Ngati Ruapani, the court decision, and the manner of its expression, clearly added insult to injury: their tipuna had been forced out of the court in 1875; yet sixty years later that fact was still being used against them. And the court also denied Ngati Ruapani claims to be a separate tribe from Ngati Kahungunu, stating that the Kahungunu boundary extended to the Huiarau range, and that Ngati Ruapani were a 'powerful hapu' of Ngati Kahungunu.[403]

Crown counsel, addressing this issue in our inquiry, stated only that the Crown had no part in influencing the court's decision, which 'is claimed to wrongly portray the circumstances of the Native Land Court sitting in 1875 and the subsequent purchase of Tuhoe and Ruapani interests, and the allocation of reserves.'[404]

Sir Rodney Gallen, who was, he told us, the last surviving member of the committee involved in negotiating the lease of the lake bed of Lake Waikaremoana, commented on one of the impacts of this decision. (The lease to the Crown would be implemented by the Lake Waikaremoana Act 1971.) At the time the lease was being discussed Tuhoe representatives were opposed to the suggestion of the Ngati Kahungunu representatives that a new trust be set up with all Waikaremoana owners as beneficiaries. There were concerns, he said, that Kahungunu members might 'dominate' any trust formed, arising from a feeling that 'previous Court proceedings in the Land Court had been dominated by Kahungunu.' Many people who lived at Waikaremoana had not found the decision of the Appellate Court acceptable. (He went on to say that the court's decision that Ngati Ruapani was a hapu of Ngati Kahungunu, and its decision on the nature of the tribal boundary were particularly resented.) All of this explained why two trusts, the Tuhoe Waikaremoana Maori Trust Board, and the Wairoa Waikaremoana Maori Trust Board were eventually nominated to receive the rentals.[405]

Tama Nikora wrote compellingly about the impacts on the lake bed lease negotiations of the appellate court's decision, in the context of the post 1875 contests over title to the lake, and Waikaremoana lands, and tribal relationships.

402. Decision of Native Appellate Court, 22 April 1947, Gisborne Appellate Court Minute Book 27, pp 4–6
403. Decision of Native Appellate Court, 22 April 1947, Gisborne Appellate Court Minute Book 27, p 7
404. Crown counsel, closing submissions (doc N20), Topic 6, p 18
405. Rodney Gallen, brief of evidence (doc H1), paras 14–18

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> The Committee and the owners faced enormous difficulties due to the tensions that existed between Tuhoe and Ngati Kahungunu. By 1969 Tuhoe and Ngati Kahungunu had spent almost 100 years arguing over customary interests at Waikaremoana. Title to land had been disputed in the Native Land Court and the Urewera Commissions, and title to the Lake had been disputed in the Native Land Court and in the Native Appellate Court. It had only been a little over 20 years since the case in the Native Appellate Court had been run which had determined the final list of owners at Waikaremoana. Those arguments were fresh in everyone's minds. Many of the meetings were very heated and tense and at times it was difficult to see how the discussion could progress to agreement between the Tuhoe and Ngati Kahungunu owners.[406]

In his view, the negotiations thus had a dual significance: Tuhoe and Ngati Kahungunu were attempting to achieve a reconciliation. 'The [Lake Waikaremoana] Act represented a "treaty" between Tuhoe and Ngati Kahungunu, as much as a "treaty" with the Crown.'[407] That seems a remarkable comment on the tensions between Tuhoe and Ngati Kahungunu which were the legacy of the disputes generated by the four southern blocks.

We noted above the Appellate Court's decision on the identity of Ngati Ruapani – which directly contradicted what Ngati Ruapani themselves told the Court. The contested position of Ngati Ruapani at the lake since the nineteenth century – the outcome of the history of their interaction with Tuhoe and Ngati Kahungunu, as well as of the Crown's acts from 1865 on – is evident in the snapshots available to us in title investigation hearings from different periods. It is no part of our brief to impose our own interpretation of the history of relationships between Tuhoe, Ngati Kahungunu and Ngati Ruapani. We note simply that key leaders of Waikaremoana had multiple strands of whakapapa as a result of generations of intermarriage: they had kin to the north among Tuhoe and to the south and east with Ngati Kahungunu. Like people everywhere, they emphasised particular whakapapa depending on the circumstances. This was also the case in land court or commission hearings in which they appeared. Despite extensive intermarriage and close connections between the various communities on the ground, the circumstances surrounding the loss of the four southern blocks continue to rankle – part of the legacy of a difficult past. Almost inevitably they ignited in adversarial fora where rights to land had to be formally contested. This has left its mark on tribal relationships.

Katarina Kawana addressed this point in her evidence to us, emphasising what she considered to be the impact of Crown actions, lasting right to the present:

406. Tama Nikora, 'Waikaremoana' (doc H25), pp 124–125
407. Tama Nikora, 'Waikaremoana' (doc H25), p 124

> The Crown has used whakapapa to divide us. I want a future where all groups are recognised and where Whakapapa is used to unite us. I want a future where hurts can be acknowledged and things put right. I want a future where we can all move forward.[408]

Erina Renata also described to us the legacy of these events in graphic terms. Referring to the Waitangi Tribunal's hearing at Waikaremoana, Ms Renata said that the very process of making claims and giving evidence set 'whanau against whanau and hapu against hapu':

> Each group stood under a certain banner to give evidence, the barriers were put up and we were all supposed to be enemies. But when we went off for meals in the whare kai, without the labels of those who we represented, we found ourselves all sitting together, sharing a meal and laughing about each others korero, and presentations.[409]

Our analysis of the events from the arrival of Crown troops in the region in 1865 through to the alienation of the blocks tells us where things began to go wrong. Waikaremoana communities had engaged in widespread conflict for a brief period at the beginning of the century, but had restored their relationships through intermarriage and negotiation. But events stemming from the second period of conflict with Crown forces, from 1865, would see the two main iwi of the region – Tuhoe and Ngati Kahungunu – locked inexorably into damaging contests about their customary rights. Ngati Ruapani – as the smaller tribal group in the region – occupied an equally difficult middle ground.

(b) ***Impact on the exercise of customary rights and on relationships to the land:*** The loss of land for any Maori community involves not only the loss of rights to resources, but very often the severing of crucial cultural relationships with that land. Although people might continue their associations with land which had passed from their possession through regular visits, without the unfettered access that ownership confers, these relationships would inevitably be disrupted. The four southern blocks were no exception.

Earlier we explained that the evidence before us helps us understand how customary rights operated in the four southern blocks. In summary:

- The land to the south and east of Lake Waikaremoana was undoubtedly a border region between two large tribes (Tuhoe and Ngati Kahungunu) in which a third distinct tribal group (Ngati Ruapani) also live.
- Communities of these three tribes occupied land in several key locations (on the southern shore of Lake Waikaremoana; to the south of the Tukurangi block; in the upper reaches of the Mangaaruhe and Ruakituri rivers; and in the east of the Ruakituri block); from these key locations, they travelled, often considerable distances, to utilise resources seasonally

408. Katarina Kawana, brief of evidence, undated (doc 129), para 39
409. Erina Renata, brief of evidence, 22 November 2004 (doc 118), p 9

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- Communities had close connections through shared whakapapa, but usually affiliated to one of the two main iwi (or to Ngati Ruapani also)
- Rights to land and resources were held at hapu level; the general pattern was negotiation of rights between hapu leaders.

Occupation was well established in these lands, not marginal as Young and Belgrave argued; the exception was the key period of conflict in the 1820s.[410] Hapu rights to the land, and the exercise of their authority over it, were also well-established, if subject to negotiation with other communities.

The picture of settlement that emerged in the Native Land Court in 1875 and in subsequent hearings was without doubt distorted by the military conflicts of 1865–1866 and 1869–1871. But the four southern blocks were not as heavily settled as other places in the region: there were no concentrated areas of settlement, like Ruatahuna or Maungapohatu. Young and Belgrave summarised the evidence of Ngati Kahungunu witnesses before the Native Land Court who identified themselves as having fought against the Government in the conflicts of 1865–66 and 1869–71. Many spoke of the fact that the conflicts ended their occupation in the four southern block lands.[411] The war years of 1865–71 also wrought havoc with the sustained process of relationship building and the renegotiation of rights.

The loss of the blocks made permanent what war had begun. It resulted in the lasting loss of customary rights that Maori communities had built up over some generations, and many of the spiritual and cultural relationships the people had established with their land.

It is not possible to quantify the extent of land loss for each of the key claimant groups concerned. Nor would we attempt a similar exercise to that which we undertook in chapter 4 of this report. Our attempt at quantifying Tuhoe's loss in that chapter was done solely for the purpose of assisting settlement negotiations, and the line we drew on the map was expressly for this purpose. We believe it would be inappropriate for us to add another line to what is already a fraught history of boundary-defining in these southern lands.

It is appropriate, however, that we should signal, in general terms, what the evidence tells us about the rights particular groups held in particular lands within the four southern blocks. Although customary rights were complex, there were areas where particular tribal groups were acknowledged to have established the closest relationships with the land. It is clear to us that Tuhoe and Ngati Ruapani had an established presence on the southern shores of Lake Waikaremoana, and particularly at Onepoto. This was not merely a seasonal base, but rather a permanent settlement; and it remained after the reserves had been established. Other areas associated with Tuhoe and Ngati Ruapani were in the north and the west of the blocks. Ngati Kahungunu excercised rights to land across the blocks, but their cultivations and settlements were mostly found in the south and east. As we have seen, Tuhoe, Ngati Ruapani and Ngati Kahungunu all acknowledged this situation. But the Government

410. Young and Belgrave, 'Customary Rights and the Waikaremoana lands' (doc A129), pp 20–21
411. Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), p 173

attempt to force a clear separation of their spheres in the form of a tribal boundary created great difficulties for them.

We cannot doubt that the peoples of the region suffered a significant blow to their spiritual well-being with the loss of their ancestral land. They were separated from their wahi tapu and other sites important to them. Although they retained some land in the reserves (which we will considerbelow), this could hardly compensate for the permanent separation of communities from the greater part of the land. The story of Te Waru Tamatea and his community is emblematic of the peoples' loss. Their exile to Waiotahe was permanent; today, their descendants remain in exile, but remember their ancestral land – and the events that brought about its loss.

Lorna Taylor described the loss for Tuhoe: 'Our kinship ties to the whenua has been eroded for we no longer have kainga around Lake Waikaremoana and there is a deep sense of grief as our links to our ancestors are clouded with the pain of confiscation and denial.'[412] Jenny Takuta-Moses echoed these comments when she said: 'It is a land of lost content as I no longer have access to the resources which give sustenance to my life like my ancestors before me.'[413] Ms Takuta-Moses underlined this with the following pepeha:

> Te Aitanga a Potiki
> Mai te Whenua kua Ngaro
> From the Ancient People of Nga Potiki
> to a Land of Lost Content

(c) ***Economic loss:*** Having discussed the impacts of land loss in the four southern blocks on customary rights, we turn to examine what this meant in economic terms. The loss of the land would inevitably impact on the traditional economy of communities, through the loss of traditional resources) and also their ability to participate in the colonial economy. How might we understand the extent of the economic fallout from this loss?

We received very little evidence about the productive capacity of the four southern blocks, or the impact of their loss on the peoples of the region. Therefore we can only provide a general assessment of the economic consequences of the loss of land. The total area of the four southern blocks was 178,226 acres. If we deduct the reserves allocated to Ngati Kahungunu, Tuhoe, and Ngati Ruapani the total the iwi lost to the Crown was 168, 228 acres. The question of the reserves is a separate one, and we address the history of the Tuhoe and Ngati Ruapani reserves below. Here we ask two questions:

- What was the quality of the land that was alienated and what resources were lost to the communities?

412. Lorna Taylor, brief of evidence 18 October 2004 (doc H17), p 14
413. Jenny Takuta-Moses, brief of evidence, 18 October 2004 (doc H35), p 7

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▶ What kind of economic benefit could the owners have derived had it stayed in their ownership?

Professor Brian Murton did not address the quality of the four southern blocks in his report, as he did for the northern lands that were confiscated in 1866. But we can draw on the same Ministry of Works landuse capability survey from 1962 that Murton used in making his assessment of the northern lands. The map produced from this survey shows the blocks contained large areas of 'non-arable land with moderate limitations for use under perennial vegetation such as pasture or forest[ry]', and two areas 'with very severe to extreme limitations or hazards' and 'unsuitable for cropping, pasture or forestry' (one to the south of Lake Waikaremoana, and one in the north-west of the Taramarama block). But the survey map also shows that the blocks contained small areas of higher quality land. These were primarily located on the banks of the Ruakituri, Mangaaruhe, and Waiau rivers, and the Waikaretaheke stream.[414] This evidence shows that the four southern blocks contained areas that were marginal – perhaps verging on the unproductive – because of the steep terrain. Compared to the northern lands confiscated in 1866, the southern lands do not include substantial areas of high quality.

But there were a number of locations within the blocks where Maori lived and cultivated in traditional times – and these areas were crucial to the economy of the region. People lived in kainga across the blocks; these were bases from which they would access and utilise the resources of the land. Permanent settlements included Te Reinga to the south-east of the Ruakituri block; Erepeti on the Ruakituri river; Whataroa and Ohiwa on the Mangaaruhe River; settlements along the Waiau river; and the land near Te Onepoto.

Witnesses before the Native Land Court in 1875 described some of the cultivations they and their ancestors had established in the Tukurangi and Ruakituri blocks. Ihakara of Ngati Kahungunu told the court that his cultivations were located at Ahi Kuha Kuha (possibly to the south of the block towards the maunga Tukurangi).[415] Hapimana Tunupaura and Toha Rahurahu explained that their cultivations were at Mangamauka and Kahotea, a place in the south of the Tukurangi block where a Ngati Kahungunu reserve was created.[416] Tuhoe and Ngati Ruapani witnesses supplied similar evidence, though to different areas of the Tukurangi block. Both Hori Whareranga and Te Makarini described cultivations on the bank of the Waihi river.[417] Witnesses also described their cultivations in the Ruakituri block. Speaking for Tuhoe and Ngati Ruapani, Wi Hautaruke said that his people (the 'Urewera') cultivated land in locations throughout the block, including Erepeti, Rautakiri, Mangaaruhe, Whataroa, and Ohiwa.[418] Although Ngati Kahungunu witnesses disputed this

414. Map 25, 'Landuse Capability within Te Urewera District Inquiry', Te Urewera Inquiry District Overview Map Book, Part 3, August 2003 (doc A132), produced by the Crown Forestry Rental Trust

415. Napier Minute Book 4, 4 November 1875, p 75

416. Napier Minute Book 4, 4 November 1875, p 76

417. Napier Minute Book 4, 5 November 1875, pp 78–79

418. Napier Minute Book 4, 5 November 1875, p 80

evidence, the dispute was not about whether the cultivations existed but whether Tuhoe and Ngati Ruapani had rights in those places. Tamihana Huata and Ihakara Tuhi described many of the same places in their evidence, and Wi Tipuna outlined the places of his people's cultivations, including Te Papuni, Te Arero, Nga Mahanga, and Ohiwa.[419] This evidence can only be considered as a snapshot of the locations where Maori had once accessed and utilised resources. Belgrave and Young noted that the evidence of occupation presented before the court reflected a distorted picture of customary rights due to the conflict that took place in 1865–1866 and 1869–1871.[420] We agree, and take from this that had there not been a conflict, witnesses who spoke before the court would have presented a much fuller picture of the range of cultivations that could be found on the land.

Anaru Paine provided us with his assessment of the range of resources Maori would have utilised – one based on his knowledge of the region and on oral traditions. Paine discussed one corridor of land to the south and west of Te Onepoto in the context of explaining the strategic importance of the pa, Te Pou o Tumatawhero. From the puke Raekohu, he said, there was a direct line from Kiriopukai lake through to Te Kopani. 'In this one place', Paine describes, 'are gardens, bird hunting areas, eel netting places forts and caves for interring the bones of our ancestors.' He explained the significance of Te Pou o Tumatawhero because of its close proximity to these resources. '[T]he fort Te Pou o Tumatawhero was used as a station to repel invaders who wanted to take this area of unique abundance.'[421] This evidence, combined with that given in the court, paints a picture of the location and range of resources Maori utilised in these lands during traditional times.

The extent of crop destruction in early 1866 also suggests that traditional horticultural practices were well established in certain areas of the four southern blocks. As we explained above, Crown forces scoured the countryside in the 'vicinity' of Lake Waikaremoana in the days preceding the battle at Te Kopani. According to the correspondent for the Hawke's Bay Herald 'large tracts of valuable land' were discovered near the ten settlements that the troops destroyed: 'Immense cultivations – the extent of which took the friendly natives completely by surprise – were found in the vicinity of the kaingas, as well as large numbers of horses and cattle. The cultivations comprised crops of all kinds of cereals, and are estimated to be worth, as they stand, a large sum of money.'[422] The productive potential of these areas is evident. Pakeha who visited the area in the 1860s and 1870s generally expected the land to be little or no use. And while observers who travelled across the land did note the poor quality of some areas within the blocks, others also expressed their surprise about the quality of different areas, which defied their expectations.

419. Napier Minute Book 4, 5 November 1875, pp 81–83
420. Belgrave and Young, summary report of 'Customary rights and the Waikaremoana lands' (doc 12), p 22
421. Anaru Paine, brief of evidence, 18 October 2004 (doc H39), pp 3–4
422. 'Retreat of the enemy upon Waikaremoana', *Hawke's Bay Herald*, 6 February 1866, p 3 (cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 111)

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It was at this time, when military leaders and other officials were visiting the district more often, that observations began to be made about the land's potential use for pastoral farming. Thus in May 1866 (after hostilities were over) Fraser made an assessment of the land that later became the Ruakituri block: 'the country around the Reinga is very rough and can never be of much value that, as far as Opouiti and about two miles beyond is good and available for cheaper cattle'.[423]

O'Malley also notes that by mid-1868 the surveyor George Burton was 'scouting for land for McLean' in the upper Wairoa and Waikaremoana regions.[424] This included land in and around the Te Hatepe deed area. In July 1868 Burton wrote to McLean describing the results ofhis examination of the 'inland district'.[425] The letter included a sketch map which showed two areas: area A was the south-eastern portion of what later became the Taramarama block; area B was the Kauhouroa block, between the Wairoa, Waiau and Mangaaruhe rivers. The divide between A and B was marked with the words 'Government Boundary'. Burton began the letter by referring to a piece of land outside areas A and B about which he had already provided advice to McLean. The accompanying sketch map reveals that this land was to the west of the Waikaretaheke stream, where the Tukurangi block was later created. Burton commented that he was 'still of the opinion' that this land would 'carry the number of sheep I said before, namely from 4 to 6000 to begin with'.

Burton also described the pastoral potential for areas A – the land that remained in Maori ownership. This land, he said, would suit McLean's purposes better than that to the west of the Waikaretaheke river, as it was easier to access, 'provided you could make any arrangements with the Govt to Lease the portion marked' (Burton anticipated that McLean would lease the Kauhouroa block from the Crown).

> The Block marked A is very good sheep country being nearly all grass. I estimate the open and available country behind B [that is, area A] to be about 4000 acres. I think this could be easily worked with two shepherds. Taking A&B together I think they would carry to begin with 10,000 to 15,000 and with a little improvement in the shape of burning & cutr [cutover] it would easily carry about 25000 sheep.

Burton revealed he had taken independent advice that confirmed his estimates. He was unsure how much Maori would lease area A for, but he thought 'they should take £140 or 150 a year'. On the accompanying sketch map, Burton described the south eastern reaches of what was later defined as the Taramarama block as 'all open country and very well grassed

423. Fraser to Under-secretary for Colonial Defence, 26 May 1866, in Binney, Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), p 144

424. O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 99

425. Burton to Mclean 24 July 1868, in Binney, Supporting Papers for 'Encircled Lands', vol 1 (doc A12(a)), pp 100–103

hills, with good sheltered valleys'. He also described the area to the east of the Mangaaruhe river, in what later became the Ruakituri block, as 'very good grassy valley [*sic*]'.[426]

Although none of these plans came to fruition, they are important for showing how settlers viewed the farming potential of the land at the time. Burton had the advantage of having travelled across the land in his surveying activities, and gained a broad appreciation of their value. In September 1868 he wrote that the part of the land toward Lake Waikaremoana 'is certainly very rough'.[427] While the northern parts of the blocks were rightly considered as being of little potential, Burton's July 1868 evaluation clearly reveals that the southern portions were of a standard suitable for stocking good-sized flocks of sheep.

It is no surprise therefore that when leasing arrangements were established in 1873 the primary purpose was to establish viable pastoral enterprises. Both groups of lessors – Barker, Cable, MacDonald and Drummond for the Waiau and Tukurangi blocks, and Maney for the Taramarama and Ruakituri blocks – entered into these arrangements with this intention.

And, as we have seen, one of the key considerations in the Crown's decision to begin purchasing the land in November 1874 was opening the land for settlement. In his advice to McLean, Burton stated that the land 'is not very good', but this contradicted his previous assessment of the land toward the south of the blocks.[428] The Crown's ultimate position was recorded in the minutes of the meeting with McLean in November 1874 in which it was formally decided to purchase the land. Once the Government had 'obtained possession' of the land, and dealt with the claims of the owners, it would have acquired 'a large extent of Country for the purposes of settlement.'[429]

We were given no evidence of what use the land was put to in the years after the Crown's purchase; and we are therefore unable to comment on this. But with the evidence we have concerning the potential and anticipated use of the blocks, it is important to consider the income Maori might have been able to derive from leasing had they retained the blocks. The four blocks were leased in 1873 for a total of £700 per annum for 21 years. Over 21 years this would have amounted to £14,700. In comparison, Ngati Kahungunu (including Te Waru's people and Ihaka Whaanga's people), Tuhoe and Ngati Ruapani were eventually paid a total of £12,750. Counsel for Wai 621 Ngati Kahungunu questioned the adequacy of the purchase price.[430] We believe that this is not the most appropriate line of inquiry. As we have explained, the Crown acquired the blocks in dubious circumstances, and because of this the price the Crown paid is irrelevant in determining whether there was a breach of

426. Burton to Mclean 24 July 1868, in Binney, Supporting Papers for 'Encircled Lands', vol 1 (doc A12(a)), pp 100–103

427. Burton to McLean, 4 September 1868, MS papers-0032–0192, ATL (cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 187

428. Burton to McLean, 17 October 1874, in Binney, Supporting Papers for 'Encircled Lands', vol 1 (doc A12(b)), pp 541–544

429. Minute, 20 November 1874, St John memorandum, 25 November 1874, MA-MLP 3/1874/483 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), pp 116–117)

430. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 56

Treaty principles. But the total purchase price is important when considering the extent of prejudice suffered. In total, Maori were paid less than what they would have derived from a 21-year lease. Those leases would have expired in 1894. Of course there were no guarantees similar leasing arrangements would have continued into the twentieth century. But taking these figures as a general indication, and given that this land would have been put to some kind of use in following years, it is clear that Maori of the region lost over a century's worth of potential income from the land.

We turn to consider the economic impact of the alienation of the four blocks on each of the iwi. For Ngati Kahungunu, the loss of the blocks needs to be considered in the context of other alienations at the time. Land purchases in the coastal Wairoa region from the Mahia Peninsula to the Waihui river in 1864 and 1865 totalled 186,794 acres.[431] Ms Gillingham explained that Ngati Kahungunu sold land for a range of economic and political reasons, foremost among which was the desire to stimulate the local economy by enticing Pakeha to the region.[432] But such alienations were also based on the assumption that a sufficient land base was retained in other parts of the rohe. Ms Gillingham also provided us with an assessment of the overall Ngati Kahungunu loss of land in this period, including the four southern blocks. By 1880, she said, approximately 55 percent of their original land base had been alienated – this in just over 15 years.[433] It is unlikely that Ngati Kahungunu leaders contemplated such a large extent of alienation when they began selling in 1864, or that they considered 45 per cent of their original land base to be sufficient for their needs, and their future prosperity. But, as explained earlier in the chapter, Ngati Kahungunu entered into purchase negotiations in early 1875 under a combination of pressures.

For Ngati Kahungunu, especially those from the Wairoa region, the loss of the four southern blocks would have had a marked economic impact. Not only did they lose the ability to utilise mahinga kai and other traditional resources, they were also denied the opportunity of developing their lands, or leasing them long-term, to engage with the colonial economy. The greatest effect would have been felt by those hapu of the upper Wairoa for whom the blocks were their primary areas of residence and cultivation. Charles Cotter told us that Ngai Tamaterangi have been 'left without an adequate economic base'.[434] The loss devastated the land base of Tamaterangi and left the people with 'insufficient lands for their sustenance as a hapu'.[435] From the sale of the blocks Ngati Kahungunu were left with 8000 acres of reserves; as stated previously we are unable to investigate the history of these reserves.

Although it is impossible to quantify the precise land loss for any of the iwi with rights in the blocks, it is clear that for Tuhoe and Ngati Ruapani the reduction of their holdings to 2500 acres, overnight, represented a very substantial loss. For Tuhoe, the loss of a

431. Gillingham, 'Maori of the Wairoa district' (doc 15), p 115
432. Gillingham, 'Maori of the Wairoa district' (doc 15), pp 116–117
433. Gillingham, 'Maori of the Wairoa district' (doc 15), p 274
434. Charles Cotter, brief of evidence (doc 125), p 5
435. Charles Cotter, brief of evidence (doc 125), p 16

significant portion of land in the south-east of their rohe followed only a decade after the northern raupatu. This was a further diminution of their land base. In purely economic terms it should be noted that the impact of this loss on the wider Tuhoe iwi was not as severe as the northern raupatu. The northern lands, as noted in chapter 4, were warm and flat, with significant potential for development. They constituted half of the highest quality land in the Tuhoe rohe. The four southern block lands, especially the lands on the southern shores of Lake Waikaremoana, were not of the same quality. Their loss, therefore, did not have the same kind of impact on the ability of the iwi to engage with the colonial economy. But there is no denying that the loss would have contributed to the desire evident among Tuhoe leaders in the latter part of the nineteenth century to focus on developing their internal economy. These effects would have been felt particularly by the Tuhoe hapu whose homes were at Waikaremoana. In the following chapter, we note that it was in these border areas that Tuhoe communities were most eager to develop their lands. This suggests that, had they been given the opportunity, they would have sought to participate in the colonial economy to the fullest extent. Their local economy was restricted, primarily through the loss of mahinga kai and other resources. For Ngati Ruapani, whose home was Lake Waikaremoana and its surrounding lands, the alienation of the four southern blocks was sorely felt. Proportionately, the loss of land and resources was greater for them than either Tuhoe or Ngati Kahungunu. Rose Pere told us that the 'Hapu of Waikaremoana still experience a situation of blind chaos', and 'abject poverty', mainly through lack of natural resources they once had.[436] Like Tuhoe, Ngati Ruapani say they were denied the opportunity to develop the land in the late nineteenth and twentieth centuries. And what they were left with were four small reserves. For Tuhoe and Ngati Ruapani, the impact of the loss of land in the four blocks was compounded by the unhappy history of the reserves allocated to them in the wake of the sale. These inalienable reserves, comprising 2500 acres, provided small compensation for the loss of their rights and interests in the land. As we will see in a later chapter, in the 1920s – and without providing alternative land – the Crown acquired the two smaller reserves, which totalled 600 acres (nearly 25 percent by area) of the reserves originally allocated to Tuhoe and Ngati Ruapani. There were also public works takings of some 40 acres in the remaining reserves in the early 1940s, when the lands in the area that were left in Tuhoe and Ngati Ruapani ownership were a remnant of their ancestral heritage. We turn here to consider the impacts on Tuhoe and Ngati Ruapani of being confined to the reserves. We ask whether the reserves allocated were adequate in terms of location, quality and quantity of land, to meet their present and future needs.

Crown counsel submitted that 2500 acres, averaging 236 acres per person (an indicative calculation only, according to counsel), was a 'not unreasonable' allocation in 1875 given that the standard for reserves at the time was not less than 50 acres per person.[437] We find

436. Rose Pere, brief of evidence (doc H41(a)), p 6
437. Crown counsel, closing submissions (doc N20), Topic 6, p 18

this argument difficult to accept for two reasons. First, we would point out that successive tribunals have noted the flaws in the 50 acre rule. The Turanga tribunal found that a requirement of 50 acres per individual was 'fundamentally misconceived' for communally held land, especially for customary land. The figure was set at a time when land requirements for pastoral farming were clearly greater. It 'took no account of the size of families, or the location and quality of land needed for workable farms.'[438] The Central North Island tribunal added that it was a figure which envisaged only bare subsistence; it did not take account of what might be required to actively participate in economic opportunities arising from settlement. From the preamble of the Native Land Act 1873, the Crown 'appeared to have a more generous object than a sufficiency of 50 acres per individual, envisaging sufficient land for the support and maintenance of the Maori people as well as landed endowments on top of that for their permanent "general" benefit.'[439]

Secondly, the Crown's argument does not address the actual needs of the community that lived at the lake at the time. As we have shown, a settled community existed on the southern shore of Lake Waikaremoana before the arrival of Crown forces in the district in 1865. We have rejected the idea that the land around Lake Waikaremoana was used only for the taking of seasonal resources. The southern shore of the lake was a place of permanent residence for many people, who depended on the resources of the land and the lake itself. This settlement was severely disrupted by the conflict of 1865–1866 and 1869–1871, when the community withdrew to the northern side of the lake. The people returned to the land at the conclusion of hostilities, especially when the sites of the reserves were chosen and nominally 'set aside' in 1876.

But it is clear to us that the four reserves granted to Tuhoe and Ngati Ruapani were not sufficient to meet the needs of the community who lived there in the late nineteenth century. This emerged clearly in 1894, when those who lived on the reserves expressed their concerns to Premier Richard Seddon, on his visit to Onepoto. Hori Wharerangi told Seddon that 'we occupy most of our land that will admit of occupation [*sic*]'. Another leader, Hapi, spoke of the conditions on their reserve: 'We are occupying the whole of it, ourselves and our horses.'[440] Similarly, in 1896 an official commented on the small size of Ngati Ruapani's cultivations.[441] In the four southern blocks, this meant the Heiotahoka and Te Kopani reserves. The other two reserves (Whareama and Ngaputahi) were isolated in the middle of Crown land and impossible to access without trespassing. Moreover, they did not contain land suitable for cultivation. Ngati Ruapani spokesman Vernon Winitana highlighted these points in his evidence:

438. Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol II, p 457
439. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 439
440. O'Malley, 'The Crown's Acquisition of the Waikaremoana Block' (doc A50), pp 18–19
441. O'Malley, 'The Crown's Acquisition of the Waikaremoana Block' (doc A50), p 46

> People may think it's strange that there was a food shortage here in the Urewera, surrounded by all these forests full of kai. But it's not that simple – by the 1890s most of the area was off limits and we weren't allowed to access it. This restriction meant survival became essentially poaching to feed whanau and hapu.[442]

Evidence of the inadequacy of the reserves emerged more starkly in the 1920s, in discussions surrounding the implementation of the Urewera Consolidation Scheme. This is not surprising, given the earlier complaints, and cannot be considered as an outcome of changing circumstances. As we have seen, Apirana Ngata commented on the poor quality of the reserves, and the peoples' need to build up their interests around the Te Kopani reserve.[443] Three years later the consolidation commissioners came to similar conclusions. They noted the poor access to Whareama and Ngaputahi, and the need for the owners to be given a more adequate land base.[444] In short, two of the four reserves were not viable for farm development in the 1920s – as they had not been viable in the 1870s. They were small, on broken land, and were marooned in the middle of Crown lands. All four reserves together were not enough to sustain the community who lived south of the lake in the 1920s.

For these reasons we agree with counsel for Wai 36 Tuhoe, who submitted that there was 'clear evidence' that those of Tuhoe and Ngati Ruapani who lived on the reserves 'suffered significant deprivation because of the poor quality and quantity of the land.'[445] The four reserves designated in 1875 were not 'sufficient' – even by the standards of the time. Without the ability to utilise the resources of the wider district as they once had, the community that lived at the lake could not adequately provide for themselves. Because this was clearly the case even in the 1890s, we reject the Crown's suggestion it was the increasing population over time that produced this situation.[446] Although (as we explained in chapter 5) the Te Urewera population began to recover from the 1870s, it seems unlikely that any increase in the lake community by the 1890s would so quickly have placed pressure on their remaining resources. Put simply, what they were granted at the outset was not enough to sustain the communities that had lived on the land before the alienation of the blocks.

Tuhoe and Ngati Ruapani occupation in the four southern blocks has not been entirely erased. They have concentrated their settlements on the two reserves still in their ownership, and have demonstrated down to the present day a fierce determination to keep this remaining land. They are communities with a strong sense of their identity – as was very evident in their intense participation in our hearings, and in their korero and waiata. The two marae – Waimako and Te Kuha – are in active use. But the people have struggled to

442. Vernon Winitana, brief of evidence (doc H28), pp 9–10
443. Ngata to Coates, 19 September 1921, in O'Malley, supporting documents (doc A50(b)), pp 471–472
444. Knight to Under-secretary, Native Department, 10 September 1924, in O'Malley, Supporting Documents (doc A55(b)), p 220
445. Counsel for Wai 36 Tuhoe, closing submissions, part B, (doc N8(a)), p 42
446. Crown counsel, closing submissions (doc N20), Topic 6, p 18

survive in economic terms, on land that is difficult to farm. The loss of their customary rights in the four southern blocks was a considerable blow to their cultural and economic wellbeing. Though they remain on the land, their foothold continues to be hard-won.

It is a cruel irony that one of the two small portions of land remaining in Tuhoe and Ngati Ruapani ownership is the Te Kopani reserve – the site of the battle with Crown forces in January 1866. This was the battle that began this most unfortunate series of events – first, the Crown's determination to take land in the Wairoa district and, ultimately, its acquisition of the four southern blocks from its tribal owners.

(d) ***Social, cultural and economic impacts – conclusions:*** In short, the loss of the four southern blocks had marked impacts on the customary rights and interests of Maori communities. Yet, despite this loss, all of the affected iwi – Ngati Kahungunu, Tuhoe, and Ngati Ruapani – have maintained their presence there, retaining what little land they have left. They have sustained a strong network of relationships among those who connect to the land. Although many people have been driven away by a lack of opportunities, those who spoke to us of their loss told us also of their desire to rekindle their full ancestral connections to the land.

(3) ***Political Impacts***

The events that culminated in the Crown's purchase of the blocks have also impacted upon the relationship between Maori communities of the region and the Crown. In this section we trace these effects from the signing of the Te Hatepe deed, by looking at how the Crown's actions in respect of the blocks affected its relationship with these communities. We look first at the relationship between the Crown and Ngati Kahungunu, before turning to its relationship with Tuhoe and Ngati Ruapani.

(a) ***Ngati Kahungunu and the Crown:*** The upper Wairoa and Waikaremoana conflict, as we have seen, strained the relationship between various Ngati Kahungunu groups and the Crown. This conflict, and the events that followed, also strained relationships between the Ngati Kahungunu communities of the upper and lower Wairoa. As we explained in the previous chapter, upper Wairoa Ngati Kahungunu led primarily by Te Waru Tamatea fought against Crown forces that included Ngati Kahungunu. After the conflict, those Ngati Kahungunu who had fought on opposing sides appeared to have resolved their differences. But the signing of the Te Hatepe deed placed new pressures on the people.

Though Te Waru Tamatea returned to his lands in the upper Wairoa outside the Kauhouroa block after the signing of the Te Hatepe deed, he had become alienated from the wider kin group. The cession of the Kauhouroa block had been made despite his protests at the hui. In this context, and with many of his people having recently been killed in conflict, Te Waru and his people aligned with Te Kooti. They had little reason to support the Crown.

Professor Binney concluded that the loss of upper Wairoa land in the Te Hatepe deed was one of the main causes for Te Waru and Nama (the other key upper Wairoa leader) siding with Te Kooti. In joining Te Kooti, 'they were linking the issue of land confiscation to Te Kooti's cause: illegal imprisonment and communal dispossession'.[447] Te Kooti's message of salvation offered hope to Te Waru and his people. Binney suggests that it was unsurprising that Captain Biggs, 'the agent of their mutual dispossession', became the primary target for their combined attack on Matawhero in 1869. Thus, the Crown's acts at Wairoa contributed, in Binney's view, to much wider political consequences across the North Island.

For the peoples of the upper and lower Wairoa, such consequences were most keenly felt in the killing of four lower Wairoa chiefs who were sent on a mission to persuade Te Waru not to join Te Kooti at the end of September 1868. The identity of the killers is uncertain (though Binney and Gillingham both state that killings were carried out by Te Waru's brother, Reihana), but the result was clear. According to Ms Gillingham, the event

> drove a deep wedge between the hapu of the lower and upper Wairoa River. It became the central factor motivating the involvement of the Wairoa hapu in the Government's attempts to catch Te Kooti, and incited an unprecedented (at least, during the time period of this report) level of violence between the hapu of the Wairoa River.[448]

Richard Niania, referring to the series of conflicts that occurred between 1865–1871, in which Te Waru and his community fought on one side against other Ngati Kahungunu who gave assistance to the Crown,stated: 'These years of warfare had a debilitating effect upon all peoples around Waikaremoana.'[449]

The killings appear also to have been a determining factor in preventing Te Waru and his people from returning to the Wairoa region after the wars.

But the Crown's role in precipitating conflict and land loss in many parts of the North Island, which Te Waru had opposed over a number of years in the belief thatthe Crown did not have the best interests of Maori at heart, doubtless weighed on him as he signed away the interests of his people in their ancestral land. They now resided on land far away from their home. Certainly it was land granted to them by the Crown, but in the circumstances it must not have seemed much of a gift.

Other Ngati Kahungunu who, as we have seen, sold their rights and interests in the blocks in the face of a variety of pressures, had experienced a journey that few could have imagined a decade before. Many had sided with the Crown in the face of pressures after the battle at Waerenga a Hika in November 1865. Their political descent was from the line of leaders who adopted a stance of cautious neutrality, but their concerns in the face of a determined Crown which had shown itself ready to take the land of those regarded as rebels, saw them

447. Binney, 'Encircled Lands', vol 1 (doc A12), p 188
448. Gillingham, 'Maori of the Wairoa district and the Crown' (doc 15), p 212
449. Richard Niania, brief of evidence (doc 138), p 24

fight against their kin of the upper Wairoa. They subsequently agreed to a cession of land at Kauhouroa under further pressure from the Crown. Their supposed compensation was the award of 'rebel' land in the wider Te Hatepe deed area. After five years of waiting to have these promises fulfilled – and with a considerable number of the wider kin group permanently exiled from the region as a consequence of earlier events – they were only rewarded with more uncertainty in the form of the Locke deed and its purported grants to owners in the newly created southern blocks. This, as we have seen, led to divisions among those Ngati Kahungunu who were promised recompense for their military services or their loss of land in the Kauhouroa block and those who had customary rights in the blocks – as well as increased tensions with Tuhoe. The outcome of these tensions and disappointments, as well as indebtedness, would be willingness to sell, and the alienation of the land to the Crown.

Some Ngati Kahungunu leaders, who had invested a great deal politically in their relationship with the Crown, nevertheless remained committed to that relationship. But the Crown did not escape unscathed in the eyes of many Ngati Kahungunu who considered themselves loyal, yet who – in the context of other land alienations in the region – increasingly turned to the Repudiation Movement for explanations. This movement helped explain to Ngati Kahungunu the promises made by the Crown in entering into the Treaty. Seen in the light of the broad sweep of events from the 1860s through to the 1870s, the early hesitant approach of some of the Ngati Kahungunu leaders toward Crown authority must have appeared justified. In Wairoa this position had initially been occupied primarily by Pitiera Kopu. Kopu's sole desire in his support of Crown from early to mid 1860s was to save the land. Yet, despite unwavering political and military support, he witnessed the loss to the Crown of the Kauhouroa block – and passed away shortly thereafter. Had he lived, he would have also seen the loss of the lands extending to Lake Waikaremoana.

Concerns over these events lingered into the twentieth century. But these concerns remained largely unresolved even after the inquiry and report of the Sim Commission. The commission had only limited terms of reference – a point acknowledged by Crown counsel.[450] It was only able to investigate confiscated land: the four southern blocks, therefore, did not come under consideration. But it did look at five petitions relating to the Kauhouroa block. This block, it will be remembered, is outside our inquiry district boundary, but we refer to these petitions and the commission's comments because they are testimony to Ngati Kahungunu dissatisfaction. Crown counsel acknowledged that 'the Sim Commission was not engaged in a full inquiry of all the evidence that might be available on the issue of rebellion, and was constrained to an extent by the evidence placed before it.'[451] Richard Niania told us that few Ngati Kahungunu 'were happy with the settlement proposed by the Sim Commission.'[452]

450. Crown counsel, closing submissions (doc N20), Topic 6, p 20
451. Crown counsel, closing submissions (doc N20), Topic 6, p 20
452. Richard Niania, brief of evidence (doc 138), p 32

The outcome for many of the Ngati Kahungunu claimants who appeared before us has been a lasting mistrust of the Crown. The memories of these events have been passed down through generations. Ngai Tamaterangi claimants primarily seek answers to their one overriding question: why did the Crown treat them as it did? As Katarina Kawana put it:

> I want to know why the Crown branded my great grandfather Peta and other members of Ngai Tamaterangi tipuna rebels.
>
> I want to know why Crown soldiers attacked our lands at Omaruhakeke on Christmas day in 1865 and at Lake Waikaremoana in January 1866.
>
> I want to know why the Crown soldiers destroyed our villages at Omaruhakeke and at Lake Waikaremoana
>
> I want to know why my great grandfather was forced to go in to hiding on his own lands.
>
> I want to know why the Ngai Tamaterangi chief Moururangi was imprisoned without trial on Wharekauri.
>
> I want to know why the Crown confiscated Ngai Tamaterangi land at Kauhouroa.
>
> I want to know why Ngai Tamaterangi lost our lands at Waiau, Tukurangi, Taramarama and Ruakituri.
>
> . . . . .
>
> I want to know why my tipuna Te Waru Tamatea was forced to live in exile in Waiotahe.
>
> I want to know when will the Crown apologise to us for the atrocities committed against my tipuna and others of Ngai Tamaterangi and Hinemanuhiri.
>
> I want to know when the Crown will put things right by returning our lands, which were wrongfully taken.[453]

Charles Cotter added: 'It is my view that Ngai Tamaterangi has suffered considerably at the hands of the Crown and those working for the Crown.' He sought a Crown apology, alongside appropriate compensation, as part of a comprehensive settlement of their claims. 'At the end of the day all that we want is for the Crown to be fair to us and to recognise our legitimate grievances. We seek justice and we ask simply that the Crown put things right.'[454]

(b) ***Tuhoe, Ngati Ruapani, and the Crown:*** For Tuhoe, the alienation of the four southern blocks came at a time when their leaders were building a relationship with the Crown following the prolonged period of conflict and upheaval in the upper Wairoa and Waikaremoana regions. Tuhoe's conditional acknowledgement of Crown authority in April 1871 with the cessation of hostilities and the withdrawal of Wahawaha's force, the peace agreement in November 1871 and the formation of Te Whitu Tekau in June 1872 marked a watershed in the relationship between Tuhoe and the Crown. As we explain in detail in chapter 8, although Te Whitu Tekau arrived at policies that were designed to retain their remaining

453. Katarina Kawana, brief of evidence, undated (doc 129), paras 27–33, 35–37
454. Charles Cotter, brief of evidence, undated (doc 125), pp 27–28

lands – including the banning of roads, leasing, selling and the operation of the Native Land Court within their boundaries – such policies were not seen as inconsistent with Tuhoe's wish to foster a positive relationship with the Crown. Te Whitu Tekau saw the Crown's role as recognising its authority, and thus sought legislative approval of its powers. Yet, in the course of events which culminated in the alienation of the four southern blocks, Tuhoe saw every key policy they had set in June 1872 set aside in the south east. By 1875, not only had their lands been leased, but they had been compelled to enter the Native Land Court in a desperate bid to protect their rights. They subsequently sold their interests under the threat of their lands being taken under the East Coast confiscation legislation.

The issue is whether these events had any short- or long-term effects on the relationship between Tuhoe and the Crown. Crown counsel made no submissions on whether the events culminating in the sale of the blocks placed strain on Te Whitu Tekau or whether there was a consequential impact on Tuhoe's relationship with the Crown.[455] Counsel for Wai 36 Tuhoe, on the other hand, submitted that these events had a marked impact on the relationship. 'Rather than softening Te Whitu Tekau's attitudes to sales and the Native Land Court however, Tuhoe's experience in the four southern blocks merely reinforced Te Whitu Tekau's belief that dealing with the Court and purchase agents wrought disaster on the tribe.'[456]

It is important, we believe, to view these events in the context of the wider relationship between Tuhoe and the Crown in the 1860s and 1870s. In 1867, Tuhoe not only believed that their interests in the southern lands remained intact but that they had also established a positive relationship with the Crown. This occurred in the wake of the hostilities of 1865–1866, when Paerau Te Rangikaitupuake met with Donald McLean and Ngati Kahungunu. Although there was a restoration of relationships with the latter iwi, the Crown in fact rejected Paerau's overtures, which they found out later. As we explained in chapter 5, this was a significant lost opportunity in the history of the Crown's relationship with the peoples of Te Urewera. The lack of any kind of meaningful relationship with the Crown and the unhappy events of previous years that had fostered a negative impression of Crown authority were contributing factors to Tuhoe's decision to commit to Te Kooti.

The peace that followed three years of conflict and Crown expeditions into the heart of Te Urewera was indeed a watershed in Tuhoe history. But the signing of the Locke deed and the creation of the four southern blocks posed new problems. First, and most importantly, the Locke deed affected significant tracts of land south of Waikaremoana in which Tuhoe held interests. Secondly, the creation of the blocks, and mistaken official pronouncements that the land had been confiscated and was now being returned, indicated for the first time the Crown's assertion of authority over these lands. The spectre of Crown intervention in the Waikaremoana lands, therefore, loomed to spoil this new era of peace in its very

455. Crown counsel, closing submissions (doc N20), Topic 7, pp 7–8
456. Wai 36 Tuhoe counsel, closing submissions (doc N8(a)), p 56

earliest stages. Tuhoe anger was initially directed at their principal leader at Waikaremoana, Tamarau Te Makarini, who had signed the deed. But this was soon redirected to the Crown and its agents. Even though disagreements continued between the main body of Te Whitu Tekau leaders and the Waikaremoana leaders, Tuhoe consistently signalled its mistrust of Crown officials, and Samuel Locke in particular. This was in part because they suspected that the Crown favoured Ngati Kahungunu in its dealings over the land- a suspicion that was only intensified by the manufactured 'boundary dispute' that Crown officials came to insist on at this time. Tuhoe mistrust of Crown officials was such that the leaders collectively decided to take the land before the Native Land Court in the hope that their case would get a fair hearing, and their rights would be recognised. Counsel for Wai 36 Tuhoe emphasised the significance of this decision: 'These were the first lands that Tuhoe would be forced to pursue through the Native Land Court in breach of Te Whitu Tekau's policy.'[457] They made the decision because they saw no alternative, in light of their understanding of Government policy about the four southern blocks lands.

As we have shown, they received anything but a fair hearing; instead they were suddenly presented with the threat of confiscation of their land. We can only surmise what impact this had on Tuhoe's view of the Crown – or of the court for that matter. We have virtually no account of the interaction between Tuhoe and Ngati Ruapani leaders, and officials, in the days following the bombshell which was dropped into the court proceedings. The result, however, was that they sold their interests in the blocks, because they saw no alternative.

Professor Binney argued that in 'one stroke' McLean destroyed all the positive advances he had made with Te Urewera peoples. The methods he adopted in acquiring the blocks left a lasting legacy of bitterness among Te Urewera leaders that surfaced in evidence given to the Native Land Court in subsequent years.[458] Although we might not accept that the impact of McLean's acts was quite so far-reaching, there was certainly a noticeable cooling in what had been – at last- a developing relationship. The late 1870s is notable for the drying-up of letters from Tuhoe to the Crown. There were no great hui between Tuhoe and Crown officials as there had been before the Crown's purchase of the blocks. This might in part be explained by sources not having survived; alternatively it might be explained by the death of Donald McLean in 1876, who was in essence the face of the Crown for Tuhoe during the war years. The end of a political era brought with it a change in the face of Government. But we tend to think that the lack of correspondence is symptomatic of an interruption in the relationship – one that can be dated to the mid-1870s.

We would qualify this conclusion, however. Tuhoe's loss of the four southern blocks was but one factor in the cooling of the relationship. As we will see in the next chapter, there were other events at this time that disappointed Tuhoe. The second point is that they determinedly recovered from this setback. By and large Tuhoe remained committed to

457. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 39
458. Binney, 'Encircled Lands', vol 1 (doc A12), p 317

developing a positive relationship with the Crown, while keeping control of their remaining lands. In the 1880s they again began to invite Government representatives to hui. We believe therefore that this period may best be described as an interruption in the relationship between Tuhoe and the Crown which had so recently begun to develop.

Anita Miles suggested that the greater political impact was evident in Tuhoe's view of the Native Land Court, rather than the Crown. Tuhoe's first experience of the court was 'disastrous' and '[i]t must have made a very poor impression' upon them.[459] It is possible that the experience may have led to a hardening of Tuhoe's view of the court. They appeared only as counter-claimants in the land court in later years – that is, when applications from other parties obliged them to defend their rights – but they always argued their cases vigorously, often marshalling many witnesses. Tuhoe experience in the southern lands might of course only have confirmed them in the policy they had established against the court's operation in their rohe.

Tuhoe's seemingly muted reaction to the loss of the blocks, both in the short and the long term, might be explained more by the unusual circumstances in which the blocks were alienated and by the consequences this had for the defence of their lands in other title investigations. The adversarial nature of later land court hearings, and the emphasis placed on demonstrating wide-ranging occupation in the Waikaremoana region, might explain why many Tuhoe who appeared before the court highlighted the alienation of their interests as a sale in which they had taken the initiative. Hurae Puketapu gave evidence to the Native Land Court in 1915 and again in 1917 about how Tuhoe and Ngati Ruapani sold the blocks.[460] Tutakangahau made a similar comment to Elsdon Best: 'The Tuku-rangi Block was awarded to us by the Native Land Court, and we sold it to the Government. Whakamoe, Haere-rangi, Kereru Te Puke-nui and I set up the case.'[461] The block had not of course been awarded to Tuhoe, but these statements reveal how the sale was generally remembered, as Tuhoe focussed long after the event on protecting their interests in other title inquiries. By contrast, Eria Raukura (whom we quoted above) still harked back to the fact that the sale of their rights had been made under the threat of confiscation.[462] But in the context of continuing title inquiries, it was understandable that Tuhoe should stress the sale itself as evidence of their rights in and authority over the land. Consequently the loss of the blocks was not well-remembered in Tuhoe oral tradition as one of their primary grievances against the Crown.

And because the four southern blocks had not been confiscated in fact, Tuhoe submitted no petitions to the Sim Commission. Thus the story of the blocks was not a focus of the Tuhoe komiti raupatu of the 1920s and 1930s, which concentrated its efforts on securing redress for the northern raupatu (see chapter 4). In the course of more recent claims

459. Miles, 'Te Urewera' (doc A11), pp 218, 234
460. Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), pp 145, 156
461. Best, *Tuhoe*, vol 1, pp 517–518
462. Wairoa Minute Book 29, 26 July 1917, p 47 (cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 315)

> *Ngati Ruapani knew the Crown was being dishonest. The attitude of Ngati Ruapani towards the Crown was what would be a natural attitude towards dishonest behaviour. It's hard to love your neighbour as yourself when you know that they're ripping you off.*
>
> Desmond Renata, brief of evidence (doc I24), p 11

research, however, Tuhoe have more clearly articulated their grievance in relation to the loss of the blocks. Claimants in our inquiry described this loss in the wider context of other Crown actions at the time. It is seen as one of a series of actions by the Crown in the 1860s and 1870s that eroded Tuhoe's land base and harmed the peoples of the region. This has particular significance for the Waikaremoana people. Tamati Kruger told us that the Crown at Waikaremoana had resorted to 'utilization of force of arms, the threat of confiscation and forced sale as tools to manipulate outcomes'.[463] As a result, Tuhoe identity had been eroded in the Crown's attempt to make them anonymous – he Whakamau Tarawa – of unknown identity.[464] Viewing these events in context, it was clear to Kruger that the Crown's approach to Tuhoe at Waikaremoana had been consistently hostile.

Similarly, Rose Pere of Waikaremoana viewed events at Waikaremoana as having a deeply detrimental effect on her people's relationship with the Crown. 'Their symbol to this very day, is the 'Crown': the 'Hat', that depicts the divine right of the Kings of England. Of what value is this to us in Waikaremoana?'[465] Such a feeling of alienation, it became clear during our hearings, was the result of Waikaremoana experience of later Crown policies as well; but the basis for it was laid during the war years.

(4) *Conclusion*

If there is any lesson to emerge from the sad history of the four southern blocks, it is that the Crown should avoid compounding the effects of its interventions by attempting to impose its own order on such a complex tribal landscape.

The parties expressed to us, in various ways, their view that they were capable themselves of settling the matters still at issue between them, in the wake of the Crown's various acts and omissions. The Crown should give the claimants the opportunity to show that they can do this, and should assist them to put things right.

463. Tamati Kruger, brief of evidence, 18 October 2004, (doc H31), para 4
464. Kruger, brief of evidence (doc H31), para 11
465. Rose Pere, brief of evidence (doc H41(a)), p 5

We have faith in the communities who have long survived on the remnants of these lands, and who are bound closely together by whakapapa, to decide how best they may order their affairs for the future, and what role the Crown may play in empowering them.

7.5.8 How did the Crown acquire and use the pa sites Te Pou o Tumatawhero and Te Tukutuku o Heihei?

Ko te Owata	*Te Owata*
'Makuru te ringa'	*'The expert hand'*
Ko Tamahore	*Tamahore*
'Te Waha Korero'	*'The Sacred Orator'*
Ko Te Purewa	*Te Purewa*
'Te Pakihiwi whanui'	*'The Carrier of the hopes of Many'*
Ko Tumatawhero	*Tumatawhero*
'Te Pa Harakeke'	*'The many Offspring'*

Anaru Paine, brief of evidence, 18 October 2004 (doc H39), p 2

(1) *Introduction*

Te Pou o Tumatawhero and Te Tukutuku o Heihei are two well-remembered pa among Tuhoe and Ngati Ruapani that were located on the southern shores of Lake Waikaremoana but are no longer in existence today. Two of the claims we received concerned the Crown's acquisition of the land where they once stood, and the subsequent use of that land into the twentieth century.[466] The land in question lies within the Tukurangi block on the southern shore of Lake Waikaremoana, one of the four southern blocks, which – as we have already discussed – were acquired by the Crown through a complicated series of transactions, beginning with the Te Hatepe deed in 1867 and finishing with the purchase of the blocks in 1875. In the twentieth century the Crown embarked on the construction of a series of hydro-electric structures on some of the land in the Onepoto region where the pa had once stood. In this section, we examine the issues arising from these events.

Before our hearings one of the points of dispute between claimants and the Crown was the exact location of the two pa. Tangata whenua testimony and historical evidence showed

466. The primary claim – Wai 795 – was made by Hirini Paine, Anaru Paine, and Irene Huka Williams. Hirini Paine, statement of claim, 5 May 1999, Wai 795 (doc 1.31); Hirini Paine, amended statement of claim, 6 August 2001, Wai 795 (doc 1.31(a)); Hirini Paine, Anaru Paine, and Irene Huka Williams, amended statement of claim, undated, Wai 795 (doc 1.31(b)). Wai 945 Ngati Ruapani also brought claims about Te Pou o Tumatawhero. See Wai 945 Ngati Ruapani, fourth amended statement of claim, 4 October 2004 (doc 1.2.19(a), SOC JJ), pp 11–12

they were on the southern shores of Lake Waikaremoana in the vicinity of Onepoto bay. But exactly where they were located, or when they had been in existence, was unclear. The matter of their location was addressed more fully in the research report and evidence of Peter Clayworth, and in the evidence of Sidney Paine, Anaru Paine, Irene Huka Williams, Rangi Mataamua, Desmond Renata, and Robert Wiri, as well as that of Sir Rodney Gallen.[467] From this evidence Crown counsel agreed that the nineteenth century location of Te Pou o Tumatawhero was clearly identifiable. Te Tukutuku o Heihei was less easily found, but counsel agreed that its likely location was near Te Pou o Tumatawhero. Specifically, counsel stated:

- 'The evidence suggests that Te Pou o Tumatawhero is on a promontory on the eastern shore of Onepoto Bay, on land that was once occupied by Lieutenant-Colonel Herrick's camp in 1869. . . . The promontory . . . was designated in 1965 as section 9, block I, Waiau Survey District and set aside for water power development. It was later authorised to be used for the secondary use of national park purposes.'[468]
- 'There is conflicting evidence as to whether Te Tukutuku-o-heihei was built before or after Te Pou o Tu-mata-whero. However, the evidence indicates that both pa were built close to one another.'[469] Counsel went on to quote Tuhoe claimant Sidney Paine, who stated that 'Te Tukutuku o Heihei was sited higher and further back although on the same body of land as Te Pou o Tumatawhero and possibly encompasses parts of the now present Onepoto holiday village. This locates it to the east of Te Pou o Tumatawhero and Te Onepoto.'[470] Mr Paine identified this as section 19, block I, Waiau Survey District.[471]

We have already discussed some of the evidence relating to these pa in this and the preceding chapter. While somewhat contradictory, it suggests that Te Tukutuku o Heihei was built after Te Pou o Tumatawhero. Mr Paine reached the same conclusion from his examination of the evidence.[472] What we can say with some certainty is that they were separate pa. Given this, and the broad agreement between the parties outlined above, we make no further comment here on their location.

But there are other significant issues on which parties have not reached agreement. These relate to the Crown's acquisition of the land and its subsequent use in the twentieth century.

467. Peter Clayworth, 'Preliminary Report on Te Pou o Tumatawhero: Background Information on Part 2 of the Wai 795: Te Pou o Tumatawhero-Waikaremoana Claim', May 2001 (doc A4); Peter Clayworth, summary report of 'Te Pou o Tumatawhero', 20 September 2004 (doc H8); Peter Clayworth, written answers to questions from Crown counsel, undated (doc H67); SidneyPaine, brief of evidence, 18 October 2004 (doc H20); Anaru Paine, brief of evidence, 18 October 2004 (doc H39); Irene Huka Williams, brief of evidence, 18 October 2004 (doc H23); Rangi Mataamua, brief of evidence, undated (doc H21); Desmond Renata, brief of evidence, 15 October 2004 (doc H49); Desmond Renata, brief of evidence, 22 November 2004 (doc I24); Robert Wiri, brief of evidence, 19 October 2004 (doc H52); Rodney Gallen, brief of evidence, undated (doc H1)

468. Crown counsel, closing submissions (doc N20), topic 28, p 24

469. Crown counsel, closing submissions (doc N20), topic 28, p 24

470. Sidney Paine, brief of evidence (doc H20), p 9

471. Sidney Paine, brief of evidence (doc H20), p 18

472. Sidney Paine, brief of evidence (doc H20), pp 6–10, 16

7.5.8

Crown counsel stated in closing submissions that Te Pou o Tumatawhero was 'probably located within the Tukurangi block that was purchased by the Crown in 1875'.[473] Counsel implied that the land was purchased fairly – an argument that they applied to the Crown's acquisition of all four southern blocks.[474] Counsel for Nga Rauru o Nga Potiki, however, submitted that the land on which the two pa were located was not purchased at all. Instead it was part of the land set aside in the Locke deed (1872) for a military reserve. Counsel described this as a confiscation:

> Land, which included wahi tapu and which was confiscated in 1872 at Onepoto for a redoubt, was not returned when the redoubt was no longer in use. Instead these lands were used for electricity generation purposes. To add insult to injury the land no longer required for the purposes of electricity generation has not been returned to the hapu of Waikaremoana.[475]

Crown counsel did not directly address issues relating to the use of the land in the twentieth century. Although hydro-electric power development was canvassed in closing submissions, counsel did not discuss whether and how this affected the former pa sites.[476] We note, however, that the Crown did address some of these matters in response to the claimants' statement of claim: 'The Crown says . . . that the land at Onepoto was obtained by the Crown by agreement in 1872 [the Locke deed] and was not subject to offer back provisions. Therefore it was not required to be offered back to its original owners when it ceased to be used for defence purposes.' The Crown noted further in its response that some of the land continued to be used by Genesis Power Limited.[477]

Both the Crown's acquisition of the land and its subsequent use, therefore, remain as outstanding issues before us. In addition, there are issues as to who held rights in this land before the Crown acquired it. Based on these issues, we address three questions:

1. Did the Crown legally and fairly acquire the land where the pa were located?
2. On what basis did the Crown retain the land where the pa were located and how did the legal status of the land change during the twentieth century?
3. Who held rights in the land where the pa were located?

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473. Crown counsel, closing submissions (doc N20), topic 28, p 24

474. We note that the Crown had previously accepted part of the following statement from Waikaremoana claimants: 'The Crown retained 200 acres at Onepoto, situated on the Tukurangi block and 50 acres at the Waikaretaheke River crossing. Thus Te Pou o Tumatawhero and Tukutuku o Heihei were lost to the hapu o Waikaremoana.' The Crown thus accepted that it had retained that land as part of the Locke deed arrangements, but denied due to insufficient knowledge the statement about the loss of the two pa. This point was not addressed in Crown counsel's closing submissions, which in contrast to the assertions of Waikaremoana claimants implied that the land had been purchased. See Waikaremoana claimants (Wai 937, 795, 1010, 1037, 1013), final consolidated particularised statement of claim, 3 March 2003 (doc 1.2.1 SOC 1), p 60; Crown counsel, final Crown statement of response, 11 June 2003 (doc 1.3.2), section Q, pp 48, 125

475. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 278

476. Crown counsel, closing submissions (doc N20), Topic 28, pp 13–17

477. Crown counsel, final Crown statement of response, 11 June 2003 (doc 1.3.2), section Q, p 125

Issues relating to the impact of the hydro-electric scheme on the land will be dealt with in a later part of the report.

(2) *Did the Crown legally and fairly acquire the land where the pa were located?*

We have already established in this chapter that Tuhoe and Ngati Ruapani sold their interests in the four southern blocks under threat of confiscation. This constituted a significant breach of the principles of the Treaty of Waitangi. The Crown further breached the Treaty in acts and omissions which culminated in its purchase of the land in 1875, including its assumption that land extending as far as Lake Waikaremoana was confiscated, when it was not; and its failure to scrutinize the Locke agreement (which, on the basis of that assumption, purported to 'return' the land to Maori, divided into blocks). The events preceding and including the purchase of 1875 are significant for our understanding of the Crown's acquisition of Te Pou o Tumatawhero and Te Tukutuku o Heihei pa sites. But Crown and claimant counsel differed as to whether this land was purchased or whether the Crown acquired it earlier under the Locke deed.

Evidence presented to us clearly demonstrates that the promontory where the pa were located was intended to be part of the 'military reserve' set aside in the Locke deed in 1872. In fact the redoubt at Onepoto had already been erected when the deed was signed in August of that year. From the Crown's perspective, the deed merely formalised what had already taken place on the ground. The deed set out the following geographical features as the boundaries for the reserve:

> All that portion of land, situated at Waikaremoana, commencing at outlet of Lake Waikaremoana into Waikaretaheke, thence down that stream to where the stream issues from under ground, thence to Raekahu, thence to Rotokiri-o-Pakai, thence to summit of Panekiri, thence to the outlet of lake into Waikaretaheke, containing two hundred acres, more or less.[478]

At that time, before its course was altered during the construction of the hydro-electric scheme – the Waikaretaheke Stream exited Lake Waikaremoana from the eastern side of Onepoto Bay. This was to the east of the promontory where the two pa were located. The proposed 'military reserve', therefore, included this land.

This reserve, however, was never formally gazetted and as a result did not become Crown land at this time. The primary reason for this is that officials such as Locke believed (wrongly) that all the four southern blocks had been legally confiscated in 1867. A few years later, the Locke deed guaranteed the return of all but a few portions of this confiscated land to the 'loyal Natives' (a term which in 1872 was intended to include Tuhoe, with whom the Crown had by then made peace). As officials believed that those portions – including

478. 'Deed of agreement', Enclosure in Locke to Ormond, 19 August 1872, AJHR 1872, C-4, p 31

the land at Onepoto – had been legally confiscated, no further action was required by the Crown.

Because of this, the deed referred only to blocks 'retained' by the Government. It did not provide for, or refer, to any process by which the land would transfer to Crown ownership. In his letter accompanying the deed, Locke wrote, 'By the present agreement, the Government retain, over and above what they formerly held, two other blocks of land – one of about 250 acres at Onepoto, on Waikaremoana Lake, at its outlet into Waikaretaheke, the site of present redoubt; and fifty acres on Waikaretaheke Stream, where the proposed road to the lake will cross that stream.'[479]

There matters stood until a Native Land Court hearing was convened in November 1875. As we now know, the assumptions on which officials operated were turned on their head three years after the signing of the Locke deed, when the four southern blocks went before the land court. The Solicitor General's opinion at that time was that those lands had never been confiscated. Thus the portions of the four southern blocks the Crown claimed to retain had never been removed from customary title, nor had any kind of legal transfer to the Crown taken place. Meanwhile the Crown set about acquiring the blocks through purchase, and after the land court hearing it moved to finalise its purchase. As we have already shown this took place through several steps: first, the purchase of Tuhoe and Ngati Ruapani interests[480]; second, finalising the purchase of most Ngati Kahungunu customary interests (except those of Te Waru Tamatea and his people)[481]; third, the purchase of interests of those Ngati Kahungunu who were stated to have no customary rights but who were owed payment for their military service[482]; and finally, in 1877, the purchase of the interests of Te Waru Tamatea and his people.[483] The week after this final purchase of interests had been completed the four southern blocks were proclaimed as 'Waste Lands' of the Crown.[484]

With this evidence in mind, we agree with Crown counsel that the land at Onepoto – including the sites of Te Pou o Tumatawhero and Te Tukutuku o Heihei – was in fact acquired through purchase. At no time had it been confiscated, and the Locke Deed could thus provide no legal basis for the Crown to 'retain' the land. But as we have seen Tuhoe

479. Locke to Ormond, 19 August 1872, AJHR 1872, c-4, p 30

480. 'Tuhoe, Urewera and Ngati Ruapani' southern blocks purchase deed, 12 November 1875, deed 841, in Marr, Supporting Papers for 'Crown impacts on customary interests in land in the Waikaremoana region in the nineteenth and early twentieth century' (doc A52(a)), pp 36–39

481. Toha Rahurahu and others Tukurangi block purchase deed, 17 November 1875, Deed 838, in Marr, Supporting Papers for 'Crown impacts on customary interests in land in the Waikaremoana region in the nineteenth and early twentieth century' (doc A52(a)), pp 25–27

482. Memorandum of Agreement between the Crown and Ngati Kahungunu to convey interests in the southern blocks, 15 January 1876, in Marr, Supporting Papers for 'Crown impacts on customary interests in land in the Waikaremoana region in the nineteenth and early twentieth century' (doc A52(a)), p 43–58

483. Te Waru and others of Ngai Tamatea southern blocks purchase deed (and Hangaroa), 6 September 1877, deed 841, in Marr, Supporting Papers for 'Crown impacts on customary interests in land in the Waikaremoana region in the nineteenth and early twentieth century' (doc A52(a)), pp 40–42

484. *New Zealand Gazette*, no 78, 13 September 1877, p 928

and Ngati Ruapani did not enter freely into the sale of the blocks; rather they sold because they believed themselves to be facing the threat of confiscation under the East Coast Act. Ngati Kahungunu had also offered their interests in the blocks for sale in the face of a range of pressures. The purchase took place against the backdrop of a series of Crown errors and mis-statements regarding the status of the land, from the Te Hatepe deed onwards. In the meantime, the Crown had had the benefit of use of this land for over three years, and had maintained a redoubt there without any legal title to the land. Its title was simply assumed. If Tuhoe had completed their evidence in the land court, and if they had been awarded title, it is possible that the anomaly of the Crown's 'retained' lands might have become obvious at the time. As it was, the Crown's completion of its purchase from all parties meant that the so-called 'retained' lands were conveniently swept into the purchase. The Crown finally acquired the sites of Te Pou o Tumatawhero and Te Tukutuku o Heihei, but there is no evidence before us to suggest that the Crown admitted – then or later- that it had wrongly assumed possession of the Onepoto and Waikaretaheke blocks in 1872. The purchase of the four southern blocks was based on flawed premises and was in breach of the Treaty principles of active protection and good government. It follows that the Crown's acquisition of the Onepoto and Waikaretaheke blocks was likewise in breach of the principles of the Treaty. There is no evidence before us to suggest that officials reopened with Maori the question of the Crown's title to the two small blocks during the period when it purchased the four southern blocks and settled the matter of reserves for Tuhoe and Ngati Ruapani. We concludethat tribal leaders were left to assume that title to those areas had already passed to the Crown. There would thus have been no discussion between officials and Maori of the value of the 300 acres, and the extent to which the price to be paid by the Crown should be higher as a result. These two blocks passed to the Crown with no explicit consent, no additional payment, and by a sidewind.

(3) *On what basis did the Crown retain the land where the pa were located, and how did the legal status of the land change during the twentieth century?*

We also address here the argument made by counsel for Nga Rauru o Nga Potiki about the Crown's retention of the Onepoto land into the twentieth century.

As we have already noted, counsel argued that the land 'was not returned when the redoubt was no longer in use'. Rather, it was used for electricity generation purposes and then the part of it no longer required for those purposes was never returned to the hapu of Waikaremoana.[485] The Crown denied that it had a responsibility to return the land to the original owners once the initial purpose of establishing a redoubt ceased to exist. In its early pleadings, the Crown argued that the Locke deed 'was not subject to offer back provisions'.[486] Although Crown counsel did not address this point in closing submissions,

485. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 278
486. Crown counsel, final Crown statement of response, 11 June 2003 (doc 1.3.2), section Q, p 125

we presume that its response was implicit in its main submissions concerning its purchase of the land: because the Crown acquired the land through purchase it was not required to return the land to the original owners when it was put to a different use.

What happened to the land? We note, first, that the Onepoto land did remain in Crown ownership – and initially was used as a military reserve. Belgrave and Young referred to a long report which Locke wrote on 16 August 1877, in which he outlined the history of the purchase of the blocks and explained which reserves would be allocated to Maori within them. 'Locke also suggested an area of 300 acres be set aside as a military reserve round the redoubt at Onepoto and 150 acres nearby as a timber reserve and these proposals were subsequently adopted.'[487] The 300 acres suggested by Locke in this report added another 100 acres beyond the amount agreed with Maori in his 1872 deed – though the Crown, of course, now owned the land.

It is unclear what happened next. Clayworth argues that a survey was conducted in 1879, the result of which was a survey plan that marked out the military reserve, including the Armed Constabulary redoubt.[488] The total area of the reserve as shown on the survey plan was 263 acres and 2 roods.[489] According to Belgrave and Young, however, officials discovered in 1883 that the military reserve had not been surveyed. Following a request from officials to locate a survey plan, the Chief Surveyor at Napier undertook a search of his records, but was unable to find any record of a survey having occurred.[490] Whether a survey did in fact take place is uncertain. The plan might have been lost – or at least mislaid when the Chief Surveyor undertook his search. It is clear, however, that no action was taken to formally set aside the Onepoto land as a reserve. At some point in the following years, the redoubt – which had been constructed in 1872 – was abandoned. Although we did not receive evidence on this, it may have been abandoned as early as the late 1870s. After this, the land remained in Crown ownership.

Did the Crown have an obligation to return the land to the original owners at this point? We have to doubt that the Crown even considered the possibility, since the lands had been proclaimed Crown land in the wake of its purchase. The moment for acknowledgement that the Crown had no right to Onepoto and Te Kopani land, had passed in 1875. That was when it should have offered to return the land to Maori or (since by then it was intent on completing its purchase of the land) to have made Onepoto a reserve for Tuhoe and Ngati Ruapani. But by then, a redoubt had been built on the land, which perhaps accounts for the fact that the status of the land seems to have been passed over. It was not convenient for the Crown

487. Belgrave and Young, 'Te Urewera inquiry district and Ngati Kahungunu: War, confiscation and the 'four southern blocks' (doc A131), p 112

488. Clayworth, 'Preliminary report on Te Pou o Tumatawhero' (doc A4), pp 14, 18

489. See Figure 5 – survey plan SO 817 – the Government reserve at Waikaremoana, November 1879, in Clayworth, 'Preliminary report on Te Pou o Tumatawhero' (doc A4), p 14

490. Belgrave and Young, 'Te Urewera inquiry district and Ngati Kahungunu: War, confiscation and the 'four southern blocks' (doc A131), p 119

to acknowledge that it had in fact been a trespasser. After the abandonment of the redoubt, the Onepoto land appears not to have been used by the Crown until the construction of the Kaitawa Power Station for the Waikaremoana hydro scheme between 1943 and 1948. But there were no moves to conduct a formal survey of the land until 1963. In that year a survey was conducted and the land was subdivided into sections 5 to 13, block I, Waiau survey district.[491] The largest sections, 5 and 6, contained some 228 acres – by far the majority of the original military reserve land. Section 9 (3 acres) contained the promontory on which Te Pou o Tumatawhero and Te Tukutuku o Heihei were located.[492]

The following year, moves were under way to formally state the purposes for which the land was to be used. The result was that in 1965, section 9, containing the promontory, was declared to have a primary use (water-power development) and a secondary use (national park). Other sections were also affected, as follows:

- Sections 7, 8, 9, 10, and 13 of Block I, Waiau Survey District – which together contained the land intended to be set aside as a military reserve – was 'set apart for the development of water power' under s 25 of the Public Works Act 1928[493]
- Sections 7, 9, and 10 of Block I, Waiau Survey District, 'being land held primarily for the development of water power', was 'authorised to be applied also for national park purposes which shall be a secondary use of the said land'[494]

Clayworth notes that it is 'not clear why the legal status of these areas of land was changed in 1965, as the power station structures had been in place since 1946'.[495]

Over the next 20 years some of the land continued to be used for the purposes of hydro-electric power development. According to Clayworth, the rest of the land was administered by the Works Department and national park staff.[496] 'The day to day maintenance of the land was carried out by national park staff as though the area were part of the Urewera National Park, but any water power development uses over-rode national park usages.'[497]

In 1988 the Crown transferred certain electricity assets to the newly formed State-owned enterprise Electricity Corporation of New Zealand Limited (ECNZ). A certificate of title issued two years later preserved the status quo: the land would be used for power generation purposes but was also registered for the secondary purpose of national park use.[498] But, in 1998, ECNZ transferred some of this land to Genesis Energy – another state-owned enter-

491. Crown counsel, memorandum, 19 October 2009 (doc 2.882), p 1
492. Clayworth, 'Preliminary report on Te Pou o Tumatawhero' (doc A4), p 20
493. *New Zealand Gazette*, no 41, 29 July 1965, p 1211
494. *New Zealand Gazette*, no 41, 29 July 1965, p 1202
495. Clayworth, 'Preliminary report on Te Pou o Tumatawhero' (doc A4), p 20
496. Clayworth, 'Preliminary report on Te Pou o Tumatawhero' (doc A4), pp 20–21
497. Clayworth, 'Preliminary report on Te Pou o Tumatawhero' (doc A4), p 21
498. Crown counsel, memorandum, 19 October 2009 (doc 2.882), p 2

prise that was formally created in 1999 as part of the break-up of ECNZ.[499] As part of this transfer, section 9 block I Waiau survey district was divided into two sections:

- Section 17 SO 8881: a very small area of 16 square metres, containing the meteorological station
- Section 18 SO 8881: the remaining area of the old section 9[500]

At the time of our hearings this process of transfer was still under way. Clayworth noted in his report that section 17 was to have its secondary (national park) use lifted and be fully transferred to Genesis Energy. Section 18 was to be transferred to Land Information New Zealand (LINZ), at which point it would be 'either returned to the original owners under section 40 of the Public Works Act 1981; landbanked for Maori claimants to the Waitangi Tribunal; sold to private owners; or transferred to DOC'.[501] In closing submissions, Crown counsel said it was not clear if those proposed transfers had occurred.[502] Recently, the Tribunal asked the Crown to identify the current owners of sections 17 and 18, and to state the circumstances of any transfer of ownership or alienation that had taken place.[503] The Crown responded with information about the very small section 17 SO 8881 which shows that:

- Its secondary use (national park) was revoked on 29 November 2000.
- ECNZ became registered as the owner of the land in substitution for the Crown on 7 November 2003.
- Genesis Power Limited became the registered owner of the land on 12 August 2005.
- Genesis Power remained the owner when, on 26 August 2005, a new computer freehold register 238533 was issued for various parcels of land, including section 17.
- Genesis Power Limited remains the owner subject to a memorial pursuant to section 27B of the State-Owned Enterprises Act 1986; and to Part IVA of the Conservation Act 1987 and section 11 of the Crown Minerals Act 1991.

As for section 18 SO 8881, the Crown informed us that it contains approximately 1.887 hectares, remains in Crown ownership and continues to form part of Te Urewera National Park.[504]

From this we conclude that the main part of the land where Te Pou o Tumatawhero was located – section 18 – remains in Crown ownership. The far smaller area – section 17 – is owned by Genesis Energy, which is a Crown entity.

499. Roger Miller to Peter Clayworth, 1 December 2000, in Clayworth, Supporting Papers for 'Preliminary report on Te Pou o Tumatawhero' (doc A4(a)), pp 26–27
500. Crown counsel, memorandum (doc 2.882), pp 2–3
501. Clayworth, 'Preliminary report on Te Pou o Tumatawhero' (doc A4), pp 22–23
502. Crown counsel, closing submissions (doc N20), Topic 28, p 24
503. Presiding officer, memorandum and directions concerning the Te Urewera Inquiry, 2 October 2009 (doc 2.880), p 2
504. Crown counsel, memorandum (doc 2.882), pp 3–4

We also note the importance of section 19 – the land identified by Sidney Paine as the likely site of Te Tukutuku o Heihei. This area was not referred to in Crown counsel's closing submissions, and was not included in our recent request for further information. Section 19 appears to have been made out of the old Section 10, which was one of the original sections created in 1963 as block I, Waiau survey district. We have viewed a number of the title documents relating to this land but are unable to draw any firm conclusions as to its ownership. We assume, however, that section 19 remains part of the Urewera National Park. The same applies for the rest of the land that was nominally set aside for use as a military reserve in the nineteenth century. Sections 5 and 6 – by far the major part of this area, and adjacent to the land identified as the sites of the two pa – remain part of the Urewera National Park to this day.[505]

(4) *Treaty findings and recommendation*

In light of our analysis, we reach the following conclusions:

- In the 1872 Locke deed the Crown assumed the right to 'retain' Onepoto land when it purported to confirm the return of lands to Maori which it claimed, wrongly, to have confiscated under ECLTIA. There was thus no legal basis for its claim to retain the Onepoto land, or for its use of the land for the next three years.
- There is no evidence that when the Solicitor-General gave an opinion in 1875 that the land was still in customary title, officials explained to Maori the significance of this for Onepoto, or offered to return the land.
- Instead, the Onepoto land was swept into the four southern block purchases in 1875. Tuhoe and Ngati Ruapani sold their interests in the blocks under threat of confiscation. There was no additional payment for the Onepoto land.
- The Crown subsequently used the Onepoto land for hydro-electric power development and national park purposes.

We find the Crown to be in breach of the Treaty principles of active protection and good government in its acquisition and retention of the land at Onepoto.

As this land is of particular significance to the claimants we recommend that the Crown begin a process whereby it will be returned to the original owners. Although there are issues relating to the meteorological station (on the 16 square metre section 17), we see no reason why section 18 should not be returned. Section 19, and other land acquired by the Crown for the purposes of establishing a 'military reserve' at Onepoto that currently remains in Crown ownership in the Urewera National Park, should also be returned. We see no good reason why all of these lands should not be excised from the park, subject to the provision of access to neighbouring lands from State Highway 38, and returned to the claimants.

505. *New Zealand Gazette*, No 29, 14 May 1964, p 805

7.5.8

Given the circumstances in which the Crown acquired the land, we believe it would be appropriate for the ownership to revert to the original owners.

We are aware, however, that issues arise as to who held customary rights in the four southern blocks prior to its alienation – particularly in light of the history of these lands as we have outlined it above, and the complex customary rights in the area. We recognise that our recommendation that the Crown return this land to the original owners raises potential difficulties. We feel it necessary therefore to make some comment about those groups who held rights in the land before the Crown acquired it, in order to facilitate negotiations.

(5) *Who held rights in the land where Te Pou o Tumatawhero and Te Tukutuku o Heihei were located?*

As we stated earlier, two claims were made about Crown acts and omissions concerning the pa at Onepoto. The most comprehensive of these was the Wai 795 claim, which dealt specifically with Te Pou o Tumatawhero and Te Tukutuku o Heihei. This was later incorporated into the Nga Rauru o Nga Potiki claims, and we heard evidence from Sidney Paine, Anaru Paine, and Irene Huka Williams. But Te Pou o Tumatawhero was also discussed in the Wai 945 Ngati Ruapani claim, and the traditional history of the pa was explained from a Ngati Ruapani perspective by Desmond Renata. Other Tuhoe and Ngati Ruapani claimants also discussed the pa in their evidence, including Rangi Mataamua (speaking for Wai 36 Tuhoe) and Robert Wiri (speaking for Wai 144 Ngati Ruapani).

Earlier in this chapter we discussed the broad range of customary rights exercised by various peoples (Tuhoe, Ngati Ruapani and Ngati Kahungunu) in the four southern blocks before war, and their alienation. We also discussed the historical evidence of occupation on the southern shores of Lake Waikaremoana, including:

- Evidence of battles in Waikaremoana in the 1820s, and Tuhoe's subsequent occupation of that area, including the construction of pa.
- Visits by the missionaries Colenso and Hamlin to the community at Onepoto in the 1840s.
- The construction of a pa at Onepoto by Tuhoe in 1863.
- The battle at Te Kopani in January 1866 in which Tuhoe and Ngati Ruapani participated against Crown forces. This included the occupation and destruction of a pa at Onepoto. After this, there is no record of occupation at Onepoto.

We also discussed the extent to which witnesses before the Native Land Court acknowledged the rights of others. This included the concessions made by Ngati Kahungunu witnesses who acknowledged the place of Tuhoe and Ngati Ruapani at Lake Waikaremoana, and specifically at Onepoto.

This evidence is supported by the oral testimony given to us by Tuhoe and Ngati Ruapani claimants during our hearings. Anaru Paine described how the famous Tuhoe chiefs Te

Purewa and Tumatawhero went to Waikaremoana following Mihikitekapua's call to arms. In chapter 2 we explained the circumstances in which this happened. After this campaign, Mr Paine told us, 'they then set about building the fort at Te Pou o Tumatawhero'. This was because of their 'strong chiefly connections' to Lake Waikaremoana.[506]

Rapata Wiri and Desmond Renata provided Ngati Ruapani perspectives on this. Dr Wiri listed Hinemare as one of the descendants of Ruapani. 'It is important to note the marriage between Tumatawhero of Tuhoe and Hinemare of Ngati Ruapani ki Waikaremoana. This indicates that the pa of Te Pou-o-Tumatawhero was occupied jointly by Ngati Ruapani and Tuhoe.' Wiri says that Ngati Ruapani and Tuhoe built the pa 'to guard the south-eastern gateway to Waikaremoana from further attacks by their enemies'.[507] Mr Renata talked about the origins of the name Te Tukutuku o Heihei. The 'original Te Tukutuku-o-heihei Pa', he told us, was built at Te Pukekohu by Haua, the son of Ruapani. This was 'in memory of his father who was raised in his grandfather's Pa called Te Heihei in Turanganui. "Tukutuku" (earnest praying) was added to the name.' Mr Renata claimed that the pa was rebuilt by Tuhoe in later years after they destroyed it in battle.[508]

Both Sidney and Anaru Paine explained their whakapapa from Tumatawhero, whose direct descendants they are.[509] One important tipuna was Te Peeti Tihi, who Anaru Paine explained was 'an expert boat, and house builder'. 'To my knowledge, it was him and the ancestor Te Pika Te Peeti Tihi who built the house Hinekura at Te Kuha. Te Peeti was the tohunga.'[510] Another tipuna was Rangiaho Paora, also known as Te Maitaranui. Rangiaho was, Sidney Paine told us, 'active in the Waikaremoana and southern Waikaremoana lands', and was later buried at Te Reinga.[511] This may have been the same Rangiaho who was named in Hori Wharerangi's list of owners of the Tukurangi block submitted to the Native Land Court in 1875.[512] Sidney Paine explained to us the significance of this whakapapa to his current search for justice:

> During this claims process I have discovered that my grandfather and my great grandfather and great great grandfather through our descent from Tumatawhero have had a consistent presence and connection to Lake Waikaremoana. This discovery had added to my own strong interest and aroha for Waikaremoana and indeed the whole of Te Urewera. It has been almost pre-determinative of our role in this claims process and the search for justice that has been inherited by our generation, following in the endeavors of our grandfather Te Kahu Tihi, our great grandfather Tihi Te Pika Te Peeti and our great great grandfather Te Peeti. Given their past efforts it should not surprise anyone that we continue today to

506. Anaru Paine, brief of evidence (doc H39), p 3
507. Rapata Wiri, brief of evidence (doc H52), p 11
508. Desmond Renata, brief of evidence (doc H49), para 8.14–8.15
509. Sidney Paine, brief of evidence (doc H20), pp 3, 4
510. Anaru Paine, brief of evidence (doc H39), p 4
511. Sidney Paine, brief of evidence (doc H20), p 4
512. Napier Minute Book 4, 4 November 1875, p 73

attempt to resolve the outstanding issues that have plagued Lake Waikaremoana since the arrival of the Crown.[513]

In cross-examination, Mr Paine told us that he sought the return of the land to his people: 'we would be looking at the Crown . . . returning the title to those lands.'[514]

The evidence thus strongly points to a conclusion that the sites where the pa were located, and the land immediately surrounding these sites, had been occupied by, and under the authority of Tuhoe and Ngati Ruapani in the period preceding the wars and Crown purchase of the four southern blocks in 1875. We received no evidence as to the customary rights of Ngati Kahungunu at Onepoto – though this does not necessarily mean they had none. We note that the claim area of Wai 621 Ngati Kahungunu extends as far north as the southern shores of Lake Waikaremoana, whereas the Ngai Tamaterangi claim area extends to the Huiarau range.[515] But neither group presented evidence on this particular land, nor did they object to the evidence presented by Tuhoe and Ngati Ruapani respectively. More crucially, we note the evidence of Ngati Kahungunu leaders such as Tamihana Huata who, in the Native Land Court hearing of 1875, acknowledged the rights and occupation of Tuhoe and Ngati Ruapani at this site. In such an adversarial forum, this was an acknowledgement to which we attach considerable weight.

7.6 Explanatory Note: Te Hatepe Deed, ECLTIA, and Four Southern Blocks Maps

In this section, we discuss historical mapping issues relating to Te Hatepe deed, ECLTIA, and the four southern blocks boundaries. Both the Te Hatepe deed and the Locke deed were made with reference to areas defined in the schedules to the East Coast Lands Title Investigation Act 1866 and its 1867 amendment. Issues regarding these boundaries were subject to much discussion before us.[516] Two questions are of particular importance to this chapter:

- What was the difference between the overall area defined in the Te Hatepe deed and that in the Locke deed?

513. Sidney Paine, brief of evidence (doc H20), p 4

514. Draft Waikaremoana hearing transcript (doc 4.11), p 205

515. Rangi Paku on behalf of all beneficiaries of the Wairoa-Waikaremoana Maori Trust Board, first amended statement of claim, 27 January 2003 (doc 1.23(a)), pp 4–6; Charles Manahi Cotter on behalf of Ngai Tama Te Rangi ki Ngati Kahungunu, first amended statement of claim, 27 January 2003 (doc 1.19(a)), pp 3–4

516. Dr O'Malley discussed these issues extensively in his written answers to questions from counsel. He was also subject to sustained cross-examination from Crown counsel on the same matters. O'Malley, written answers to questions, 11 October 2004 (doc H64), pp 26–29; O'Malley, cross-examination, draft transcript, 18–19 October 2004 (doc 4.11), pp 18–21

- Was any part of the four southern blocks outside the boundaries of areas outlined in the schedules to the 1866 Act, its 1867 amendment, or the East Coast Act 1868?

These questions have broader relevance to how the four southern blocks were alienated. When McLean cabled Locke in 1875 he stated that while the land had not been confiscated, 'rebel' interests would be taken under the East Coast Act 1868[517] if it went through the Native Land Court. The assumption at the time wasthat the whole of the four southern blocks was inside the area subject to the Act.

Given the importance of contemporary official understanding, or misunderstanding, of crucial boundaries in the period between 1866 and 1875, we have attempted to reconstruct the areas that were defined in the schedules to the legislation and in the two deeds signed between Maori and the Crown. To highlight the issues involved, and to attempt some resolution of them, we have created two maps:

- Map 1: The Te Hatepe deed boundary, the Kauhouroa block and the four southern blocks
- Map 2: The boundaries of the ECLTIA 1866 and its 1867 amendment, the Kauhouroa block, and the four southern blocks

The schedule to ECLTIA 1866 and its successors outline a number of geographical features that form the boundaries of the district within which the legislation is to apply. As with many similar descriptions dating from the nineteenth century, these geographical features are often difficult to identify – whether because of misnamed or misplaced locations, or because they were features that might be identified only in the broadest terms (such as whole mountain ranges). Generally, this was because of limited official knowledge of the area in question. To take one such example, two markers in the schedule to the ECLTIA Amendment Act 1867 are given as 'the range of mountains forming the watershed between the East Coast and the Bay of Plenty to the extremity of the said range north-east of Waikare Moana.'[518] While this range of mountains is clearly the Raukumara range, what exactly forms its watershed and how can this be shown on a map? And which peak is its extremity?

Not only were the descriptions often vague, mapping in the nineteenth century was also an inexact science. Sketch maps were produced without the benefit of modern satellite technology, and often before professional surveys had been conducted. Thus maps produced at the time were prone to error and distortion. For the most part, therefore, they can only be used as guides to what nineteenth century officials intended. Because of these factors, reconstructing the boundaries of the various deeds and legislation today is fraught with difficulties. More specifically, it is difficult to match those geographical features we can identify with lines on contemporary maps that showed what was intended at the time.

517. The schedule to the East Coast Act 1868 was the same as the East Coast Lands Title Investigation Act Amendment Act 1867

518. East Coast Land Titles Investigation Act Amendment Act 1867, Schedule, in Marr, supporting papers for 'Crown Impacts on Customary Interests in land in the Waikaremoana region' (doc A52(a)), p 3

The two maps we provide here include modern reconstructions of mid-nineteenth century boundaries.

Map 1 shows two possible reconstructions of the Te Hatepe deed boundary, as well as the Kauhouroa block, and what were later defined as the four southern blocks. We have given two reconstructions of the Te Hatepe deed boundary because it is not clear where the boundary is. The southern and western portion of the deed boundary is defined in the schedule to the East Coast Lands Title Investigation Act 1866;[519] the eastern boundary is defined in the deed itself.[520] But the deed also had attached to it a sketch plan that showed which area was intended to be subject to the deed's provisions.[521] The difficulty comes in matching what was shown in the sketch plan with the various descriptions of geographical features in schedules to the legislation, and the deed.

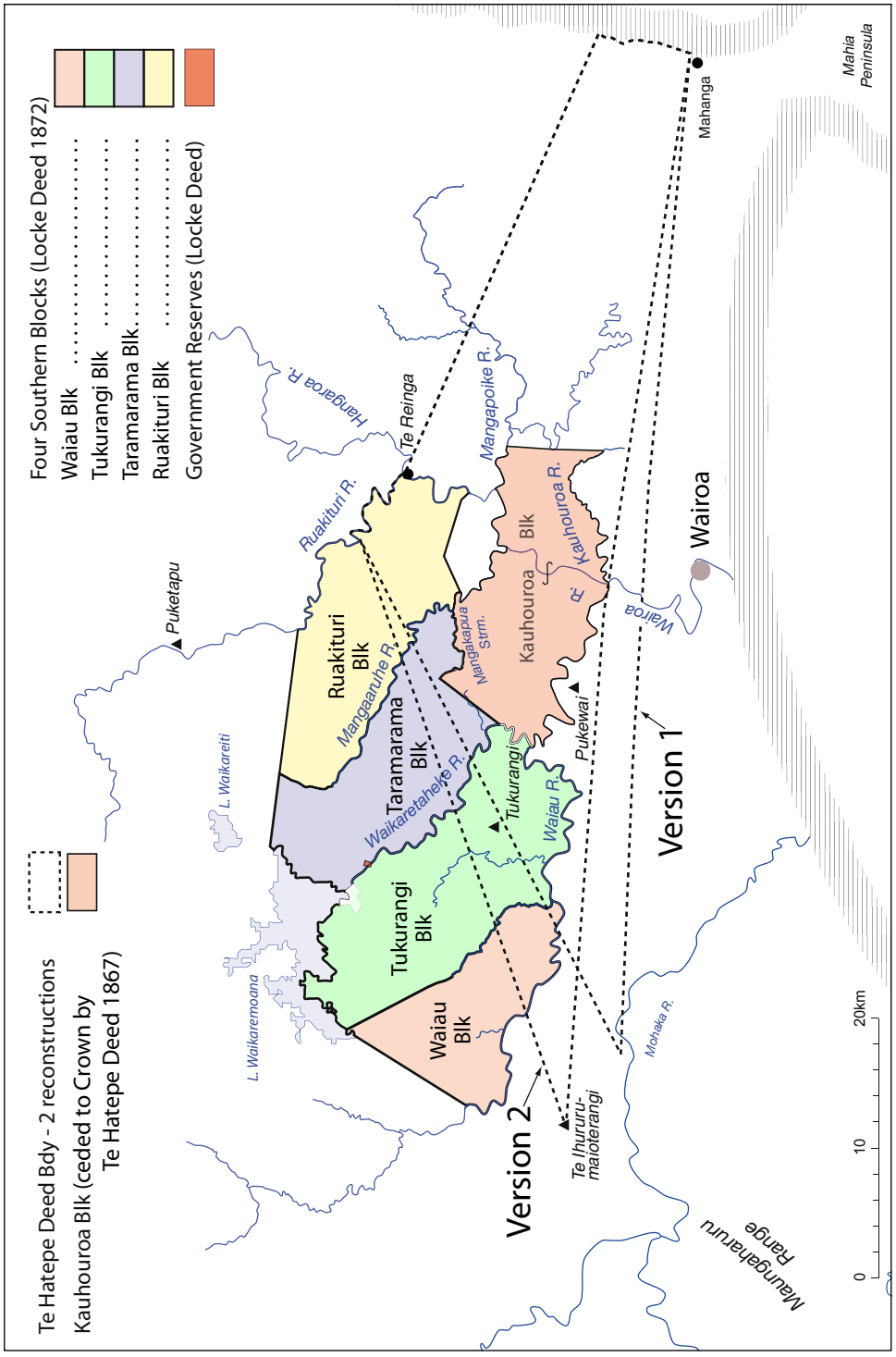
More specifically, there is a problem with re-creating the southern and western boundaries. The southern boundary is given as the boundary between the Auckland and Hawke's Bay provinces, which was then defined as the 39th parallel, and is shown as intersecting the confluence of three rivers – Wairoa, Kauhouroa, and Waiau. The western boundary is shown in the sketch map as intersecting three rivers – Waikaretaheke, Mangakapua and Ruakituri. The problem is to match the two boundaries with the south-western point – the furthest peak of the Maungaharuru range. The two versions of Map 1 arise from our attempts to reconcile the sketch plan with the written descriptions.

- Version 1 follows the 39th parallel as it is given today, beginning about Mahanga and cutting through the Mohaka river at its western point. This means that the western boundary cuts close to the Mangakapua stream, as is shown on the sketch plan. But the

519. Although the Te Hatepe deed refers to the 'East Coast Land Titles Investigation Act 1867', it is likely that this was a clerical error rather than a reference to the amendment Act – which was not passed until later that year. O'Malley says that there is 'nothing to suggest that this was anything more than a clerical error'. (O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 83) The sketch plan to the Te Hatepe deed was clearly made in reference to the schedule to the 1866 Act. 'Haurangi', which was part of the 1866 schedule but did not feature in the schedule to the 1867 Act, is marked as a feature on the map.

520. The deed stated: 'The land comprised in the said schedule [to the ECLTIA 1866] lying to the southward of the Ruaki Turi River and of a straight line drawn from the junction of the said river and the Huanga Reu River at Te Reinga to Paritu on the East Coast, as shown on the sketch map drawn hereon except the land comprised within the following boundary commencing at the mouth of the Kauhauroa stream up the river to its source thence to the Manga Poiki by the shortest line down the Manga Poiki to its junction with the Wairoa down the Wairoa to the mouth of the Mangaaruhe river up the Mangaaruhe to the mouth of the Manga Kapua up the Manga Kapua to its source thence a straight line to the junction of the Waikare Taheke and the Waiau thence following the course of the Waiau to its junction with the Wairoa thence to the mouth of the Kauhauroa the commencing point a shown on the said sketch map where the same is colored pink and marked A.' 'The 1867 Wairoa Cession Deed', in Marr, supporting papers for 'Crown Impacts on Customary Interests in land in the Waikaremoana region", (doc A52(a)), p 7

521. The sketch map has been reproduced in a number of reports, including: O'Malley, 'The Crown and Ngati Ruapani' (doc A37), map 6; Robert Wiri, 'Te Wai-Kaukau o Nga Matua Tipuna: Myths, Realities, and the Determination of Mana Whenua in the Waikaremoana District' (doc A35), p 188. The Crown Forestry Rental Trust reproduced the map in its Overview Maps, Part 3, and provided an 'overlay' of the area onto a satellite-imaged map. Crown Forestry Rental Trust, Wai 894 – Te Urewera Inquiry Overview Map Book, Part 3 (doc A132), maps 28, 29. A graphical representation of the map can also be found in Marr, 'Crown Impacts on Customary Interests in land in the Waikaremoana region in the nineteenth century and early twentieth centuries' (doc A52), p 101



Map 1 : Two reconstructions of the Te Hatepe deed boundary, the Kauhouroa block, and the Four Southern Blocks

39th parallel does not intersect the confluence of the Wairoa, Kauhouroa, and Waiau rivers. Nor does it travel as far west as the Maungaharuru range.

- Version 2 does intersect the confluence of the three rivers, and reaches the furthest peak on the Maungaharuru range (Te Ihuru-maioterangi), but is some distance from the Mangakapua stream.

As this map shows, there is no way to re-create perfectly what was intended at the time.

This map also contains a reconstruction of the Kauhouroa block and the four southern blocks. The boundaries of the Kauhouroa block were primarily defined by natural features, notably streams and rivers. Apart from some minor wording changes, the description of the block's boundaries is exactly the same in both the 1867 and 1872 deeds.[522] We have also shown the areas defined in 1872 as the four southern blocks to illustrate how much the original area subject to the Te Hatepe deed later changed. While the 1867 area had the Kauhouroa block as its centre and extended as far east as the sea, the area subject to the Locke deed had the Kauhouroa block at its eastern extremity and extended as far west as Lake Waikaremoana. The two areas were substantially different.

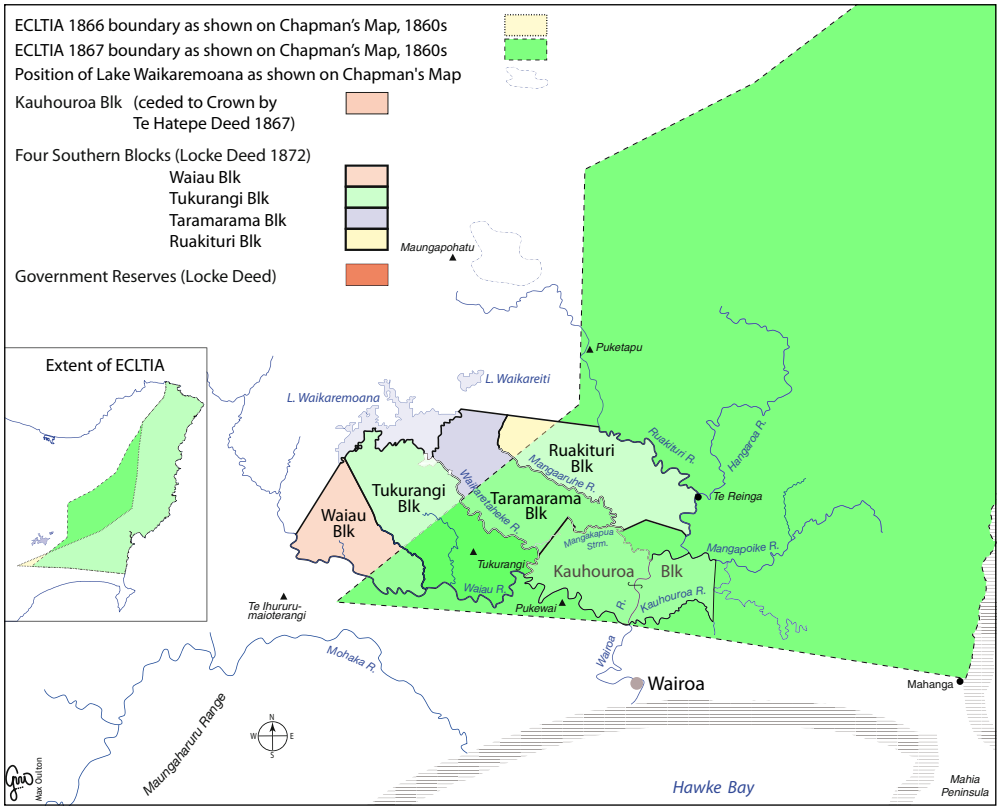
Map 2 shows the difference between the boundaries outlined in the schedules to the East Coast Lands Title Investigation Act 1866 and its 1867 amendment, in relation to the four southern blocks and the Kauhouroa block. Our map of the ECLTIA boundaries is a reproduction of one made in 1870, now known as the 'Chapman map'.[523] Here, we have placed the two boundaries from the Chapman map onto a satellite-imaged map. We agree with Dr O'Malley that the Chapman map is the most reliable source of information as to official understandings of the original 1866 ECLTIA boundaries and their 1867 revision – at least at the time the legislation was passed.[524] It shows the 1867 boundary taking in a much bigger area of the East Coast than the 1866 original. It also shows Lake Waikaremoana to be outside both the 1866 and 1867 boundaries. This would appear to show that much of the four southern blocks are outside the boundaries specified in the schedules to both the 1866 Act and its 1867 amendment.

Transposed on to a satellite-imaged map, however, the Chapman map can only be a general indication of what was intended at the time. The boundaries shown on our map do

522. 'The 1867 Wairoa Cession Deed', in Marr, Supporting Papers to 'Crown Impacts on Customary Interests in land in the Waikaremoana region in the nineteenth century and early twentieth centuries' (doc A52(a)), p 7; 'The 1872 four southern blocks deed agreement', AJHR 1872, c-4, p 31in Marr, Supporting Papers to 'Crown Impacts on Customary Interests in land in the Waikaremoana region in the nineteenth century and early twentieth centuries' (doc A52(a)), p 9

523. Dr O'Malley provided the following information about the map's origins: 'It was published by George Thomson Chapman, the prominent Auckland bookseller and publisher, and dates from approximately 1870. It is held at Archives New Zealand, under the reference number AAFV 997 G12 and is listed in the Raupatu Document Bank Map Index at page 53635.' O'Malley, written answers to questions (doc H64), p 29. O'Malley stated further in cross-examination that the Chapman map was a 'standard printed map'. 'A commercial map if you like that you'd buy but the confiscation district boundaries have been drawn over the top on it.' He added that the map not only includes the East Coast but also 'the entire North Island'. O'Malley, cross-examination (doc 4.11), p 19

524. O'Malley, written answers to questions (doc H64), pp 26–28



Map 2: 'Chapman map' of the ECLTIA 1866 and 1867 boundaries, the Kauhouroa block, and the Four Southern Blocks

not match exactly the geographical features described in the schedules to the Acts, or the original Chapman map. For example, the schedule to the 1867 Act states that one of the boundary points was the 'junction of the River Waiau with the River Waikare-taheke.'[525] The original Chapman map shows the boundary running to the junction of the rivers, as they were understood at the time. Transferred on to a modern map, however, this boundary point is some considerable distance from the junction of the rivers. For this reason we have included the position of Waikaremoana as it was shown on the original Chapman map.

But the Chapman map does serve to highlight – and to clarify – one of the most important interpretive issues surrounding the expanded boundary of the ECLTIA area: the western boundary, from 'the range of mountains forming the watershed between the East Coast and the Bay of Plenty' to its extremity. What is this range and what can be thought of as is its extremity? One of the issues raised before us was whether this 'range of mountains' included Maungapohatu. Ms Marr considered the mountains to be the Huiarau Ranges and that 'Maungapohatu was probably the 'extremity' described as it was a well-known

525. East Coast Land Titles Investigation Act Amendment Act 1867, Schedule, in Marr, supporting papers for 'Crown Impacts on Customary Interests in land in the Waikaremoana region' (doc A52(a)), p 3

mountain peak and had traditional significance to both Tuhoe and Ngati Kahungunu.'[526] There is good evidence to support this argument:

- In January 1867, Reginald Biggs informed the Government that the boundaries of the 1866 Act did not include 'some of the most valuable lands belonging to the Aitangamahaki [*sic*] Tribe'.[527] This land was known to include much sought-after oil springs. Later in February, Richmond also stated that the Government had intended to include the land east of the dividing watershed, but mistakes in the schedule had rendered the Act 'nugatory'.[528] O'Malley identifies those as the mis-named Lottin Point ('Lottery Point' in the 1866 Act) and mis-placed Purororangi.[529] Biggs made the suggestion to amend the boundaries to include the following:

  > To the North and East by the sea from Lottin Point (called in schedule Lottery) to the northern boundary of the Province of Hawkes Bay thence by the said boundary to the summit of the Maunga Haruru Range thence by a line to Maunga Powhatu thence by a line to Maunga Haumi thence by a line to Hikurangi thence by a line to Lottin Point.[530]

- A sketch map was prepared around this time showing a boundary line bisecting Lake Waikaremoana and reaching a point at or near Maungapohatu (the name of which is clearly written on the map).[531]
- Another map dating from 1867 showing Biggs' proposal for the Turanga cession clearly identifies Maungapohatu as a boundary point of the 1867 ECLTIA extension.[532]
- Surveying operations from 1867–1868 – based on Biggs' instructions – ranged as far as Lake Waikaremoana and possibly Maungapohatu (see details elsewhere in this chapter).
- When the Native Land Court sat at Wairoa in September 1868, Biggs told the court that the western portion of the Te Hatepe deed area boundary ran from 'Mangapuata, thence along the range to Waikaremoana.'[533] It is likely that 'Mangapuata' is 'Maungapohatu' mis-transcribed.

Based on only some of this evidence, Marr concluded that the amended district 'clearly extended into the Waikaremoana region.'[534]

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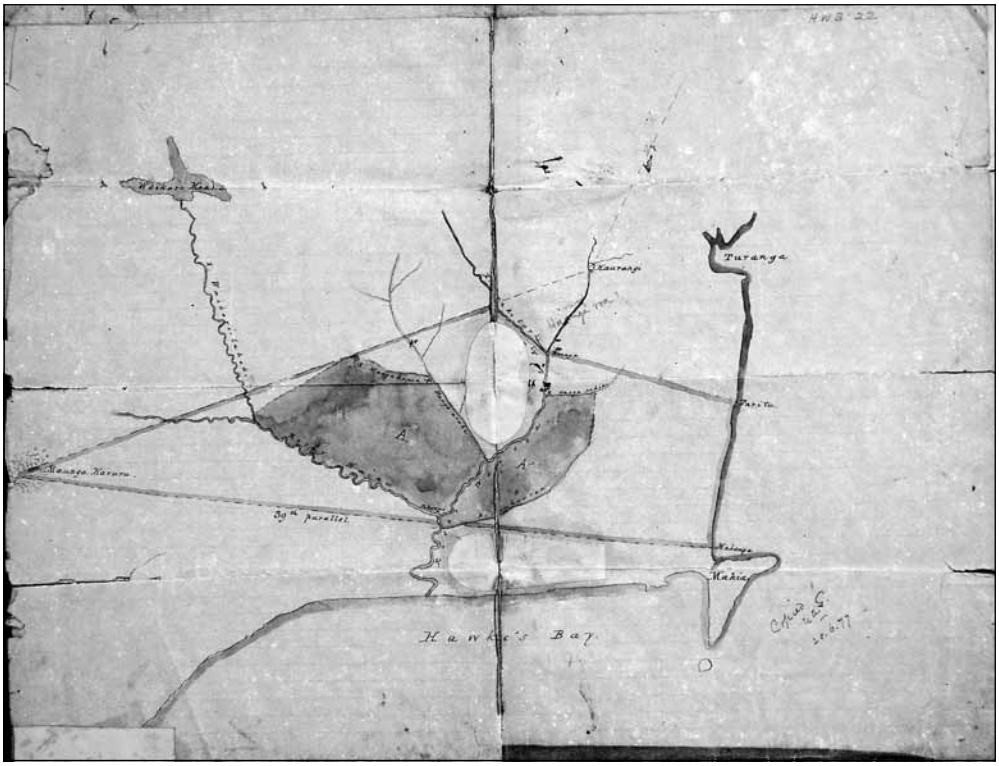
526. Marr, 'Crown Impacts on Customary Interests in land in the Waikaremoana region' (doc A52), p 91
527. Biggs to Halse, 6 January 1867, in Raupatu Document Bank, vol 131, p 50391 (cited in O'Malley, written answers to questions (doc H64), p 27)
528. O'Malley, written answers to questions (doc H64), pp 27–28
529. O'Malley, written answers to questions (doc H64), p 33
530. Biggs to Halse, 6 January 1867, in Raupatu Document Bank, vol 131, p 50392
531. O'Malley gives the reference to this map as MA 62/6, ANZ-W; it is reproduced in the Raupatu Document Bank, vol 131, p 50398. O'Malley, written answers to questions (doc H64), p 28
532. See Map 9, 'Biggs' proposed cession, 1867', in Waitangi Tribunal, *Turanga Tangata, Turanga Whenua*, vol 1, p 146
533. Wairoa Minute Book 1,p 25 (cited in O'Malley, 'The Crown and Ngati Ruapani' (doc A37), p 100)
534. Marr, 'Crown Impacts on Customary Interests in land in the Waikaremoana region' (doc A52), pp 91–92, 116–117

While this evidence is convincing in respect of Biggs' views, it seems that the Government rejected his proposed boundary. Biggs had suggested precise landmarks: mountains that were known and could be identified. Instead the western boundary was left vague: a watershed instead of a series of peaks and an unnamed peak. In addition, the schedule to the act named the junction of the Waiau river and Waiakaretaheke stream as a boundary point – which Biggs did not. One possibility is that officials selected the junction of the Waiau and Waikaretaheke rivers instead of Maungapohatu as a point on the boundary. In this scenario, the boundary ran from the junction of the rivers to a different peak – one that was properly considered as the 'extremity' of the mountain range. Finally, in one of Biggs' 1867 sketch maps Maungapohatu was shown to be directly north of Lake Waikaremoana – where in fact it is located. It is likely that officials had heard enough of the area to locate Maungapohatu north of the lake. It is unlikely, therefore, that they would have said the extremity of the range was 'to the north-east of Waikaremoana' had they meant Maungapohatu.

The reasons for opting for these boundary points over Biggs' suggestions are unknown. The most obvious possibility is that officials – hamstrung by their lack of geographical knowledge – preferred to leave the western boundary undefined. Once a survey of the interior region had been completed, the range of mountains and its extremity could be more accurately identified. Another possibility is that surveyors may have objected to Biggs' particular suggestion of peaks: it may have been difficult to make proper trigonometric surveys between four peaks that were at some distance from each other. Maungapohatu may have also been seen as a provocative inclusion, given that hostilities had not reached that far in late 1865 and 1866, and given the delicate state of relations between Te Urewera peoples and the Crown in 1867.

If not Maungapohatu, what other peak could have been considered the extremity of the range? One possibility is Maungahaumi – one of the other peaks suggested by Biggs. By taking the boundary from the junction of the two rivers to Maungahaumi, the Crown was still achieving its primary aim of including the oil springs in the Waipaoa valley, north of Gisborne. This argument is supported by our current geographical knowledge. Maungapohatu is not considered part of the range of mountains dividing the East Coast from the Bay of Plenty. This is properly known as the Raukumara range and is quite different from the Huiarau range. The divide between the two ranges is clear, and is symbolised today by the Opotiki-Gisborne road. But Maungahaumi is some distance from either Maungapohatu or Lake Waikaremoana. The phrasing used in the schedule to the 1867 Act – 'to the north-east of Waikaremoana' – suggests something much closer. It is possible, therefore, that the Government had in mind another peak between Maungapohatu and Maungahaumi; or no specific peak at all but a theoretical location somewhere between the two.

7.6

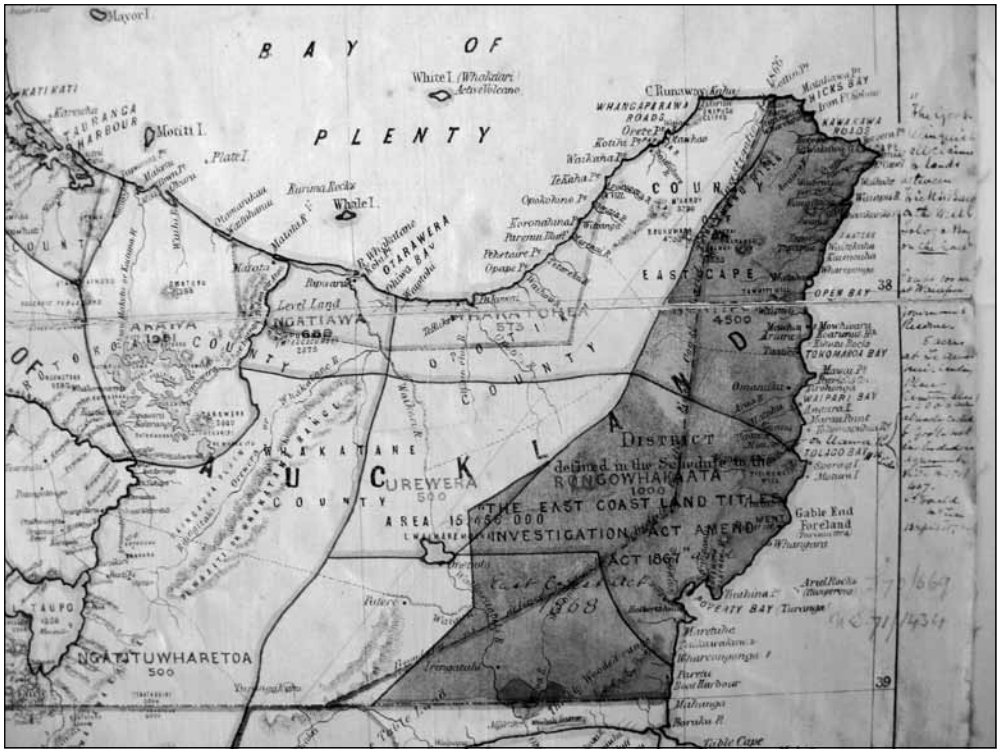


Map 3: Original Te Hatepe deed sketch plan

For these reasons it is impossible to know what went through officials' minds at the time. Given their lack of geographical knowledge it seems unlikely that they would have been able to distinguish between the Raukumara and Huiarau ranges: the two ranges would have appeared as one continuous mountain range. Further research may reveal that officials – apart from Biggs – privately considered Maungapohatu as the extremity of the range of mountains. Even if this were the case, all of what became the Waiau block, most of the Tukurangi block, and some of the Taramarama block would have been outside the boundary of the 1867 amendment.

But nor does it make geographical sense to assume Maungapohatu was the 'extremity' of any particular range. From our examination of the sources, we believe it made more sense in 1867 for the boundary line to run from a peak to the north east of Maungapohatu and Lake Waikaremoana to the junction of the two rivers, thereby excluding most of what later became the four southern blocks. Not only did this roughly stay in keeping with the south–western portion of the boundary as defined in the 1866 Act, it also fulfilled the objectives of including the sought-after oil lands.

It was for this last reason that Dr O'Malley concluded the Chapman map is 'more reliable' than other contemporary maps. On the Chapman map, the boundary of the 1867



Map 4: Original 'Chapman map'

amendment runs so far west as to include the oil lands, but not Maungapohatu, Lake Waikaremoana or most of the four southern blocks. For our purposes, the Chapman map also shows the boundary line travelling directly south from the extremity of the range to the junction of the rivers. This is likely to have been the direction and the geography that officials had in mind in rejecting Biggs' proposed boundary of a series of peaks – one that was specifically designed to exclude Lake Waikaremoana and surrounding lands. While Biggs may have been acting on different assumptions in 1867 and 1868, these assumptions were not shared by those in power who drafted the 1867 amendment. If the boundary on the Chapman map is considered to be the most accurate version as officials understood it at the time of the Act's passing, then the entire Waiau block, most of the Tukurangi block, much of the Taramarama block, and some of the Ruakituri block would be outside the operation of the Act.

Dr O'Malley also drew our attention to the fact that the Chapman map was signed by McLean on 13 April 1870. 'This raises the disturbing possibility that McLean may have known at least parts of the four blocks were outside the area subject to the East Coast confiscation legislation.'[535] Yet by 1875 many – including McLean – believed that all of the four

535. O'Malley, written answers to questions (doc H64), p 28

southern blocks were subject to the legislation. When informing Locke of the status of the four southern blocks, neither he nor the Solicitor General paid attention to the schedule to the legislation. If they had, they would have discovered that a significant portion of the blocks fell outside the boundaries. According to O'Malley, this fact was not acknowledged by the Crown until the 1920s.[536]

In summary, to address the two main issues before us:

- The area defined in the Locke deed differed significantly from the overall area defined in the Te Hatepe deed. It included a greater area to the north-west towards Lake Waikaremoana, excluding the area east of the Kauhouroa block to the sea
- Much of the four southern blocks was outside the boundary defined in the schedule to the East Coast Lands Title Investigation Act Amendment Act 1867, as it was understood at the time it was passed.

536. O'Malley, written answers to questions (doc H64), p 33; O'Malley, summary report of 'The Crown and Ngati Ruapani' (doc H6), p 4

CHAPTER 8

TE WHITU TEKAU: THE 1871 COMPACT AND MAORI AUTONOMY IN TE UREWERA, 1871–93

Listen, O Tuhoe. Your mana, O Urewera, and your power in war has not been killed by the mana of the Government. My word, O Tuhoe, is, I do not approve of roads, lease of land, or selling land.

Erueti Tamaikoha, proceedings of meeting at Ruatahuna, 9 June 1872 (in English only), AJHR 1872, F-3A, p 30

8.1 Introduction

This chapter concerns the question of autonomy – te mana motuhake – in Te Urewera during the decades after the end of military conflict in 1871. This issue is crucial to understanding the de facto political independence of Te Urewera in those years, and the long, hard-fought struggle that took place against land loss and the Native Land Court.

In 1871, as part of the process of making peace, an arrangement was reached between Donald McLean (represented by J D Ormond, Government Agent for the East Coast, and Major Rapata Wahawaha, a commander of Crown forces) and the leaders of Te Urewera: Ngati Porou forces were withdrawn and the chiefs entrusted with the future management of affairs in their districts. The claimants referred to this as a 'compact' involving Government recognition of their autonomy. The Crown, on the other hand, denied that there was an official compact or any formal approval of the claimants' autonomy. This disagreement lies at the heart of matters discussed in this chapter. For Tuhoe and Ngati Whare claimants, their actions in resisting the Native Land Court, in excluding magistrates, and exercising their collective authority within a defined and protective boundary all sprang from their Treaty-guaranteed autonomy.

As a result of what they saw as a compact that affirmed their autonomy, in 1872 Tuhoe and Ngati Whare formed a runanga called Te Whitu Tekau (the Seventy), sometimes referred to as Te Hokowhitu, or the Union of Seventy. This new body acted as a means

of collective decision-making for the hapu of the protected district (Te Rohe Potae) from which all roads, surveys, land sales, leases, magistrates, the Native Land Court, and all 'evil things' ('mea kino') were to be excluded. The Crown argued that Te Whitu Tekau was short-lived, although it accepted that its policies lasted until the 1890s. The claimants maintained that Te Whitu Tekau continued to guide and guard Te Urewera throughout the 1870s and 1880s. In their view, the Crown had rejected major opportunities to recognise their governance body in that period. These opportunities arose from the Government's own initiatives for native councils in the 1870s and for native committees in the 1880s. Even so, the parties acknowledged that the Crown's continued rejection of Te Whitu Tekau in these years was combined with some acceptance of its authority on the ground. The Government acquiesced in the exclusion of roads and prospectors and magistrates, but surveys and the Native Land Court penetrated the blocks on the rim of Te Rohe Potae. We will examine the detail of how that happened in chapter 10. In this chapter, we concentrate on the political struggle of Te Urewera leaders to keep their lands out of the court.

One of the reasons the interior of the rohe potae survived intact was because there was little pressure to open it up until the late 1880s. From then on, however, there was growing Government insistence on opening Te Urewera for mining and settlement. In 1889 the Government sent Samuel Locke to negotiate an agreement, without success. Negotiations foundered on the Government's refusal to accord legal powers to the Tuhoe committee and Tuhoe's refusal to consider opening their district on any other basis. This created something of a stalemate, until the Governor succeeded in obtaining an invitation to visit Te Urewera in 1891. His visit was followed by applications from a small but significant group of Tuhoe leaders for the valuable Ruatoki lands to be surveyed and their title determined by the Native Land Court. For the claimants, the inability of the majority of the tribe to enforce Te Whitu Tekau policies and prevent this survey epitomised the Crown's failure to recognise or accord legal powers to their tribal governance body. By 1893, Maori autonomy was under siege in Te Urewera.

8.2 Issues for Tribunal Determination

The issues for Tribunal determination with respect to Te Whitu Tekau are:

- What was the basis on which peace was established between the Crown and the peoples of Te Urewera?
- What were the origins, character, and policies of Te Whitu Tekau?
- How did the Crown interact with Te Whitu Tekau? How did it respond to political initiatives taken by Te Urewera leaders?

▶ Why were some Tuhoe leaders prepared to set aside Te Whitu Tekau policies at Ruatoki in the 1890s, and with what effect?

8.3 Key Facts

At the outset of the period covered by this chapter, peace between the peoples of Te Urewera and the Crown had not yet been established. In chapter 5 we outlined the first making of peace, by Tamaikoha and Te Rangihiwinui in 1870, and the Government's policy of unconditional surrender and relocation to coastal reserves. This changed in 1871, with the release of Te Whenuanui and Paerau, and the Government's acceptance that peace could be established without the physical removal of all communities from Te Urewera. In April 1871, Te Whenuanui and Paerau called a hui at Tatahoata (Ruatahuna). According to the oral history of Tuhoe, this was the occasion on which they decided 'to give their allegiance to the Government as a Tribe'[1] ('ka whakaaetia kia tu hangai ki ta te kawanatanga').[2] Tensions continued, however, as the Government refused to release the exiles held on the coast, sent further expeditionary forces to search for Te Kooti, and pressed Tuhoe to join them in the search. Finally, the growing peace was put at risk in late 1871, when Wahawaha attacked Waikaremoana and occupied Ruatahuna and Maungapohatu, building redoubts and installing Crown garrisons.

It was at this point that, as we saw in chapter 5, the Government decided against attempting a military occupation of Te Urewera. It was too expensive (and simply unnecessary) to occupy Te Urewera. Lieutenant T W Porter put to the Government that it had a choice: either embark on a permanent occupation, or withdraw its forces and entrust Te Urewera (and the capture of Te Kooti) to its chiefs. In November, Ormond, based at Napier, wrote letters to key Urewera chiefs, setting out the terms of an agreement and, in the case of Te Purewa, responding to his own proposals. The letters proposed that the chiefs of Te Urewera would be responsible for their own affairs and districts, in return for which they would capture Te Kooti if he came within their boundaries. 'The management of your people,' Ormond wrote to Te Whenuanui and Paerau, 'would be left as we arranged to yourselves.'[3] Ormond asked Wahawaha to present this proposal to the chiefs, and to withdraw if he considered their response satisfactory. Porter then took the letters to Wahawaha and all the Urewera chiefs.

1. Binney, summary of 'Encircled Lands' (doc B1(d)), p 22; Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 252; Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two: A History of the Mana of Ruatahuna from the Urewera District Native Reserve Act 1896 to the 1980s', April 2004 (doc D2), pp 427, 510
2. Tuawhenua Research Team, 'Ruatahuna' (Maori), vol 1 (doc B4), p 222
3. Ormond to Whenuanui and Paerau, 20 November 1871 (quoted in Binney, 'Encircled Lands', vol 1 (doc A12), p 259)

8.3

The peace took effect in December 1871. On 11 December, Wahawaha formally withdrew from Te Urewera, having explained to the chiefs the Government's recognition of their authority and its expectations of them. The flag that had flown over Kohimarama redoubt was formally handed over to Kereru Te Pukenui. Subsequently, various Urewera chiefs were involved in searching for Te Kooti, who was on the move constantly: from the north of Te Whaiti, he went to the upper Waiau River, then to the upper Mohaka River and, by March 1872, to Nuhaka. From there he made his last appearance in Te Urewera, moving rapidly to avoid his trackers from Maungapohatu and Waikaremoana, and finally disappearing into the King Country in mid-May 1872.[4] Meanwhile, in April, McLean had met Paerau in Napier and other Urewera leaders in Whakatane; and those who had surrendered and were being held at Te Putere reserve on the coast had at last been told they could go home.

As a result of the agreement of late 1871, not only were some Urewera Maori employed as messengers (karere) but the Government also began to pay annual pensions to several Urewera chiefs. The pension arrangements remained in place up to and beyond the passing of the Urewera District Native Reserve Act 1896.

In the wake of these events, the peoples of Te Urewera formed Te Whitu Tekau – the Seventy. Essentially, this 'union' was a traditional-style runanga (council), which met for many years to make collective decisions for Te Urewera. Ngati Whare leaders were among its members, but it did not represent Ngati Manawa. The rangatira who participated in the runanga varied – the number 70 was symbolic, as we will explain below – but they met regularly at hui, and formed common policies to control interaction with the Crown and with settlers. The crucial hui at which this runanga was formed took place between 7 and 9 June 1872 in Ruatahuna, at Kohimarama, the redoubt that Wahawaha had handed over to the people the previous December. A number of issues were discussed: their boundaries; the importance of unity; and opposition to roads, to leasing and selling of land, and to the Native Land Court. Both the overall decisions of the gathering and the opposition of some leaders to those decisions, particularly with respect to roads, were reported to the Government in five letters sent by various Urewera chiefs, and in abbreviated and poorly translated minutes of the meeting supplied by Captain George Preece of the Wairoa Armed Constabulary.

These matters were further discussed at a large hui held at Ruatahuna in March and April 1874. What became the core Te Whitu Tekau policies, repeated throughout the 1870s and 1880s, were confirmed at this hui. Both the Governor and Native Minister McLean had been invited to attend on this occasion. But the hui was delayed from its original summer date, and the only Government representatives present were Herbert Brabant (resident magistrate at Opotiki) and, later, Resident Magistrate Locke from Wairoa, along with Charles

4. Anita Miles, *Te Urewera*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1999) (doc A11), p190; Binney, 'Encircled Lands', vol1 (doc A12), pp263–265

Ferris of the Armed Constabulary. Also present were leaders from Ngati Awa, Ngati Pukeko, and Whakatohea (with Brabant) and Ngati Kahungunu (with Locke).

The two major hui of 1872 and 1874 indicate the key concerns of Te Urewera leaders. A range of letters to the Government has survived in which those concerns and policies – and, sometimes, differing approaches within the leadership – are outlined. From the mid-1870s there is somewhat sparse evidence in the written record of the discussions of Te Whitu Tekau, though it is clear both from the oral histories and from the later comment of a Government official (in 1889) that the runanga continued to operate.[5] Hieke Tupe, for example, recounted a meeting between Te Kooti and Te Whitu Tekau representatives in the 1880s at which Te Kooti told Tuhoe to unite; they responded that they had already done so, and they were 'seventy'.[6]

This accords with evidence from Resident Magistrate Robert Bush, who wrote in April 1889: 'The Urewera have always had a tribal Committee termed the "Seventy". This Committee has always opposed the making of roads, surveys, and prospecting.'[7]

From the mid-1870s, the interaction between Crown officials and Urewera leaders that had begun during the peace negotiations continued. Brabant visited Ruatahuna several times during 1873, and in 1874 McLean visited Whakatane to open Ngati Awa's new wharenui, Mataatua. The opening was also attended by a large Tuhoe party who spoke to McLean of issues of concern to them.

In the wake of the confiscation, and the establishment of peace, there were other interactions as well. Armed Constabulary men stationed at Fort Galatea, Te Teko, and Whakatane were building a road down the Rangitaiki Valley to link the three policing posts. And Gilbert Mair, George Preece, Sergeant Bluett, and Captain Frederick Swindley were looking to lease land in the area. Mair, who developed a close relationship with Ngati Manawa, leased at Galatea; Swindley was living at Te Waimana; Bluett had made payments for the Matahina block; and the settler Hutton Troutbeck had leased land from Ngati Haka Patuheuheu and Ngati Manawa in the Horomanga Valley (Kuhawaea). Captain C Fergusson and William Kelly bought up some of the abandoned military allotments on the confiscated land; Fergusson lived at Opouriao from May 1875; and their Whakatane Cattle Company leased an additional 12,000 acres on the western side of the Whakatane River. Cattle wandered across the confiscation line and were seized by Tuhoe on several occasions, resulting in Government mediation between Fergusson and Te Makarini (first by McLean, and later by Preece, in his role as Napier resident magistrate.

From August 1873 the Crown also indicated a strong interest in acquiring land on the western edges of Te Urewera. Using a provision in the Native Land Act 1873, it suspended

5. Tamati Kruger, summary of evidence concerning 'Ruatahuna: Te Manawa o te Ika', 11 May 2004 (doc D28), p 59
6. Oral source: Hieke Tupe, 26 November 1999, quoted in Judith Binney, 'Te Umutaoroa: the Earth Oven of Long Cooking', in Andrew Sharp and Paul McHugh, eds, *Histories, Power and Loss: uses of the past – a New Zealand commentary* (Wellington: Bridget Williams Books Ltd, 2001) (doc K29), p 160.
7. Bush to ND, 4 April 1889, MA 23/13B (cited in Binney, 'Encircled Lands', vol 2 (doc A15), p 7)

the operation of the native land legislation over a vast district of the Taupo and central Bay of Plenty (which included an extent of land in the west of Te Urewera). During the period when no Land Court sittings could be held, the Crown then sent in its own agents, securing agreements to lease by making payments to those it deemed owners. Government agents thus attended various hui. In May 1874, Wilson, the land purchase agent, and District Officer Gilbert Mair, attended one at Galatea hosted by Ngati Manawa. Wilson, who was buying up interests within Tauaroa-Kuhawaea (land leased by Troutbeck), attended four meetings with the Urewera leaders in the early part of 1874.

The history of the 'four southern blocks' is dealt with in detail in chapter 7, but it is also relevant here. As we have seen, a major hui was held at Wairoa in 1875 when Tuhoe, Ngati Ruapani, and Ngati Kahungunu debated their respective rights to lands on the south-eastern shores of Lake Waikaremoana. Tuhoe leaders, on advice from Samuel Locke, applied for a Land Court hearing to determine those rights to the four newly created blocks: Waiau, Tukurangi, Taramarama, and Ruakituri. Tamarau Te Makarini had signed the 1872 Locke deed, and this angered Te Whitu Tekau. The Government was anxious to buy the land but needed the Native Land Court to confirm who the customary owners were. Locke told those present at the 1875 hui that the land had been confiscated after the first fighting in Waikaremoana (which occurred in 1865 – 1866) then returned to the 'loyal' chiefs of Ngati Kahungunu to look after, but that the Government now accepted the right of 'the Urewera' to have their claims heard in the court.

The four southern blocks were not the only Te Urewera lands for which applications were made to have title determined by the Native Land Court. Waimana was heard after a Te Upokorehe man applied for survey and investigation of title in 1877, which brought Tuhoe applicants forward as well.[8] Waimana, Heruiwi, and Waiohau were heard in mid-1878, and Matahina and Kuhawaea in 1881 and 1882 respectively. There was a gap then until Tahora 2 in 1888–89; Waipaoa in 1889; and Whirinaki, Heruiwi 4, and Tuararangaia in 1890. In 1891, following the visit of the Governor (see below), an application was made for a hearing of Ruatoki lands. This would lead to considerable internal dispute. (These Land Court cases, and the sales that followed in their wake, will be discussed further in chapter 10.)

During the 1880s, there was further interaction between the peoples of Te Urewera and the Government. The Government's 1883 legislation providing for native committees led to both the Government and iwi in the Bay of Plenty region considering the formation of new committees. Under sections 3 to 6 of the Native Committees Act 1883, committees could be elected in proclaimed districts to arbitrate civil disputes, and to give preliminary reports and advice to the Native Land Court. Native committee districts with potential relevance to Te Urewera were declared for Opotiki and Rotorua. Beginning in 1886, there were various proposals to form a committee or committees covering part of the Opotiki and Rotorua

8. There was an earlier application from Rakuraku but that had not been progressed.

districts, with either a new district including the lands of Ngati Awa and Te Urewera, or a smaller Ngati Awa committee and/or a committee for Te Urewera. In the late 1880s, Te Urewera leaders sought Crown sanction for komiti they formed, without success.

By the late 1880s and early 1890s there were new reasons why the Crown was looking with greater interest at Te Urewera. An important incentive was the belief that there were substantial gold reserves there. Resident Magistrate Samuel Locke, who visited Ruatoki in April 1889, stated that he had come to 'make arrangements' for the opening up of Te Urewera.[9] Both prospecting for gold and minerals and the utilisation of the forests were discussed. Locke pressed for a group of chiefs to be chosen with whom the Government could communicate when it authorised any person to explore in Te Urewera for any purpose. But his visit was not followed by the admission of prospectors, and the following year the Minister for Lands and Mines, G F Richardson, was unsuccessful in even gaining access to Te Urewera. Agreement could not be reached because Tuhoe wanted the Government to recognise a committee with decision-making powers, whereas the Government wanted a committee whose role was limited to admitting and assisting those to whom it had already granted passes.

Government efforts to survey parts of Te Urewera for road-building purposes also met with opposition from Tuhoe – though there was some support from Urewera people living on the western fringes of the district. By the late 1880s, three strategic roads ran close to Te Urewera. At various times, Ngati Manawa, Ngati Whare, Ngati Haka Patuheuheu, and people from Ruatoki and Waimana were employed in building them.[10] On the western side was an old road, made by the Armed Constabulary, linking Fort Galatea, Te Teko, and Whakatane. To the south of Te Urewera there was a road from Wairoa through to Waikaremoana. To the north of the district a road had been built from Ohiwa on the coast through to Waimana. There was some work on a bridle path from Galatea to Ahikereru in the mid-1880s. Basically, major roads were not permitted in Te Urewera itself, and the Government accepted Te Whitu Tekau's decision on this issue, although it tested it from time to time.

By 1889, there was something of a stalemate between Te Urewera leaders and the Crown. Although the Native Land Court had penetrated the 'rim' of Te Urewera, it was still excluded from the interior lands. But there was a new interest in those lands, especially because it was believed they might hold major gold deposits. The Government had now opened the King Country, and Te Urewera was thus seen as the last place to be 'opened up' to the forces of settlement and civilisation. Locke's attempt in 1889 had failed. Against this background, the Governor, Lord Onslow, visited Te Urewera in 1891 – the first Governor to do so. He

9. Miles, *Te Urewera* (doc A11), p 239

10. Brian Murton, 'The Crown and the Peoples of Te Urewera: The Economic and Social Experience of Te Urewera Maori, 1860–2000', 3 vols, report commissioned by the Crown Forestry Rental Trust, 2004 (doc H12), vol 1, p 338 for groups involved. Murton also mentions Ngati Ruapani as probably having been involved as well.

and the Native Minister both wished to visit Te Urewera, and 'after much debate' the senior chiefs issued an invitation to the Governor to visit Ruatoki.[11]

In March 1891, the Governor and his party, including the Native Minister, met with a cordial reception at Ruatoki. The hui followed another major Urewera hui held at Ruatahuna to open the great wharenui Te Whai-a-te-Motu, built over a number of years 'as a memorial to Te Kooti'.[12] Te Kooti, to whom the Government had extended an amnesty in 1883, had first returned to Te Urewera in the post-war years in 1884. In February 1891 he returned for the opening of Te Whai-a-te-Motu the following month. The senior chiefs then moved to Ruatoki to greet the Governor. While welcoming him as the representative of the Queen, many chiefs took advantage of the occasion to press the Government for the return of some of the confiscated land. Rakuraku reiterated that no roads, no magistrates, no surveys, no leases, and no land sales were permitted in Te Rohe Potae. 'The Government laws,' he said, 'are not to come on this side of the boundary.'[13] These fundamental Te Whitu Tekau policies were again published in the Maori newspapers on behalf of 'Tuhoe Potiki katoa' (all Tuhoe) in 1893.

But Te Whitu Tekau policies were set aside by some Ruatoki leaders in 1891, soon after the Governor's visit. Ngati Awa had already applied to bring the Ruatoki lands before the court, and in 1891 this was followed with applications from Tuhoe hapu, including Ngati Rongo. In 1892, a complicated series of negotiations took place between the Native Minister, Te Urewera leaders, Native Land Court applicants (especially Te Wakaunua and Numia Kereru), Government representatives (especially James Carroll, Maori member of the Executive Council) and Te Kooti. There may have been general agreement at Ruatoki to allow the survey to proceed in late 1891; this had been brokered by Te Kooti. But by February 1892 there was significant opposition. In March, the proponents of the survey agreed to hand the matter over to the tribe to decide, and the decision went against continuing with the survey. Rather than accept this decision, Native Minister Alfred Cadman sent Carroll to Ruatoki to negotiate a new agreement. In April 1892, Carroll proposed completion of the survey for the portion of the block where it was underway (some 11,000 to 12,000 acres) and a general ban on any new surveys or court activity in Te Urewera until all peoples had agreed to it. Te Kooti was instrumental in persuading all sides to agree to the Government's compromise in May 1892.

This compromise agreement, however, was immediately followed by obstruction of the survey. The two sides disagreed over whether the surveyor was in fact limiting his work to the compromise block. The Government allowed the survey to remain unfinished for the meantime, with Cadman promising that he and Carroll would visit Ruatoki at the end of

11. Miles, *Te Urewera* (doc A11), p 244
12. Pou Temara (cited in Tuawhenua Research Team, 'Ruatahuna: Te Manawa o te Ika' (English), 2 vols, report commissioned by claimants in association with the Crown Forestry Rental Trust, 2003–04, vol 1 (doc B4(a)), p 282)
13. Rakuraku's speech as reported in the *New Zealand Herald*, 23 March 1891, quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 16

the parliamentary session to 'hear both sides'.[14] In the event, Cadman came on his own in January 1893 and delivered an ultimatum: if Tuhoe could not agree to the survey within one month, he would order it to proceed regardless. From this point on, the compromise agreement was abandoned, and Cadman insisted on a full survey of the whole Ruatoki block.

Tuhoe did not agree to his demands, so Cadman authorised the surveyor to continue in the face of obstruction from the opposing hapu, whom Crown historian Cecilia Edwards accepted were 'the majority'.[15] The survey was obstructed peacefully by a number of women, at the direction of leading chiefs. In March 1893, those women (and four chiefs) were summonsed to appear at the resident magistrate's court in Whakatane. They voluntarily answered the summonses. Eleven women and four men were convicted for obstruction, and sentenced to one month's imprisonment in Auckland. The sentences were carried out. Tuhoe offered no resistance.

The survey was resumed and again obstructed peacefully. Further trials followed in April, with fines imposed instead of imprisonment. This time, however, many of the obstructors hid in the interior to avoid summonses. The Government brought in armed police to prevent any further obstruction of the survey, but a peaceful resolution was ultimately obtained by the intervention of Te Kooti, who advised Te Urewera leaders not to obstruct the survey again. As a result, it was completed by mid-1893. The Native Land Court began its hearings on the title of the Ruatoki block in December 1893. In the meantime, as we have seen, tribal leaders had publicised their continued opposition to the court and all it entailed.

In 1894, Richard Seddon made the first visit by a Premier to Te Urewera. It seems to have been on this occasion that Seddon heard for the first time, from one of the Tuhoe orators, about the agreement made by Paerau and Te Whenuanui with the Government in 1871.

8.4 The Essence of the Difference between the Parties

Counsel for the Wai 36 Tuhoe claimants argued that the origins of Te Whitu Tekau lay in the peace agreement forged between the Government and Tuhoe in November 1871; it was formed 'precisely because the chiefs thought they were operating in a new relationship with the Crown'.[16] They relied on Judith Binney's production of documentary evidence surrounding the 1871 peace agreement, and on McLean's continuation of negotiations with Tuhoe from April 1872.[17] The Tuawhenua claimants pointed to the 'peace compact' of 1871, which originated in an agreement between Te Whenuanui, Paerau and Ormond in April 1871 that

14. Native Minister to under-secretary, 9 June 1892, quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 33; Morpeth to Kipa Te Whatanui, 9 July 1892 ((Edwards, comp, supporting papers to 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)(i)), vol 2, p 659)
15. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 20, 78
16. Counsel for Wai 36 Tuhoe, closing submissions, 31 May 2005, pt B (doc N8(a)), p 48
17. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 48–49

began to be implemented in November of that year. Self-management had been sought by the Tuhoe chiefs and agreed to by Ormond (as is evident, counsel argued, in the letters Ormond wrote to senior Tuhoe chiefs in November 1871). This should be considered in the context of other peace-makings and confiscations in the Bay of Plenty; no such 'management' issues were agreed or implemented with other iwi.[18]

The Crown, however, adopted the position of its historian, Dr Battersby, that no specific peace compact was made; rather peace-making was an incremental process. It did not specifically address the evidence of the Ormond letters, but it denied the existence of a formal peace compact in which McLean was understood to have promised some form of recognition of self-government in the district.[19] Alongside this, though, the Crown accepted, with some caution, a link between the establishment of Te Whitu Tekau and the restoration of peace.[20]

Differences remain between the parties as to the significance of Te Whitu Tekau and its policies, and the attitude of Governments of the time towards Te Whitu Tekau.

The claimants argued that Tuhoe were 'decisive in rejecting the foreign institutions which would probably bring harm to Te Urewera' – notably roading, surveys, leases, land sales, and the Native Land Court. But this is not to say they rejected the new economy. Rather, they wanted it on their own terms. Yet Tuhoe were seen by the Crown from the early 1870s as a 'threat' to economic development and settlement in the region. They thus had to cope with the Crown's 'programme' to pull land into the Native Land Court and secure its alienation.[21]

Te Whitu Tekau, the claimants stated, was 'clearly established as a vehicle by which Tuhoe sought to assert their mana motuhake or authority within their own district'.[22] It was a 'tangible vehicle of collective action among the hapu of Te Urewera including Tuhoe and Ngati Whare'.[23] It held a mandate to represent the views of Tuhoe as the body politic to engage with the Crown, and its policies were clearly expressed. There was some disagreement from the outset over how best to protect and advance Tuhoe interests, especially over roads. Such differing opinions and the potential for dispute 'only underlined the real need for a governance body for the tribe'; in fact it was no different from a parliament in which different opinions might be expressed but it was understood that a common view would prevail.[24]

In particular, the claimants pointed to the general long-term effectiveness of Te Whitu Tekau policies, given the noticeably limited participation of Tuhoe and Ngati Whare in the Native Land Court despite the Crown's 'divide and rule' policy.[25]

18. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), pp 73–76
19. Crown counsel, closing submissions, June 2005 (doc N20), topic 7, pp 8–9
20. Crown counsel, closing submissions (doc N20), topic 7, pp 3–4, 9
21. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 10–25
22. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 45
23. Counsel for Ngati Whare, closing submissions, not dated (doc N16), p 40
24. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 47
25. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 45–48

The Crown for its part stated that Te Whitu Tekau had difficulty reaching a consensus agreement in 1872 and 1874, and in enforcing its policies.

The parties did not agree on the nature of the relationship between Te Whitu Tekau and the Crown. According to the claimants, the Crown failed to act towards Te Whitu Tekau and later komiti in such a way as to respect and enhance them as vehicles of rangatiratanga. Its stance, in their submission, was essentially the same as toward any Maori expression of collective identity and local autonomy in this period: it was negative.[26] In particular, counsel for Ngati Haka Patuheuheu argued that the hapu was a member of Te Whitu Tekau and wanted to support its consensus policies, but that such 'border' groups faced particular pressures from the Crown and settlers which undermined their ability to do so.[27]

The Crown stated that it 'did not conspire' to undermine Te Whitu Tekau, or to destroy tribal autonomy in this way. In fact, it did not accept that successive governments recognised Te Whitu Tekau as an autonomous, independent entity beyond the sphere of Government control, or that it had any particular constitutional status.[28] Rather, the Crown saw it as a 'loose confederation of interests in a particular location'. The Government was concerned about Te Whitu Tekau policies to the extent that such policies seemed to be 'holding back the use of any productive lands' and preventing the peoples of Te Urewera from enjoying the benefits of 'civilisation'; and it did attempt to 'include Urewera Maori in its mainstream policies for Maori affairs'.[29] Indeed, there were 'ongoing efforts to establish dialogue and engagement over a number of issues[,] particularly those related to governance structures', and though successive Governments were supportive of opening up land for settlement purposes, 'they were inclined to proceed cautiously and at a pace that suited the wishes of Te Urewera leadership'.[30]

The Crown and claimants both looked back on the events of the 1870s and 1880s from the perspective of the Urewera District Native Reserve Act 1896 (see ch 9). Counsel for Wai 36 Tuhoe claimants argued that McLean was willing to accept and engage with separate laws and districts for Maori in the 1870s, pointing to his Native Councils Bill in the context of the compact of 1871. Later Ministers were less open to such possibilities.[31] In the claimants' view, the Crown should have instituted 'something akin to the UDNRA much earlier'.[32] The Crown, for its part, submitted that the 1896 Act did in fact give the peoples of Te Urewera what they had sought through Te Whitu Tekau:

> The idea of a forum for collective decision making on the larger issues of tribal affairs, whilst preserving the independence of the constituent hapu, appears to have been preserved

26. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 59
27. Counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 116–121, 167
28. Crown counsel, closing submissions (doc N20), topic 7, pp 5–6
29. Crown counsel, closing submissions (doc N20), topic 7, p 2
30. Crown counsel, closing submissions (doc N20), topic 7, p 13
31. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 47–50
32. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 35

in substance if not form in the models for local governance structures developed under the UDNR legislation.[33]

Why, then, if it was possible in 1896, could the peoples of Te Urewera not have had such an arrangement earlier? While arguing that it engaged in dialogue with them about governance structures, the Crown defended itself by relying on what the law had required of it at the time: 'It was not a task of government under the legislation of the day to enhance Te Whitu Tekau as a vehicle of rangatiratanga.'[34] Having made this argument, the Crown admitted that McLean had introduced legislation to provide for Maori 'local government' in 1872 but that it had failed.[35] Counsel also admitted that there had been dialogue about official recognition of a Tuhoe committee in the 1880s, in the context of the Native Committees Act 1883, but did not comment on the fact that no such committee was ultimately recognised or sanctioned. Rather, the Crown implied there were a number of possible tribal committee and district proposals relevant to Te Urewera in the mid- to late 1880s, all of them overlapping and none of them justifying recognition.[36]

The claimants, in reply, took issue with the Crown's view of Te Whitu Tekau as a 'loose confederation of interests in a particular location'. This disparaging approach, they suggested, was the basis of 'the very action that caused prejudice and loss'.[37] In their view, the Crown ought to have 'fostered relationships with Te Whitu Tekau and supported the policies upon which there was broad agreement'.[38] But the Crown ignored the traditional leadership, and exploited rifts within it over matters that were not of central importance. It declined to recognise the komiti Tuhoe 'elected' in 1888, the policies of which were no different from those of Te Whitu Tekau (indeed, the komiti may have been Te Whitu Tekau in another guise).[39] And though the Crown pointed to 'difficulties in enforcing [Te Whitu Tekau's] policies', it did not recognise that its own actions contributed significantly to those difficulties – particularly its land purchase policies, its insistence on use of the Native Land Court, and its undermining of Te Whitu Tekau leadership in various ways.[40]

Further, the Tuawhenua claimants took issue with the Crown's submission that it had not recognised Te Whitu Tekau as having any constitutional status:

> The Crown states that it does not accept that successive governments recognised Te Whitu Tekau 'as having any particular constitutional status'. This statement, with respect misses the entire point of the claimants' case in respect of Te Whitu Tekau. The claimants

33. Crown counsel, closing submissions (doc N20), topic 7, p 18
34. Crown counsel, closing submissions (doc N20), topic 7, p 12
35. Crown counsel, closing submissions (doc N20), topic 7, p 12
36. Crown counsel, closing submissions (doc N20), topic 7, pp 13–17
37. Counsel for Tuawhenua claimants, submissions in reply, 8 July 2005 (doc N34), p 21
38. Counsel for Tuawheuna claimants, submissions in reply (doc N34), pp 21–22
39. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 60
40. Counsel for Tuawhenua, submissions in reply (doc N34), pp 21–22

argue that the Crown ought to have recognised Te Whitu Tekau as having a special constitutional status. Te Whitu Tekau was one of the key manifestations of Tuhoe mana motuhake, a vehicle through which tino rangatiratanga was given expression. As such, the Crown was required to recognise and protect Te Whitu Tekau, Article Two requires no less.[41]

Finally, the parties did not agree on the issue of the Ruatoki survey crisis of 1891 to 1893, in which a significant minority of the Tuhoe leadership set aside Te Whitu Tekau policies in favour of having the Ruatoki block surveyed and processed through the Native Land Court. According to the claimants, the Crown breached the Treaty, because it 'trampled' on the mana motuhake and tino rangatiratanga of the claimants when it:

- failed to respect the Tuhoe tribal body's constant proclamation that Te Rohe Potae was closed to surveys;
- 'forced' a survey of Ruatoki and the taking of Ruatoki to the Native Land Court;
- arrested chiefs and women of Tuhoe who obstructed the survey;
- sent armed men to assist survey parties to complete the 'unwanted' survey; and
- presented Tuhoe with an ultimatum, threatening them with confiscation if the survey the Crown wanted was not completed.[42]

The Crown, on the other hand, argued that the Ruatoki crisis was brought on by internal factors. These included conflict between Tuhoe hapu over land, causing some of them to apply for the survey. In that circumstance, the Crown had the responsibility of applying the law and seeing the survey carried out. Also, there was a difference of principle among Tuhoe groups: by this time, some favoured the 'security of tenure' and its 'attendant benefits' that a land court title would confer; others 'remained faithful to the policies of Te Whitu Tekau'. Nonetheless, the Government attempted 12 months of mediation before finally applying the full force of the law to the obstructors. In the Crown's view, it performed its various roles appropriately and responsibly when the survey was applied for and subsequently obstructed.[43]

8.5 Tribunal Analysis

We will address the key issues for Tribunal determination in terms of the questions set out above in section 7.2.

41. Counsel for Tuawhenua, submissions in reply (doc N34), p 21
42. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), pp 97–98
43. Crown counsel, closing submissions (doc N20), topics 14–16, pp 11–12

8.5.1 What was the basis on which peace was established between the Crown and the peoples of Te Urewera?

Summary answer: *The peace-making in Te Urewera evolved over time but was interrupted in late 1871, presenting the Government with a crisis to resolve. The result was an offer of terms by the Crown in November 1871. These were conveyed to Te Urewera leaders in letters to several chiefs, and by Rapata Wahawaha at a widely attended tribal hui. The terms of the peace are thus to be found in both written and oral sources. Letters were written by J D Ormond, the Government's General Agent at Napier; this correspondence both followed and was followed by face-to-face meetings. The peace was designed to meet the Crown's objectives of ensuring the capture of Te Kooti or, at least, ensuring he would receive no assistance from Te Urewera leaders. It was also designed to meet the objectives of Te Urewera leaders that Crown forces withdraw from their territory and their authority be recognised by the Crown. The basis of the peace was thus that chiefs in the various districts of Te Urewera were authorised by the Crown to direct the affairs of their districts in exchange for giving up Te Kooti if he was in or appeared in their territories. Crown forces would withdraw, and the Crown would allow the people to remain in their own communities, rather than insisting they 'came out' to the coast. There was a clear understanding that the Crown recognised the authority of the chiefs. On the basis of this understanding, Te Urewera leaders would proceed to establish a new tribal body, Te Whitu Tekau.*

We consider the basis on which peace was established between the Crown and Urewera leaders in light of the differences between the parties: first, whether there was in fact a peace agreement or compact, as opposed to an 'incremental' process of peace-making; and, secondly (as argued by the Crown), that it has not been established that the Government at the time endorsed the idea of 'self-government' in Te Urewera.

We note that the Crown did not expand on its argument that there was no peace compact. Nor did it explicitly adopt the argument of its historian, Dr Battersby, that what the Government was trying to achieve at the end of 1871 was to 're-establish a more normal peace-time footing' in Te Urewera, thus relying on Urewera chiefs 'for information and cooperation in keeping with the peace'. It would withdraw Ngati Porou forces; in return, Urewera leaders would hand over Te Kooti, and would be entrusted with ensuring that 'no further security issue emerged within their territory'.[44] In other words, the Government simply gave responsibility for maintaining security in the various hapu areas to local chiefs.[45]

The Crown focused instead on what it terms the respective parties' 'different understandings of the nature of the conditions around the return to peace in 1871 and 1872'.[46] Though

44. John Battersby, 'The Government, Te Kooti and Te Urewera', report commissioned by the Crown Law Office, 2003 (doc B2), pp 172, 177
45. Battersby, 'The Government, Te Kooti and Te Urewera' (doc B2), p 184
46. Crown counsel, closing submissions (doc N20), topic 7, p 9

both sides understood that peace had been made by the end of 1871, the Crown argued that there was no formalised arrangement for regional autonomy. The extent of their mutual understanding, according to the Crown, was that 'government officials would not be excluded from the district, but so long as the district remained quiet, Urewera Maori would generally be left to their own devices'.[47]

This, it seems to us, does little justice to the agreement reached between Urewera leaders and the Crown in December 1871. The key documentary evidence consists of the letters written by Ormond to Urewera chiefs in November 1871, as well as a letter written by Te Purewa to Ormond; Ormond's internal memorandum on the peace terms; and the accounts we have of the korero of Rapata Wahawaha, explaining the Government's terms to the chiefs in December 1871. With regard to the oral evidence of Tuhoe, we have a record of what various chiefs said to Prime Minister Seddon in 1894, when they referred to a compact or treaty having been made with McLean, and the evidence of tangata whenua witnesses in our inquiry. Tuhoe witnesses at our hearings, including Tamati Kruger, Tama Nikora, Matthew Te Pou, and the Tuawhenua research team, believed that a formal compact or agreement had been entered into in 1871, carrying the status of a binding oral pact.[48]

As we have seen in chapter 5, the agreement grew out of negotiations between Te Whenuanui and Paerau and Government representatives that began when the chiefs met Ormond in Napier in December 1870. Insofar as we can assess them from the records left by McLean and Crown officials, they initially involved either a request from Te Whenuanui and Paerau, or their concurrence in a plan, to assemble the remaining peoples of Te Urewera at Ruatahuna, where they could be protected from Te Kooti by the building of a redoubt and by Government forces. We accept Binney's explanation that Te Whenuanui's adoption of or support for this plan was based on an attempt both to cooperate with the Government and to shield Tuhoe from the dilemma they found themselves in, given 'their inner belief in the justice of Te Kooti's cause'.[49] Ormond's focus, however, was more on securing Te Kooti. As he told Wahawaha, it was 'thought that by settling the Urewera at Ruatahuna and placing soldiers there, some plan will be devised for capturing Te Kooti'.[50] But, at any rate, the Government conceded that it was no longer necessary for all the people to leave their lands as a condition of making their peace with the Crown.

In April 1871, the Government allowed Te Whenuanui and Paerau to return home. Soon afterwards, the chiefs held a major hui at Ruatahuna, and wrote letters to report its outcome

47. Crown counsel, closing submissions (doc N20), topic 7, p 9

48. See, for example, Tamati Kruger, brief of evidence, 17 January 2005 (doc J29(b)), paras 10.3–10.8; Tamati Kruger, claimant translation of transcript of oral evidence, 17 January 2005, Tauarau marae, Ruatoki (doc J48(a)), Part 2, p 2; Tamaroa Raymond Nikora, brief of evidence, 3 September 2004 (doc G8), p 7; Matthew Te Pou, brief of evidence, 10 December 2003 (doc B24), p 58; Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 261

49. Binney, 'Encircled Lands', vol 1 (doc A12), p 243

50. Ormond to Ropata, 20 December 1870, AJHR, 1871, F-1, p 8; Ormond to Porter, 20 December 1870, AJHR, 1871, F-1, p 8. The two letters interpret the role of Te Whenuanui and Paerau in this plan somewhat differently.

to the Government; Kereru wrote too, and Hapurona Kohi of Ngati Whare reported back to Preece, bringing the letters with him. All the Urewera, he said, were 'united in their determination to commit themselves to the government'.[51] The chiefs of Te Urewera thus made a firm commitment to peace, and some eventually became willing to be more actively involved in the pursuit of Te Kooti. Binney and the Tuawhenua researchers drew our attention to a hui called at Ruatahuna in April 1971, attended by the then Minister of Maori Affairs, Duncan McIntyre, to mark the centenary of the meeting at Tatahoata. The hui was held in Te Whai-a-te-Motu meeting house (see below). In their submission to McIntyre, Tuhoe described the April 1871 hui as the occasion when they decided 'to give their allegiance to the Government as a Tribe'.[52]

As we discussed in chapter 5, this developing peace between Urewera communities and the Crown was interrupted and put at risk in late 1871. First, Wahawaha's forces attacked pa and destroyed food supplies at Waikaremoana in August, leading to complaints from Te Makarini. Secondly, Wahawaha then occupied Maungapohatu and Ruatahuna, erected redoubts, and declared his intention of remaining until Te Kooti was captured. This created a crisis in relations between the Crown and Tuhoe. It confronted the Government with a serious choice, as Porter conveyed when he brought Wahawaha's reports back to Wellington: it had either to occupy Te Urewera permanently or withdraw. The gradual process of peace-making, building on the rongopai established between Te Rangihiwinui and Tamaikoha in 1870, had been placed at risk.

In November 1871, Porter outlined two alternative solutions for peace-making in Te Urewera. The first was that there should be permanent military posts with garrisons at Maungapohatu and Ruatahuna, rather than a reliance on expeditionary forces. The second was that each of the Urewera chiefs should be given responsibility for preserving peace and supervising their own districts; men would be paid as messengers to ensure that communications were kept up with them.[53]

As we found in chapter 5, Ormond regarded Porter's first proposal for governing Te Urewera through military posts at Maungapohatu and Ruatahuna as too expensive – though the existing posts on the outskirts of the region, at Waikaremoana and Fort Galatea, should be kept. Instead, he favoured the option that chiefs be 'entrusted with the security' of their respective districts.[54] In making this choice he was no doubt influenced – as Porter was – by the view that military occupation was not only too expensive but also probably unnecessary.

51. Binney, 'Encircled Lands', vol 1 (doc A12), p 242

52. Binney, summary of 'Encircled Lands' (doc B1(d)), p 22; Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 252; Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two: A History of the Mana of Ruatahuna from the Urewera District Native Reserve Act 1896 to the 1980s', April 2004 (doc D2), p 427

53. Porter to Ormond, 16 November 1871, AGG-HB 1/3, ArchivesNZ (Judith Binney, comp, supporting papers to 'Encircled Lands', various dates (doc A12(a)), pp 32, 34–35, quotation on p 32); Binney, 'Encircled Lands', vol 1 (doc A12), pp 257–258; Battersby, 'The Government, Te Kooti and Te Urewera' (doc B2), p 173

54. Battersby, 'The Government, Te Kooti and Te Urewera' (doc B2), pp 173–174

At this moment in time, the Government chose to trust the Urewera leaders to manage their own affairs and to hand over Te Kooti should he return to their territories.

The memorandum Ormond wrote soon afterwards, and dated 21 November, embodies the essence of what became the peace agreement, or compact, between the peoples of Te Urewera and the Crown. The chiefs of Te Urewera were 'given direction of affairs in their own districts' in exchange for giving up Te Kooti, while mail carriers at Ruatahuna and Maungapohatu were also to be employed.[55]

These terms formed the basis of letters Ormond had written the previous day, 20 November, to senior Urewera chiefs Tamaikoha, Te Whenuanui and Paerau, Te Purewa, and Te Makarini. The letters referred to:

- the future role of the chiefs in managing the affairs of Te Urewera;
- the creation of a messenger service;
- the withdrawal of Ngati Porou forces and the handing over of Te Kooti to the Government; and
- the proposed construction of a road from Waikaremoana to Wairoa and Ruatahuna.[56]

These letters, together with the memorandum, form a major part of the written component of the peace agreement. Binney pointed out that although the letters survive in draft, and some are unsigned, they are all in the handwriting of Ormond, and the associated correspondence makes it clear that Porter personally delivered them all to the recipients.[57] To Tamaikoha, Ormond wrote:

> Friend I received your letter written fr[om] Waimana & learn that Te Kooti's people are in your hands for safe keeping – that is well it is to you the Govt. will look to prevent them returning again to evil. Also it is to you the regulation of affairs within your boundaries will be entrusted – to Whenuanui & Paerau in their boundaries & to Purewa in his – as for Te Kooti I have written to Whenuanui & Paerau he must be given up to the Law as it is within their boundaries he is now hiding – Friend add your word that the evil caused by this man may be ended – . . .[58]

On the same day, Ormond wrote to Te Whenuanui and Paerau:

55. JD Ormond, memorandum, 21 November 1871, on Porter to Ormond, 16 November 1871, AGG-HB 1/3, ArchivesNZ (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), p 33)

56. Ormond to Tamaikoha, 20 November 1871, AGG-HB 4/8, ArchivesNZ (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), p 95); Ormond to Whenuanui and Paerau, 20 November 1871 (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), pp 96–97); Ormond to Purewa, 20 November 1871 (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), p 98); Ormond to Makarini, 20 November 1871 (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), p 99); Binney, 'Encircled Lands', vol 1 (doc A12), pp 258–260; Battersby, 'The Government, Te Kooti and Te Urewera' (doc B2), pp 175–176

57. Binney, 'Encircled Lands', vol 1 (doc A12), p 258 fn 93

58. Ormond to Tamaikoha, 20 November 1871 (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), p 95)

8.5.1

Friends when you left here your engagement with me was you were to keep your boundaries clear of trouble & that if Te Kooti came within your boundaries he was to be given up by you – the Govt are well informed of what has passed since – Quite recently an offer was made by Wepiha that Te Kooti shd be given up by you & he conjointly to be tried by the Law provided the govt. withdrew Ngatiporou from your boundaries. Wepiha is now employed on that business. It rests now with yourselves Te Kooti *is in* your boundaries it is for you to fulfil your engagements & hand him over to the Law – let that be done at once. You choose to who you will give him either to Major Cumming at Waikaremoana or to Mr Clarke at Tauranga or to Major Ropata – Ngatiporou will then withdraw at once & the management of your people will be left as we arranged to yourselves. Porter will talk with you & arrange about the mails through which communication will be kept up between us – The Govt relies on your word being Kept. [Emphasis in original][59]

To Te Makarini at Waikaremoana, Ormond wrote:

Friend I have received your letters through Major Cumming & have been glad to find your people have been kept together & out of evil – Capt Porter will give you what word there is f[rom] here & it will be for you to add your word to Whenuanui & Paerau that Te Kooti who is with[in] their boundaries shd be given up to the law in accordance with their promise to me at Wellington – Another word of mine is that you talk with your people about a Road f[rom] Waikaremaoana to Wairoa & f[rom] Waikaremoana to Ruatahuna so that the mail may go – write to me on this & the road work shall be given to your people that they may earn money as is done by the other Tribes – . . .[60]

And to Te Purewa at Maungapohatu, Ormond wrote:

Friend I received your letter by Capt Porter who takes this to you. The Govt have considered your proposal to leave the manag[emen]t of your people in your hands that is to look to you to keep evil out of your boundaries & hold your people together – This word of yours is accepted & it is to you the Govt will look in future for the regulation of affairs at Maungapowhatu what is meant is that goodwill shall exist between your people & the Govt & that Kooti & other evil disposed people shall be given up – Porter will talk with you about the empl[o]y[men]t of two of your people to carry mails so that communicat[io]n between us may be complete – he will give you further word from me – . . .[61]

Ormond's letter to Te Purewa, as Binney pointed out, was in fact written in reply to a letter he had received from the chief. Te Purewa's letter read:

59. Ormond to Whenuanui and Paerau, 20 November 1871 (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), pp 96–97)
60. Ormond to Makarini, 20 November 1871 (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), p 99)
61. Ormond to Purewa, 20 November 1871 (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), p 98)

> Ko au me aku tikanga katoa me aku whakahaere me waiho ki Maungapohatu me aku tangata. Kaore e tae tetahi tikanga maku ki Ruatahuna. Waiho kia Te Whenuanui raua ko Paerau te whakahaere ki runga ki to raua iwi, a Tamaikoha ki tona wahi me tona hapu me ana whakahaere. Te take kia marama ai nga whakahaere ki runga ki enei hapu e 3 me nei kaiwhakahaere tikanga hoki to 4 i runga i enei hapu o te Urewera.
>
> [1871 translation by the Native Department] My word to you is that I be left alone with my young people to manage affairs at Maungapohatu. I do not want to have anything to do with Ruatahuna. Let Te Whenuanui and Paerau manage their people – and Tamaikoha to manage his people. The reason I ask this is that the management of these three hapus [*sic*] may be clear, by their four leaders.[62]

Te Purewa's letter is important because in it we hear a Tuhoe voice at a crucial time. Our translation of this letter is as follows:

> I say to you that in accordance with tikanga I be left to manage the affairs of Maungapohatu and my people. I do not have any right to the affairs of Ruatahuna. Let Te Whenuanui and Paerau manage their people, and Tamaikoha to manage his. The reason is to make clear that the management of the affairs of the 3 Hapu of Te Urewera be left to the 4 Rangatira (or leaders).

Binney suggested that this letter embodies Te Purewa's view of the arrangement being made between Tuhoe and the Government. Battersby was critical of such an interpretation, because the letter was written before the events comprising the 'peace compact' occurred.[63] It seems clear, in fact, that Ormond had received the letter only recently, when Porter brought it to Wellington. It is likely that Porter had discussed the possible agreement with Te Purewa before he left Te Urewera.

What can we take from all these letters? Security, clearly, was a preoccupation of the Government; most of all, it wanted to capture Te Kooti, who at this time was assumed to be in Te Urewera (or likely to return there). As Binney has pointed out, he was not in the district.[64] Yet officials were giving consideration not merely to how they might bring the pursuit of Te Kooti to a successful conclusion; they were also concerned with how they should provide for the conduct of future relations with Te Urewera leaders. Both officials and military leaders had been engaged in talks with Urewera leaders for some time. In his letter to Te Whenuanui and Paerau, Ormond referred to their earlier arrangement that the two chiefs would manage the affairs of their people. The wording of Te Purewa's letter implies that he also knew of these discussions, and of the form an impending agreement would

62. Te Purewa to Ormond, [November 1871], AGG-HB 2/1, (Binney, additional supporting papers to 'Encircled Lands' (doc A12(b)), pp 341–343)
63. Binney, 'Encircled Lands', vol 1 (doc A12), pp 259–260; Battersby, 'The Government, Te Kooti and Te Urewera' (doc B2), pp 172–173
64. Binney, 'Encircled Lands', vol 1 (doc A12), p 259

take. We do not think, therefore, that there was any reason he should have written secretly, as Battersby implied. It was important to him that the Government knew his position too; he wanted his Maungapohatu community to be included and its autonomy respected. It will be recalled from chapter 5 that the Maungapohatu peoples were the last to make peace with the Crown, and may have feared that Te Whenuanui and Paerau had an advantage in dealing with the Government. Thus, Ngati Huri and the peoples of Maungapohatu had not been involved in (or did not agree to the outcome of) the April 1871 hui, but were part of the arrangements made in November and December of that year.

Finally, we note that McLean must have already been contemplating his policy of self-governing Maori districts with 'native councils', for which he attempted to legislate in 1872 and 1873. We know that he must have discussed the idea with Tuhoe leaders at some time before he introduced his Native Councils Bill in 1872, as he sent them copies of the relevant parliamentary debates at the end of that year.[65] We return to this point below.

Here, we conclude that the Crown was prepared to put its relations with the peoples of Te Urewera on a footing that recognised the role and responsibilities of rangatira in managing hapu and iwi affairs. This was because of the evident willingness of various leaders to assist in the search for Te Kooti or at least to provide information, the discussions it had held with those leaders, and the communications it received from them.

This is underlined in the speech Rapata Wahawaha made when he formally withdrew with his force from Te Urewera. This took place at a large hui at Ruatahuna on 11 December 1871, attended by people from Waikaremoana, Maungapohatu, and the upper Whakatane River valley, with Wahawaha 'formally handing back authority to the Tuhoe chiefs.'[66] The letters he brought to the chiefs had been left open so that he could read them, and Ormond had made it clear to Wahawaha that it was important he speak to the people and present the Government's message as he deemed appropriate. In other words, Ormond knew the importance of direct discussions with the chiefs. He wrote to Wahawaha: 'I meant those letters to be more a lever for you to use than anything else & I would like therefore you to return to Ruatahuna at once & push matters.'[67] This left Wahawaha with an important role to play – as he emphasised when he spoke. In translation, his speech stated:

> The Government are greatly desirous that I should disclose to you the thoughts and intentions of the Govrnt. towards you therefore listen intently. It is their thought, that Te Kooti is, or may come among you, trusting in your former sympathies shewn to him, therefore it is left to you, to capture, and hand him over, to be tried by the Law, the same as in the case of Kereopa. The Government have acceded to your thoughts, and no longer entertain the wish to drive you from your country, this change is owing to your present

65. Binney, 'Encircled Lands', vol 1 (doc A12), p 259
66. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), pp 261–262
67. Ormond to Wahawaha, 24 November 1871, AGG-HB 4/8 (cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 261)

Donald McLean Withdraws his Second Native Councils Bill, 1873

Speaking in Parliament, Donald McLean, the Native Minister, explained that he was of the opinion that:

> there were many districts in the North Island where it was exceedingly desirable that there should be local institutions for the Natives, to enable them to govern themselves. The object of this Bill was in that direction; and the intention of the Government had been to confine its operation to those districts where there were no European Magistrates, and no means of affording redress to Natives for differences that might arise among themselves. It was also thought desirable to induce the Natives in remote districts to take an active part in settling their own disputes, thus enabling them to become acquainted with European modes of settlement, so that they might gradually adopt our laws. He regretted that at this late period of the session he would not be able to go on with the Bill, but he hoped, next session, to introduce a measure embodying the principles of the one which he now asked to be discharged. It was intended that this Bill should not apply to the north of Auckland, or to any districts where there were English Courts of law for settling disputes; but to such districts as those of the Urewera, Ngatiporou, and some parts of the Waikato. The Government desired to apply the measure, because in many of those districts the Natives had expressed a wish that some such law should be enacted, to enable them to take part in the management of their own affairs.[1]

1. NZPD, vol 15, 30 September 1873, p 1514

obedience to the Government. Therefore the government desire that I and my people should vacate your Country leaving you the right to act over all your boundaries: – the Waimana, Maungapohatu, Ruatahuna and Waikare Moana. I therefore authorise the Chiefs of the Uriwera [*sic*] to be responsible for their several Districts, that the Government may know that you are responsible for the actions of your tribes in your own boundaries . . .

It will be the duty of each of the Chiefs appointed to the Districts to keep up a communication with the Government, that a path may be opened for the receipt of correct information, for which reason the Government allow messengers for the conveyance of letters.[68]

What would Wahawaha's korero have conveyed to the chiefs and people listening? First, he stressed (and Porter affirmed) that he spoke on behalf of the Crown; his words would thus have carried great weight. Secondly, it was their responsibility to take Te Kooti and

68. Porter, 'Proceedings of a Meeting held at Ruatahuna', 11 December 1871, AD 1/1872/679, ArchivesNZ (cited in Binney, summary of 'Encircled Lands' (doc B1(d)), p 25)

to hand him to the authorities for trial. It was no longer assumed that Te Kooti was in Te Urewera, so his capture was not a pre-condition for this arrangement; but, if he returned, he should be captured. Thirdly, the Government acknowledged two-way discussions that led to this point: the chiefs had conceded Government authority, and the Government had conceded that Urewera communities should not be subject to further aggression. Fourthly, Ngati Porou were to withdraw from Te Urewera at the wish of the Government. Fifthly, the chiefs' authority over and responsibility for their own people and districts was recognised. (Wahawaha underlined that he authorised this on behalf of the Government.) Finally, the chiefs had a duty to communicate with the Government, which would provide for messengers to facilitate this.

Wahawaha's speech, alongside Ormond's letters, is crucial to our understanding of the peace terms which were finalised at this time. It was clearly important to the Government, since Porter was careful to translate the speeches made that day and to send them to McLean; McLean ordered that the report be published, although seemingly it was not.[69] The Government, however, had its own written record of the undertakings made orally to the peoples of Te Urewera. There is little need to labour the importance of such undertakings, on such a solemn occasion, for the peoples of Te Urewera. They were underlined, moreover, by the actions of Wahawaha in withdrawing his occupying force.

The basis of the peace between the Crown and the peoples of Te Urewera thus emerges clearly from the sources available to us. It is true that Urewera leaders may have had grounds for suspicion of Government motives. Tamati Kruger, giving evidence to us, expressed such suspicions in the context of the devastation wrought by the wars. Considering the letters written separately to the chiefs, the suggestion of roads, the employment of mail carriers, and the offer of Government pensions, he suggested that the 'whole arrangement represented a working relationship with the government that acted to subdue Tuhoe and incite tension between the leaders'.[70] Urewera leaders were certainly under pressure throughout this period. Ormond's letter to Wahawaha – and Wahawaha's reference to the chiefs' accountability for the actions of their tribes – indicate a readiness on the part of the Government to apply such pressure to ensure that it achieved its own object, which was the capture of Te Kooti.

But the Crown, whatever its motives, offered the chiefs what they had been seeking. In December 1871 it entered into a peace agreement with Urewera leaders and withdrew Ngati Porou. Binney referred to the peace variously as a 'compact',[71] a 'compact, or at least an understanding', and the 'peace agreement of November 1871'.[72] The Crown's historian, Dr Battersby, conceded in cross-examination that he had not considered Wahawaha's

69. Binney, summary of 'Encircled Lands' (doc B1(d)), p 25
70. Kruger, summary of evidence concerning 'Ruatahuna: Te Manawa o te Ika' (doc D28), p 55
71. Binney, 'Encircled Lands', vol 1 (doc A12), pp 260–261
72. Judith Binney, statement in response to statement of issues 3, 4, 6, and 7, 17 November 2003 (doc B1(a)), p 35

statements to Tuhoe, and that 'one might' describe the terms referred to by Wahawaha as those of a compact, even though he was 'not sure that [he himself] would'.[73] Tamati Kruger referred to the 'compact' as 'Te Maungarongo', underlining its foundation in the making of peace between Urewera leaders and the Crown.[74]

The claimants further drew our attention to how the peace was remembered by Tuhoe 20 years afterwards. When Premier Seddon visited Ruatahuna in 1894 during his tour of Te Urewera, Te Puke-i-otu of Waikaremoana spoke, as Binney pointed out, of the peace and the role of Paerau and Te Whenuanui in it:

> It was only in the year 1871 that I made peace with the Government. That was the year that Paerau went *via* Wairoa to Napier to make peace and swear allegiance to the queen and the Government. That was when Sir Donald McLean was alive.[75]

He told the Premier:

> This is Ruatahuna, and the two great chiefs of this country, Paerau and Te Whenuanui, in the days that are past and in the days of the voice of Sir Donald McLean, arranged that this territory should be kept inviolate, and that they should reign supreme in this part, and that was given effect to by Sir Donald McLean . . . The chiefs arranged that all Government matters should be excluded from this boundary – namely, roads, leases, wrongful sales, mortgages, and everything that is vile. There was then a protectorate over this place, to protect these people against the advances of the Europeans.[76]

The evidence appears to affirm, as Binney argued, that McLean 'personally confirmed the peace arrangements with Tuhoe's leaders'.[77] He met Paerau in Napier, and subsequently, on 15 April, he met other Tuhoe leaders assembled in Whakatane. Also, as counsel for the Wai 36 Tuhoe claimants noted, 'there is no correspondence on record to suggest that McLean corrected the chiefs' interpretation [of Ormond's letters] when they formed Te Whitu Tekau'.[78] At some time before the end of 1872, although we do not know precisely when, the Minister conveyed to them his plan for legislation to empower native councils.

Two things are clear from Te Puke-i-otu's korero. The first is the lasting significance of the agreement to Tuhoe, which was underlined by the mana of those who had entered into and confirmed it: Paerau, Te Whenuanui, and Sir Donald McLean. Secondly, the essence of the

73. John Battersby, cross-examined by David Ambler, Taneautua School, Taneatua, 12 April 2005 (transcript 4.16(a), pp 130–132, quotation on p 132)
74. Kruger, summary of evidence concerning 'Ruatahuna: Te Manawa o te Ika' (doc D28), p 54
75. 'Pakeha and Maori: A Narrative of the Premier's Trip through the Native Districts of the North Island', AJHR, 1895, G-1, p 76
76. AJHR, 1895, G-1, p 74 (cited in Binney, 'Encircled Lands', vol 2 (doc A15), p 148)
77. Binney, summary of 'Encircled Lands' (doc B1(d)), p 26
78. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 49

agreement was recognition of the authority of Te Urewera chiefs as the basis for protecting the people of Te Urewera, and their land, in the difficult post-war years.

The claimants also noted Tutakangahau's reference to the compact in 1898. He referred to it as a 'treaty' ('tiriti'), marked at Ruatahuna by a 'rata stone'.[79] These traditions have been preserved, and several tangata whenua witnesses referred to this 'compact' in our hearings. Tamati Kruger noted that Tuhoe had sought both the end of fighting and a new, constructive relationship with the Crown: 'I will mention at this stage that this is a tribe that is able to put aside conflict, able to lay down the patu. These are the attributes of mana motuhake, the true qualities of leadership.'[80] There was no diminution of mana involved:

> It was here [at Maungapohatu] according to the crown that Te Puehu and Te Whiu relinquished their mana to the crown. However I again reiterate that which was said to you at Waimana, at Ruatahuna and at Maungapohatu. This was the suspension of the patu.[81]

In the oral history as recounted by Mr Kruger, the 'assurance' ('te kupu taurangi') of 1871 was seen as 'an oath to create a law exclusively for Ngai Tuhoe and in 1871 my ancestors were happy'. ('E kii atu o nga korero o te karauna ki reira, whakaaea ana te karauna ki te waihanga tetahi ture Motuhake mo Ngai-Tuhoe ake. Katahi ka harakoa o matau tipuna i te tau 1871.'[82]) The compact, he told us, 'gave Tuhoe some internal autonomy'.[83] The Tuawhenua researchers pointed to the harsh terms imposed in 1870 by F E Hamlin, a commander of Crown forces (see ch 5), and concluded that Tuhoe were 'being forced, not just to make peace, but to accept a condition of utter subjugation where their mana tangata and mana whenua were of no matter'.[84] By contrast, in their view, Tuhoe had accepted a relationship with the Crown at the April 1871 hui, after which the 'compact' of December 1871 offered at least the potential for that relationship to be based on recognition of their autonomy, their mana motuhake.[85]

We agree with the claimants. In clearly recognising the authority of the Urewera chiefs in 1871, the Crown offered them an opportunity; and within six months they would meet to try to make the most of it by forming a broadly based runanga (council) in Te Urewera. We turn to that development next.

79. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 49, citing Binney, 'Encircled Lands', vol 2 (doc A15), p 138
80. Kruger, D44(a), Part 2, p 12
81. Kruger, K34(a), p 11
82. Kruger, claimant translation of transcript of oral evidence, 17 January 2005, Tauarau marae, Ruatoki (doc J48(a)), Part 2, p 2; Tamati Kruger, claimant transcript of oral evidence, 17 January 2005, Tauarau marae, Ruatoki (doc J48), Part 2, p 3; see also Kruger, brief of evidence (doc J29(b)), paras 10.3–10.7
83. Kruger, Summary of evidence concerning 'Ruatahuna: Te Manawa o te Ika' (doc D28), p 56
84. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), pp 248–249
85. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), pp 252, 259, 261, 267–269

8.5.2 What were the origins, character, and policies of Te Whitu Tekau?

Summary answer: *Te Whitu Tekau, the runanga of the 'Seventy' of Te Urewera, was established at a hui held in Ruatahuna in June 1872. The hui followed further discussions between Paerau, senior Urewera leaders, and McLean, the Minister for Native Affairs. It remains uncertain whether McLean expected the authority entrusted to Urewera chiefs to lead to the organisation of a runanga which developed a particular set of policies in the way it did; but he may not have been surprised. It certainly dovetailed with his own intention to pass laws to provide district self-government for Maori communities in the form of native councils. He specifically informed Parliament of his intention to apply such legislation in Te Urewera.*

In any case, Te Urewera chiefs at once communicated to the Government the establishment of Te Whitu Tekau and the shape of its policies; and the Government acknowledged this. Te Whitu Tekau was a remarkable political initiative which represented the attempt of the peoples of Te Urewera to regroup after a debilitating conflict, to conduct a relationship with the Crown from a position of political unity, and to conduct it on their terms by developing policies to safeguard their mana motuhake and their lands. After the first years, little has survived in written sources known to us of the discussions of the runanga. Nor is it quite clear how Te Whitu Tekau related to the komiti formed in Te Urewera during the late 1880s. Nevertheless, the existence of Te Whitu Tekau was taken for granted by the resident magistrate at Opotiki in 1889.

There was much consistency in the policies pursued by Te Urewera leaders from 1872 to at least 1893 with respect to: protection of the boundary of their district (which they called Te Rohe Potae); protesting against the confiscation; seeking unity in Te Urewera; forbidding roads inside Te Rohe Potae; and preventing leasing and sales of land, surveys, and the taking of land to the Native Land Court. Such policies were not always sustainable on the edges of the rohe, where settlers and the Crown were anxious to secure land. The hapu of those areas were faced at an early stage with weighing their economic options; and some communities did wish to engage. But the determination to protect the core Te Urewera lands was lasting, and in that the chiefs succeeded.

(1) *The origins of Te Whitu Tekau*

Te Whitu Tekau, in our view, was formed at a June 1872 hui, and its establishment was related to the peace agreement of 1871. It was also known as Te Hokowhitu (the Seventy, or the Union of Seventy).

Historians have not agreed on the timing of the formation of the new runanga. Battersby has stated with respect to the hui held in June 1872 that 'the evidence only supports the conclusion that the formation of [Te Whitu Tekau] *was in itself a topic for discussion at the hui*' (emphasis in original).[86] Subsequently he argued that 'it is safe to conclude that by 1874

86. Battersby, 'The Government, Te Kooti and Te Urewera' (doc B2), p193

Te Whitu Tekau existed, though did not appear from the outside to operate any differently to Maori runanga in other districts'.[87] Similarly, Angela Ballara dates the establishment of Te Whitu Tekau to 1874, although her discussion of this issue is only brief.[88]

'The seventy chiefs of Tuhoe' are referred to in the letter sent by Henare Kepa Te Ahuru and others to McLean in June 1872 as one of the subjects Te Ahikaiata discussed at the hui. There is no further detail about what was said with respect to the Seventy, or what actions were taken.[89] Battersby also quoted a letter in which Resident Magistrate Brabant reported to McLean that he had told Tamaikoha: 'I considered the Urewera's plan of appointing seventy chiefs a bad one, as they might have seventy different opinions.'[90] In Battersby's view, Brabant's comment suggests that the formation of Te Whitu Tekau was merely intended; it does not confirm that it had taken place.[91] We do not find this a compelling argument.

The letter sent by Te Whenuanui and other senior chiefs to the Government on 9 June 1872 stated: 'There are this day seventy chiefs. Their work is to carry on the work of this bird of peace and quietness.'[92] Furthermore, the previous day Tutakangahau had written to Ormond in Napier that:

> The word I am clear about which was decided at the meeting was the appointment of 70 chiefs of the Ureweras to conduct affairs which would benefit the tribe so that the Law might be clear.[93]

Along with this and other information about the meeting, Tutakangahau included one pound, partly so that he could have his words 'inserted in the paper'.[94] Accordingly, a slightly variant version of his letter was published in *Te Waka Maori o Niu Tirani* shortly afterwards:

> Kati ko te kupu kua marama i au mo tenei hui he whakatu i nga rangatira e 70 o te Urewera hai whakahaere i nga tikanga pai ki runga ki te iwi kia marama ai nga tikanga o te Ture. Tuarua, he tiaki tonu i tona rohe koi pa mai te kino me te hara hoki ki oku takiwa. Tuatoru, ko te kore kaore e tukua tetahi wahi o tona whenua mo te hoko ranei, mo te tuku

87. Battersby, 'The Government, Te Kooti and Te Urewera' (doc B2), p 196
88. Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from c1769 to c1945* (Wellington: Victoria University Press, 1998), pp 297–298
89. Henare Te Kepa Te Ahuru and others to Native Minister, 9 June 1872, AJHR, 1872, F-3A, p 29
90. Brabant to Native Minister, 4 July 1872, AJHR, 1872, F-3A, p 28 (Battersby, 'The Government, Te Kooti and Te Urewera' (doc B2), p 190)
91. Battersby, 'The Government, Te Kooti and Te Urewera' (doc B2), p 193
92. Te Whenuanui and others to Government, 9 June 1872, AJHR, 1872, F-3A, p 29
93. Tutakangahau to Ormond, 8 June 1872, AGG-HB 2/1, ArchivesNZ (Binney, comp, additional supporting papers to 'Encircled Lands' (doc A12(b), p 333)
94. Tutakangahau to Ormond, 8 June 1872, AGG-HB 2/1, ArchivesNZ (Binney, comp, additional supporting papers to 'Encircled Lands' (doc A12(b), p 334)

ranei ki te tangata, ki te Pakeha ranei. Tuawha, he kore kaore e pai ki Te Kooti Whakawa Whenua, ruri whenua, kereme ranei.[95]

The Tuawhenua research team translated this as:

> The communique from this hui is about the establishment of 70 leaders of the Urewera to govern with sound laws over the people, so that the aspects of law are clarified. Secondly, to protect its region against wrongdoing and offences in this area. Thirdly to prevent any of its lands being offered for sale or releasing to others or to Pakeha. Fourthly to ban the land court, surveying of land, and claiming of lands.[96]

The Native Department's translation at the time was more literal:

> The word I am clear about which was decided at the meeting was the appointment of 70 chiefs of the Urewera to conduct affairs which would benefit the tribe so that the Law might be clear. Secondly to keep a watch within their boundaries so no crime might be charged against them. Thirdly, no lands within their boundaries were to be sold or disposed of in any other way either to Natives or Europeans. Fourthly, an objection to the N[ative] L[and] Court and Surveys & forwarding of claims.[97]

These letters indicate clearly that Te Whitu Tekau was in fact formed at the June 1872 hui. Crown counsel effectively accepted an 1872 date by using it in a number of places in their closing submissions and, in particular, in their comment that the 'June 1872 hui is central in terms of the government and government officials learning about Te Whitu Tekau'.[98] The significance of this point is that if, as the claimants maintained, the establishment of Te Whitu Tekau followed immediately on from the peace agreement and discussions of late 1871 and early 1872, then the weight of evidence is stronger that its establishment was a consequence of that agreement, and thus more likely to have been anticipated and approved by the Government of the day. If, as the Crown maintained, Te Whitu Tekau was not formed until 1874, its link with the agreement of 1871 is obviously more tenuous.

Urewera leaders clearly wished to publicise their new body. Publication of Tutakangahau's letter at his request would also have served to assure them that the Government recognised their initiative. In 1873, Captain Charles Ferris of the Wairoa Armed Constabulary referred to the views of the council, the Hokowhitu, after a meeting held at Ruatahuna in

95. Na Tutakangahau ki Nepia ki a Te Omana, ara ki te Kawanatanga, Hune 8, 1872, in *Te Waka Maori o Nui Tirani*, 17 July 1872, vol 8, no 14, p 94. Although there are some slight variations between the letter as recorded in the files of the Agent of the General Government, Hawke's Bay, and as printed in *Te Waka Maori o Nui Tirani*, they do not appear to us to affect the substance or meaning of the letter.

96. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 270

97. Tutakangahau to Ormond, 8 June 1872, AGG-HB 2/1, ArchivesNZ (Binney, comp, additional supporting papers to 'Encircled Lands' (doc A12(b)), p 333)

98. Crown counsel, closing submissions (doc N20), topic 7, p 5

November.[99] And, as the Crown noted in its closing submissions, extensive meeting notes taken by Government officials at the 1874 hui are important in revealing how the policies of Te Whitu Tekau developed and were communicated.[100]

In light of what seems to us the established sequence of events – the making of peace at the end of 1871, and the formation of Te Whitu Tekau in June 1872 – we accept the argument of Binney, and of Tribunal-commissioned historian Anita Miles, that the one grew out of the other. Miles pointed to key phrases in the letters written to the chiefs by Ormond at the end of 1871: 'the management of the district in their own hands . . . the regulation of affairs . . . the direction of affairs . . . the management of people' spoke to them of the future after Te Kooti had been taken with their help. The chiefs, she suggested, formed Te Whitu Tekau in response 'to whatever they had taken from those letters'.[101] They met to consider how best to manage their affairs in the post-war era, and they reported what they had done to the Government. We accept that Te Whenuanui was referring to the origin of Te Whitu Tekau in the peace-making when he wrote in his letter of 9 June 1872 of the 70 chiefs carrying 'on the work of this bird of peace and quietness'.[102] This echoed the phrase he had used to McLean when he 'came in' in 1870: that he had 'come under the wings of the bird of peace'. Binney said this became a 'whakatauki underlying Te Whitu Tekau, the guardians of Te Urewera set up by Tuhoe when the fighting ended'.[103]

The question has also been raised whether McLean knew in advance that a broadly based runanga such as Te Whitu Tekau, which sought to establish the boundaries of Te Urewera, would be formed. Binney argued that it is likely he did.[104] It is certainly the case that the chiefs referred to prior discussions in Napier. The letter from Henare Kepa Te Ahuru and others, for instance, recorded that Tu Taituha said at the hui: 'I am clear about the plans arranged by Tuhoe, as I have spoken before Mr McLean's face at Napier about that law setting forth the boundaries of the land.'[105] The words attributed to Paerau at the hui by George Preece also imply some foreknowledge by McLean of what Urewera leaders were expecting to do:

> *Paerau* said: Let us have roads; let us lease, let us sell land; let me have the chiefs, as I am the man to stop all these things. It was spoken to Mr McLean at Napier.[106]

99. Binney, 'Encircled Lands', vol 1 (doc A12), p 287
100. Crown counsel, closing submissions (doc N20), topic 7, p 5
101. Anita Miles, cross-examined by Crown counsel, Mataatua Marae, Ruatahuna, 17 May 2004 (transcript 4.5, p 13)
102. Binney, 'Encircled Lands', vol 1 (doc A12), pp 231, 278
103. Binney, 'Encircled Lands', vol 1 (doc A12), p 231; Te Whenuanui to McLean, 27 September 1870, MS-Papers-0032–0694D, ATL
104. Binney, 'Encircled Lands', vol 1 (doc A12), p 272
105. Henare Te Kepa Te Ahuru and others to Native Minister, 9 June 1872, AJHR, 1872, F-3A, p 29
106. 'Proceedings of Meeting at Ruatahuna, Forwarded for the Information of the Civil Commissioner, Tauranga', 9 June 1872, AJHR, 1872, F-3A, p 30

Preece's interpretation of the korero is stilted and, in the absence of an account in Maori, the significance of what Paerau said is hard to determine. Binney has suggested that it is likely the published text amalgamates the speeches of two people; it is also possible that Paerau began by echoing, sardonically, the enthusiasm for roads of Paora Kingi, who had spoken immediately before him. What does seem clear, however, is that Paerau referred to direct discussions with McLean in Napier.[107]

In short, though we cannot say for certain that McLean knew in advance that a body such as Te Whitu Tekau would be established, it seems clear that there had been some discussions with him about the issues of concern to the chiefs. It is possible that McLean concluded from these discussions that a runanga would meet to consider the issues. Given his familiarity with Maori decision-making processes, that would hardly have come as a surprise to him. Historian Cathy Marr observed of Te Whitu Tekau as a vehicle for 'Maori control of their own districts': 'This seems to have been well within what McLean was prepared to accommodate at the time.'[108] As we noted above, McLean must have spoken with the Urewera leaders about his plan to give legal powers to native councils, which he followed up later in 1872 by sending them the relevant parliamentary debates. Even had he not known of their intention, it dovetailed with his own. During a speech to the House in 1873, he specified Te Urewera as a district in which he wanted to apply his Native Councils Bill.[109] The Crown put it to Professor Binney that there was nothing more than a 'coincidence of timing' between the establishment of Te Whitu Tekau and McLean's 1872 Bill, an argument she flatly denied.[110] We agree with Binney's conclusion:

> Given the fact that McLean was also preparing to present his Native Councils Bill to parliament in October 1872, which was intended to provide Maori districts with self-governing councils, and that he had the Urewera specifically in mind when he did so, it is not unreasonable to assume that the Urewera chiefs believed that they had his personal support for their union.[111]

We conclude also that Te Urewera leaders considered, as a result of the terms of the peace, that they had the approval of the Government to manage their own affairs, and that they moved very deliberately to a collective approach. 'All the boundaries of Te Urewera,' wrote Tutakangahau, 'are joined into one on the 7th June.'[112] The leaders had some earlier experience, as Binney pointed out, with a broadly based runanga, including both Whakatohea and

107. Binney, 'Encircled Lands', vol 1 (doc A12), p 281
108. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 9
109. Binney, 'Encircled Lands', vol 1 (doc A12), pp 272–273, 290
110. Judith Binney, 'Statement in response to questions of clarification filed by the Crown', 26 November 2003 (doc B1(c)) pp 24–25
111. Binney, 'Encircled Lands', vol 1 (doc A12), p 272
112. Tutakangahau to Ormond, 8 June 1872, AGG-HB 2/1, ArchivesNZ (Binney, comp, additional supporting papers to 'Encircled Lands' (doc A12(b)), p 333)

Urewera members at Opotiki, operating in 1861.[113] At the same time, as we saw in the 1871 letters to and from individual chiefs, there was an important emphasis on hapu or community autonomy. This foreshadowed one of the key themes in the history of Te Whitu Tekau: the collective action of Tuhoe and Ngati Whare depended on the reaching of consensus among the leaders of multi-hapu communities. There was an uneasy tension between these levels of collective action, as the claimants acknowledged.

In the early 1870s, Te Urewera leaders saw the opportunity to reclaim their lands, to protect them from the new threats that were perceived, and, as Tamati Kruger suggested, to 'bind Tuhoe together after the ravages of war'.[114] This was part of the reconstruction and cultural renewal necessary after the devastation of the years 1869 to 1871. 'The purpose of Te Whitu Tekau,' he explained, 'was to raise and uplift the spirit and heart of the tribe and to restore the health of Ngai Tuhoe after the wars.'[115] Its leaders were both 'frightened' of what seemed the 'inevitability' of land alienation to the Government and determined to prevent it. They were also determined to 'exercise governance responsibilities recognised by the compact with the government'.[116]

Ani Hare, in her evidence for Ngati Haka Patuheuheu, saw the need for common action to protect the tribal estate as the key reason for forming Te Whitu Tekau:

> According to the stories it was Te Whitu Tekau who sheltered all the lands of Te Urewera. They were the force determined to hold onto this. Ngati Haka Patuheuheu strongly supported Te Whitu Tekau so that Tuhoe would have the authority over the lands of Te Urewera, so that it would not fall into the hands of the Pakeha or someone else . . . Ngati Haka Patuheuheu held onto their authority and to administer their home and their region, but because of the strong support for Tuhoe, Ngati Haka Patuheuheu supported broad pan-Tuhoe issues, because of the love we had for Te Urewera and for our land.[117]

Thus, the origins of Te Whitu Tekau lie in the Tuhoe tradition of great tribal hui to decide matters of moment for the district; the Government's undertakings in the peace agreement of 1871; the willingness of McLean to recognise self-governing native councils at that time; and the determination of many Urewera communities to act in concert to govern themselves and protect their lands while preserving the autonomy of their hapu.

(2) *The character of Te Whitu Tekau*

We turn here to consider what kind of body Te Whitu Tekau was, the nature of its authority, and the extent to which the leaders of Te Urewera gave support to it. Te Whitu Tekau

113. Binney, 'Encircled Lands', vol 1 (doc A12), p 71
114. Kruger, summary of evidence concerning 'Ruatahuna: Te Manawa o te Ika' (doc D28), p 57
115. Tamati Kruger, claimant translation of transcript of oral evidence, Mataatua Marae, Ruatahuna, 17 May 2004 (doc D44(a)), Part 2, p 22
116. Kruger, summary of evidence concerning 'Ruatahuna: Te Manawa o te Ika' (doc D28), p 57
117. Simultaneous translation of oral evidence of Ani Hare, 11 December 2003, Tataiahape Marae, Waimana

has been described as a 'governing council for the Urewera',[118] the 'governing runanga' of Tuhoe, and its 'political union', expressing 'regional and political autonomy'.[119] It was not solely a Tuhoe body. The broader representativeness of the runanga is underlined by John Hutton and Klaus Neumann, historians for Ngati Whare, who described Te Whitu Tekau as primarily 'a coalition of hapu who resided in Te Urewera'.[120] The hapu were 'represented by their rangatira on a council termed Hokowhitu (the Seventy)'. Hutton and Neumann stated that the various hapu were responsible for their own regions, 'and particularly for the maintenance of their boundaries with neighbouring regions'.[121] (We return to this point below.) Binney also stressed that although the chiefs were to act through Te Whitu Tekau on the basis of collective agreement, the hapu retained autonomy at the local level; and the voice of each was heard in the collective, through their chief.[122]

Chiefs from Ngati Whare and Ngati Manawa were present at the 1872 hui. Miles observed that the more conciliatory group of chiefs who wrote to the Government from the June hui apparently included three Ngati Whare and Ngati Manawa leaders; a further signatory to this letter was 'possibly of Ngati Rangitihi and Ngati Manawa connections'.[123] The authority of the Ngati Whare chief, Hapurona Kohi, was acknowledged at the hui. As counsel for Ngati Whare put it, Kohi '"gave up" (to the collective) and then "held" responsibility (as passed back by the collective) for roads at the Te Whaiti entrance to the Urewera'.[124]

Ngati Whare seem to have been more inclined to remain within the policies of Te Whitu Tekau than Ngati Manawa, who had aligned themselves with the Crown during the war years.[125] Anaru Te Amo told us that Ngati Whare gave their allegiance to Te Whitu Tekau and supported its opposition to the Native Land Court.[126] Counsel for Ngati Whare, too, pointed to the tribe's support for Te Kooti, and the opening of the wharenui Eripitana in 1884, as evidence of their continued alignment with Te Whitu Tekau. As far as possible in their circumstances at Te Whaiti, Ngati Whare held to Te Whitu Tekau's policies of opposing surveys, the Native Land Court, and interference from outside authorities.[127] Counsel for Ngati Manawa adopted Peter McBurney's position that Ngati Manawa were not part of Te Whitu Tekau, and did not follow its policies with respect to land alienation.[128]

118. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 270
119. Miles, *Te Urewera* (doc A11), pp 193–194
120. Klaus Neumann and John Hutton, 'Ngati Whare and the Crown, 1880–1999', report commissioned by the Crown Forestry Rental Trust, 2001 (doc A28), p 71
121. Neumann and Hutton, 'Ngati Whare and the Crown' (doc A28), p 71
122. Binney, 'Encircled Lands', vol 1 (doc A12), p 283
123. Miles, *Te Urewera* (doc A11), p 199
124. Counsel for Ngati Whare, closing submissions (doc N16), p 41
125. Richard Boast, 'Ngati Whare and Te Whaiti-Nui-a-Toi: A History', report commissioned by the Crown Forestry Rental Trust on behalf of the claimants, 1999 (doc A27), p 78
126. Anaru Te Amo, brief of evidence, September 2004 (doc G34), p 11
127. Counsel for Ngati Whare, closing submissions (doc N16), pp 41–43
128. Counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), pp 20, 24

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The name Te Whitu Tekau itself tells us something about the purpose of the new body; it signified the sharing of authority. As Binney pointed out, the number 70 was probably based on scriptural texts, and was adopted 'as a symbolically appropriate number rather than as a literal one'.[129] The number 70 was used in the Old Testament for a group of elders of the people of Israel, most specifically in Numbers, chapter 11, where it is recounted that God instructed Moses to gather 70 elders who might bear the burden of leadership with him, and 'took of the spirit that was upon [Moses] and gave it unto the seventy elders'. Binney suggested that the chiefs may have drawn an analogy with the lifting of the spirit from Te Kooti and the sharing of his burden of leadership.[130] Similarly symbolic was the name Hokowhitu, also used for the new runanga. In Binney's evidence, 70 (seven times ten) is the number Maori use to depict 'a full complement of men' ('hoko-whitu').[131]

It is not surprising, then, that a number of Urewera leaders emerged as spokesmen for Te Whitu Tekau: they included Tutakangahau, Te Whenuanui, Paerau, Haunui, Erueti Tamaikoha, Tu, Hetaraka Te Wakaunua, Te Pukenui, Te Makarini, and Te Ahikaiata – who was described as the secretary of Te Whitu Tekau in its early years.[132] Tamaikoha was identified by Land Purchase Agent Wilson in 1874 as 'the head of the Seventy'.[133] Te Makarini was said by Numia Kereru, in 1897, to have been appointed as 'the leader' of Te Whitu Tekau in 1872.[134] Yet, it is clear from the correspondence to which we have already referred that a number of chiefs had important roles in the early years of Te Whitu Tekau. Hetaraka Te Wakaunua, Binney considered, was the 'organising secretary' of Te Whitu Tekau for most of the period when trouble occurred over the Kuhawaea, Waiohau, and Tahora 2 lands (see ch 10). She noted, however, that on a later occasion, when a petition relating to the Ruatoki survey was prepared in February 1893, 'Te Ahikaiata . . . signed as chairman (presumably of Te Whitu Tekau)', replacing Hetaraka, who had previously been 'its most frequent spokesman' but who opposed this petition.[135] Later again (1894), she stated, Te Wharekotua acted as 'secretary and spokesman for Tuhoe's Union, sometimes writing in concert with Te Whenuanui II, Tuhoe's senior chief'.[136]

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129. Binney, 'Encircled Lands', vol 1 (doc A12), p 12, p 71

130. Binney, 'Encircled Lands', vol 1 (doc A12), p 278; Numbers 11:16–17, 24–25. There is a further reference to the 70 elders in Exodus 24: 1, 9–10.

131. Binney, 'Encircled Lands', vol 1 (doc A12), p 71. Footnote 113 on page 71 cites Bruce Biggs in favour of the statement that 'Hokowhitu' is a 'canonical' or optimal number for a full complement of fighting men; see: Bruce Biggs, 'Extraordinary Eight', in *Pacific Island Languages: Essays in Honour of G B Milner*, edited by Jeremy H C S Davidson (Honolulu: University of Hawaii Press, 1990), p 35.

132. HW Brabant referred to Te Ahikaiata as the Secretary of Te Whitu Tekau in his 1874 report – see Binney, 'Encircled Lands', vol 1 (doc A12), p 291

133. Wilson to Native Minister, 1 June 1874, p 4, MA 1/1874/230, ArchivesNZ (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), p 45)

134. Numia Kereru, 28 April 1897, Native Land Court, Whakatane, minute book 5, fol 158 (quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 113)

135. Binney, 'Encircled Lands', vol 2 (doc A15), pp 123, 233

136. Binney, 'Encircled Lands', vol 2 (doc A15), pp 150, 233

It seems, in fact, that Te Whitu Tekau operated along the lines of a traditional runanga, rather than like a more formal komiti of the period, which usually had a chairman, officials, elections, minutes, and an official seal, as in the case of Te Komiti Nui o Rotorua – which also passed by-laws.[137]

We note that the early base of Te Whitu Tekau was at Ruatahuna – where both the 1872 and 1874 hui that were of critical importance to its development were held.[138] Ruatahuna remained the centre for Te Whitu Tekau; Tamati Kruger stated that their meetings were held there over a number of years.[139] Brabant commented after the 1874 hui that 'Meetings of the "Seventy" were held every day while I was at Ruatahuna', though he was not asked to attend, and received no official report of them. This is a reminder that the absence of information about Te Whitu Tekau in official sources is not necessarily proof that the runanga had gone into abeyance.[140]

Te Whitu Tekau also flew flags at its hui. In 1874, two flags were flying at Ruatahuna. One was a red ensign, which had for many years been the flag usually flown on marae. The other displayed, as Brabant put it at the time, 'the bust of a black man on a red ground which was intended for the flag of the *Whitu Tekau* (seventy)'.[141] Tamati Kruger stated that the flag was designed by Te Whitu Tekau; a replica of it is in Te Totara wharenui, painted up on the heke (rafter). The 'black man,' he said, 'represents te tangata whenua o konei [here]'.[142]

Later, the centre of power within Tuhoe moved to Ruatoki. This move resulted from Te Kooti's visit to Te Urewera in 1884 to open the wharenui Eripitana, located at Te Murumurunga in the vicinity of Te Whaiti. Te Kooti urged the people to care for their land and not to part with it. As Akuhata Te Kaha later explained, 'Te Kooti said let the Urewera be one people and one land.' The people interpreted this as an instruction to 'live together in one place'. There was a deliberate migration back to Ruatoki, because it had been chosen as the place 'not to be given up to the Pakeha'.[143] The Tuawhenua researchers stated that:

> With this migration went key Tuhoe leaders such as Kereru, Numia (Kereru's brother), Te Makarini, Te Ahikaiata and Hetaraka Te Wakaunua. With this move also went a shift in power. It was these chiefs of Ruatoki, along with Tamaikoha and Rakuraku at Waimana

137. Waitangi Tribunal, *He Maunga Rongo: Report on the Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 1, p 143

138. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 281

139. Ibid, pp 270, 275

140. H W Brabant, 'Notes of Speeches Made at the Native Meeting at Ruatahuna, March 23rd and 24th, 1874', 2 April 1874, AJHR, 1874, G-1A, p 5

141. H W Brabant, 'Report by H W Brabant, Esq, RM, Opotiki', 1 April 1874, AJHR, 1874, G-1A, p 2. There is a reproduction of the flag (or, Binney suggests, the Te Whaiti version of it) on plate 11a of Judith Binney, *Redemption Songs: A Life of Te Kooti Arikirangi Te Turuki*, (Auckland: Auckland University Press and Bridget Williams Books, 1995).

142. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 270

143. Akuhata Te Kaha, Ruatoki appellate hearing, 6 May 1897, Native Land Court, Whakatane, minute book 5, fols 190–194 (cited in Binney, 'Encircled Lands', vol 2 (doc A15), pp 110–111)

and Tutakangahau at Maungapohatu, who began to represent 'Tuhoe katoa' more and more often. By the late 1880s, Te Whenuanui was aging and ailing.[144]

Whether this shift was connected with the less visible use of the name Te Whitu Tekau – at least to outsiders – we cannot say. What we do know is that in 1889 Robert Bush, resident magistrate in the Opotiki district, recorded in a letter to the Native Department: 'The Urewera have always had a tribal Committee termed the "Seventy". This Committee has always opposed the making of roads, surveys, and prospecting.'[145]

The clear implication is that Te Whitu Tekau continued to meet and to maintain its policies, and that Bush was aware of its meetings. His letter was written six months after two senior Tuhoe leaders, Rakuraku Rehua and Tutakangahau, signalled to the Government the election of a committee, the 'great committee of Tuhoe Potiki' (te komiti nui o Tuhoe Potiki), to conduct their own affairs. (We discuss this komiti further below.)

Though the relationship of this komiti to Te Whitu Tekau is not entirely clear, the main point is that the policies established by Te Whitu Tekau were of lasting influence. This point was accepted by Crown counsel in closing submissions.[146] That is not to say, however, that the chiefs were unanimous in support of them. It is hardly surprising that there were divergent views within a tribal body like Te Whitu Tekau. As counsel for Ngati Whare put it:

> It is not unusual in our mind that conflict, disagreement, or divergence in opinion is evident in the historical archive; that could be described as the natural state for any community anywhere, and indeed any process of government. It also reflects the diverse genealogical and community rights in land that were encompassed in Te Whitu Tekau. Such instances of divergence do not, however, in our view, detract from the existence of Te Whitu Tekau as a tangible vehicle of collective action among the hapu of Te Urewera including Tuhoe and Ngati Whare.[147]

It seems to us that there was a remarkably consistent determination to maintain the policies adopted by Te Whitu Tekau, even if growing interaction between the Government, colonists, and Urewera communities on and beyond the boundaries increasingly led to some communities revising their positions. The earlier policies, based on a determination to protect the people and the land, remained the touchstone. We turn now to discuss those policies in more detail.

(3) *The policies of Te Whitu Tekau*

The broad policies of Te Whitu Tekau, as we have seen, were first set out in a series of letters sent from the June 1872 hui to the Government, each bearing multiple signatures. Binney

144. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), pp 297–298
145. Bush to ND, 4 April 1889, MA 23/13B (cited in Binney, 'Encircled Lands', vol 2 (doc A15), p 7)
146. Crown counsel, closing submissions (doc N20), Topic 7, p 17
147. Counsel for Ngati Whare, closing submissions (doc N16), p 40

Te Rohe Potae o Tuhoe, 1872

My district commences at Pukenui, to Pupirake, to Ahirau, to Huorangi, Tokitoki, Motuotu, Toretore, Haumiaroa, Taurukotare, Taumatapatiti, Tipare, Kawakawa, Te Karaka, Ohine te Rarakau, Kiwinui, Te Tirina, Omata-roa, Te Mapara, thence following the Rangi Taiki River to Otipa, Whaka-ngutu-toroa, Tuku-toromiro, Te Hokowhitu, Te Whakamatau, Okahu, Oniwarima, Te Houhi, Te Taupaki, Te Rautahuri, Ngahuinga, Te Arawata, Pohotea, Makihoi, Te Ahianatane, Ngatapa, Te Harau-ngamoa, Kahotea, Tukurangi, Te Koarere, Te Ahu-o-te-Atua, Arewa, Ruakituri, Puketoromiro, Mokomirarangi, Maungatapere, Oterangi-pu, and on to Puke-nui-o-raho, where this ends.

Te Whenuanui, Paerau, Haunui, Erueti Tamaikoha, Tu, Hetaraka, Te Pukenui, Te Makarini, Ahikaiata, and 'all the tribe' to the Government, Kohimarama, Ruatahuna, 9 June 1872

stated that the Maori originals of these letters have not survived. The first, from a group of senior Urewera chiefs, dealt with the general business of the hui. From this letter it is clear that Urewera leaders were concerned with conveying to the Crown their intention in the new post-war era to conduct cohesive policies within their rohe (which they set out), including resistance to roads, and to leasing and sale of land. On 9 June, Te Whenuanui, Paerau, Haunui, Erueti Tamaikoha, Tu, Hetaraka Te Wakaunua, Te Pukenui, Te Makarini, Te Ahikaiata, and 'all the tribe' sent a letter to the Government:

> Salutations to you – this is our word to you. The meeting of Tuhoe (Urewera) has taken place at Ruatahuna on the 9th June. The first thing decided were the boundaries of the land [set out in the box] . . .
>
> 2nd. Was the uniting of the tribe – that their words should be one and that they should have one canoe, Matatua.
>
> 3rd. Was the apportionment of chiefs among Tuhoe. There are this day seventy chiefs. Their work is to carry on the work of this bird of peace and quietness.
>
> 4th. The things that were rejected from these boundaries are roads, leasing and selling land.[148]

A further letter addressed to McLean, Ormond, and the Government, dated the same day, and signed by a very similar group, related to the control of roads. After discussion:

> The Urewera requested that the roads should be given over to them, and they were given up by Hapurona, Paora Kingi, Te Kepa Te Ahuru, from Te Whaiti, Ruatoki, Te Waimana, and to Waikare Moana.

148. Te Whenuanui and others to Government, 9 June 1872, AJHR, 1872, F-3A, p 29

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> Te Makarini is to have the roads at Waikare Moana, Hapurona and all the others the road at Ruatoki and Te Whaiti; Tamaikoha to have the road at Waimana, so that now the Urewera have all the roads in their own hands at this present time.[149]

A third general letter about the hui, which also highlighted discussion of roads, was addressed to McLean on the same day by chiefs from the western borders, who indicated a more conciliatory approach towards the Government:

> Salutations to you. We have been to the Urewera meeting, and have heard the points decided on by them. The first is the boundaries of the land . . . [list of boundaries]
>
> Te Ahikaiata stood up and talked about the boundaries; 2nd, about the canoe Matatua; and 3rd, about the seventy chiefs of Tuhoe. He ended, and Te Hiko spoke. He asked the Urewera what they desired to be brought within their boundaries. Te Makarini got up and answered Te Hiko's question, which was that there were two things which they liked to be brought within their boundaries, that is, Orderlies and Militia; but roads, and leasing and selling lands they would not have on their boundaries. Then Te Kepa Te Ahuru spoke, saying: My word for the chiefs of Tuhoe to listen to is that the roads in these boundaries would be broken up by me; but my concluding word to you is – I will send our dispute to the Government, to Mr Ormond. Tu Tatuha then got up and said: I am clear about the plans arranged by Tuhoe, as I have spoken before Mr McLean's face at Napier about that law setting forth the boundaries of the land. All.
>
> Henare Kepa Te Ahuru
> Paora Kingi
> Arama Karaka
> Tuaia
> Hapurona
> Te Meihana
> Mohi.
>
> The conclusion of our words were that the roads were to go on. This is all the information at present. If any serious troubles arises after that it will be sent on to you. All.
>
> Henare Kepa Te Ahuru.[150]

We discuss these statements further below.

149. Te Makarini and others to Native Minister, 9 June 1872, AJHR, 1872, F-3A, pp 28–29
150. Henare Kepa Te Ahuru and others to Native Minister, 9 June 1872, AJHR, 1872, F-3A, p 29

(4) *Setting the boundary: Te Rohe Potae, and inclusion of the confiscated lands*

Among the first concerns of Te Whitu Tekau was the setting of a boundary for Te Urewera.[151] In 1872 the boundary was of immediate importance to indicate to the Government the lands over which the chiefs expected to exercise their authority. Binney described the names given by the chiefs as 'key boundary markers, carrying ancestral histories'.[152] The Tuawhenua claimants explained to us the importance of Te Rohe Potae, the name given to the heartland of Te Urewera by Te Kooti. In the words of Rakaua Teka of Ruatahuna:

> I mea ra a Te Kooti, Tuhoe te rohe potae wehea ra ano e ia te rohe potae.
> Te Kooti said that Tuhoe is a district of special status, he defined a region as such.[153]

Tamati Kruger explained the significance of Te Rohe Potae in this way:

> Te rohe potae applies to the designation of Tuhoe's traditional territories over which Tuhoe mana applies. From this area others are excluded or only welcomed on Tuhoe's terms. The word 'potae' means special state or condition . . . Te rohe potae was about placing territories under Tuhoe mana and about unifying the hapu of those territories.[154]

Initially, Te Whitu Tekau focused on uniting Tuhoe, but by 1874 they were looking outwards towards a possible Mataatua union against uncontrolled land alienation.

We need to note three significant points about the rohe potae as set out (and defended) by Te Whitu Tekau from 1872 onwards. First, it should not be thought of as a 'district' in English terms. To Tuhoe, the statement of their boundaries was a statement of their intent to protect and retain their mana motuhake. The Crown accepted it as such in our hearings. From the 1874 reports of Locke and Brabant, the Crown concluded: 'it can be inferred that Urewera Maori seemed to assert and seek to maintain mana motuhake within certain specific boundaries'.[155]

Our second point about the boundaries of Te Rohe Potae, as set out by Te Whitu Tekau in 1872, is that they included the land confiscated from Tuhoe in 1866 (see ch 4). This is important because Te Whitu Tekau sought the return of that land. The hope that the confiscation line would be altered and that land would be returned to the peoples of Te Urewera was constantly expressed at hui associated with Te Whitu Tekau, and in other interactions between the Government and various Urewera leaders. While the two letters from the June 1872 hui describing the boundary have different starting points, and while some of

151. The term 'Rohe Potae' was sometimes used for Te Urewera from the 1860s. Binney states that this name 'probably originally derived from the confiscation line which defined the northern border of Tuhoe's lands, in the same manner that Ngati Maniapoto's lands were defined and named 'Rohe Potae' after the 1864 confiscation there': Binney, 'Encircled Lands', vol 2 (doc A15), p 2.

152. Binney, 'Encircled Lands', vol 1 (doc A12), p 273

153. Cited in Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), pp 271–272

154. Kruger, summary of evidence concerning 'Ruatahuna: Te Manawa o te Ika' (doc D28), p 58

155. Crown counsel, closing submissions (N20), Topic 7, p 5

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Ko Ranginui

Te raupatu, taku whenua toka, te raupatu taku whenua tangata
Ko Te Kaharoa ko Pukenui-o-Raho, Waiputatawa
Kokou-matua tomokia te whare Te Whitu Tekau
Whakaea i te hahani o te raupatu
Te urunga tu, te urunga tapu, te mauri tu
Te mauri tapu, Te Whitu Tekau . . .[1]

The following explanation (with some adaptation by Brenda Tahi) was given by Kupai McGarvey to Taiarahia Black in 1981:

> And the lands were taken, the sustenance and significant sites of the people including Te Kaharoa, Pukenui-o-raho, Waiputatawa. The fold of the Te Whitu Tekau exists to repay the insult of confiscation as a central, sacred and vibrant force.[2]

Tamaroa Nikora provided Judith Binney with the following translation:

The confiscation of my own land, the confiscation of land of my people,
From Te Kaharoa, Pukenui-o-Raho, Waiputatawa,
Anointed elders, enter the house of Te Whitu Tekau
To rebut the false allegations for the seizure,
The refuge, the sacred pillow, the life force,
The sacred life force, Te Whitu Tekau . . .[3]

1. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 294
2. Ibid, p 294
3. Binney, 'Encircled Lands', vol 2 (doc A15), p 6

the places mentioned are difficult to identify with certainty today, Binney pointed out that both groups of chiefs included the confiscated land within the boundaries, reflecting their ancestral claims.[156]

A Tuhoe patere, 'Ko Ranginui', recalled the role of Te Whitu Tekau in respect of the confiscation.[157] We were given various translations, but the main point is that, because of the mana of Te Whitu Tekau, it was described as a central and 'vibrant force' in combating

156. Binney, 'Encircled Lands', vol 1 (doc A12), pp 273–277. For a map of Te Rohe Potae o Tuhoe 1872, see Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 273.

157. Taiarahia Black, 'Kaore Te Aroha Te Hua o Te Wananga', PhD thesis, Massey University, quoted in Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 294

'te raupatu'.[158] Binney described this patere as probably dating to the late 1880s, although Tamati Kruger considered, on the basis of its style and language, that this is likely to be too early a date.[159] At any rate, it indicates that there was an ongoing understanding in Te Urewera that a key policy of Te Whitu Tekau was to stand against the confiscation and, if possible, secure the return of their lands that had been taken.

The 1870 settlement of the confiscated lands issue in Hawke's Bay, involving the return of land to Maori, might have contributed to a widespread rumour that the Government would return other confiscated lands.[160] Tamaikoha, a signatory to two of the June 1872 letters quoted above, had admitted to Brabant soon afterwards that including confiscated land in the boundaries was a way of testing what they had heard about the Government returning their land, but that 'it had been agreed that if the Government refused that ended the matter'. Brabant told Tamaikoha that persistence in raising the issue would lead to trouble.[161] Nevertheless, Tutakangahau inquired in September 1872 whether the Tuhoe confiscated lands were to be returned, while Te Makarini, a further signatory, requested the return of eastern Bay of Plenty confiscated lands in December 1872. Neither request met with an encouraging response.[162]

The issue was set down as a key one for discussion at the 1874 hui, and there were different views as to what strategy to pursue. Some chiefs were moving to acceptance of the inevitable. Tamaikoha, Hemi Kakitu, and Rakuraku had taken responsibility for sections of the dray road from Ohiwa to the boundary at Waimana; Tamaikoha observed that in practice, if not in principle, he had accepted the confiscation boundary. As part of that acceptance, however, he and others expected that the Government would grant them sections of confiscated land, and that Te Whitu Tekau might become guardians of land that had been granted to Ngati Awa and Ngati Pukeko. (Hemi Kakitu and Kaperiere Tamaiarohe of Ngati Pukeko, however, objected at this hui to Te Whitu Tekau asserting control over their sections). Other Te Whitu Tekau leaders wanted the confiscation line moved. Kereru announced his intention of using the ture (law) to get the land back; he would succeed because the Government had wrongly taken the land: 'The Government said they took the land for our fault; we never committed any fault.'[163]

In March 1875, at the hui held to open the new Mataatua meeting house of Ngati Awa, Urewera chiefs again raised the question of return of the confiscated land. McLean insisted once more that the line would not change.[164] As we have seen in chapter 4, the issue of

158. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 295
159. On the probable date of the patere, see Binney, 'Encircled Lands', vol 2 (doc A15), p 6; Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 295 fn 408.
160. Battersby, 'The Government, Te Kooti and Te Urewera' (doc B2), p 185
161. Brabant to Native Minister, 4 July 1872, AJHR, 1872, F-3A, p 28
162. Binney, 'Encircled Lands', vol 1 (doc A12), p 277
163. H W Brabant, 'Notes of Speeches Made at the Native Meeting at Ruatahuna, March 23rd and 24th, 1874', 2 April 1874, AJHR, 1874, G-1A, pp 4–5; see also Binney, 'Encircled Lands', vol 1 (doc A12), pp 301–302
164. Binney, 'Encircled Lands', vol 1 (doc A12), pp 326–328

the confiscated lands became a festering sore in the relationship between the peoples of Te Urewera and the Crown.

A third significant point about the 1872 boundaries, as set out by Te Whitu Tekau, is that they included land claimed by several iwi. As Tamaikoha put it in 1874:

> I made the peace which causes all the island to be at peace now [the rongopai of 1870]. I made my boundary (the Urewera boundary, made by themselves in 1872). It is not all mine; it belongs to several tribes, but it is for me to look after it. The *Whitu Tekau* were appointed to look after it.[165]

One of the Crown's main arguments in its submissions was that it could not recognise or deal with the authority of Te Whitu Tekau in instances where the 'community of owners' either was not represented on the council or had rejected the consensus of the wider group.[166]

(5) *Uniting the iwi, and the waka*

A second matter of great concern to Te Whitu Tekau was working for unity. Clearly this was important because the protective policies of Te Whitu Tekau would have more chance of success if all adhered to them. Te Whenuanui and the other chiefs told the Government in 1872 that the second matter decided at the June hui was 'the uniting of the tribe – that their words should be one and that they should have one canoe, Matatua.'[167] Henare Kepa Te Ahuru also mentioned that Te Ahikaiata, who would later be the secretary of Te Whitu Tekau, talked about 'the canoe Matatua.'[168] In fact, Tamati Kruger stated that Ngati Awa and Whakatohea were invited to this first Te Whitu Tekau hui but chose not to attend.[169] The focus at the 1872 hui, therefore, was on 'uniting of the tribe', rather than on the wider grouping.

There was some discussion of a wider Mataatua union at the 1874 hui, and it is clear that representatives attended from Ngati Awa, Ngati Pukeko, and Whakatohea, as well as Ngai Tai, Te Arawa, the East Coast, and eastern Taupo.[170] Kereru summed up his vision of unity thus: 'Let Matatua be one, and let us join our lands to keep out rents and roads. Give me the land, not for myself, but to look after.'[171] The kinship links between Tuhoe and Ngati

165. HW Brabant, 'Notes of Speeches Made at the Native Meeting at Ruatahuna, March 23rd and 24th, 1874', 2 April 1874, AJHR, 1874, G-1A, p 4
166. Crown counsel, closing submissions, (doc N20), topic 7, pp 5–8, 11–12
167. Te Whenuanui and others to Government, 9 June 1872, AJHR 1872, F-3A, p 29
168. Henare Kepa Te Ahuru and others to Native Minister, AJHR 1872, F-3A, p 29. On Te Ahikaiata as secretary to Te Whitu Tekau, see Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 275.
169. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), pp 274–275
170. HW Brabant, 'Report by HW Brabant, Esq, RM, Opotiki', 1 April 1874, AJHR, 1874, G-1A, p 1; Binney, 'Encircled Lands', vol 1 (doc A12), p 305
171. HW Brabant, 'Notes of Speeches Made at the Native Meeting at Ruatahuna, March 23rd and 24th, 1874', 2 April 1874, AJHR, G-1A, p 4

Awa were obviously of importance to both. The Tuawhenua researchers note that at the 1875 Ngati Awa hui to open the new whare Mataatua, Te Whenuanui and other Tuhoe leaders were invited to sit 'on the pae for the speechmaking' in an acknowledgement of their link with Mataatua.[172] We note that Tuhoe carvers had been involved in work on the great new wharenui; this would doubtless also have been in the minds of Tuhoe leaders during this period.

It does not seem, however, that the attempt to create a waka-based political grouping met with success. Ngati Awa, Ngati Pukeko, and Whakatohea rejected the invitation to join Te Whitu Tekau. Herbert Brabant, the resident magistrate who attended the Ruatahuna hui in 1874 for the Government, understood that a 'land league' was proposed. His wording is reminiscent of that used by officials in describing the Kingitanga (and Taranaki leaders' initiatives) in the 1850s and 1860s. He described its purpose as being 'to forbid the sale and leasing of lands, roads, etc'.[173] From the speeches as recorded at the hui, this appears to be an accurate assessment.

As will be clear from chapter 2, there had been a long and complicated history of conflict and peace-making between Tuhoe and Ngati Awa. Recent events, especially with regard to the award of reserves in the confiscated lands, had caused further tensions, especially with Ngati Pukeko (see ch 5). This was one of the main stumbling blocks to 'union'. The Ngati Awa leader, Wepiha Apanui, maintained that Maori authority could not be reasserted over land in Crown title, even if it had been granted back to Maori. Kereru, on the other hand, argued that if it was in the hands of Ngati Awa, then it could be governed by Te Whitu Tekau, no matter what its title. Brabant told the hui that the Government would not permit Ngati Awa and Ngati Pukeko to hand over their Crown-titled lands to Te Whitu Tekau 'to take care of', although the iwi could do as they wished with their customary lands. In any case, Ngati Awa and Ngati Pukeko leaders refused to join Te Whitu Tekau or to place their lands under its protection.[174] Kaperiere of Ngati Pukeko said: 'We prefer the Government to the *Whitu Tekau* as guardians for our land.'[175]

The Whakatohea spokesman, Piahana Tiwai, said that his tribe was prepared to 'join their land to the Ureweras, to keep out leases, roads, etc.' He also revealed that there had been prior negotiations between the iwi; Tamaikoha had visited Opape and raised the issue with Whakatohea leaders there. According to Tiwai, Whakatohea leader Te Awanui had agreed with Tamaikoha to join Te Whitu Tekau, but Brabant later confirmed this was not correct.[176] The coastal iwi preferred not to join in a political union with the peoples of Te Urewera at this time. According to the Tuhoe understanding of this decision, it was based on fear that

172. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 288
173. H W Brabant, 'Report by H W Brabant, Esq, RM, Opotiki', 1 April 1874, AJHR, G-1A, p 3
174. H W Brabant, 'Notes of Speeches Made at the Native Meeting at Ruatahuna, March 23rd and 24th, 1874', 2 April 1874, AJHR, G-1A, pp 4–5
175. Ibid, p 4
176. Ibid

the Government would target and attack this kind of political union, as it had done with the Kingitanga. Nonetheless, Tamati Kruger maintained that the borders of Te Rohe Potae were not affected by their decision not to join, as Te Rohe Potae represented the fullest extent of Tuhoe claims (and not Mataatua claims).[177]

According to Brabant, Te Whitu Tekau leaders themselves decided not to proceed with a wider union at the end of the hui.[178] The consensus was summed up by Hira Tauaki (described as 'one of the "Seventy"; a sensible, moderate man and a chief of influence'), who stated: 'It is clear to everyone that we are divided. As Tuhoe cannot agree, I cannot ask others to join us.'[179] This disagreement was focused on leasing and the question of whether to accept the finality of confiscation; otherwise, as Brabant said, the hui was 'almost unanimous in their wish to keep roads, Magistrates, and other Government measures out of their boundaries.'[180]

By the late 1880s, as we shall see below, the issue surfaced again in the context of the Government's provision for committees; by then, however, there seems to have been little support among Urewera chiefs for a wider Mataatua organisation.

(6) *Protecting Te Urewera lands: policy on roads, surveys, sale and lease of land, and the Native Land Court*

The policies of Te Whitu Tekau were first and foremost aimed at protecting the remaining lands of the peoples of Te Urewera. From the letters of the leaders cited above, it is clear that their main concerns at the outset were to keep roads, surveys, and the leasing and sale of land outside their boundaries. These remained key policies for a quarter century. Tama Nikora explained that they are remembered on Tuhoe marae as: '"Kaua te ruri, kaua te rori, kaua te rihi, kaua te hoko", Irakoihu Manihera being the last kaumatua to have been heard by me to say so.'[181]

Roads were a difficult issue. This is not surprising, given their utility, and for some chiefs the advantages of roads outweighed the risks. Hapurona Kohi and Ngati Whare, for example, remained in favour of roads after their release from Te Putere in 1872 (see ch5). Others were more cautious, fearing for their ability to protect their boundaries if access to their land was too easy. Their first attempt to deal with this dilemma was to secure general agreement that roads were to be controlled. Those in whose areas roads were located should symbolically hand them to 'the Urewera', who would assign guardianship of them:

177. D28, pp 58–59; see also B4(a), pp 274–275
178. H W Brabant, 'Report by H W Brabant, Esq, RM, Opotiki', 1 April 1874, AJHR, G-1A, p 3
179. H W Brabant, 'Notes of Speeches Made at the Native Meeting at Ruatahuna, March 23rd and 24th, 1874', 2 April 1874, AJHR, G-1A, p 5
180. H W Brabant, 'Notes of Speeches Made at the Native Meeting at Ruatahuna, March 23rd and 24th, 1874', 2 April 1874, AJHR, G-1A, p 3
181. Tamaroa Nikora, 'Statement of Evidence of Tamaroa Raymond Nikora – Ko Wai a Tuhoe?', 2003 (doc B11), p 16. We translate this as: 'No surveys, no roads, no leasing, no land sales'.

> Te Makarini is to have the roads at Waikare Moana, Hapurona and all the others the road at Ruatoki and Te Whaiti; Tamaikoha to have the road at Waimana, so that now the Urewera have all the roads in their own hands at the present time.[182]

The communication of this decision to the Government, it seems to us, was to indicate that the building of roads was not a matter for Government to pursue without consultation with the tribal body. Various chiefs had been assigned responsibility in their own areas where roads were already built, but oversight of policy now rested with that body.

It is true that some dissented from this position during the period in which Te Whitu Tekau was active, beginning with chiefs who were more conciliatory to the Government. The postscript in their 9 June 1872 letter to McLean stated that the 'conclusion of our words were that the roads were to go on'.[183] In the later months of 1872, controversy over roads continued, and further discussions were held within Te Urewera in October, November, and December 1872. Te Whenuanui and Paerau, Binney has pointed out, reconfirmed to Captain Ferris in October 1872 that no more roads should be built in their territory:

> We are not agreeable to your word; the good is to make roads in your own territory, as for our own territory it rests with us, the Government have nothing to do with it. Our word is, let the Government gently carry about the law, leave Waikaremoana to us, as well as all our territory, Te Whaiti, Ruatoki, Waimana and Ruatahuna.
>
> Kaore matou i pai ki to korero; te pai karia te rori ki tou takiwa ano, ko toku takiwa ano kei ahau ano te tikanga, kaore he tikanga i a korua ko te Kawanatanga. Ta maua kupu ki a koe, kia ta whakahaere korua ko te Ka[wa]natanga i te tikanga o te ture, waiho Waikaremoana kei a maua te tikanga otira moku takiwa katoa, mo Te Whaiti, mo Ruatoki, mo Te Waimana, mo Ru[a]tahuna.[184]

This is a clear statement of the bounds between the authority of the Government and the authority of Tuhoe; the two chiefs on this occasion signed for 'all Tuhoe' ('na Tuhoe katoa').[185] There is a sense, too, in which this was a test for the Crown – what would 'the law' do in response to Te Whitu Tekau's decision? The chiefs wrote:

> Our word is let the Government gently carry about the law . . . We are not agreeable for the road to enter these places. Make roads in your own territory, and the law will look at our talk (decision) now.[186]

182. Te Makarini and others to Native Minister, 9 June 1872, AJHR, 1872, F-3A, p 29
183. Henare Te Kepa Te Ahuru and others to Native Minister, 9 June 1872, AJHR, 1872, F-3A, p 29
184. Te Whenuanui, Paerau, and all Tuhoe to Captain Ferris, 23 October 1872 (Binney, comp, additional supporting papers to 'Encircled Lands' (doc A12(b)), pp 288–290)
185. Te Whenuanui and Paerau to Ferris, 23 October 1872, in Maori (pp 288–289) and English (p 290) (Binney, comp, additional supporting papers to 'Encircled Lands', (doc A12(b)))
186. Te Whenuanui and Paerau to Ferris, 23 October 1872, Binney, comp, additional supporting papers to 'Encircled Lands', (doc A12(b)), p 290

8.5.2

Yet, Ngati Huri of Maungapohatu made it clear to the Government in September and November that they were prepared to agree to roads: one from Ruatahuna to Te Whaiti (thence to Whakatane), and another from Maungapohatu to Opotiki. This led to further hui in November and December 1872, where views both for and against roads were expressed.[187] The number of hui indicates not only the importance of the issue, and of collective discussion of it, but also the difficulty of securing the agreement of all the hapu. Professor Wharehuia Milroy told us of a tribal record of the November hui, at which Te Makarini expressed his desire that roads should be allowed in Te Urewera. It will be recalled that Te Makarini had been entrusted with the responsibility of keeping roads out of Waikaremoana. In response to his position, Tamaikoha and Te Whenuanui both suggested that he give up oversight of Waikaremoana and come to live at Ruatahuna – an option he clearly did not favour.[188] Ultimately, the decision of these hui remained against taking the risk of permitting roads in Te Rohe Potae.

At the next major Te Whitu Tekau hui, in March 1874, Te Ahikaiata gave as the fourth item on the agenda the 'forbidding of roads, leases, Magistrates and other bad things (*mea kino*)'.[189] Tamaikoha told those present that he had become involved in road-building, but only on the condition the road stopped at the confiscation line. Opotiki Resident Magistrate Brabant reported, as we have seen above, that those at the hui 'appear almost unanimous in their wish to keep roads, Magistrates, and other Government measures out of their boundary'; though on other issues – notably 'renting land', and whether they should ask the Government to give them sections on the confiscated lands – they were 'much divided'.[190]

The opposition to roads was confirmed and repeated to Donald McLean in person at a Whakatane hui in March 1875. Hapurona Kohi of Ngati Whare spoke in favour of a road to Ahikereru at that meeting, but in June 1875 a letter from Te Whenuanui and other chiefs reiterated that this road would not be allowed to go ahead.[191]

After Te Whitu Tekau's first indication of its views in June 1872, the Crown had no success in getting roads built through Te Urewera. It is difficult to assess information about roading. Sometimes what are referred to as 'principal roads' through Te Urewera turn out to be little more than 'fair bridle tracks'.[192] But right up to the 1890s it was impossible to obtain sufficient agreement to allow the building of a European-style road through Te Urewera. The opposition of senior chiefs such as Te Whenuanui prevailed, and the Te Whitu Tekau policy opposing roads within the rohe held firm.[193]

187. Cleaver, 'Urewera Roading' (doc A25), pp 9–10
188. Milroy, doc H51(a), pp 8–9
189. H W Brabant, 'Native Meeting of Urewera Tribes, Held at Ruatahuna, 23rd and 24th March, 1874', 1 April 1874, AJHR, 1874, G-1A, p 3
190. H W Brabant, 'Notes of Speeches Made at the Native Meeting at Ruatahuna, March 23rd and 24th, 1874', 2 April 1874, AJHR, G-1A, p 3
191. Cleaver, 'Urewera Roads' (doc A25), pp 12–13; Binney, 'Encircled Lands', vol 1 (doc A12), p 334
192. For these expressions, see Locke to Native Minister, 30 May 1874, AJHR, 1874, G-2, p 20.
193. Binney, 'Encircled Lands', vol 1 (doc A12), pp 281–283, 334–335

Ministers and officials engaged in cautious testing of Te Whitu Tekau's resolve in the early 1870s. McLean wrote to the Maungapohatu community, for example, encouraging them to agree to roads.[194] Preece, Brabant, Locke, and Ferris promoted the economic advantages of roads – both for trade and for the short-term income available during their construction. But ultimately the Government was not prepared to risk an open confrontation with the Urewera leadership by insisting on building roads, even in areas where local hapu might have been favourable. McLean, for example, annotated Ngati Huri's letter (referred to above) with the comment that the Government must wait for the approval of the Urewera chiefs before acting on internal roads.[195] In 1873, Ferris attended a Te Whitu Tekau hui at Ruatahuna. He reported to the Government:

> The subjects of discourse were Roads, Leases, & Selling Land. They wished to know if the Government intended carrying roads into their country, as they did not want them at present. I answered them I believed that the Govt had no such intention at present, and was of opinion that no such work should be done until they asked for it themselves.[196]

Officials insisted on the Crown's right to build roads on Crown lands. Accordingly, the planned Ohiwa to Waimana, Whakatane Valley, and Te Kapu to Waikaremoana roads all stopped at the limits of Crown land. A roadline for a new Galatea to Ahikereru road was surveyed and laid off (with the support of Ngati Whare), but it did not proceed to the construction phase after Te Whenuanui's objection in June 1875. According to a Public Works Department report for the year to 25 July 1876, less than £20 was spent on survey costs, so there was no substantial progress even on this road in the boundary area of the rohe.[197] Later in the 1870s, all mention of this road disappears from the annual roading reports, with the Ahikereru to Waikaremoana road promoted by Preece appearing in none of the reports between 1873 and 1879.[198] Over the decade from the mid 1870s, the Government basically respected Te Whitu Tekau's ban on roads.

During the mid-1880s, there was a new push to put a road right through the rohe. This was reported in a section of the Public Works Department's annual report, entitled 'Roads to open Crown Lands for Sale'. A road surveyor, J C Blythe, explored a possible road from Galatea to Onepoto, walking along 'the old Native track'. Even Ngati Whare, who were less opposed to roads than others, initially wanted to send him back. Only the intervention of

194. Miles, 'Te Urewera' (doc A11), p 200. Although this letter is undated, it is clear from the context that it was either written in late 1872 or possibly early 1873. See also Cleaver, 'Urewera Roads' (doc A25), p 9.

195. Binney, 'Encircled Lands', vol 1 (doc A12), pp 283–284

196. Ferris to Locke, 2 November 1873, MS papers 0032:0271, ATL

197. 'Public Works Statement, by the Minister for Public Works, the Hon Edward Richardson, Tuesday, 25th July, 1876', p 11

198. See references for 1873 and 1875 just given; John Blackett, 'Annual Report on Roads, by Assistant Engineer-in-Chief', 30 June 1877, AJHR, 1877, E-1, p 77; John Blackett, 'Annual Report on Roads in the North Island, by the Engineer in Charge', 30 June 1878, AJHR, 1878, E-1, pp 27–28; John Blackett, 'Annual Report on Roads in the North Island, Including Other Miscellaneous Works, by the Engineer in Charge', 30 June 1879, AJHR, 1879, E-1, pp 34–35

Harehare Atarea of Ngati Manawa enabled him to walk the route at all. Nonetheless, one of his Maori guides advised him 'not to do any writing within sight of the Uriweras, as they would at once turn me back'. At Ruatahuna, the people indicated forcibly their opposition to 'any surveying of any kind', their determination not to allow any road-making, and their wish 'not . . . in any way to have any dealings with the Government or pakehas'.[199] Although Blythe was confident that labour could be found to build the proposed road among young Maori men in the habit of working outside the rohe, he was well aware that these were 'men of no influence – as they put it, "they are living outside the room," the room being Mataatua'.[200]

In March 1886, S Percy Smith went with Blythe to Ahikereru and had discussions about roading with both Ngati Whare and Tuhoe. The former were divided but still substantially supportive of a road as far as Ahikereru. Tuhoe, however, made it clear that they opposed not just the road but also 'surveys, leases or sales, and all these followed in the wake of the road'.[201] Although Smith announced his determination to continue a road past Ahikereru, this did not happen. By 1 July 1886, 15½ miles of bridle path had been built as far as Ahikereru.[202] In 1889, Samuel Locke met with Urewera leaders at Ruatoki, hoping to secure agreement to the opening up of the district. Nothing concrete came from this meeting, and Robert Bush reported in the same year that opposition to roading and European settlement was stronger than ever, due (he believed) to recent visits by Te Kooti.[203]

The original Te Whitu Tekau opposition to roads was still being expressed by Rakuraku in 1891 when he addressed the Governor. Even though there was some dissent from Rakuraku's views, there was no further work on the road beyond Ahikereru until 1895.[204] We consider that the Crown's lack of success in getting a road built through Te Urewera during the 1880s and early 1890s shows that Te Whitu Tekau's policies proved remarkably resilient, even if there is little overt reference to the organisation itself in the sources at this time.

A determination to prevent leases and sales of land was also evident from the outset. Te Whenuanui and other senior chiefs, in their general 9 June 1872 letter to the Government, quoted in full above, observed that the 'things that were rejected from these boundaries are roads, leasing and selling land'.[205]

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199. 'Roads to Open Crown Lands For Sale', 1 July 1884 – 30 June 1885, AJHR, 1885, C-1A, pp 31–33 (quotations on p 32)

200. 'Roads to Open Crown Lands For Sale', 1 July 1884 – 30 June 1885, AJHR, 1885, C-1A, p 33

201. S Percy Smith, 'Notebook 1886', entry for 7 March 1886, MS-2023, ATL (quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 3)

202. 'Roads to Open Crown Lands for Sale', 1 July 1885 – 1 July 1886, AJHR, 1886, C-1A, p 23 (quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 3)

203. Bush to Native Department, 3 June 1889, AJHR 1889, G-3, p 7

204. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 3

205. Te Whenuanui and others to Government, 9 June 1872, AJHR, 1872, F-3A, p 29; Paerau to Native Minister, 10 June 1872, AJHR, 1872, F-3A, p 30; Te Makarini and others to Native Minister, 9 June 1872, AJHR, 1872, F-3A, pp 28–29

An early focus of concern was Government handling of the four southern blocks. As we have seen in chapter 7, 17 Wairoa chiefs and Tamarau Te Makarini signed the Locke deed. Ngati Kahungunu chiefs at once leased the blocks to settlers, adding to the anger of Tuhoe chiefs at Te Makarini's signing of the deed. Leases – as well as roads – were discussed at length at a hui held at Ruatahuna in November 1873. These included a Ngati Manawa lease as well as the leasing of the four southern blocks.[206] Ferris informed Locke that much dissatisfaction had been expressed at the leasing and selling of land, for which the Government was blamed: 'As regards leasing and selling land, they appear to have been under a false impression that it emanated from the Government.'[207] It was agreed that no presents from the Government, including food contributions, should be received for any meeting held with the Crown's agents: 'presents acted as softeners, leading to the start of roads, leases and sales.'[208]

By this time the Crown was also involved in the leasing and purchase of land. From September 1873, the Crown employed Henry Mitchell and C O Davis, who had previously been active agents on behalf of private interests, as native land purchase commissioners, and they began buying out de facto leasing arrangements with McLean's full knowledge.[209] In December 1873, McLean also appointed J A Wilson his land purchase agent for the area 'east of the Rangitaiki river and North of the Whirinaki stream and Ruatahuna'.[210] Wilson, in a report to McLean dated 1 June 1874, was very blunt about the purpose of his land transactions. They were, he told the Native Minister, 'all tending in one direction; viz the setting aside of the ring-boundary – the rohe-potae – which the Uriwera seventy have set up [as he put it] to enclose in many instances the lands of other tribes'.[211]

A few months after Wilson's appointment, Gilbert Mair was appointed district officer for the Bay of Plenty under the Native Land Act 1873, while remaining captain in command of the Arawa Flying Column no.1. Despite these official positions, Mair made use of his close relationship with Ngati Manawa to encourage them to lease their lands (initially to him, then to the Government); to take this land through the Native Land Court; and, eventually, to sell large areas to the Crown.[212] Senior Urewera chiefs in Te Whitu Tekau opposed the Crown policy of paying tamana (advance lease payments later treated as down payments on the sale of the land concerned) in various areas, and of making payments to single in-

206. Binney, 'Encircled Lands', vol 1 (doc A12), pp 287–288
207. Ferris to Locke, 2 November 1873, MS papers 0032:0271, ATL (cited in Binney, 'Encircled Lands', vol 1 (doc A12), pp 287–288)
208. Binney, 'Encircled Lands', vol 1 (doc A12), p 287. See also Ferris to Locke, 2 November 1873, & Ferris to Locke, 3 November 1873, MS papers 0032:0271, ATL
209. Binney, 'Encircled Lands', vol 1 (doc A12), p 295; Peter McBurney, 'Ngati Manawa and the Crown, 1840–1927', report commissioned by the Crown Forestry Rental Trust on behalf of the claimants, 2004 (doc C12), pp 142–143, 145–146
210. Binney, 'Encircled Lands', vol 1 (doc A12), p 298; McBurney, 'Ngati Manawa and the Crown' (doc C12), p 161
211. 1 June 1874, MA-MLP 1/1874/230, p [2] (cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 298)
212. McBurney, 'Ngati Manawa and the Crown' (doc C12), pp 149–150, 152–160

dividuals 'for land which were the common property of the hapu'.[213] As the Central North Island Tribunal pointed out, the payment of advances 'even to just a few individuals in each block . . . could then be used to lock whole communities into land transactions'.[214] We discuss this issue further in chapter 10. The point to be made here, however, is that Urewera leaders criticised Crown tactics at the 1875 hui with McLean. McLean admitted that because 'blocks of land belonged to communities and not to individuals', it was 'not right that single individuals should receive money on lands that were the property of hapus'.[215]

Private interests were also involved in arranging leases for lands on the western borders of Te Urewera. Ngati Manawa leases there had been objected to at the 1873 hui. And, two months earlier, Te Whitu Tekau had written to Tamaikoha, who was negotiating a lease of land at Waimana with Frederick Swindley, a former aide-de-camp to General Whitmore, reminding him of their ban on leases.[216]

By 1874, leasing was a key issue at the Ruatahuna hui. The chief Nga Waka, contrary to the policy of Te Whitu Tekau, upheld a lease of Kuhawaea to the settler Troutbeck that Ngati Haka Patuheuheu and Ngati Manawa had made the previous year. Wi Patene Taranui of Ngati Haka Patuheuheu defended his acceptance of lease money from the Crown for part of the Pokohu block, subsequently known as Matahina, against the objections of some senior Tuhoe chiefs.[217] He reached agreement, however, with Te Whitu Tekau about pulling back from negotiations with the Government purchase officer, Wilson, about the lease of Waiohau. According to Wilson, Taranui 'made over the land of his tribe to them [Te Whitu Tekau] by a writing dated the 26th of March, a copy of which he shewed to me afterwards'.[218] Despite this, he was later involved in a private lease of the land, along with Mehaka Tokopounamu of Ngati Haka Patuheuheu.[219] Ultimately, the block was taken to the Native Land Court in 1878, and senior Tuhoe leaders – notably Makarini Te Waru, Kereru Te Pukenui, Hetaraka Wakaunua, Tutakangahau, Netana Rangiihu, and Kepa Te Ahuru – again objected that the land had been leased without their knowledge or agreement.[220]

Ani Hare explained that Ngati Haka Patuheuheu were a 'border people', subject to an intense pressure that they were unable to resist. As a result, 'Our hapu forgot to support Te Whitu Tekau so that Tuhoe would retain the physical, the symbolic essence, the authority

213. Binney, 'Encircled Lands', vol 1 (doc A12), pp 295, 331–333; McBurney, 'Ngati Manawa and the Crown' (doc C12), pp 146–147, 170, 194

214. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 592

215. *Te Waka Maori o Niu Tireni*, 6 Hurae 1875, vol 11, no 13, quoted in counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 56

216. Binney, 'Encircled Lands', vol 1 (doc A12), p 289; Professor Jeffrey Sissons, 'Waimana Kaaku: A History of the Waimana Block', report commissioned by the Crown Forestry Rental Trust, 2002 (doc A24), pp 31–33

217. Binney, 'Encircled Lands', vol 1 (doc A12), p-294–295, 299, 300; McBurney, 'Ngati Manawa and the Crown' (doc C12), p 136

218. Cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 299

219. Binney, 'Encircled Lands', vol 1 (doc A12), p 299

220. Binney, 'Encircled Lands', vol 1 (doc A12), p 300

and the sovereignty of their own lands in Te Urewera.'[221] Ngati Haka Patuheuheu's historian, Kathryn Rose, concluded:

> The paths that Tuhoe and Ngati Manawa chose to follow to secure their position were very different. Generally speaking, whereas Tuhoe believed that their future depended on the retention of their land and authority, Ngati Manawa hoped that cooperation with the Crown, by active military support and then by supporting the Crown's purchasing policies would ensure their future prosperity. Ngati Haka Patuheuheu can be characterised as somewhere in between these attitudes, attempting to adhere to the policies of Tuhoe's governing body, Te Whitu Tekau, but at times succumbing to pressures on their land (sometimes in cooperation with Ngati Manawa and other landsellers and at other times in response to rival claims on their lands). Certainly, their impoverished conditions made accepting offers to lease or buy land more attractive.[222]

As we discussed above, in 1874 Te Whitu Tekau had – as Brabant put it – tried to secure agreement by 'all the tribes to join them in a sort of land league, to forbid the sale and leasing of land, roads, &c'; it is perhaps not surprising that he reported the Seventy were on the verge of giving up the plan 'as impracticable'. Tribes beyond Te Urewera would not support it, and he thought they could not agree on it themselves. He gave more names of chiefs who were anxious to lease.[223]

Further hui were held at Waimana in April 1874, and at Galatea in May. The Urewera leaders all attended the Waimana hui to discuss their concern about the leases being set up on the borders of Te Urewera and about Waimana's being targeted. The May hui, however, originated in a panui sent by Government Purchase Officer Wilson, and Te Whitu Tekau leaders did not attend, stating that the meeting was held too soon after their own.[224] But Te Makarini was there as the spokesman for Te Whitu Tekau and he also delivered a letter 'signed by the Seventy and all their chiefs', addressed to Peraniko, the Ngati Manawa chief, and to Wilson. Wilson stated that 'Te Makarini performed his part with firmness and good temper', and that he had said what they all would have said: 'viz that they would not allow their rohe potae to be invaded'.[225] He was particularly concerned that the Raungaehe block, forest land lying between the Rangitaiki and Whakatane Rivers, might be leased (by Ngati Awa and Ngati Pukeko).

A proposed lease of land at Waimana was also contested. Frederick Swindley had attended the Ruatahuna hui himself, along with William Kelly, an important local businessman who

221. Simultaneous translation of oral evidence of Ani Hare, 11 December 2003, Tataiahape Marae, Waimana
222. Kathryn Rose, 'A People Dispossessed: Ngati Haka Patuheuheu and the Crown, 1864–1960', report commissioned by the Crown Forestry Rental Trust, 2003 (doc A119), p 61
223. H W Brabant, 'Report by H W Brabant, Esq, RM, Opotiki', 1 April 1874, AJHR, 1874, G-1A, p 3
224. Wilson to McLean, 1 June 1874, MA-MLP 1/1874/230 (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), pp 56–59)
225. Wilson, 1 June 1874, MA-MLP 1/1874/230 (Binney, 'Encircled Lands', vol 1 (doc A12), p 324)

was also a member of the House of Representatives; they accompanied Tamaikoha in what was at that stage a vain attempt to get Te Whitu Tekau to consent to Tamaikoha's lease.[226] Tamaikoha called a hui at Te Waimana in April where leasing was further discussed; but the Swindley lease was not agreed to here either. But in October 1874, in a modification of their position, Te Whitu Tekau finally accepted the lease. Sissons suggested that this may have been because of the developing tension between Rakuraku and Tamaikoha over the right to lease Waimana land, and Rakuraku's accepting a payment jointly with Wepiha Apanui (Ngati Awa) and Hira Te Popo (Whakatohea). Though Tamaikoha recovered the payment, and returned it to Swindley, the pressures at Waimana were becoming evident. Te Whitu Tekau may have preferred the lease to Tamaikoha as being simpler and, Sissons suggested, as clearly stamping Tuhoe's rights to the land. In October, Tamaikoha received the rent at a hui at Ruatahuna; Netana Rangiihu stated in 1878 that: 'Tamaikoha had the 100 pounds, he is the head of the seventy.'[227] Te Whitu Tekau's condition for agreeing to the lease, however, was that the land was not taken to the Native Land Court and it was not surveyed.[228] We discuss this transaction further in chapter 10.

The basis for such a decision was further clarified at a hui at Whakatane in March 1875, when Urewera chiefs made it clear they were not wholly opposed to the leasing of some land but that the focus of their concern was strategies that set out to create division among them. Thus, for the time being, Kereru Te Pukenui stated, they wished 'to close their district against all land dealings'.[229] Tamaikoha explained to McLean that they did 'not wish the Government to believe that they would always oppose the leasing of lands to the Government or other Europeans, but they wished to have time for consideration'.[230] This was confirmed by Te Pukenui, who said that Tuhoe wanted to have time to 'mature plans for the leasing of their lands', and to select their own tenants, not just Government agents. 'But this was in the future,' he said.[231]

In other words, they wished to control the pace and nature of their engagement with the new economy; they were very aware of the dangers of individuals being singled out to enter into transactions which might pull land into the Native Land Court; and they also associated the court with sales and loss of control over their lands. Ultimately, as events unfolded in the 1870s and 1880s, with border leases triggering land court hearings and sales, Te Whitu Tekau never actually relaxed its stance on leasing (or any form of alienation). Since there was, at the time, no other way for the peoples of Te Urewera to obtain an income from their

226. Sissons, 'Waimana Kaaku' (doc A24), pp 33–43
227. Sissons, 'Waimana Kaaku' (doc A24), pp 35–37
228. Binney, 'Encircled Lands', vol 1 (doc A12), pp 325–326; 343; Sissons, 'Waimana Kaaku' (doc A24), pp 36–38
229. Te Waka Maori o Niu Tireni, 6 Hurae 1875, vol 11, no 13, as quoted in counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 47
230. Ibid
231. Ibid

lands or to raise capital for farming, this did amount to a rejection of the colonial economy. It was not what they wanted; but it was a price they were prepared to pay.

As Tamati Kruger explained to us on one occasion, an evident Tuhoe unwillingness to accept development had its roots in their determination to assert and defend their mana motuhake:

> Ko te utu mo to matau oranga kaore i paku rereke ake ki tera kua roa ke e mau ana i a Tuhoe ara ko te matahi taua mo te oranga poka no mai o etahi atu tikanga ki roti i a ia. Ko nga mahi a nga tipuna penei ano nei ki a Te Ngahuru, Te Purewa, Te Umuariki, Te Auki Hingarae, Tamaikoha, Tutakangahau, Te Raiara, Te Rangiaukume me Te Makurata koira to ratau he arai atu i te rohe poate. He mea kokirikiri tenei mahi i runga i te whakaaro kia tapu te mana motuhake o Tuhoe, na reira i tapu ai etahi o a ratau mahi.
>
> Na enei mahi ka kore a Ngai [Tuhoe] e whai kanohi i roto i nga tuhinga o ratau nana nei matau i peia atu i Te Urewera. Kaore matau i aro atu ki wa koutou kupu whakapai kanohi mo te kaupapa whanake i a matau otira ko aua Minita ra a Ngata me Carroll e meatia whanuitia ana e matau he whakahihi.
>
> Na reira i ata kitea ai e etahi he ara ra i peneki ai ta Tuhoe whai i tona mana motuhake – he mohio no Tuhoe i ahu katoa mai tona mana motuhake i enei mahi.[232]
>
> The price of our liberty, the price that Tuhoe have always been willing to pay, is unfaltering vigilance coupled with the resolved resistance to the infection of our philosophies [tikanga] and the constriction of its expression. The actions of our tupuna like Te Ngahuru, Te Purewa, Te Umuariki, Te Au Ki Hingarae, Tamaikoha, Tutakangahau, Te Raiara, Te Rangiaukume, Te Makurata can all be seen in this context. The mana achieved by these peoples of Te Urewera must always be seen in the context of that which drove them, the assertion and display of Te Mana Motuhake o Tuhoe, as it is there that the tapu nature of their feats may be found.
>
> For such behaviour, Tuhoe have been criticized and deprioritised in the written records of those who have sought to drag us from Te Urewera. We have been scorned as slow in coming forward and unwilling to accept development, as people such as Ngata and Carroll have. We have been labeled as whakahihi [arrogant] and fundamentalist.
>
> Nevertheless, it is now becoming clear to others why Tuhoe have conducted themselves in the way in which they have, as it is upon this conduct that their liberty depends.[233]

This stance – of effectively keeping their lands out of the colonial economy – was much debated during these decades. From time to time, various leaders of Te Urewera experimented with border leases or supported the idea of roads, schools, and economic development. However, the fundamental kaupapa remained opposition to those things that were perceived as threats to the autonomy and integrity of the rohe potae.

232. Tamati Kruger, brief of evidence (Maori), 6 September 2004 (doc G12), p 5
233. Tamati Kruger, brief of evidence (English), 6 September 2004 (doc G12(a)), p 5

Te Whai-a-te-Motu

In May 2004, we held our Ruatahuna hearing in the wharenui Te Whai-a-te-Motu. While presenting his evidence, Tamati Kruger explained how the planning and construction of this wharenui helped in the social and cultural reconstruction of Tuhoe after the wars of 1869 to 1871:

> In between all of these troubles we can see that the Tuhoe population decreased as a result of disease, lands were being confiscated, soldiers were attacking, houses were burnt. However amidst all these disputes an idea was formed to build this house. The intention was to wake the soul of Ngai Tuhoe in recognition of the fact that although we were overwhelmed and whatever was done, our mana motuhake remains. Let us portray our mana motuhake of Tuhoe. Although poor, abused, trampled upon, they turned around to build this house.
>
> Let us contemplate that a man in the middle of all these troubles would have time to think about building a house. For most of us we would want to go or run away to recuperate from the burdens and troubles. However alas! The leaders of Tuhoe were going to be united by this house; to the thinking of the people of Tuhoe. This house will bring to mind that we are looking for recovery through our mana motuhake. From the middle of fire and brimstone, this is the cure that this house provides.[1]

1. Tamati Kruger, claimant translation of transcript of oral evidence, Mataatua Marae, Ruatahuna, 17 May 2004 (doc D44(a)), pt 2, p 24

Cash was obtained from growing maize and running sheep on some of the better low-lying lands at Waimana and Ruatoki, but mostly it was earned by working outside the district.[234] As we saw in chapters 3 and 4, there was a pre-war history of people from Te Urewera seeking paid employment on the coast, which continued in the 1870s and 1880s. Younger people were often the ones who took this step. Some of them felt alienated from the policies of their leaders. As we saw above, Blythe reported their feeling that they had no influence.[235]

Tuhoe were focused on preserving their mana motuhake, and on social and economic reconstruction in the wake of the wars. The first Te Whitu Tekau hui had to be held at Kohimarama, Wahawaha's redoubt, as all the major buildings at Ruatahuna had been destroyed. By 1874, the people had rebuilt a meeting house of their own, and then Te Whenuanui began the 12-year project of building a very large, carved house in hon-

234. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), vol 1, pp 268–277

235. Binney, 'Encircled Lands', vol 2 (doc A15), p 25; Neumann and Hutton, 'Ngati Whare and the Crown' (doc A28), pp 78–79

our of Te Kooti.[236] The Tuawhenua researchers, quoting the oral evidence of Pou Temara, described how the whole of Tuhoe became involved in the building and ornamenting of this whare, the magnificent Te Whai-a-te-Motu, a memorial to Te Kooti and his successful escape from pursuit.[237] Tamati Kruger commented that the whole venture was the idea of a 'mastermind',[238] uniting the people and assisting their recovery from the wars: 'From the middle of fire and brimstone, this is the cure that this house provides.'[239]

As far as possible, the peoples of Te Urewera revived their customary economy, although it was now truncated by the loss of land south-east of Waikaremoana, by the Eastern Bay of Plenty confiscation, loss of access to Ohiwa, and the damage that war and land loss had inflicted on the customary resources of their traditional trading partners. As the decades wore on, more land was lost in the rim blocks. The inland Urewera economy of the 1870s and 1880s was very different from the pre-war economy. In particular, there had been a significant reduction of kumara-growing, access to marine resources, and trade.[240] By the late 1880s, even the people of Ruatoki – who had much of the best remaining land – were still focused on making canoes and trading them with Ngati Awa for fish and European tools.[241]

Professor Murton noted the development of some small-scale farming at Waimana and Ruatoki, and in the Rangitaiki Valley, with maize cash cropping and the establishment of small flocks of sheep. By the end of the 1880s, the great majority of the people were living mainly on the Waimana and Ruatoki lands. Cash also came from seasonal work outside Te Urewera, as we have seen, but the people really survived by growing potatoes and maize for consumption, and from hunting birds and wild pigs.[242] According to Murton's evidence, Te Urewera communities lacked capital to develop their land. By the end of the 1880s, as the lands around Te Urewera began to be developed – and so became closed to hunting and gathering – this was really starting to matter. There were new opportunities by then for smaller-scale dairy and other farming to be made profitable. This was especially so because of the advent of refrigeration.[243] The question was: would the peoples of Te Urewera be able to take advantage of this opportunity? Could they agree on leasing land to raise capital, and could they start leasing without resort to the Native Land Court and the sales that followed in its wake? These were the issues confronting Tuhoe and Ngati Whare at the beginning of the 1890s.

236. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), pp 281–282
237. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), pp 282–285
238. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 285
239. Kruger, claimant translation of transcript of oral evidence, Mataatua Marae, Ruatahuna, 17 May 2004 (doc D44(a)), Part 2, p 24
240. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), vol 1, pp 263–264; see also pp 253–268 more generally.
241. Kruger, claimant translation of transcript of oral evidence, 17 January 2005, Tauarau marae, Ruatoki (doc J48(a)), Part 1, p 13
242. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), vol 1, pp 268–297
243. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), vol 1, pp 249, 251–253, 258–297

8.5.2

The basis of this economy, as we have seen, was the rejection of dealing in land, either by lease or sale. This key policy of Te Whitu Tekau, as adopted in the early to mid-1870s, was discussed at many hui, and great effort was put into trying to secure general adherence to it. Even on the borders of the rohe potae, where it proved difficult to keep leases and sales and the Native Land Court at bay from the mid-1870s onwards, Te Urewera leaders strove to ensure that land transactions were not entered into lightly.[244]

This was still the case in the mid-1880s. In 1884, for instance, the surveyor Charles Alma Baker (who would later embark on an unauthorised survey of the Tahora 2 lands along the eastern edge of Te Urewera) attended the hui of the Ringatu, celebrated on 1 July and held at Ruatahuna. It was a large hui, attended by about 700 people. Among the issues discussed was surveying, and the chiefs raised this directly with Baker:

> Ka timata te whakahaere a Tuhoe i te rohe potae ki a ratau i reira ano a te peka kairuri, H [*sic*] Baker Esq, surveyor. I e mutunga o te whakahaere o te hore [sic: rohe] potae ka hoata [*sic*: hoatu] tau pukapuka e Tuhoe kia peka me tetehi pukapuka apiti atu ki tono ki a Te Mete, Tumuaki Kairuri, Akarana, kia kauwa rawa e whakaetia kia haere tetehi ruri i roto i te rohe.

The Tuawhenua researchers translated this as:

> Tuhoe began to describe Te Rohe Potae to them, and the surveyor H [*sic*] Baker Esq who was also present. After their description of Te Rohe Potae, Tuhoe gave the papers to Baker, along with papers containing a direction to Smith, Chief Surveyor, Auckland, that surveys would never be allowed in the district.[245]

Te Whitu Tekau could not keep surveys and the Native Land Court out of Te Rohe Potae altogether. In part, this was because – as the Crown pointed out – there were overlapping tribal rights and interests in the outer lands. But, generally speaking, the interior Urewera lands were not the subject of survey or court applications until 1891 – a somewhat remarkable achievement.

A detailed consideration of how the land court operated, and how exactly the rim blocks ended up being the subject of hearings and alienations, will be given in chapter 10. Here, we note that – until the Ruatoki survey and hearings in the early 1890s – Tuhoe and Ngati Whare rangatira largely followed the line advocated by Te Whitu Tekau of keeping land out of the Native Land Court. Tuhoe did, however, take part in court processes throughout the period as counter-claimants, with Rakuraku and Tamaikoha putting their case in Waimana

244. Binney, 'Encircled Lands', vol 1 (doc A12), pp 287–290, 295–300, 307–326, 329–334, 342–348, vol 2 (doc A15), pp 33–107

245. Hare Rauparaha to Te Korimako, *Te Korimako*, 15 August 1884, p 4 (translation given by Tuawhenua Research Team)

in 1878 and again in 1880 (to which end Tamarau Te Makarini also gave evidence).[246] Netana Rangiihu, Tamaikoha, and Hetaraka Te Wakaunua all appeared at the Tahora 2 hearings in 1889, while Tutakangahau appeared for Tuhoe in the 1890 Whirinaki hearing. Tamaikoha and Kereru Te Pukenui represented Tuhoe at the Heruiwi 4 and Tuararangaia hearings respectively; Netana Rangiihu and Tutakangahau had also made claims on behalf of whanau with respect to Heruiwi 4. Their experiences reinforced the view that it was not possible to have leases without also having the court and subsequent sales. In Waimana, even the Tuhoe chiefs sold interests in the 1880s (see ch10).

Most of the Native Land Court business within the Te Urewera inquiry district had involved blocks in the Rangitaiki Valley. Thus much of it was instigated either by Penetito Hawea of Ngati Awa, or Peraniko te Hura and Harehare Atarea of Ngati Manawa (although, as we shall see in chapter 10, these iwi were also divided about the merits and pace of putting blocks before the court). Neither was part of Te Whitu Tekau, so its injunctions had little persuasive influence over them. The only weight Te Whitu Tekau could claim was with chiefs of affiliated hapu (Ngati Haka Patuheuheu, Ngati Hamua, and Ngati Rakei) in the valley blocks, such as Mehaka Tokopounamu, Te Whaiti Paora, and Makarini Te Waru. With the exception of the Waiohau hearing in 1878, and Tuararangaia in 1890, even these chiefs were involved as counter-claimants rather than claimants, and the Tuararangaia application was made without the support of the hapu (see ch10).

In the early 1890s, marked opposition to roads, leasing, surveying, sale of land, and the Native Land Court survived surprisingly intact given the pressures exerted by Government officials and private colonists, and the growing need for cash just to buy necessities. As the claimants suggested, it was very telling that between 1872 and 1896 the Native Land Court, as well as Crown and private purchasing, were 'kept in check from the interior Urewera'.[247] One reason for this, we were told, was that Te Kooti, and the cultural and spiritual revival associated with Ringatu, stiffened the people's resistance in the 1880s.

Te Kooti was pardoned by the Governor in 1883, following the passing of an Amnesty Act the year before. One of his first actions after regaining his freedom to leave the King Country was to visit Te Urewera for the opening of the wharenui Eripitana, at Te Whaiti. Te Kooti's visit in January 1884 was marked by an attempt to place the lands of Te Urewera 'under Te Kooti's spiritual authority, in order to hold it'.[248] Te Kooti, for his part, encouraged the people to resist land alienation, although he would not accept any authority over the

246. In 1873, during his contest with Tamaikoha over the lease, Rakuraku had joined with Paora Kingi and Wepiha Apanui in applying for a Native Land Court hearing of the Waimana block. When the matter came to hearing in December 1874, the application was withdrawn unanimously so it did not proceed. The judge recorded that 'none of the claimants wish to have it either surveyed or adjudicated upon'. (Maketu Minute Book 2, 7 December 1874, in Brent Parker, 'Document Bank Relating to the Waimana Block', 19 January 2005 (doc K4(b)), p 26. See also Brent Parker, 'Timeline relating to the Waimana Block', 19 January 2005 (doc K4(a)), pp 1–2

247. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 60

248. Binney, *Redemption Songs*, p 321

> *Te Kooti is just another word for the struggle for independence from Crown authority, the retention of Mana Motuhake.*
>
> Tamati Kruger, brief of evidence, 17 January 2005 (doc J29(b)), para 7.22

land.[249] During our hearing at Murumurunga marae, we heard of Te Kooti's kupu whakaari (prophecy) when he arrived to open Eripitana, and of the waiata he sang on that occasion.[250]

Eripitana, Robert Wiri told us, was to be 'the most sacred house of the Ringatu faith . . . the "holiest of holies"'.[251] As a consequence of Te Kooti's kupu whakaari, the house became extremely tapu. Although he did not take up residence in Te Urewera, Te Kooti's influence there remained strong. After the eruption of Mount Tarawera in 1886, for example, he advised the people to leave Ruatoki for a year, as it had been rendered tapu 'from cover with ash or scoria which had killed many Maori'.[252] Even more importantly, one of his kupu whakaari (pronouncements) – 'Let the Urewera be one people and one land' – was interpreted to mean that Tuhoe should live together in one place.[253] There was an exodus to Ruatoki after the tapu had been lifted, and this had profound effects on the history of Tuhoe (as we shall see below).

The Government was soon aware of Te Kooti's influence and his exhortations, which were, as Binney maintained, consistent with the long-term policies of Te Whitu Tekau. In 1889, Resident Magistrate Bush summed it up succinctly: 'He [Te Kooti] does not approve of Lands being surveyed, or passed through the Court, as he is evidently of [the] opinion that these two things help the Natives to part with their lands.' Thus, Tuhoe chiefs under the influence of 'Te Kooti principles' would, as the Government saw it, 'keep the Country locked up'.[254] But, as we have seen, Te Kooti had refused to take on the mantle of direct leadership of Te Urewera on these matters. Bush was present at the 1884 hui near Whakatane when the chiefs tried to place their lands under the spiritual protection of Te Kooti, whose response Bush reported in these words:

249. Binney, 'Encircled Lands', vol 2 (doc A15), p 20
250. Robert Wiri, 'Ngati Whare Mana Whenua: Summary of Evidence from "Te Whaiti-nui-a-Toi, the Ngati Whare Mana Whenua report"', August 2004 (doc G7), pp 34–45
251. Robert Wiri, 'Ngati Whare Mana Whenua: Summary of Evidence' (doc G7), p 34
252. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 297
253. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 297
254. Bush to Native Department, 4 April 1889 (quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 11)

***Te Morikarika*, 1884**

The Tuawhenua researchers told us that:

> Tuhoe sought to place their lands under Te Kooti for his protection and guidance, but Te Kooti insisted that the lands be dealt with under traditional customs, and urged Tuhoe to take care of their land and not to squander it. His advice was etched into the minds and history of Tuhoe through his waiata tohutohu [a waiata giving advice and guidance], *Te Morikarika*:
>
> *Kaore te po nei i morikarika noa!*
> *Te ohonga, ki te ao mapu kau noa ahau.*
> *Ko te mana, tuatahi ko te Tiriti o Waitangi*
> *Ko te mana, tuarua ko Te Kooti Whenua*
> *Ko te mana, tuatoru ko te Mana Motuhake*
> *Ka kia, I reira ko Te Rohe Potae o Tuhoe*
> *He rongo ka, houhia ki a Ngati Awa*
> *He kino ano ra ka ata kitea iho*
> *Nga mana, Maori ka mahue kei muri*
> *Ka uru, nei au ki te mahi kaunihera*
> *E rua, aku mahi e noho nei au*
> *Ko te hanga, I nga rori, ko te hanga I nga tiriti!*
> *Pukohu, tairi ki Poneke ra*
> *Ki te kainga ra, i noho ai te minita*
> *Ki taku, whakaro ka tae mai to Poari*
> *Hai noho i, te whenua e kotitia nei;*
> *Pa rawa, te maemae ki te tau o taku ate*
> *E te iwi, nui e tu ake ki runga ra*
> *Tirohia, mai ra te he o aku mahi*
> *Maku e, ki atu, nohia, nohia!*
> *No mua iho ano, no nga kaumatua!*
> *Na taku, ngakau i kimi ai ki te ture,*
> *No konei, hoki au i kino ai ki te hoko!*
> *Hei! Hei aha to hoko*
>
> *This is not just a troubled night*
> *For when I awoke to the light, it was with a sobbing gasp*
> *There is the first law, the Treaty of Waitangi*
> *Then the second authority, the Land Court*
> *The third mana is the Independent Sovereignty*

Proclaimed as Te Rohe Potae of Tuhoe
And peace was made with Ngati Awa.
But a malevolence can be clearly seen
Where the mana of the Maori is abandoned!
If I took part in the activities of councils
There's two things I would do
Building roads, and building streets!
Yonder the mist hangs over Wellington
Over the place where the Minister resides
It is my belief, that a Board will emerge
To take over the land being processed by the court
Pain strikes deep in my gut
All my people, rise up
See if you can see the faults of my deeds!
I say to you 'Remain, remain [on our land]!'
It is from former ages, from your ancestors!
Because my heart has searched out the law
And for this reason I abhor selling!
Never! Never (mind) selling![1]

We were provided with varying translations and explanations of this waiata tohutohu, or waiata matakite. The words of the waiata in Maori are those held in oral tradition at Ruatahuna and other parts of Tuhoe. The translation above is by Brenda Tahi (with reference to McLean and Orbell, *Traditional Songs of the Maori*, p 38) for the Tuawhenua researchers. As Judith Binney pointed out, there are many translations of the waiata, as Te Kooti's vision – fittingly – is interpreted, and reinterpreted, by those who return to seek guidance from his words. We reproduce here several of the translations received during our hearings. We received this translation from Te Hue Rangi of Tuhoe:

This night will not be cause for torment
Upon the awakening I sigh with sorrow
The first spiritual endowment is the Treaty of Waitangi
The second spiritual endowment is the Land Court
The third spiritual endowment is Metaautonomy
Where it is stated that that is the domain of Tuhoe
Peace has just been made with Ngati Awa
Through the conspicuous evils that have been seen

1. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), pp 296–297

Leaving all Maori spiritual endowments behind
I admit myself into the activities of the council
Where I am engaged into 2 specific tasks
Building the roads and the streets
The mist that shrouds over Wellington
To the home where the Minister resides
I have long considered the arrival of the Board
To settle the land that is being severed into pieces
Affixing this pain to the couch of my liver
Behold my people take your stand
And observe these misdeeds
While I say take what is yours
That which derives from our elders
Which coerced the heart to seek out the law
Manifesting into my disgust towards capitalism
Enough of Capitalism![2]

We received this translation from Judith Binney, which was based on a translation made in 1975 by Mervyn McLean and Margaret Orbell:

Alas for this troubled night!
Waking to the world I search about in vain.
The first authority is the Treaty of Waitangi,
The second authority is the Land Court,
The third authority is the Separate Mana,
Hence the Rohe Potae (Encircling Borders) of Tuhoe.
A peace was made with Ngati Awa.
It would indeed be an evil thing
To abandon the mana of the Maori!
When I submit to the law of the Council,
There are two things that I do:
Building roads, and building streets!
Yonder the fog hangs over Wellington,
The home of the Minister.
I fear that the [Land] Board will come
To occupy this land adjudicated by the Court,

2. Te Hue Rangi of Tuhoe (doc G23), pp 9–10

And I am sick at heart.
Oh great people, stand forth,
Examine whether my works are wrong!
I say to you, 'Stay', 'Stay'!
It comes from former ages, from your ancestors!
Because my heart has searched out the Law,
For this reason I abhor selling!
Hii! Why sell![3]

We received this translation from Robert Wiri and Ngati Whare:

Alas for this troubled night!
Waking to the world I sob regretfully.
The first authority is the Treaty of Waitangi,
The second authority is the Land Court,
The third authority is Self Governance;
Known as The Encircling Borders of Tuhoe,
Peace has been made with Ngati Awa
But misfortune is clearly foreseen
Maori authorities would be abandoned!
If I enter into the law of the Council,
There are two things that I would do
The building of roads and streets!
The mist hangs over Wellington,
Over the dwelling place of the minister,
I fear that the Board will come,
To occupy the land which has been divided;
The pain strikes at the heart of my emotions
Oh you great people stand up for your rights,
Look at the injustices perpetrated against you!
I say 'Have no fear! Have no fear!'
For your mana comes from your ancestors!
My heart has searched for the law and justice,
And so I proclaim that selling is evil!
Ah! Why sell![4]

3. Mervyn McLean and Margaret Orbell (doc A15), pp 17–18
4. Robert Wiri and Ngati Whare (doc A29), p 150

> that he had not come for the purpose of acquiring lands, but simply to see them in accordance with their ancient customs, he therefore did not want any of their land, but would recommend them to take care of it, and not to squander it.[255]

It seems clear to us that Te Kooti's return and his spiritual messages strengthened the resolve of Tuhoe and Ngati Whare to resist land alienation (and its perceived instruments: surveys and the Native Land Court). Senior Tuhoe leaders, we note, were making the same points to the Governor in 1891 as they had made to Government representatives in the early 1870s. Rakuraku pointed out to Lord Onslow and A J Cadman, the Native Minister who accompanied him, that various 'evil things' – including leases and sales of land – were forbidden within the borders of Te Rohe Potae.[256] But in 1891, Tuhoe and Ngati Whare were, in fact, on the verge of a period of disagreement and conflict over these issues, creating a significant crisis for those who wanted to hold firm to the Te Whitu Tekau policies of 1872. We address this crisis below in section 7.5.4.

8.5.3 How did the Crown interact with Te Whitu Tekau? How did it respond to political initiatives taken by Te Urewera leaders?

Summary answer: *During the early 1870s, the Crown acknowledged the formation of Te Whitu Tekau. The Crown responded to invitations to hui in these years, though the Governor and Native Minister did not attend a major hui in 1874. Lesser officials who did attend dismissed the importance of Te Whitu Tekau, and pointed out that it had no status or powers under colonial law. The responsibility for this state of affairs rested squarely with the Government, which had failed to enact the Native Councils Bills of 1872 and 1873, and had failed to follow up on McLean's assurance in Parliament in 1873 that special arrangements would be made for Te Urewera (and other districts) in 1874.*

On the borders of the rohe potae, land purchase agents were anxious to undermine Te Whitu Tekau policies, for they recognised their force; and some communities were willing to participate in land transactions. Crown officials also recognised the limits of their own authority in Te Urewera, and acquiesced in the exercise of authority by Urewera chiefs within their rohe. As a result, there was some de facto recognition of Te Whitu Tekau and its policies. The Government did not force the issue on roads or prospectors, nor did it insist on trying to station a magistrate or any other official inside Te Urewera. Issues were resolved by negotiation – for instance, the attempts to secure roads in 1872 to 1874 and again in the mid-1880s, the call for Tuhoe to send out Himiona Te Rua for trial, the trespass of cattle from leased lands, and the attempt to introduce prospectors in 1889.

255. Bush to Native Department, 8 March 1884, quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 20
256. Binney, 'Encircled Lands', vol 2 (doc A15), pp 29–30

On one question, however, there was neither negotiation nor compromise. The Native Land Acts gave Maori individuals or communities the right to apply for survey and court titles for lands, and the Crown did not vary this position for Te Whitu Tekau or any other tribal governance body in Te Urewera. Despite the leadership's constantly stated opposition to surveys, leases involving the court, sales, and the court itself, the rim blocks passed through the court (and land was alienated) throughout the 1870s and 1880s.

In the late 1880s and early 1890s, however, the Crown stepped up its efforts to introduce roads, surveying, and prospecting into the interior of Te Urewera. At the same time, the Crown neither granted Te Urewera leaders a committee under the Native Committees Act 1883, nor sanctioned a komiti formed by Tuhoe in 1888. Offers to recognise a Tuhoe committee in 1889 amounted to nothing more than a committee that would receive and protect people granted passes by the Government, rather than share decision-making as to whom to admit, and so were not accepted by Te Urewera leaders.

By 1889, with Te Urewera closed to prospectors and no agreement that a tribal governance body should decide who could be admitted and on what basis, matters seemed to have reached a stalemate.

(1) *The Crown's interaction with Te Whitu Tekau*

The Crown and the claimants, as we noted above, did not agree on either the nature of the relationship between Te Whitu Tekau and the Crown or on the nature of Crown actions towards Te Whitu Tekau. In this section (8.5.3), we explore the Crown's actions with a view to later measuring their consistency with the principles of the Treaty of Waitangi (in 8.5.5).

From the outset, it is clear that the leaders of Te Whitu Tekau considered it important to communicate with the Crown. The letters they sent after the 1872 hui, reporting on their discussions, and announcing their new body and their policies, were addressed to the Native Minister and to 'the Government'. The Crown's response in printing English translations of the various letters in the *Appendices to the Journals* is evidence of interest in Wellington in what Te Urewera leaders were doing. More important to the chiefs, however, would have been the printing of the letters in *Te Waka Maori o Niu Tireni*, as Te Ahikaiata had requested. *Te Waka Maori* was published by the Government Printer; it contained letters and accounts of meetings, and tended to press Government views on land purchase and Native Department policy. The printing of the Te Urewera letters would, in our view, have conveyed to the chiefs Government acknowledgement of their policies, and would also have served as an announcement of those policies to other Maori groups.

We note that subsequently Samuel Locke (the resident magistrate at Wairoa) and two officers visited Te Urewera in 1873 on behalf of the Government. People were invited from different parts of Te Urewera to meet with them at Ruatahuna. One of those who accompanied Locke published an account of the visit in a Hawke's Bay newspaper, and this was

later reprinted in *Te Waka Maori*. It highlighted Tuhoe's pledge of allegiance to the Queen and their dissociation from the Kingitanga; discussion of roads to join the various settlements of Te Urewera; and the establishment of a school at Maungapohatu. The Tuawhenua research team, although alert to the possibility of a Government slant in the account, commented that it nevertheless shows 'Tuhoe were not automatically opposed to government services, but simply wanted to introduce them into Te Urewera under their own regulation and control.'[257]

The Tuawhenua researchers accepted that the peace-making of 1871 had included a pledge of allegiance to the Crown.[258] But Tamati Kruger made it clear that Tuhoe saw this as an acceptance of Crown authority on their terms. At our first Ruatahuna hearing, counsel for the Tuawhenua claimants asked Tamati Kruger if a pledge of allegiance was inconsistent with Tuhoe mana motuhake. He replied that it was not. Under the Treaty of Waitangi, he told us, there was room for the Crown in Tuhoe's house, and the 'rangatiratanga of the hapu and the whanau would be similar to the mana of the Crown of England'.[259] Both the Crown and Tuhoe had mana, not the Crown alone.[260] Under the 1871 compact, Tuhoe had autonomy and the management of their own affairs.[261] This, too, was how Te Pukeiotu saw it in his speech to Premier Seddon at Ruatahuna in 1894. As we have seen, he pointed out that the great rangatira Paerau had sworn allegiance to the Queen, but all 'Government matters . . . and everything that is vile' were excluded from Te Rohe Potae.[262]

Other officials to attend Te Whitu Tekau hui in these early years included Ferris (1873) and Brabant (1874). Invitations were also issued to Crown representatives – notably, the Governor, Sir James Fergusson – for the second major Te Whitu Tekau hui, scheduled for January 1874 at Ruatahuna. Kereru of Ruatahuna and Hetaraka Te Wakaunua of Maungapohatu both invited Fergusson, while Kereru and Tutakangahau invited McLean in his capacity as Native Minister. They emphasised that all 'Tuhoepotiki' extended an invitation to the two men. This was a remarkable initiative, which might have been the basis for positive political discussions and a stronger political relationship. The hui of course was postponed till March, which may well have created difficulties for the Native Minister and the Governor, neither of whom attended. It is likely that, like many who hosted large hui, the people found they needed more time to assemble quantities of food – potatoes and preserved pigeons – for the hundreds of manuhiri. But McLean had always been conscious of the importance of kanohi ki te kanohi (personal interaction), and it is difficult to believe his absence was not carefully considered.

257. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), pp 277–278 (quotation on p 278)
258. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 267
259. Tamati Kruger, re-examined by Kathy Ertel, Mataatua Marae, Ruatahuna, 17 May 2004 (transcript 4.5, p 11)
260. Tamati Kruger, re-examined by Kathy Ertel, Mataatua Marae, Ruatahuna, 17 May 2004 (transcript 4.5, p 11)
261. Kruger, summary of evidence concerning 'Ruatahuna: Te Manawa o te Ika' (doc D28), pp 54–55
262. 'Pakeha and Maori: A Narrative of the Premier's Trip through the Native Districts of the North Island', AJHR, 1895, G-1, pp 74, 76

8.5.3

It will be recalled that the Minister had failed to secure the enactment of Native Councils Bills in 1872 and 1873, as we discussed above. Given the failure of his first Bill in 1872 (of which Te Urewera leaders may well have had expectations), and the abandonment in 1873 of his proposal to introduce a revised version for certain regions (one of which was Te Urewera), McLean may not have wished to arrive empty-handed.[263] Equally, he was probably well informed about the policy directions of Te Whitu Tekau: that is, that he would face not only pressure for the return of confiscated lands, but also Tuhoe anger at the lease of lands in the four blocks to the south-east of Lake Waikaremoana. He may not have thought it possible to have a useful meeting, especially without anything concrete to offer the chiefs. In any case, the attendance instead of local officials – Brabant, resident magistrate at Opotiki; Locke from Wairoa; and Charles Ferris from the Armed Constabulary – marked a substantial down-grading in Government representation.[264] Whether or not this was intended, the potential for a positive outcome was greatly reduced in such circumstances.

In fact, the Crown representatives put little effort into establishing a positive relationship. Brabant, as we have noted, had made discouraging comments about Te Whitu Tekau at the outset, telling Tamaikoha in mid-1872 that he 'considered the plan of appointing seventy chiefs a bad one, as they might have seventy different opinions'.[265] At the 1874 hui, the tone of Brabant's reported speeches was not conciliatory. In response to the korero on the confiscated lands, he said that there was no use discussing 'whether the Government were right', since the confiscation had happened long ago. And, in any case, they were lucky not to have had more taken; it was only through the 'clemency' of the Government that Ruatahuna itself had not been confiscated too. The people might go to the courts, and to England, as was their right, but it would be very costly, and he thought an appeal would fail. If any of them wanted sections within the confiscated lands, the Government would consider that, since (as he put it) 'Government are not stingy with their lands as you are.' The Government, he added, would 'give' land to anyone, European or native, who wanted it for 'actual settlement'.[266]

After Brabant had left the hui, Samuel Locke arrived with Charles Ferris and Hamana Tiakiwai of lower Wairoa. Locke reinforced Brabant's approach, telling the council it would be impossible 'to hold intact the boundaries of the Uriwera or Tuhoe tribe, or the lands of the descendants of those who arrived in the Matatua canoe'.[267] On the borders, Ngati Whare and Ngati Manawa were already leasing land. The people should take their lands to the Native Land Court so that titles could be determined. And Locke, like Brabant, underlined the Crown's view of Te Whitu Tekau, but added the point that it had no status in law. The

263. Binney, 'Encircled Lands', vol 1 (doc A12), p 272
264. Binney, 'Encircled Lands', vol 1 (doc A12), pp 290–291
265. Brabant to Native Minister, 4 July 1872, AJHR, 1872, F-3A, p 28
266. H W Brabant, 'Notes of Speeches Made at the Native Meeting at Ruatahuna, March 23rd and 24th, 1874', 2 April 1874, AJHR, 1874, G-1A, p 5
267. R Price, *Through the Uriwera Country* (Napier: Daily Telegraph, 1891), p 44

chiefs, he said, had expressed their desire to arrange their internal affairs and to resolve any questions with Europeans 'in a peaceful manner, and in accordance with the law'.[268] Locke challenged them on this point: 'If it be your sincere desire to arrange all questions that may arise in a peaceful manner, and in accordance with the law, there is no necessity for the Hokowhitu, or Council of Seventy, or the Maori Committee, *as neither is recognised by the law*.' (emphasis added)[269] The Government, Locke told the hui, would have regard to the wishes of the 'owners of the soil', be they individuals or 'sections of your tribes', and not to those of a council which had no legal status.[270]

Messages like those offered by Brabant and Locke would, it seems, have simply reinforced emerging Te Urewera mistrust of the Government's post-war intentions in respect of their land. Such mistrust was evident at the 1874 hui. Paerau presented ten large taha (calabashes), some carved, containing about 1800 preserved birds, to the Government – to McLean, Captain Porter, and Brabant. Hira Tauaki asked that the Government accept them as payment for food and clothing they had received after their surrender, for rations their leaders had received when visiting the towns, and for money accepted by Kereru Te Pukenui. Their fear was that the Government would at some point claim land in payment. Nor did they want any more rations to be given, so that the Government would have no hold over their land.[271]

Brabant accepted the taha as a 'mark of the friendship of the Urewera towards the Government', rather than as payment for rations, and stated that the people were entitled to some share of the public revenue, even though they would not accept public officers appointed within their boundaries. Brabant left the taha at Ruatahuna for the time being, he said; but, when Locke left, he was told young men would carry the taha to Waikaremoana, en route to Napier.[272] Despite Government reassurances that land would not be taken for such payments, the leaders were anxious that the matter be settled on their own terms.

We reiterate, however, the significance of the invitations sent to the Governor, the Native Minister, and officials at this time. Brabant reported that the speeches at the hui were 'moderate' in tone, and that 'the tribe appear to be earnest in their desire to maintain friendly relations with the Government'.[273] Locke, who had visited Ruatahuna twice in 1873 to 1874, reported a warm reception, and the same wish expressed that the people should 'remain on friendly terms with the Government'.[274]

268. R Price, *Through the Uriwera Country* (Napier: Daily Telegraph, 1891), pp 43–44
269. Ibid, pp 44–45
270. Ibid, pp 43–46
271. H W Brabant, 'Report by H W Brabant, Esq, RM, Opotiki', 1 April 1874, AJHR, 1874, G-1A, pp 2–3 (Binney, 'Encircled Lands', vol 1 (doc A12), p 292)
272. Binney, 'Encircled Lands', vol 1 (doc A12), pp 305–306
273. H W Brabant, 'Report by H W Brabant, Esq, RM, Opotiki', 1 April 1874, AJHR, 1874, G-1A, p 3
274. Locke to Native Minister, 30 May 1874, AJHR, 1874, G-2, p 20

8.5.3

The question, then, is whether the Crown was prepared to accept the terms on which Te Urewera leaders sought a 'friendly' relationship, and to respect those terms. The Crown suggested in our hearings that Governments were 'inclined to proceed cautiously and at a pace that suited the wishes of Te Urewera leadership'.[275] We think this rather understates the position. In the 1870s and 1880s, the Crown, in our view, seems in practice to have recognised the authority of Te Urewera leadership (though its agents dismissed the importance of Te Whitu Tekau to their face), perhaps because it saw no alternative; yet it did not hesitate to try to undermine policies it considered would interfere with settlement.

Thus, Government policy in relation to roads and land acquisition, it can be argued, tended in precisely the direction many tribal leaders feared. Wilson, one of the local land purchase agents, as we have seen, reported to McLean in June 1874 on the number of transactions he was undertaking,

> each as yet imperfect in itself; but all tending in one direction; viz the setting aside of the ring-boundary – the rohe-potae – which the Uriwera seventy have set up to enclose in many instances the lands of other tribes.[276]

Wilson added that this was not to imply Te Whitu Tekau meant to claim ownership of lands that were not theirs. Nevertheless, he went on to imply strongly that the 'Seventy' were out of line in their claims, and were attempting to block the real owners from leasing their lands. As he put it:

> On the contrary they say some of this land is not ours, but we are more or less connected with its owners, and as the boundaries between us are not always clearly defined and there may be some dispute in some cases about them, therefore we draw this rohe-potae to prevent leases and sales, and within it we assume entire control of all lands.[277]

In this way, the Seventy try to 'hinder the owners of about 920,000 acres on the Whakatane and Rangitaiki side from doing as they like with their own – and these owners are principally friendly natives who are most anxious to lease their lands for the sake of an income'.[278]

In the face of what he described as 'an organised opposition to civilisation', Wilson reported that he thought it best not to attempt overt Government land purchase, which might simply 'provoke greater opposition, make the Government unpopular, and retard the object sought'. Instead, he was working in a 'less ostentatious' manner. He went on to detail his various approaches, including acquiring sufficient interest in the Tawaroa and Kuhawaea

275. Crown counsel, closing submissions (doc N20), topic 7, p 13
276. Wilson to McLean, 1 June 1874, MA-MLP 1/1874/230, p [2] (cited in Binney, 'Encircled Lands', vol 1 (doc A12), p 298)
277. Wilson to McLean, 1 June 1874 (as quoted in Binney, 'Encircled Lands', vol 1 (doc A12), p 298)
278. Wilson to McLean, 1 June 1874, MA-MLP 1/1874/ 230 (Binney, comp, supporting papers to 'Encircled Lands', various dates (doc A12(a)), pp 43–44)

run occupied by Troutbeck 'within the rohe potae' to 'render the freehold of the remaining portion comparatively valueless to any other purchaser'; and the purchase of some shares in Te Whaiti land from Ngati Manawa and Ngati Rangitihi.

We will consider Wilson's tactics more fully in chapter 10. Here, we note that his report makes it clear that he recognised the force of Te Whitu Tekau policy and thus hesitated to confront it head on. At the same time, however, he was anxious to undermine it, by working in a concerted way to increase land transactions on the borders and immediately within the rohe potae. It was Wilson who sent out 'circulars' for a planned hui at Te Teko in April 1874, so that his negotiations 'with all the Whakatane and Rangitaiki tribes' could be further discussed; the hui had to be re-scheduled (at Galatea) after he conferred with Locke, who had also been planning one with Davis and Mitchell. Ultimately, after a further delay, Wilson went ahead and 'conducted proceedings' on his own. It is not at all surprising that Te Whitu Tekau leaders chose not to attend a hui called by a land purchase official, and ensured simply that their position was represented by Te Makarini and a written communication. With so little 'Urewera' representation, the outcome, as Wilson observed with satisfaction, was that 'the general voice of a meeting of loyal tribes settled against him [Te Makarini]', and each of these tribes emerged, in his view, knowing 'pretty well . . . what lands it may deal with'. 'Urewera' failure to attend, he suggested, was 'a confession of weakness'.[279]

In short, where the Government could attain its object through sufficient willing Maori participation, it did not hesitate. We do not discount the importance of such participation in land transactions; Maori agency cannot be set aside. That indeed was the dilemma Te Whitu Tekau leaders faced at the time. But what is clear also is that the land purchase commissioner saw it as the ultimate aim of policy to 'set aside' the protective boundary that the Urewera leadership had created. Certainly, by the time the leaders defined their boundary again in 1889, excluding from it land that had gone through the Native Land Court, the area involved had been significantly reduced.[280]

Similarly, Crown anxiety to build roads in Te Urewera is hard to explain solely in terms of a wish to assist the people to access markets or improve communications. Crown officials, as we have seen, raised the question of roads even in the context of the peace agreement of late 1871, when Ormond, Government Agent for the East Coast, asked Te Makarini to 'talk with your people about a Road f[rom] Waikaremoana to Wairoa and f[rom] Waikaremoana to Ruatahuna' so that, he said, 'the mail may go'.[281] At this time, Captain George Preece had some men from the Native Contingent of the Militia and Armed Constabulary working on part of a road from Galatea to Ahikereru. Preece also promoted the idea of building a road right through Te Urewera, from 'Waikaremoana to Maungapowhatu and Galatea via

279. Wilson to McLean, 1 June 1874, MA-MLP, MA 1/1874/230 (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), pp 56–60)

280. Binney, 'Encircled Lands', vol 2 (doc A15), pp 11–16

281. Ormond to Makarini, 20 November 1871 (Binney, supporting papers to 'Encircled Lands' (doc A12(a)), p 99)

Ruatahuna.'[282] It is telling that he recorded in his diary in November 1871, before the peace agreement between the Crown and Urewera leaders had been finalised, that Mr Crapp of the Public Works Department had informed him that this proposed road 'is to be done at once. This will be a good stroke in weakening the Urewera and will strengthen ourselves in case of war at any time.' Subsequently, he noted that 'Maling and party' had travelled to Ahikereru and then on to Waikaremoana, inspecting the line of the road and estimating its cost.[283]

Preece continued to strive for roads through Te Urewera early in 1872, but his efforts bore no more practical fruit than later discussions once Te Whitu Tekau had been formed. In February, he was involved in a conversation with Paerau and Te Makarini about roading, and remarked hopefully:'I think that the Urewera will fall in with the idea when they get a taste of the money.'[284] He subsequently recorded that Hamiora said 'they would be willing' to countenance a road through Te Urewera if Paerau was consulted first. Preece's efforts to persuade people at Ruatahuna about the virtues of a road right through the area were, however, unsuccessful at this time.[285]

In the previous section, we discussed Government pressure on Urewera communities to agree to roads after the policy-setting hui of 1872. It became clear that the Crown was not willing to force the issue. While there was vigorous debate among and between hapu, the consensus remained firm against roads in the 1870s and 1880s. The Government respected Te Whitu Tekau's authority on this point, although it tested it from time to time. It was not until the 1890s that the Government effectively forced the issue at Te Whaiti inland to Ruatahuna (see ch9).

Despite the underlying aims of Crown policy, the rohe potae survived – diminished, certainly, but with its core intact. Some historians have seen this as the outcome of not only Te Whitu Tekau policy but also 'a measure of Government and settler disinterest'. There was, as Miles put it, 'little pressure on the Government to open up the area', since the terrain was regarded as unsuitable for agriculture. In any case, the Government was preoccupied with 'opening up' the King Country.[286] (We consider this further in chapter 9.) In other words, remoteness and the less-than-favourable reputation of the land brought some protection, at least until the end of the 1880s, when Government and private interest was kindled by the gold believed to be in the region.

282. George Augustus Preece, diary, 1 March 1870 – 5 June 1872, qMS-1685, ATL, entry for 7 November 1871, pp177–178

283. Preece, diary, entries for 12 November 1871, p188; 15 November 1871, p188; 16 December 1871, p189; 20 December 1871, p190

284. Preece, diary, 23 February 1872, p209

285. Preece, diary, 29 March 1872, pp218–219 (Hamiora quotation on p218); 22 April 1872, p227; 23 April 1872, p227

286. Miles, *Te Urewera* (doc A11), pp237–238

Colonial criminal law was another key area of interaction between the Crown and Te Urewera. Richard Boast has suggested that the reports of successive resident magistrates (based in Opotiki) show 'law enforcement was entirely dependent on co-operation with the Urewera chiefs'.[287] Brabant thus asked the chiefs to assist in handing over 'wanted criminals' to stand trial. The best-known case involved the handing over for trial by Te Whitu Tekau of Himiona Te Rua, who in 1876 was charged with the murder of his uncle Te Marae for practising makutu; Te Rua was delivered to the authorities at Opotiki. Te Rua, who was of Ngati Awa, had been living at Te Whaiti with his Ngati Whare wife. Many of the chiefs were present at a lower court hearing at which Te Rua was committed for high court trial.[288]

Boast has suggested that chiefs and officials interpreted this state of affairs differently. Brabant, reporting to the Government, presented the episode as exemplifying a 'gratifying' development: the Urewera tribe 'now appear . . . to be surrendering themselves voluntarily to the rule of law and of the Government'.[289] The chiefs, however, aware of Ngati Awa pressure on Brabant, took a decision which indicated their cooperation with the Crown while keeping colonial law outside their takiwa.

Chiefs and Crown officials may also have interpreted the payment of pensions differently. The Crown began to pay annual pensions in the wake of the 1871 agreement (see ch5). Up to the end of the nineteenth century, and beyond, pensions were paid to Rakuraku, Tutakangahau, Hetaraka Te Wakaunua (Te Wakaunua Houpepe), Te Whenuanui (and his son Te Whenuanui II, also known as Te Whenuanui Umuariki and Te Haka), and Te Makarini (Tamarau Waiari). Binney considered that both parties regarded these pensions as an affirmation of an 'alliance' or 'association'.[290] Whether the Crown viewed the payment of pensions in this light, we think it is clear the chiefs saw no inconsistency between their acceptance of pensions or Government work and their determination to control access to Te Urewera, including Crown access, on their own terms.

In response to Te Whitu Tekau's position, the Crown did not force the issue by, for example, trying to install a native officer or a resident magistrate in the region. In fact, there was evident acknowledgement of the Te Urewera position that Government officers were not to have a role within the rohe potae; this was stated publicly. In his speech about Government gifts and rations, Brabant told Te Whitu Tekau in 1874:

> That the Government had considered that although the Urewera and some other Native tribes declined to have public officers appointed within their boundaries, or to have roads and other public improvements gone on with, that they were nevertheless entitled to some

287. Boast, 'Ngati Whare and Te Whaiti-Nui-a-Toi' (doc A27), p 83
288. Binney, 'Encircled Lands', vol 1 (doc A12), pp 337–338
289. Boast, 'Ngati Whare and Te Whaiti-Nui-a-Toi' (doc A27), p 84
290. Binney, 'Encircled Lands', vol 2 (doc A15), p 20

share of the [tax] revenue until they were sufficiently advanced in civilization to appreciate our system of government and public works, as they would doubtless do in course of time.[291]

We note also that Preece, resident magistrate in 1877, decided he had no authority to intervene to retrieve a few head of cattle seized by Te Makarini when they wandered from an unfenced farm on the confiscation boundary onto Tuhoe lands. (Most had been returned.[292]) All of this, in our view, indicates acceptance by the Crown that its position in Te Urewera had to be negotiated – or, at least, that this was a prudent or pragmatic approach to take. This remained Government policy after the end of McLean's tenure as Minister in 1877. Although officials such as Blythe and Smith were sent occasionally to test the Urewera leadership's position, as we discussed above, there was no serious push to 'open' the interior of Te Rohe Potae until gold and timber came to the fore at the end of the 1880s. From 1889 onwards, the Crown increased its pressure on Te Urewera leaders to accept gold prospectors, surveyors, timber leases, roads, and the Native Land Court, triggering a crisis in 1891 to 1894 (see below).

(2) *The Crown's opportunities to give legal recognition and powers to Te Whitu Tekau: the 1870s*

The Crown defended its failure to formally recognise Te Whitu Tekau, or to endorse it as a body for the enhancement and protection of mana motuhake by arguing: 'It was not a task of government under the legislation of the day to enhance Te Whitu Tekau as a vehicle of rangatiratanga.'[293]

Crown counsel denied that McLean had promised to recognise Te Urewera self-government in 1871. There was no 'formalised arrangement for regional autonomy', and 'it has not been established from the evidence that the government endorsed the idea of "self-government" in the Urewera'.[294] There is no evidence, counsel stated, that McLean accepted that the operation of Te Whitu Tekau 'supplanted the rule of law within Te Urewera'.[295] Instead, the Crown emphasised Premier Seddon's conception of McLean's promise: 'to prevent the alienation of Urewera lands (unless they changed their minds) and to allow Urewera Maori to administer their own lands subject to the laws of the colony'.[296] Further, the Crown noted that McLean's Native Councils Bill had failed to gain sufficient support to be enacted. In all these submissions, the Crown stressed its need to act according to the law as it was at the

291. H W Brabant, 'Notes of Speeches Made at the Native Meeting at Ruatahuna, March 23rd and 24th, 1874', 2 April 1874, AJHR, 1874, G-1A, pp 2–3
292. Binney, 'Encircled Lands', vol 1 (doc A12), pp 340–344
293. Crown counsel, closing submissions (doc N20), topic 7, p 12
294. Crown counsel, closing submissions (doc N20), topic 7, p 9
295. Crown counsel, closing submissions (doc N20), topic 7, p 10
296. Crown counsel, closing submissions (doc N20), topic 7, p 10

time. Thus, it also had to protect the legal rights of those who applied for surveys and court hearings.[297]

On the other hand, the Crown submitted that it engaged in dialogue with Urewera leaders about 'governance structures' in the 1870s and 1880s; that it considered formally recognising a Urewera committee in the 1880s; and that the essence of what Te Whitu Tekau wanted was in fact achieved with the Urewera District Native Reserve Act 1896.[298] Counsel submitted:

> The idea of a forum for collective decision making on the larger issues of tribal affairs, whilst preserving the independence of the constituent hapu, appears to have been preserved in substance if not form in the models for local governance structures developed under the UDNR legislation.'[299]

As we noted in section 7.4, this raises the question of why Te Whitu Tekau could not have had formal recognition and legal powers much earlier.

As discussed in chapter 3, the Government had made an attempt to give legal powers of self-government to Maori runanga in the 1860s. These were called the New Institutions, and the runanga were to operate in partnership with magistrates and a civil commissioner. Rachel Paul, in a report for Te Ika Whenua, quoted the views of Premier Fox in 1862. He told Parliament that it was necessary to

> treat the Natives as men, as men of like feelings with ourselves; to avail ourselves of the great movement of the [Maori] National mind as one which has law and order for its objects; and to encourage the Runanga under legal sanctions. But beyond all this we must offer them political institutions for their own self-government.[300]

Charles Hunter Brown brought this offer to Te Urewera in 1862. It was received with some caution but, as we found in chapter 3, the Government took no follow-up action and the matter lapsed. The New Institutions, which had been set up as a result of this policy, were – as Binney said – undermined by the Native Lands Act 1862 and then abolished in 1865.[301]

Although the New Institutions had been abolished, many Maori groups pressed the Government to accord recognition and legal powers to their runanga. McLean told Parliament that he had been inundated with such requests in 1871. A number of historians drew our attention to McLean's Native Councils Bills of 1872 and 1873. The first Bill proposed to give significant powers of self-government to native councils, including collec-

297. Crown counsel, closing submissions (doc N20), topic 7, pp 8, 12
298. Crown counsel, closing submissions (doc N20), topic 7, pp 13–18
299. Crown counsel, closing submissions (doc N20), topic 7, p 18
300. William Fox, NZPD 1862, 22 July 1862, quoted in Rachel Paul, 'Native Land Legislation from 1862 to 1880', report for Te Runanganui o Te Ika Whenua, 1994 (doc A94), p 3
301. Binney, 'Encircled Lands', vol 1 (doc A12), p 71

tive land management and powers of deciding land entitlements (with a secondary role for the Native Land Court).[302] Judith Binney, Cathy Marr, Anita Miles, Peter McBurney, and Bryan Gilling all noted the significance of the proposal for various tribal groups, including Ngati Manawa, Whakatohea, and Te Arawa, as well as Tuhoe.[303] By contrast, the Crown's historian was dismissive, particularly of any idea that the Bills illuminate McLean's intentions towards Te Whitu Tekau. Dr Battersby argued that 'the bill was general, had no direct connection with events in the Urewera and was withdrawn shortly after being presented to Parliament'.[304]

Counsel for Wai 36 Tuhoe claimants, however, stressed the importance of the native councils initiative. Drawing on the evidence of Marr and Binney, he argued that McLean was sympathetic to 'separate laws and districts for Maori'.[305] The Minister contemplated using North American models of indigenous self-government, establishing districts in which Maori customs would prevail, colonisation would be restricted, and a council of chiefs would have 'powers of local self-government'.[306] (Marr added that the Minister was also influenced by British models; local communities there had their own laws and institutions, some of which differed markedly.[307]) At the same time, McLean's native councils initiative was a response to Maori demands; it was introduced because of Maori calls for the Government to recognise their runanga 'to regulate local affairs'. This is the context for McLean's policy towards Te Whitu Tekau.[308]

As the Crown rightly observed, the Bills were not enacted. Crown counsel put to Cathy Marr that this meant the Bills, 'while useful context to explain Donald McLean's thinking . . . cannot be said to be reflective of the Government's position'.[309] Ms Marr responded that it was McLean who had made the 1871 agreement with Te Urewera leaders. He was the Minister responsible for the negotiations, and the Bills show that he did not find their desire to manage their own district either unacceptable or inimical to Government interests.[310] It was McLean's responsibility to ensure that his arrangements were carried out, or, if he could not do so, to return to the people and negotiate a fresh arrangement. He did neither. In 1873, McLean told Parliament of his intention to bring in a new Native Councils Bill the follow-

302. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 309–312

303. Binney, 'Encircled Lands', vol 1 (doc A12), pp 272, 290; Judith Binney, 'Statement in response to questions of clarification filed by the Crown' (doc B1(c)), pp 24–25; Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 8–10, 13–14, 27; Anita Miles, 'Answers to questions of clarification from counsel for Nga Rauru o Nga Potiki' (doc D41), p 2; McBurney, 'Ngati Manawa and the Crown' (doc C12), pp 138–139; Bryan Gilling, 'Te Raupatu o Whakatohea: the confiscation of Whakatohea land, 1865–1866', report for the Treaty of Waitangi Policy Unit, 1994 (doc A53), pp 159–161

304. Battersby, 'The Government, Te Kooti and Te Urewera' (doc B2), p 184

305. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 47

306. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 49

307. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 7–8

308. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 49–50

309. Cathy Marr, 'Answers to questions of clarification' (doc D11), p 1

310. Cathy Marr, 'Answers to questions of clarification' (doc D11), p 1

ing year to provide for Te Urewera (among other districts).[311] In 1874, the very year in which Locke told Te Whitu Tekau that it had no status under colonial law, the Minister failed to carry out this intention – no new Native Councils Bills were introduced from then on.

In respect of the failure of McLean's Bills, Ms Marr explained:

> McLean was only willing to go as far as settler opinion would tolerate. He introduced his Native Councils Bill 1872 in response to Maori requests for more official recognition of local runanga to regulate local affairs and control petty crime. Importantly, the runanga were also to have responsibility in determining land boundaries and managing land in response to criticisms of the dislocation caused by the Native Land Court and land purchase officers. As [Professor Alan] Ward notes, the Bill 'promised to give Maori leaders a much-needed recognition and responsibility'. However, Parliament rejected the Bill largely on the grounds that it gave Maori too much authority over important matters affecting settlers and it undermined the authority of the Land Court. McLean made further efforts to make the Bill more acceptable to settler politicians but when these were also rejected he bowed to settler pressure and withdrew it, abandoning his attempt to provide legal recognition of runanga authority.[312]

Thus, when the Crown defended itself on the basis that the legislation of the day did not require it to 'enhance Te Whitu Tekau as a vehicle of rangatiratanga', it quite deliberately ignored the point that it failed to enact laws that would have required it to do so. In particular, the Native Councils Bills of 1872 and 1873 were a key point at which the Crown chose to prioritise settler interests and to refuse legal powers to runanga such as Te Whitu Tekau. As a result, the runanga had no official role or powers vis-à-vis bodies which did have legal powers, such as the Native Land Court. Nor did it have standing to negate the acts of dissentients who opted to exercise the rights available to them under the law as it stood, such as applying for a survey and Native Land Court title.

There is no doubt, of course, that Te Whitu Tekau could expect neither unanimity on all issues nor perfect obedience from all the leaders and groups in the union. In the claimants' submission:

> The existence of differing opinions and the potential for dispute only underlined the real need for a governance body for the tribe. It was no different to a Parliament, where it is expected that different opinions might be expressed but where it is understood that a common view will prevail.[313]

As Locke pointed out at Ruatahuna in 1874, colonial law did not recognise Te Whitu Tekau: it could not enforce its decisions by any means other than customary ones. While

311. NZPD, vol 15, 30 September 1873, p 1514
312. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 8
313. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 47

those had sufficed in Te Urewera before 1871, they were no longer enough in instances where the colonial State gave legal rights and powers to others – rights that could be enforced. If roads had been treated in the same way as Maori land – if, for example, a single individual had had the right to apply for a road, after which the Government would enforce that right and build the road no matter what the objections – then Te Whitu Tekau may not have been able to stop roads either.

We do not underestimate the difficulty of the situation facing the peoples of Te Urewera in the 1870s and 1880s. As we saw above, the 1874 hui at Ruatahuna was unable to reach a consensus among iwi claiming rights in the outer lands. But it is also necessary to consider the role of the Government when attempts were made to resolve these matters by discussion at tribal hui. Counsel for Wai 36 Tuhoe claimants argued that the Government actually exploited such differences and conflicts.[314] It was not impartial: it sought the bringing of land to the Native Land Court and transference of a substantial part of it to settlers. Thus, Brabant and Locke did not seek to mediate or assist a resolution of tribal differences at the Ruatahuna hui; rather, they discouraged a Mataatua union and advocated taking land to the court. There were no legal powers for Maori tribal bodies to resolve their own boundaries and entitlements, as would have been the case had the Native Councils Bill been enacted. The only body with powers recognised by the State was the Native Land Court.

This is not to say that legally empowered native councils would have been a full expression of – or vehicle for – mana motuhake. Their success would have depended on Tuhoe's acknowledgement of the Crown's right to legislate, and on the tribe's acceptance of a State-sanctioned body with powers recognised by (but also limited by) the State. We do note the apparent enthusiasm of Te Urewera chiefs for the council proposal. In the letter cited on this point by Professor Binney,[315] Tutakangahau wrote to McLean and Ormond:

> Friends, salutations to you both. May you both prosper because of the mercy you have extended towards this people and this land. The papers with the Parliament's talk has reached here and have filled me with wonder and admiration.[316]

The success of the council initiative, had it been enacted, would also have depended on settler Governments remaining willing to share power, and to do so for longer than the four-year life span allowed the New Institutions in the 1860s.

We add that the native councils legislation would not have accorded powers to Te Whitu Tekau as it existed in 1872. Some changes of form would have been required, such as an election process and more formal procedures for passing resolutions and enacting by-laws. We cannot say with certainty that Te Whitu Tekau leaders would have been willing to adapt

314. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 47
315. Binney, 'Encircled Lands', vol 1 (doc A12), p 290
316. Tutakangahau to Ormond and McLean, Maungapohatu, 1 December 1872, AGG-HB 2/1, Binney, comp, supporting papers to 'Encircled Lands' (doc A12(b)), p 350

their runanga in these ways. In our view, however, they would have welcomed the benefits of recognition under the law. They were certainly willing to make such changes in the 1880s, in return for formal Government recognition and legal powers. It is to that development – efforts to obtain Government endorsement of their committee in the 1880s – that we now turn.

(3) *The Crown's opportunities to give legal recognition and powers to Te Urewera komiti: the 1880s*

In the early 1880s, Maori members of Parliament began introducing annual Bills to recognise and empower district komiti (committees) as a vehicle for Maori self-government and collective land management. Finally, in 1883, the Government gave way to Maori pressure and passed its own Native Committees Act. This Act was condemned by the Rees-Carroll commission of 1891 as a 'hollow shell' and a mockery – a condemnation echoed recently by the Tribunal in its report *He Maunga Rongo*, as we shall see below.[317] Its disadvantages, however, were not immediately apparent to those Maori who sought legal powers for their committees.

Te Urewera leaders, like leaders elsewhere in the North Island, took a considerable interest in the 1880s in Crown provision for various kinds of committees. In 1886, Native Minister John Ballance visited Whakatane and talked about committees under the Native Committees Act 1883. From the evidence of Cecilia Edwards, there does not appear to have been a Government or newspaper record of the proceedings of this hui, so we cannot be sure of the detail of what was discussed.[318] Under the Native Committees Act, district committees had powers to decide civil disputes and could also inquire into Maori land titles. Both powers were limited:

- civil disputes had to be for matters worth £20 or less, and could proceed only where the Maori parties bound themselves in writing to abide by the committee's decision; and
- the committee's title investigations consisted of reporting to the Chief Judge for the information of the Native Land Court on cases about to be or actually before the court, and on boundary disputes relating to adjoining areas of Maori land.[319]

While Maori parties had to bind themselves to accept the committee's decision, no such requirement was placed on the Native Land Court – it was free to take account of the committee's report or not as it chose.

In itself, Ballance's visit marked a notable renewal of Crown interaction with the peoples of the Bay of Plenty. Resident Magistrate Bush pointed out that no Native Minister had visited the region since McLean many years before. Maori, he said:

317. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 318, 340
318. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 4–5; transcript 4.14, p 79
319. Native Committees Act 1883, ss 11, 14

> have looked upon themselves as being neglected – in fact, slighted . . . [they] argue that the Native Minister is expressly appointed on their account; he ought therefore to make himself personally known to them all, and he can only do this by visiting them at their settlements, and there discussing matters of interest to them and the Government, and affecting their welfare.[320]

Despite Bush's cynical take on the worth of ministerial visits – that the Maori needed regular opportunities for 'giving vent to his pent-up feelings, which in most instances are grievances of some kind or another, over which he has been brooding more or less for some time' – Ballance's arrival was much appreciated.[321]

'The Urewera', Bush reported in May 1886, had 'expressed a wish to have their district made a separate committee district' – as had Ngati Awa, Ngati Pukeko, Te Tawera, and others who wanted a new district extending to the west of Ohiwa.[322] Twelve districts had been proclaimed, and two, Opotiki and Rotorua, impinged on Te Urewera. Bush also recorded that during his visit Ballance promised the Urewera leaders a separate district.[323] There was initially some doubt about this reported promise; and the Crown, in our hearings, reiterated that doubt. TW Lewis, the Under-Secretary for Native Affairs, searched the file for a record of it and, according to Crown historian Edwards, could find no record of it.[324] But Bush referred to the promise again in a memorandum to Lewis in 1889; and it seems quite clear that it was made. In this 1889 memorandum, Bush reported Ballance's 1886 response to Ngati Awa when they raised the question of a separate district: 'he had promised a committee to Tuhoe, but that it would be necessary for the tribes to confer together, and adjust their tribal boundaries' – and that a surveyor would have to be involved to lay down the boundaries.[325]

Te Urewera leaders were thus not alone in seeking their own committee. It was a generally held iwi view that such committees could work only if they represented cohesive tribal bodies. This was at odds with the Government position, which was to create districts based on population size, whatever unworkable tribal combinations and whatever difficulties around drawing district boundaries this formula produced. As Ballance told the people at the Opotiki hui in April 1886, there 'should be at least 1000 people in each district'.[326]

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320. Bush to Under-Secretary, Native Department, 3 May 1886, AJHR, 1886, G-1, p 13
321. Bush to Under-Secretary, Native Department, 3 May 1886, AJHR, 1886, G-1, p 13
322. Bush to Under-secretary, Native Department, 3 May 1886, AJHR, 1886, G-1, pp 13–14
323. Bush, memorandum, 18 June 1886, 86/1713, MA 23/13B, ArchivesNZ (cited in Binney, 'Encircled Lands', vol 2 (doc A15), p 7)
324. TW Lewis, file note, 12 August 1886, to NO86/1713, MA23/13B, ArchivesNZ (Cecilia Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896', 3 vols, various dates (doc D7(a)(i)), vol 3, p 1227)
325. Bush memorandum, 4 April 1889 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896' (doc D7(a)(i)), vol 3, p 1190)
326. Extracts from notes of native meetings, 24 April 1886 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896' (doc D7(a)(i)), vol 3, pp 1229–1230)

In February 1887, Wepiha Apanui reported that Ngati Awa had elected a committee, and petitioned for recognition of a separate Ngati Awa district under the 1883 Act. A number of chiefs signed, including representatives of Ngati Pukeko, Te Tawera, and Ngati Rangitihi, as well as Te Makarini Hona (who reportedly later repudiated his consent) for Tuhoe and Te Peti for Ngati Manawa.[327] Bush noted that the boundaries given included 'a portion, or perhaps I should say, the bulk' of the Urewera country. A 'regular' election would need to be held to 'provide for some Ureweras being elected, because there are disputed claims to land between them and Ngatiawa'.[328]

Subsequently, Urewera leaders objected to the concept of a Ngati Awa–Urewera district, asking that the boundary be removed from their lands, and reminding Ballance that Tuhoe and Ngati Awa were 'quite . . . distinct'. This time, it was Urewera leaders who rejected the idea of a Mataatua union. Ngati Awa and Ngati Pukeko told Bush:

> The two tribes said, the reason they had included the Urewera in this application was because they were descended from the one ancestor, and belonged to the one Canoe, but as it appeared that the Urewera were averse to joining with them, they would not press the matter, but leave them to go their own way . . .[329]

Bush, who went to talk to Rakuraku, Tutakangahau, and Te Wakaunua, pointed out that their lands already formed part of districts under the Act, and the new proposal would 'give them a voice in matters concerning themselves'. It was not surprising therefore that the chiefs said they would 'prefer to work on their own in the meantime'; they would see how the new committee worked, but at present did not wish for a committee themselves under the Act.[330] We do not think Urewera hapu were divided, as Cecilia Edwards suggested. Rather, they were keeping their options open while making their present position clear. In fact, Bush advised the Government against accepting the Ngati Awa proposal, as he was suspicious of those who might be members of their committee.[331]

The Urewera chiefs later decided to take the initiative themselves. It appears that Kereru Te Pukenui, writing from Ruatahuna, notified the Native Minister in November 1887 that Tuhoe had elected their own committee. Edwards commented that because the actual letter

327. Wepiha Apanui to Native Minister, 21 February 1887, MA 23/13B (quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 5; petition in Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896', (doc D7(a)(i)), vol 3, pp 1210, 1212–1215)

328. Bush, minute, 23 February 1887, on Wepiha Apanui and others to Ballance, 21 February 1887 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896' (doc D7(a)(i)), vol 3, pp 1211–1212); see also Bush, minute, 2 July 1887, on Te Makarini Hona and Te Whakaunua to Ballance (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896' (doc D7(a)(i)), vol 3, p 1199)

329. Bush to Lewis, memorandum, 27 May 1887 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896' (doc D7(a)(i)), vol 3, p 1203)

330. Bush to Lewis, memorandum, 27 May 1887 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896' (doc D7(a)(i)), vol 3, pp 1203–1205)

331. Bush, memorandum, 27 May 1887 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896' (doc D7(a)(i)), vol 3, p 1205)

is not extant it is impossible to tell whether Kereru simply advised the Minister of the committee's establishment or sought Government sanction for it. In her view, the reply, which is extant, implies the former. At any rate, Kereru was informed that, unless the committee was set up in accordance with the correct regulations, it had no legal authority.[332]

The following year, Tuhoe made another approach to the Crown. Rakuraku, Tutakangahau, and 'te komiti nui o tuhoe potiki' wrote from Waimana to inform the Native Minister of Tuhoe's election of a committee:

> for the purpose of dealing with their local affairs within their own boundaries, as all strife, perverse dealings, and acts of violence have ceased, and all have mutually settled down under the law. (he whakaatu tena kia koe i te komiti o tuhoe kuaara hai whakahaere mo na raruraru i roto i ana rohe kua mutu hoki na ki nona patu tanata [tangata] na whakato i na tuki no i te tanata kua noho tenei ki te ture)[333]

The committee was to have sole power both to deal with all survey applications, 'not by any one or two individuals or more', and to grant permission for any gold prospecting. This collective approach would 'prevent difficulty and trouble arising within the boundaries of their territories'. The chiefs wanted the Minister's sanction for the komiti, and set out the 'Rohe Potae' boundaries again.[334] Binney argued that the boundaries given here took in more land on the west because of competition with Ngati Awa[335]

We can take several points from this letter and the important proposal it contained. First, it was written in the context of new pressure from gold prospectors. There was a widespread, albeit mistaken, belief that large quantities of gold would be found in Te Urewera.[336] As early as October 1869, Lieutenant-Colonel St John had told McLean that, although the country of the rebel Whakatohea and the Urewera was otherwise worthless, he firmly believed 'these mountains contain within their bosom mines which some day will add to the wealth of New Zealand'.[337] In the late 1880s, both the Government and private interests were turning their eyes to Te Urewera.

Secondly, it remains uncertain what the relationship of this komiti was to that proposed by Kereru Te Pukenui not long before. Nor is its relationship to Te Whitu Tekau clear. The claimants suggested that the komiti nui 'may have been Te Whitu Tekau in another guise,

332. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 7–8
333. Rakuraku Rehua, Tutakangahau ara na te komiti nui a tuhoe potiki to Native Minister, 30 Hepetema 1888 (1887 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896' (doc D7(a)(i)), vol 3, pp 1193–1195)
334. Rakuraku Rehua and others to Native Minister, 30 September 1888, MA 23/13B (Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 8)
335. Binney, 'Encircled Lands', vol 2 (doc A15), p 10
336. Binney, 'Encircled Lands', vol 2 (doc A15), p 25
337. St John to McLean, 18 October 1869, AJHR, 1870, A-17, p 65

made more palatable for the Government'; and this seems probable.[338] Its policies were no different from those of Te Whitu Tekau.

Thirdly, there was a long delay before the Government responded to Tuhoe leaders. Though their letter was dated 30 September, it was 26 November before it was even registered and 9 March 1889 before T W Lewis, the Under-Secretary for Native Affairs, referred it back to Bush for comment. At that time, Lewis was inclined to think it 'advisable to constitute the district referred to [as] a Committee district under the Act & let a Committee be legally formed'.[339] This raises a further question about whether constitution under the Act was what Tuhoe sought. The Crown suggested to us that this was uncertain, and we are inclined to agree.[340] At the time, however, the Tuhoe request was interpreted in this way. We return to this point below.

Fourthly, we note that Bush's negative report, dated 4 April 1889, guided the Crown's response. He detailed the whole history of proposed committees in the region since Ballance's visit. He then, in effect, strongly advised against the new Tuhoe committee on the same grounds as he had earlier advised against the Ngati Awa proposal for a Bay of Plenty district, namely that the influence of 'Te Kooti-ites' on the committee might be too great. The 'Urewera', he told the Government, were all 'Kooti-ites'. Bush was in fact well aware of the influence of the Ringatu faith; in 1886 he had spoken both of its abandonment in some parts of the Bay of Plenty and of the 'grave suspicion' in such settlements of 'the increase of Te-Kootism', presumably following the visit to the region of Te Kooti himself in 1884.[341] He may have been aware of the significance of the building of the great wharenui at Ruatahuna, which we described above. But what Bush really objected to was 'Te Kooti principles, which are to keep the country locked up':

> He [Te Kooti] does not approve of Lands being surveyed, or passed through the Court, as he is evidently of opinion, that these two things help the natives to part with their lands. If there would be any chance of the Urewera acting sensibly, and allowing gold prospecting and such like within their territory, then I certain think it would be a great advantage to constitute their country into a separate Committee district, but of this I am doubtful. The Urewera have always had a tribal Committee termed the 'Seventy'. This Committee has always opposed, the making of roads, surveys, and prospecting. The question is would another Committee be more amenable to reason. I am doubtful.[342]

338. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 60
339. T W Lewis, minute, 9 March 1889, addressed to Bush, NO 88/2533 (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896' (doc D7(a)(i)), vol 3, p 1192)
340. Crown counsel, closing submissions (doc N20), topic 7, p 15
341. Bush to under-secretary, Native Department, 3 May 1886, AJHR, 1886, G-1, p 13
342. Bush to Native Department, 4 April 1889, 89/821, MA 23/13B (Edwards, 'The Urewera District Native Reserve Act 1896', supporting documents, vol 3 (doc D7(a)(i)), pp 1190–1191)

8.5.3

It seems to us that whatever Bush knew or did not know of Te Kooti's advice to the people, the main point is that the continued protection of the rohe potae by the leaders of Te Urewera was not acceptable to him. The only advantage he was prepared to allow for the establishment of a Tuhoe committee was if it helped in 'opening up' the country. But since it was unlikely the committee would be 'sensible', there was no point. In a way, of course, he was right; the native committees were designed to assist processes of title determination by the Native Land Court. But his frank comments underline the limits of Government thinking at this time. Offered the opportunity of affording legal sanction to a Tuhoe komiti – seemingly the first, as Edwards pointed out, if Kereru's was not such a request[343] – Bush's response was to turn aside on the grounds that the komiti would not act in accordance with the Government's wishes. He passed over the important fact that the komiti had not stated that surveyors or prospectors would be prevented from entering Te Urewera. What the komiti had said was that it would take responsibility for decisions, so that such important matters were not left to individuals acting on their own; this kind of initiative could lead to real trouble when the rohe potae had been protected for so long.

Bush's advice, its impact doubtless enhanced by the reference to Te Kooti's influence, was critical. The Native Minister was advised to let the application 'stand over'; accordingly, the correspondence was simply filed.[344] After months of delay, the approach of Tuhoe leaders to the Crown was ignored.

The Government's wishes were spelt out to Te Urewera leaders soon afterwards. On the instructions of the new Native Minister, Edwin Mitchelson, Samuel Locke was sent to meet with Tuhoe leaders at Ruatoki in April 1889. His mission was 'endeavouring to make such arrangements as would lead to the opening-up of that part of this Island for prospecting for gold and other minerals, and for utilising the forest, &c, which are said to contain a large quantity of totara'.[345] Locke tried to persuade the leaders to form a committee to receive communications from the Government about people whom the Government authorised to explore, and to 'make arrangements for any required object'.[346] The Urewera chiefs, however, were not prepared to accept such a passive role. They wrote to the Native Minister on 17 April to say they would set up a committee 'to prevent and to consent to (consider?) the desires of some Pakeha-Maoris who had applied to the Governor for permission to come to do certain works on the Tuhoe land'. Their letter also included a list of their boundaries.[347]

343. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 7–8

344. Morpeth, file note, 16 April 1889, approved 17 April 1889, on NO 89/821, MA 23/13B (Edwards, supporting papers to 'The Urewera District Native Reserve Act 1896', vol 3, p 1189)

345. 'Mr S Locke's Trip to the Urewera Country (Report of)', AJHR, 1889, G-6, p 1

346. 'Mr S Locke's Trip to the Urewera Country (Report of)', AJHR, 1889, G-6, p 1

347. Kereru Te Pukenui and eight others to Native Minister, 17 April 1889, 'Mr S Locke's Trip to the Urewera Country (Report of)', AJHR, 1889, G-6, p 2. The insertion of the word 'consider?' in round brackets was made by the translator at the time.

Maori Self-government in Te Urewera: A Settler Perspective

Professor Judith Binney drew our attention to the following 18 March 1891 editorial in the *New Zealand Herald*, which, she argued, showed that the settler public could be persuaded to accept Maori autonomy in Te Urewera in the late nineteenth century. The occasion for the editorial was Governor Onslow's planned visit to Ruatoki, which had been a matter of some controversy:

> But through the Urewera Country the Queen's writ has never yet run, and New Zealand has gone on for twenty years without anybody caring much about the matter. There are several reasons for this. When the troops returned to England, and the Treasury chest was closed against us, there was a sudden fall to zero of our enthusiasm about the Queen's writ . . . Another reason was – for we are compelled to be strictly truthful – that the Urewera country was not of the least use to us. . . . Of late years they [the Urewera] have been perfectly quiet, contenting themselves with preventing all access to their country, and especially keeping an eye on all surveyors, gold prospectors, and those who wander about on the 'ragged edges of civilisation'.
>
> It is quite natural that His Excellency Lord Onslow should wish to go through this country. No Governor has been through it, and very few Europeans. . . . But he will reflect that there is a time for everything, and that, after all, there is nothing whatever to be gained by shaking the aforesaid writ in the face of the Maoris, when all they want to do is to be allowed to live in peace on the lands of their fathers. There are about 2000 Urewera all told, and they are to assemble at Ruatoki, a place only a few miles within their own territory, to meet His Excellency. It has been stated that they do not intend to allow the Governor to go any further . . . There is nothing that we can see to be gained by any attempt to force this tribe to open their country. . . . If they give a kindly reception to Lord Onslow – which we are sure they will do – that is about as much as can be expected. That will show that they have no desire to disturb the peace of the colony, and wish to be in friendly relationship with the representative of Her Majesty. As for the Queen's writ, they carry out a better system of self-government than we could give them. There is no need for the policeman crossing the boundary line of the confiscated land.[1]

1. Binney, 'Encircled Lands', vol 2 (doc A15), p 27

The Minister's response to the chiefs, in the wake of Locke's visit, emphasised that the role of a committee would be to 'consider any government-issued passes for prospectors' and to admit prospectors carrying a Government pass by noting their consent on the pass.[348] Basically, as Cecilia Edwards put it, the Government envisaged a 'consultative body'; its

348. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 11

role was to be limited to receiving Government passes for prospectors and then ensuring those prospectors were admitted. The Minister, for his part, assured the chiefs that the Government would vet prospectors very carefully.[349] This proposal is an important one. It shows that, despite talk about the law and not recognising committees that had not been established under the law, the Government was prepared to work with an informal committee where it suited. It also shows that Locke's discussions with the chiefs, and their response to his proposal, had envisaged the committee actually exercising authority: it could say no to prospectors if it chose. This was not, however, the Government's view, as was made clear to the chiefs by the Minister.

On 26 July, Kereru Te Pukenui conveyed to the Minister his people's objection to this proposal about the authorising of gold prospecting. This was hardly a surprising result, given Tuhoe's earlier decision as to how prospectors should be dealt with. The same decision was conveyed to Wellington as before: Te Urewera leaders intended to retain authority over their land in their own hands. The boundaries given to the Native Minister on this occasion were different from boundaries stated previously, and we agree with Binney that they delineated only land that the peoples of Te Urewera still possessed and were actively defending. Land under Government control through confiscation and land that had been passed through the Native Land Court was excluded.[350] As a result of Tuhoe's rejection of such a limited committee – informal, and allowed only to say 'yes' – the Government's offer was discontinued. Edwards concluded: 'This appears to have spelt the end of the earlier agreement that Tuhoe elect a committee to authorise prospectors, in the manner described.'[351]

The Crown's failure to respond to Tuhoe on their own terms was in our view a major missed opportunity. But its failure also highlights the limits of Crown provision for Maori self-government in this period, when Maori had fought a long battle for recognition, protection, and empowering of their autonomy. The Central North Island Tribunal has drawn attention to the range of options then available to the Crown and its failure to deliver what Maori wanted – despite its various attempts.[352] There were, for instance, considerable limits on the powers of committees under the Native Committees Act 1883; Native Minister Bryce (whose Bill it was) had rejected the idea that they should have decision-making powers with regard to land titles. The Central North Island Tribunal found that the Committees 'had no powers, either as title-determination bodies (or even advisers), or as organs of self-government'. It pointed to the determination of the 1891 Native Land Laws Commission 'that the Act was a "mockery" that provided no more than a "hollow shell"'.[353] Further, the Tribunal highlighted the shortcomings of Ballance's 1886 Act to establish block committees: it had left out the almost-universal Maori request that land be managed at two levels

349. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 11, 18
350. Binney, 'Encircled Lands', vol 2 (doc A15), pp 12–16
351. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 12
352. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 282–357
353. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 340; see also pp 318–319

– by district committees as well as the block committees actually included in the Act.[354] In other words, Tuhoe might have been disappointed with the outcome, even if their komiti had been constituted under the 1883 Act. They had a clear idea of the kind of powers they wished to exercise.

On the other hand, Tuhoe had made a direct proposal to the Crown, and Crown officials might have engaged in a useful dialogue with the iwi on the basis of that proposal. This might have led to the constitution of their komiti under the 1883 Act (and Crown acquiescence in its exercising broader powers than the Act provided for), or simply to Tuhoe exercise of their authority through the komiti with Crown sanction. Such an arrangement might have eventuated in 1889, had the Government been interested in more than a committee that would simply receive and protect the prospectors it sent. Tuhoe had indicated that the important thing was the preservation of their own right to collective decision-making – that they had room to shape their own policies on survey and prospecting. They had not necessarily shut the door on either, but had offered a pathway forward. The lack of Crown engagement with the Tuhoe komiti, and substitution of its own proposals, was not helpful. In the final years of the period we look at here, the pressures on Tuhoe to change their policies in line with Government wishes intensified; and Tuhoe responded initially by turning their backs. In the next section, we turn to the stalemate that seemed to exist by 1890, with the Government determined to open up Te Urewera and the Tuhoe chiefs still committed to the original policies of Te Whitu Tekau.

8.5.4 Why were some Tuhoe leaders prepared to set aside Te Whitu Tekau policies at Ruatoki in the 1890s, and with what effect?

Summary answer: *In 1890, the Minister of Mines was turned back from the borders of Te Urewera. At the same time, the Government was negotiating for an invitation to the Governor to visit Te Urewera. This was refused first in 1889 and again in 1890, but by early 1891 the chiefs were ready to agree to extend an invitation. In March 1891, Governor Onslow visited Ruatoki, where he was greeted with great warmth but also a restatement of Tuhoe requests for the return of confiscated land, and of Tuhoe opposition to roads, surveys, leases, and land sales. Even so, the Governor's visit – and especially the Native Minister's statement that Tuhoe could protect their lands from being claimed by other iwi if they had it surveyed and its title determined by the Native Land Court – prompted an application by some Ruatoki leaders to have their lands surveyed. External pressure was one of the reasons for this setting aside of Te Whitu Tekau policies. In particular, Government pressure to open Te Urewera worked in combination with pressure from Ngati Awa applications that had been filed for Ruatoki, and that were known to Tuhoe leaders. The Tuhoe application to survey Ruatoki also occurred because*

354. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 349–356

of the settlement of so many hapu there, the disputes between hapu (especially Ngati Rongo and Ngati Koura), and the desire of Numia Kereru and others to lease and develop land in the colonial economy. The result was that Tuhoe could not reach agreement, and some Ruatoki hapu insisted on the survey taking place.

As the Crown's historian acknowledged, Government mediation was not impartial, but rather aimed at opening Te Urewera to surveys and settlement. When Tuhoe leaders all agreed to stop the survey in March 1892, Native Minister Cadman responded by sending James Carroll to negotiate a new agreement. Carroll found that there was still significant support for the survey, despite the March decision. With the assistance of Te Kooti, he secured a compromise agreement: the Government agreed to a limited survey of part of the block, and to allow no new surveys or court hearings in Te Urewera without the explicit consent of all its peoples; the opponents of the survey agreed to its completion for a small part of the block; and the proponents of the survey agreed to give up on surveying the full block. When the surveyor (Creagh) resumed work, however, he was immediately obstructed. Tuhoe leaders disputed whether Creagh was actually working inside the compromise block. We are unable to answer that question today.

Instead of inquiring into the matter when it was raised, Cadman postponed dealing with it until January 1893. At that time, he took charge of the situation, set aside the compromise agreement (which he probably viewed as defunct), and insisted on a full survey of the whole block. Tuhoe could not agree to his ultimatum, so he ordered the survey to resume and had the obstructors summonsed to Whakatane for trial in March 1893. Refusing all further appeals that he negotiate (including those from the Kotahitanga parliament), Cadman insisted on proceeding with the survey and using the courts to deal with each obstruction.

Tuhoe leaders voluntarily left Te Urewera to stand trial, and accepted their imprisonment without resistance. Further peaceful obstruction of the survey resulted in additional trials and the imposition of fines. This time, the obstructors hid in the interior. The Government then brought in armed police to prevent further obstruction, but conflict was prevented by the final intervention of Te Kooti, who advised Tuhoe to stop obstructing the survey. The Crown's historian recognised that the Crown had a duty to protect the rights of 'the majority', who opposed the survey. But colonial law did not recognise tribal governance institutions or their decision-making power; it was weighted in favour of the land court's processes. Thus those who opposed a survey, even if they were a majority with the support of their tribal governance body, could not prevent the court exercising jurisdiction over their land.

(1) *Origins of the Ruatoki Survey*

As we discussed in the previous section, Samuel Locke failed to negotiate agreement in 1889 to the opening of Te Urewera on the Government's terms. A month prior to Locke's mis-

sion, a prospecting party was compelled to turn back at Galatea.[355] Around the same time, Tamaikoha added to a rahui (carved post) that marked the northern confiscation line at Opouriao a notice 'warning that any gold prospector or indeed any European who crossed the line "will make relish for my food."'[356] Early in 1890, G F Richardson, the Minister for Lands and Mines, was told to turn back from his intended trip into Te Urewera before he crossed the northern confiscation line.[357]

The visit paid by the Governor, Lord Onslow, to Ruatoki in March 1891 was, therefore, a very significant occasion. Its origins appear to lie in the wish of the Native Minister to secure an invitation to Te Urewera for himself and the Governor, and a consequent approach to the chiefs from a Native Department official in June 1889. In fact, the Minister sought an invitation specifically to the 'meeting proposed to be held at Ruatahuna' connected with the opening of the wharenui there.[358] The Governor reported later to the Queen that in seeking an invitation through intermediaries he had emphasised the 'difference between the Governor who represented your Majesty and the Government who represented the people of New Zealand'.[359] He reiterated this distinction during his speech at Ruatoki in 1891.[360]

In 1874, as we have seen, Te Whitu Tekau leaders had invited the Governor and Native Minister to their hui at Ruatahuna. Now, in the context of the late 1880s, the idea of allowing the Crown's most senior representatives into Te Rohe Potae was the subject of a long and intense debate. At first, in 1889, Tutakangahau wrote to the Minister that there was not going to be a hui at Ruatahuna. Then, in July 1889, the Ngati Haka Patuheuheu leader Mehaka Tokopounamu issued what appears to have been an invitation to the Governor and Native Minister to visit Ruatahuna. This was repudiated by Ruatahuna leaders, and further debate and negotiation followed. In February 1890, Tokopounamu finally advised the Government that a decision had been made not to invite the Governor in 1890. The Government (through Bush) continued to negotiate the point during 1890.[361]

Ultimately, on 10 February 1891, an invitation was issued to Governor Onslow by Kereru Te Pukenui, his brother Numia, Tamaikoha, Hetaraka Te Wakaunua, Te Makarini, and Tutakangahau, speaking for 'Tuhoe katoa'. After a considerable amount of diplomacy, and a long delay, the chiefs had finally invited the Governor – but only as far as Ruatoki 'at the edges of their territory'.[362] Three weeks before the arrival of the Governor and his

355. Binney, 'Encircled Lands', vol 2 (doc A15), p 26
356. Binney, 'Encircled Lands', vol 2 (doc A15), p 26
357. Binney, 'Encircled Lands', vol 2 (doc A15), p 26
358. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 14
359. Onslow to Queen Victoria, 18 June 1891, as quoted in Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 305
360. *Auckland Evening Star*, 23 March 1891
361. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 13–15. We note that the content of much of this correspondence is unknown. Historians have had to rely on very brief summaries recorded in the Maori Affairs register of letters.
362. Binney, 'Encircled Lands', vol 2 (doc A15), p 23

party, there was a hui of more than 800 of the people of Te Urewera at Ruatahuna, where Te Kooti was greeted and the great new meeting house, Te Whai-a-te-Motu, was opened at Mataatua. The people also agreed unanimously that no gold prospectors, surveyors, or other Europeans might enter their boundaries, with the sole exception of the Governor and those with him, who were to be allowed to travel as far as Ruatoki.[363] Food shortages at the time meant that the Ruatahuna hui was cut short and only some 200 people could attended the Ruatoki hui.[364]

The invitation to the Governor and his party, which included Native Minister Alfred Cadman, Under-Secretary of the Native Department T W Lewis and Resident Magistrate Bush, was significant, both for the relationship between the Crown and the leaders of Te Urewera, and for its immediate consequences in 1891. Tuhoe, it seems, were willing to hold discussions with the New Zealand Government at the highest level. This meant the Native Minister, not the Governor. The point had been made that the Governor represented Queen Victoria, and the speeches of welcome to the Governor on the first day focused on the importance of face-to-face knowledge of one another and of testing whether intentions were good or ill. The speeches on the second day were for the Native Minister. There was general laughter when Rakuraku finished his welcome to the Governor by saying that he would have more to say the next day, when his korero would be with the Minister.[365] It was Rakuraku who put the decisions of the earlier hui to the Government, reaffirming the long-standing ban on roads, prospecting, surveying, and leases and sales of land within Te Rohe Potae.[366] Other senior Urewera chiefs used the occasion to present some practical requests to the Native Minister, including for redress on specific land matters. Their main issue in this respect was the return of some of the confiscated land, including land for access to fisheries at Ohiwa. Some chiefs emphasised their past friendship with and support for the Government in the hope of eliciting a favourable response.[367]

Cecilia Edwards suggested, that the hui with the Governor revealed an 'ongoing tension between those who held firm to the Te Whitu Tekau policies, and those who did not'.[368] This was based on Cadman's report that a young chief named 'Miua' told him privately that Rakuraku 'spoke for himself, and that it was childish talk'.[369] Tamaikoha, who had missed the hui but accompanied the Governor's party back to Whakatane, was also reported to have 'expressed contempt for the speech when he heard about it'.[370] We set little store by this evidence. As Professor Binney pointed out, this was a second-hand report of Tamaikoha's

363. Binney, 'Encircled Lands', vol 2 (doc A15), p 24; Miles, *Te Urewera* (doc A11), pp 244–245
364. Binney, 'Encircled Lands', vol 2 (doc A15), p 29
365. *New Zealand Herald*, 23 March 1891
366. Binney, 'Encircled Lands', vol 2 (doc A15), pp 29–30
367. *Auckland Evening Star*, 23 March 1891
368. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 17
369. *New Zealand Herald*, 23 March 1891
370. *New Zealand Herald*, 23 March 1891

Rakuraku's Speech to the Governor and the Native Minister, 1891

In his speech to the Governor and the Native Minister in 1891, Rakuraku said:

> Peace was made, and then the Government sent up Major Mair. The Government were to have the other side of the aukati line, and the Tuhoes this side. We were to live here, and the Government on the other side of that line. The Tuhoes were not go to into the confiscated lands to steal any of the Government land, and the Government would not come on the Tuhoe side to steal any of their land. That is why we, the Tuhoe people, like to have none of the evil things belonging to the Europeans – namely surveying, leases, land sales, roads, gold prospecting, and coming after criminals. If the Government can catch criminals outside the Tuhoe boundary, it is all right; but they are not to come after criminals here. The Government laws are not to come on this side of the boundary. This is what I wish to bring to your notice as Governor. Today, you the Governor, are a visitor of the Urewera, and are therefore at liberty to go where you like, but we are not in the habit of allowing Europeans into our country, either this way or by any other road. That is one of the established rules of this tribe. There were two words left by Sir Donald McLean to the natives when he left them at Whakatane. One refers to selling their land. They should preserve their land. The Tuhoes have nothing to do with selling lands, but adhere to their decision not to sell. Europeans must not think that because you, the Governor, have gone where you have been that anybody else could go. They would be turned back on any road they might come.[1]

1. Rakuraku's speech as reported in the *New Zealand Herald*, 23 March 1891 (Edwards, comp, supporting papers to 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)(i)), vol 3, newspaper section, doc 002)

views, which had not been stated publicly. In her view, '[t]he examples chosen do not represent significant differences among Tuhoe's leaders'.[371] Also, Rakuraku was clearly not speaking for himself but reporting the views of the tribe as decided at the Ruatahuna hui. No one contradicted him or put a different view at the hui with the Government.[372]

Rakuraku's speech asserted Tuhoe authority, including authority to grant access to their lands. He added that the Government might not enforce colonial criminal law within their takiwa, although dealing with criminals outside it was acceptable. In this, he stated the position as it had long been in practice. But Native Minister Cadman responded at once to this statement:

371. Judith Binney, 'Statement of Judith Binney in response to Crown questions of clarification', 18 February 2005 (doc K28), p 3

372. *Auckland Evening Star*, 23 March 1891

8.5.4

> Now I want you all to understand very distinctly that the Queen's laws must go everywhere in New Zealand. So far as your own lands are concerned, they are in your own hands, and if you part with them, you have no one but yourselves to blame, but you must understand that criminals will be taken here if necessary, and the laws generally upheld.[373]

And when Te Urewera leaders requested that the Government 'settle' their boundary, so that their land could not be claimed by other tribes, the Minister replied that the way to do that was to 'have the land surveyed and put through the Court'.[374] These interchanges, it may be argued, set the tone for developments over the next few years. They reveal some of the pressures and concerns which soon led Ruatoki leaders to set aside Te Whitu Tekau policies, and apply for a survey and court title for their lands.

These pressures were both external and internal. The Crown's historian, Cecilia Edwards, suggested that the Governor's visit triggered the 1891 applications to the Native Land Court. In her view, some Tuhoe leaders may have believed (as a result of what Cadman had said) that they could get surveyed an outer boundary, inside which other tribes could not claim land.[375] Ultimately, though, the survey applications focused on the Ruatoki lands, which were the best of the agricultural lands in Te Rohe Potae. These lands, as Edwards noted, had already been the subject of applications by Ngati Awa.[376] Ngati Pukeko and Ngai Tai were also applicants.[377] Professor Binney stressed that one of the Ngati Awa applications had been lodged by Wepiha Apanui, and so was a serious challenge from a senior Ngati Awa leader.[378]

Tuhoe at the Ruatoki hui were clearly concerned that surveys initiated by other peoples could lead to their own land being forced into court. Edwards noted that Tuhoe knew of the Ngati Awa applications and were worried about them.[379] Ngati Awa decided that Ruatoki could be surveyed only on a Tuhoe application, and so did not attempt to have it done themselves.[380] Instead, they pressed Resident Magistrate Bush, who in turn had been 'for years been trying to get that tribe [Tuhoe] to have one made'.[381] As Binney pointed out, Tuhoe's wariness also reflected their experience in the Tahora lands.[382] These had just been put through the court on the survey and application of outsiders who were found not to

373. *New Zealand Herald*, 23 March 1891 (quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 16)
374. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 16
375. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 16–17, 18, 20–21, 78; Edwards, 'Summary of Part 1 of "The UDNR Act 1896, Part 1: Prior Agreements and the Legislation' (doc L1), pp 12, 17
376. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 30, 78
377. Te Wharehuia Milroy and Hirini Melbourne, 'Te Roi o Te Whenua: Tuhoe claims under the Treaty before the Waitangi Tribunal', 1995 (doc A33), p 213
378. Binney, 'Statement of Judith Binney in Response to Crown Questions of Clarification' (doc K28), p 13
379. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 78
380. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 25, 64
381. Bush to Surveyor General, 17 February 1892, quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 25
382. Binney, 'Encircled Lands', vol 2 (doc A15), p 110

***Imperium in Imperio* (A State within a State):**
A 'Community . . . Worthy of Self-governing Powers'

On 23 March 1891, the *Auckland Star* had this to say:

> The Tuhoe tribe hold their land by right of conquest and centuries of occupation – a better title than our Crown grants or land transfer deeds; and if they choose to fence round their estate and warn off trespassers, they do no more than they have a perfect right to do. These people are self-governing and self-supporting in a rugged territory . . . But there is gold in the wild mountain ranges of the Urewera country; wealth . . . is there in alleged abundance, and it is argued that the Government have no right to exempt this part of the country from the operation of the goldfields laws . . . Yet we would fain hope that the inevitable breaking up of their isolation may be long delayed . . . True, the toleration of this *imperium in imperio* is a derogation of its functions by the Government of New Zealand; but it is better to accord exceptional treatment to this tribe than to create a 'native difficulty' by needless precipitancy of action. In other words a community that has proved itself so worthy of self-governing powers ought not to be lightly interfered with, and we feel assured Lord Onslow's visit does not portend any radical change of policy on the part of the Native Department.[1]

1. *Auckland Star*, 23 March 1891 (quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 28)

have rights to the lands (see ch10). We should not under-estimate the growing pressure as a result of Ngati Awa (and other) applications for Ruatoki being filed with the Government.

There was, in addition, ongoing pressure from the Government, which wanted the district opened for prospecting. Rather than applying direct pressure in 1891, the Government waited for the Native Land Court system to secure the outcome it wanted. When Tuhoe asked Cadman for the protection of their lands from unwanted surveys and court hearings, he could have responded – as Carroll was to do the following year – with a promise to prevent surveys and hearings until the tribal authorities had agreed to them. Instead, Cadman told the chiefs that their only recourse was to apply for surveys and hearings themselves. And this was exactly what followed in 1891.

As well as external pressures, there were particular factors at Ruatoki that influenced the decision to apply for a survey. The Tuawhenua researchers saw the developing crisis at Ruatoki in 1891 to 1893 primarily as a land dispute between Tuhoe hapu, especially Ngati Rongo and Ngati Koura. This dispute, they argued, could not be resolved because Te Whenuanui was now too ill to lead the tribe – he died in 1892.[383] Quarrels over land

383. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), pp 297–298, 307–308

arose in part because of the additional pressures at Ruatoki in the late 1880s and early 1890s. As we noted in chapter 4, those who had lived mainly on the confiscated lands had been forced to relocate to Ruatoki. Then, as we have seen, from 1887 the word of Te Kooti encouraged many Tuhoe to come to live on the Ruatoki lands, which were some of the best that remained.[384] As Murton argued, economic factors had encouraged a concentration on these lands.[385]

Finally, there was a new, younger leader in the ascendant: Numia Kereru. Tamati Kruger described him as 'a new breed of Tuhoe leadership, non-military, politically moderate, culturally astute'.[386] Professor Binney emphasised that the key factor for Numia Kereru, as for many at Ruatoki, was the need to use their lands more effectively in the colonial economy.[387] As Murton explained, they were growing maize for sale, but pastoral farming had been very small scale up to this point.[388] Leasing to raise capital seemed the only way forward; and, as was abundantly clear by 1891, the only way to get that was by surveying land and obtaining a title from the Native Land Court.

Although Numia Kereru was a key leader in applying for (and persisting with) the survey, he did not act alone. Other senior Ruatoki rangatira, including Kereru Te Pukenui and Hetaraka Te Wakaunua, joined him in this endeavour.[389] At first, it seemed that Ngati Koura also wanted the lands surveyed. Binney attributed early, widespread Ruatoki agreement to the survey to the influence of Te Kooti. She argued that in November 1891 Cadman finally agreed to set aside land near Ohiwa as a home for Te Kooti and his people. In return, Te Kooti agreed to mediate Tuhoe agreement to the Ruatoki survey: 'On 22 November 1891, at Ruatoki, Te Kooti persuaded Tuhoe to allow Ngati Rongo's application to survey to go ahead.'[390] Edwards pointed out that there are no records of this November hui, so we have no direct account of what happened at it.[391] If Tuhoe did agree to the survey at this time, then that agreement was shortlived.

The Native Minister was quick to take advantage of the Ngati Rongo request. He expedited Government approval of a surveyor. The Surveyor General, Percy Smith, had been holding things up because he was sure there would be opposition and obstruction, but the Minister telegraphed him to proceed.[392] Cadman was, he said, 'exceedingly anxious to get

384. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 297; Binney, 'Encircled Lands', vol 2 (doc A15), p 110–111
385. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12) vol 1, p 297
386. Kruger, brief of evidence (doc J29(b)), para 10.19
387. Binney, 'Encircled Lands', vol 2 (doc A15), p 111
388. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12) vol 1, pp 268–273
389. Binney, 'Encircled Lands', vol 2 (doc A15), pp 113–114
390. Binney, 'Encircled Lands', vol 2 (doc A15), p 113; see also p 118
391. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 21
392. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 21

the Urewera country opened'.[393] It was 'a matter of importance . . . to the whole country'.[394] This remained Cadman's overriding motive in all that followed. As Edwards put it, he had 'achieved what, for him, would have seemed a major concession from the Urewera chiefs, namely the introduction of the Native Land Court into the prime area of agricultural potential in the Urewera'.[395]

As Percy Smith had predicted, opposition to the survey was soon evident. In part, this opposition came from Ngati Koura, and was motivated by their contest with Ngati Rongo over Ruatoki lands. Its leader was Te Makarini Tamarau, who had long been a proponent of Te Whitu Tekau policies against surveying, the court, and land dealings. As became clear over the following months, this survey was considered a tribal question, and the leaders of all Tuhoe hapu and communities felt entitled to participate in decision-making about it.[396] The Crown and claimant historians agreed that the majority of Tuhoe hapu adhered to Te Whitu Tekau policies and opposed the survey.[397] They had no legal power, however, to stop it.

The result was open conflict between Tuhoe leaders and hapu, played out in support for (and obstruction of) the survey. As we have seen, Cadman was keen to see the survey underway as soon as possible. A key question for our inquiry, therefore, is: how did the Government respond when some Tuhoe hapu obstructed the survey? In her evidence for the Crown, Cecilia Edwards argued that the Crown had three duties when the survey was contested: it had to protect the legal rights (granted under the Native Land Acts) for any Maori to get a survey and land court title; it had to protect and keep the peace; and it had to protect the rights of the majority of Tuhoe hapu, who were clearly opposed to the survey and 'adhered to the Te Whitu Tekau policies at this time'.[398] She concluded: 'I have no suggestion as to how the government of the day might have reconciled the one role with the other.'[399] She did, however, note what she considered various Government attempts at mediation 'tempered by the threat of enforcement action'.[400] She also argued that obstruction – and therefore trials and imprisonment – could have been circumvented altogether if the Government had withdrawn the surveyor, and exercised its legal power to apply for the court to rely on a sketch map instead of a full survey. Had this option been pursued, this

393. Native Minister to Surveyor General, 18 January 1892, quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 21

394. Cadman to Carnachan, 9 February 1892 (Edwards, comp, supporting papers to 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)(i)), vol 2, p 692)

395. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 21

396. Binney, 'Encircled Lands', vol 2 (doc A15), pp 113–114, 125

397. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 20, 78; Judith Binney, 'Summary of Report of Judith Binney "Encircled Lands. Part Two: a history of the Urewera from 1878 until 1912"', 19 April 2004 (doc D4), p 7

398. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 78

399. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 78–79

400. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 78

'might have resulted in a better balance being struck between the duties of the government', she argued.[401]

The key point, in our view, is that the native land legislation was heavily weighted towards those who saw fit to use the system it provided. As we noted in the preceding section, persistent Tuhoe efforts had failed to get recognition of their komiti from the Crown. This meant that, in the eyes of the State, their governance body had no legal status or powers. As Edwards put it, the tribe had no legal rights: 'Under the law, he [Native Minister Cadman] was not required to protect any such collective group.'[402] In April 1892, the Government's mediator, James Carroll, told Tuhoe that 'as they had started the law in motion by sending in an application', the law would have to run its course – the survey would have to go ahead.[403]

Professor Binney drew our attention to a newspaper article of 4 April 1892,[404] which said of the objectors to the survey: 'So far their rights and privileges are not to be regarded.'[405] Those rights and privileges, protected and guaranteed by the Treaty, were not provided for under colonial law. What were provided for, as Carroll so bluntly noted, were the rights of those who had applied for a survey. We quote Ms Edwards in full on this point:

> The former opposition to the survey, on the basis that there had been no collective agreement by Tuhoe (a point made by many of those who objected to the survey) was not a focus of Cadman's attention. Under the law, he was not required to protect any such collective group. He confined his attention to protecting the legal rights of those who had applied to have the survey conducted, and the [legal] authorisation of a surveyor to carry out a survey of the Ruatoki block.[406]

We do not intend here to provide a complete account of the long process which saw the survey applications vetted, a surveyor appointed by the Government, the surveyor challenged by various applicant groups, and the survey itself challenged by the majority of Tuhoe. Rather, we focus on the Government's actions in dealing with the crisis, which soon assumed national prominence when Tuhoe appealed to Kotahitanga for assistance. At various times, officials and Ministers tried to mediate the dispute, Te Kooti was called in by the Government to assist, and Tuhoe held hui after hui to resolve the matter. All these attempts failed to budge Ngati Rongo and others from a determination to see the land surveyed and

401. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 78
402. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 37
403. Binney, 'Encircled Lands', vol 2 (doc A15), p 116
404. Binney, 'Encircled Lands', vol 2 (doc A15), p 115
405. *New Zealand Herald*, 4 April 1892, (Edwards, comp, supporting papers to 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)(i)), vol 1, p 380)
406. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 37

put through the court, although at one point there did seem to be an agreement to stop the survey.[407]

In February 1892, the division between Ngati Rongo and Ngati Koura became evident at a major tribal hui which could not agree on whether the survey should be permitted to go ahead. Both sides appealed to the Government: Numia Kereru, Kereru Te Pukenui, and Hetaraka Te Wakaunua asked for the survey to continue; Paroa Kingi and Tamaikoha asked Cadman to put a stop to it.[408] The tribe came together again in March 1892 for a further hui, at which they reached a fragile consensus. According to Paora Kingi's account, Te Kooti and Ngati Awa representatives were also present at this hui and agreed to its decision.[409] The hui reaffirmed the main Te Whitu Tekau policies; it was decided 'by Tuhoe, by Ngati Awa, and Te Kooti Te Turuki not to allow the survey, roads, lease, sale of land, prospecting for gold and mortgage within the Tuhoe territory to trouble them'.[410] A letter was sent to the Government, with 79 names attached (including those of Te Whenuanui, Rakuraku, Kereru Te Pukenui, Tamaikoha, Tutakangahau, Hemi Kakitu, and Paora Kingi), stating that the supporters of the survey had agreed to have the question decided by the tribe, which wanted it stopped.[411]

Cecilia Edwards asked: 'Can this letter be taken as a firm sign that on 17 March all Tuhoe chiefs, including those, who on 20 February had still supported the survey, were now averse to it?'[412] She noted that this was 'certainly the understanding of the *Herald* reporter', who on 1 April wrote that Ngati Rongo and Ngati Koura were now opposed to the survey.[413] On 30 March, Cadman wired Numia to ask his opinion. Edwards described Numia's response as 'curiously passive'.[414] In her view, he 'washed his hands' of it, saying he was not responsible for the trouble that had arisen. 'At this point in time,' she wrote, 'Numia's support or opposition to the survey seems ambiguous.'[415] Given that Cadman had asked Numia to arrange for it to proceed, his response must have caused some consternation in Government circles.

Cadman still wanted to see the survey for these valuable lands completed, although he now indicated his willingness to compromise about the rest of the district along the lines sought by Tuhoe in 1891. He had written to Numia to ask 'whether it was possible to complete this survey and have a general meeting of Natives afterwards to decide what is to be

407. Agreement was reached at a hui on 17 March 1892; Binney, 'Encircled Lands', vol 2 (doc A15), pp 114–115; Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 307

408. Binney, 'Encircled Lands', vol 2 (doc A15), pp 113–114; Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 27

409. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 28

410. Paora Kingi to Native Minister, 29 March 1892, quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 28

411. Binney, 'Encircled Lands', vol 2 (doc A15), pp 114–115

412. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 29

413. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 29

414. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 29

415. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 29

done respecting future surveys'.[416] The Minister also wrote to Paora Kingi, pointing out that the people would still have to pay for the survey costs incurred so far. Kingi replied on 2 April, agreeing that those who had applied for the survey should pay – but pointing out that neither the people generally nor the chiefs had consented to the survey, as no collective decision had been made to 'abandon the previous collective policy of banning surveys'.[417] Thus, the threat of costs might have backfired in this instance. (In other words, it might have acted as an incentive to the opponents of the survey, if they believed they could pin the costs on Numia Kereru and Ngati Rongo.)

The Minister's next move was to send James Carroll to Ruatoki at the beginning of April, rather than accepting Tuhoe's request that the survey be stopped, which it seems even Numia was unwilling to challenge. It is important to note, therefore, that Carroll's mission cannot be characterised as an attempt at mediation. In the circumstances, it appears that Carroll was sent to negotiate a different outcome from the one agreed by Tuhoe on 17 March 1892. Carroll met with the tribe on 7 April 1892. He found there was still significant support for the survey, as well as opposition (led by Te Makarini and Paora Kingi) and some who were 'neutral'. According to the account in the *Auckland Star*, this hui was fairly evenly divided between supporters and opponents of the survey.[418] At the least, Carroll rightly discovered that the March consensus had not meant the proponents of the survey had changed their minds, once given the chance to express their dissent – as they now were by Carroll's mission.

So far, some 11,000 or 12,000 acres (about half the block) had been partially surveyed. Carroll proposed a remarkable solution. He wrote to Te Kooti:

> Ko taku kupu atu ki a ratou me whatatutuki poro te ruri i te wa e iti ana, kia wawe te rite atu – Ki te oti tena i a ratou maku a muri atu. Katahi au ka kaha ki te whakamana i a ratou hiahia i te mea hoki kua rite mai te taha ki au ki te ture. . . . Ara, ahakoa oti taua ruri i te wahi iti i ki ake nei au, ka taea e au te whakatapu taua wahi, otira te rohe katoa o te Urewera. Ka whakahokia e au te kai-ruri, ka araitia e au nga ruri a muri atu me nga Kooti Whenua Maori. E kore e tukua e au kia mana nga tono a nga iwi o waho. Kia rite rano te whakaaro a te iwi nui tonu, otira ma te reo tonu o te iwi nui e whakakeukeu te ture, katahi ka pera. Kati tena.
>
> Katahi ano au ka mea atu ano – 'Ki te kore koutou e whakaae ki taku kupu ki te tuku mai i ta koutou raruraru ki au maku koutou e awhina – heoi ka whakawatea au i au ma koutou ano ko te ture e whakaoti a koutou raruraru. Ko tona mutunga ka puta tena ruri ki te rohe nui katoa o te Urewera, kaore e taea te puru.'
>
> My advice to them was that they should at once bring the survey to conclusion while it is (a) small (area) so it can be settled immediately. If they complete that, it will be up to me

416. Native Minister to Numia, 30 March 1892, telegram quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 28
417. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 29
418. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 29–31

> thereafter. Only then will I be able to sanction their wishes because my position with the law [that is, under the native land legislation] will be justified. . . . That is, although that survey over the small part which I mentioned above will be completed, I will be able to restrict that part, that is, the whole region of the Urewera. I will send back the surveyor and I will prevent surveys thereafter, and the Maori Land Court (sittings). I will not allow the demands of the tribes outside to be authorized until the opinion of the whole people is the same, that is, the very voice of the whole people will move the law [the native land legislation], but only then will it happen like that. Enough of that.
>
> Then I also said – 'If you don't agree to my suggestion to give your problems to me, for me to help you – then I will free myself (of you) and it will be up to you yourselves and the law to end your troubles, and the conclusion will be that that survey will come out right over the vast region of the Urewera. Blocking it won't be possible.'[419]

Binney characterised this proposal as a 'small compromise', but we do not agree.[420] In our view, this was a constructive solution which offered Tuhoe the chance of tribal control over any further surveys and court applications in Te Rohe Potae, in return for agreeing to a limited survey of part of Ruatoki. It did not, as Binney suggested, further the Government's desire to open the district; rather, it offered control to the tribe. While such a solution was outside the native land legislation, it was not beyond the power of the Government to arrange. Carroll did not have as much political clout in the Liberal Government then as he would achieve later, but it appears from Cadman's telegram to Numia Kereru (cited above) that the Minister was willing to endorse this kind of arrangement. Carroll had, however, compromised on Cadman's wish to see the whole of Ruatoki surveyed. At the same time, there was an influential group of Ruatoki leaders and people who wanted the survey, so they too got part of what they wanted.

It appears to us that Carroll's intervention was successful. Both the supporters and the opponents of the survey agreed to his compromise solution. They did not do so, however, without further persuasion from Te Kooti. Carroll had promised to delay additional survey work for two weeks, and asked Tuhoe to consider his proposal and make a decision within that time.[421] On 2 May 1892, Cadman and Wi Pere met with Te Kooti at Otorohanga, where they agreed that completion of the survey would again be delayed 'to enable a settlement to be come to between the parties through the intervention of Te Kooti'.[422] According to Binney, Te Kooti felt obligated to help Cadman in return for agreement that he and his followers be given land at Te Wainui, near Ohiwa Harbour.[423] Edwards, however, felt that

419. Timi Kara (James Carroll) to Te Kooti, 12 April 1892 (Binney, 'Encircled Lands', vol 2 (doc A15), pp 117–118)
420. Binney, 'Encircled Lands', vol 2 (doc A15), p 116
421. *The Evening Star*, 11 April 1892 (Edwards, comp, supporting papers to 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)(i)), vol 1, p 370)
422. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 32
423. Binney, 'Encircled Lands', vol 2 (doc A15), pp 118–120

Te Kooti's role at this time was a more 'neutral' one, which sought the best outcome for Tuhoe.[424] It was certainly the case that he had a strong and sincere belief that the law should be looked to for protection.[425] Although we have no record of Te Kooti's subsequent meeting with Tuhoe in May 1892, Binney and Edwards concurred that he won agreement to Carroll's proposal. This had happened by late May, when the survey was recommenced.[426]

(2) *What were the outcomes of the survey being resumed?*

At once, Te Makarini and Te Ahikaiata obstructed it and destroyed three trig stations. There is disagreement over whether the survey was in fact being conducted inside the agreed boundaries of the smaller, compromise block. Cadman telegraphed Te Kooti, advising him that the stations were 'in the portion of land arranged to be surveyed'.[427] Binney agreed this was the case.[428] But Edwards provided evidence that this was contested. On further inquiry, Resident Magistrate Bush uncovered that the survey's opponents alleged the trig stations were outside the agreed boundary for surveying, while Numia Kereru and Hetaraka Te Wakaunua insisted they were inside.[429] In 1893, the obstructors' lawyer also reported his clients' view that the surveyor, Oliver Creagh had broken the agreement and was surveying outside the boundary.[430] Thus, it appears that both sides saw themselves as upholding the agreement negotiated by Carroll in April and Te Kooti in May 1892. We have no definite evidence on the location of these stations, whether they were inside or outside the agreed survey area. In any case, as Edwards pointed out, the two sides disputed the location of the boundary of the compromise block over the following months.[431]

The opponents of the survey sought assistance from Kotahitanga at this point. The Maori parliament wrote to Cadman on 29 June that it was not right for the survey to proceed 'without the consent of all', and appealed for him to stop the survey.[432] Creagh did stop in July 1892 and the matter was left in abeyance for six months. Numia Kereru, from the other side, asked the Minister to send in the police to enforce the survey, but Cadman declined to do so. Instead, he replied that he would come to Ruatoki after the parliamentary session, to

424. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 76–77
425. Binney, 'Encircled Lands', vol 2 (doc A15), p 128
426. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 33–34; Binney, 'Encircled Lands', vol 2 (doc A15), p 120
427. Cadman to Te Kooti, 3 June 1892 (Binney, 'Encircled Lands', vol 2 (doc A15), p 120)
428. Judith Binney, 'Statement of Judith Binney in response to questions of clarification of the Tuawhenua claimants', 1 April 2005 (doc M19), p 4
429. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 34. Cadman's telegram to Te Kooti, stating that the trig stations were inside the compromise block, was dated 3 June 1892. The same view was communicated by the Native Department under-secretary to Wilkinson on 8 June. Bush informed the Native Department on 17 June 1892 that he had since found out that the obstructers claimed the trig stations were outside the compromise block.
430. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 51; see also *New Zealand Herald*, 28 March 1893 (Edwards, comp, D7(a)(i), vol 3, doc 027 in the newspaper section)
431. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 37
432. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 34

'hear both sides of the case before taking extreme steps'.[433] He also told Kotahitanga on 9 July that he would go with Carroll to Ruatoki after the session, 'when they will be prepared to hear both sides of this survey dispute before deciding anything'.[434] There the matter rested: the first proposal had been made to enforce the survey, instead of relying on mediators such as Carroll and Te Kooti, but the Minister was not yet prepared to do so. The survey was left incomplete for the time being.[435]

It appears, however, that the Minister had made up his mind to enforce the survey. The parliamentary session ended on 11 October 1892, but Cadman did not come to Ruatoki until January 1893. A criticism was later levelled at the Government by the obstructors' lawyer: where was Carroll, and why did he play no further part, as had been promised?[436] But Cadman went alone. He seems to have decided to set aside the April–May agreement and have the whole Ruatoki block surveyed.[437] There was no more talk of Tuhoe making tribal decisions about future surveys or court sittings in the rest of Te Urewera. This was off the Government agenda until Carroll resumed an influential role in 1894, acting in conjunction with Seddon as Native Minister (see ch 9). In the meantime, Cadman took direct control and Carroll's 1892 agreement was set aside. It is likely, however, that by this time the opponents of the survey were no longer so willing to accept the small, compromise survey, although they did propose an alternative small block later in March. Ngati Rongo, for their part, were determined to see the full survey completed. In other words, by January 1893 there may have been little point in trying to keep people to the agreement, but that was not put to the test.

When he arrived at Ruatoki in January 1893, Cadman delivered an ultimatum: the people had a month to agree among themselves as to the survey; after that he would order it resumed. Edwards has suggested that there was room to interpret this as an offer to abandon the survey if they all agreed it should be stopped.[438] This is not, however, supported by Cadman's own statements on the subject. In a February 1893 letter to Paora Kingi, the Minister reminded him:

433. Native Minister to Under-Secretary, 9 June 1892 (instructing him to write to Numia Kereru), quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 33

434. Morpeth (for the Native Minister) to Kipa Te Whatanui, 9 July 1892 ((Edwards, comp, supporting papers to 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)(i)), vol 2, p 659)

435. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 33–34

436. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 51

437. Creagh's original authorisation to survey Ruatoki had expired by this time. On the instructions of the Native Minister, Creagh was issued a new authority to survey on 9 February 1893. Although this authorisation was revised to suit new circumstances (it no longer contained a requirement to start the survey, as it was already underway), the new authority required Creagh to survey an estimated 20,000 acres, the same area as the original 19 January 1892 document (that is, the full Ruatoki block). See Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 37; Lands and Survey Department, 'Authority to Survey Native Land', 9 February 1890 (Edwards, comp, supporting papers to 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)(i)), vol 2, p 647)

438. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 37

> that Maori who had gathered at Ruatoki on 23 January had been told that if they did not themselves contact Mr Creagh within one month and request him to complete the survey, he, Cadman, would instruct Creagh himself.[439]

Similarly, Cadman wrote to Te Makarini Tamarau on 27 February: 'The Tuhoe heard my words at Ruatoki and they have declined to grant my request, viz, that they would instruct the surveyor to proceed.'[440] Also, well before the month expired, Cadman had already ordered Creagh's survey authority for Ruatoki to be renewed.[441]

From January 1893, the Government's efforts were focused on trying to get agreement to a full survey, and (in the absence of agreement) on enforcing that survey against all opposition and obstruction. We take it from Edwards' account that the Government was neither neutral nor impartial; for a long time, Cadman and others had wanted the land surveyed and the rest of the Urewera district opened up to further surveys and court titles.[442] In 1892, the Government had been willing to negotiate and compromise, but now the gloves were off. At one point, the Native Minister even instructed George Wilkinson, the Government's Native Agent at Otorohanga, to threaten to move the confiscation line 'closer to Ruatoki' and to cancel the chiefs' pensions if they would not give in.[443] Thus, the Government's dealing with the survey in 1893 was of a markedly different character from what it had been the year before.

We will not provide details here of the fresh round of obstructions in 1893. Suffice to say that neither side would give in to the other. When George Wilkinson was sent to Ruatoki in 1893, he reported that the grounds for obstructing the survey were:

> a determination that the Maori law recognised by them shall not give way because of European law, if they can prevent it without bloodshed & also that the other side who have appealed to the European law to have the title to the land investigated shall not be able to exult over them. There is great jealousy and bitter feeling between the two parties.[444]

Ngati Rongo leaders, although sorely tempted, took no action against the obstructors. They refrained from turning up in force to support the survey. Cadman asked Kereru Te Pukenui, Numia Kereru, and Te Wakaunua to keep their people from interfering, and to

439. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 38–39
440. Native Minister to Tamarau Te Makarini & Te Amo Te Pouwhenua, 27 February 1893, quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 39
441. Native Minister to Surveyor General, 30 January 1893 (Edwards, comp, supporting papers to 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)(i)), vol 2, p 649). This instruction was given only a week after Cadman's meeting with Tuhoe.
442. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 21, 23, 24, 32, 38–40, 49–50, 65–69, 78; Edwards, 'Summary' (doc L1), pp 15, 25–26
443. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 48, 68
444. Wilkinson to Native Minister, 29 March 1893, quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 52

sit 'quietly at home so that no trouble may arise'.[445] This left the field to the obstructors, who removed instruments and at times physically prevented the surveyors from working. As a tactic to avoid violence, women – including some leading women of the tribe – confronted the male surveyors and carried out the obstruction. The chiefs also sent written appeals to Cadman, but they had no legal right to stop the survey, and he refused all further requests for discussion or negotiation. From February 1893, the Government was determined to see the survey carried out no matter what, and the obstructors were summonsed to appear before the resident magistrate's court in Whakatane.

The first set of summonses (March 1893) was obeyed. In the resulting trial, the women who had obstructed the survey, as well as several leading chiefs (including Te Makarini and Te Ahikaiata), were convicted and sent to prison in Auckland. The chiefs were sentenced to hard labour.[446] The law, as Ms Edwards put it, 'took its course'.[447] This was a remarkable turnaround from the situation only a few years before, given that Tuhoe leaders voluntarily came out of Te Rohe Potae, stood trial, and accepted their sentence. As we see it, they were prisoners of conscience. Resident Magistrate Bush asked the convicted protestors 'whether they would discontinue opposition'. In return for an assurance that they would no longer obstruct the survey, he would not imprison the women. They refused to give any such undertaking, so he sentenced all of them to prison. The assembled Tuhoe (some 300 people) made it clear that they too would continue their non-violent resistance to the survey.[448]

After the trials, the Native Minister instructed Creagh to continue the survey, and the 'majority' of people at a Ruatoki hui asked for the survey to be delayed and for Cadman to visit them. Again, Cadman refused any further diplomacy, instructing the survey to proceed.[449] The whole of Tuhoe, including people from Waimana, Maungapohatu, and 'other parts', now assembled to consider the question at a huge meeting from 20 to 22 March. The decision of the hui was to continue obstructing the survey.[450] On 22 March two women removed Creagh's instruments, in the presence of about 100 protesters, and two more trig stations were destroyed.[451]

Cadman's response was to send Wilkinson from Otorohanga at the end of March, not to mediate or negotiate but to persuade the protesters to give up. As noted above, he instructed Wilkinson to threaten the people with confiscation and the chiefs with cancellation of their pensions. Edwards cautioned, however, that 'there is no certainty' that Wilkinson conveyed

445. Native Minister to Numia, 4 March 1893, quoted in Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 41

446. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 41–49; Binney, 'Encircled Lands', vol 2 (doc A15), pp 124–125

447. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 78

448. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 44

449. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 45

450. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 46; Binney, 'Encircled Lands', vol 2 (doc A15), p 125

451. Binney, 'Encircled Lands', vol 2 (doc A15), p 125

these threats.[452] He did communicate on 27 March the Government's resolve to continue, even if it had to imprison every single one of them, and he pointed out that in the end they would have to pay the costs of the ever-lengthening survey.[453] According to Binney, the obstructors gave way not because of Wilkinson's threats, but because Te Kooti had sent a message on 24 March urging them to allow the survey to continue.[454] As a result, they offered Wilkinson a compromise similar to that agreed with Carroll and Te Kooti the year before: limiting the survey to only a portion of the block (7,010 acres). They were willing to consider a larger area (16,000 to 18,000 acres), although the majority had not agreed to that. Numia Kereru, Te Wakaunua, and their party thought this 'absurd', because both proposals left out disputed land, but they agreed to abide by Cadman's decision.[455] The Minister's response on 28 March was that nothing less than the full block could be surveyed: 'Government cannot agree to any compromise in the matter.'[456] This had been Cadman's line since January.

There was outside intervention in March 1893 from two other sources apart from Wilkinson. First, the Kotahitanga parliament petitioned the Governor on 23 March, asking for the release of people who had been imprisoned for obstructing surveys (at East Cape as well as Ruatoki). The parliament also asked for the survey to be stopped, and for the chiefs to meet and decide the matter.[457] Secondly, as noted, Te Kooti had sent a message that the survey should be allowed to proceed and the surveryors' instruments returned. He was responding to a telegram earlier in the month from Cadman, who asked him to use his 'influence and advice to respect the law otherwise serious trouble must ensue as the survey will be continued even though it be necessary to send sufficient constables to carry it through.'[458] Cadman was threatening force, which Te Kooti was anxious to see avoided. In February, he had asked Cadman not to send soldiers, 'because the shedding of blood has ceased. I am not willing that that bad work (shedding of blood) should take place.'[459] As Binney noted, Te Kooti was on his way to Wainui from the end of February, and was expected in Ruatoki in mid March. But he met with a very serious accident, and by the end of March he was dying.[460]

452. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 48, 50
453. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 49–50
454. Binney, 'Encircled Lands', vol 2 (doc A15), p 125
455. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 50
456. Under-Secretary, Justice, to Wilkinson, 28 March 1893, draft telegram (Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 50)
457. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 49. See also Henare Tomoana and others to Governor Glasgow, 23 March 1893 (Edwards, comp, supporting papers to 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)(i)), vol 2, p 597)
458. Native Minister to Te Kooti (Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 42)
459. Te Kooti to Wilkinson, 27 February 1893 (Binney, 'Encircled Lands', vol 2 (doc A15), p 124). In this letter, Te Kooti asked Wilkinson to convey his views to Cadman.
460. Binney, 'Encircled Lands', vol 2 (doc A15), pp 123 – 128

On 29 March, as Te Kooti struggled to Ruatoki, Tuhoe again placed the Ruatoki lands under Te Kooti's protection. On 10 April, Te Kooti sent his last word on the matter: 'Nathan [Netana Rangiihu] salutations to you[;] let the survey proceed until completed and better look to the law for redress in the future.'[461] As Binney pointed out, Te Kooti's word was final. Armed police with an artillery escort were brought in to protect the survey after this, but they were not needed. There were no further obstructions.[462]

In the meantime, the two women who had taken Creagh's instruments on 22 March (and 13 men who assisted them) were summonsed for trial. Conducted by Resident Magistrate Clendon in April 1893, the trials resulted in 13 convictions. This time the penalty was fines of £10 or £15 instead of imprisonment.[463] Many of those convicted fled to Ruatahuna, avoiding either answering their summons or paying fines.[464] We note that the Government did not attempt to pursue them or send armed police to arrest them. These people were still in hiding when Premier Richard Seddon visited in 1894.[465] Edwards argued that outstanding fines were finally written off in 1895.[466] Binney pointed out that the fines of only six of the protestors were rescinded.[467]

Cadman wrote to Te Kooti on 13 April, thanking him for his help, and 'particularly for his instruction to look to the law for any redress of grievance'.[468] As Binney argued, Te Kooti put his belief in the principle of the law to the test in 1893, and 'it was on this principle, too, that the integrity of the government should have rested'.[469] In any case, it was Te Kooti's intervention, not Clendon's court or Cadman's threats, 'which had been central to Tuhoe's acceptance of the Ruatoki survey. Te Kooti's spiritual authority was the determining fact by which Tuhoe acted in this matter.'[470] For that very reason, no progress was made in resolving the issues that led to the obstruction of surveys. The majority of hapu were still committed to the kaupapa of Te Whitu Tekau, while others were determined on having lands surveyed for use in the colonial economy.

We may summarise developments since 1892 as follows. Agreement had been reached to stop the survey back in March 1892, but Cadman's refusal to accept this decision effectively overturned it. The compromise agreement negotiated by Carroll (and cemented by Te Kooti) in April and May 1892 had a much firmer base, with the commitment of the Government, the Ngati Rongo leaders, the opponents of the survey, and Te Kooti. But this

461. Te Kooti's letter was quoted in translation in James Clendon RM to under-secretary, Justice Department, 11 April 1893 (Binney, 'Encircled Lands', vol 2 (doc A15), p 127)
462. Binney, 'Encircled Lands', vol 2 (doc A15), pp 128–129
463. Binney, 'Encircled Lands', vol 2 (doc A15), p 127
464. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), pp 47–60, 75–76; Binney, 'Encircled Lands', vol 2 (doc A15), pp 127–131
465. Binney, 'Encircled Lands', vol 2 (doc A15), p 130
466. Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 63
467. Binney, 'Encircled Lands', vol 2 (doc A15), p 130
468. Binney, 'Encircled Lands', vol 2 (doc A15), p 128
469. Binney, 'Encircled Lands', vol 2 (doc A15), p 128
470. Binney, 'Encircled Lands', vol 2 (doc A15), p 129

agreement dissolved in uncertainty. When Creagh resumed the survey in late May, its supporters maintained that he was acting inside the agreed boundary; its opponents argued that he was not, and obstructed him. Instead of inquiring into the matter, Cadman left it in abeyance for six months and then appeared at Ruatoki in January 1893, without Carroll, insisting that the full block survey be agreed to. This shattered the Carroll–Te Kooti compromise agreement for good, and resulted in bitter division. As we have seen, Government policy from then on was to insist on the full survey, without the possibility of negotiation or compromise.

Even so, at the time of this apparent defeat for collective decision-making and tribal governance, Tuhoe's leaders stressed that the completion of the survey was possible only because the tribe had allowed it to happen.[471] They placed a panui in the Maori newspaper *Huia Tangata Katoa* in July 1893, reaffirming Te Whitu Tekau policies and notifying all Aotearoa of Tuhoe laws:

> Tenei Panui he Panui na Tuhoe mo ana ture, kaore nei e pai ki nga mea kino, ate Pakeha.
>
> [This notice is a notice by Tuhoe of their laws and who do not accept the bad things of the Pakeha.]
>
> (Tuatahi) ko te Ruri, (2) ko te Rori, (3) ko te Reti, (4) ko te Rohepotae (5) ko te Ateha, (6) ko te Pirihimana, (7) ko te Kaiwhakawa, (8), ko te Hoko Whenua, (9) ko te Nama moni, (10) ko te Mokete.
>
> [(Firstly) the survey, (2) the road, (3) the rate, (4) the area encumbered, (5) the Assessor, (6) the police, (7) the judge, (8) the sale of land, (9) the borrowing of money, (10) the mortgage.]
>
> Ko a matou ture tenei i whakatakoto ai, i te kitenga i te Pakeha, kaore matou e pai ki aua tu mahi:
>
> [These are our law we laid out, when we saw the Pakeha, and did not agree to those kind of works]
>
> Kua kite a Tuhoe i nga mate o nga iwi Maori menga iwi Pakeha. Nga Tane nga wahine, nga Tamariki,
>
> [Tuhoe has seen the sufferances of the Maori people and the Pakeha people, the men, the women, and children]
>
> Koia tenei te ture a Tuhoe, ka tukua atu nei kia Huia tangata kotahi o Aotearoa, mana e Panui kia mohio ai nga iwi tauhou, e noho maira i nga pito e wha o Aotearoa. Kia pai te Panui, a Huia Tangata Kotahi o te kawanatanga maori.
>
> [This is the law of Tuhoe we now send to 'Huia tangata kotahi o Aotearoa' for it to publish for the information of the strange and unacquainted people living in the four corners of Aotearoa. May this be well published by 'Huia Tangata Kotahi' of maori governance.]

471. Netana Rangiihu, Erueti Tamaikoha and others to Cadman, 2 June 1893 (Edwards, comp, supporting papers to 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)(i)), vol 2, p 539)

E hoa ma kapai tenei mahi a Tuhoe.

[Friends, this work of Tuhoe is good.][472]

The panui was signed by Tamaikoha, Rakuraku, Te Ahikaiata, Te Makarini, Wi Tamaikoha, and 'na Tuhoe Potiki katoa' ('from all Tuhoe').[473]

The leaders of Tuhoe were about to embark on a new phase in their relations with the government. The following year (1894), the Premier toured the district, in part to try to resolve outstanding issues with the Urewera leadership. He found there a belief that Donald McLean had made promises and arrangements in 1871 – promises that had not been fulfilled. This was to become part of his dialogue with the chiefs. What exactly had McLean promised in 1871, and how was it now to be honoured? This belief about the 1871 compact and its broken promise has passed down through the oral history of the people.[474] In 1896 it seemed to all that it might finally be fulfilled in the Urewera District Native Reserve Act. We consider that Act in chapter 9. And, when Seddon visited Ruatoki in 1894, he heard Numia Kereru set out the policy of Tuhoe: no roads, no surveys, no sales, no leases, and no Native Land Court. The kaupapa of Te Whitu Tekau, reaffirmed in the July panui quoted above, were thus put to the Premier of New Zealand in 1894 by the principal architect of the Ruatoki survey. As we shall see in chapter 9, the Te Whitu Tekau vision was far from spent.

8.5.5 Treaty analysis and findings

In 1870 and 1871, peace was negotiated between the Crown and the leaders of Tuhoe and Ngati Whare. In April 1871, Te Whenuanui and Paerau returned to Ruatahuna and called a hui of the leaders who had not been sent into exile. Tuhoe date their acknowledgement of the Crown, and their relationship with it, from that hui.[475] As the Tuawhenua researchers explained:

> Ka tu te hui taumata mo Tuhoe ki Tatahoata i te timata o te marama o Paenga-whawha o te tau 1871, ka whakaaetia kia tu hangai ki ta te kawanatanga.[476]
>
> Tuhoe held a major hui at Tatahoata early in April 1871, and decided to give their allegiance to the Government.[477]

472. Huia Tangata Kotahi, 6 Hurae 1893, vol 1, no 17, p 7, transcribed and translated by Tama Nikora, 20 May 2005 (quoted in counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 61–62)

473. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 62

474. Kruger, brief of evidence, (doc J29(b)), paras 10.3–10.5; Kruger, claimant translation of transcript of oral evidence, 17 January 2005, Tauarau marae, Ruatoki (doc J48(a)), Part 2, p 2

475. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 252; Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two: A History of the Mana of Ruatahuna from the Urewera District Native Reserve Act 1896 to the 1980s', April 2004 (doc D2), pp 427; 510; see also Binney, summary of 'Encircled Lands' (doc B1(d)), p 22

476. Tuawhenua Research Team, 'Ruatahuna' (Maori), vol 1 (doc B4), p 222

477. Tuawhenua Research Team, 'Ruatahuna' (English), vol 1 (doc B4(a)), p 252

8.5.5

This acceptance of the Crown's authority was not unconditional. When asked if a pledge of allegiance to the Crown was 'inconsistent with Tuhoe still exercising and maintaining its mana motuhake', Tamati Kruger replied that the two were perfectly consistent because both the Crown and Tuhoe had mana, not the Crown alone.[478]

As we discussed in chapter 5, however, the developing peace was put at risk in late 1871 by an attack on Waikaremoana, and the occupation of Ruatahuna and Maungapohatu by Crown forces. As a result, the Government made a deliberate decision to withdraw all expeditions from Te Urewera and to entrust the capture of Te Kooti – and the future management of all their affairs – to the chiefs in their various districts.

At the time (and still today), Tuhoe saw the peace arrangement as their compact or treaty with the Crown. Tamati Kruger referred to McLean's assurances ('te kupu taurangi') as a key part of this compact ('te maungarongo'). Letters from Ormond, and the korero of Rapata Wahawaha and T W Porter, set out the Crown's assurances. From the Crown's perspective, it was a definite watershed in its relationship with the leaders of Te Urewera. The expeditionary forces were withdrawn, the redoubts handed over to Tuhoe, and Maori messengers were paid to keep communications open between the Government and tribal leaders. Above all, the Government accepted that those leaders would henceforth have full authority in their own districts. On the basis of these assurances, Tuhoe engaged with the Crown.

In 1872, some six months after Wahawaha's korero at Ruatahuna, the leaders of Te Urewera (including those who had finally been released from exile) met at Ruatahuna and formed Te Whitu Tekau. The historical evidence is clear that they believed they were doing so with the knowledge and agreement of the Crown. In our view, McLean's policies in the early 1870s – especially his Native Councils bills – reinforced this belief. Having established a 'Union of Seventy' for the purpose of maintaining consensus, Te Whitu Tekau set out its primary objectives: roads, magistrates, surveys, the Native Land Court, and the leasing and selling of land would all be excluded from the boundaries of Te Rohe Potae. These objectives were communicated to the Government and published in the Maori newspapers. Attempts to widen this union to other Mataatua groups were not successful, but there was a fair amount of consensus among Tuhoe and Ngati Whare leaders. Ngati Manawa, however, did not accept Te Whitu Tekau or its policies.

Nonetheless, the historical evidence is clear that Te Whitu Tekau's policies were maintained from 1872 to 1893 (at which point we end the discussion in this chapter). These policies were constantly communicated to the Government, often in the form of objections to Government pressure to build roads or to lease and sell interests in land. At the time, both the Crown and the leaders of Te Urewera wrestled with the fact that some hapu and chiefs, especially on the borders of Te Rohe Potae, did not always apply the Te Whitu Tekau kaupapa. In that circumstance, Te Whitu Tekau was able to maintain its authority

478. Tamati Kruger, re-examined by Kathy Ertel, Mataatua Marae, Ruatahuna, 17 May 2004 (transcript 4.5, p 11)

where colonial law did not undermine it. The best example of this is roads. Despite the fact that some leaders (especially the chiefs of Ngati Whare) favoured roads, the Government backed down in the face of determined resistance from Te Whitu Tekau. In the case of land, however, the Government implemented the Native Land Acts, which gave enforceable legal rights to individuals or groups to have land surveyed and put through the court, regardless of the strength of any opposition to that move. Beginning with the four southern blocks, a number of 'rim' blocks were the subject of dealings with private or Crown agents, often in the form of de facto leases, and were then taken to the Native Land Court. Although unable to prevent this on the outer borders, where many tribal rights and interests overlapped, the leaders of Te Urewera succeeded in keeping the inner lands out of this process.

By the Treaty of Waitangi, the Crown promised to protect the tino rangatiratanga of Maori communities, their right to manage their own affairs, and to keep their land in their possession and control for as long as they wished to do so. It will be recalled that in chapter 3, when we discussed the Tuhoe "constitutional claim", we found that because they did not sign the Treaty and were not offered the opportunity to do so, in 1840 the Treaty of Waitangi took effect for Tuhoe as a unilateral set of Crown promises. We also found that the situation had not changed by 1865: by that date, Tuhoe had still not entered into a relationship with the Crown and did not recognise its authority. In our view, the events of 1871 signalled the beginning of a new era for Tuhoe and the Crown, but fell short of establishing a reciprocal Treaty-based relationship. The April hui, at which Tuhoe accepted kawanatanga and sought a relationship with the Crown, and the November–December agreement, in which the Crown recognised the authority of Tuhoe chiefs to manage their own affairs and withdrew its forces from their rohe, were positive steps. But as it transpired, neither development was formalised and entrenched by the Crown, which left to trust and to chance the vitally important matter of the future engagement of the Crown and Tuhoe. Such uncertainty could not generate Treaty obligations owed by Tuhoe to the Crown.

In their submissions on the significance of the Treaty for Te Whitu Tekau, the claimants emphasised the Crown's obligation to protect and enhance their mana motuhake (or tino rangatiratanga) in its policies and legislation. Crown counsel submitted that Te Whitu Tekau was not a tribal governance body and that the law did not require the Crown to recognise it. She observed that, while McLean wished to introduce a form of local government for Maori districts in 1872, his Native Councils Bill had failed to gain sufficient support.

Central to our analysis of the events outlined in this chapter is the Treaty principle of autonomy, which arises from the Crown's guarantee to protect the tino rangatiratanga (mana motuhake) of the chiefs. The Tribunal's Taranaki and Central North Island Tribunals have explained this principle in clear terms. Autonomy is 'the inherent right of peoples in their native territories'. It describes the right of indigenous peoples to 'constitutional status as first peoples' and their rights to:

- 'manage their own policy, resources, and affairs within miminum parameters necessary for the proper operation of the State' and
- 'enjoy cooperation and dialogue with the Government.'[479]

We agree with the Taranaki Tribunal which found that, in dealing with Maori for their lands, the Crown's responsibility was to recognise and protect institutions that formalised a 'negotiating face' for the tribe.[480] This was a practical way for the Crown to give effect to the Treaty principle of autonomy. We also agree with the Central North Island Tribunal's finding that the Crown was obliged to give effect to the Treaty recognition of Maori authority through the models suggested to or available to it at the time. The Tribunal gave an extensive account of such models, and of the practical institutions for Maori self-government proposed to the Crown in the 1870s and 1880s, which we do not need to repeat here.[481] In our view, Te Whitu Tekau – or some variant of it acceptable to those it represented – was an institution within the range of options identified by the Central North Island Tribunal as being available to the Crown in the late nineteenth century to give effect to Maori autonomy.[482]

We further accept the Central North Island Tribunal's finding that there is an article 3 right of self-government by representative institutions. This was clearly the case in nineteenth-century New Zealand.[483] It forms part of the Treaty guarantee of Maori autonomy. In her questions to Cecilia Edwards, counsel for the Tuawhenua claimants drew a strong contrast between the legal arrangements available for the self-government of settler communities and what was allowed the peoples of Te Urewera. Ms Edwards accepted this point.[484] Counsel for the Nga Rauru o Nga Potiki claimants put it to her that, in nineteenth-century terms, a Treaty partnership between Crown and Maori (where Treaty obligations are owed by both parties) was to be achieved by the Crown recognising Maori institutions of self-government. Ms Edwards declined to comment on constitutional matters, although she accepted the argument might have 'merit'.[485]

Ultimately, we agree with the submission of counsel for Nga Rauru o Nga Potiki that the ability of Maori to control their own destiny depended on 'substantive equality of treatment' for Maori and settlers in the exercise of authority over their own affairs. This required Maori authority to be 'entrenched in the legal systems of nation states, so that it is not vulnerable

479. Waitangi Tribunal, *The Taranaki Report:Kaupapa Tuatahi* (Wellington, New Zealand: GP Publications, 1996) p 5

480. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, p 5

481. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 172–192, 198–208; and, more generally, pp 215–400

482. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 206

483. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 174–177

484. Edwards, cross-examination by Ertel (transcript 4.14, pp 92–93). Ms Edwards qualified her answer by pointing out that she did not know much about the political institutions available for settler communities at the time, but she accepted as 'reasonable' the proposition that they had institutions which were passing laws and regulating affairs within their own boundaries.

485. Edwards, cross-examined by Sykes (transcript 4.14, p 25)

to political pressures'.[486] The way to achieve that in the nineteenth century, as the Central North Island Tribunal has found, was for the Crown to have given legal recognition and protection to institutions of Maori self-government.

We are in no doubt that Te Whitu Tekau was such an institution. It was established after deliberate debate and decision by the peoples of Te Urewera, in the wake of the Crown's promise that they should have full authority inside their own borders. It acted in a responsible manner. Hui were held constantly throughout the period to discuss and reconfirm the cardinal policies: no roads; no surveys; no magistrates; no Native Land Court; no leases; and no land sales. Though later events showed that the peoples of Te Urewera were willing to change the formal shape of their runanga to that of a komiti, the system they had established was one in which the leaders came together, and decisions were thoroughly canvassed and agreed in a Maori way. Witnesses such as Tamati Kruger assured us that Te Whitu Tekau was the embodiment of mana motuhake. It recognised and tried to work with Government authority (kawanatanga). But it remained determined to exclude unwanted authority, including colonial laws and magistrates, from its borders. This, the Government of the day accepted until 1893. No magistrate or court operated inside Te Urewera, except for the Native Land Court. Clearly, this was a situation the Government could live with. As one settler newspaper put it in 1891, nobody had much cared for the past 20 years that the Queen's writ did not run in Te Urewera.

As has been seen, Te Whitu Tekau was successful in upholding its kaupapa only where colonial law did not grant enforceable legal rights to individuals or groups who dissented from its aims. The most glaring example of the law undermining the authority of Te Whitu Tekau in this way is the native land legislation, which was built on principles diametrically opposed to those of Te Whitu Tekau. We examine the operation and impacts of the Native Land system in chapter 10 and conclude, in agreement with many previous tribunals, that the system was gravely in breach of the Treaty's guarantee to protect Maori ownership and control of their land. It suffices here to note that had the Crown recognised and afforded legal status to an autonomous, tribal governance entity, it would also have needed to suspend, or at least greatly modify, the operation of the native land system within that tribal entity's sphere of influence. The native land laws upheld the right of an individual or group to invoke the Native Land Court's power to decide who had rights and interests in particular customary land, and authority over it, and to translate that customary position into ownership by the individuals named on a certificate of title. The law thus promoted (in breach of the Treaty of Waitangi, as previous Tribunals have found) the individualisation of title to Maori land and, as an inevitable consequence, the alienation of that land – results to which Te Whitu Tekau was totally opposed. Therefore, had legal recognition and protection been given to the authority of a body such as Te Whitu Tekau to determine issues affecting

486. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 163 (quotation), 163–165

the land within its sphere of interest, the Crown would have had to accept as a necessary corollary the severe curtailment both of the native land court's powers and the rights of those who would otherwise have invoked the court's powers. The result – tribal control of tribal land – would have been consistent with the Treaty.

It follows from the Treaty principle of autonomy that where different iwi claimed interests in the same land, the primary means of decision-making about that land should have been negotiation among the institutions that were the legally recognised 'negotiating faces' of those iwi. An alternative process would have been needed only for situations in which those tribal bodies could not agree. It is not merely with the benefit of hindsight that we can see the existence of Te Whitu Tekau as presenting the Crown with an opportunity to honour its Treaty promises, and its 1871 promises, to the leaders of Te Urewera. We are certain that, at the time, McLean intended to recognise Te Whitu Tekau through the provisions of the Native Councils Bills of 1872 to 1873. When withdrawing his second Native Councils Bill in 1873, the Minister told Parliament that special arrangements were needed for Te Urewera (among other districts), and that he planned to introduce another Bill in 1874. Yet, he did not do so. Nor did he accept the invitation to attend the crucial Ruatahuna hui of that year. Instead, magistrates Brabant and Locke told the hui that Te Whitu Tekau had no legal status or standing. The Crown's failure to provide a mechanism through which the authority of tribal leadership in Te Urewera could be recognised in colonial law was a critical one and was to have major consequences.

As we have seen in this chapter, the peoples of Te Urewera were willing to be flexible on the exact form of their governance body. By the 1880s, they were willing to experiment with a committee structure, either under the Government's 1883 Native Committees Act or in some other form, so long as the Crown accepted it and recognised its authority. The negotiations of 1886 to 1889, in which 'the Ureweras' were promised their own committee but not delivered it, were an important failure on the part of the Crown, compounding the failure of the early 1870s.

This is not to deny that, on some matters, the Crown accorded de facto recognition to Te Whitu Tekau in the 1870s, and to the authority of 'Tuhoe katoa'. The most telling examples are roads and prospectors: although Ministers and officials tested the leadership's resolve from time to time, the Government did not try to force either of these in the face of the leaders' consensus against them. In 1890, the Minister of Mines himself was turned away from Te Rohe Potae, a fact rather meekly accepted by the Government of the day. These are, however, examples of matters more incidental than central to the colonial endeavour.

In summary then, we have found the Treaty principle of autonomy to have been breached by the Crown's failure to ensure that colonial law recognised Maori governance bodies, including Te Whitu Tekau, as the primary means of resolving their own land disputes. That breach was compounded by the Crown's failure both to engage constructively with Te

Urewera leaders in the 1880s, and to provide legal recognition and powers for their komiti at that time.

We are also of the view that the Government's handling of the Ruatoki survey crisis in 1893 was inconsistent with Treaty principles. Prior to that, the Government had mostly acted properly in Treaty terms. There was apparent agreement to stop the survey in March 1892, but Cadman sent Carroll to negotiate an alternative solution. Carroll found a significant body was still in support of the survey. The compromise agreement negotiated by Carroll and Te Kooti in April and May 1892 was, in our view, consistent with the Treaty and reasonable in the circumstances. The Government agreed to a limited survey, and to prevent further surveys or court sittings in Te Urewera, until the people had given their explicit consent to them. This was a proper – though tardy – concession by the Crown. The proponents of the survey gave up their wish to put the whole block through the court, and its opponents accepted a limited survey in the knowledge that it would be the last one unless they agreed to more. In other words, their rights would be respected from then on.

The obstruction that followed this agreement in May 1892 was not a rejection of it. Rather, the two sides disputed whether the surveyor was keeping to its terms. Instead of inquiring into this matter, the Native Minister postponed the survey for six months. In January 1893, he then unilaterally set aside the compromise agreement and insisted on the full survey of the Ruatoki block, without the previous guarantee that any further surveys would require tribal agreement. He also refused requests to negotiate, and insisted on using the law and the courts to punish each set of obstructors. We find the Crown in breach of Treaty principles for setting aside its own negotiated agreement unilaterally, for refusing to negotiate any further, and for using the full force of the law to punish those whose 'crime' was non-violent obstruction of a disputed survey.

The prejudicial effects of the Crown's broader Treaty breaches of the principle of autonomy are thus seen most clearly at Ruatoki in 1891 to 1893. Disagreement among the hapu, and opposition of the majority to the survey, could not be resolved by the iwi because iwi had no legal powers to resolve the dispute. As a result, Tuhoe leaders who resisted the survey were fined or jailed by the State, and the land was surveyed in the teeth of their opposition. The full prejudice will be described in chapter 10, where we address the alienation of land in the 'rim' blocks during this period.

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CHAPTER 9

KO TE TURE MOTUHAKE MO TUHOE: THE UREWERA DISTRICT NATIVE RESERVE ACT

9.1 Introduction

In October 1896, Parliament enacted the Urewera District Native Reserve Act. This was the culmination of 25 years of struggle by the leaders of Tuhoe and Ngati Whare to repel the Native Land Court and to seek Crown recognition of tribal autonomy. The Act established a unique 'native reserve' of some 656,000 acres and a Commission, with a majority of Tuhoe members, to determine land titles within it. The lands of the reserve were to be managed by hapu committees, and the whole district was to be governed by a tribal General Committee. Only the General Committee could alienate any portion of the reserve, and only to the Crown. In the claimants' view, this unique system of land title determination and self-government represented the fulfilment of their 1871 compact with Donald McLean. The Act preserved their autonomy and gave it the recognition of colonial law.

The creation of the Urewera District Native Reserve was the outcome of a series of remarkable discussions and negotiations from 1894 to 1896 between the Premier, Richard Seddon, cabinet minister James Carroll, and Te Urewera leaders. Overshadowing those communications was the so-called 'small war' of 1895, which reflected long-standing tensions over surveys of lands and roads in Te Urewera and the Government's lingering anxiety to show that it could carry out both if it wished. The Government was quick to send in an armed force but quick also to realise the time for armed confrontation had passed. In any case, Seddon was convinced that Te Urewera was unsuitable for settlement, which helped persuade his Government to give up its insistence on the Native Land Court, costly surveys, and land purchases in the district. The leaders of Te Urewera also emerged from the confrontation more determined to pursue their dialogue with the Government to an agreed position. As a result, Tuhoe and Ngati Whare were persuaded to give up their adherence to some of the core Te Whitu Tekau principles while Ngati Manawa were persuaded that they could halt land loss by trusting to a new arrangement with the Crown. From mid-1895, Te Urewera leaders spent several months in Wellington to finalise with the Premier the arrangements for the future governance of their district. By the time the Act was passed, there was genuine agreement on the fundamentals of the new relationship between the

Government and Te Urewera. In particular, the Government saw itself as granting real powers of self-government and collective tribal control of lands. The purpose of this unique arrangement, as Seddon stated repeatedly, was to protect the peoples of Te Urewera in the retention of their land and to ensure their future prosperity.

For many claimants, the passage of the 1896 Urewera District Native Reserve Act represented a rare high point in the history of the relationship between the Crown and the peoples of Te Urewera. They regard the Act as having provided the means by which the future of Te Urewera could unfold in a manner consistent with the Treaty, to the mutual benefit of Maori and settlers. It gave their tipuna hope of a positive relationship with the Crown, based on recognition of their own institutions, and of their wish to preserve their lands. The Crown conceded in our inquiry that it had granted powers of self-government in the 1896 Act, and that this could be characterised as protecting the claimants' mana motuhake.

And yet the Act's arrangements were only partly implemented. The system of self government, which was the key to the success of the Act, was not implemented and Crown agents bought up individual shares in the Reserve from 1909. Crown counsel stated that by 1921, the Crown had purchased more than 50 percent of those shares. By 1927, it held some 75 percent of Te Urewera lands, much of which later became part of Te Urewera National Park.[1] In our inquiry, the Crown made an unprecedented number of concessions of Treaty breach in connection with the fate of the Urewera District Native Reserve. It conceded that in implementing the agreement with the peoples of Te Urewera reflected in the 1896 Act, the Crown did not act reasonably and in good faith in that it:

- Failed to establish an effective system of local land administration and local governance;
- Made unilateral changes to key parts of the legislation, without effective consultation with Urewera Maori; and
- Purchased individuals' shares without the collective control of such actions by the General Committee [established by the 1896 Act]. In these purchases the Crown did not follow the usual protective mechanisms applying to Crown purchases of Maori land from 1909–1921.[2]

The result of those concessions, the Crown stated, is that it:

> ultimately accepts responsibility for the parlous state of affairs that existed in the Urewea district as a result of Crown actions and omissions in implementing the local governance provisions and purchasing undivided shares.[3]

Despite these major concessions, there were fundamental points of contention between the Crown and claimants concerning the creation and destruction of the Reserve. There

1. Crown counsel, closing submissions (doc N20), topics 14–16, p 5
2. Crown counsel, closing submissions (doc N20), topics 14–16, p 5
3. Crown counsel, closing submissions (doc N20), topics 14–16, p 9

was disagreement over exactly what had been agreed between the Crown and Te Urewera leaders about the Reserve, why the Act was not implemented according to its terms, and the nature and extent of the impact of that failure on the peoples and the environment of Te Urewera.

In this chapter, our attention is confined to the motives for and the intentions behind the passing of the Urewera District Native Reserve Act. The purpose of our examination is to understand fully the nature of the agreement that was reached between the Crown and Te Urewera leaders, the extent to which the agreement was incorporated in the 1896 Act, and the reasons for any discrepancies between what was agreed and what was enacted. That information provides the essential context for our examination in later chapters of the full range of issues that arise out of the Crown's admitted failure to implement the Urewera District Native Reserve Act 1896 in a manner consistent with the principles of the Treaty of Waitangi. It also provides information vital to the Tribunal's task of considering whether and, if so, when the peoples of Te Urewera who did not sign the Treaty of Waitangi forged a Treaty-based relationship with the Crown.

9.2 Issues for Tribunal Determination

After reviewing the evidence and submissions, we have determined that the following questions are key to our analysis of the claims:

- Why and how did Te Urewera leaders and the Crown negotiate a new basis for their relationship in 1894 and 1895?
- What agreement was reached as a result of negotiations?
- Was the agreement between Te Urewera leaders and the Crown given legislative effect in the Urewera District Native Reserve Act 1896?

We have structured our account of the essential differences between the parties (sec 9.4) and our analysis of issues (sec 9.5) around these three fundamental questions.

9.3 Key Facts

In February 1894, the leaders of Te Urewera sought to heal the divisions of recent years, especially those caused by the split over surveying Ruatoki and having the land put through the Native Land Court. At a month-long hui, they agreed to return to the principles of Te Whitu Tekau. Ruatoki lands would be considered as outside Te Rohe Potae. Inside Te Rohe Potae, the 'vile things' of the Government would remain banned: surveys, the Native Land Court, leases, land sales, and roads. In April 1894, soon after this hui, Richard Seddon, the

Premier of New Zealand, visited Te Urewera as part of a tour of North Island Maori districts. He was accompanied by James Carroll, a minister in cabinet (representing the 'Native race' there), and by an entourage of officials. Carroll was a key figure for Te Urewera, having represented the Crown in negotiations over the Ruatoki survey. He was also a member of the Rees-Carroll commission of 1891, which had investigated the situation of Maori land and delivered a report highly critical of individualisation of title, the native land laws, and the Native Land Court.

Seddon and his party visited Maori communities at Ruatoki, Ruatahuna, Te Whaiti, Galatea, and Waikaremoana. James Carroll acted as both translator and facilitator, explaining many of the Premier's points for the benefit of his Maori audience. Unfortunately, most of Carroll's speeches were not recorded. The Liberal leader was partly on a 'fact-finding' tour, and partly on a mission to persuade Maori communities to trust his Government's reforms and use the new Native Land Purchase and Acquisition Act 1893. He wanted leaders to agree to have their lands surveyed and put through the court, and then to use their 'surplus' land in the economy by leasing or selling it (although he hardly ever mentioned sales in Te Urewera). At the same time, he promoted schools and roads, and promised Crown protection to those who obtained legal titles from the land court. He emphasised the Treaty of Waitangi and its protections.

Ngati Manawa, Ngati Whare, and Ngati Haka Patuheuheu were – to varying degrees – willing to trust the Premier's assurances and deal with their lands. They welcomed schools, and roads to link their communities with coastal trading centres. Tuhoe, on the other hand, conveyed to Seddon the results of the February 1894 hui, and sought the Government's agreement to exclude the court and surveys from Te Rohe Potae, and to recognise their governing committee. The Premier responded that trig surveys would be carried out (at no cost), and that prior notification would be given, but that other issues could be reserved for future discussions in Wellington. He encouraged the idea of reaching a general agreement on all the issues later, after he had completed his tour. In recognition of their difficulties, the Premier promised to fund the journey of a delegation from Te Urewera to complete the discussions.

At Ruatoki, Kereru Te Pukenui gifted the Premier with an ancient taiaha, Rongokarae. Both there and at Ruatahuna the people pressed for legal powers for a governing committee. There was a sharp exchange on this point at Ruatahuna, but no real agreement on it. It was one of many matters to be pursued later in Wellington.

After the tour, the Premier informed Parliament and the public that he had settled the 'native problem' in Te Urewera. The chiefs recognised the authority of the Queen and had promised to obey the law. But the anticipated negotiations did not take place in Wellington in 1894, as promised. In January 1895, there was a hui at Ruatoki about mining at which the Surveyor General informed the people that a trig survey was about to commence. It

was obstructed at Ruatoki in April 1895, and the Premier sent a combined force of 40 to 50 soldiers and armed police to prevent further obstructions. He also sent James Carroll, who negotiated a new agreement with Te Urewera leaders at an eight-day hui at Ruatoki. At that hui, he was reported as promising that the Government would conserve the lands of Te Urewera for its Maori people. The time had now come, he said, for the long-delayed Te Urewera delegation to go to Wellington. Kereru Te Pukenui made a key speech at this hui, affirming his gift to the Premier and his intention to live at peace and obey the law. In response to Carroll's promises and Te Pukenui's assurances, the Crown and Tuhoe agreed that the trig survey would go ahead. Most of the troops were withdrawn.

At some point in 1895, however, the Government also decided to push roads through Te Urewera. When it became apparent in May 1895 that some surveyors were also surveying road lines, there was renewed obstruction. This time, a force of 68 armed soldiers and police was dispatched to Te Whaiti. Again, Carroll was sent to the district. He met with Te Urewera leaders at Te Whaiti and Waikaremoana. Once again, the idea of a delegation to Wellington and a wide-ranging settlement of issues was proposed. This time, however, Carroll is believed to have promised that the whole of Te Urewera could be protected and reserved to its Maori owners by a special Act of Parliament. On the strength of Carroll's renewed assurances, and in the face of Seddon's 'show of force', Tuhoe and Ngati Whare agreed to allow work for interior roads to continue.

A delegation of Te Urewera leaders finally came to Wellington in August 1895. It consisted of important chiefs, and is known to have included Tuhoe, Ngati Whare, and Ngati Manawa leaders. The delegation held discussions with Carroll (and Maori members of the House) in August and September, but we have no record of them. On 7 September 1895, the delegation met with Seddon. At that meeting, Carroll presented a series of proposals that he and the delegation had worked out. The Premier responded to each of them. The content of the proposals (and of the Premier's response) was not agreed between the claimants and the Crown in our inquiry, and will be examined in our analysis section below. Here, we note that there was a further meeting between Seddon and the delegation on 23 September at which additional proposals were presented to the Premier. The delegation also asked for a draft Bill or 'heads of agreement' to take back to their people for consultation.

On 25 September, Seddon drafted a memorandum setting out what he understood to be each of the delegation's proposals and his undertakings in respect of them. It was understood between the Premier and Te Urewera leaders that they were in broad agreement. The newspaper account of the 7 September 1895 meeting (which was very detailed), and Seddon's memorandum of 25 September, were translated into Maori and printed for distribution in Te Urewera. Tuhoe and Ngati Whare held hui to discuss and confirm the arrangements.

9.3

In October 1895, the Premier introduced a draft Bill into the House. This Bill appears to have been sent to Te Urewera for discussion, but there is no definite evidence on the point. It does appear that, as a result of Tuhoe representations, some aspects of this Bill (and later the 1896 Bill) were changed by the Government. Seddon had introduced the 1895 Bill mainly so that it could be read for a first time in Parliament and then sent out for consultation. It lapsed when the session ended, and a new (and in some respects quite different) Bill was prepared in 1896.

The purpose of the 1895 Bill was to provide for Maori ownership and 'local government' of an inalienable reserve. The 'Urewera District' was declared an inalienable native reserve, with the exception that land could be ceded to the Queen. A seven-person commission (five Maori, two Europeans) would define the boundary of the reserve and investigate 'native ownership' according to 'native customs and usages' and the 'equities of each particular case'. A sketch plan (paid for by the Government) was sufficient for each block, which would be based as far as possible on hapu boundaries. The Commission would declare the relative interests of owners, 'grouping family interests together'. Family members would be joint tenants; all other owners would be tenants in common. Every ownership order would be a 'certificate of title'. The commission would then appoint a committee for each block, with the committee 'deemed to be the sole owners of the block'. Each local committee would elect one of its members to be a member of a General Committee that would 'deal with all questions affecting the reserve as a whole', with its decisions binding on the local committees. The powers and functions of the Commission as well as the local committee and the General Committee would be prescribed by regulations made under the Act. The Governor in Council could give jurisdiction to the Native Land Court to determine succession claims or for 'any other specific purpose in connection with orders' made by the Commission. Appeals from the Commission's orders would be to the Native Minister. Finally, the Governor in Council would be empowered to make regulations to give effect to anything in the Bill, including Seddon's memorandum (attached as a schedule).[4]

In June 1896, a second delegation from Te Urewera arrived in Wellington to see the new Bill enacted into law. There was a four-month delay. As far as we have been able to determine, there were no significant meetings between the delegation and the Premier before September 1896. When they did finally meet, business was not discussed because of the death of Kereru Te Pukenui. Members of the delegation are likely to have given evidence to the Native Affairs Committee when it investigated the Bill, and some of the committee's changes may have been in response to the delegation's input. After the select committee's amendments, the Bill passed through the House of Representatives and the Legislative Council with virtually no changes. It was, however, vigorously debated at both its second and third readings in the House. The Urewera District Native Reserve Act became law on 12

4. Draft Urewera District Native Reserves Bill 1895, reproduced as an appendix in Cecilia Edwards, 'The Urewera District Native Reserve Act 1896: Part 1, Prior Agreements and the Legislation', Appendix B (doc D7(a)), p 265

October 1896. We summarise its main provisions over. The differences between the original Bill and the Act will be highlighted later in the chapter.

9.4 Essence of the Difference between the Parties

9.4.1 Why and how did Te Urewera leaders and the Crown negotiate a new basis for their relationship in 1894 and 1895?

The parties were generally agreed that a dialogue was opened with Seddon's tour of Te Urewera in 1894, was interrupted (but ultimately assisted) by the events of the 'small war' in 1895, and was concluded with the reaching of a 'heads of agreement' in Wellington in September 1895.

For their part, the claimants argued that the negotiations of 1894 to 1895 were inspired by their fear of land loss, and of the erosion of their autonomy by colonial institutions, especially the Native Land Court. On the other hand, they were not 'isolationist'; they did want to participate in the colonial economy and build a more constructive relationship with the Government. Both sets of factors, positive and negative, impelled them to negotiate when the opportunity arose.[5] The Wai 36 Tuhoe claimants argued that the origin of the Urewera District Native Reserve Act 1896, which was the outcome of the negotiations, lay in their long-standing efforts to preserve their autonomy. Since 1871, Tuhoe had been struggling to obtain Crown recognition of a tribal governance body.[6] Their long and partially successful resistance to the Native Land Court also helped to force the Crown to negotiate a new arrangement in 1895.[7] Because they had held out for so long and so successfully, the Government had little choice but to negotiate something unique to fit their particular circumstances.

In the short term, the claimants argued, the Ruatoki survey of the early 1890s, followed by the Government's attempts to force trig and road surveys in 1895, created a crisis that 'ironically served as a catalyst for the legal protection of the district'.[8] According to counsel for the Wai 36 Tuhoe claimants, the so-called 'small war' of 1895 'embarrassed' the Government and helped pressure Seddon to negotiate.[9]

In respect of longer-term factors leading to negotiations in 1894 to 1895, the Crown accepted that by this time there had been lengthy opposition from the 'majority of Urewera Maori' to the operations of the Native Land Court. The court was seen as time-consuming, expensive, and the cause of rapid land alienation. At the same time, one of the Government's

5. Counsel for Ngati Whare, closing submissions, not dated (doc N16), p 58
6. Counsel for Wai 36 Tuhoe, closing submissions, 31 May 2005, pt A: overview (doc N8), pp 9–10
7. Ibid, pp 10–11, 43
8. Counsel for Wai 36 Tuhoe, closing submissions, 30 May 2005, pt B: response to statement of issues (doc N8(a)), p 84
9. Ibid, p 84; see also counsel for Ngati Whare, closing submissions (doc N16), p 57

The Urewera District Native Reserve Act 1896: A Summary

'An Act to make Provision as to the Ownership and Local Government of the Native Lands in the Urewera District.'

Creation of a native reserve

Sections 2–3: The 'Urewera District' (of approximately 656,000 acres, its boundaries specified in the Act's first schedule) is set aside as a native reserve, in which the Native Reserves Act 1882 and the Native Land Court Act 1894 will not apply (except as provided for in this Act).

A special commission to investigate title

Sections 4–7: A commission (five Tuhoe, two Europeans), with powers and functions to be prescribed by regulation, will divide the district into blocks based as far as possible on hapu boundaries, and investigate the ownership of each block 'with due regard to Native customs and usages' and to justice and equity. A sketch plan (paid for by the Government) will be sufficient.

Form of title

Section 8: The commission will make an order declaring the names of the owners of each block, grouping families together, and also the relative share of each family in the block, and the relative share of each member of the family.

Appeals and the role of the Native Land Court

Sections 9–15: People have 12 months to appeal any order of the commission to the Minister of Native Affairs. If no appeal is lodged, the Governor will confirm the commission's order and have it registered as a 'certificate of ownership'. When the Minister decides appeals, he may direct an 'expert inquiry' to assist him and either confirm the commission's order or modify or vary it as he deems equitable. Alternatively, the Minister can refer the appeal to the Governor in Council, so that it may confer jurisdiction on the Native Land Court to deal with it. The Governor in Council can also confer jurisdiction on the Native Land Court to determine succession claims or for any other specific purpose relating to the district. The court's orders can be registered as, or recorded on, a certificate of ownership under the Act.

Local government and management of lands by committees

Sections 16–20: The commissioners will appoint provisional local committees for each block, until permanent local committees can be elected. Each local committee will elect one of its members to a General Committee, which will deal with 'all questions affecting the reserve', with its decisions

binding on the local committees. The powers, functions, and mode of election for the local committees and the General Committee will be prescribed by regulation.

Alienations

Sections 21–23: The General Committee will have power to alienate any part of the district to the Queen or to cede land for mining purposes. The Governor may lay out roads and landing places. The Governor may also take land for other public works, with the proviso that the sum total of takings cannot exceed 400 acres without the consent of the General Committee.

Powers to make regulations

Section 24: The Governor in Council may make regulations for the election of committees, to fix their term of office, to give effect to anything in the Act that is stated to be presecribed by regulations, or to 'give full effect to the Act', and to give effect to the memorandum of Seddon, dated 25 September 1895 (which is reproduced as the Act's second schedule).

Costs

Section 25: All of the Government's expenses incurred under the Act will be paid from money appropriated by Parliament (in other words, not charged to the peoples of Te Urewera).

key objectives was to open land for settlement.[10] But, in the Crown's submission, the 1894 tour was critical in convincing the Premier that Te Urewera was in fact unsuitable for settlement. As a result, this was no longer a motive for the Crown when it negotiated an agreement in 1895. Rather, Seddon's and Carroll's motivation 'appears to have been to extend to Urewera Maori the benefits enjoyed by Maori elsewhere, specifically schools, roads, and enjoying legal title to their lands'.[11] In this context, Crown counsel also submitted that Seddon and Carroll had demonstrated a willingness to build a constructive relationship with the tribal leaders of Te Urewera, and 'strove not to impose solutions on unwilling participants'.[12]

Within this broader context, the Crown agreed with the claimants that the immediate trigger for a negotiated agreement in 1895 was the 'small war' over surveys. It also agreed with the claimants that the crisis had been resolved by quick resort to a show of force.

10. Crown counsel, closing submissions, June 2005 (doc N20), topics 14–16, p 3
11. Crown counsel, closing submissions (doc N20), topics 14–16, p 16
12. Crown counsel, closing submissions (doc N20), topics 14–16, p 16

Carroll had also mediated, however, and secured agreement to the surveys going ahead, with a promise that local Maori would be paid to build the roads, and that there would be special legislation to protect their district.[13] The Crown accepted that core elements of the future agreement were included in Carroll's promise: 'the preservation of collective decision-making for Tuhoe, and keeping the Native Land Court out of the district'.[14] At the end of this crisis, the need to repair the relationship between the Crown and Te Urewera leaders was 'uppermost in the minds of all parties'.[15] This brought them together in Wellington.

9.4.2 What agreement was reached as a result of negotiations?

The Crown and claimants submitted that agreement, at least in principle or to a broad 'heads of agreement', was reached in Wellington in September 1895. The parties also agreed about some of the content of what was negotiated, but differed as to how the broad principles should be interpreted and whether some things had been agreed at all. The claimants took an expansive view of the content and meaning of the agreement, whereas the Crown – while accepting some of the claimants' arguments – took the view that it could be held to account only where very concrete undertakings had been made.

The only claimants to argue that they were not represented in these negotiations were Ngati Kahungunu and Ngai Tamaterangi.[16] The Crown accepted that it had an obligation to consult all hapu likely to have been affected. Crown counsel noted that the Ngati Kahungunu claimants' historians were 'silent on the question of Kahungunu participation at the meetings held in 1895', but the Crown inferred that they were not represented.[17]

The question of when agreement was reached was contested in our inquiry, because it had a critical effect on which set of proposals or statements constituted the actual 'agreement'. According to counsel for the Tuawhenua claimants, the essence of the agreement was contained in the 7 September 1895 proposals of the delegation from Te Urewera.[18] The claimants did not agree among themselves as to the significance of Seddon's memorandum, which followed on 25 September. The Wai 36 Tuhoe claimants said that it was 'akin to a Heads of Agreement', in which the details had not yet been discussed or agreed.[19] The Tuawhenua claimants, however, believed that the memorandum did not reflect and in fact resiled from almost all of the agreements reached in Wellington on 7 September.[20]

13. Crown counsel, closing submissions (doc N20), topics 14–16, p 17; topics 18–26, p 89
14. Crown counsel, closing submissions (doc N20), topics 18–26, p 89
15. Crown counsel, closing submissions (doc N20), topics 14–16, p 17
16. Counsel for Wai 621 Ngati Kahungungu, closing submissions, 30 May 2005 (doc N1), p 22; counsel for Ngai Tamaterangi, closing submissions, 30 May 2005 (doc N2), p 44
17. Crown counsel, closing submissions (doc N20), topics 14–16, pp 26–27
18. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), pp 111–121
19. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 86
20. Counsel for Tuawhenua, closing submissions (doc N9), p 120

Home Rule

Counsel for the Wai 36 Tuhoe claimants submitted: 'It was also agreed that the chiefs and people would retain a significant degree of control and management of their own district expressed variously as "local government" or "home rule".'[1] The term 'Home Rule' is referred to several times in this chapter. In the 1880s and 1890s, the Liberal Government in Britain, under the leadership of Prime Minister W E Gladstone, tried to legislate to introduce self-government for Ireland. In the nineteenth century, although the Irish people were represented in the British Parliament, they had no local self-government. A range of measures was advocated, including a separate parliament for Ireland, under the overarching authority of the British Parliament. These measures came to be known as Home Rule. In the 1890s, the term was adopted in New Zealand to describe Maori aspirations for self-government, and to point to a parallel between the situations of the Irish and Maori peoples. In particular, the term was used in association with the Kotahitanga (Maori Parliament) movement to apply moral pressure on the New Zealand Government. Many New Zealand Liberals were strong supporters of Irish Home Rule. There was some debate, in the press and in Parliament, as to whether the 1895 agreement and the Urewera District Native Reserve Act provided Home Rule for the peoples of Te Urewera.

1. Cathy Marr, 'The Urewera District Native Reserve Act 1896 and Amendments, 1896–1922' (doc A21), pp 67–68 (counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 85)

The Crown argued that the 7 September meeting represented a 'milestone' in the negotiations, but that the agreement was most fully summarised in Seddon's memorandum.[21] The Crown's view of the memorandum was similar to that of the Wai 36 Tuhoe claimants: it recorded 'broad agreement to a set of principles in good faith'.[22] Those principles, however, had to be translated into practical legislation, which necessarily meant changes or additions; the Crown saw the process of reaching an agreement as one that continued in 1896.[23]

According to the claimants, the core elements of the September 1895 agreement were: an inalienable reserve; continued autonomy or self-government through tribal committees; the exclusion of the Native Land Court and surveys; a special title investigation process 'in accordance with Tuhoe customs and at no cost to the people'; protection of native flora and fauna; and a package of social and economic assistance.[24] There was a 'clear understanding,

21. Crown counsel, closing submissions (doc N20), topics 14–16, p 6
22. Crown counsel, closing submissions (doc N20), topics 14–16, p 23
23. Crown counsel, closing submissions (doc N20), topics 14–16, pp 21–23
24. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 44

in accordance with Tuhoe's consistent wishes, that land title was not to be individualised but to be dealt with at a hapu level'.[25]

The Crown's view of what it called the 'broad' principles of agreement was much the same as the claimants'.[26] The Crown took a narrow view, however, of what specific promises were made to put these principles into effect:

> These were title determination through an alternative process to the Native Land Court involving hapu, no court or survey costs to be charged for title determination, and the provision of a form of local government.[27]

In the Crown's submission: 'The test for the Crown is whether it translated the agreed principles into the legislation, and whether in implementing the Act it derogated from those key principles.'[28] The claimants broadly agreed that this was a key test for the Tribunal to apply. The parties differed, however, on the exact content and extent of what had been agreed in 1895. Largely, the disagreement arose because the Crown saw itself as committed only to the concrete promises it had made.[29] This was partly because so much, in the Crown's view, was left 'unspecified'. The Crown argued, for example, that the degree of self-government promised by Seddon 'appeared to be not unlimited and certainly remained unspecified to any degree'.[30]

The claimants, however, saw the Crown as committed to delivering every aspect of what had been discussed and (so they argued) agreed. Moreover, they said, some aspects of the agreement that they considered were both critical and wide-ranging were interpreted by the Crown to be indirect or 'ancillary'. The claimants, as we have seen, argued that an extensive package of 'social assistance' was part of the agreement.[31] The Crown considered most of this 'package' to be made up of benefits that were expected by everyone involved, including Seddon and Carroll, but that were not concrete promises of the kind the Crown could be held to account for failing to deliver.[32]

9.4.3 Was the agreement between Te Urewera leaders and the Crown given legislative effect in the Urewera District Native Reserve Act 1896?

The parties agreed that the Urewera District Native Reserve Act was intended to save the lands and to preserve and promote the self-government, tino rangatiratanga, and mana

25. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 85
26. Crown counsel, closing submissions (doc N20), topics 14–16, pp 19–22, 28–29
27. Crown counsel, closing submissions (doc N20), topics 14–16, p 21
28. Crown counsel, closing submissions (doc N20), topics 14–16, p 6
29. Crown counsel, closing submissions (doc N20), topics 14–16, pp 20–22, 47
30. Crown counsel, closing submissions (doc N20), topics 14–16, p 23
31. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 51; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 87, 92
32. Crown counsel, closing submissions (doc N20), topics 14–16, p 47

motuhake of the peoples of Te Urewera. Within that broad agreement, there was considerable disagreement over whether the Act was a faithful representation – and, where necessary, amplification – of the September 1895 principles. Nonetheless, the Crown and claimants generally agreed that Treaty breaches arose from the Crown's failure to carry out the Act, rather than from fatal flaws within the Act itself. The main exceptions to this were the questions of whether the Act provided for the creation of individualised titles to land, and whether it was appropriate or safe to have left key points for future regulation (by the Crown alone). The claimants and the Crown also agreed that powers to alienate land and to take land for public works were added to the Act without their having been part of the September principles. The parties did not agree on whether Te Urewera leaders had consented to the additions.

(1) *Title determination*

Counsel for the Tuawhenua claimants argued that Tuhoe had wanted hapu to decide titles but, instead, the Act created a title-determining commission in which hapu would play only a subordinate role.[33] Other claimants argued that the process – and the degree of Maori involvement and control – was not in fact 'well articulated' in the Act. No one was sure how it would work.[34] The Crown's view was that the Act gave effect to what had been agreed: an 'alternative form of title investigation through the specially appointed Commission'. The Commission provided for Tuhoe input, because five of the seven commissioners would be Tuhoe and the titles would be determined according to Maori custom.[35] Ngati Kahungunu claimants argued that they were disadvantaged by the specification that the five Maori members of the Commission were to be Tuhoe.[36] The Crown accepted that Ngati Kahungunu were not consulted about this, but suggested that since their rights were recognised in parts of the reserve, the real issue was whether they were represented on the governing committees.[37]

(2) *Individualisation of title*

The parties did not agree on whether the 1896 Act created individual titles in land. The question was one of the key issues for our inquiry. The claimants argued that section 8 of the Act either individualised title, which they had never agreed to, or it enabled the Government to 'raid' the shares of individuals, even if the title was not technically individualised.[38] The Crown argued that section 8 was necessary to define the owners who would elect block

33. Counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), pp 126–127
34. Counsel for Ngati Whare, closing submissions (doc N16), p 59
35. Crown counsel, closing submissions (doc N20), topics 14–16, pp 28, 46, 49
36. Counsel for Wai 621 Ngati Kahungungu (doc N1), p 23
37. Crown counsel, closing submissions (doc N20), topics 14–16, pp 27, 35, 37
38. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 87–88, 91, 93–96, 98; counsel for Ngati Whare, closing submissions (doc N16), pp 59–60

committees and to whom proceeds from the land could be distributed. But individuals did not have many of the powers of ownership; these were vested in the General Committee. In the Crown's view, this meant that section 8 did not create individual titles.[39]

(3) *Self-government*

The Crown and claimants agreed that the Urewera District Native Reserve Act was intended to give effect to the claimants' tino rangatiratanga and mana motuhake. The Crown's argument was that it breached the Treaty later, when it lost sight of this purpose of the district reserve, and when it failed to give effect to the promises of self-government and tribal land management.[40] In the claimants' view, the Act failed to define the powers of the committees. Instead, this was to be done by regulations, which placed the Crown in an important position of trust.[41] The Act thus failed to entrench Maori autonomy in colonial law, and therefore provided only 'ostensible' autonomy.[42] The Wai 36 Tuhoe claimants argued that the Crown's reservation of these powers to itself was a breach of the agreement and of their tino rangatiratanga.[43] The Tuawhenua claimants, however, argued that it did allow for flexibility in working out the details, and that iwi ought to have been able to trust the Crown: 'The honour of the Crown was a key component that could determine the success or otherwise of the legislation.'[44] On this point, the Crown and claimants were in agreement.

(4) *Social assistance*

According to the claimants, the Government had promised a package of social and economic assistance, but this was left out of the Act.[45] The Crown argued that it had never promised anything more than a few specific things (such as schools) that could already be provided under existing laws or by the Crown's power to regulate for matters in Seddon's memorandum.[46]

(5) *Alienations*

The parties agreed that there were two key provisions in the Act that had not been agreed or discussed in September 1895. These were the General Committee's power to alienate land to the Crown, and the Government's power to take land for public works. The claimants regarded these additions as breaches of the 1895 agreement, although they admitted that the

39. Crown counsel, closing submissions (doc N20), topics 14–16, pp 46, 50–53
40. Crown counsel, closing submissions (doc N20), topics 14–16, p 34
41. Counsel for Ngati Whare, closing submissions (doc N16), pp 59–60; counsel for Tuawhenua, closing submissions (doc N9), p 124
42. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 68, 163
43. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 91
44. Counsel for Tuawhenua, closing submissions (doc N9), p 124
45. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 51; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 92
46. Crown counsel, closing submissions (doc N20), topics 14–16, pp 25, 28–29, 47, topic 29, pp 8–9

alienation provisions were relatively restricted and included significant protections.[47] The Crown's power to take land for public works, however, was seen as a violation of their tino rangatiratanga.[48] The Crown argued that both powers were restricted and qualified by safeguards, and that their inclusion was almost certainly agreed by the delegation of Te Urewera leaders in 1896.[49]

9.5 Tribunal Analysis

9.5.1 Why and how did Te Urewera leaders and the Crown negotiate a new basis for their relationship in 1894 and 1895?

Summary answer: *By 1894, there was significant pressure to open Te Urewera to settlement and the colonial economy. Premier Seddon toured the district, intent on convincing its inhabitants of the benefits of roads, schools, and using their 'surplus' land in the economy. In particular, he stressed Treaty protections, but argued that these could be given effect only if Maori obtained land court titles for their lands. The Government, he said, wished to protect them in the retention of their lands, protect their interests from the settler majority, promote their welfare, and see them prosperous and free. Ngati Manawa, and to a lesser extent Ngati Whare and Ngati Haka Patuheuheu, welcomed this message. Tuhoe, however, told the Premier of their determined resolution to keep to Te Whitu Tekau policies, and to seek legal powers for a governing committee. There were sharp exchanges on some of these issues, especially the question of what kinds of powers the Crown could or would recognise in a Maori committee. Nonetheless, the historians who gave evidence on this issue agreed that a foundation of trust and some level of agreement were achieved at these meetings, serving as a basis for later discussions and agreement in 1895.*

When Seddon left the district, the press said he had solved the 'native problem'. The chiefs, it was said, had confirmed their acknowledgement of the Queen and had promised to obey the law. Kereru Te Pukenui had gifted the taiaha Rongokarae to the Premier at Ruatoki, though this exchange was understood quite differently by Tuhoe and the Government. At the same time, the Premier had offered further discussions on most issues at Wellington later in the year. He insisted, however, that a trig survey would be carried out (with proper notification). Given their circumstances, Seddon undertook to fund a delegation from Te Urewera to visit Wellington. For reasons unknown, the Government did not keep this undertaking, despite several requests from Te Urewera leaders during the remainder of 1894.

47. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 48; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 95–96
48. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 91
49. Crown counsel, closing submissions (doc N20), topics 14–16, pp 28–29, 44, 69

9.5.1

As a result, the promised discussion of surveys and protection of Te Rohe Potae did not happen before the trig survey started in 1895. What followed was, in the words of Apirana Ngata, a 'small war', though a war in which neither side fired any shots. Tuhoe and Ngati Whare obstructed the survey, leading (as the Crown conceded) to an immediate 'show of force' by the Government. In the wake of the troops, however, cabinet minister James Carroll came to negotiate agreement to the trig survey. He convinced Tuhoe at Ruatoki that the survey would not (as officials had told them in the past) be used for Native Land Court purposes. Numia Kereru stressed that Tuhoe's compact with the Government, confirmed by the gift of the taiaha Rongokarae, did not mean the Government could do whatever it chose without consulting them. But by the close of the hui, Kereru Te Pukenui secured agreement among those present that the Crown could be trusted and the law would be obeyed.

No sooner had the dust settled than it was discovered the surveyors were also surveying for roads in the interior. The Government appears to have decided to force the issue of roads in response to the first obstruction, so that the district would be opened up and any further opposition speedily countered. The surveyors were again obstructed, with the result that Seddon immediately sent a (larger) armed force – and Carroll to negotiate. This time, Carroll seems to have promised that a delegation could go to Wellington to negotiate a settlement of all outstanding issues, and that the district would be protected and reserved by a special Act of Parliament.

Bewildered at the Government's willingness to use troops and to force roads on them, Ngati Whare and Tuhoe wavered in their commitment to Te Whitu Tekau policies. At the same time, Seddon was embarrassed that his much-lauded settlement of the 'native problem' had been exposed in this way; he was also aware that he could do no more than make a limited show of force. Moreover, his 1894 tour had convinced him that the district was not required for European settlement. But he needed to undermine the growing influence of Kotahitanga, with its goal of a national Maori parliament and Maori control of their own lands, and show that the Government's policies presented a genuine and reasonable alternative, of benefit to both Maori and settlers. For all these reasons, both sides were by August 1895 ready not only to negotiate but also to make real concessions.

(1) *Origins of the negotiations between Te Urewera leaders and Seddon's Government*

By 1894, there was significant pressure on the peoples of Te Urewera to give up the long-standing Te Whitu Tekau policies of no roads, no surveys, no land sales, no leases, and no Native Land Court. For some time, the groups on the outer edges of Te Rohe Potae – especially Ngati Manawa and Ngati Haka Patuheuheu – had been getting land surveyed and put through the Native Land Court. As we will see in chapter 10, there were many reasons for this. Ngati Manawa, in particular, wanted to use and develop their lands in the colonial economy. But all groups faced the risk of losing land no matter which way they

turned. Native Land Court processes empowered any group (even though they might have comparatively small or even no interests in a block) to set in motion the inexorable process of surveying, land court hearings, and the award of title. At the same time, Government agents pressed for the leasing and sale of land for settlement. Tuhoe had been unable to keep land in which they had interests out of the court or to prevent the alienations that usually followed.

This situation was mitigated by two factors. First, the leaders of Te Urewera had maintained their compact with the Government since 1871. They had sought to communicate and cooperate with the Government where possible, and to obtain recognition (and legal powers) for their tribal governance body. As we saw in chapter 8, they were willing in the 1880s to be flexible about the exact form of their governance body, and to accept the trappings of a European-style committee, if that won it status and powers at colonial law. At the same time, they did not accept all the powers of kawanatanga as conceptualised by the Crown. They kept magistrates and the operation of most colonial laws out of their district, and they maintained a 'border' which prevented access for prospectors and others who the tribe saw as threatening Te Whitu Tekau policies.

Secondly, Te Whitu Tekau policies were maintained by consensus. The leaders of Te Urewera met with each other and, from time to time, with officials (usually neighbouring resident magistrates such as Samuel Locke and R S Bush) and continually debated how to protect their authority, lands, laws, and way of life. Until 1891, there had been general agreement that the Te Whitu Tekau policies were the best – indeed the only – way to do this. The result, as we have seen in chapter 8, was a stalemate with an increasingly assertive Crown by 1889. By that time, the Government was actively trying to open Te Urewera to gold prospecting, the Native Land Court, and British settlement. Also an issue, though arguably less important to the Crown than these others, was its desire to bring Te Urewera under the full authority of colonial law. In chapter 8, we pointed to articles in the settler press which were sceptical of any urgent need to see the Queen's writ run inside Te Urewera.

Three factors had protected the heartland of Te Urewera from the full brunt of colonisation before 1889. First, it had not been subject to much pressure from either private settlers or the Crown, who had been preoccupied with better, more accessible, less apparently 'hostile' districts. Secondly, ever since the withdrawal of Rapata Wahawaha's forces and the 1871 compact with Donald McLean, the leaders of Te Urewera had protected their mana motuhake with a single-minded determination. Thirdly, there had been – as we noted above – continuous debate and renewal of the consensus to keep out the 'evils' of colonisation and the colonial state. These factors either no longer applied or were of less force by the early 1890s. In particular, there was a new and intense pressure from the Crown to open Te Urewera for economic development, and the consensus of Te Urewera leaders had been decisively broken.

9.5.1

How had this come about? As we saw in chapter 8, there had been a great movement of Tuhoe to live at Ruatoki by the late 1880s. One result seems to have been an explosion of conflict and uncertainty as to land rights and authority. At the same time, a younger generation of leaders, especially Numia Kereru, saw the future of Tuhoe in the development and use of their lands in the colonial economy. Applications to survey Ruatoki lands and put them through the Native Land Court had been filed by Ngati Awa. Partly in response to that, and partly as a result of the Governor's visit in 1891 and internal conflict, some Ruatoki leaders and hapu decided to have the lands surveyed to get the court to confirm their ownership. With most of the people now living at Ruatoki, and the majority still opposed to surveying and to the court, this intensified the conflict within Tuhoe. That conflict is one context for the negotiations which took place with the Crown from 1894 to 1896.

The Tuawhenua researchers described the choice facing their people as follows:

> [By the early 1890s] the leadership of Tuhoe [was] in disarray – divided and distracted by the actions of the Crown, and desperate to find some way to regain control over their destiny.
>
> They faced a great dilemma as only the great composer Mihikitekapua could put it in her pithy waiata:
>
> *Te roa o te whenua te tawhaia atu*
> *E noho ana hoki au i Poneke raia*
> *Awhi ana hoki au ko koe Te Karauna*
> *He whakairitanga mo te mate o te tinana.*
> *I travel such a long way*
> *To reach distant Wellington.*
> *When I embrace you the Crown*
> *I know it will destroy me.*
>
> Thus, as Mihikitekapua in her wisdom could see, Ngai Tuhoe had come to a point where they had little choice but to co-operate with the Crown, even join with the Crown, yet they knew that act would only bring disaster for the people.[50]

What had brought the peoples of Te Urewera to this point, and would it be ruinous as Mihikitekapua feared?

We pause here to briefly recapitulate the events at Ruatoki in 1892 and 1893, which serve as essential context for what followed. It will be recalled from chapter 8 that the majority of hapu opposed the survey of Ruatoki, which was at first delayed by their opposition, and then obstructed when the Government decided to persevere. James Carroll had mediated on behalf of the Government. He did try to limit the amount of land covered by the survey, and he was understood to have promised in 1892 that if the people allowed the survey of

50. Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two: A History of the Mana of Ruatahuna from the Urewera District Native Reserve Act 1896 to the 1980s', April 2004 (doc D2), p ii

Ruatoki to go ahead the rest of the district would be protected from further surveys and the court.[51] In any case, there were two rounds of major obstruction in 1893, each of which was followed by arrests, trials, and the imposition of either fines or imprisonment. On both occasions, the Premier, Richard Seddon, brought in armed police and the situation appeared headed for a major showdown until Te Kooti intervened (at the request of the Government). Te Kooti had been pardoned by the Crown in 1883 and was able to return to Te Urewera, where his influence remained strong among Tuhoe and Ngati Whare. By 1891 the Government was looking to Te Kooti to play a mediating role with Tuhoe, and we noted above that Te Kooti (whether or not he felt under an obligation to assist the Government) had come to believe that the law should be looked to for protection. His advice to Tuhoe was that the survey should be allowed to continue, and this proved decisive. The survey was completed without further obstruction, and the Native Land Court proceeded to sit and hear the Ruatoki case in late 1893 and from time to time in 1894.

In February 1894, Tuhoe held an important hui to try to heal the divisions that were manifested in these developments and to restore a united approach to the threats that faced them.[52] The hui lasted for over a month, and at the end of it a consensus had been reached: Tuhoe reaffirmed all the old Te Whitu Tekau policies as the way to protect their lands and authority from further encroachments. Our main source of information about this hui and its decisions comes from the record of Seddon's visit to Ruatoki in April 1894. It was telling that the rangatira who addressed him on the subject, and set out the Te Whitu Tekau policies as the considered decisions of a united Tuhoe, was Numia Kereru, one of the leading proponents of the Ruatoki survey. At Whakatane, Ngati Awa had warned the Premier that Tuhoe would try to get him to stop the court from completing its work at Ruatoki. But that did not happen. The price of unity, it seems, was a concession by other Tuhoe leaders that the valuable Ruatoki lands were to continue through the court and obtain Crown titles, the key to participation in the colonial economy. Numia was chosen as the spokesperson to present the united views of Tuhoe, even though, as he told the meeting, he did not agree with some of them. For him, the undoubted key point was that the policies newly re-endorsed by the hui did not cover land that had already been surveyed – in other words, Ruatoki.[53]

For our purposes, it is important that Tuhoe negotiations with the Crown in the mid-1890s began from this starting point: an apparent restoration of unity in February 1894 around the policies of Te Whitu Tekau. We have to account for how and why the leaders

51. Cathy Marr, 'The Urewera District Native Reserve Act 1896 and Amendments, 1896–1922', report commissioned by the Waitangi Tribunal, June 2002 (doc A21), pp 25–26, 28

52. Tamati Kruger, summary of evidence concerning 'Ruatahuna: Te Manawa o te Ika, Part One: A History of the Mana of Ruatahuna from Early Origins to Contact and Conflict with the Crown', 11 May 2004 (doc D28), pp 67–68

53. 'Pakeha and Maori: A Narrative of the Premier's Trip Through the Native Districts of the North Island', March 1894, AJHR, 1895, G-1, pp 45, 52

of Te Urewera were persuaded to move from this position and to give up some of these policies by September 1895. Numia Kereru's account of the February hui was recorded as follows:

> That meeting began its work on the 1st of February, and continued till the 4th of March, when it concluded its business. I will now let you know what transpired at that gathering. I will lay before you what was transacted on that occasion. One matter that was determined was the territorial boundary of what land was to be surveyed under command of the Government [the ring boundary], and internal surveys within these boundaries would not be consented to at the present time, and that searching for gold would not be agreed to by them, and that the sale of their land would not be acquiesced in by them, and the laying-off of roads through their land would not be agreed to, and that leasing of their lands was also to be prohibited, that committees should be established and that the duty of these committees was to deal with troubles that might arise in reference to their lands. These were the matters decided upon at that meeting. I may further explain to the Government what else took place at that meeting. The people who attended it are dwelling under the authority of the Government; they are dwelling in peace; they will not depart therefrom and take up the course followed in former times; they will pursue the road that leads to prosperity. Now, this is a separate matter I am going to speak of – that is, in regard to the land. They – I am referring to the meeting – wished to retain within their own hands the administration of the affairs relating to their lands. The lands that are already surveyed are not included in the remarks I am now making. I should explain why the meeting has taken up this position. This is the explanation I have to give: Lands that get under the control of the Government are simply squandered away; those who have possessed land become landless, they are those who are supported by the Government.[54]

This, then, was to be the basis for Tuhoe's re-engagement with the Crown in the wake of the Ruatoki survey crisis.

After the abandonment of resistance to the survey in mid-1893, there was no significant contact between Tuhoe leaders and the Crown for several months. This situation underwent a dramatic change in April 1894, when the Premier (who was also the Native Minister) came to visit them as part of his tour of North Island Maori communities.

In her evidence for the Tribunal, Cathy Marr explained the Liberal Government policies that had led to this tour, and the events that followed. In Ms Marr's view, the tour was designed to win both Maori and Pakeha over to Liberal Party policies.[55] On one side, the Government was under Pakeha pressure to open up more Maori land for settlement. On the other, Seddon's Government was faced with a North Island-wide groundswell of Maori

54. 'Pakeha and Maori: A Narrative of the Premier's Trip Through the Native Districts of the North Island', March 1894, AJHR, 1895, G-1, p 52
55. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 29–31.

Seddon in Te Urewera

Seddon travelled determinedly through Te Urewera, though the weather was often bad, and he refused to turn back. The journey from Ruatahuna to Waikaremoana was arduous; the official report described it as 'most trying, it being over the roughest part of the country they had travelled, the party having literally to crawl over masses of slippery clay and rocks, besides fording several streams'. The waters of the Lake were rough when they crossed to Onepoto, and the party were 'half drowned by the huge seas which continually broke over the canoe'. Three settlers were waiting to welcome them, and served whiskey without stint. Seddon then rode on 3 miles to the 'Native settlement' where a warm welcome and a huge fire awaited him; soaked to the skin, he addressed the people, and the hui lasted from 9 in the evening to 1 in the morning.[1]

Cathy Marr commented that:

> The documentary records of the 1894 visits show that Seddon appeared to relish the opportunity to engage in debate with Maori communities, and employed his usual combative political style to full effect. He liberally mixed eloquent appeals, entertaining humour, and promises of protection and goodwill with thinly veiled threats that only his government's sense of justice stood between Maori and the far less generous mood of the settler community. His physical size, debating ability and obvious enjoyment of public speaking also appeared to impress many in the Maori communities he visited and according to his biographer he showed during these visits that the 'mana of a Premier was safe in his keeping'. As the tour went on, Seddon also clearly became enamoured of the idea of himself as a statesman. He relished the idea of following in the footsteps of men he admired such as Sir George Grey and John Ballance in negotiating with Maori leaders of the most separatist districts to persuade them to bring their communities to acknowledge the authority of the Queen.[2]

1. AJHR, 1895, G-1, pp 48, 61, 79
2. Cathy Marr, 'The Urewera District Native Reserve Act 1896 and Amendments, 1896–1922' (doc A21), p 31

disquiet over land loss and the effects of the Native Land Court. Maori concerns had been reflected in the establishment of the Kotahitanga, or Maori parliament movement, in 1891:

> A major goal of this movement was to establish a separate council or parliament to handle Maori affairs. It also sought to abolish the Native Land Court and replace it with committees of owners under the council to settle title and administer Maori lands. In the early 1890s, the Kotahitanga pursued these aims in parliament, proposing a series of Bills in the General Assembly. When the Liberals rejected these, the movement sought to establish its

parliament independently and from the mid-1890s supported a boycott of the Native Land Court.[56]

The Liberals responded to Maori and Pakeha discontent by appointing a commission of inquiry into the native land laws, which reported in 1891. James Carroll, who accompanied Seddon and was a key point of Government contact with the Ruatoki leaders in 1893, had been a member of that commission. Its report, as Ms Marr noted, was highly critical of the impact of the Native Land Court on Maori. Seddon had appointed himself Native Minister in 1893, following the resignation of Alfred Cadman. He had the task of trying to balance reforms (such as the re-introduction of pre-emption) that the Government hoped would deal with Maori concerns, with the Liberals' desire to make more Maori land available for settlement.[57] As Cecilia Edwards put it: 'a critical issue for Seddon and Carroll was to win grassroots support from the communities involved for having title to their lands determined through the Native Land Court as a pre-requisite for considering selling lands surplus to their requirements to Government.'[58]

In Cathy Marr's view, the Liberals were also keen to give the impression that they understood Maori issues and were in 'control' of Maori districts. Discussion and negotiation, rather than military force, were considered the best way to achieve this aim. Ms Marr notes that Seddon, who spent two years as Minister of Defence under Ballance, was well aware that the armed forces were 'small, inefficient and underfunded', and that any measures to strengthen them would be expensive and unpopular. Thus military solutions, apart from occasional shows of force, were no longer seen as viable by the 1890s.[59] For that reason alone, Seddon – who had sent armed police to Te Urewera in 1893 – had an incentive to improve relations with the leaders of that district, and to get to the bottom of their opposition to surveys and the court. As Cecilia Edwards also noted in her evidence for the Crown, this was a 'fact-finding' tour designed to better inform the Government, as well as a mission to 'sell' Liberal land policies to Maori. For their part, Te Urewera leaders welcomed the arrival of the leader of the Government, a man who said he had come to sort out problems and settle any justified grievances, as an important opportunity.

(2) *Seddon and Carroll visit Te Urewera, 1894*

Seddon's entourage travelled extensively in Te Urewera in 1894, holding talks in Ruatoki, Galatea, Te Whaiti, Ruatahuna, and near Lake Waikaremoana. Seddon was heartened by apparent support from Ngati Whare and Ngati Manawa for the prospect of roads and

56. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 24; see also John A Williams, *Politics of the New Zealand Maori: Protest and Cooperation, 1891–1909* (Oxford: Oxford University Press, 1969), pp 48–67

57. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 21.

58. Cecilia Edwards, 'The Urewera District Native Reserve Act 1896', 3 pts, report commissioned by Crown Law Office, 2004, pt 1 (doc D7(a)), p 90

59. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 20

schools in the district. According to Marr, Seddon returned from his tour believing that 'he had finally convinced the majority of the Urewera leadership to accept the mana of the government and the Queen'. He was able to portray this to the settler electorate as a success.[60] Seddon's conviction arose in part because he had learned on his tour – to his surprise – of McLean's 1871 compact, and the way in which the leaders of Te Urewera understood it. Seddon had not been aware of past efforts by Tuhoe and Ngati Whare leaders to maintain contact and a positive relationship with the Government. He was told of this in no uncertain terms.

The discussions between the Government representatives – primarily Seddon, but also Carroll – and the leaders of Te Urewera were recorded in English and published in newspapers and the AJHR.[61] They provide an important account of how dialogue was opened between Tuhoe, Ngati Whare, and Ngati Manawa on the one hand, and the new Premier on the other. The exchange of views, which was sometimes heated and inconclusive, started both parties on the road to the Urewera District Native Reserve Act in 1896. In some ways, it was a false start. This was because the dialogue was interrupted. As we shall see, Seddon and the various communities agreed that the latter should send representatives to Wellington to continue the discussions there. Several key matters, including surveys and tribal committees, were held over for future settlement in Wellington. But before that could happen, surveyors were sent in 1895 to complete a trigonometrical survey, and to survey a road line from Te Whaiti to Ruatahuna. The result was a conflict which Sir Apirana Ngata later described famously as the 'small war'.

Nonetheless, there was an important exchange of views and exploration of opening positions at the 1894 hui. Seddon and Carroll explained how the Government wanted to protect Maori interests and ensure their prosperity, and the manner in which they believed it would (or could) do so. Much of the groundwork for future trust in the Premier was, in our view, laid at these meetings. At the same time, Seddon learned of the existence of the 1871 compact, alongside Tuhoe's determination to have their land and affairs controlled absolutely by their own committees, and their fundamental opposition to parting with their lands. He also learned, as we shall see below, that most of the land in Te Urewera was not suitable for the kind of close settlement promoted by the Liberals. These things underpinned the eventual agreement reached in 1895.

(3) *What the Liberals wanted: surveys, land titles, land dealings, roads, schools*

Three main themes emerged from the 1894 hui. The first was the government's message that Maori should prepare their lands for use in the colonial economy by putting them through the land court. The second was the government's promise to protect the peoples of

60. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 33–34

61. Detailed accounts of the hui have also been provided in the reports of Cecilia Edwards (doc D7(a)) and Judith Binney, 'Encircled Lands: Part Two, A History of the Urewera 1878–1912', June 2002 (doc A15).

9.5.1

Seddon and the Treaty of Waitangi, April 1894

During his 1894 tour, Seddon made frequent references to the Treaty, which he reaffirmed. His comments to Tuhoe at Ruatoki and Ruatahuna related mainly to the Queen's guarantee of protection; he explained that the Government did not want to take their land but would protect them in their retention of it. We will consider those comments in detail below. Here, we describe Seddon's general understanding of the Treaty, as he explained it at Whakatane in April 1894:

> Then the Europeans came, many years afterwards [after the arrival of the canoes], and further trouble arose, and that was caused through the men. Instead, then, of agreeing as brothers – instead of living in peace together – because there was quite enough land for all – they commenced to destroy each other. This evil state of things continued for some time; there was great loss of life, and many evils overtook both races. Then the forefathers of those present, the chiefs of the Native race, held a conference. They saw that the European race was increasing in large numbers, and the Natives were decreasing, that unless some position was established on a more satisfactory footing it probably meant the extermination of their children. The result of this was the signing of the Treaty of Waitangi. Now, the principles contained in that treaty were – first, that the Native race was to admit the sovereignty of the British Government – the sovereignty of the Queen – and from that day forward the Native race were to be her children just the same as the pakehas; that their welfare was to be attended to; that they were to have protection; that no one else should interfere with them; and that she – the Queen – would give them the same protection she gave her liege subjects at Home. And she conceded that they were to be the owners of the land. There were also certain privileges conceded as regards the fishing rights which had been established, and which it was considered good for the Native race should be reserved to them; your forefathers, at the same time agreeing, on your behalf, that in dealing with their lands they were only to deal through the Government – that is, the Queen. The wisdom of that course has been apparent, because wherever there has been a departure therefrom trouble has overtaken both races. We must all, therefore, admit that the principles of that treaty originated with men who knew what they were doing – men who could see a long distance ahead; and I am sure that if some of your forefathers had only had an opportunity they would have left some mark behind to prevent a departure from this treaty, and would have taken steps on behalf of the Native race – would have left some command – so that a departure could not have taken place. This day the Government – Her Majesty the Queen, and those under her who are governing this country – are quite prepared – and I speak on their behalf – I say it is our desire to maintain the position that was then agreed upon by both races.[1]

1. AJHR, 1895, G-1, p44 (cited in Edwards, 'The Urewera District Native Reserve Act 1896, Part 1: Prior Agreements and the Legislation' (doc D7(a)), p92)

Te Urewera and ensure their prosperity. The third theme was Tuhoe's wish to govern themselves by means of a tribal committee, which they believed was compatible with the Crown's exercise of kawanatanga.

During the 1894 hui, the Government constantly reiterated its message that Maori should get their lands surveyed and clothed with a 'legal title', and then use their 'surplus' land in the colonial economy. That could involve either leases or sales but the idea of selling land was seldom mentioned, except at Galatea, where Harehare Atarea of Ngati Manawa said: 'We always acted under the instructions of the Government. I have carried out roads, surveys, land-courts, leases, and sales.'[62] This, as he well knew, was the antithesis of Te Whitu Tekau policies.

At most places, the Premier's messages included his promotion of the recently enacted Native Land Purchase and Acquisition Act 1893, which was designed to facilitate the disposal of 'surplus' Maori customary land, thereby helping meet the 'rapidly increasing demands for land for settlement'.[63] Seddon emphasised that committees of owners, or the majority of the owners themselves, should make a deliberate decision as to whether their lands were 'surplus' or not. If they were considered surplus, then the majority of owners would be able to decide if the land should be leased or sold. Land did not have to be sold to be profitable in the colonial economy. Nor were leases of land the only way to ensure an income in the long term, as the Government could invest purchase monies in annuities for the sellers. In either case, under the Liberals the choice would be a deliberate one made by the community. The Government itself did not want to take the people's lands from them. There was an emphasis on leasing, in acknowledgement of the audience's expected preferences. There was also an emphasis on fair prices. The people could have their land auctioned, either for lease or sale, to the highest bidder, or – if they dealt with the Crown – their land would be valued by an independent board, on which they would be represented.[64] (All these assurances should be kept in mind when we consider the actual process of land alienation in Te Urewera, in chapters 10 and 14.)

As well as surveys, land titles, and land dealings, the Government representatives preached a message of roads and schools as the means to develop the people both economically and socially. Schools would enable the teaching of new farming methods and technical skills such as carpentry. Roads would enable better communications and commerce. Ngati Whare and Ngati Manawa expressed themselves in favour of both. Tuhoe, on the other hand, were more willing to have schools than roads. At Ruatoki, some people wanted the land titles clarified before deciding where to put the school, while at Ruatahuna the community preferred to keep the school at a safe distance – at Ruatoki – for the meantime. But the benefits of schools were not challenged by anyone. Roads, however, were still

62. AJHR, 1895, G-1, p 65
63. Cecilia Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 87
64. See, for example, AJHR, 1895, G-1, pp 54–56, 82

banned from Te Rohe Potae despite everything that Seddon and Carroll could say in their favour.[65]

Gold prospecting proved a non-issue, disposed of briefly by Seddon at Ruatoki. He told the people that the Government would not send any prospectors, and that nothing would be done about gold until after land titles had been awarded: 'So you do not require to have any anxiety upon that account.'[66]

Most of the disagreement was therefore focused on the Government's promotion of surveys, land titles, and land dealings. At Galatea and Te Whaiti, Ngati Manawa, Ngati Haka Patuheuheu, and Ngati Whare saw the advantages offered by dealing with their lands, and evidently accepted the Premier's view that secure land ownership and prosperity would be the result.[67] This was indeed an act of faith, especially for Ngati Haka Patuheuheu, who so far had achieved neither of these things in the wake of their land court hearings (see chapter 10). The hardest audience to convince, however, was Tuhoe at Ruatoki, Ruatahuna, and Waikaremoana. The latter community was something of a special case. As they explained to Seddon, they were living to the south of the lake on their reserved land. The Premier seems to have accepted that 'surplus' land was hardly an issue for this group.[68] At Ruatoki and Ruatahuna, however, he pressed the idea of surveys, titles, and leasing. Tuhoe, in response, told him quite firmly that they wanted an outer boundary defined, within which a committee would manage their affairs, and a ban on surveys within the boundary – at least for the meantime. Interestingly, in response to the strong line taken by Seddon and Carroll, Tuhoe indicated that they might be willing to accept surveys and land transactions in the future. They wanted to negotiate a full agreement with Seddon in Wellington first. But they stressed that only short-term benefit had ever resulted for Maori dealing with their lands. They did not believe his assurances that this was the path to long-term prosperity.[69]

The Premier deduced that the concerns about the court and surveying arose from the admittedly heavy costs. He was not yet prepared to abandon either the court or surveying, as he would be in discussions a year later. Instead, he promised reforms, including cheaper surveys carried out fairly as between all parties by Government surveyors, and cheaper court costs. The value of the land would no longer be swallowed up by the costs of getting a title. He also promised that the court would sit in Ruatoki; the people would not be forced to go long distances or to sell land for the costs of attending court in distant locations for long periods of time.[70] At Ruatoki and Waikaremoana, Seddon was told that Tuhoe's main objection to surveys and the court was indeed the ruinous costs.[71]

65. AJHR, 1895, G-1, pp 51–52, 55, 56, 59, 64, 65, 70, 71, 72, 73, 75–76, 77, 83
66. AJHR, 1895, G-1, p 60
67. AJHR, 1895, G-1, pp 65–66, 71–73; see also Binney, 'Encircled Lands', vol 2 (doc A15), pp 140–147
68. AJHR, 1895, G-1, pp 79, 81, 82, 83
69. AJHR, 1895, G-1, pp 48–61; see also Binney, 'Encircled Lands', vol 2 (doc A15), pp 132–140
70. AJHR, 1895, G-1, pp 54, 55, 58, 71
71. AJHR, 1895, G-1, pp 57, 84

One of Seddon's key messages at the 1894 hui was that for their land to be protected and bring them prosperity, it had to be defined (by survey) and awarded a Government-created title by the Native Land Court. The Premier stated that the tribe could not protect their land under their own laws; they had no choice but to get a title from the Queen. He also accused them of being afraid they could not prove themselves the owners in court.[72] While accusations and criticisms flew back and forth, amid the expressions of love and good will, Seddon remained adamant that Tuhoe must get their land surveyed and put through the court. Tuhoe remained adamant that they would not do so – but qualified their position by holding out hope they might do so in future, if a satisfactory general arrangement could be made with the Government.

From these hui there emerged the proposal of continuing negotiations. The Premier encouraged the idea that Tuhoe should send a delegation to Wellington, after he had completed his tour and had a chance to get the preliminary views of all communities. Recognising that transport and accommodation would be difficult for the delegation, he promised to fund it.[73] June was mooted as the time for further discussions, during the parliamentary session.[74] Due to the nature of the meetings (or perhaps the minutes), the historian witnesses in our inquiry do not agree on exactly what the parties agreed to hold over for further negotiations in Wellington. Judith Binney understood that decisions in relation to the ring boundary, surveys, and roads were all left in abeyance until future discussions could take place.[75] Edwards, on the other hand, maintained that Seddon was sometimes promising only to wait until he had completed his tour and talked to everyone before making a decision. And in her view the Government party had made it clear that a topographical survey would be carried out no matter what, and that proper notification (rather than further consultation) was all that had been promised for road and trigonometrical surveys.[76] We will return to this point below when we consider the renewed survey crisis of 1895.

(4) *What the Liberals offered: the active protection of Maori, and the creation of prosperity for the mutual benefit of Maori and settlers*

The second main theme to emerge from the hui was the Government's wish to protect the peoples of Te Urewera. Almost everything that Seddon said in his discussions was couched in the language of active protection. He told the people that he was their loving father who had only their best interests at heart. He explained that the Government wanted to protect them, to ensure they retained their lands, and to ensure they survived as a race and had a happy, prosperous future. He promised the Government would be 'strong' to protect them; it would stand between them and the large settler population. He stressed that Liberal

72. AJHR, 1895, G-1, pp 53–54
73. AJHR, 1895, G-1, pp 57–58; 71
74. AJHR, 1895, G-1, p 57
75. Binney, 'Encircled Lands', vol 2 (doc A15), pp 139, 151, 166–167
76. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 98, 101, 111

policies would enhance the prosperity of both Maori and settlers. Professor Binney noted that Seddon's references to himself as parent (translated as matua) would not have seemed paternalistic to his Maori audience, and that the Government cast itself quite properly as having a role to 'control, guide, protect, and assist both races'.[77]

Seddon repeatedly told the people that his words were not empty ones but could be relied upon.[78] 'My heart is not made of stone', he said.

> I see a noble race, and see that they are disappearing from the face of the earth. I say, it is my desire to preserve that race. I see them living in absolute poverty, not having sufficient food, not having the comforts they ought to have. We wish to alter this state of things, and let them live happy and contented by our side.[79]

The way to reach this happy state was to deal with their lands under the law:

> I say they will never be landless – never be without money, food, or clothes. They will be more prosperous than Tuhoe have been since they have been Tuhoe. There is still a sufficient remnant of your tribe from which may be built a good and great people, and I have indicated to you the foundation upon which that great people can be built.[80]

But it is also important that the Government's many promises of protection and prosperity came with 'riders' or provisos, as Binney noted.[81] Carroll, for example, reiterating at Ruatoki that the Government stood between the people and the settlers, stated that: 'We are warding off any evil that may befall you and the Native people, but it will be impossible for us to maintain this position for long.' Continued protection, in his view, was dependent on their getting titles to their land and deciding to do something with it.[82] Seddon underlined both of these points. Although the Government stood between Maori and the large settler population, there was 'an almost overwhelming pressure being brought to bear upon the Government'.[83] His Government wished to carry out the Treaty, and ensure the peoples of Te Urewera were protected in the retention of their land, but he added that they could not have such protection without a Crown-derived legal title to their lands. Only then, he said, would he know who and what the Crown needed to protect. Seddon, perhaps unaware that Tuhoe had not signed the Treaty, told the hui at Ruatoki:

> Your forefathers [when signing the Treaty] laid down the principle that the Government, which you acknowledge, was to see you maintained in the possession of your own lands. Now, it is impossible for the Government, of which I am the head, to still carry out, on

77. Binney, 'Encircled Lands', vol 2 (doc A15), pp 135–136
78. See, for example, AJHR, 1895, G-1, pp 48, 49, 62, 69
79. AJHR, 1895, G-1, p 49
80. AJHR, 1895, G-1, p 55
81. Binney, 'Encircled Lands', vol 2 (doc A15), p 135
82. AJHR, 1895, G-1, p 51
83. AJHR, 1895, G-1, p 70

behalf of the Queen, the Treaty of Waitangi; I say it is impossible for us to maintain you in the possession of lands belonging to you unless we know where those lands are situated.[84]

At Ruatahuna Seddon returned to this point: the Queen's protection under the Treaty was vital for Maori to keep their lands and thus for their very survival as a people:

> The great changes that are taking place make it almost imperative that the titles to all lands in the colony should be ascertained, so that the Natives who own land should be put in possession of their own land, and may have the protection of the Queen. Your forefathers stipulated that the Queen was to give them her protection. She can only protect you by giving you a title and by placing you in possession of the land. Those who say, 'We do not want the protection of the Queen,' are practically committing suicide, because the land is life.[85]

Also important is the question of whether Seddon's many promises of protection and prosperity, and of his Government's intention to ensure the peoples of Te Urewera had both, amounted to an enforceable undertaking on the part of the Crown. Many of the historians who appeared before us agreed that Seddon's statements were sincere; that what he said to Tuhoe, Ngati Whare, and Ngati Manawa was what he meant, not just in 1894 but throughout the discussions that led to the 1896 Act. Richard Boast, in his evidence on twentieth-century issues, cited the evidence of John Hutton and Klaus Neumann:

> From the government's side, while Seddon appears to have been enamoured with the sound of his own voice – and he sincerely appears to have believed his paternalistic rhetoric – the commitment he made as Premier of the New Zealand Government to the hapu of Te Urewera should not be treated lightly. Seddon repeatedly stated that the people of Te Urewera would be protected, that a survey of their lands would ease 'uncertainty', and that the government would be their friend and parent. He stressed the benefits of development that would flow from their new relationship, and he gave emphatic assurances that Urewera hapu would be protected in their ownership and management of land. This seems to have been exactly what Urewera rangatira were looking for.[86]

In our view, Seddon's promises and assurances fell broadly into three categories. First, he assured Te Urewera communities that the Crown did not want to acquire their land, but rather to protect them in their retention of it. Carroll told Tuhoe at Ruatoki: 'It is not that the Government has any desire on its part to take possession of your land. What the Government wishes is to see you firmly established upon your own property.'[87] Seddon said

84. AJHR, 1895, G-1, p 53
85. AJHR, 1895, G-1, p 76
86. John Hutton and Klaus Neumann, 'Ngati Whare and the Crown, 1880–1889' (commissioned research report, Wellington: Crown Forest Rental Trust, 2000), p 115 (Richard P Boast, 'The Crown and Te Urewera in the 20th Century: A Study of Government Policy' (commissioned research report, Wellington: Waitangi Tribunal, 2002) (doc A109), p 36)
87. AJHR, 1895, G-1, p 56

at Ruatahuna: 'I speak for the Government when I say we promise you our protection to confirm you in the possession of your lands. We do not want to take your land from you.'[88] He tied this assurance directly to the Treaty.[89]

Secondly, as we have seen, he assured the peoples of Te Urewera that the Government was their friend and protector, anxious to protect their interests both from the settler majority and in a multitude of ways. These assurances were not tied to any particular outcome, but rather were statements of how his Government intended to act. As such, Maori were entitled to believe them and rely on them.

Thirdly, Seddon assured the people that the Government wanted them to be prosperous, and tied this to a particular outcome; if they leased or sold their 'surplus' land, and accepted roads and schools, then they would never be landless but would instead enjoy permanent prosperity alongside settlers. Both peoples would benefit from such an outcome. These kinds of promises, in the Crown's submission, were nothing more than an expectation of a future outcome: they did not bind the Crown to deliver it.[90] Further, the Crown's historian, Cecilia Edwards stated that, in her view, Seddon's discussions were sometimes tied to Maori using a very particular piece of legislation: the 1893 Native Land Purchase and Acquisition Act.[91]

We do not accept, however, that Seddon's assurances were limited to (or understood as limited to) what would happen if Maori used the 1893 Act. They had a broader relevance and application to his Te Urewera audiences, and laid the groundwork for future trust in a good outcome from the Urewera District Native Reserve Act. Overall, Seddon's message was that if the people got a Crown title for their lands, and then used them in the colonial economy, they would be forever prosperous. In 1894 Tuhoe themselves did not necessarily believe his assurances on this point. The starkest representation of this is Numia Kereru's speech at Ruatoki. Numia assured the Premier that he himself accepted the truth of what had been said. 'People like myself,' he said, 'who are upholding the Government, are strong in our endeavours to get the people to consent to the advancement that is pointed out to us.'[92] But the great majority of Tuhoe had agreed on a contrary view in February, and Numia explained that view on behalf of the people, in measured and thoughtful terms:

> They have watched what has taken place with regard to the tribes outside of us; we see that others of the Native race are now in a landless condition – that their lands have all passed away to the Government. These lands have passed away, because they desired the Government should have control of them. It is not that the Government obtained these lands unfairly from these people; hence it is that my people wish that the control of their

88. AJHR, 1895, G-1, p 76
89. AJHR, 1895, G-1, p 76
90. Crown counsel, closing submissions (doc N20), topics 14–16, p 47
91. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 81, 97–98, 115–116
92. AJHR, 1895, G-1, p 52

> own land should remain with themselves. I may explain to the Tuhoe the course suggested whereby prosperity and wealth may come to them. The people of Tuhoe do not agree; they think that there may be temporary prosperity, a temporary enjoyment thereof by dealing with land. You are an advocate of progress. Very good; but the people do not believe in a temporary prosperity. There is the reaction to be taken into consideration. People like myself, who are upholding the Government, are strong in our endeavours to get the people to consent to the advancement that is pointed out to us, but the bulk of the people of Tuhoe look at what has taken place in the past – they do not agree with us. They see in other parts of the country Natives struggling and passing away; they give away their land without any good coming to them.[93]

Numia's powerful message on behalf of Tuhoe was that they had seen little in the experience of other iwi, or indeed, closer to home, to convince them that the result of engaging with the land court system was prosperity – unless it was a short-lived prosperity which could be of little real benefit. All of the land in the blocks surrounding what was to beome the Urewera District Native Reserve had already passed though the Court. Seddon's response to the deep concerns expressed about the Court – concerns that had inspired the recent recommitment to Te Whitu Tekau's policies- – was that the people at the February hui had not heard the opposing view. The exaggerated rhetoric he then employed in order to sway the people indicates, however, that he was aware of the strength of their resolve. It would be suicidal for Tuhoe to keep to the hui's platform he said: 'They might just as well have hung themselves, cut their own throats, or flung themselves into the river.'[94] 'I have said,' he repeated, 'that the Government desire to protect you, and to maintain you in the possession of the lands which belong to you.'[95] This promise was tied to the Treaty and to the protection of those who had certain title under colonial law.

But the Premier expressed himself glad of the opportunity to answer the charge that land dealings were not in the best interests of Maori. Some Maori, it was true, had 'dissipated their substance', but his message was that if that looked like happening the Government would step in and 'by a very strong hand' prevent them from 'doing away with their substance'.[96] He gave as an example the west coast of the North Island, from New Plymouth to Whanganui; that is, the reserves created for Maori from the confiscated lands of the Taranaki region, which had been vested in the management of the Public Trustee under legislation that provided for perpetually renewable leases.[97] Seddon claimed that in Taranaki the Government had done exactly that, ensuring the people kept land for their own use,

93. AJHR, 1895, G-1, p 52
94. AJHR, 1895, G-1, p 53
95. AJHR, 1895, G-1, p 53
96. AJHR, 1895, G-1, p 53; see also pp 54–55
97. For the Taranaki Tribunal's discussion of the West Coast Settlements Reserves legislation,which the Tribunal found to be contrary to the principles of the Treaty of Waitangi, see the *Taranaki Report: Kaupapa Tuatahi*, ch 9.

'more than ample for them and their children'. Their 'surplus' lands were then leased by the Government for high rents. This was how 'good parents' protected their children, but first those children had to have titles before the 'strong power of the Government' could stand behind them and secure their future.[98]

Thus, Seddon's assurance was broader than any specific piece of legislation or any particular outcome. If the peoples of Te Urewera trusted the Government, got legal titles, and dealt with their lands in the colonial economy, then the strong power of the Government would always protect them. It would step in where necessary, as it claimed to have done in Taranaki, to ensure they kept sufficient for their own use and also obtained a good income from leasing their 'surplus' land.

Previous tribunals have considered these kinds of promises when connected to specific land transactions. That is, the 'collateral benefits' of land dealings were often promised as part and parcel of the individual land deals themselves.[99] In this instance, Seddon's and Carroll's assurances were both broader and, in a sense, more binding, because they related to the future of an entire tribe's land dealings, whatever forms those dealings might take. If their land was brought into the economy, the Government would protect them and they (and future generations) would be prosperous.

(5) *Mana motuhake and Kawanatanga: self-government empowered by New Zealand law*

The third main theme to emerge from the 1894 hui was the desire of Tuhoe to govern themselves by means of a tribal committee, and their belief that this was compatible with the Crown also exercising authority. As Cecilia Edwards noted, Seddon went into the tour with the intention of sounding out Maori communities about committees to manage their lands.[100] He told the peoples of Te Urewera that they could have committees to advise the Government and to make decisions about land. Under his 1893 Act, majorities of owners could also act directly, as we discussed above.[101] Thus, the Premier was already interested in the idea that committees of owners should manage their lands. (We note that he also encouraged individualisation of title, in the sense of nuclear family farms for the lands that were to be kept, but not a single speaker took any notice of that idea.[102])

Seddon also sought an assurance from the peoples of Te Urewera that they were under the mana of the Queen and would obey 'her' laws. He was surprised to learn of the 1871 compact, and delighted to receive assurances from the leaders of Tuhoe, Ngati Manawa, and Ngati Whare that they accepted the authority of the Government and undertook to obey its laws. Negotiations could not have resumed in 1895 without these assurances. There

98. AJHR, 1895, G-1, p 53
99. See, for example, Waitangi Tribunal, *Te Tau Ihu o Te Waka a Maui: report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008), vol 1, pp 469–470, 473–474
100. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 81
101. AJHR, 1895, G-1, pp 54, 56, 78, 82
102. AJHR, 1895, G-1, pp 48–84

Seddon's Vision for the Individualisation of Maori Land Titles

Towards the end of his tour, on his way from Wairoa to Gisborne, Seddon commented:

> The great trouble that besets the Natives arises from the fact that each Native has not got his own particular bit of land to cultivate. Some will not work; some reap where they have not sown. That is the curse of the Natives in this country. That is the mist that is over the minds of the men of the Native race. They see this going on, but do nothing to stop it. In time they will refuse to work, and will leave the *wahines* to do the cultivation. If I had the power, I would subdivide every plot of Native land and put each of the owners on his own particular plot, and see the husbands, wives, and children cultivating it so that they may live, and know that what you are doing is for the benefit of yourselves for all time.[1]

1. AJHR, 1895, G-1, p 87 (Edwards, 'The Urewera District Native Reserve Act 1896, Part 1: Prior Agreements and the Legislation' (doc D7(a)), p 109)

had been a recent failure to obey the law, however, and at Ruatoki this was brought before Seddon with a request that he sort it out. Te Makarini and others told him of the fines that had been imposed on survey obstructers, and that some of those people were even now in hiding, having failed to obey their summons or pay their fines (see ch 8). Seddon promised that the fines could be forgiven so long as the obstructers turned up in court and accepted the mercy of the Government. He was thus presented with two conflicting facts: the leaders of Te Urewera promised to obey the law; and they had recently failed to do so over the matter of surveys. Nonetheless, Seddon accepted their assurances.

At both Ruatoki and Ruatahuna the nature of the relationship between Tuhoe and the Crown was discussed. At Ruatoki Seddon offered flags for the people to fly in proof that they accepted the Queen and her protection.[103] Kereru Te Pukenui, for Ruatoki, offered to erect a flagstaff there, to be named Rongokarae, after the eponymous ancestor of Ngati Rongo. And at the end of the Ruatoki hui, Kereru Te Pukenui gifted to Seddon the taiaha 'which once belonged to Rongokarae and which bore his name.'[104] This was a gift of great significance.

Te Pukenui was recorded as saying that the gift was 'an earnest that there was to be peace for the future, and that the Tuhoe intended to be with the Government and obey the laws.'[105] Edwards reported the official interpretation of the gift, as recorded in the minutes: 'From a

103. AJHR, 1895, G-1, pp 49–50, 57, 60–61
104. Binney, 'Encircled Lands', vol 2 (doc A15), pp 136
105. AJHR, 1895, G-1, p 61

Maori point of view such a gift means perfect submission, and is symbolical of an intention to abandon all unfriendliness and to live in peace in the future.'[106] Binney pointed out that Te Pukenui mentioned peace, not submission. She cited his brother Numia's view, reported later, that the gift had been intended to create a covenant, binding both sides to peace and future consultation with each other.[107] In 1895, speaking in Wellington to the delegation from Te Urewera, Seddon claimed that Te Pukenui had said to him on that occasion: 'To you I hand this – protect my people – I am weak and old but the Gov't is strong.'[108] Seddon, as Binney stressed, accepted that the gift had imposed a trust upon him. He hung the taiaha on his wall, saying 'there is the Tuhoe's insignia of office, power of office, that has been given to me, and there has been a trust imposed and that trust will be followed out to the letter'.[109]

An 1895 newspaper report asserted that the gift carried with it the 'mana of sovereignty'.[110] Tamati Kruger denied that there was any kind of submission or cession of authority in the gift. In the oral history of Tuhoe, the coming of Seddon in 1894 was seen as a fulfilment of Donald McLean's 1871 promise to 'recognise separate laws for Tuhoe'. The gift was made to confirm the compact with McLean and now with Seddon.[111] It was not an acceptance that the Crown's mana was greater than that of Tuhoe; nor was it an act that 'surrendered their mana motuhake to the government'.[112]

But it was at Ruatahuna rather than at Ruatoki that the main discussion of tribal autonomy took place. Because it is central to understanding how agreement was reached in 1895, we provide a full account of that discussion. As we outlined in chapter 8, Te Pukeiotu, a Waikaremoana chief who had fought with Te Kooti, explained the 1871 compact to the Premier. Te Whenuanui and Paerau had arranged with McLean that 'this territory should be kept inviolate, and that they should reign supreme in this part'.[113] He outlined the original Te Whitu Tekau policies, just as Numia Kereru had outlined their recent renewal in his korero at Ruatoki. But while McLean had promised that the chiefs would 'reign supreme' in Te Urewera, Paerau had also sworn 'allegiance to the Queen and the Government'.[114] This was not, in Te Pukeiotu's view, inconsistent with what followed: the chiefs' creation of the 'ring boundary' and the agreement that 'all Government matters should be excluded from

106. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 102

107. Binney, 'Encircled Lands', vol 2 (doc A15), pp 136–138, 183–184. Numia Kereru's view was reported in the press by Hone Heke, MP for Northern Maori.

108. Binney, 'Encircled Lands', vol 2 (doc A15), p 197

109. Binney, 'Encircled Lands', vol 2 (doc A15), pp 197–198. The taiaha Rongokarae seems to have gone missing. Claimant researchers expressed great concern that they were unable to locate this important taonga in any public or private collection. See Ngahuia Te Awekotuku and Linda Waimarie Nikora, 'Nga Taonga o Te Urewera', August 2003 (doc B6), pp 56–57

110. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 34

111. Tamati Kruger, brief of evidence (English), Tauarau marae, Ruatoki, 17 January 2005, (doc J29(b)), paras 10.3–10.8

112. Tamati Kruger, claimant translation of transcript of oral evidence, Tauarau marae, Ruatoki, 17 January 2005, (doc J48(a)), pt 2, p 2

113. AJHR, 1895, G-1, p 74

114. AJHR, 1895, G-1, p 76

this boundary – namely, roads, leases, wrongful sales, mortgages, and everything that is vile'. Indeed, referring to the Ruatoki hui that Seddon had just attended, Te Pukeiotu said that Tuhoe were bound by the discussion there: 'The law will be our defender and we will look up to it.'[115]

Te Wharekotua endorsed Te Pukeiotu:

> I would like the surveys to be held in abeyance in the meantime. We want our territorial boundary defined. We want the Government to let a committee of Tuhoe be established to carry out our affairs. We would not then need the Government to carry out our affairs within this boundary. If you like to answer these subjects now you can do so; but if you like them to remain over until you reach Wellington that will suit us equally well. We do not want other people to prosecute the survey, and cut up our land while we are trying to arrange with the Government. We want a proper understanding to be arrived at. We want our boundary confirmed, and our titles to the land indorsed, without a survey if possible. We want the Government to give legal effect to the establishment of a committee, who will manage our affairs in connection with our land.[116]

Discussion ensued over surveys and whether these matters could (or would) be delayed for further negotiations once the Premier, having consulted all communities during his tour, had returned to Wellington. Seddon found it difficult to distinguish between the surveying of an outer boundary, which was to define Te Rohe Potae, and the surveying of land claimed for an award of sole ownership. Tuhoe made it clear that they wanted to define the boundary within which land would be protected and governed by a committee, while Seddon wanted the Native Land Court to decide legal ownership of the land. He did not think that land claimed by more than one tribe could be included inside the kind of boundary Tuhoe wanted.[117]

It is clear that these topics aroused strong feelings among those present, and there were sharp exchanges between various speakers, whom the note-taker could not identify, and the Premier. An unnamed speaker said: 'Let us define our own boundary.' Seddon replied that he would hold the matter over until the tribe's delegates came to Wellington, as they had asked for; but then there was something of an outcry from 'the meeting' that they had a 'paper with all the signatures of the Tuhoe in support of this subject'.[118] The meeting came to a head as Seddon reacted strongly to what he saw as a challenge to the Crown's sovereignty. Evidently uncomfortable with the turn the korero was taking, the Premier stated:

> If you mean by that there is to be another Government outside the Government of the country, and that the Queen is not to be recognised by the Tuhoe, it is no use for you to

115. AJHR, 1895, G-1, pp74, 76
116. AJHR, 1895, G-1, p76
117. AJHR, 1895, G-1, p77
118. AJHR, 1895, G-1, p77

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discuss it in that way. There cannot be two Governments in this country. I always speak plainly, so that I may be understood. I do not come here to leave any doubts in your minds. There are none in my mind. Not only that, but you cannot have protection unless you acknowledge the sovereignty of the Queen, who governs all. Who is there to protect you? You are only a few in number. It is the law, the Parliament, and the Queen who afford you protection. Suppose we said, "All right, you say you can govern yourselves; very well, do so"; where would you be? Why, you would soon disappear from off the face of the earth. There must be, and can only be, one Government. I have said, as regards any matters you wish to put before the Government, come and do so. Do not stop at home nursing ill-will, but let the Government know the cause of the trouble. It is impossible for things to go on as they are much longer. You must admit that you are disappearing from the face of the earth, and that you are in absolute poverty. Well, the Government is willing to maintain the race, but you must work with the Government, so that your own welfare and the welfare of your children may be protected. If you want to have a committee amongst yourselves to meet and discuss matters so as to condense and bring down to a focus what is in your interest, it is wise you should do so. The pakehas adopt the same course, and they select advisers for the benefit of the country. They are what are called advisory committees. There is no objection to that. But if you want a committee that is to pass laws to have effect in the land of Tuhoe and to act antagonistically to the Government, I may tell you at once it is impossible, and the sooner you get that out of your minds the better it will be for all of you . . . I can, in conclusion, only advise that you should have a meeting, gather from all parts representatives of the Tuhoe – their best men – consult together, then come to me and bring matters in such a form that I may grant what is reasonable. What is unreasonable I mean to reject, and one thing I should object to, and that would be to have two controlling bodies over one country. Perhaps I have misunderstood you, and I would not like it to be said you had again requested the Government to allow you to pass laws for yourselves in these boundaries. I say, perhaps I have misunderstood you.[119]

Faced with Seddon's portrayal of their request as one for a separatist government, the immediate response was: 'No, we do not want to fly so high as that.' Seddon replied: 'What am I to understand then?' He was told: 'We simply want a committee for our own district to settle matters amongst ourselves, not between ourselves and other people – a committee to protect and control our own affairs.'[120] Having had it explained that what was sought was the power to manage their own affairs, and not the power to govern others, the Premier then changed tack to focus on practicalities. He put it to the meeting that if anyone refused to obey the committee, by what power would its decisions be enforced? 'Without the power of the law,' he said, 'any decision of the committee would be valueless; with no laws to

119. AJHR, 1895, G-1, pp77–78
120. AJHR, 1895, G-1, p78

support you, it would be no good.' The response was: 'The Government could give effect to the decision.'[121] In other words, Tuhoe were reminding him that they wanted their committee to have its own legal powers, conferred by the Government. Seddon almost wilfully misunderstood, suggesting that the people wanted the Government to enforce the committee's decisions directly. It could only do so, he replied, if a commissioner was sent each time to make sure the decision was a just one.[122]

The Premier's fundamental point was there could not be two governments, and the kinds of powers that Tuhoe wanted to exercise could only be exercised by a government. His compromise was that he would recognise 'an advisory body', which would be the organ of communication between the Government and the tribe. 'Further than that,' he said, 'it would be very unwise to go.' Clearly the role of the Kotahitanga parliament was weighing on his mind, and he was dismissive of its attempts to make laws for Maori. Those attempts, he said, had proved a 'farce' because the people would not fund the parliament's operations[123] Again, he mixed matters of principle with what he portrayed as the very practical difficulties of getting a Maori government off the ground.

Resolution was reached at this point in the meeting. An unnamed person said:

> It is well that we brought this matter out, because it has drawn from you the possibilities and impossibilities. We are quite satisfied, if it is at all feasible, to have a committee to act on behalf of the people, and to advise the Government in matters on behalf of the people.

Seddon replied: 'That is quite feasible.'[124]

But exactly what would satisfy the people, and what Seddon understood of their expectations, were matters in dispute. Professor Binney commented that Seddon was wrong if he believed the people had agreed to nothing more than an advisory committee. She interpreted the Tuhoe statement that they wanted a committee to protect and control their own affairs as the true essence of the korero:

> They wanted a *recognised* authority controlling autonomy within their own defined boundaries; they wanted to retain those lands intact and unpartitioned; they wanted the government to uphold their decisions, based on consensus, by legislation. They wanted an internal autonomy, under the Crown, based on customary law with regard to land. In 1894 they possessed that autonomy, *de facto*; they wanted it *de jure*. [Emphasis in original.][125]

Binney's view was that Tuhoe had not cut back their aspirations to match what Seddon had wanted but rather saw the concept of a tribal committee to manage their own lands and affairs, and to be consulted henceforth by the Government (even if only 'advisory') as

121. AJHR, 1895, G-1, p78
122. Ibid
123. Ibid
124. Ibid
125. Binney, 'Encircled Lands', vol 2 (doc A15), p152

a step forward. Binney thought that although they may have seemed to have compromised, Tuhoe maintained their position (which she saw as the genesis of the General Committee in 1895), knowing that they could continue to press for its adoption as long as 'the nature of the powers of such a Committee was unresolved'.[126]

Cecilia Edwards disagreed, arguing that Seddon would have emerged from the hui believing the chiefs were willing to accept an advisory committee. The significance of this, she said, was that the origins of the 1896 Act could not be sourced in the 1894 hui.[127] In cross-examination by counsel for the Tuawhenua claimants, Ms Edwards agreed with the claimants that, contrary to his own words at Ruatahuna, Seddon had no grounds for assuming that a committee would act 'antagonistically' towards the Government. Nor could she disagree with the proposition that – contrary to what Seddon had implied – settler communities governed themselves with local bodies that passed laws.[128] And Ms Edwards accepted that the 1894 tour marked the beginning of a key relationship between Seddon and the leaders of Te Urewera, and that the 'mutual good-will' generated at the hui underpinned the successful negotiation of an agreement the following year.[129]

The relationship between Tuhoe authority and kawanatanga was a key issue for the Tuawhenua researchers. They suggested that Seddon was mistaken to think of Tuhoe authority (mana motuhake) as incompatible with kawanatanga:

> For Tuhoe, it seemed not only possible, but reasonable for the rangatiratanga of Tuhoe to be accommodated alongside the kawanatanga authority of the Crown. After all, Tuhoe had demonstrated their willingness to recognise the sovereignty of the Crown alongside Te Mana Motuhake o Tuhoe, when they had formed the compact with McLean, and as they now recognised Seddon as Premier and welcomed him into their rohe.
>
> Ngai Tuhoe were used to this kind of political accommodation. The Tuhoe people had long been operating in Te Urewera under political schema that involved different levels of authority – iwi, hapu and whanau, as well as the overlay of mana from Tuhoe-Potiki, Toi, and Potiki I. As they had reconciled the authorities of these tipuna and their descendants, they believed now there could be a place for the Crown across all of Aotearoa, whilst Tuhoe maintained its mana within Te Rohe Potae. Seddon's insistence on one government could only have been interpreted as a 'takahi mana', for it did not allow for Tuhoe to have any real authority over Tuhoe affairs.[130]

At various hui in Te Urewera, Seddon had floated the idea that the Government would allow committees of owners to manage their lands, which was a step forward from the out-

126. Judith Binney, 'Statement of Judith Binney in response to questions of clarification of the Tuawhenua claimants dated 8 March 2005', 1 April 2005 (doc M19), pp 6–7
127. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 116
128. Counsel for Tuawhenua, closing submissions (doc N9), pp 106–107
129. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 116
130. Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two' (doc D2), p 11

right individualisation that had dominated Maori land titles since 1865. At the same time, he was willing to accept a tribal committee that would advise the Government and present Tuhoe wishes to the Government – in other words, be an ongoing part of consultation and negotiation between the tribe and the Government from then on. This in itself would have gone some way to securing more of a partnership between the Crown and Maori. He had also heard the Tuhoe aspiration that tribal affairs should be managed by their own committee, not the Government. In particular, the tribe should control its lands; wherever the Government had gained control of the lands, disaster had followed.

Tuhoe's aspirations could not have come as a surprise. In particular, the Government would have known that from the late 1880s onwards Tuhoe had been seeking its recognition of – and legal powers for – a tribal committee. But Seddon took a hard line in respect of a committee having anything smacking of government powers. In particular, the tribal committee would not be allowed to pass laws for its district. As a result, the meeting made some progress but ended with the parties still far apart. Nonetheless, this was the beginning of a dialogue between Seddon and Carroll on the one hand, and Tuhoe on the other, that was to see both sides reach a compromise in 1895 that won much more for Tuhoe than might have been expected from Seddon's korero at Ruatahuna.

(6) *Interruption of the dialogue between Te Urewera leaders and Seddon: the failure to negotiate an agreement in Wellington in 1894*

It is clear that both Seddon and Te Urewera leaders planned to resume negotiations in Wellington. While the historians who presented evidence did not agree on what, exactly, was held over for further discussions, Tuhoe, at the very least, expected further discussions of their ring boundary, internal surveys, and land titles, before any further surveying or court activity took place in Te Rohe Potae.[131] (As noted above, Ruatoki was no longer counted as part of Te Rohe Potae.) Seddon had expected to resume discussions quite quickly, and Carroll mentioned June as a possible date.[132] At Ruatoki, the Premier told the hui that he expected immediate answers about a school and flag, but 'larger questions' could wait for a considered response from a delegation to Wellington: 'The want of means shall not prevent you coming to Wellington and seeing me there. I think it is only right that Her Majesty's subjects living in isolated places should be brought more together.'[133]

But no Tuhoe delegation visited Wellington to negotiate with the Government during the remainder of 1894, nor before the 'small war' broke out over road and trig surveys in 1895. Why were there no further discussions, as promised? Cathy Marr suggested that Seddon became too busy during the parliamentary session, and the matter was simply lost

131. See, for example, Heteraka Wakaunua's speech at Ruatoki, AJHR, 1895, G-1, p 58, compared to Seddon's speeches, AJHR, 1895, G-1, pp 60, 73
132. AJHR, 1895, G-1, p 57
133. AJHR, 1895, G-1, pp 57–58

sight of.[134] Cecilia Edwards set out the following facts. On 13 April 1894, Numia Kereru wrote to the Government, asking how many Tuhoe should come to Wellington. He was informed that the tribe should send six representatives. On 2 May, the Justice Department wrote to the Ngati Whare chief, Wharepapa Whatanui, and others from Te Whaiti, and told them the travel arrangements for the representatives would be finalised in six weeks. Everything seemed on track for the proposed June meeting. Nothing happened, however, and Tutakangahau's son, Tukua Te Rangi, wrote to the Government in either September or November, asking for the promised financial assistance so that the delegation could come to Wellington. In October, Tutakangahau himself wrote requesting funds to visit Wellington 'in connection with the survey of the Rohe Potae'. Edwards concluded that the leaders of Te Urewera were keen to continue the discussions in Wellington in 1894, but she offered no explanation for why the Government did not provide the necessary funds.[135]

It seems clear to us that because they lacked the means to do so, the delegation of Te Urewera leaders could not come to Wellington. They must also have doubted whether they would be welcome. Despite their requests throughout 1894, the Government did not keep its pledge to fund their delegation and to follow up the April hui by discussing their considered views and responses in Wellington. This was an important failure on the part of the Crown. It left the matter of surveys and roads up in the air, when these issues could have been the subject of consultation and a negotiated agreement before matters reached a crisis point in 1895. It is to that crisis which we turn next.

(7) *Interruption of the dialogue between Te Urewera leaders and Seddon: the 'small war' of 1895*

The importance of the 1894 discussions, and the dangers of leaving them in limbo for months afterwards, became evident when a crisis erupted in Te Urewera early in 1895 about surveying. Nine months after Seddon's April tour of Te Urewera, the promised follow-up negotiations in Wellington still had not happened. In January 1895, the Minister of Mines, Alfred Cadman, was invited to a hui at Ruatoki to discuss gold prospecting. Seddon had been nearby in Whakatane the month before, but had not met with Te Urewera leaders there or visited Te Rohe Potae.[136] Cadman was accompanied by the Surveyor General, Percy Smith, who took the opportunity to explain that a trigonometrical survey was about to be carried out in Te Urewera. Such a survey would be used to create topographical maps, and had been discussed at hui by Seddon and Carroll in 1894. Both ministers had told Te Urewera communities in 1894 that the survey was for mapping purposes, but they had also stressed that it could and would be used in the work of the Native Land Court. They also insisted that the Government would carry it out but the people would be notified of it in

134. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 34
135. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 117
136. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 118

advance.[137] Percy Smith delivered the same message in January 1895 – the survey would happen soon, and it would be useful for the court's title decisions. His message to the January hui was later relied on by the Government as notification that the trig survey was about to happen.[138]

The speeches of Seddon and Carroll in 1894, and of Percy Smith in 1895, laid the basis for much of the confusion that followed. From the evidence of Cecilia Edwards, it is quite clear that almost every minister and official involved, as well as settler press editors and reporters, either believed the trig survey would assist the title work of the Native Land Court or told Maori that it would do so, or both.[139] As a result, the peoples of Te Urewera confused it with 'subdivisional' surveys, by which was meant the surveying of blocks for Native Land Court hearings. Crown counsel accepted that this confusion was understandable, given what the people had been told.[140] Tuhoe warned Smith at the January 1895 hui that they would not permit this survey – it would be Ruatoki all over again, they told him.[141] But the Government persevered, sending first its surveyors to Ruatoki and Te Whaiti in April 1895, and then an armed force, 40 to 50 strong, in response to the immediate obstruction of the survey at Ruatoki. (At Te Whaiti, Ngati Whare refused to guide or work for the surveyors, but did not attempt active obstruction.) James Cowan, then a reporter, gave a graphic account of the reception of the armed force in Te Urewera, and the role of James Carroll in resolving the stalemate, which we reproduce over. Despite its stereotypes, it also conveys deep Tuhoe concerns at the arrival of the surveyors, and their anxiety to avoid direct conflict.

One of the issues debated between claimants and the Crown was whether Seddon had promised that surveying would be delayed until after further discussions in Wellington, and also whether the Government notified the communities of Te Urewera in compliance with the law.[142] On the first point, it is quite clear that Seddon told the people the trig survey would be carried out no matter what. All he promised in that respect was proper notice. The claimants and their historians argued that notice was not given. Surveyors brought the notices with them when they turned up to do the work, and were prevented from delivering any notices to Ruatahuna as part of the obstruction of the survey itself.[143] The Crown, however, argued that notification had been delivered as thoroughly as possible in the circumstances, and reminded the Tribunal that all communities had known of the coming survey after Percy Smith told them of it in January. We accept that the Government thought

137. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 98, 101, 111, 114, 154–156
138. Binney, 'Encircled Lands', vol 2 (doc A15), pp 167–170
139. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 126–127, 128, 132–135, 142, 155, 158–159
140. Crown counsel, closing submissions (doc N20), topics 14–16, p 15
141. Binney, 'Encircled Lands', vol 2 (doc A15), p 167
142. Crown counsel, closing submissions (doc N20), topics 14–16, pp 12–16; counsel for Tuawhenua, closing submissions (doc N9), pp 107–111
143. Binney, 'Encircled Lands', vol 2 (doc A15), pp 167–173; see also Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 37

9.5.1

James Cowan's Account of the Coming of the Troops

In *The New Zealand Wars and the Pioneering Period*, James Cown wrote of the coming of the troops:

> In April, 1895, the Urewera and Ngati-Whare Tribes turned back two Government survey-parties who had begun a triangulation survey of the so far unmapped Urewera mountain territory, and seized their instruments . . . The fact was that the Government's intention to survey and road the Urewera Country had not been explained properly to the tribes, who naturally viewed with disfavour and apprehension the arrival of the *kai-ruri* with his theodolite, the forerunner of *pakeha* encroachment and settlement. The Government considered it necessary to make a show of military force, and a detachment of the Permanent Artillery at Auckland, numbering between forty and fifty, armed with carbines and revolvers, was despatched to Whakatane and Ruatoki . . . It was on Sunday, 21st April, that the force marched into Ruatoki, at the entrance to the gorge of the Whakatane. We found all the leading men of the Urewera, from Ruatoki to Waikare-moana, assembled there, to the number of about two hundred, seated in half-moon formation on the *marae*. It was an ominous reception. No call of welcome; not a word from the sullen mountain-men squatting there glowering at us. When at last they did speak their speeches were decidedly hostile. They wanted no surveyors in their country; they did not see any necessity for mapping it; they feared some of their land might be taken to pay for the survey. We found, afterwards, that many of the younger men were ready and eager to fight; and practically every man had a gun and ammunition, although they did not parade their arms before us.
>
> However, patience and diplomacy worked wonders with the 'new-caught sullen' Urewera. Mr James Carroll, always a successful mediator in disputes of this nature, rode through from Gisborne, and after some days' discussion with Numia, Kereru, Te Wakaunua, Rakuraku and other chiefs the trouble was settled. The Urewera permitted the survey to go on.
>
> Similarly, at Te Whaiti, the Ngati-Whare in the end were won over to the side of progress. A covering-party of the Permanent Force was stationed at Te Whaiti for some weeks, for the protection of the surveyors, but its services were not needed. The survey went on, and there went on also the strategic road through the heart of the Urewera Country, destined to link up with the Waikare-moana side. Suspicious, inimical as these mountain-dwellers were, fearful of the *pakeha's* intrusion, which meant loss of independence, loss of land, they soon came to look with a friendly eye on the new-comers, and even to welcome the new road that slowly pierced the gorges and forests of their rugged country. It was the first stage in the breaking-down of the long isolation which had kept the Urewera people a tribe apart, conservative in the extreme, clinging to the old Maori ways of life.[1]

1. James Cowan, *The New Zealand Wars and the Pioneering Period*, vol 2, pp 496–498

it was acting within the law. Nonetheless, we note that Seddon was not entirely satisfied. He claimed not to have known that the survey was happening and regretted that the Survey Department had not notified him or the Native Department of its intentions. He told Smith that, had he known, he would have notified the Te Urewera leaders himself.[144] We consider, however, that the issue of notification was not the real problem.

In essence, the people of Te Urewera believed that the survey would be used for Native Land Court purposes – with good reason, as the Crown has conceded – and they had told the Government they did not want it. They also feared that some of their land might be taken to pay for it. The Government clearly had the legal power to carry out the survey, regardless of the people's wishes. As soon as any kind of obstruction took place, Seddon sent armed forces to Ruatoki. As Binney put it: 'While within their legal rights to make the triangulation survey, the government chose to make a fight rather than to negotiate properly and openly.'[145] But the Government also sent Carroll to Ruatoki. He attended an eight-day hui, at which he told the people the trig survey was not a survey of land for Native Land Court purposes and there was no risk to them if it went ahead. He firmly refused their request that the survey be delayed until Parliament met in June. This request had its origins in a suggestion from Hone Heke, the member for Northern Maori, who was working with both the Kotahitanga parliament and Te Urewera leaders. Heke had advised against obstructing the survey, but had also suggested that the people allow their members in the settler Parliament to seek a solution.[146]

At hui it was evident that the arrival of the surveyors might call in question Seddon's good faith. As Heke put it, discussion at the Ruatoki hui focused on Maori authority, colonial law, and the gifting of the taiaha, Rongokarae. Numia Kereru pointed out to Carroll that the law had been satisfied; Numia had 'caused the law to awake' when he applied for the Ruatoki survey, but now that was finished. The people had not applied for the current survey, they did not want it, and they wanted to go to Wellington to discuss it.[147] The gift of Rongokarae did not mean that the 'chief rangatira of the pakeha' could do whatever he wanted to the people or their lands without objection. Nor did the covenant with the Government bind the people to accept anything the Premier 'desired to impose upon them without consulting them in the first place'.[148] Numia Kereru made an impassioned speech, claiming that the sending of an armed force to Te Urewera was a violation of the covenant, aiming to 'extinguish off the face of the earth the very person and his people who gave the chief rangatira

144. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 157; Binney, 'Encircled Lands', vol 2 (doc A15), p 173

145. Binney, 'Encircled Lands', vol 2 (doc A15), p 168

146. Binney, 'Encircled Lands', vol 2 (doc A15), pp 174, 183–184; Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 36–40

147. *NZ Herald*, 3 June 1895, (Cathy Marr, 'The Urewera District Native Reserve Act 1896 and Amendments 1896–1922: Report Document Bank' vol 2 (doc A21(b)), p 248

148. *NZ Herald*, 3 June 1895 (as quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 183)

his taiaha. Fine love this!'[149] Numia was deliberately echoing what Seddon had said to them the year before, when he told them that his loving protection would prevent them from disappearing off the face of the earth. The integrity of the Premier's words, and his assurances of active protection, were now in question.

But the final decision of the hui was brought about by Kereru Te Pukenui, who reminded the people that he had given his taiaha to the Premier, and with it his pledge that he would not allow fighting and would 'uphold the law, and live and abide under it'.[150] He accepted Carroll's explanation of the survey, and said:

> We should have confidence in the law. . . . Let this trouble end. Sufficient for us to rest our thoughts on the promise Mr Carroll has given to concede our rights to the soil. This pledge was given last year, and it is now repeated.[151]

Subsequently, according to Cathy Marr: 'Seddon informed the Governor that it was the chief Kereru who persuaded the meeting to trust Carroll, largely because of the goodwill developed during the 1894 tour.'[152] In his report to the Governor, Seddon gave a slightly different version of Carroll's promise: that it was to 'conserve' rather than 'concede' their 'rights to the soil'.[153] Although we do not have a detailed account of this hui, we infer that Carroll renewed the promises that had been made in 1894: that the Government did not want to obtain their land but instead would protect them in their possession of it. The trig survey, it was now affirmed, would not interfere with that promise. The sense of Carroll's 1895 promise, therefore, was more likely to have been to 'conserve' their rights.

A further positive outcome of the hui was the revival of the proposal to send a delegation of Te Urewera leaders to Wellington. According to Binney, Numia was the first to raise the issue of the long-delayed delegation. Carroll clearly favoured the idea, telling the people that the delegation should lay their issues before Parliament and resolve the question of the other surveys (Native Land Court surveys and the ring boundary).[154] Carroll also wrote to the Premier 'that the present is a fitting opportunity to once and for all time settle the difficulties in connection with the Urewera Natives'.[155] Binney suggested that this referred to the Government's intention to push roads through Te Urewera. But we think it

149. *NZ Herald*, 3 June 1895 (as quoted in Binney, 'Encircled Lands', vol 2 (doc A15), pp 183–184). We note that it is not always clear in the *NZ Herald* article when the words of Heke are being quoted, as opposed to those of Numia Kereru, but we take it from the context that Heke was reporting the views of Tuhoe and of Numia Kereru as put forward at the April 1895 hui.

150. *NZ Times*, 30 April 1895, Marr, Report Document Bank (doc A21(b)), p 231

151. *NZ Times*, 30 April 1895, Marr, Report Document Bank (doc A21(b)), p 231

152. Cathy Marr, 'Answers to questions of clarification: Urewera District Native Reserve Act 1896 and Amendments 1896–1922 (Wai 894, A21)', May 2004 (doc D11), p 6 [Note for ed: this document has neither page nos nor para nos]

153. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 40

154. Binney, 'Encircled Lands', vol 2 (doc A15), pp 183–184; Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 138

155. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 139

more likely that Carroll was talking of a political solution – given his own encouragement at the hui for Tuhoe to negotiate with the government, and his strong statement to Seddon about the desirability of settling difficulties 'for all time'. In other words, he was reminding the Premier about his invitation during the April 1894 hui for a Te Urewera delegation to visit Wellington and negotiate a wide-ranging agreement. If this was so, however, Seddon seemed not to be listening. But in the short term, he accepted the hui's decision and Carroll's assurances, and withdrew the troops from Ruatoki. A few armed police remained for the duration of the survey.

But though the crisis passed, the government made little effort to avoid further straining relations with the peoples of Te Urewera. At some point in 1895, the government decided to force roads through the interior of Te Urewera. How or why this decision was made is not clear.[156] But the outcome was a repetition of the earlier pattern of obstruction of surveyors, government despatch of troops, and the arrival of Carroll to mediate. A decision had clearly been made by June 1895 when the Governor made his speech at the opening of Parliament:

> From causes which will be made known to you, the work of surveying the territory of the Tuhoe Tribe was some months ago suddenly interrupted. A display of armed force, and negotiations conducted for the Government by the member of the Executive representing the Native race [Carroll], quickly led to a peaceful understanding. But my Advisers, deeming it best to guard against any further disturbance or obstruction in that part of the colony, have decided to insure, by pushing roads through the length and breadth of the Urewera Country, that in future it shall lie at peace and open to all.[157]

This fitted with the way Cowan and Best saw the decision to open the interior with a road to Ruatahuna. Cowan later described it as 'the strategic road through the heart of the Urewera Country'.[158] Best noted that it was the same road that had been sought back in 1885 (see chapter 8), and 'commented that it was intended to be "the wedge that split up the Tuhoean policy of isolation"'.[159] Binney and Marr agreed that Seddon was also keen to see the district opened up with good roads for tourism, having decided the area was mostly unsuitable for settlement.[160] Crown counsel, however, suggested that since Seddon thought the district useless for settlement, he simply wished to ensure that Maori in Te Urewera

156. Binney, 'Encircled Lands', vol 2 (doc A15), pp 167–186; Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 121–162; Judith Binney, 'Statement in response to questions of clarification of the Tuawhenua claimants' (doc M19), pp 9–10

157. NZPD, 1895, vol 87, 20 June 1895 (Marr, Report Document Bank (doc A21(a)), p 68). The Governor's opening speech to Parliament was traditionally written by his ministers, and summarised policy and legislative intentions for the coming session

158. Binney, 'Encircled Lands', vol 2 (doc A15), p 185

159. Binney, 'Encircled Lands', vol 2 (doc A15), p 185

160. Binney, 'Encircled Lands', vol 2 (doc A15), pp 185–186; Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 43

got the same benefits as other Maori, including roads.[161] This was certainly how Carroll and Seddon portrayed it to Tuhoe in 1895, although the Premier also made it clear that he wanted roads to facilitate tourism.[162]

If the Governor's explanation is correct, then the Government decided to push road surveys through the heart of Te Urewera when it did for purely political purposes, in response to the first survey obstruction in April 1895, as well as to improve communications and access. It soon became apparent in May that part of the surveying work was for a road from Te Whaiti to Ruatahuna, and also for a road from Waikaremoana into the interior. Carroll's explanation was that the Government was simply delivering the roads that had been asked for in 1894, but this was incorrect.[163] Those requests had been for roads on the outskirts of Te Urewera, running to coastal trading points, and not for roads into the interior. Also, we note Seddon's caution about roads at the 1894 hui. He encouraged Ngati Manawa, for example, to try to get Tuhoe agreement to roading, so that a joint approach could be made to Parliament.[164] But at the same time he admitted that making roads without the agreement of the people would lead to a justified grievance. 'Now,' he said, 'if the Government was to undertake to make a survey, and say, "We will put the road through in spite of you," then they [Tuhoe] might have cause to complain.'[165] He seems to have forgotten these reservations in 1895, when the Government decided to force roads through the interior without consultation or consent. It will be recalled from chapter 8 that the Government had been trying to get roads through Te Urewera since the 1870s, but had not been willing to force the issue then or in the mid-1880s. Now, under Seddon, the Government was finally prepared to use force if necessary. The settler press was puzzled by his decision: roads were urgently needed by settlers in other districts, so why bother forcing roads on an area in which they were not wanted?[166]

A possible explanation, as Cathy Marr suggested, is that Te Urewera became caught up in Seddon's showdown with Kotahitanga. Hone Heke, a member of both the New Zealand and the Maori parliaments, was accused of inciting the whole Tuhoe resistance to surveying. It was believed to be part of an orchestrated resistance to the Government, devised at the Rotorua paremata (parliament).[167] The Government tried hard to find evidence that Heke was behind it all; Edwards detailed its efforts in her report.[168] We agree with Crown counsel

161. Crown counsel, closing submissions (doc N20), topics 14–16, p 16
162. 'Urewera Deputation, Notes of Evidence', 7 September 1895, J1, 1897/1389, Archives NZ, pp 1, 41 (Marr, Report Document Bank (doc A21(b)), pp 165, 205)
163. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 137
164. AJHR, 1895, G-1, p 64
165. Ibid
166. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 41
167. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 36–42; see also Binney, 'Encircled Lands', vol 2 (doc A15), p 170
168. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 129–139, 158

that Seddon was also motivated by the need to uphold the law.[169] Having made the decision to send surveyors in, they had to be protected from forcible obstruction. The initial decision to send surveyors, as well as the degree of force necessary to protect them, were questioned at the time. Hone Heke described Seddon's decisions as 'trying to make a show of doing great things' and a 'farcical political display'.[170] In other words, Seddon was grandstanding for the settler public, impressing them with his ability to manage the Maori people (both Te Urewera and Kotahitanga).

On the ground in Te Urewera, surveyors working on the road lines in May were either obstructed or found themselves without local guides or assistance. Details of the obstruction, and the surveyors' efforts to proceed regardless, may be found in the reports of Binney and Edwards.[171] The Government's handling of the difficulties it had created followed the same pattern as before. Troops were sent to respond to obstructers with force, and then Carroll was sent in their wake to negotiate agreement. In May, 68 soldiers and armed police were sent to Te Whaiti.[172]

Tuhoe and Ngati Whare were thrown into turmoil by this renewed testing of their fragile relationships with the Government, following so soon after the first. Some chiefs tried to hold to the Te Whitu Tekau policies, no matter what. Others began to see that roads could be useful for them, or gave up in the face of Government pressure.[173] Binney cited the following letter from Ngati Whare to Hone Heke on 30 May, expressive of their loss of faith and sense of powerlessness:

> Friend, we are not going to obstruct the survey any more, and also the roads. We are going to leave it, as the Government dares to force their works. Friend, we are pained and are weary through this work of the Government. We hold to the word manawanui (patience). The road from Galatea to Te Whaiti is an old road, therefore this is all right; but the construction of a road to Ruatahuna and Waikaremoana – this is new. We are pained and weary over this.[174]

Then Carroll arrived. And this time the matter of negotiating with the Government in Wellington – and new legislation – was discussed in earnest. Carroll attended two hui at Te Whaiti, one in late May and another in early June, at which he encountered a mix of opposition and support for roads. Edwards noted that people were afraid the roads would lead to

169. Crown counsel, closing submissions (doc N20), topics 14–16, p 16
170. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 134, 135, 139
171. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 139–149; Binney, 'Encircled Lands', vol 2 (doc A15), pp 174–185
172. Binney, 'Encircled Lands', vol 2 (doc A15), p 177
173. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 148
174. "Te Whatanui and all Ngati Whare', *New Zealand Herald*, 4 June 1895 (Binney, 'Encircled Lands', vol 2 (doc A15), p 178

taxation (rates) and loss of land to the Government.[175] According to a newspaper interview with Ngapuhi Irihei, of Te Whaiti, the people told Carroll that:

> they did not like being intimidated, that if anyone was breaking the law, it was the Government; they were living on their own land in a peaceful manner doing harm to no one, and did not wish to be coerced.[176]

According to the report in the newspaper *Hot Lakes Chronicle*, Carroll assured the people the interior road would not proceed from Te Whaiti to Ruatahuna until a Te Urewera deputation had been to Wellington and settled things with the Government.[177] He also promised, according to the recollections of Urewera Commissioner Hurae Puketapu, that the rohe potae would be protected by special legislation reserving the lands for their owners.[178] These assurances were enough to convince Tuhoe and Ngati Whare to abandon their resistance. When further obstruction occurred at Waikaremoana immediately after, Tuhoe leaders accompanied Carroll to the lake. As Hurae Puketapu recalled, they informed the people there that 'the whole trouble had been settled'; representatives would be 'selected by Tuhoe' and sent to Wellington, where 'a special Act was to be passed'. The Waikaremoana hui endorsed these arrangements.[179]

Binney doubted the accuracy of the newspaper report that Carroll had promised no further work on the interior road. If there was such a promise, it 'did not hold'.[180] Binney and Edwards agreed that surveyors began to lay out the line for a road from Te Whaiti to Ruatahuna in July.[181] At Te Umuaroa, Paraki Tiakiwhare accepted the inevitability of the road. Te Whitu Tekau's great leaders, he told the survey party in July, had:

> determined to hold on to their lands, and decided that all injurious measures of the Government, such as the leasing, selling, surveying, and road making through their land should not come within the boundaries (of Tuhoe); but they have departed with their words, and now the Government policies cannot be withstood. Whilst they lived their determination lived, but now that they are dead so also are their words, & resolutions.[182]

175. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 141
176. *Hot Lakes Chronicle*, 19 June 1895, in LS 1/21734, pt 1 (Binney, 'Encircled Lands', vol 2 (doc A15), p 179)
177. Binney, 'Encircled Lands', vol 2 (doc A15), p 179
178. Binney, 'Encircled Lands', vol 2 (doc A15), p 180; Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 245
179. Binney, 'Encircled Lands', vol 2 (doc A15), pp 180–181
180. Binney, 'Encircled Lands', vol 2 (doc A15), pp 179, 181; see also Judith Binney, 'Statement of Judith Binney in response to Crown questions of clarification', 18 February 2005 (doc K28), pp 24–25
181. Binney, 'Encircled Lands', vol 2 (doc A15), pp 181–183; Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 143–149
182. Te Tuhi Pihopa, letter commenced 30 June 1895, LS 1/21734, pt 2, CT (Binney, 'Encircled Lands', vol 2 (doc A15), p 182)

Tuhoe thus 'painfully reconciled themselves to the coming of the road'.[183] Edwards noted that:

> despite his feelings about having to bear witness to 'the work of the Europeans in their surveys, and in their road making', he [Tiakiwhare] had to admit 'that the work already completed is very pleasing to the eye".[184]

But at Mataatua, in the heart of Ruatahuna, Te Whenuanui II and other leaders told the surveyors that the law had feet and eyes but was clearly deaf, since it refused to hear their opposition to roads. The ears of the law, they said tauntingly, must have been torn off by dogs.[185] Some of the soldiers were withdrawn after Carroll's successful hui at Te Whaiti, but a military presence was maintained in Te Urewera until September. No further significant obstruction was offered.[186]

(8) *What was the outcome of the 'small war'?*

The 'small war' was Apirana Ngata's label, a decade later, for this conflict.[187] The Crown's historian objected to it, asserting that no shots were fired and nothing resembling actual warfare took place. 'War did not break out,' she said, 'because it was averted.'[188] In its closing submissions, the Crown accepted that Seddon had quickly resorted to a 'show of force'. On this point, the claimants and the Crown were in agreement.[189]

Why did the Government force the question of roads in 1895, without consultation or consent? Crown counsel did not address this key issue and we have received no satisfactory explanation for it. But the outcomes of the Government's decision are clear. The first was that by mid-1895 acquiescence in internal roads had largely been brought about by Seddon's show of force. Counsel for the Tuawhenua claimants pointed out that work on the road continued, protected by an armed force. Tuhoe saw no choice but to agree to proper roads connecting Te Whaiti and Galatea with the outside world.[190] Ngati Whare had wanted such roads for some time, but were dismayed by the presence of troops and the decision to push new roads into the interior. The evidence does suggest that some Tuhoe leaders were beginning to see a use for roads in the interior. But in the claimants' view, Tuhoe did not agree to roads; they had been coerced to accept them. The hui with Carroll in April (Ruatoki) and in May and June (Te Whaiti and Waikaremoana) seemed to make significant progress towards

183. Binney, 'Encircled Lands', vol 2 (doc A15), p 182
184. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 146
185. Binney, 'Encircled Lands', vol 2 (doc A15), pp 182–183; Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 147
186. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 149–150
187. Binney, 'Encircled Lands', vol 2 (doc A15), p 188
188. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 158
189. Crown counsel, closing submissions (doc N20), topics 14–16, p 16
190. See, for example, Kereru Te Pukenui, telegram to Seddon, 25 May 1895, LS, 1/21734, pt 1, CT (quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 178)

achieving what the chiefs wanted from the Government. It remained to be seen whether a better quality of agreement to roads could be negotiated now that their delegation was at last going to Wellington.

Ironically, the second outcome was the revival of the negotiations. The claimants and the Crown agreed that, regardless of how unpromising a show of force was as a starting-point, the survey crisis of 1895 triggered the negotiations that followed in Wellington in September of that year.[191] Tuhoe had been seeking such negotiations since Seddon had first made the offer in April 1894. They had also, at their Ruatoki hui in April 1895, signified an intent to trust Seddon and his promises, despite the sending of troops. Carroll had further promised at Ruatoki that their lands would be conserved to them, and – at Te Whaiti and Waikaremoana – that special legislation would be arranged to protect Te Rohe Potae. It was on the basis of these promises, more than the presence of troops, that Te Urewera leaders gave up their resistance to surveys at the Te Whaiti hui and encouraged the same decision at Waikaremoana.

But it was not just Tuhoe that the events of April to June 1895 encouraged into negotiations. The Crown also now had reason to re-engage. Seddon's ego had been pricked, and the accolades he had received the previous year for settling the 'native problem' were now called into question.[192] Counsel for the Wai 36 Tuhoe claimants maintained that Seddon was politically embarrassed by the whole affair.[193] Cathy Marr's analysis of events would support this thesis. In particular, Seddon was anxious to woo Maori support away from Kotahitanga, and to show that the Crown offered credible alternatives to the Maori parliament's policies.[194] The importance of the 'small war' cannot be discounted, because it brought the parties to the negotiating table, with both sides ready to make concessions.

There was also an economic dimension to Seddon's willingness to negotiate by mid-1895. New Zealand was emerging from a recession, leading to a revival of immigration and more demand to utilise the country's resources. Cathy Marr cited both the misguided belief that there was gold in Te Urewera and a growing interest in tourism as important motivations for the Government to try to open up greater access to the region. During his 1894 tour, Seddon (a former miner) had observed the possibility of gold-bearing rock, and noted the tourist potential of Waikaremoana.[195] Even if Te Urewera was unsuitable for extensive European settlement, 'there could still be some possibility of negotiated exploitation of potentially valuable resources such as minerals and alternative economic development such as through tourism'.[196]

191. Counsel for Wai 36 Tuhoe, closing submissions, 31 May 2005, pt B (doc N8(a)), p 84; Crown counsel, closing submissions (doc N20), topics 14–16, p 16
192. Anita Miles, 'Te Urewera', report commissioned by the Waitangi Tribunal, March 1999 (doc A11), p 270
193. Counsel for Wai 36 Tuhoe, closing submissions, 31 May 2005, pt B (doc N8(a)), p 84
194. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 19–70
195. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 30
196. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 28

In early 1895, however, before the survey crisis broke out, Government geologists had tried to visit the district and take samples. They had been prevented from doing so in a manner that, as Binney put it, 'makes pleasant reading for those who wish to learn about the tactics of peaceful obstruction developed into an art form'.[197] Access to Te Urewera was still something that had to be negotiated, unless the Government was willing to arrange a general settlement of issues or use a show of force in each and every instance.[198] Seddon could not, we presume, keep stripping Government House of its guards in order to deploy them in Te Urewera, as he had to in 1895. The amount of force available to the Government was really quite limited.[199]

For all these reasons, the Government was interested in a negotiated settlement, and was prepared to make some genuine concessions, when the delegation from Te Urewera arrived in Wellington in August 1895.

9.5.2 What agreement was reached as a result of negotiations?

Summary answer: *In August 1895, a delegation of Te Urewera leaders went to Wellington to negotiate a wide-ranging settlement of issues with the Crown. The full composition of the delegation is not known, but it included Tuhoe, Ngati Whare, and Ngati Manawa leaders. Ngati Kahungunu and Ngai Tamaterangi say they were not represented, and the evidence appears to bear that out. Preliminary negotiations were held with James Carroll, during which Ngati Whare and Ngati Manawa delegates agreed to the inclusion of Te Whaiti lands in the proposed reserve to prevent further land loss.*

On 7 September 1895, Carroll presented a series of proposals to Premier Seddon that had been negotiated between Carroll and the Urewera delegation. On this key occasion, the Premier appeared to agree to almost all of the proposals as presented to him. He did not agree, however, that the proposed single commissioner would assist the owners to define their own titles. Rather, the Commissioner would be an adjudicator of title with input from the people. The minutes of this meeting, as reported in the newspapers, were translated into Maori for circulation in Te Urewera. On 23 September, at a less well-recorded meeting, the Premier agreed to some additional proposals from the delegation, and made the comment that powers of 'local government' were being conceded. On 25 September, in response to a request from the delegation for a draft Bill or 'heads of agreement', Seddon wrote an important memorandum that summarised some of the delegation's proposals (as he understood them) and recorded his specific responses and undertakings.

In our view, the documentation and results of the 7 September meeting, the 23 September meeting, and the 25 September memorandum must all be taken together as constituting the

197. Binney, 'Encircled Lands', vol 2 (doc A15), p 161
198. Binney, 'Encircled Lands', vol 2 (doc A15), pp 161–164
199. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 20, 36–37

agreement reached between the leaders of Te Urewera and the Crown. The agreement cannot, as the Crown suggested in our inquiry, be confined to the contents of the 25 September memorandum. Having regard to all the evidence, we agree with the Wai 36 Tuhoe claimants and the Crown that broad principles were decided, akin to a 'heads of agreement', without much detail having been specified. It was implicit in the agreement that consultation would continue, and the proposals would be fleshed out for legislative implementation. Compromises had been made on both sides.

There were seven core principles agreed between the delegation from Te Urewera and the Crown in September 1895.

- *The first principle was that an inalienable reserve would be established to provide permanent protection for the Maori peoples of Te Urewera; their lands; their forests, birds, and taonga; and their customs and way of life.*
- *The second principle was that the Native Land Court would be excluded from the reserve, and that an alternative process would be used to create Crown-derived land titles. The nature of this process had not been agreed. Carroll and the Urewera delegation essentially proposed that hapu would decide their own titles, with the assistance of a single commissioner. The Premier, however, stated on all three occasions (7 September, 23 September, and 25 September) that the commissioner would adjudicate, with input from the people.*
- *The third principle was that land titles would be awarded at a hapu level, in a form that facilitated hapu and tribal control. The claimants and Crown agreed on this point.*
- *The fourth principle was that the peoples of Te Urewera would be self-governing by means of hapu committees to manage their lands and tribal affairs, and a General Committee that would have 'local government' powers.*
- *The fifth principle was that the peoples of Te Urewera acknowledged the Queen and the Government and would obey the law.*
- *The sixth principle was that the Government would protect the people and promote their 'welfare' in all matters, and it would provide a 'package' of social and economic assistance. The details of the 'package' had not been agreed. It appears that Carroll may have had more in mind than Seddon was willing to provide at that time.*
- *The seventh principle was that development should take place in the reserve, although (as we understand it) in a manner in keeping with the primary nature of the reserve. This development included roads, tourism, gold mining (if gold was discovered), and farming.*

In August 1895, a deputation of leaders from Te Urewera arrived in Wellington to negotiate a settlement of outstanding issues with the Crown. The Tuawhenua researchers relied on the oral evidence of Tamati Kruger to explain Tuhoe's strategy. According to Mr Kruger, Tuhoe were still acting on the advice of Te Kooti when he had told them: 'Ma te ture ano te

ture hei whakatika.' ('It takes the law to put the law right.')[200] This was at the heart of Tuhoe's new approach towards the Crown in 1895: 'Faced with little choice but to co-operate with the Crown, the new leadership did its best to protect Te Rohe Potae, but this time, by using the laws of the Crown.'[201] As Mr Kruger put it:

> No longer was the leadership going to confront Pakeha but they were going to try and use the Pakeha tikanga and ture to find a comfort area for them in line with Te Kooti's kupu 'Ma te ture ano te ture hei whakatika'. That was the new strategy, new leaders . . . They were going to get all of the Tuhoe area and put it under its own Act.[202]

But it was not only Tuhoe who were represented in the delegation of Te Urewera leaders. Some of the positions it adopted were clearly compromises between iwi, as well as between iwi and the Crown. The first issue before the Tribunal is the question of which tribal groups were parties to the 1895 agreement.

(1) *Who were the Maori parties to the agreement?*

The *New Zealand Herald* reported that the delegation consisted of 'about 20 young prominent Natives in the Urewera country', although only 13 were named.[203] Some of the names of the chiefs can be determined from official records and press reports, and these indicate that several iwi and hapu were represented.[204] Binney noted representatives from Tuhoe, Te Urewera (the hapu), Ngati Haka Patuheuheu, Ngati Whare, Ngati Manawa, and Warahoe.[205] The Tuawhenua researchers identified the following leaders:

> the two delegates from Ruatahuna were Te Wharekotua and Paraki Tiakiwhare, from Ngati Whare were Ngapuhi Irihei, Te Wharepapa Whatanui and his brother Hiwawa, Te Maronui Rawiri of Galatea, probably Mehaka Tokopounamu and Korowhiti Te Maramarama of Ngati Haka/Patuheuheu, and Hori Wharerangi of Waikaremoana.[206]

Mehaka Tokopounamu has been positively identified as one of the delegation.[207] Harehare Atarea, the senior chief of Ngati Manawa, was also there.[208] Numia Kereru, the Ruatoki

200. Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two' (doc D2), p 1
201. Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two' (doc D2), p 1
202. Tamati Kruger, oral evidence, 18 February 2002, as quoted in Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two' (doc D2), p 1
203. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 44. See also Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 167
204. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 44
205. Binney, 'Encircled Lands', vol 2 (doc A15), p 189; see also NZT, 9 September 1895
206. Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two' (doc D2), pp 14–15, citing Binney, 'Encircled Lands', vol 2 (doc A15), p 202
207. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 167
208. Peter McBurney, 'Ngati Manawa & the Crown 1840–1927', March 2004 (doc C12), p 444

leader, does not appear to have been present at the 7 September meeting, but was at the later meeting on 23 September.[209]

Ngati Whare and Ngati Manawa both agreed to the inclusion of Te Whaiti lands in Te Rohe Potae.[210] This was a definite change of mind on the part of Ngati Manawa. At the 1894 hui at Galatea, Harehare Atarea had told Seddon: 'The Ngatimanawa is distinct from Tuhoe. I do not want them mixed up with the others. I do not want the Tuhoe ring, or territorial boundary, as it is styled. I want my land dealt with distinctly from the others.'[211]

Ngati Manawa's historian, Peter McBurney, argued that Ngati Manawa changed their minds in the hope of preventing further land loss. He cited Harehare Atarea's explanation to the Urewera Commission:

> Now, about Ngati Manawa and Tuhoe going to Wellington the first time about the 'rohe'. [No number given] of Ngati Manawa went, and 20 Tuhoe. I protested against Te Whaiti being included in the Tuhoe boundary. Mr Carroll showed me the map. I marked out our lands I wished to be excluded, and be dealt with by the Court. Mr Carroll then asked, 'Will you agree to put your block into the Tuhoe Rohe so that you may be saved and your land prevented from sale and other trouble?' I agreed and we all met the Premier and settled the details.[212]

The 1895 delegation, counsel for the Wai 36 Tuhoe claimants submitted, had been 'broadly representative of the communities within Urewera'.[213] We accept that submission, with one proviso. The only claimant groups to argue that they had not been represented were Ngati Kahungunu and Ngai Tamaterangi.[214] Counsel for the Wai 621 Ngati Kahungunu claimants suggested that the Crown had negotiated with 'Tuhoe/Ruapani/Whare only'.[215] The Crown had some trouble accepting this submission, noting that the claimants' own historians (Belgrave, Deason, and Young) had been 'silent' on the matter.[216]

Having reviewed the documentary evidence for the 1895 meetings, and putting it in the context of what was to follow, we conclude that there is nothing at all to suggest that Ngati Kahungunu were involved or consulted in any way. Counsel for the Wai 36 Tuhoe claimants suggested that their interests would nonetheless have been protected by James Carroll, who

209. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 58–59

210. Richard Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi: Summary of Evidence from *Ngati Whare and Te Whaiti-nui-A-Toi: A History* (Wai 894 RO1, A27) and Response to Relevant Issues', August 2004 (doc G21), para 4.18; see also John Hutton, answers to Crown questions of clarification, September 2004 (doc G27), p 4

211. AJHR, 1895, G-1, p 65

212. Mair, MB 2, WATL MS495, p 63 (McBurney, 'Ngati Manawa & the Crown' (doc C12), p 445)

213. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 86

214. Counsel for Wai 621 Ngati Kahungungu (doc N1), p 22; counsel for Ngai Tamaterangi, closing submissions (doc N2), p 44

215. Counsel for Wai 621 Ngati Kahungungu (doc N1), p 22

216. Crown counsel, closing submissions (doc N20), topics 14–16, pp 26–27; see also Michael Belgrave, Anna Deason, and Grant Young, 'The Urewera Inquiry District and Ngati Kahungunu: an overview report of issues relating to Ngati Kahungunu', April 2003 (doc A122), pp 43–46

was of Ngati Kahungunu, and by Wi Pere, who was connected to that tribe and later represented them before the second Urewera Commission.[217] The position of Carroll is not clear-cut. While he certainly worked for the best interests of both Maori and the Crown (and sometimes acted as spokesman for the Urewera delegation), he was a Minister in Seddon's government, and not a representative of Ngati Kahungunu in these negotiations.

Wi Pere, who was independent of the Government, did not mention Ngati Kahungunu in any of his recorded speeches about – and in support of – the agreement. The Crown has accepted that it was under 'an obligation to consult with the representatives of those hapu likely to be affected by the Act'.[218] In our view, Ngati Kahungunu were neither represented in the negotiations nor consulted afterwards. The reasons for this are not clear. The Crown failed to meet its obligation in respect of them. But we think it is significant that neither Carroll nor Wi Pere evidently raised the matter during the process of the negotiations. Whether Ngati Kahungunu interests were harmed by this failure will be considered in chapter 13, where we address the investigation and award of land titles following the agreement.

We turn next to the substance of the negotiations.

(2) *7 September 1895: Te Urewera delegation's proposals and Seddon's response*

The nature, content, and results of the discussions on 7 September were much debated in our inquiry. As a result, we set out what was said in some detail. The delegation of Te Urewera leaders had conducted detailed negotiations with Carroll before this meeting. As we saw above, one result of those negotiations was to persuade Ngati Manawa to agree to the inclusion of Te Whaiti in the reserve. Other groups must also have made concessions, to each other as well as to the Crown. By 7 September, Tuhoe had apparently agreed to roads, tourists, and getting land titles, all of which departed from the policies of Te Whitu Tekau. Unfortunately, we have virtually no evidence about these discussions.

But it is clear that the negotiations produced a set of proposals which were put to the Premier at Parliament on 7 September. On this the historians agree. James Carroll had a unique role. Having represented the Government in the discussions so far, he now acted as spokesperson for the Urewera delegation. As Cathy Marr noted, he spoke in Maori in order to 'show the delegation that he was reporting their views as closely as possible'.[219]

It appears from the minutes of the meeting that Carroll was presenting proposals that he himself had negotiated with the delegation. One of the chiefs told Seddon: 'I wish to say that these people here present chosen by the Tribe were chosen to come here to see you, and we have come here and we have seen Mr Carroll and discussed the whole matter with him and come to a conclusion on the matter.'[220]

217. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 86
218. Crown counsel, closing submissions (doc N20), topics 14–16, p 26
219. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 45–46
220. 'Urewera Deputation, Notes of Evidence', p 10 (Marr, Report Document Bank (doc A21(b)), p 174)

Carroll said that the delegation had 'approved of the views and policy that I have laid before them in regard to their land'.[221] In other words, the content of the proposals reflected positions that Carroll had agreed to (or initiated), and which he expected the Premier to approve. In particular, this affected the way in which some of the proposals were put; they were calculated to appeal to Liberal politicians and to Seddon's own views on matters.[222] Nonetheless, it was not a done deal, negotiated between Carroll and Seddon beforehand. The Premier did not accept everything that was proposed, and he put his own spin on some of the proposals, to some extent distorting or altering what the delegation had wanted. He spent a lot of time trying to pin the leaders down to specific sites and numbers for schools, until an unidentified chief asked him to get back to the 'principal matter' at hand: 'the matter which has been placed before you by Mr Carroll'.[223] In particular, counsel for Tuawhenua noted a fundamental disagreement between how the delegation and the Premier saw the respective roles of Maori and the single commissioner in determining land titles. We will return to this point below.

(a) ***The proposals:***

(i) *Creation of a reserve*

The most fundamental of the proposals was for the creation of a permanent reserve in which the land, natural resources, the people, and their way of life would be protected. To show how this would suit the interests of the Government (and the economic development of the people), there was an emphasis on tourism: '[The] whole of the Tuhoe boundary should be reserved as a reserve for the Native people. A place wherein the Native people could develop itself and that its mountains and its forests be reserved as a resort for tourists in the future.'[224]

Native birds would be protected from the massive deforestation that was happening elsewhere. The Maori way of life would be preserved, and might also attract tourists to 'see the Maoris in their natural state and their land and all that they placed on it'.[225] The country was unsuitable for agriculture or settlement, but 'in the estimation of the native race it is a country very suitable to their requirements; they think a great deal of it'.[226] Te Urewera was

> [the] last tract of native country in its natural state . . . And it would be a District in which the natives, the remnants of the name Maori, could gather themselves together. That is why I ask that this District be reserved, made sacred, to preserve this name of the Maori people, preserve the Maori and the forest and all connected with the people in this particular spot.[227]

221. 'Urewera Deputation, Notes of Evidence', p 2 (Marr, Report Document Bank (doc A21(b)), p 166)
222. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 47, 49
223. 'Urewera Deputation, Notes of Evidence', p 9 (Marr, Report Document Bank (doc A21(b)), p 173)
224. 'Urewera Deputation, Notes of Evidence', p 2 (Marr, Report Document Bank (doc A21(b)), p 166)
225. 'Urewera Deputation, Notes of Evidence', p 3 (Marr, Report Document Bank (doc A21(b)), p 167)
226. 'Urewera Deputation, Notes of Evidence', p 4 (Marr, Report Document Bank (doc A21(b)), p 168)
227. 'Urewera Deputation, Notes of Evidence', pp 5–6 (Marr, Report Document Bank (doc A21(b)), pp 169–170)

This was the fundamental basis of the agreement, submitted counsel for Nga Rauru o Nga Potiki. Relying on the interpretation of Brad Coombes, they argued that this was an 'affirmation of cultural traditions which were essential for the survival of tangata whenua and [which] must be seen as the real intent of the UDNR Act which was to follow and as the starting point for any relationship thereafter'.[228] This essential element of what was to be reserved was, for Nga Rauru o Nga Potiki, the 'critical underpinning' of the future relationship between the Crown and Tuhoe in Te Urewera.[229]

(ii) *Surveys, land titles, and committees*

The second proposal related to surveys and the Crown's long-term goal of creating land titles under colonial law, and the long-standing Tuhoe aspiration to get legal powers for their governing committee. Carroll had told Tuhoe earlier in the year that they would not have to pay for the trig survey and that block surveys would be 'reserved for some future time'.[230] Now, Carroll and the delegation proposed that the trig survey, in combination with a survey of the ring boundary, was all that was necessary for title purposes. A commissioner would assemble the people, 'discuss at meetings', and compile a list of 'all the owners in that Country'; 'all this to be done outside the Native Land Court by the Commissioner and the Maoris themselves'.[231] After that, 'the hapus could then settle and arrange the hapu boundaries between themselves: the Commissioner and the Natives'.[232] Cecilia Edwards understood this to mean that hapu would settle and arrange the boundaries with the assistance of the commissioner.[233] Next, the commissioner and the Maori would mark the hapu boundaries on a map. Then, each hapu would appoint a committee to manage 'their respective hapu Districts', and each hapu committee would elect one of their members to a 'general committee for the whole District'.[234] The only power specified for the committees was that, should gold be found in the district, the Government would consult the General Committee and cooperate with the hapu committee in any mining matters.[235]

This proposal represented a significant compromise on both sides. The delegation agreed to land titles on the basis that the Native Land Court would not be involved and that the people themselves would make the decisions. No doubt at Carroll's urging, the people would act with a commissioner, to compile the names of all the people in Te Urewera at

228. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), p 92; see also Brad Coombes, 'Resource and wildlife management in Te Urewera, 1895–1954: Summary of Evidence for Coombes Wai 894 A121, Part One', undated (doc H3), p 4

229. Counsel for Nga Rauru o Nga Potiki, closing submissions, 3 June 2005 (doc N14), pp 92, 117

230. 'Urewera Deputation, Notes of Evidence', p 2 (Marr, Report Document Bank (doc A21(b)), p 166)

231. 'Urewera Deputation, Notes of Evidence', p 3 (Marr, Report Document Bank (doc A21(b)), p 167)

232. 'Urewera Deputation, Notes of Evidence', p 4 (Marr, Report Document Bank (doc A21(b)), p 168)

233. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 195; Cecilia Edwards, cross-examination by claimant counsel, Taneatua School, 28 February – 4 March (transcript 4.14. pp 113–115, 117–118)

234. 'Urewera Deputation, Notes of Evidence', p 4 (Marr, Report Document Bank (doc A21(b)), p 168)

235. 'Urewera Deputation, Notes of Evidence', p 5 (Marr, Report Document Bank (doc A21(b)), p 169)

informal meetings. Then, the hapu were to decide their boundaries themselves (with the aid of the commissioner). After that, the commissioner would help them locate the boundaries on a sketch map. Carroll also agreed to the management of land by committees at both a hapu and a wider-district level. These were very significant concessions for the Government. Never before had it agreed to exclude the Native Land Court and permit the people virtual control over deciding their own titles. Although the Crown had experimented with block committees in 1886, and incorporations in 1894, it had always resisted Maori requests to manage their lands at two levels: the block/hapu level and the district/tribal level. If Seddon agreed to what Carroll and the delegation proposed, it would be a major concession by the settler Government.

(iii) *Social assistance and active protection*

In the third proposal, Carroll and the delegation linked social assistance and development with the protective role of the Crown. All of the proposals should 'be given effect to by a special legislation'. Carroll continued:

> If these proposals were given effect to in a measure such as I suggest then it would be for the Government to act as the parent and the father of this people and see that the matter was carried out: and establish schools and other measures for the welfare of the natives living in that District; such as the introduction of a medical attendant and sanitary laws; improved methods of cultivation and matters connected with the general welfare of the District, for the people within the District. This is what I thought would be for the welfare of these people, so that they would save their lands and save themselves and improve the condition of their families.[236]

In our inquiry, this part of the proposals gave rise to debate between the Crown and claimants as to whether it was part of the 1895 agreement, whether it needed to be given effect by legislation, and whether any positive obligations arose from it for the Crown. We will return to these issues below.

(*iv*) ***Roads***

As part of the proposal to create a reserve, the delegation asked for roads to be built to facilitate access and tourism.[237] This request must have been a compromise between those who favoured roads – the Government, Ngati Whare, Ngati Manawa, and Ngati Haka Patuheuheu – and those Tuhoe who did not (or who were only just beginning to come around to the idea).

(b) *Seddon's responses:*

236. 'Urewera Deputation, Notes of Evidence', p 5 (Marr, Report Document Bank (doc A21(b)), p 169)
237. 'Urewera Deputation, Notes of Evidence', pp 2–3 (Marr, Report Document Bank (doc A21(b)), p 166–167)

What about Ruatoki and the Rim Blocks?

The proposals of the Urewera delegation covered only land that had not passed through the Native Land Court. We do not know what Carroll and the delegation had discussed during their negotiations before the 7 September hui. Wi Pere, a Maori member of Parliament, was present at the hui as an observer and adviser. He was not limited by compromises worked out between Carroll and the chiefs. Carroll had pointed out that the proposals were based on the idea that settler interests were not affected, and that the land could be dealt with in the proposed way because it was 'virgin soil', not part of the colony's current legal system for Maori land. Wi Pere, on the other hand, saw no reason why the committee arrangements could not be extended to include land that had passed the court. He asked Seddon to consider this.[1] Cecilia Edwards, in her report for the Crown, noted that Seddon later agreed to see if there was anything useful in Wi Pere's own Bill, which provided for committees to manage Maori land, but did not in fact support it when it was introduced to Parliament.[2] For the time being, at least, Ruatoki and the rim blocks were excluded from the agreement.

1. 'Urewera Deputation, Notes of Evidence', pp 3–4, 56 (Marr, report document bank (doc A21(b)), pp 167–168, 220)
2. Edwards, 'The Urewera District Native Reserve Act 1896, Part 1: Prior Agreements and the Legislation', (doc D7(a)), pp 179–180, 189–191

(i) *Creation of a reserve*

The Premier based his response to this proposal on the experiences of his 1894 tour. He said that he had found 'the Maori in his original state' in Te Urewera – and this, in his view, was worth preserving. He had also learned of Donald McLean's 'policy' and 'promise'.[238] This was clearly a reference to Te Pukeiotu's speech at Ruatahuna, in which he described how McLean had agreed to a 'protectorate' preserving their lands for them, and in which they would exercise authority (see above). Now, with their ring boundary defined, Seddon said that the delegation had asked:

> that this land shall be kept intact, that your forests may continue to exist, that your wild birds which are very few now may flock there, so that you may live and shall be undisturbed. A people, only a remnant it is true, of the native race. That is your request. You ask that your streams may be allowed to flow as at present, the waters to remain unpolluted so that the fishes may live; they are also to you a source of food. Both these requests are reasonable and

238. 'Urewera Deputation, Notes of Evidence', p 11 (Marr, Report Document Bank (doc A21(b)), p 175)

they are in accordance with what I believe to be in your interest and in the interests of the Country.[239]

Seddon saw a national significance to the reserve on several levels. It would be the last tract of native land, where the people 'may enjoy the freedom that their forefathers enjoyed for ages' – a particularly important way of looking at it.[240] It would also preserve the native flora and fauna, in the same way the new Barrier Island reserve did, but without the Crown having to buy the land as it had in that case: 'Granting your request costs the State nothing.'[241] And the reserve would be shared generously with visitors from around the world, thus generating tourism.[242]

(ii) *Surveys, land titles, and committees*

Seddon confirmed that the trig surveys 'now being made will not cost the Tuhoe or the Native people a single penny piece'. He also undertook that there would be no 'subdivisional' surveys unless the people eventually wanted them.[243] 'Your anxiety is caused,' he said, 'from the fact that the subdivision surveys seem to you a first proceeding in order to take possession of your lands. But your lands will not leave you.'[244] We note here that the Crown Law Office commissioned a review of the Maori-language document supplied to the delegation, which was a translation of the newspaper account of this meeting.[245] It appears from Edwards' report that the only significant discrepancy between the English and Maori accounts was on this issue. The Maori version of the document did not always distinguish between the trig survey and other kinds of surveys. Hence, the Urewera delegation (and the people back at home) may have been left with the impression they would never have to pay for any kind of survey.[246] In our view, this is an important difference.

Not unnaturally, the Premier welcomed the delegation's decision 'to have the titles of the land ascertained'.[247] This was what he had been pushing for in 1894, and it was clearly tied to his belief that gold could not be exploited until the owners of the land had titles. But his understanding of what would be involved seemed radically different from what Carroll had proposed. The first thing, he said, would be to define the hapu boundaries; this would be

239. 'Urewera Deputation, Notes of Evidence', p 22 (Marr, Report Document Bank (doc A21(b)), p 186)
240. 'Urewera Deputation, Notes of Evidence', p 38 (Marr, Report Document Bank (doc A21(b)), p 202)
241. 'Urewera Deputation, Notes of Evidence', p 39 (Marr, Report Document Bank (doc A21(b)), p 203). We note that when the Government set about establishing the Urewera National Park in the mid-twentieth century, it rejected this concept of a Te Urewera reserve for the people who would live among the protected natural resources and use them as they had always done. (See forthcoming chapter.)
242. 'Urewera Deputation, Notes of Evidence', p 39 (Marr, Report Document Bank (doc A21(b)), p 203)
243. 'Urewera Deputation, Notes of Evidence', pp 19–20 (Marr, Report Document Bank (doc A21(b)), pp 183–184)
244. 'Urewera Deputation, Notes of Evidence', p 20 (Marr, Report Document Bank (doc A21(b)), p 184)
245. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 165–167. The Maori-language document, *Nga Korero o te Huinga Atu o Te Urewera ki te Aroaro o te Pirima i te Whitu o nga Ra o Hepetema, 1895*, is reproduced in Cecilia Edwards, Supporting Papers (doc D7(a)(i), vol 3), pp 1265–1279.
246. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 184–186
247. 'Urewera Deputation, Notes of Evidence', p 24 (Marr, Report Document Bank (doc A21(b)), p 188)

Wi Pere's Interpretation of the Role of the Proposed Commissioner

At the end of the 7 September hui, Wi Pere said that he thought the commissioner would not act as a tribunal, involving all the formalities and 'inconveniences' of the Native Land Court, but rather a 'tribunal which will better suit the Maori character and solve the question of ownership than those which are at present in force'. This 'tribunal' would hold an 'informal sort of inquiry'; it would 'confer with the natives after assembling them together', and give a 'temporary interim judgement' before giving 'further notice' to 'others who may be [affected] by that decision to bring their cases forward and they will be dealt with and every care will be taken that no injustice is done.'[1]

1. 'Urewera Deputation, Notes of Evidence', pp 52–53 (Marr, report document bank (doc A21(b)), pp 216 – 217)

done by a special commissioner.[248] The people would 'appear before' the commissioner, 'to whom shall be left the decision as regards the Hapu boundaries'.[249] This was almost the exact opposite of the delegation's proposal. The people, he added, might be allowed to help select a commissioner in whom they had confidence, but that was a point Seddon said he needed to consider further.[250]

The Premier also accepted the proposal for hapu committees and a general committee. In Seddon's view, the committees would provide for chiefly authority, but 'these men, these Committees will be the Chiefs by election, by the voice of the people'.[251] Each would act as a 'committee of management as amongst yourselves deciding upon Hapu and Tribal questions'.[252] The committees could, for example, advise the Government on surveys and the wishes of the tribe on other matters.[253] But Seddon thought decisions about mining were more appropriately made by hapu committees, not the General Committee.[254] He also promised special legislation to give effect to the agreement, which he described as 'giving all power to the Tuhoe' within the ring boundary, including the 'necessary power to select these Committees and manage affairs within these boundaries'.[255]

(iii) *Social assistance and active protection*

Seddon understood the people to be asking for the 'benefits of Civilization':

248. 'Urewera Deputation, Notes of Evidence', pp 24–25 (Marr, Report Document Bank (doc A21(b)), pp 188–189)
249. 'Urewera Deputation, Notes of Evidence', p 25 (Marr, Report Document Bank (doc A21(b)), p 189)
250. 'Urewera Deputation, Notes of Evidence', p 25 (Marr, Report Document Bank (doc A21(b)), p 189)
251. 'Urewera Deputation, Notes of Evidence', pp 26–27 (Marr, Report Document Bank (doc A21(b)), pp 190–191)
252. 'Urewera Deputation, Notes of Evidence', p 27 (Marr, Report Document Bank (doc A21(b)), p 191)
253. 'Urewera Deputation, Notes of Evidence', pp 21, 28 (Marr, Report Document Bank (doc A21(b)), pp 185, 192)
254. 'Urewera Deputation, Notes of Evidence', p 28 (Marr, Report Document Bank (doc A21(b)), p 192)
255. 'Urewera Deputation, Notes of Evidence', p 37 (Marr, Report Document Bank (doc A21(b)), p 201)

> You are entitled to have that because when your forefathers made the Treaty of Waitangi your Mother the Queen on her part undertook to say that you should have the benefits of Civilization *without losing your own rights*. It is therefore my duty as it is my pleasure as the Premier of the Colony and as the Servant of the Queen to conform to the request which is I say reasonable and while I am also satisfied it will also prove beneficial to you. [Emphasis added.][256]

In response to the delegation's proposal that the Government 'act to the Tuhoe as a father would act to his children':

> I have very great pleasure in replying in the affirmative and by expressing to them our earnest desire to act in a fair and partial and paternal manner; to act in such a way that their lives may be improved that their lands may be conserved and that their children may live after them and represent and continue for all time to represent a noble race.[257]

Referring back to Kereru Te Pukenui's gift of his taiaha, Seddon emphasised that Kereru had sought the protection of the Government for his people: 'The word of the Gov't was given and that protection shall ever be afforded to them.' A trust had been 'imposed and that trust will be followed out to the letter'.[258]

In terms of a concrete response to the social assistance requested, Seddon promised only schools and roads – and that the schools would double as distributors of medicine for their communities.[259]

Seddon's views on development within the Reserve were ambiguous to some extent. Cecilia Edwards suggested that one aspect of these discussions was an expectation that development would be excluded from the reserve.[260] Cathy Marr concluded that 'a package of development assistance' was 'presented as part of the overall provision of self-government', while noting that Seddon's assurances were at times confusing. For example, he 'appeared to support the principle of a reserve type of "sanctuary" for remnant indigenous people, flora and fauna to live by traditional means while at the same time promising Government assistance with programmes for developing the district'.[261] We note that the Premier encouraged tourism but also expected other forms of development to be compatible with what was being preserved. Most importantly (since gold would prove to be a mirage) he saw economic potential in pastoral farming. The land was not suitable for the

256. 'Urewera Deputation, Notes of Evidence', p 14 (Marr, Report Document Bank (doc A21(b)), p 178)

257. 'Urewera Deputation, Notes of Evidence', pp 34–35 (Marr, Report Document Bank (doc A21(b)), pp 198–199). The reporter for the *New Zealand Times* reported 'fair and partial and paternal' as 'fair and impartial and paternal': *NZ Times*, 9 September 1895 (Marr, Report Document Bank (doc A21(b)), p 255). Either version could be correct. If connected to the word 'fair', 'impartial' seems more likely. If connected to the word 'paternal', 'partial' (loving or favouring) seems more likely.

258. 'Urewera Deputation, Notes of Evidence', p 36 (Marr, Report Document Bank (doc A21(b)), p 200)

259. 'Urewera Deputation, Notes of Evidence', pp 36–37 (Marr, Report Document Bank (doc A21(b)), pp 200–201)

260. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 183

261. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 69

kind of 'close' settlement wanted for Europeans, but – with the benefit of roads – he thought some of it could be developed by the people themselves for sheep and cattle farming.[262] At the end of the hui, Wi Pere suggested that money be given to help the committees develop their land for farming, in the same way the Government was helping out the Bank of New Zealand.[263] No response was made to this suggestion. (We note here that no one seems to have mentioned the possibility of a timber industry, although it had been raised by resident magistrate Samuel Locke in 1889, and by Harehare Atarea at Galatea in 1894.[264])

(iv) *Roads*

In Seddon's understanding, an agreement to roads had been part of what Carroll had negotiated with Te Urewera leaders earlier in the year.[265] Now, the leaders wanted roads to facilitate tourism.[266] Although they had not asked for it, Seddon told them he would now withdraw the armed forces from their district, while leaving some police to keep an eye on things.[267] The Premier thus recognised that there was still not full agreement to roads, but he believed that those who were 'farseeing' and unselfish would recognise that both Maori and settlers would benefit from the wealth generated by giving access to tourists.[268]

(3) *Was there agreement between Te Urewera leaders and Seddon?*

At the end of the hui, Wi Pere protested that the ground had been cut out from under his feet, because the Premier had agreed to everything the delegation had asked for. All that remained, in his view, was to bring in the special Bill as soon as possible, and to sort out the matters of detail.[269]

We think this is a fair assessment of the meeting, given how the proposals had been framed and Seddon's responses to them. What Pere did not perceive – perhaps because he had his own view (which was different again) – was the total disjunction between how the delegation had framed the respective roles of the people and the special commissioner in respect of land titles, and how Seddon expressed those roles in his supposed agreement to the proposal. There was in fact no agreement as to how titles should be investigated and determined, a point stressed by counsel for the Tuawhenua claimants.[270]

Other explicit disagreements seemed minor. The disagreement over who should decide about gold mining – the hapu or General Committee – was a non-event, since mining never

262. 'Urewera Deputation, Notes of Evidence', p 41 (Marr, Report Document Bank (doc A21(b)), p 205)
263. 'Urewera Deputation, Notes of Evidence', pp 55–56 (Marr, Report Document Bank (doc A21(b)), pp 219–220)
264. Miles, 'Te Urewera' (doc A11), pp 240, 262
265. 'Urewera Deputation, Notes of Evidence', p 18 (Marr, Report Document Bank (doc A21(b)), p 182)
266. 'Urewera Deputation, Notes of Evidence', p 22 (Marr, Report Document Bank (doc A21(b)), p 186)
267. 'Urewera Deputation, Notes of Evidence', p 38 (Marr, Report Document Bank (doc A21(b)), p 202)
268. 'Urewera Deputation, Notes of Evidence', p 40 (Marr, Report Document Bank (doc A21(b)), p 204)
269. 'Urewera Deputation, Notes of Evidence', pp 49–50, 54 (Marr, Report Document Bank (doc A21(b)), pp 213–214, 218)
270. Counsel for Tuawhenua, closing submissions (doc N9), pp 126–127

Seddon, the Treaty, and Autonomy: Wi Pere's Push for Legislation

Wi Pere picked up on Seddon's reference to the Treaty at the hui on 7 September 1895, and congratulated him on it, pointing out that all the matters under discussion, and particularly the 'powers' to be accorded Tuhoe committees, were part of the Treaty:

> I have felt deeply impressed by your reference to the Treaty of Waitangi to show that what they [the delegation from Te Urewera] are asking for and ask of you come within the powers mentioned in that treaty, that this was a fitting time and fitting subject in connection with that Treaty. There is another point on which I feel impressed and a feeling of sadness stole over me to think that it should be reserved for your day to consider and administer their lands in some such system as you shadowed forth. I should like you while the question is warm to introduce a Bill forthwith while Tuhoe are here so that they may take something tangible back with them, reserving it as a maori territory for the Maori people and for the indigenous birds in the interest alike chiefly of themselves and the Colony . . . I am specially gratified at the suggestion of the Central Committee, in fact the system of committee which has been introduced so that each hapu will have its local committee and from that local committee will be formed a General Committee and that Committee will stand between the Gov't and the minor Committees in regard to the local matters and I think that Committee will be of great assistance to the Government in advancing the interests of the people. If you can give effect to all these proposals in a Bill, if you can bring down a Bill that will do all this for Tuhoe that we have discussed you may rest assured Tuhoe will never forget you. But if it is not lasting: if what we have said today is not lasting and not completed by legislation and completed as agreed then Tuhoe will forget you.[1]

1. 'Urewera Deputation, Notes of Evidence', pp 51–52, 53 (Marr, report document bank (doc A21(b)), pp 215–216, 217)

transpired in Te Urewera. What it underlined, however, was that almost nothing had been specified about the roles and powers of the committees. There was broad agreement that they were to manage land as well as all hapu and tribal affairs, and to advise the Government on those affairs. There was as yet no explicit talk of 'local government', which came later. But Edwards and Marr drew our attention to an editorial in the *New Zealand Times* of 9 September – the day it published its account of the meeting.[271] The editor saw the agreement of 7 September as similar to Sir George Grey's arrangements (see ch 3), and as the safest way to provide what Kotahitanga wanted:

271. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 186–187; Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 56

> It is the best antidote to the Home Rule policy now advocated by many of the most thoughtful of the Maori leaders. And it is so because it is a real 'Home Rule' policy, which gives the Natives the maximum of local self-government with the minimum of local friction.[272]

An article in the *New Zealand Herald* of the same date also saw the arrangements as self-government: 'they [the delegation] desired to set up committees to govern their own internal affairs' – a proposal to which the Premier had consented.[273]

What did Seddon mean, when he said that 'all power' in the district would be given to Tuhoe to manage affairs within their boundary? Ms Marr concluded that:

> Seddon's promise regarding local self-government was certainly regarded as marking a distinct milestone in government concessions to Maori self-government . . . this was recognised by Wi Pere (a Kotahitanga supporter) and the liberal newspaper the *NZ Times* in its report of the meeting of 9 September 1895. . . . This report was not rescinded or contradicted by Seddon or the government and in fact, after it appeared, Seddon reaffirmed his commitment to 'local government' for Tuhoe in a later meeting of 24 [actually 23] September 1895.[274]

For those proposals that had been agreed between the parties, the detail still had to be worked out.

(4) *23 and 25 September 1895: a second meeting between Seddon and the Urewera delegation, and the Premier's key memorandum*

The next stage in the discussions between the delegation from Te Urewera and the Crown would culminate in a crucial document issued by the Premier, setting out the Government's understanding of what had been agreed. We discuss the memorandum in detail in this section.

The written sources about this important phase in the negotiations are sparse – a cause of some frustration to us now. There were a number of meetings and discussions between the Government and the Urewera delegation, as Marr and Edwards have outlined. As noted above, we have virtually no information on the negotiations between Carroll and the delegation, prior to their presentation of joint proposals to the Premier on 7 September. By the end of that hui, Te Urewera leaders had said very little. Carroll had presented the proposals that he and the delegation had agreed upon, and then Seddon had talked at great length for the rest of the meeting (which lasted three and a half hours). At the end of the hui, Te Maronui, one of the Ngati Manawa delegates, told the Premier that they would like a chance to reply to him on the matters that had been discussed. There were more speeches

272. *NZ Times*, 9 September 1895 (Marr, Report Document Bank (doc A21(b)), p 259)
273. *NZ Herald*, 9 September 1895, (Marr, Report Document Bank (doc A21(b)), p 257)
274. Cathy Marr, 'Answers to questions of clarification', May 2004 (doc D11), pp 12–13

at the Premier's residence afterwards, and also when the delegation visited the Governor on 9 September. These speeches were either not recorded or reported only very briefly in the newspapers.[275]

The next major meeting occurred on 23 September (the Premier had not been present at their meeting with the Governor). There may have been other discussions in the meantime. Work must have begun on trying to flesh out the broad and very briefly defined agreements that had been reached on 7 September.

The only surviving account of the 23 September meeting is a brief report in the *New Zealand Times*. This time, Wi Pere acted as spokesperson for the delegation, with Carroll as translator. The reported speeches focused on new matters which had not been raised at the 7 September meeting. First, the delegates wanted the Government's help to construct breeding establishments for exotic fish, which the people would be taught to manage, and breeding places for game birds.[276] (Seddon later explained this as a request both for new sources of food and for game species to attract tourists.[277]) Secondly, they asked for responsibility to maintain the roads in their own areas – it is not entirely clear, but this appears to have been a request for paid work on their own sections of the roads. The delegation also wanted a draft Bill or 'the headings' of such to take back to their people for consultation, and for Wi Pere and Carroll to visit Te Urewera and explain it to the people. In his reply, Seddon agreed to these new requests.[278]

The Premier made three further points that we need to note:

- he reiterated his view that the commissioner would decide hapu boundaries;
- for the first time, he used the term 'local government' in reference to the committees; and
- he told the delegation he was planning to 'embody in the measure some portions of Mr Wi Pere's Bill', after having gone into it carefully.[279]

This latter point raised the possibility of extending the committee system to lands that had passed the court, which was the subject of Pere's Bill (see box); but, as Edwards noted in her report, no part of Pere's Bill was included in the Urewera legislation.[280]

The meeting was followed two days later by the drafting of one of the most critical documents in our inquiry. Seddon wrote a memorandum setting out what the Wai 36 Tuhoe claimants called a 'Heads of Agreement'. According to the claimants, it captured some of the broad principles of agreement.[281] This memorandum was later attached to the Urewera

275. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 55–58
276. *NZ Times*, 24 September 1895 (Marr, Report Document Bank (doc A21(b)), p 267)
277. Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, Second Schedule
278. *NZ Times*, 24 September 1895 (Marr, Report Document Bank (doc A21(b)), pp 267–268)
279. *NZ Times*, 24 September 1895 (Marr, Report Document Bank (doc A21(b)), pp 268–269)
280. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 179–180, 189–191
281. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 86

Wi Pere's 1894 Bill: The Replacement of the Native Land Court by Committees

The Native Lands Administration Bill 1894 sought to repeal the Native Land Court Act 1886 and its amendments and all other Acts 'that affect Natives and their property'. Its main feature was that all Maori land that had been investigated as to ownership would be administered by elected, seven-member, Block Committees. The land subject to the Bill's provisions included land held by Maori in fee simple and 'all Maori land held by Maori under any title whatsoever issued to them under any Act'. A District Committee, constituted under the Native Committees Act 1883, would investigate title to customary land, and would also determine the respective interests of owners (so that profits could be paid out) where a Block Committee and owners could not agree on that matter. Alienation of land could be effected where owners agreed, and would be administered by a Board of five members (three Maori and two European) nominated by the Kotahitanga and appointed by the Governor. A Block Committee could mortgage land to the Government, if a majority of owners consented, and the Block Committee or the Board would manage farming operations with the revenue going to the Board until any mortgage was repaid. Rates, at half the rate per acre of European-owned land, would be due only when all borrowed money had been repaid.[1]

1. Edwards, 'The Urewera District Native Reserve Act 1896, Part 1: Prior Agreements and the Legislation', (doc D7(a)), p 190

District Native Reserve Act as a schedule to ensure that no part of the agreement was left out of the Act. (We have reproduced the Act and Schedule as an appendix to this chapter.) The memorandum, written in the form of a letter to the delegation, was composed in English then translated into Maori.[282] Marr noted that Seddon had multiple copies of the letter made for the chiefs to take back to their district for consultation. In subsequent months several hui were held to discuss the proposals.[283]

According to Carroll, Seddon's letter to the delegation perhaps best represented the Government's understanding of what was agreed and what it therefore proposed to implement. He told Parliament, when introducing the Urewera District Native Reserve Bill:

> the Hon the Premier wrote them [the delegation] a memorandum, which is referred to here, setting forth the lines upon which the Government were agreeable that legislation should be carried out. The lines embodied in that memorandum have been closely adhered to throughout every clause of the Bill from beginning to end.[284]

282. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 60; Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 165
283. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 64
284. James Carroll, 24 September 1896, NZPD, 1896, vol 96, p 158

The memorandum put the stamp of Seddon's officials on the agreement, in Cathy Marr's view. In seeking advice on practical aspects of carrying out the broad principles, the Premier must have given officials a chance – in her view – to 'claw back' some of what Maori had gained.[285] In drafting the memorandum, we note that Seddon characterised what the delegation had requested in terms of his own views (not necessarily theirs). Having studied the minutes of the 7 September hui closely, it is our view that the Premier did read down or modify some of the proposals that had been put to him.

(a) ***Creation of a reserve:*** This most fundamental of the proposals was not mentioned in the memorandum. The closest statement was that the '*rohe-potae* of the Tuhoe land' would be 'permanently determined', defined by a commissioner with the aid of the trig survey.[286]

(b) ***Title determination:*** A commissioner would 'inquire into the title of the persons owning land', determine hapu boundaries, record his decisions in writing, and mark the boundaries using a sketch plan or a full survey, depending on what the owners wanted. The commissioner had to pay 'due consideration to Native manners and customs', and blocks were to be hapu blocks. Seddon added an unexpected rider: 'In dealing with the title of a person and his family they must be deemed to be joint tenants.'[287] Marr noted a tension in how Seddon referred to title, which he evidently saw as existing at both the hapu and individual level. She commented that joint tenancy may have been supposed to prevent fragmentation and thereby 'protect land in hapu or family control'.[288] Edwards agreed with Marr that land titles under the agreement were supposed to be hapu titles.[289] Counsel for the Tuawhenua claimants noted that Seddon saw the commissioner as an adjudicator, which was not what had been intended by the delegation of Te Urewera leaders.[290] We agree with that submission, but note that the Premier had now presented his differing view at least three times: on 7 September, on 23 September, and now again on 25 September. The question was: whose view would prevail in the legislation that followed? We note here that it was not a straight victory for either side, as we shall see in the next section.

(c) ***Committees:*** After title investigation, the 'Maoris who are in a block of land *belonging to a hapu* may elect a Local Committee' (emphasis added). The committee was to have a maximum of seven members. It was to administer the land on behalf of the owners. Each

285. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 62
286. Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, Second Schedule
287. Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, Second Schedule
288. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 61
289. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 196; counsel for Wai 36 Tuhoe, closing submissions in reply, 9 July 2005 (doc N31), p 18
290. Counsel for Tuawhenua, closing submissions (doc N9), pp 114–115, 119–121

Defining the Boundary of Te Rohe Potae

In the discussions of September 1895, and in the Bills of 1895 and 1896, the question of how to define the external boundary seemed to seesaw between setting it out in the legislation or appointing a commissioner to define it. The claimants and the Crown have not made submissions on this point. In response to a question from counsel for the Tuawhenua claimants, Professor Judith Binney argued that the point was irrelevant.[1] It appears to us that a major question – whether the Te Whaiti lands would be included – had already been settled amicably between Carroll and the tribes before 7 September. But there was also the question of Ngati Kahungunu interests. An investigation by a commissioner – if, as the delegation asked, it was done together with hapu – might well have resulted in informal discussions at Lake Waikaremoana and elsewhere as to whose interests were to be included in the reserve, and how those interests were to be protected. On the other hand, the naming of the boundaries in the 1896 Bill, some four months before the legislation was enacted, did give time for Ngati Kahungunu to be notified that land in which they claimed rights was to be included in the reserve. We agree with Anita Miles that James Carroll and Wi Pere 'would have been aware of Ngati Kahungunu interests in the matters under negotiation'.[2]

1. Judith Binney, 'Statement in Response to Questions of Clarification of the Tuawhenua Claimants' (doc M19), p 12
2. Anita Miles, 'Summary and Response to Issues of "Te Urewera" (Wai 894 R01, doc A11)', (doc D5), para 18

local committee 'or hapu' would elect one of their members to a General Committee, which was to 'deal with the tribal lands'. According to Seddon, the delegation had asked that the General Committee's decisions be binding on 'the Local Committees and hapus', but what he agreed to was that its decisions would be communicated to the local committees 'for their guidance'. On the matter of gold, the Premier preferred to deal with the 'hapu owning the land in which gold is found', not the General Committee.[291] Thus, the only matters specified for the committees were land management. There was no mention of 'local government' or of the power to manage 'tribal affairs', or even what Seddon had mentioned on 23 September – that the General Committee would represent the tribe in communications with the central Government.[292] The Premier did, however, note the chiefs' acceptance of

291. Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, Second Schedule
292. *New Zealand Times*, 24 September 1895 (Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 59)

the Government's authority: 'you acknowledge that the Queen's mana is over all, and that you will honour and obey her laws'.[293]

(d) ***Social assistance:*** Schools would be built 'forthwith', and Maori would be given sections of the roads to build and maintain. To provide additional food and a tourist attraction, Maori had requested that arrangements be made to introduce English birds and fish. Seddon committed to a single practical act: to ask the curator of the Masterton fish ponds if trout could be supplied for Te Urewera, and to get information as where and how best to establish trout in their waters. He also assented to the 'request that your forests and birds should be suitably protected', without specifying how.[294] Some (but not all) of the general principles – summarised above in our discussion of the 7 September hui – were captured in the way Seddon recorded the delegation's requests on these matters, but here, as with self-government, he did not offer much.

(e) ***Conclusions about the Premier's memorandum:*** Overall, this document committed the Government to:

- 'permanently' defining Te Rohe Potae;
- instituting an alternative form of title investigation in the person of a commissioner;
- determining title on the basis of sketch maps, unless the owners wanted a full survey;
- listing all individual owners but essentially defining title at a hapu level and treating hapu as the owners of the land; and
- giving powers of land management to elected hapu/block committees, overseen and guided by a General Committee representing all the hapu.

The Government would also build schools and roads *(*using Maori to build the roads*)*, look into supplying the district with exotic fish, and 'protect' the forests and birds. At the same time, the peoples of Te Urewera were understood to be accepting a commissioner and colonial land titles, schools, roads, the admission of tourists to their district, and the authority of the Government and its laws. Both sides, it was understood, had made concessions.

How far did the memorandum reflect the agreement of 7 September? Counsel for the Tuawhenua claimants submitted that it had missed out some key things that had been agreed on that date, failed to foreshadow things that Seddon would later put in his Bill, and distorted the matters that it did cover. She concluded: 'Seddon had resiled from almost every one of the agreements reached in Wellington.'[295] We think this overstates the position. Some of the broad principles were captured in the memorandum. Some do have Seddon's slant, in that they are put differently from Carroll's representations on behalf of

293. Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, Second Schedule

294. Seddon to 'the persons who came hither to represent Tuhoe', 25 September 1895, Urewera District Native Reserve Act 1896, Second Schedule

295. Counsel for Tuawhenua, closing submissions (doc N9), p120

the delegation. Other matters are either missing or notably narrower in their compass. We accept that a number of matters were put in the Bill a month later (October) that had not been mentioned before, either in the discussions (as recorded) or in this memorandum. We will return to this point below. But, in our view, the agreement cannot be confined to the wording of the Premier's memorandum. Despite what Carroll told Parliament, the 1896 Bill did not follow it slavishly. Moreover, as the Crown noted, the Premier had the 'minutes and notes of the 7 and 23 September meetings translated and sent to the communities as well'.[296] In our view, the full range of what had been discussed and agreed can only be appreciated by having regard to the accounts of the 7 September meeting (in particular) together with the 23 September meeting and Seddon's memorandum.

We turn next to consider the full nature and content of the September 1895 agreement.

(5) *What was the content of the September 1895 agreement?*

The claimants and the Crown considered what the Government had agreed to over the month of September. The claimants, putting together the discussions of 7 September and 23 September with Seddon's memorandum of 25 September, argued that the Government had agreed to deliver on the following matters:

- A legally recognised reserve within which land ownership would be settled outside of the Native Land Court system, in accordance with Tuhoe customs and at no cost to the people.
- An unspecified form of title at a hapu level not individual title.
- Self government within the reserve through the establishment of tribal committees.
- No imposition of costs for the triangulation surveys and no need for costly subdivisional surveys of lands within the reserve.
- A package of assistance to improve the general welfare of Te Urewera people, including schools, medical assistance, sanitary measures, improved methods of cultivation, etc.
- The protection of native birds, flora and fauna.[297]

The Wai 36 Tuhoe claimants relied on the conclusions of Cathy Marr:

> There would be legislative protection for the Urewera district or reserve, that ownership would be determined by means other than the Native Land Court at no cost to the people and acknowledging hapu authority. It was also agreed that the chiefs and people would retain a significant degree of control and management of their own district expressed variously as 'local government' or 'home rule'. Of great significance to later events was the clear

296. Crown counsel, closing submissions (doc N20), topics 14–16, p 21

297. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 44. The claimants included the exclusion of gold prospectors from Te Urewera as part of the agreement, but we do not consider this a material point (because gold was not an influential factor after the mid-1890s, and none of the discussions about it were ever put to a practical test)

understanding, in accordance with Tuhoe's consistent wishes, that land title was not to be individualised but to be dealt with at a hapu level.[298]

The Crown's view of what it called the 'broad' principles of agreement was based on the evidence of Anita Miles, and was much the same as that put forward by Tuhoe (as quoted above).[299] Based on Edwards' evidence, the Crown argued that there was little or no real change between what had been proposed on 7 September and what had been summarised by Seddon on 25 September.[300] But in terms of the 'set of principles that had to be worked into legislation if the government was to be able to give them effect', the Crown's adoption of the evidence of Ms Miles meant its position was so close to that of the claimants that we can say the parties seemed in virtual agreement on this question.[301] We quote at length from the Crown's submission to show how close the parties seemed to be on this point:

> Miles pinpoints the letter from Seddon to the Urewera chiefs on 25 September 1895 as confirmation of the agreement reached. She articulates this as an agreement at the principle level. The main principles agreed were in respect of: '. . . legal definition of the Urewera district; the determination of ownership with regard for native customs and usages with the aid of a commissioner; that land ownership and land boundaries would be determined at the hapu-level; that only sketch plans of the hapu blocks were necessary; the provision of local self-government through the provision of committees established to administer hapu lands (for example, to administer any goldfields within their blocks) and manage tribal affairs; that the General Committee's decisions would be binding on the block committees.'
>
> She emphasised the importance of Seddon's acknowledgement of the need to provide for the appointment and powers of the committees in future regulations.
>
> At a broad level, Miles argued that the agreement constituted an acknowledgement by the government that the district was a 'Maori district'. In this context, the district was to be reserved 'in order to protect the people, the forests, flora and fauna'. There were also several important acknowledgements. These were that legally-recognised ownership was important to protect the land, governance structures were required to manage the lands and affairs of the owners, Te Urewera was unsuitable for widespread settlement purposes, Urewera Maori needed development assistance (roads, more food sources, some agricultural advice, schools, better health), and the potential for economic development existed in the form of minerals, timber and tourism. She noted an expectation of further negotiations on the implementation of the agreement.[302]

298. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 85
299. Crown counsel, closing submissions (doc N20), topics 14–16, pp 19–22, 28–29
300. Crown counsel, closing submissions (doc N20), topics 14–16, pp 20–22
301. Crown counsel, closing submissions (doc N20), topics 14–16, pp 19–22
302. Crown counsel, closing submissions (doc N20), topics 14–16, pp 19–20

Despite this submission, which appeared to create significant agreement between the parties, the Crown took a much narrower view of what Seddon had actually promised to deliver in concrete terms:

> Seddon undertook to bring a bill before the House to put into effect the promises he had made in his letter to the chiefs of 25 September 1895. These were title determination through an alternative process to the Native Land Court involving hapu, no court or survey costs to be charged for title determination, and the provision of a form of local government.
>
> It was implicit that further discussions would need to be held in Wellington and in Te Urewera in order to provide detail on the specific nature of the principles agreed at the various meetings.[303]

This brief and narrow set of propositions served as the basis for the Crown's analysis of what it had actually agreed to deliver in the Urewera District Native Reserve Act.[304] It leaves many matters either unsettled or still in dispute between the parties. We turn next to the Government's translation of the September 1895 agreement into the Urewera District Native Reserve Act of 1896.

9.5.3 Was the agreement between Te Urewera leaders and the Crown given legislative effect in the Urewera District Native Reserve Act 1896?

Summary answer: *The claimants and the Crown are in broad agreement that the Urewera District Native Reserve Act captured most of the principles that had been agreed in September 1895. At the end of the year, a Bill was introduced into the House, and it was probably circulated in Te Urewera. The evidence is not certain but the historian witnesses who gave evidence agreed that some of the changes in the1896 Bill must have come from Tuhoe. A second Te Urewera delegation came to Wellington in June 1896, but it appears to have had little influence on the Bill's content. A limited number of changes were made by the Native Affairs Committee, but they were significant ones. The committee reduced the scope of alienations provided for in the Bill, taking out the power of leasing to settlers, and introducing a requirement that alienations to the Queen be carried out at the level of the General Committee. It also increased the scope for public works takings. The Bill passed through Parliament with virtually no other changes.*

As discussed above, there were seven core principles, or broad areas of agreement, that had to be given effect in the Act. The first was the creation of an inalienable reserve to protect not just the land but also the natural resources and the customs and way of life of the Maori people. This principle was well understood in Parliament, which accepted it on the basis that the district was useless for European settlement but could be useful for tourism and mining.

303. Crown counsel, closing submissions (doc N20), topics 14–16, p 21
304. Crown counsel, closing submissions (doc N20), topics 14–16, p 28

9.5.3

There were, however, some important qualifications. The first of these was a power to alienate land to the Queen. The claimants accepted that this power (vested in the General Committee) was sufficiently circumscribed and was not a significant violation of the agreeement. We agree. Secondly, the power to lay out roads in the reserve came with no explicit protections, but roads had been agreed to in September 1895, and seemed likely to come under the local government powers of the General Committee. On that understanding, the roading provision was not unreasonable. Thirdly, the Crown was vested with power to take land for other public works. This had not been discussed and agreed with the delegation from Te Urewera, which it should have been. However, one of the two specified public purposes for which land could be taken (tourist accommodation) was an agreed purpose of the Reserve. For any taking, compensation would have to be paid, and there was to be a cap on takings of 400 acres, after which the consent of the General Committee was required.

The second broad principle was the exclusion of the Native Land Court from the reserve, and the establishment of an alternative process to create State-recognised land titles. The Act provided a compromise between the views of Seddon and of the delegation, as they had been articulated in September 1895. A seven-person Commission (five Tuhoe, two Europeans) would adjudicate titles, with input from the people and in accordance with Maori custom. Carroll believed this would place control of title determination in the hands of the owners. We accept that this may have been a reasonable compromise, given Seddon's view that a single commissioner should adjudicate. Everything would depend on how it worked in practice, which will be examined in chapter 13. Ngati Kahungunu claimed they were disadvantaged by the specification that the owner representatives on the Commission be Tuhoe. We agree that a district-based system of electing commissioners might have been more appropriate, but note the evidence of the Ngati Kahungunu claimants' historians that no actual prejudice followed. We also note that the Urewera Commission was supposed to stop after the initial title determination, and that the Act made it possible for the Native Land Court to take over at that point, and to determine successors. This provision was against the known wishes of the owners, who should have been empowered to regulate their own shareholdings through their committees.

The third principle agreed in 1895 was that land titles would be awarded at a hapu level. Section 8 of the Act, however, required the commissioners to list all owners in a block, then group them into families and define not only each family's share of the block but also each individual's share. The Crown defended these more detailed requirements on the basis that owners had to be identified to elect committees; their relative shares had to be identified so that any proceeds from the land could be distributed; and key powers of ownership (such as the power to alienate) rested with the General Committee, not individuals. We accept that electors had to be identifed. We also accept that they could not exercise all the powers of owners. But what was created, in effect, was a virtual individual title, established on paper but never resulting in title to specific lands on the ground. Thus, under the Act, hapu would remain in actual

possession of the lands, but individuals with relative shares had to be listed, and this created an opportunity for the Crown later to purchase them. There was no need for this determination of relative shares – the hapu committee should more properly have had the role of deciding how to use (or apportion) any proceeds from the land. We agree with counsel for Ngati Whare that the 'allocation of interests down from a hapu to a family to an individual level, irrespective of the governance mechanisms in the Act, contained within it seeds of radical individualisation'.[305]

The fourth principle was that the peoples of Te Urewera would be self-governing by means of committees. Here, the principal problem with the Act was that the Government claimed to have allowed full self-government (characterised by some as Home Rule), yet the Act specified almost no powers for the committees. The Crown was left to do that later, by means of regulations. In Parliament, Carroll explained the Government's intention to have these regulations drawn up by the seven-member Urewera Commission, which would have given Tuhoe a significant role in defining the functions and powers of the committees. Also, we are convinced by Seddon's many statements, both before and during the parliamentary debate on the Bill, that he intended to fulfil the 1871 promises of Donald McLean, and that he intended to honour the Government's commitment to provide self-governing powers for the committees. We do not accept that Tuhoe were deceived on this point, as was claimed at the time (and by some witnesses in our inquiry). Rather, the peoples of Te Urewera were entitled to trust in the good faith of the Crown.

The fifth principle of the 1895 agreement was that the peoples of Te Urewera acknowledged the Queen and the Government and would obey the law. This principle did not need to be specified in the Act, although it is implicit in its provisions.

Finally, there were two broad areas of agreement in 1895 about social and economic development. These related to the Urewera delegation's acceptance of development – in the form of roads, tourism, and other possibilities – and the Government's undertaking to protect their interests and (as they requested) provide social and economic assistance. None of this was specified in the Act, other than the provision for roads. The Crown argued before us that it had agreed to very little in concrete terms, and that everything it had agreed to could be delivered under existing laws or policies. We accept that the details of the 'package' did not have to be specified in the Act for the Crown to be obliged to deliver them. We also accept that the details had not been agreed. Carroll had been more expansive, Seddon more restrictive. Health, education, and the increase of food supplies were (at a minimum) agreed as areas for Government assistance. In our view, it would have been reasonable for the Government to have assisted with farming, as Carroll seemed to anticipate (and as the Liberals were prepared to do for settlers). But full agreement still needed to be negotiated between the Crown and the General Committee on these matters.

305. Counsel for Ngati Whare, closing submissions, (doc N16), p 60

9.5.3

(1) *The introduction of the UDNR Bills into the House*

In the Crown's submission: 'The test for the Crown is whether it translated the agreed principles into the legislation, and whether in implementing the Act it derogated from those key principles.'[306] We deal with the first part of this test in this section. The second part of the test is addressed in chapter 13 (dealing with the Urewera Commissions) and chapter 14 (dealing with governance bodies and Crown purchasing in the reserve).

Counsel for the Wai 36 Tuhoe claimants acknowledged: 'At a broad level the Act was generally consistent with most of the measures sought by Tuhoe in the negotiations leading up to the Act.'[307] But, according to the claimants, the Act had some key differences from the September agreement:

- it allowed alienation of land;
- it gave the Crown power to take land for public works;
- it failed to 'provide for any of the promised development package'; and
- it changed the concept of hapu ownership to individual shareholdings.

This final change was, in the claimants' view, 'the single greatest feature of the Act to undermine the understandings of Tuhoe.'[308] In addition, the Act had a key weakness: it lacked detail on so many key issues, including the powers of 'local government' and the General Committee, that it may or may not have granted what it said it did.[309] These are the claims which we explore in this section.

At the end of October 1895, Seddon introduced the Urewera District Native Reserves Bill into the House. The Urewera delegation had left Wellington at the end of September. Its members are unlikely to have had any role in the formulation of this Bill. The Premier brought it late in the session, not expecting to pass it but wanting to have it translated and sent to Te Urewera for consultation. We have no direct evidence that this occurred, but Cathy Marr thought it 'possible'. It seems to us that some of the changes in the new Bill in 1896 must have been the result of requests from Te Urewera. Cecilia Edwards analysed the differences between the 1895 Bill and the revised Bill that had its first reading in June 1896, concluding that the some of the changes were, by their nature, likely to have been made 'in favour of Tuhoe requests'.[310] Binney agreed that the changes were probably suggested following several hui during the summer.[311]

The Government funded a further Urewera delegation to travel to Wellington in June 1896 to see the passage of the revised Bill through Parliament. Its members included Hetaraka Te Wakaunua, Te Makarini Tamarau, Mehaka Tokopounamu, Te Tuhituhi Pihopa, and

306. Crown counsel, closing submissions (doc N20), topics 14–16, p 6
307. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 87
308. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 87
309. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 87
310. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 207
311. Judith Binney, 'Statement of Judith Binney in response to Crown questions of clarification', 18 February 2005 (doc L27) p 27

Tutakangahau's son, Tukua Te Rangi.[312] We do not know whether it included Ngati Whare and Ngati Manawa representatives, as the 1895 delegation had done. We do know that Ngati Whare's leader, Wharepapa Whatanui, had written to Seddon in October 1895, informing him that his people 'very much approved' of the September agreement.[313] In any case, there was a four-month delay before Seddon finally met with the delegation on 8 September 1896.[314] The main reported topic of discussion at the meeting was the recent death of Kereru Te Pukenui. A further meeting was promised at which details of the Bill could be discussed, although no record of such a meeting has been found.[315]

On 10 September, the Bill was referred to the Native Affairs select committee, of which Seddon was a member, and the opportunity for Te Urewera leaders to give evidence at this committee may have removed the need for further discussions. Unfortunately, most papers relating to the workings of the select committee and the drafting of the 1896 Act appear to have been lost, probably in the fire which destroyed Parliament in 1907. The workings of the committee also went unreported in the press.[316] When Carroll introduced the Bill at its second reading, he informed the House:

> We took evidence from the Natives themselves, and found that it would meet the general wish of the tribe if we conceded to them some form of local government by which they can administer their own affairs within a prescribed circle.[317]

It is not clear whether this refers to the Native Affairs Committee or the meetings in 1895, but Wi Pere also implied that the delegation had had direct input to the Bill, presumably at the select committee stage:

> I have already told you yesterday that the Tuhoe themselves struck out certain clauses in that Bill. They insisted that the power of leasing should still be left open, because they thought that perhaps in future they might find a payable goldfield there.[318]

The Tuhoe delegation was clearly not able to rewrite the 1896 Bill. Cathy Marr has noted that we have no firm evidence on what the 1896 delegation understood the Bill's provisions to mean, how far they had input to them, and whether their views were reflected in amendments.[319] If this was the main opportunity for the delegation's input to the Bill – as it seems to have been – we can say only that few changes resulted.

312. Binney, 'Encircled Lands', vol 2 (doc A15), p 202
313. John Hutton and Klaus Neumann, 'Ngati Whare and the Crown, 1880–1999', 2001 (doc A28), p 113
314. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 207
315. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 79–80
316. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 80–81
317. NZPD, 1896, vol 96, p 158
318. NZPD, 1896, vol 96, p 192
319. Cathy Marr, 'Answers to questions of clarification' (doc D11), pp 16, 17–18

The Native Affairs Committee's Changes to the 1896 Bill

The Native Affairs Committee made three significant changes to the 1896 Bill:

- it removed the power of leasing directly to private settlers from the Bill, so that alienation could only take place to the Crown;
- it inserted a new clause (clause 20A in the Bill, section 21 in the Act), specifying that alienations to the Crown had to be carried out at the level of the General Committee; and
- it amended the public works section (clause 22 in the Bill, section 23 in the Act). The original clause was a very limited one, providing for the Government only to take land for accommodation houses. The committee extended this to include 'camping grounds for stock', and any other 'purposes of public utility' at all. It did not, however, change the maximum amount of land (400 acres) that could be taken without the consent of the General Committee. The original clause provided for the taking, without consent, of four blocks of up to 100 acres each (for the accommodation houses). The committee removed the requirement that the land be taken in four blocks, but kept the maximum of 400 acres in total.[1]

1. The Urewera District Native Reserve Bill, as reported from the Native Affairs Committee, 18 September 1896 (Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), app)

The Native Affairs Committee made three changes to the Bill, and no clauses were actually struck out.[320] So Wi Pere may have had in mind the 1895 Bill, which had been more fundamentally revised. Nonetheless, there was agreement among Carroll, Wi Pere, and almost all other members that the 1896 Bill faithfully represented both the wishes of the tribe and the promises and agreements made by the Premier in 1895. Some members of the Opposition, including Hone Heke, argued that, even so, the Bill would not deliver what Tuhoe wanted; the tribe had been deceived.

(2) *The Urewera District Native Reserve Act 1896: key provisions*

(a) *Creation of a reserve:* The Urewera District Native Reserve Act created a permanent reserve of some 650,000 acres. One of the key issues to consider is: what was the Act intended to reserve? First, it reserved the land permanently for its Maori owners. In Parliament, the Government emphasised the unsuitability of the district for settlement, combined with its natural tourist attractions. Secondly, it was supposed to reserve these 'natural beauties', the forests, and the birds of Te Urewera. Thirdly, it was supposed to create a reserve for the Maori people, their customs, and their way of life. For some of the

320. Urewera District Native Reserve Bill 1896, as reported from the Native Affairs Committee, 18 September 1896, reproduced as an appendix in Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a))

Self-determination

In the Legislative Council, the Urewera District Native Reserve Bill was introduced by the Honourable W C Walker, Minister of Education. He told the council: 'in short, the design of the Bill is that these people might be allowed to work out their own destinies very much in their own way, and the measure simply provides the necessary machinery for the purpose.'[1]

1. W C Walker, 29 September 1896, NZPD, 1896, vol 96, p 262

settler members of the House, this was related to the idea that Te Urewera would be a resort for tourists, who would view New Zealand in its original state – people as well as scenery.[321] As Cathy Marr put it, the Act was intended to create a 'living museum'.[322] While the peoples of Te Urewera would have found offensive the idea that they were 'curiosities', the important thing for them was Parliament's explicit recognition that they, their customs, and their way of life would be protected and preserved. This sat uneasily alongside statements in the House that European 'civilisation' would also be promoted in Te Urewera, especially through schools. But it was nonetheless a core part of the agreement, reflecting what had been proposed (and assented to) on 7 September. We agree with counsel for Nga Rauru o Nga Potiki that the protection of the people and their way of life was a fundamental concept underlying the Urewera District Native Reserve Act, and that it was understood on both sides.[323]

How would protection be achieved? The member for Clutha, Thomas McKenzie, wanted to exclude 'direct interference' of Europeans from the reserve, so that Maori customs and way of life would be preserved.[324] Parliament was not willing to go that far. But, in the Legislative Council, the Minister of Education said that the Government was going to 'go very much further than any other legislation has done in giving legal sanction to those customs and habits by putting them into an Act of Parliament'.[325] Basically, the protective powers were placed in the hands of Maori themselves. As William Jennings put it in the Legislative Council: 'it gives the Maoris the right to protect themselves'.[326] Their lands were

321. NZPD, 1896, vol 96, pp 157–159, 164, 166–167, 169, 170, 171–172, 173, 261–262
322. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 54, 107–109
323. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), pp 92, 117, 145–149
324. NZPD, 1896, vol 96, pp 171–172. We note that the premier expected that Europeans (presumably other than tourists) would in fact be excluded from the reserve.
325. NZPD, 1896, vol 96, p 262
326. NZPD, 1896, vol 96, p 262

to be inalienable, and they were to control them (and the affairs of the district) through committees with 'local government' powers.

The question of Treaty rights was raised by Hone Heke. He wanted to specify in the Act that it 'reserved to the Natives all their rights as conferred upon them by the second article of the Treaty of Waitangi'.[327] In his view, the Premier had promised this at the 7 September meeting. He tried to get an amendment inserted in the preamble that the purpose of the reserve was for:

> preserving to the Native owners the full enjoyment of their rights to the lands within the said district, and to the forests, fisheries, and other properties which they may collectively or individually possess (as provided by the second article of the Treaty of Waitangi).[328]

This amendment was rejected three times – by the Native Affairs Committee, by the House in committee, and at the third reading of the Bill. We note the significance of this rejection. Firstly, the Act without the amendment gives no explicit protection to forests, birds, fisheries, or any other property or taonga other than land, apart from what might be inferred from Seddon's memorandum (attached as a schedule). Secondly, Parliament's rejection of any reference to the Treaty meant that the Crown missed an opportunity to give it due weight.

Nonetheless, the Act created a unique Native Reserve, unlike any other in New Zealand, in which the intention was to preserve the people, their customs, their lands, and the beauty of their environment. It was the only such reserve that would actually be controlled by its Maori owners. The jurisdiction of the Native Reserves Act 1882 was excluded from Te Urewera.[329] Under that Act, native reserves were controlled by the Public Trustee and often leased to settlers. The absolute inalienability of the reserve was qualified, however, by a provision that land could be alienated to the Crown.[330] The 1896 Bill originally included two powers of alienation: an unrestricted power to alienate to the Crown; and a power to lease (which would have included direct leasing to settlers). These parts of the Bill were changed in the Native Affairs Committee, probably in response to objections from the Urewera delegation. The power to lease to settlers was removed, and the power to alienate land to the Crown was reserved to the General Committee.[331] In Parliament, Wi Pere objected even so, saying that his constituents (Tuhoe) wanted this provision struck out of the Bill. The only exception, he said, was that they wanted to be able to lease land for a goldfield if gold was

327. NZPD, 1896, vol 96, p 188
328. NZPD, 1896, vol 96, p 188
329. Urewera District Native Reserve Act 1896, section 3
330. Urewera District Native Reserve Act 1896, section 21
331. Urewera District Native Reserve Bill 1896, as reported from the Native Affairs Committee, 18 September 1896, reproduced as an appendix in Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a))

found in Te Urewera.[332] He was unable to persuade the Government that the alienation provision should be deleted.

The claimants pointed out that the power to alienate had never been discussed in September 1895. Tuhoe had wanted a 'blanket exclusion of alienations': that was the whole point of an inalienable reserve.[333] The same was true for Ngati Whare and Ngati Manawa. As Richard Boast argued, 'both groups saw the main reason for the reserve as being a means of preventing alienation'.[334] Nonetheless, the claimants accepted that the alienation provision was relatively restricted and included significant protections. Land could be alienated only to the Crown and by the decision of the district-wide General Committee.[335] This ought to have enabled the corporate tribal body to make deliberate decisions about whether to lease or sell land, if so how much and for what price, and how the proceeds would be distributed or invested.[336]

The Crown, relying on the evidence of Cecilia Edwards, agreed that alienation had not been discussed in 1895, but pointed out that it had not been ruled out either. There was what the Crown called a 'future clause' in the agreement, based on Seddon's underlying view that ownership must always carry a power to alienate, and that such a power would be wanted some time in the future.[337] The Crown agreed with the claimants that the Act was supposed to restrict alienation decisions to the 'collective Urewera leadership' to prevent 'unwanted and piecemeal alienation'.[338] The Crown did not accept, however, that provision for alienation was in itself a breach of the 1895 agreement. It was included in both the 1895 and 1896 Bills, and must have been known to the Urewera delegation of 1896. At first, there had been no restrictions or protections in the Bill. In the Crown's view, the late insertion of a requirement that the General Committee approve alienations must have been instrumental in securing the Urewera delegation's agreement.[339]

We cannot accept the Crown's argument in its entirety. Counsel suggested that the Urewera delegation must have agreed to the alienation provision, but Wi Pere stated more than once in the House that they had not.[340] We have to accept Pere's information as accurate. It was not challenged by the Government at the time. Nor do we accept the argument that because alienation was not explicitly ruled out in September, it was somehow 'left open' as a 'future clause'.[341] The whole thrust of the discussion had been the creation

332. NZPD, 1896, vol 96, pp 164, 192
333. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 48
334. Boast, 'Summary of Evidence from *Ngati Whare and Te Whaiti-nui-A-Toi: a History* (Wai 894 A27) and Response to Relevant Issues' (doc G21), para 4.18
335. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 48
336. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 95–96
337. Crown counsel, closing submissions (doc N20), topics 14–16, p 25
338. Crown counsel, closing submissions (doc N20), topics 14–16, p 69
339. Crown counsel, closing submissions (doc N20), topics 14–16, pp 28–29
340. NZPD, 1896, vol 96, pp 164, 192
341. Crown counsel, closing submissions (doc N20), topics 14–16, p 25

of an inalienable reserve, with the sole exception of mining. There, indeed, Seddon contemplated the establishment of goldfields. The power to lease land for such a purpose was clearly envisaged by both parties in 1895. Wi Pere argued that it was the only circumstance in which Tuhoe would agree to alienation. We do, however, agree with the claimants and the Crown that the power to alienate was a restricted one, vested in the General Committee and thus under the collective control of the Urewera leadership. Also, only the Crown could deal with the General Committee for land, and Seddon had assured the Urewera delegation in 1895 (and Te Urewera communities in 1894) that the Crown would act in a manner that protected their interests and provided for their long-term prosperity. We note too that the Government did not anticipate extensive alienation. From the speeches of Carroll and others in the House, it is clear that the Government truly intended to reserve the entire district for its owners.[342]

In addition to the power of the General Committee to alienate land to the Crown, the Act gave the Government power to take land for public works. Section 22 provided for roads and landing places. There was no mention of the Public Works Act or of any protections (no notification, consultation, or compensation provisions). This resembled the Crown's right under the native land legislation to take 5 percent of any block for roads. Section 23 empowered the Crown to take land for accommodation houses, stock paddocks, and any other 'public purposes'. These takings were to be governed by the Public Works Act. The specified purposes were related to tourism and the Government's expectation that farmers would in the future drive stock through Te Urewera.[343] There was, however, a unique restriction on public works takings (except for roads). The Crown could take a maximum of only 400 acres for any and all works, after which it would require the permission of the General Committee.[344]

These provisions were new. There had been no power for compulsory (or any) takings in the 1895 Bill.[345] In September of that year, the peoples of Te Urewera had agreed to roads for the purposes of communications, commerce, and the facilitation of tourism. That they took tourism seriously was demonstrated in 1901 when, once the road to Ruatahuna was finished, the people of that district began to build a model 'fighting pa' for tourists to visit and inspect. Governor Glasgow had suggested this in 1896, but it had to await the completion of the road; Tuhoe saw the pa's construction as an integral part of the 'passing of the Act'.[346] They had also asked for control of (and paid work on) sections of roads in their respective areas. The 1896 Act gave the Crown the power to make such roads. Although there was still not full agreement to roads in the district, the Tuawhenua researchers clarified that opposi-

342. See, for example, Premier Seddon's speech, NZPD, 1896, vol 96, pp 166–168
343. NZPD, 1896, vol 96, p 158
344. Urewera District Native Reserve Act 1896, section 23
345. Urewera District Native Reserves Bill 1895, reproduced as an appendix in Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a))
346. Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two' (doc D2), p 100

An Inalienable Reserve?

One of the matters that was not discussed in September 1895 was the possibility of sales in the future. Yet subsequently, section 21 was introduced in the Urewera District Native Reserve Act 1896. This raises the question why – if the agreement created an inalienable Reserve – section 21 provided for the General Committee to alienate land to the Crown.

At the first week of hearing Crown evidence, held at Taneatua School from 28 February to 4 March 2005, Cecilia Edwards was cross-examined by counsel for the Tuawhenua claimants, Kathy Ertel, on the meaning and content of the September agreement. During that discussion, Ms Edwards introduced the idea of a 'future clause' in the agreement, which was her explanation for the later introduction of section 21 in the UDNR Act:

> **Ertel:** You note that there was no discussion [in September 1895] about possible future sales of land.
>
> **Edwards:** Yes.
>
> **Ertel:** Now, could that be because that reflects the reserve status of the land, that there was to be no purchases by the Crown for Pakeha settlement because it was going to be a reserve?
>
> **Edwards:** Yes, that's highly likely, although I think Seddon always reserved this, sort of, unless the owners want it, kind of, the future clause. But, he probably also had in mind his own, if you like, possibly limited understanding of the agricultural potential of the district, based on his tour the year before. . . .
>
> **Ertel:** Yes. And, in fact, Carroll, during the [Parliamentary] Debates, refers to this district being an absolute native reserve.
>
> **Edwards:** Yes.
>
> **Ertel:** So, that further strengthens the argument that it wasn't to be purchased. Wasn't to be encroached upon by purchase.
>
> **Edwards:** I think you have to read that comment of his bearing in mind that there was still the, what became the section 21 ability of the General Committee to have the power to alienate or cede to the Crown. So . . . [it] didn't mean sealed off, perpetual, never-never-never-never.[1]

1. Transcript of twelfth hearing (transcript 4.14), pp 118–119

tion by 1896 was related to the route, not the fact, of the Ruatahuna road.[347] We think it reasonable for the Crown to have included a power to acquire land for roads, but not without consent. We are concerned that there were no restrictions or protections. But it was noted

347. Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two' (doc D2), p 18; see also Binney, 'Encircled Lands', vol 2 (doc A15), p 204

in the House that local authorities should have charge of roads.[348] So long as the General Committee was treated as the local authority for that purpose, the Act would have provided for Maori interests.

Other public works were neither discussed nor contemplated in 1895. As we said above, this was an innovation in the 1896 Bill. The Wai 36 Tuhoe claimants argued that the power itself, and the fact that it was included without their consent, was a violation of their tino rangatiratanga.[349] The Crown did not agree. Nobody else in New Zealand had a cap on the amount of land that could be taken without their consent. In the Crown's view, this was likely to have been persuasive. The Urewera delegation was 'likely' to have been consulted about this provision in 1896, and was 'likely' to have accepted it.[350] Wi Pere, as we noted above, disagreed. In his view, the only alienation power wanted by Tuhoe was the ability to lease land for goldfields. Hone Heke also criticised the provisions, arguing that they would open Maori land in Te Urewera to rates and taxation, something which had not been contemplated in the agreement.[351] As we noted above, we know that only a handful of changes were made by the Committee. These included an extension (not a reduction) of the Crown's power to take land for public works.[352]

In our view, it was not unreasonable to include provisions for public works, so long as there were appropriate protections. We note the proviso that after the Crown had taken 400 acres it would require the consent of the General Committee for more takings. We see no reason why an arbitrary figure should have been settled on. The General Committee should have consented to all takings, as it did with other alienations. Also, there was potential for the General Committee to serve as the local authority responsible for public works. But Hone Heke raised a legitimate concern about the cost of such works. If they were to be paid for by rates, he did not see how the peoples of Te Urewera could afford them.[353] It seems clear that the Crown did not envisage extensive takings of any kind in 1896, and expected that it would pay for roads itself. On that basis, so long as the people had a say in how and where the roads were built, we do not see a problem with the Act.

(b) ***Title determination:*** There had been no real agreement in earlier discussions between the Urewera delegation and the Premier on the question of how titles were to be decided, as we have pointed out. The delegation accepted the Government's main goal, which was to create a title recognised by the colonial law. Only then, the Premier had assured them, could he be certain which lands were theirs and use his powers to protect them as required by the

348. NZPD, 1896, vol 96, p 169
349. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 91
350. Crown counsel, closing submissions (doc N20), topics 14–16, p 44
351. NZPD, 1896, vol 96, pp 188–189
352. Urewera District Native Reserve Bill 1896, as reported from the Native Affairs Committee, 18 September 1896, reproduced as an appendix in Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a))
353. NZPD, 1896, vol 96, p 189

Treaty. Only then, too, could goldfields be established (one of Seddon's main hopes). The delegation had proposed an informal process by which a single commissioner would meet with the people and together they would draw up a list of all owners. After that, the hapu would decide block boundaries, which the commissioner would help them locate on a map. The Premier, however, wanted the commissioner to adjudicate and decide titles: a roving judge, rather than a mediator-facilitator of the people's own decisions.

The 1895 Bill provided for seven commissioners – five Maori, two European – to 'define the boundaries and investigate the ownership of the district, and to issue titles in respect thereof'.[354] This seems to have been the outcome of an effort, probably by Carroll, to keep Seddon's concept of an adjudicative commission, but to put it under Maori control. The commissioners were to have 'due regard to Native customs and usages', to use 'hapu boundaries' as much as possible, and to arrive at a 'just and equitable decision'.[355] Although we cannot be certain this Bill was circulated in Te Urewera, it is probable that it was.[356] In the 1896 Bill, the Government made two important changes: the commissioners were no longer to define the boundary of the district; and the five Maori commissioners were to be Tuhoe.[357]

This requirement for the commissioners to be Tuhoe is likely to have been asked for by the tribe, but we cannot be sure of that.[358] Carroll was enthusiastic about this clause. In explaining the Bill to Parliament, he said that it placed title decisions under the control of the owners themselves.[359] He thought it would ensure that Tuhoe were 'working out their own destiny'.[360] Seddon himself seems to have come around to this way of thinking. He told the House that the Bill would 'give the owners of the land – the Tuhoe – the opportunity of ascertaining amongst themselves who were the owners of the land'.[361] Thus, the Government very clearly intended the Commission to be a practical vehicle for the owners to decide their own titles. Whether it met that test will be seen in chapter 13. We note the concern of the Tuawhenua claimants that, even with a majority of Tuhoe commissioners, the decision-making would not be with hapu, as their delegates had sought.[362] Again, we will return to this question in chapter 13.

Here, we note that the seven-person Commission, with a majority of Tuhoe members, was a significant modification by the Government of Seddon's original position. We accept the Crown's submission that the Act provided for significant Tuhoe input in the process of

354. Urewera District Native Reserves Bill 1895, reproduced as an appendix in Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a))
355. Urewera District Native Reserves Bill 1895, reproduced as an appendix in Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a))
356. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 64–65
357. Urewera District Native Reserve Bill 1896, reproduced as an appendix in Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a))
358. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 206–207
359. NZPD, 1896, vol 96, p 158
360. NZPD, 1896, vol 96, p 173
361. NZPD, 1896, vol 96, p 166
362. Counsel for Tuawhenua, closing submissions (doc N9), pp 114–115, 125–126

title determination.[363] We also accept the submission of Ngati Whare that the exact process the Commission would follow (and therefore the degree of Maori involvement and control) was not 'well articulated' in the Act.[364] No one was sure how it would work. Much was left to be decided later, either by regulation or by the Commission itself. It was noted in Parliament at the time that this was experimental legislation and it was dangerous to be overly prescriptive in advance. Carroll, however, was clear that the Commission would not be a long-lived body; it would put in place structures and systems essential to the Reserve's operation and then disband:

> I may state that the Commissioners will cease to exist immediately they have performed their duties as set forth in the first instance – that is, after they have investigated the title, after they have grouped the families, after they have subdivided the country into the tribal or family estates, and after they have appointed a provisional [local] Committee. And then, after they have ceased to exist, the Act will be self-working amongst the Natives, and in their interests, assisted by the Governor in Council or the Government of the day.[365]

Nonetheless, the legislation was very specific that five of the commissioners were to be Tuhoe, and the other two were to be Europeans. In this context, most members of Parliament, including Carroll, spoke of the reserve as land belonging to Tuhoe. There were two exceptions. The Premier himself stated that the land 'belongs to these Tuhoe people and the Natives living on the lands adjoining'.[366] The member for the Bay of Plenty, W Kelly, pointed out that Maori groups who had supported and fought for the Crown had an interest in the lands. The Bill, in his view, would 'have the effect of putting the lands belonging to those friendly Natives into the hands of the Tuhoe people'.[367] Because he spoke during the third reading, which was too late to introduce an amendment, Kelly wanted the Legislative Council to change the Bill 'so that the Natives living on the boundaries may be represented on the Commission'. 'I do not think,' he said, 'the Tuhoe should be given the whip-hand of the Natives who have been so long at variance with them, and who have always fought on the European side.'[368] The Government took no notice of this suggestion. Carroll did not mention it during his reply to the matters raised in the third reading.[369] This seems particularly significant because an amendment could still have been introduced in the upper House. Carroll's evident decision to refrain from urging the claim of Ngati Kahungunu at this late stage may mean that their claims had never been considered and that he did not want to jeopardise the Bill. Why Ngati Kahungunu's claims were never considered we simply do

363. Crown counsel, closing submissions (doc N20), topics 14–16, pp 28, 46, 49
364. Counsel for Ngati Whare, closing submissions (doc N16), p 59
365. NZPD, 1896, vol 96, p 159
366. NZPD, 1896, vol 96, p 166
367. NZPD, 1896, vol 96, p 192
368. NZPD, 1896, vol 96, p 166
369. NZPD, 1896, vol 96, pp 193–196

not know. The Legislative Council did not amend the composition of the Commission, as hoped for by Kelly.

In our inquiry, Ngati Manawa and Ngati Whare did not object to the requirement that the commissioners be Tuhoe.[370] Counsel for the Wai 621 Ngati Kahungunu claimants did, however, on the grounds that it stacked the deck against Ngati Kahungunu. He submitted that Ngati Kahungunu faced a 'combined pakeha/tuhoe decision-making process', which confined them to the role of applicants – and, even worse, applicants in contest with Tuhoe. The Act should have provided for Ngati Kahungunu representation on the Commission.[371] The claimants' historians, Michael Belgrave, Grant Young, and Anna Deason, said that the composition of the Urewera Commission had the 'potential' to seriously affect Ngati Kahungunu interests, but they came to the conclusion that it did not. By the end of the second Commission, Ngati Kahungunu interests were in fact recognised in the Waikaremoana, Paharakeke, and Manuoha blocks.[372] The Crown took the same view, submitting that the real issue was therefore whether Ngati Kahungunu would be properly represented on the governing committees after they were found to be owners.[373]

The title determination provisions in the Act were a compromise between the Urewera delegation's wish for the owners to decide titles themselves and Seddon's desire for an outside adjudicative commissioner. As such, we think it right for the Act to have specified that the majority of commissioners be from among the owners, but not for it to have specified the tribal affiliation of those owners. We note that the first action taken in Te Urewera to implement the Act was to divide the district into five sub-districts and elect commissioners.[374] That, it seems to us, pointed to the solution to the dilemma. The Act should simply have provided for representation of all places (and peoples) in Te Urewera on the Commission to ensure that it provided fairly and properly for the communities of owners to be decision-makers. We accept, however, that there may have been no real prejudice to Ngati Kahungunu from the composition of the first Urewera Commission, as suggested by the claimants' historians. We leave this question for consideration in chapter 13.

In addition to the composition and process of the Commission, there was also the much-debated issue of surveys. The Act did not require blocks to be surveyed; the boundaries could be recorded on a sketch plan as 'approximately correct', and the Government would pay for the plan.[375] This was clearly in line with the 1895 agreement.

370. Counsel for Ngati Whare, closing submissions (doc N16), pp 57–70; counsel for Ngati Manawa, closing submissions (doc N12), pp 55–56

371. Counsel for Wai 621 Ngati Kahungungu (doc N1), p 23

372. Michael Belgrave, Anna Deason, and Grant Young, 'The Urewera Inquiry District and Ngati Kahungunu: an overview report of issues relating to Ngati Kahungunu: A Summary', November 2004 (doc 14), pp 7–8

373. Crown counsel, closing submissions (doc N20), topics 14–16, pp 27, 35, 37

374. Binney, 'Encircled Lands', vol 2 (doc A15), p 222

375. Urewera District Native Reserve Act 1896, section 7

The Native Land Court and the Urewera District Native Reserve

Section 3 of the Urewera District Native Reserve Act 1896 said that the Native Land Court Act 1894 would not apply in Te Urewera, except as provided for later in the Act, or in regulations made under the Act.

Sections 4 to 11 provided for a commission to decide titles (in the form of 'orders'). An appeal from the commission's order could be made to the Minister of Native Affairs, who could direct an 'expert inquiry' and either confirm or vary the commission's order. If no appeal was made, the commission's order was to be confirmed by the Governor. Once finalised, an order was registered as a certificate of ownership under the Act.

Section 12 authorised the Minister of Native Affairs, instead of dealing with an appeal, to refer it to the Governor in Council, which could confer jurisdiction on the Native Land Court to deal with it.

Under section 14, the Governor in Council could also confer jurisdiction on the court to determine succession claims, or for 'any other specific purpose relating to the said district'. This provision gave very broad scope for the court's potential role. The Act made no other provision for determining successions, or for dealing with other matters 'relating to the said district' but it was possible that the local committees or General Committee could have been given such powers by regulation. Section 15 provided that, if the Native Land Court did decide successions, the successors' titles would be registered as certificates of ownership under the 1896 Act. In other words, even if the court appointed the successors, their titles would be titles under the Urewera District Native Reserve Act, not full Native Land Court titles.

In its provision of a possible role for the Native Land Court in respect of Reserve land titles, the Act departed significantly from the 1895 agreement. Very little in the way of specific or practical detail had been worked out at the September meetings (or even in Seddon's memorandum). It seemed to be assumed that the single commissioner and the people, working closely together, would 'easily' work out the titles to everyone's satisfaction.[376] Wi Pere sounded a caution on this point. He suggested that it would be necessary for interim decisions to be reached, and then time allowed for disagreement or late claims to be worked out with the commissioner.[377] But there was firm agreement in September 1895 that the Native Land Court was not to be involved.

Seddon's first Bill, drafted in October 1895, abandoned this aspect of the agreement. It provided for the Governor in Council to 'confer jurisdiction on the Native Land Court to determine succession claims or for any other specific purpose in connection with orders

376. 'Urewera Deputation, Notes of Evidence', p 3 (Marr, Report Document Bank (doc A21(b)), p 167)
377. 'Urewera Deputation, Notes of Evidence', pp 52–53 (Marr, Report Document Bank (doc A21(b)), pp 216–217)

made by the Commissioners'.[378] The Court was not, however, expressly identified as having a role in the appeal process provided by the 1895 Bill. Rather, the Native Minister would receive an appeal, direct some kind of (unspecified) 'expert' inquiry, and then decide to confirm, vary or amend the original order.[379] Thus, the Government (in the form of the Native Minister) and the Native Land Court (if given jurisdiction by the Governor in Council) took on key roles in title determination. The 1896 Bill went further, in two respects, towards the Native Land Court having a role in the Urewera District Native Reserve. First, by clause 14 the jurisdiction able to be conferred on the Court was for succession claims and 'for any other specific purpose relating to the said district', as opposed to any other specific purpose relating 'to the orders of the Commission'. Secondly, the Native Land Court was expressly identified in clause 12 of the 1896 Bill as being able to determine appeals from the Commission's orders, if the Native Minister chose to refer appeals to the Court. Both of those elements of the 1896 Bill were enacted.

As we have noted, the debate in Parliament made it clear that the Commission was expected to have a very short life. It would do the intial title work and disband.[380] We agree that in any process designed to confer legal titles there ought to be provision for an appeal and for the recognition of successive generations. But the procedures for this should have been discussed with the owners and agreed to by them. We are not sure why the Government decided to have the owners control the task of title investigation (by a majority on the Commission), only to place all subsequent title decisions in its own hands or those of the Native Land Court. We do not think that was a fair translation of the September 1895 principles into action. We see no reason why the Urewera Commission, or some other body established by or in agreement with the General Committee, could not have continued to make title decisions for Te Urewera. The possibility of a role for the Native Land Court for title matters was against the known wishes of the owners.

(c) ***Individualisation of title?:*** Hapu titles were a key part of the September agreement, as Cathy Marr and Cecilia Edwards agreed. Thus, section 8 of the Urewera District Native Reserve Act aroused much debate in our inquiry. Counsel for the Wai 36 Tuhoe claimants suggested that the Act 'arguably changed the concept of hapu ownership in accordance with "Native customs and usages" to ownership orders which identified families and individuals and the "share" they were entitled to in each block.'[381]

Section 8 required the commissioners to make an order declaring the names of the owners of the block, 'grouping families together, but specifying the name of each member

378. Urewera District Native Reserves Bill 1895, clause 7, reproduced as an appendix in Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a))

379. Urewera District Native Reserves Bill 1895, clause 9, reproduced as an appendix in Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a))

380. NZPD, 1896, vol 96, p 159

381. Tuhoe Wai 36 closings, Part B, N8a, para 366, p 87

of each family'. After that, the commissioners had to determine each family's share of the block, and then the relative share to which each individual family member was entitled.[382] If no appeal was made to the Native Minister, the commission's order was to be confirmed by the Governor (s 9) and registered as required, at which point it operated as a certificate of ownership under the Act. If an appeal was lodged, the Minister could adopt one of two courses. He could direct an 'expert inquiry' and then make a final decision on the matter (s 10). Alternatively, the Minister could refer the matter to the Governor in Council, for it to confer jurisdiction on the Native Land Court to deal with the appeal (s 12) (see box).

Carroll explained that the certificate of ownership provided for by the 1896 Act was an 'interim' or 'provisional' title, not 'an absolute state of perfection' or a full title under the recently enacted Land Transfer Act.[383] Some members of the House understood it to be an individualised title.[384] Carroll seems to have seen it as a step in that direction. Land transfer titles were not needed because land was not to be alienated and the 'interim' title was adequate 'for the present period' and 'I dare say for a lengthened time yet to come'.[385] His hopes that the peoples of Te Urewera would 'advance' in that time and one day assume the same full responsibilities as other citizens, would seem to indicate that he anticipated a time when the 'interim' titles would be turned into ordinary land titles.[386]

How different was this from the 1895 Bill? The earlier Bill had vested the land in the block committee, declaring the committee members to be the 'owners'.[387] This clause was dropped from the 1896 Bill. Also, there had earlier been provision for family members to be joint tenants, an idea first mentioned by Seddon in his 25 September memorandum.[388] We have no concrete information as to why joint tenancy was suggested by Seddon and included in the 1895 Bill, nor why it was dropped from the 1896 Bill. The earlier Bill had provided for the commission to determine 'the relative shares of the owners, grouping family interests together'.[389] The language used in the Bill was unclear; it may or may not have required each individual family member's share to be defined. The 1896 Bill, in contrast, was much clearer.

Varying views were presented to the Tribunal concerning the interpretation of section 8 of the 1896 Act. On one side of the debate was Richard Boast, who considered this section to be unambiguous: 'The Commissioners were being required to do no more or less than to

382. Urewera District Native Reserve Act 1896, section 8

383. NZPD, 1896, vol 96, p 159. Carroll told the House that this was an 'interim' title in the same manner that titles under the Native Land Act 1873 had been, whereas, he said, the Native Land Court under the Native Land Court Act 1894 now granted full 'Land Transfer titles'.

384. NZPD, 1896, vol 96, pp 169, 170

385. NZPD, 1896, vol 96, pp 159, 195

386. NZPD, 1896, vol 96, p 159

387. Urewera District Native Reserves Bill 1895, clause 6(1) (Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), Appendix B)

388. Urewera District Native Reserves Bill 1895, clause 5 (Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), Appendix B)

389. Urewera District Native Reserves Bill 1895, clause 4(3) (Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), Appendix B)

identify the rights of every single individual of Te Urewera, or, in other words, to completely individualise title to the entire region.'[390] Cathy Marr saw the provisions as being 'capable of a wide interpretation', including something 'very close to an individual form of exclusive title such as was created by the Native Land Court, as appeared to be anticipated by a number of Members of Parliament at the time'.[391] The Tuawhenua claimants agreed with Professor Boast, submitting that 'the UDNRA compelled the individualisation of title'. It did so in part because the Act was 'the first step to enabling individuals to transact their land interests without reference to their hapu'.[392]

On the other side of the debate was Cecilia Edwards, who cited Robert Hayes' report for the Hauraki inquiry in support of her position:

> In his [Hayes'] view, the critical question is whether the title conferred a right (i.e. legal ability) on the named owners to deal with their interests without the consent of the community of owners. The certificate of ownership [under the UDNR Act] conferred no such right. The right to deal with interests was not even vested with the Local Committee, which represented the interests of the community of owners. It lay with the General Committee under s 21 of the Act.[393]

Thus, the form of title provided for under the Act was to enable the community of owners 'to elect their Local Committees, and derive financial benefits from their ownership rights'.[394] Only the General Committee had the right to deal in land interests. Crown counsel put this argument in more detail:

> The form of title under the UDNR Act 1896 was not simply a replication of Maori freehold title under the native land legislation of the time. The Act required the naming of individuals and families and definition of relative shares. The purpose of this was two fold: for electoral purposes under the local government provisions of the Act, and for the distribution of proceeds of leases and sales. The form of title, in terms of the rights that individual owners could exercise, was constrained against individual dealings of any kind. It was therefore compatible with the general principles discussed in 1895 and 1896, given that all powers to alienate in any form rested with the General Committee, and not individual owners, under s 21 of the UDNR Act 1896.[395]

390. Richard Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi: a history', June 1999 (doc A27), p 103
391. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 14
392. Counsel for Tuawhenua, closing submissions (doc N9), p 127
393. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 249, citing Robert Hayes, 'Evidence on the Native Land Legislation and Operation of the Native Land Court in Hauraki', 17 January 2001 (doc A125)
394. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 249
395. Crown counsel, closing submissions (doc N20), topics 14–16, p 51

9.5.3

Counsel for the Wai 36 Tuhoe claimants made a similar submission. He agreed with Ms Marr that the Act was unclear, but disagreed that it was intended to individualise title. Instead, he submitted that, under section 8, the interests identified were not a 'property interest' but rather an 'electoral interest' only. That interest, he suggested:

> is comparable (though not identical) to a shareholder's interest in a corporate entity which gives rise to a shareholder's right to vote and right to share in the benefits, but where there is no separate and divisible right in the property of the corporate entity.[396]

Thus, the real problem arose later when the Crown decided to 'raid' the shares.[397]

Counsel for the Tuawhenua claimants responded to Ms Edwards' argument that the Act needed to establish ownership down to an individual level to enable the community of owners to elect local committees. Counsel submitted that, for this purpose, there would be no need to determine the relative shares of each owner: 'One owner one vote, relative interest was not required for this end.'[398] We agree. The determination of relative shares was not required for an electoral roll, even though Commissioner Percy Smith later suggested that the Commission was merely creating 'electorate localities'.[399] The Commission was doing much more than creating an 'electoral college' when it defined relative shares, just as counsel for the Wai 36 Tuhoe claimants submitted.[400] Counsel appeared to blame the Commission itself for this, and for the type of orders it produced, but in our view section 8 of the Act clearly prescribed what had to be done in this respect.[401]

John Hutton, an anthropologist, commented on how the form of title created by the Act would affect Maori kin groups. He argued that the relative shares were similar to those created by the Native Land Court. This was because they existed only on paper and were not defined in terms of pieces of land (either for individuals or for whanau), and because there was no effective or flexible means of changing them for future generations.[402] The Act gave the power of deciding successions to the Native Land Court. Mr Hutton argued that the communities themselves (through their committees) should have been empowered to adjust their own shareholdings.[403] 'What was needed,' he said, 'were better mechanisms of distribution and investment within the communities of owners, and a means by which the community could self-regulate share-holding over time (as succession would always lead to problematic imbalances of shareholdings).'[404]

396. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 19
397. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 98
398. Counsel for Tuawhenua, closing submissions (doc N9), p 127
399. Miles, 'Te Urewera' (doc A11), p 290
400. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 91, 94
401. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 94
402. John Hutton, answers to Crown questions of clarification, September 2004 (doc G27), p 16
403. John Hutton, 'Ngati Whare development, 1896–1928: first summary of evidence from "Ngati Whare and the Crown, 1880–1999" (Wai 894 A28) and response to relevant issues', August 2004 (doc G3), pp 17–19
404. John Hutton, answers to Crown questions of clarification, September 2004 (doc G27), p 16

Nonetheless, John Hutton considered that because the shares were not defined in any meaningful way (that is, as pieces of land), ownership still 'rested with the higher kin-group, and not individuals'.[405] This was especially so because the power to alienate was vested in the General Committee, not the individual, thus reinforcing 'community and regional control'.[406] Counsel for the Tuawhenua claimants, however, argued that 'the Tribunal can take no comfort' from the General Committee's role, because it was not established 'in a timely and effective way'.[407] Such an argument takes us beyond the scope of the Act itself.

We are left with the question: was the provision for the Commission to determine the relative shares of individuals a 'fatal flaw' in the Act? In one sense, any listing of individuals was a potential flaw: the Crown had shown itself prepared to purchase undivided shares in the past, whether equal or relative. But the Act was clear. Only the General Committee could alienate land. So long as the Act was implemented properly, the determination of relative interests for individuals did not put ownership of land at risk. As the Crown put it, decisions to alienate would be made collectively and would not result in 'unwanted and piecemeal alienation'.[408] As the Crown conceded, however, the Act was not properly implemented. We will return to that point in more detail in chapter 14, but we cannot discount it entirely here. We agree with counsel for Ngati Whare that 'the UDNR Act was not absolutely flawed' but the 'allocation of interests down from a hapu to a family to an individual level, irrespective of the governance mechanisms in the Act, contained within it seeds of radical individualisation'.[409] We also agree with Mr Hutton that communities should have been able to 'self-regulate' their shareholdings.

(d) ***Self-government:*** The Crown and claimants agreed that the Urewera District Native Reserve Act was intended to give effect to the claimants' tino rangatiratanga or mana motuhake.[410] The vehicles for this were 'local self-government' of the Urewera district by a General Committee; hapu corporate management of their own lands through block committees; and tribal management of lands and all tribal affairs by the General Committee. Most of the detail about the role, functions, and powers of the committees was left for future definition. The Act empowered the Crown to carry out this definition by regulation. It did not provide for the committees to have any role in defining their own powers or procedures. Nor did the terms of the Act require consultation, although in our inquiry the Crown accepted the need for consultation was implicit.

405. John Hutton, answers to Crown questions of clarification, September 2004 (doc G27), p 16
406. John Hutton, answers to Crown questions of clarification, September 2004 (doc G27), p 16
407. Counsel for Tuawhenua, closing submissions (doc N9), p 127
408. Crown counsel, closing submissions (doc N20), topics 14–16, p 69
409. Counsel for Ngati Whare, closing submissions, (doc N16), p 60
410. See, for example, counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 89; Crown counsel, closing submissions (doc N20), topics 14–16, pp 34, 48

9.5.3

As we noted above, the Wai 36 Tuhoe claimants suggested there was a key weakness in the Act – it specified so little detail that it may or may not have granted what the Government said it granted. The Act was certainly striking in the number of substantive issues it left to regulation. These included 'the mode of election of members of the Local committees and the General Committee, and fixing their term of office'; the powers and functions of these committees; and additional powers and functions of the Commissioners.[411]

The number of issues left to be settled by regulation attracted criticism from Northern Maori member Hone Heke when the Bill was debated in Parliament. The Bill, he claimed, was 'simply a shadow', because the real Act would be 'entirely governed by regulations made by the Governor in Council'. The result was that the Bill was supposed to 'give the Tuhoe Natives the right to administer their properties as they think fit' but 'no such power is given'. The committees' power 'is or will be entirely limited by regulations'.[412] Cathy Marr agreed that this was a serious risk:

> The Government retained considerable powers through the regulatory provisions. These not only left the Urewera people open to the risk that new unanticipated regulations might be brought in at some future time, but if the Government failed to act to make the necessary regulations and appointments, very little could happen in the way of establishing the system provided.[413]

But there was an unwritten clause in the Act. Carroll told Parliament that the regulations would actually be drawn up by the Urewera Commission, with its Tuhoe majority. In introducing the Bill, he explained that the powers of the General Committee had deliberately been left vague:

> because it is very difficult at the present time to treat with a new thing like this, a new area under exceptional circumstances and conditions, and prescribe with any exactitude what will be absolutely necessary for the best interests of the Natives. Therefore we have left that, as far as we can, quite open, so that when the Commissioners undertake their duties . . . .it will leave them the power to suggest a set of regulations to meet every contingency, and they will be given effect to accordingly by the Governor through the Ministry.[414]

Thus, as Ms Marr put it, there would be some flexibility and 'powers could be granted as needed'.[415] In her view, the members of the delegation probably accepted the provisions because they were 'reassured by the fact that there would be a majority of Urewera people

411. Urewera District Native Reserve Act 1896, sections 5, 16–20, 24
412. NZPD, 1896, vol 96, p 163
413. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 118
414. NZPD, 1896, vol 96, p 159
415. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 102

The 'Local Government' Provisions of the Urewera District Native Reserve Act 1896

The 'local government' provisions of the Urewera District Native Reserve Act 1896 are as follows:

Preamble: 'Whereas it is desirable in the interests of the Native race that' . . . 'provision should be made for the local government of the said district'.

Section 16: The Urewera Commission will appoint a provisional local committee for each block, consisting of five to seven members, in a way to be prescribed (by regulations). Members of the provisional committees can be removed by the Governor, and vacancies filled in a way to be prescribed (by regulation).

Section 17: Provisional local committees would hold office until the election of a permanent local committee by the owners of the block (in a way to be prescribed by regulation).

Section 18: Each local committee (not specified whether provisional or permanent) will elect one of its members to be a member of the General Committee. The General Committee will deal with 'all questions affecting the reserve as a whole, or affecting any portion thereof in relation to other persons than the owners'.

Section 19: All decisions of the General Committee are binding on all owners (subject to regulations).

Section 20: The local and General committees will have such powers and functions as are prescribed by the Governor in Council; the only proviso is that the powers and functions of the local committees will be confined to the 'internal affairs of the block'.

Section 21: The General Committee will have power to alienate any part of the district to the Queen, and to cede land for mining purposes.

Section 23: The Governor cannot take more than 400 acres in total for public works (excluding roads) without the consent of the General Committee.

Section 24: The Governor in Council may make such regulations as he thinks necessary for certain purposes including the mode of election of the local and General committees, fixing their term of office, to give effect to anything in the Act whose effect is expressed to be prescribed, anything he deems necessary to 'give full effect' to the Act, and for giving effect to Seddon's memorandum of 25 September 1895.

on the Commission. Any of its suggestions would therefore be likely to come from, or at least have the support of, the Maori commissioners.'[416]

In our view, the chiefs must have relied on the many promises made in 1894 and 1895 that the Government would listen to them and protect their interests. The Act itself, as the

416. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 103

fulfilment of the 1895 agreement, which in turn was seen as fulfilling the 1871 compact, must have seemed proof of that. We agree with Ms Marr that they were 'placing a great deal of trust in the Crown and in the Native Minister that their recommendations would be heeded'.[417]

In contrast to Heke, Maori members Wi Pere and Te Ao appeared confident the Act would deliver self-government. Wi Pere, in particular, was jubilant.[418] Many Opposition members were also confident (or, more accurately, fearful) that the Government intended to allow extensive self-government of the Urewera district, and therefore criticised the proposal. The Leader of the Opposition, Captain William Russell, along with R Thompson, the member for Marsden, complained that 'home rule' was being given to a group of Maori who mixed little with Europeans and were therefore less likely than others to competently manage their own affairs.[419] Carroll attempted to allay such fears and win Pakeha support for the Bill by emphasising that the land had limited value apart from as a sanctuary for tourism and for Maori.[420]

At the same time, some Opposition members agreed with Heke's position (though from different motives) that the Act did not actually provide the powers of self-government that ministers said it would. Captain Russell argued that Tuhoe had been deceived, that the Native Minister would control everything, and that the Bill would prove the 'thin edge of the wedge' for land alienation and settlement. As he told the House, he did not object to such an outcome, merely to getting there by deceitful means. Perhaps more telling was Charles Hall's response to Russell: having been through the Bill, he could not see how it gave the peoples of Te Urewera any power other than deciding their own land titles.[421] Hall contrasted this to the early New Zealand provinces, which – with populations not much bigger than Tuhoe's – had had the power to pass laws and truly govern themselves.[422] Judith Binney thought the Opposition's criticisms were accurate, revealing 'the extent of the latent government control inserted in a law which ostensibly acceded to Tuhoe's wish to retain their existing autonomy'.[423]

Premier Seddon, however, insisted that the Act would give self-government within the reserve. He reminded the House of the situation in the early 1890s when even a Governor could be turned away from Te Urewera, and pointed out that self-government existed on the ground whether members liked it or not. But, in his view, they should like it, and should give it the sanction of colonial law. His speech is critical to our understanding of the Act and its constitutional significance, so in the following discussion we quote from it at length:

417. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 103
418. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 105–106
419. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 106–107
420. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 107–108
421. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 211–212, 217–218, 222–223
422. NZPD, 1896, vol 96, p 169
423. Binney, 'Encircled Lands', vol 2 (doc A15), p 217

> I believe myself, that by leaving these people to manage their own affairs, seeing they are not interfered with and no Europeans are allowed in their midst, they can govern themselves in accordance with their own traditions, and are a people self-contained . . . I am satisfied that there are exceptional circumstances in connection with the Tuhoe, and that those circumstances are favourable to the attempt being made, as provided by this Bill, to give them, in respect to the several matters mentioned in this Bill, self-government.[424]

The Premier went on to say that, in his opinion, the 'greatest evil that overtook the Natives arose from the fact that they were essentially a people governing themselves', yet settlers had taken away from them 'all control and administration of their own affairs'. As a result, a 'people who are essentially a self-governing and self-contained people' had been 'set aside', having 'no responsibility and no government'. This had had a detrimental effect on Maori. For decades they had sought self-government from 'respective Governments and respective Parliaments', but without success. 'What is asked for by this Bill,' he said, 'is not at all unknown; it has been pressed upon Parliament time after time.' The Native Committees Act back in 1883 had not actually given effect to 'what was proposed'. But now the time had come to:

> try what the result will be – finding the Tuhoe as we find them, where there is no difficulty arising as between the Europeans and the Natives – of allowing them to elect Committees, and giving the Committees power to deal with their affairs as mentioned in this Bill.[425]

There were two features that Seddon saw as unique to this situation: European interests would not be affected; and Te Urewera was already (or rather still) self-contained and self-governing, but without the protection of colonial law:

> If matters had continued as they were it was practically a reserve, but not a reserve supported by legislation; it was a stronghold of the people who were determined that Europeans should not be in their midst – that our Courts and our present course in respect to Native lands procedure would not obtain in their part of the colony. That was the position. It was practically so, for years, under the old Maori custom. I say it would be much better to have a reserve such as this is made now, with the sanction and approval of our Parliament, with the mana of the Queen admitted freely and without the slightest reservation, than to have, as we had only a few years ago, a representative of Her Majesty the Queen going to the borders of the Urewera Country and then turning back, deeming it not to be advisable to proceed further. I say, contrast that condition of affairs with what we have to-day in the Urewera Country, and with what the Tuhoe have asked for, and which they are only too pleased to

424. NZPD, 1896, vol 96, pp 166–167
425. NZPD, 1896, vol 96, p 167

assist us in working in the shape of this Bill, and I say it is very much in favour of having a reserve granted under the conditions mentioned.[426]

At this point in his speech, Seddon added that schools were now being built and roads were being pushed 'from one end of the Tuhoe country to the other'; 'that reserve [aloofness] which has hitherto been maintained has entirely broken down.'[427] He went on to say:

> I never was so gratified at anything that has arisen as at seeing a prospect under this Bill – and under what has been done – of preserving a large slice of country, which is essentially a Native country, to the Natives, keeping them clear as far as we possibly can, of the dark side of our civilisation, and having positive proof, as I think we shall have if this Bill becomes law, that they are able to look after themselves, and to manage their own affairs in such a way as will reflect credit upon themselves and upon the Parliament that has granted them the powers which, I say, they ask for, and which, in my opinion, they are entitled to receive. An honourable member representing the Native race said this afternoon that if this is granted to the Tuhoe Natives it will be asked for by the Natives in other parts of the colony. If it proves a success with the Natives in the Urewera Country, then, I say, by all means grant the request alluded to.[428]

Seddon assured the House there was no intention to deceive Tuhoe.[429] Anita Miles thought this was correct: although Russell's predictions later became 'a chilling reality, the Act was not designed to deceive Tuhoe'.[430]

We will return to Seddon's speech below, when we consider the constitutional implications of what the Government and Tuhoe were doing in 1896. Here, we note that the Premier recognised an existing state of self-government in Te Urewera and he very deliberately intended to provide mechanisms and powers to recognise and protect self-government in the Reserve under colonial law.

Did the Act fail in this respect? The Crown's argument is that the Crown breached the Treaty later, when it lost sight of this purpose of the district reserve, and when it failed to give practical effect to the promises of self-government and tribal land management.[431] In the Tuawhenua claimants' view, as we have seen, the failure to define the powers of the committees in the Act itself – and the reservation of the power to do so to the Crown – placed the Crown in an important position of trust. This allowed for flexibility in working out the details, and iwi ought to have been able to trust the Crown: 'The honour of the Crown was a key component that could determine the success or otherwise of the legislation.'[432] The Wai

426. NZPD, 1896, vol 96, p 167
427. NZPD, 1896, vol 96, p 167
428. NZPD, 1896, vol 96, p 167
429. NZPD, 1896, vol 96, p 168
430. Miles, 'Te Urewera' (doc A11), p 284
431. Crown counsel, closing submissions (doc N20), topics 14–16, p 34
432. Counsel for Tuawhenua, closing submissions (doc N9), p 124

36 Tuhoe claimants argued, however, that the Crown's reservation of these powers to itself was a breach of the agreement and of their tino rangatiratanga.[433] We will return to these arguments when we make our findings.

Here, we note how Tuhoe have remembered the Act in their history. From Tamati Kruger's account, they saw Seddon's actions as the fulfilment of the promises made by Donald McLean in 1871.[434] Tuhoe had quite deliberately sought a law to protect them from the law, following the word of Te Kooti.[435] They saw Numia Kereru as the 'co-architect' of the agreement with the Crown: 'It was his life's work. A passage by which Tuhoe would avoid savage colonisation.'[436] Numia flew a flag at Ruatoki bearing the words: 'Ko te Ture Motuhake mo Tuhoe', which Mr Kruger translated as: 'A Separate Law for Tuhoe' and 'Te Urewera District Reserve Act'.[437] The Act was good but the sequel was not:

> That was the new strategy, new leaders . . . They were going to get all of the Tuhoe area and put it under its own Act. A general committee of all of the rangatira o nga hapu to govern over it. That's a good concept except that the government manipulated it . . . Huri, hurihia, [turning it on its head] that whole general committee Urewera Act thing was hijacked . . .[438]

Tama Nikora looked back on the Act from the perspective of what followed and called it 'a law for the acquisition of land for Pakeha settlement'.[439] Seddon and Carroll are not kindly remembered in Te Urewera. Ani Hare, in her evidence for Ngati Haka Patuheuheu, made a pun on Seddon's name: was he Te Hetana (Seddon) or Te Hatana (Satan)? She said:

> He teka nona oati a Hetana, nana hoki te ki, ka riro i a Tuhoe, te mana whakahaere, te mana rangatira o ratou whenua o Te Urewera. Engari, he oati teka noa iho tenei na Hatana pea, na Hetana ranei.[440]
>
> Seddon's oaths were untrue because he said Tuhoe would have the authority and administration over their lands of Te Urewera, but it was just a false oath by Seddon – or is it Satan?[441]

433. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 91
434. Kruger, brief of evidence (English) (doc J29(b)), paras 10.3–10.6
435. Tamati Kruger, oral evidence, 18 February 2002, cited in Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two' (doc D2), p 1
436. Kruger, brief of evidence (English) (doc J29(b)), para 10.6
437. Kruger, brief of evidence (English) (doc J29(b)), paras 10.13–10.14; Tamati Kruger, claimant transcript of oral evidence, 17 January 2005, Tauarau marae, Ruatoki (doc J48), Part 2, p 5; Kruger, claimant translation of transcript of oral evidence (doc J48(a)), Part 2, p 3
438. Tamati Kruger, oral evidence, 18 February 2002, as quoted in Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two' (doc D2), p 1
439. Tamaroa Nikora, 'The Urewera Consolidation Scheme (1921–1926): an analysis', June 2004 (doc E7), p 3
440. Oral evidence of Ani Hare, 11 December 2003, Tataiahape Marae, Waimana
441. Simultaneous translation of oral evidence of Ani Hare, 11 December 2003, Tataiahape Marae, Waimana

And the Tuawhenua researchers pointed to a waiata that is not complimentary to Carroll.[442] Subsequent events have overshadowed and soured the claimants' memory of the Urewera District Native Reserve Act, and of the two political leaders with whom such a promising relationship had been forged between 1894 and 1896.

(e) ***Social assistance:*** For the claimants, a key problem was that the Act left out what they saw as a fundamental part of the September agreement. This was the promised 'development package' of social assistance, including 'schools, protection of indigenous flora and fauna, land improvement, and introduction of new food sources'.[443] Without legislation requiring the Crown to act, nothing happened to deliver this package (apart from schools).[444]

The Crown, in response, argued that what was promised in this respect was in reality very little, and that it could have been delivered under existing laws and policies; there was no need to legislate for it in the Urewera District Native Reserve Act. Further, the Crown argued that specific promises about these matters in Seddon's 25 September memorandum could have been provided for by regulations, without their having to be specified in the main part of the Act. The memorandum was attached as a schedule to the Act, and section 24 empowered the Governor in Council to give effect to it by regulation.[445]

In large part, the debate over this question focused on the contrary evidence of Cecilia Edwards on one side, and Cathy Marr and Anita Miles on the other. Ms Marr and Ms Miles put together the many statements about active protection and prosperity that had been made in 1894 (see above) with the 7 September proposals, the 25 September memorandum, and the continued assurances of active protection and future benefit that took place in 1895 and 1896. They argued that a 'package' of social assistance was promised. Its particular elements can be derived from the Urewera delegation's proposals on 7 September and Seddon's apparent agreement to them.[446]

As we saw above, Carroll proposed on 7 September that, in the measure he anticipated (the Act), the Government would act as 'the parent and the father of this people'. It would establish schools and

> other measures for the welfare of the natives living in that District; such as the introduction of a medical attendant and sanitary laws; improved methods of cultivation and matters connected with the general welfare of the District, for the people within the District.

442. Tuawhenua Research Team, 'Te Manawa o Te Ika, Part Two' (doc D2), pp 102–103
443. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 92
444. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 51
445. Crown counsel, closing submissions (doc N20), topics 14–16, pp 25, 28–29, 47, topic 29, pp 8–9
446. Anita Miles, 'Summary and response to issues', no date (doc D5), paras 14–16; Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), pp 49, 52–53, 58–60, 63, 114, 193–195

This would enable the people to save their lands, save themselves, and 'improve the condition of their families'.[447] In response, Seddon had agreed that the Government would act as parent and ensure the welfare of the people, but (as Ms Edwards pointed out) specifically mentioned only building schools and roads. He advised that schoolteachers, rather than doctors or nurses, would supply medicines to their local communities.[448] Also, Wi Pere had suggested that the Government provide finance to help the committees farm the land – a point to which the Premier did not respond.[449]

Then, on 23 September, the delegation had asked to be provided with exotic fish and animals to attract tourists and increase local food supplies. In his 25 September memorandum, Seddon had promised schools, roads, paid work on the roads, and a favourable response to the request for English birds and fish. But, on the question of food supplies, the only concrete thing he undertook was to get information about whether (and how) trout could be introduced.[450] During the parliamentary debate on the 1896 Bill, the Premier renewed his statements that he wanted to see the people of Te Urewera prosper and their health and population improved. He told the House: 'I hope, by the benefits we can give – by introducing the bright light of our civilization, and eschewing the dark side – the result will be a very large increase of the Tuhoe.'[451] This was an echo of the many similar statements he had made while visiting Te Urewera in 1894.

In evaluating this evidence, Ms Edwards mainly confined her attention to the 25 September memorandum, which she considered was a 'heads of agreement' and contained the Government's commitment of what needed to be put into the Act. She concluded: 'No general promises were made in respect of social assistance. There was a specific commitment to have schools built at certain kainga.'[452] In terms of economic development: 'There is no explicit mention of Government commitment to economic development of the Ureweras, although the tourism development contemplated in the memorandum implies a possible indirect economic benefit.'[453] In addition, she noted a broad statement that forests and birds would be protected; a specific statement that the Premier would look into providing trout; and a commitment to building roads. Based on this summary of the agreement, Ms Edwards concluded that the Act was a faithful execution of all that the Government had promised. It provided for roads. Schools could already be built under existing legislation. Trout could be provided as a matter of policy.[454] Other legislation, such as the animals protection laws, may already have protected birds.[455]

447. 'Urewera Deputation, Notes of Evidence', p 5 (Marr, Report Document Bank (doc A21(b)), p 169)
448. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 195
449. 'Urewera Deputation, Notes of Evidence', pp 55–56 (Marr, Report Document Bank (doc A21(b)), p 219–220)
450. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 195–196
451. NZPD, 1896, vol 96, p 166
452. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p 232
453. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 232–233
454. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), pp 232–234
455. Transcript 4.14, p 105

Fulfilling the Compact of 1871

For the Tuhoe claimants, Tamati Kruger gave evidence at Ruatoki in January 2005. He told us that Seddon's promises and the 1896 Act were seen as fulfilling the promises made by Donald McLean in 1871.[1] For the Crown, Cecilia Edwards gave evidence at Taneatua in March 2005. She quoted extensively from Seddon's speech in the House in September 1896, and from a speech he gave at Wairarapa in January of that year, to explain how the Premier saw it at the time.[2]

In Seddon's own words (in January 1896):

> There had been a promise made to them by Sir Donald McLean that their country, at all events unless they consented otherwise, should be protected against encroachment in the form of alienation of their land, and they stipulated that a line should be drawn within which they should have the administration of their lands; and it was owing to the attempts being made from time to time to ignore that promise and pledge and to encroach upon that line, and to endeavours being made to break through that arrangement, that caused the Natives of the Urewera to become pouri [distressed]. They did not openly violate the law, but they said 'Do not come near us; the hospitality that we are proud of we cannot offer you with freedom, nor can we use you as well as we would like to. In the meantime we must keep faith with those who have passed away. We must insist on the Government keeping the promise made by Sir Donald McLean'.[3]

Seddon then described the 1894 tour, the face-to-face explanation of grievances, and the relationship that was forged. An arrangement was made (in September 1895) 'by which they will be able to manage their own affairs, subject of course to our laws. A responsibility has been cast on them, they have accepted that responsibility, and the Urewera difficulty has gone, in my opinion, for all time.'[4]

Later in the year, when the Urewera District Native Reserve Bill was debated in Parliament, Seddon put great emphasis on the Bill as fulfilling McLean's pledge to the peoples of Te Urewera. He told the House:

> this measure has been asked for by the Tuhoe people, and, tracing back, I have no hesitation in saying that in bringing this Bill before the House now the Government are redeeming a promise made by Sir Donald McLean to the Tuhoe people many years ago. And, Sir, I must say that, after having seen the country, and after having listened attentively to what was put forward by the Tuhoe people, I have come to the conclusion that if the promise made many years ago by Sir

1. Tamati Kruger (doc J29(b)), paras 10.3–10.6
2. Edwards, 'The Urewera District Native Reserve Act 1896, Part 1: Prior Agreements and the Legislation', (doc D7(a)), pp 216–217, 241–242
3. *New Zealand Mail*, 23 January 1896 (as quoted in Edwards, 'The Urewera District Native Reserve Act 1896, Part 1', p 241)
4. Ibid (p 242)

> Donald McLean to the Tuhoe had then been kept, if we had given the same powers and privileges which we are proposing to give under this Bill, a lot of the trouble that has arisen – which has been the cause of an otherwise well-disposed people being estranged from the rest of the colony – would have been avoided.'[5]
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> 5. NZPD, 1896, vol 96, p 166

Cathy Marr's view was that Seddon's memorandum, with its promises of roads, schools, protection of forests and birds, acclimatisation for food and tourism, and possible goldfields, indicated agreement to 'a development package for the district'.[456] The Crown questioned Ms Marr on this point, suggesting that the memorandum contained specific responses to specific requests, and no 'regionally based development package'.[457] She replied that the document was indeed framed in that way, but it had to be considered together with the evidence of the 1894 tour and the 7 September hui. The context was Seddon's 'promises of government protection and assistance for the district, so that as he claimed, the people might have their lives improved and their lands conserved'. From these many sources and promises arose the 'package', which was the subject of ongoing discussion and expansion. The acclimatisation proposals, for example, had been added just before the Premier wrote his memorandum. Further additions were still possible.[458] Ms Marr conceded, however, that Seddon did seem to be narrowing what she thought had been agreed.[459]

Cecilia Edwards, in her summary of her report, responded further to Ms Marr's evidence, accepting that the Government intended to help with health and education, and that the Urewera delegation's proposals had included definite elements of 'social and economic assistance'.[460] On this point, she suggested that Carroll may well have nurtured hopes of State assistance for Maori development, but she suspected that Seddon meant nothing more than the standard 'benefits of civilisation': health and western-style education.[461] We agree with Ms Edwards that there was not much scope for modern-style 'planned and integrated government interventions, and associated development grants in order to achieve a

456. Cathy Marr, 'Summary and response to issues for report on the Urewera District Native Reserve Act 1896 and amendments 1896–1922', no date (doc D6), p 9
457. Marr, 'Answers to questions of clarification', (doc D11), p 13
458. Marr, 'Answers to questions of clarification', (doc D11), p 13
459. Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 63
460. Edwards, 'Summary of Part 2 of "The UDNR Act 1896, Part 1: Prior Agreements and the Legislation' (doc L2), p 20
461. Edwards, 'Summary of Part 2 of "The UDNR Act 1896, Part 1: Prior Agreements and the Legislation' (doc L2), p 20

significant economic transformation'.[462] But, as Ms Edwards put it, Seddon wanted to provide Te Urewera with article 3 benefits enjoyed by other New Zealanders.[463] In the 1890s, Liberal policies included significant social and economic assistance for settlers, not just in the areas of health and education, but also generous assistance to obtain land and development capital for farming.[464] Seddon, it will be recalled, had envisaged the people developing pastoral farming in addition to their cropping.

We do not accept that the social assistance 'package' envisaged by the Government can be evaluated only in terms of Seddon's memorandum. We agree with Ms Marr and Ms Miles that, putting together the many statements made in 1894 and 1895 – particularly the delegation's 7 September proposals, supposedly endorsed by the Premier – there is strong evidence that the Government promised help with social and economic development.

As geographer Brad Coombes pointed out, Carroll considered help with food supplies to have been a binding part of the agreement. (Food shortages had been evident to the Government party that toured in 1894, and there were to be serious shortages and famine in the mid- to late 1890s.) In 1903, Carroll suggested that Maori should not be prevented from hunting imported or native game at Waikaremoana 'because one of the conditions upon which the Urewera Reserve Act was passed was that we should augment their food supply and not exclude their rights to taking game for food'.[465] We will consider the issues of birds, forests, and the protection of flora and fauna in later chapters. Here, we note Carroll's belief that increasing the food supply was part of the 1895 agreement (and a condition for passing the Act). This strengthens our view that the Government was bound by much more than just the undertaking to consider introducing trout.

The Crown argued that some of the statements of Seddon and Carroll must be taken simply as an expression of what they expected or hoped would happen.[466] In other words, if long-term prosperity was not the outcome of getting legal titles for their land, though they told Tuhoe it would be, then an expectation was disappointed but a promise was not broken. We have some sympathy for this view. In cross-examination by counsel for the Tuawhenua claimants, Cecilia Edwards clarified that the expectations raised were nonetheless important, and that Seddon did 'clearly flag' future prosperity several times during his 1894 tour.[467] In any case, as we noted during our discussion of the 1894 hui, many of the ministers' statements were about how the Government quite deliberately intended to act. That is, the ministers promised that the Government would protect Maori interests and promote their wel-

462. Edwards, 'Summary of Part 2 of "The UDNR Act 1896, Part 1: Prior Agreements and the Legislation' (doc L2), p 20
463. Edwards, 'Summary of Part 2 of "The UDNR Act 1896, Part 1: Prior Agreements and the Legislation' (doc L2), p 20
464. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 891–896, 954–1001
465. Coombes, 'Resource and wildlife management in Te Urewera, 1895–1954: Summary of Evidence' (doc H3), p 11
466. Crown counsel, closing submissions (doc N20), topics 14–16, p 47
467. Transcript 4.14, p 124

fare (socially and economically). This was not just an expectation of what might happen if Tuhoe and the other tribes dealt with their lands in the economy; it was a guarantee of how the Crown would behave. The communities at Ruatoki, Ruatahuna, Galatea, Te Whaiti, and Waikaremoana were entitled to believe these assurances.

Also, the Urewera delegation's proposals (as hammered out with Carroll) were not contingent on future economic outcomes; they were tied to Government assistance. The Government was to protect the people's interests, provide roads and schools, help improve farming and food supplies, help with doctors and improved sanitation, and generally take measures for the 'welfare' of the district. Ms Edwards is correct to point out that little of this appears in the 25 September memorandum but, as we found above, that document was only part of the agreement, and its specific undertakings are only part of what was required of the Crown. There would have been no self-government in the Act if the Crown had seen itself as bound only to deliver the strict undertakings of that memorandum.

Thus, we agree with the claimants that a package of social and economic assistance was part of the 1895 agreement. We also agree with the Crown that Seddon had not promised everything that was requested in September of that year. The Premier and the Urewera delegation had not agreed on all the components of such a package, but its general character was not in doubt. It would provide for improvements in health, education, farming, and other matters for the 'welfare' of the people. We agree with the Crown that the details did not need to be in the Act if the package could be delivered under existing legislation. Whether this would be by doctors and improved sanitation, as Carroll and the delegation requested, or by the local teacher dispensing medicines, as Seddon offered, one overall goal was for the Government to help improve the health of the people of Te Urewera. The details had not yet been worked out. Presumably, that could be done in future discussions between the Government and the General Committee. It would then be seen whether Carroll's more generous view, or Seddon's more restrictive view, would prevail in Government circles. This issue was one of many waiting to be worked out after the passage of the Act. The question then becomes: was agreement ever reached on the details of the 'package', and did the Crown deliver (at least) what had already been promised? We will return to that question in forthcoming chapters.

9.5.4 Treaty analysis and findings

Our Treaty analysis and findings in respect of the Urewera District Native Reserve Act are central to our report on Te Urewera claims. Of particular importance is whether the Act formalised a Treaty relationship between Tuhoe and the Crown. As we saw in chapter 7, matters had reached a stalemate between the Crown and Te Urewera leaders by 1889. This was resolved in the wake of the Governor's 1891 visit, when some Tuhoe hapu and

leaders applied to survey Ruatoki and put it through the Native Land Court. Te Rohe Potae remained closed, however, to gold prospectors. In February 1894, Tuhoe held a month-long hui to try to heal the divisions and restore unity. In this they were successful. In exchange for an agreement that Ruatoki would remain outside Te Rohe Potae, all the leaders reaffirmed the core Te Whitu Tekau policies: no surveys, no leases, no roads, no land sales, and no Native Land Court. They presented a united front to the Government when the Premier and the minister 'representing the Native race' came to visit Te Urewera in April 1894 partly to restore relations after the survey crisis, arrests, and imprisonments of 1893. At that time, the relationship between the Crown and the peoples of Te Urewera was still of the kind we discussed in chapter 3. By the terms of the Treaty of Waitangi, the Crown was obliged to fulfil its promises to all Maori, whether or not they had signed it. But for the peoples of Te Urewera who had not signed the Treaty, and had not even been given the opportunity to sign, the reality (if not the law) was that they could not, without more, be bound by its terms. In our view, the Treaty's binding effect in Te Urewera would remain one-sided unless and until such time as the Crown and the peoples forged a relationship in which the authority of each was formally recognised in terms consistent with the Treaty. As we discussed in our chapter on Te Whitu Tekau, the peace of 1871 was a watershed in the development of that relationship. Tuhoe and Ngati Whare saw that arrangement as their compact with the Crown. The Crown accepted that Tuhoe leaders would have full authority in their districts. On the basis of that understanding Tuhoe and Ngati Whare established Te Whitu Tekau and established policies within Te Rohe Potae to protect the pople and their lands, which were maintained from 1872 to 1893. Te Whitu Tekau tried to work with the Crown, but the Crown failed to provide a mechanism through which the authority of tribal leadership in Te Urewera could be recognised in colonial law. Thus the events of 1871 fell short of establishing a reciprocal Treaty relationship. The question that arises here, as we consider the discussions and negotiations leading up to the UDNR Act 1896 and the agreement reflected in it is whether these events forged a reciprocal, Treaty-based relationship.

None of the claimants who endorsed the 'constitutional claim' (discussed in chapter 3) saw the events in question as establishing such a relationship. They maintained that they have never, to this day, ceded to the Crown the 'sovereignty' that it claims to possess. The result, they say, is that they have never entered a Treaty-based relationship with the Crown. Nor did the Crown see the events of 1894–1896 as forging a Treaty-based relationship with the peoples of Te Urewera. But that is because, as we saw in chapter 3, the Crown's understanding is that the Treaty has bound all Maori from 1840, regardless of whether they signed it.

Despite those positions, the Tuhoe and Ngati Whare claimants' submissions on the events of 1895 and 1896 painted them as a defining moment in their relationship with the Crown and in New Zealand's system of government. The Wai 36 Tuhoe claimants argued

that the 'understandings reached between the Tuhoe delegation and Crown representatives in Wellington in September 1895 were a solemn compact of constitutional significance'.[468] Seddon himself referred to the 1871 compact with McLean and the Treaty of Waitangi. As such, the agreement was intended to give effect to both kawanatanga and tino rangatiratanga.[469] Together, the agreement and the Act had a significance akin to a treaty with the Crown. In particular, the Wai 36 Tuhoe claimants felt that the Act entrenched their autonomy and their tino rangatiratanga in colonial law.[470] Counsel for Ngati Whare agreed, adding that the constitutional significance of the agreement was enhanced when it was ratified and enacted by Parliament. It could not be broken lightly by the Crown; in fact, 'having regard to the principles of utmost good faith and active protection, it is difficult to see on what basis in Treaty terms it could be broken at all. Yet, ultimately that is precisely what occurred.'[471] Counsel for Nga Rauru o Nga Potiki argued that the legitimate authority in Te Urewera remained the mana motuhake of the claimants but the challenge was to find ways 'to maintain Te Mana Motuhake o Tuhoe within the demands of Te Ao Hurihuri the new world'.[472] Counsel suggested to Cecilia Edwards in cross examination that there was an opportunity for Maori authority to be exercised in partnership with the Crown, through the committee structure to be set up under the Act. Ms Edwards agreed, although she suggested that a Treaty partnership today would involve more than what was offered in 1896.[473]

The Crown did not agree with the claimants that either the 1895 agreement or the 1896 Act had constitutional significance. Because the degree of self-government to be accorded to the peoples of Te Urewera was, in the Crown's view, 'not unlimited', it was nothing out of the ordinary in terms of constitutional arrangements. The Crown's sovereignty was not affected or altered by the agreement or the Act, and the constitutional situation of the Urewera district 'at law' did not change. The Crown did accept, however, that the agreement was 'an important symbolic affirmation of a new relationship with the government, which was of immense significance for the Urewera chiefs as well as Seddon and Carroll as the representatives of the government'.[474]

We are mindful of the parties' depth of commitment to their opposing positions. The claimants would have it that the agreement and the Act discussed in this chapter were full of promise but because that promise was ultimately not realised, there was no change to the pre-existing relationship between the Crown and the peoples of Te Urewera. Those who had not signed the Treaty remained outside its fold and the Crown continued, for them, as an unwelcome pretender to sovereign authority. The Crown would have it that the claim-

468. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 43
469. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 85
470. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 42–44
471. Counsel for Ngati Whare, closing submissions, (doc N16), p 60
472. Counsel for Nga Rauru o Nga Potiki, closing submissions (doc N14), p 80
473. Edwards, cross-examined by counsel for Nga Rauru o Nga Potiki (transcript 4.14, p 25)
474. Crown counsel, closing submissions (doc N20), topics 14–16, p 23

ants have been, since 1840, bound to it in a relationship founded in the Treaty, and that the events discussed in this chapter neither promised to alter the balance of governmental power defined by the Treaty, nor altered it in fact.

Our analysis of the significance, in Treaty terms, of the matters examined in this chapter is different from that of the claimants and of the Crown. We turn now to review the events that are material to our conclusion.

The 1894 hui, which we have discussed in some detail, represented the first truly positive engagement of the Crown with Te Urewera leaders since 1871. At those hui, the Crown's Treaty promises were affirmed and Te Urewera leaders acknowledged the Queen and the Government and for the first time, promised to obey the law. In his own compelling language, the Premier affirmed the Treaty's promises of active protection and mutual benefit, and the Crown's duty to consult the peoples of Te Urewera on matters of importance. He made many promises of protection, as we have detailed: his Government would protect Maori from the settler majority, and in the retention of their land. He maintained, however, that modern circumstances required a legal title; the Queen's protection could no longer be guaranteed for customary land. Seddon told Tuhoe that if they obtained a legal title for their lands, and used their lands in the settler economy, they would 'never be landless – never be without money, food, or clothes. They will be more prosperous than Tuhoe have been since they have been Tuhoe'. These assurances were a critical part of the dialogue that led to the enactment of the Urewera District Native Reserve Act in 1896.

One of the fundamental elements of the Treaty is that Maori and settlers would both benefit and prosper. Seddon explained what the settlers wanted that would also benefit the peoples of Te Urewera: they wanted roads and schools for Te Urewera; they wanted legal titles for its lands; they wanted to settle 'surplus' lands (if there were any); and they wanted economic development for the region – including the possibilities of gold mining and tourism. On the basis of the promises made to them, Ngati Manawa and (to a lesser extent) Ngati Whare and Ngati Haka Patuheuheu were prepared to consider opening their remaining lands. In particular, they agreed to roads and schools. But Tuhoe were more sceptical that they would benefit from the settlers' plans. The Waikaremoana people put it to Seddon that they were living on small reserves with no 'surplus' land – a point the Premier seemed to accept. At Ruatoki and Ruatahuna, the leaders pointed to the ruinous costs of surveys and the court, and to the fact that wherever the Crown got control of tribal lands, the lands evaporated with no lasting benefit for the people. The Premier promised reforms in response to their criticisms, to demonstrate that they would genuinely prosper if they engaged. Court and survey costs would be slashed, individual dealings would be stopped, fair prices and rents would be paid, and the Government would be a protective backstop – it would be 'strong' to protect them and ensure that they prospered.

But the Premier was not (yet) prepared to give up on the Native Land Court as the only instrument for deciding titles. This was a sticking point in the discussions. Another was the principle of Maori autonomy. Seddon was prepared to go part of the way in recognising Tuhoe autonomy. He was already experimenting with the idea of block committees and collective decision-making for lands. He affirmed that hapu could either have a committee or could act directly, but from now on groups could make collective decisions about which land was 'surplus' and whether to lease or sell any of it. At Ruatoki and Ruatahuna, the Premier was presented with requests to acknowledge their authority, their mana motuhake. Tuhoe wanted a tribal/district committee to control and administer their lands and all the affairs of their district (and a prescribed boundary for that district). They did not want the Government to control their lands. They did not want or need the Government to control their affairs. What they did want, however, was for the Government to recognise their committee – something they had been asking for years – and give it legal powers so that it could deal with the law and the institutions that did have such powers. The Premier, in response, was prepared to accept what he called an advisory committee: a permanent committee, representing Tuhoe, which would be the organ for future consultation between the Government and the tribe. But he was not – at this stage – willing to accept that a tribal committee could exercise what he considered to be government powers.

Seddon impressed the people, and leaders such as Kereru Te Pukenui quite deliberately decided to trust him and his promises. The gift of the taiaha Rongokarae reaffirmed the 1871 compact, and that Tuhoe would live in peace with the Government and obey its laws. Seddon, in his turn, recognised that a great trust was being placed in him – a perpetual trust for the Government to keep. A dialogue was opened but was interrupted before real progress was made. It was understood that Seddon would complete his tour, consulting with all communities, and that he would then be willing to consider further discussion and settlement of the key issues in Wellington. Recognising the difficulty that this would impose, he offered to fund a delegation of Te Urewera leaders to come to the capital. At the hui, the leaders welcomed this initiative as a way to allow further discussions among the people before reaching deliberate positions on the many issues that Seddon had raised with them. As it turned out, the Government failed to keep this undertaking. As the Crown's historian noted, Te Urewera leaders pressed for the resumption of talks that Seddon had offered, but the Government did not fund their delegation or resume negotiations in 1894.

Instead, the Government sent surveyors in 1895 to carry out a trig survey for mapping purposes. Unfortunately, the Surveyor General had explained at a hui in January that the trig survey would also be useful for the court. Seddon and Carroll had said the same thing the year before. The Crown conceded before us that Tuhoe and Ngati Whare were right to be alarmed and suspicious of this survey. When they obstructed the surveyors – thus breaking the law – Seddon was quick to send troops to Te Urewera for a 'show of force'.

9.5.4

One question that arose was the genuineness of the leaders' 1894 commitment to obey the law. Hone Heke reported Tuhoe's views, as expressed to Carroll in April 1895. The gift of Rongokarae had not meant that the Premier could do whatever he wanted to Tuhoe. Nor did their covenant with the Government bind the people to accept anything the Premier 'desired to impose upon them without consulting them in the first place'.[475] The essence of that message is also found in Waitangi Tribunal statements of the Crown's Treaty responsibilities when making law relating to Maori land. The Turanga Tribunal found when examining the native land legislation that the Maori promise to obey the law was not unconditional: the Crown had a reciprocal duty to ensure that its laws did not defeat or neutralise its Treaty guarantees to Maori.[476]

On this occasion, the Government mixed negotiation with its show of force. Carroll arrived on the heels of the troops. At the hui that followed, Kereru Te Pukenui reaffirmed his promises of the year before. Tuhoe would obey the law, and the survey would be permitted to go ahead. In return, Carroll agreed that a full settlement of issues should be negotiated in Wellington and that Tuhoe lands should be 'conserved' to them – also renewing promises made the year before. But a further crisis arose: the Government decided to force roads through Te Urewera at this time, and began surveying for them in May. Again, the surveys were obstructed. Again troops were sent, with Carroll following behind to negotiate.

Our view of these events is that the Crown may have acted within the law, but the law was clearly unjust. The Public Works Act permitted the Government to put roads wherever it wished, so long as notification was given. The parties did not agree on whether notification was in fact given properly, but that is beside the point. The law allowed the Government to force roads through an entire district without paying the slightest heed to Maori authority. The fundamental concept behind the Public Works Acts was that the Crown (or local authorities) would make these decisions on behalf and in the best interests of the whole community. In this instance, the community was Maori, and it had had no say in whether or where roads would be built through its territories. But, as Ngati Whare leaders stated at the time, the Government was prepared to use force and Maori were not – so the road surveys went ahead. Perhaps more importantly, Carroll also contributed to securing agreement on the basis that a full settlement of issues would be negotiated in Wellington, and that (this time) Urewera lands could be protected by a special Act of Parliament.

In our view, Tuhoe and Ngati Whare were compelled to agree to road surveys in May and June 1895 because of the threat of force. In light of the Crown's obligations under the Treaty, this was entirely inappropriate. But Carroll's diplomacy had also played a part in securing their agreement. It remained to be seen whether the acceptance of roads could be placed on a better footing through the promised negotiations in Wellington. We consider

475. *New Zealand Herald*, 3 June 1895 (Binney, 'Encircled Lands', vol 2 (doc A15), p 183)

476. Waitangi Tribunal, *Turanga Tangata Turanga Whenua: the Report on the Turanganui a Kiwa Claims*, Wellington, Legislation Direct, 2004, pp 534–535

that the Crown did not act consistently with the Treaty in forcing roads on the peoples of Te Urewera. However, it is a separate question, which we consider in a later chapter, whether the people were prejudiced as a result.

As counsel for Wai 36 Tuhoe observed, there was some irony in the fact that the 'small war' over surveys actually brought the Crown to the point where it was willing to negotiate a broader settlement and make genuine concessions. We turn now to the September 1895 negotiations and the agreement that was reached. In large part, as we have already found, the basis for this agreement was laid in the hui of 1894, and in Carroll's promises of April to June 1895. Again the Crown's Treaty promises of active protection of the peoples of Te Urewera and of mutual benefit for both Maori and settlers were affirmed in Wellington in September 1895, as they had been in Ruatoki, Ruatahuna, Waikaremoana, Galatea, and Te Whaiti in 1894. Te Urewera leaders acknowledged the Queen and the Government and promised to obey the law. In Wellington, the Premier (and Carroll) promised to protect and to reserve for all time the peoples' lands, their treasured forests, birds, and waters, their customs, and their way of life. In return, Te Urewera leaders would give up some of the Te Whitu Tekau policies, and allow roads, tourism, gold mining (if gold was found), and the creation of land titles that the colonial law would recognise and protect. Although the district was not suitable for close settlement – and hence could be reserved to Maori – regional economic development was still expected, in the form of tourism, mining, and Maori farming. This would be to the advantage of the peoples of Te Urewera and settlers. At the same time, the people sought active social and economic assistance from the Crown in the fields of health, education, farming, and all matters for the 'welfare' of future generations. As Cecilia Edwards noted, there was a disjunction between the level of assistance that Carroll thought the Crown should give, and what Seddon was prepared to offer in concrete terms.

Of vital importance to our consideration of the issue under examination is that in September 1895, in order to secure the agreement of the peoples of Te Urewera to land titles, roads, and the use of their district in the economy, the Crown was willing to give way on the two key matters that had been sticking points in the 1894 discussions. First, it was willing to accept that the Native Land Court should be excluded from the district. There was no agreement, however, on the degree of Maori control in the proposed alternative process. Maori would either decide their own titles, with the assistance of a commissioner (favoured by Carroll and the Urewera delegation), or would work with a commissioner who would make the final decisions (favoured by Seddon). The claimants and Crown agreed, however, that the Crown promised titles at a hapu level in September 1895. Seddon had agreed to this in practice in 1894, when he had posited that hapu should make collective decisions about their lands.

Secondly, the Crown was now willing to give effect to the Treaty principle of autonomy, and the article 3 right of the peoples of Te Urewera to govern themselves by representative

institutions, which we discussed in chapter 8. The peoples of Te Urewera would have the authority of Parliament's law conferred on their unique tribal institutions in order to protect themselves and their lands, and to decide their own destinies (as the Government put it in the Legislative Council in 1896). As we saw above, in 1894 Seddon had been willing to have hapu/block committees, but not a tribal/district committee unless it was an advisory body and a mechanism for Crown-tribal consultation. Now, he agreed to powers of self-government for a general (district) committee which would conserve the authority of rangatira and their communities, with its members to be elected from the local hapu/block committees. The powers to be accorded the committees, Seddon indicated, had been preserved and protected by the Treaty. Wi Pere understood this when he told Seddon:

> I have felt deeply impressed by your reference to the Treaty of Waitangi to show that what they are asking for and ask of you come within the powers mentioned in that treaty, that this was a fitting time and fitting subject in connection with that Treaty.[477]

These were very significant concessions on the part of the Crown. Once they had been made, the Crown and the leaders of Te Urewera reached agreement on broad principles that covered almost everything at issue. The agreement was not recorded in any one document. Rather, it was the sum total of the Urewera delegation's proposals on 7 September (and Seddon's recorded agreement), the further requests of 23 September, and the Premier's written undertakings of 25 September 1895. Taken together, we find that the agreement provided for:

- The creation of an inalienable reserve, in which the peoples of Te Urewera, their lands, forests, birds, waters, and taonga, their customs, and their way of life were to be protected.
- The exclusion of the Native Land Court from the district, and the creation of land titles through an alternative process, involving a single commissioner working with hapu. The extent to which the commissioner would be an adjudicator, as well as the degree of control the owners would exert in the process, had not been fully agreed. Titles were to be decided according to Maori custom, free of cost for the owners. Also, titles could be awarded on the basis of sketch maps (rather than full survey plans), to be paid for by the Government. The owners could request full surveys if they wanted. Otherwise, there would be no block surveys.
- The award of land titles at a hapu level, to facilitate hapu and tribal control of lands.
- Self-government for the peoples of Te Urewera, by means of elected hapu/block committees to manage their lands; a General Committee to manage their lands and all their affairs, and to act as the organ for consultation with the Government; and legal powers of 'local government' for the General Committee within the boundaries of the reserve.

477. 'Urewera Deputation, Notes of Evidence', p 51 (Marr, Report Document Bank (doc A21(b)), p 215)

- The acknowledgement of the Queen and the settler Government by the peoples of Te Urewera and their agreement to obey the law.
- A 'package' of social and economic assistance, as part of the Government's promises to protect their interests and promote their welfare. The details of the package, however, were not agreed. It clearly included improvements in health, education, farming, and food supplies, but Carroll seems to have had a more extensive programme in mind than Seddon had (yet) agreed to.
- Forms of economic development consistent with the fundamental principles of the reserve, including roads, tourism, the possibility of gold mining, and the possibility of pastoral farming. To what extent such development, including mining, farming, and timber extraction, would be consistent with the core principles of the reserve was yet to be worked out in practice.

Both sides had made reasonable concessions to get to this point. All major issues seemed either to have been settled to the satisfaction of the parties or to be capable of settlement when the details were worked out. For those who had been part of the negotiation process, the provisions of the agreement were clearly in accord with the principles of the Treaty.

But Ngati Kahungunu and Ngai Tamaterangi claimants stated that they had not been involved in the negotiations or consulted about the terms of the agreement. Crown counsel accepted that the Crown was obliged to consult all interested hapu. Having reviewed the evidence, we concluded that Ngati Kahungunu hapu were not involved in the negotiations, although the Crown must have known of their interests. We find the Crown in breach of the Treaty for its failure to consult or obtain the consent of those Ngati Kahungunu hapu with interests in the Reserve. It is startling, however, that neither Carroll nor Wi Pere spoke out in this regard to safeguard Ngati Kahungunu interests. The question of whether the hapu were prejudiced by this Treaty breach will be returned to in later chapters.

The September 1895 agreement was a broad one, with many of the details yet to be worked out. As we have seen, the Crown and claimants did not agree on whether it was fully translated into legislation in 1896. In one sense, the question depends on the degree of consultation involved in turning the 1895 Bill into a significantly revised Bill in 1896, and then amending that Bill in the parliamentary process. In our view, the evidence shows one of the fullest processes of nineteenth-century consultation this Tribunal has seen. In addition to the negotiations of September 1895, the documents produced by those negotiations were translated and circulated in the district, and hui were held to discuss them. It appears that the 1895 Bill was also circulated, and amended in response to at least some of the people's suggestions. (One example may be the change from five Maori commissioners to five commissioners specifically representing the owners, who were to be 'Tuhoe'). A second Urewera delegation had input to the 1896 Bill, but the changes to that Bill were very few. As Wi Pere observed in Parliament, Tuhoe objected to some of its provisions. On the whole, though,

the 1896 Bill was understood at the time to represent what both the Crown and the peoples of Te Urewera wanted.

The fundamental concept of an inalienable reserve was provided for in the Urewera District Native Reserve Act. At the time, as the speeches in Parliament make clear, it was understood to provide protection for the people, their lands, and the natural beauties (tourist attractions) of the district. But it was also understood to protect the customs and way of life of the peoples of Te Urewera. We agree with counsel for Nga Rauru o Nga Potiki that this concept underlay the Act. Although some of the language used was condescending – Richard Boast used the word 'quaint'[478] – it nonetheless provided for one of the core objectives of the peoples of Te Urewera. Their tikanga and taonga would be protected, and (as the people in charge of the reserve) they would have the legal powers to protect them.

This Tribunal has seldom seen an agreement more promising in Treaty terms. For Tuhoe and Ngati Whare, the process by which it was devised not only ensured that their aspirations were known and considered by the Crown, it also secured critical concessions from the Crown in recognition of their autonomy. It was the repeated assurances given by Seddon – and by Carroll in his role as facilitator of the negotiations – that persuaded the leaders of Te Urewera to commit to the arrangements that were written into the 1896 Act. Those assurances were compelling: the strong power of the Crown would always be behind the peoples of Te Urewera and they would never be poor if they controlled their lands and their lives in the manner that had been agreed. Those promises caused the leaders to trust that the Act would be implemented in the spirit of good faith that had now brought them so close to the Government's leaders. There can be no doubt that Maori were entitled to trust the repeated assurances of ministers of the Crown.

On the evidence before us, we are satisfied that the leaders of Te Urewera recognised the authority of the Crown to protect their mana motuhake through its power to make law for New Zealand. And we are satisfied that the Crown sincerely recognised the mana motuhake of the peoples of Te Urewera and intended to give it legal recognition so that it would endure despite the changes in New Zealand society. The question we have had to answer is whether this meeting of minds about the future prospects of the peoples of Te Urewera, and its enactment into law, is of such moment that it marked the beginning of a reciprocal Treaty-based relationship between the Crown and the peoples of Te Urewera who were parties to it. From the claimants' standpoint, the obstacle to regarding the events of 1894–1896 in this way is that the Act was not implemented so as to give effect to their aspirations. Quite the contrary. Within a mere 25 years, the Urewera District Native Reserve was destroyed, together with the trust that its peoples had placed in the Crown. The Crown has conceded that the fate of the Urewera District Native Reserve involved it breaching the Treaty. We examine the full extent of those breaches, and their impact, in later chapters.

478. Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi: a history' (doc A27), p 106

It is our conclusion that, despite the later dramatic change in circumstances, a Treaty-based, reciprocal, relationship between Tuhoe and Ngati Whare and the Crown was in fact established by the events that culminated in the enactment of the 1896 Urewera District Native Reserve Act. We believe that those events show a genuine meeting of minds on the fundamental element of the Treaty relationship: the recognition by each party of the authority of the other. And once that accord was reached, we consider, it could not later be negated – just as a marriage in which the parties' original vows are sincere is not negated by later changes in circumstance. That is not to deny that a marriage may become unhappy, or that one party may suffer far more than the other; but a marriage made on firm foundations persists nevertheless. Even divorce, which ends a marriage, does not mean that the marriage did not take place. But it is our view that there is no equivalent to divorce from the Treaty relationship. Once that relationship is established it endures to guide both parties' behaviour and to serve as the measure of their regard for one another. We are well aware that history has disclosed many departures from the Treaty standards: it is our responsibility to identify the Crown's lapses and recommend redress for the harm they have caused. But as we understand it, the fact of those lapses does not end the relationship that was previously forged.

Our conclusion would be different if the 1896 Act was so defective in reflecting the parties' recognition of each other's authority that it could not fairly be said to have brought the peoples of Te Urewera into a Treaty-based relationship with the Crown. The claimants contended that there were many defects in the Act. Their purpose was to establish that the Crown had breached the Treaty by enacting legislation that misrepresented the parties' 1895 agreement. Our purpose is broader. Of course we are concerned to establish whether the Crown breached Treaty principles as the claimants contend. But if we were to find instead that the Crown faithfully translated the 1895 agreement in the 1896 Act, what then? The claimants would still say that later events would negate that fact. Our view, as we have explained, is that if the 1896 Urewera District Native Reserve Act was a faithful rendition of the parties' agreement, then that would mark the establishment of a genuine relationship based on the Treaty of Waitangi. It is with this in mind that we turn to examine the claimants' criticisms of the 1896 Act.

The claimants' first point was that the Reserve was not made as inalienable as had been intended by the agreement. In the 1896 Bill, the Government had included an unlimited power of leasing (to settlers) and an unlimited power of alienation to the Crown. But as a result, it seems, of the Urewera delegation's objections, these powers were significantly modified in the Act. The power to lease land to settlers was struck out. The power to alienate land to the Crown was vested in the General Committee alone. These changes did not go far enough to reassure the delegation, which wanted all powers to alienate removed (except for leasing land for goldfields). But the claimants admitted in our inquiry that the power to

alienate was appropriately circumscribed, and ought to have allowed the tribal leadership to make collective decisions as to whether or when to exercise it. We agree. It seems to us that the Government made appropriate concessions to the tribe on the point. In part, the power to alienate was a 'future clause': the Government did not anticipate buying land in the reserve in 1896. In our view, the inclusion of a power to alienate, in the manner provided for in the 1896 Act, did not detract from the fundamental agreement reached between the Crown and the leaders of Te Urewera. Nor was it inconsistent with Treaty principles.

The second exception to the inalienability of the reserve was the Crown's unlimited power to take land for roads and its power to take land for other public works, which had a cap of 400 acres, after which the consent of the General Committee was required. There are several relevant considerations here. The building of roads was a compromise agreement in September 1895. The delegation from TeUrewera saw the utility of roads, and even asked that their communities be made responsible, and paid, for work on, the stretches of road in their rohe. In our view, the reluctant agreement to roads that had been forced on the people earlier in the year was now placed on a sounder footing. As the claimant historian witnesses observed, future trouble arose over the route rather than the fact of the Ruatahuna road. On this basis it is our conclusion that the power to make roads was appropriately included in the Act.

If the General Committee had been given appropriate powers to control the making and routes of roads, we think little trouble would have resulted, This should not have been a problem. As was pointed out in Parliament, local bodies could control roads, and Maori would be forming the local bodies in the reserve. Such powers, however, like the committees' other powers, were not prescribed by the Act but needed to be conferred by regulations to be made by the Governor in Council. We are concerned that the Crown had power to take land for roads without any protections for the landowners and communities concerned. Breaches of the Treaty could arise if the General Committee was not given appropriate authority. We also note Hone Heke's concern that rates – not part of the 1895 agreement – might be introduced by this means.

The additional power to take land for any other kind of public works, but under the Public Works Act, was, we consider, inserted without agreement. It was never part of the September discussions and consensus, and – as Wi Pere told Parliament – Tuhoe did not agree to any alienations other than for goldmining. The Crown pointed out that a 400-acre cap on takings was a unique protection in New Zealand, and suggested that the 1896 delegation must have agreed to it for that reason. Wi Pere's speeches in the House do not support that contention. Despite that, one of the specified public purposes for which land could be taken – tourism – was a purpose that had been agreed for the Reserve. For any taking, compensation would have to be paid and the 400-acre cap was to apply. On balance, in light of the Crown's kawanatanga – its general authority to govern – and the limits placed upon

its public works powers in the Reserve, we consider this provision in the Urewera District Native Reserve Act did not breach Treaty principles. (We note that no takings under the Act were brought to our attention.)

As we have discussed, the first core principle of the agreement was the creation of an inalienable reserve. The second principle was that the Native Land Court should be excluded, and that an alternative process would decide titles without expense, and with significant input from the owners. The question of how far the owners would control the process had not been agreed. As we found earlier, Carroll went some way to revising Seddon's original position. The creation of a seven-member Commission, with a majority of its members to be Tuhoe, provided for some owner control of title determination. Counsel for the Tuawhenua claimants criticised this for not providing what the delegation from Te Urewera had requested – hapu control of the process. And counsel for Ngati Whare criticised the Act for not properly articulating how it would work, and how much control the owners would exert. Counsel for Ngati Kahungunu condemned the Act for requiring that the Maori commissioners be Tuhoe rather than representatives of all owners in the reserve. Ngati Kahungunu's historians gave evidence that this was a 'potential' problem, but that Ngati Kahungunu interests were in fact recognised in an appropriate way by the end of the title determination processes in Te Urewera. Accordingly, we do not find any Treaty breach here. In chapter 13, we consider the separate issue of the substance and outcomes of title determination under the Act.

Carroll explained at the time that the process was experimental. No one knew how it would work in practice, but there was room for the Commission (with its Tuhoe majority) to work it out and then recommend appropriate procedures for regulation. We accept the claimants' view that the process might have worked better if hapu had had full control, assisted by a commissioner – the original proposal. But, it seems to us, the Act provided a reasonable compromise between the respective views of Maori and the Crown, and an improvement on the Premier's original decision. The Crown is to be congratulated for agreeing to an alternative to the Native Land Court, and to a process which (in theory) was to provide for Maori control of title determination. In our view, in light of the Crown's intentions at the time, no Treaty breach arises from the design of this part of the Act. We consider it to be a separate issue whether it provided in practice – as both Carroll and Seddon said in Parliament it would – for significant owner control in the process of determining their titles. We return to that issue in chapter 13.

Other features of title determination were that sketch maps could be used instead of full surveys, and the process would be free of cost. We find that the Crown faithfully translated this part of the agreement into the legislation.

On the other hand, the Native Land Court was not excluded from the reserve. Against the known wishes of the owners, the Act provided that the Court could be empowered to

decide appeals from the Commission's title orders and to determine successions. No alternative process – owner-designed or owner-controlled – was provided in the Act for the tasks that might be undertaken by the Court (if it was so empowered by the Governor in Council and the Native Minister). But the power of the Governor in Council to make regulations to implement the Act was very broad. Conceivably, especially if the Commission was to be involved in designing the processes needed to implement the Act, as was envisaged by Carroll, processes acceptable to the peoples of Te Urewera would have been put in place by regulations. We accept, as anthropologist John Hutton argued, that the Act should have provided for communities, through their tribal committees, to regulate shareholdings from generation to generation. We also consider there was no reason to limit the Urewera Commission to the first decisions about titles, as Carroll assumed would occur (although this was not expressly provided for in the Act). A commission could have continued to play a role and to assist the owners. There is no doubt that the Crown's failure to provide in the Act for committee management of titles (once created), and its provision, instead, for officers of the Crown to trigger the Native Land Court's role was against the known wishes of the peoples of Te Urewera. However, the provision was only for a possible role for the Court: the Act did not provide that it would definitely operate in the Reserve. There was scope for the Court to have a role but it need not have come to pass. And even if the Court were to be given jurisdiction in the Reserve, it would have been a jurisdiction separate from that exercised under the Native Land legislation.

It seems to us that the provision for a possible role for the Court in the Reserve was a 'Plan B' inserted by the Government at the last minute: a backstop provision should the scheme for joint Government-Tuhoe regulations founder in practice. For these reasons, and without denying that the agreement of the leaders of Te Urewera should have been sought, we consider that the Act's potential for the Native Land Court to be involved in the Reserve narrowly escapes being in breach of Treaty principle. Again, however, what happened in the course of implementing the Act is a separate matter, for our later examination.

The third core principle in the September agreement was that title would be awarded at a hapu level. The evidence on that point is uncontested. The overwhelming wish of the peoples of Te Urewera, as expressed in 1894 and 1895, had been against individualisation of title. As a result, the September agreement had provided for hapu titles. But section 8 of the 1896 Act went beyond that. As we discussed in some detail above, we received differing evidence and submissions about whether section 8 individualised title. In essence, we agree with both sides of the debate. As counsel for Ngati Whare put it, the 'allocation of interests down from a hapu to a family to an individual level, irrespective of the governance mechanisms in the Act, contained within it seeds of radical individualisation'. As a result, 'the UDNR Act was not absolutely flawed', but it 'contained the significant and ultimately

insurmountable problem of individualisation'.[479] Given this conclusion, we need to ask: was there a compelling reason to require that the relative shares of individuals be determined?

The Crown made two arguments. First, it suggested that individuals had to be identified for each block, so that the correct owners would elect the local committee. We accept that a list of owners was needed for this purpose. We also agree with counsel for the Tuawhenua claimants that this did not require the determination of relative shares. The Crown's second argument was that any proceeds from use of the land – possibly from goldfields – needed to be allocated fairly as between individuals. This argument was based on the premise that distribution would be to individuals or, at least, individual families, as opposed to the benefit being held by, and distributed for, the benefit of the community. In our view, this was an unnecessary qualification to the tino rangatiratanga of the owners. Under custom, the community through its leaders would have decided how to expend such proceeds. If (and only if) that decision included a distribution to all members of the community, then the leaders would apportion funds accordingly. This power and responsibility ought to have rested with the local committees. It may well be that the committees would have welcomed the assistance of tribal leaders in the form of the General Committee or the Urewera commissioners. But, in our view, that was a decision for the hapu. It may also be that, in a situation where the colonial economy called for settled titles, some kind of master-list of relative shares was appropriate, if controlled by the community.

We conclude, therefore, that there was no compelling reason for section 8 of the 1896 Act to provide for the identification of individual owners' shares. Was this defect in the design of the legislation in breach of Treaty principle? In our view it was not. Our view would be different if there was evidence that a reason for the Government's inclusion of section 8 was a desire to facilitate its own later purchase of interests in the Reserve. But under the Act, only the General Committee had the power to alienate Reserve land – a restriction that was fundamental to the very concept of the Reserve. We can see no basis for concluding that at the time the Crown gave legal recognition to the self-governing tribal Reserve, it had in mind that it could more easily destroy the Reserve in future if only the provisions for identifying owners were worded in a particular way. Certainly, section 8 is overly prescriptive in an Act otherwise remarkable for its lack of detailed prescription. Certainly too, section 8 reflects a view of income distribution (for example, from leases) that does not accord with Maori custom. But these were not fatal flaws in the Act's specification of the Reserve's design. Section 8 did not create a situation in which it was inevitable that the General Committee's exclusive power to alienate Reserve land would be undermined: the concept of the Reserve was perfectly capable of being translated into practice with section 8 worded as it was. As long as the exclusive legal power of the General Committee to alien-

479. Counsel for Ngati Whare, closing submissions, (doc N16), p 60

ate Reserve land was upheld, the identification of individual shares in the Reserve posed no threat to its continued existence.

It is, however, the case – as was conceded in our inquiry – that the Crown later ignored the General Committee's exclusive power of alienation and purchased the shares of individuals (or 'raided' them as counsel for Wai 36 Tuhoe claimants characterised it). Those shares had been identified in accordance with section 8 but it would be wrong to attribute the Crown's unlawful purchase of them to the wording of the section. The Crown's conduct shows that, once it resolved to purchase the Reserve land, it would not let the provisions of the law stand in its way. It could have achieved its aim regardless of whether individual owners' relative shares were identified as required by section 8. Even if the section had specified the minimum requirement – that all owners be listed – the Crown could have approached those individuals in the course of an unlawful purchase programme. Therefore, it is our conclusion that it is not the requirements of section 8, but the Crown's later 'raiding' of individual shares, that constitutes a breach of Treaty principle. We will consider the extent of any prejudice from this Treaty breach in chapter 14.

The fourth core principle of the agreement was its recognition of tribal autonomy through the mechanism of local committees and the General Committee. As we discussed earlier in this chapter, much was promised in this respect – and, it appears, those promises were genuine. Premier Seddon intended to provide legal powers of self-government, to which he said the peoples of Te Urewera were 'entitled'. The flaw in the Act, however, was that it failed to confer powers on the committees. Almost everything remained to be prescribed by regulation. We received varying interpretations of this state of affairs. Cathy Marr noted Carroll's expectation that the Urewera Commission, with its Tuhoe majority, would draw up the regulations for the Crown to promulgate. She argued that this gave flexibility and room for Tuhoe leaders to suggest the functions and powers of their committees. Ms Marr also argued that in light of the many promises of protection and consultation that had been made, the chiefs could reasonably have trusted the Government to deliver on this point. Judith Binney, on the other hand, thought the Act was 'Janus-faced'.[480] In her view, its failure to define the powers of the committes, and its reservation of that power to the Crown alone, was fatal to any real legal protection of Maori autonomy.

Counsel for the Wai 36 Tuhoe claimants concluded:

> The Crown had a duty of active protection of Tuhoe tino rangatiratanga or self-government. The principles agreed on with Seddon in 1895, and the general ambit [of] the UDNRA, represented a Crown acknowledgement of that obligation and (at least initially) an effort to implement self-government. However . . . the actual implementation fell well short and was actively undermined by the Crown. The UDNRA was a Trojan Horse.[481]

480. Binney, 'Encircled Lands', vol 2 (doc A15), p 221
481. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 89

Counsel for the Tuawhenua claimants summed up the situation best: Te Urewera leaders ought to have been able to trust the honour of the Crown to deliver what had been promised. We agree. For that reason, we do not find the Act in breach of the Treaty on this point. Crown counsel conceded that the Treaty was breached when the Crown later failed to deliver either the powers of local government or collective decision-making about land, despite the requirements of the 1895 agreement and the intentions supposedly embodied in the Act. That is a separate matter and we examine the Crown's actions in that respect in chapter 14.

The fifth core principle of the agreement was that the peoples of Te Urewera would acknowledge the Queen and the Government and obey the law. In our view, the reliance by Te Urewera leaders on the Crown's lawful authority to protect their mana motuhake was fundamental in marking the advent of a new relationship between them. The compact of 1871 was to be fulfilled and their commitment to one another placed on a genuine Treaty footing. The developing reality of this was tested by surveyors and the stationing of armed forces in Te Rohe Potae in 1895, but Tuhoe chose – as their rangatira Kereru Te Pukenui said – to uphold the Queen and her laws. Even so, a necessary precursor to a truly consensual Treaty relationship was the settlement of issues still unresolved at that point. In our view, this happened in Wellington in September 1895, and was given legislative force in 1896.

The sixth core principle of the agreement was that the Crown would protect the peoples of Te Urewera and promote their prosperity, and that it would give social and economic assistance to meet those ends. As we have found, there was no agreement on the details of the 'package'. Carroll seemed to envisage more than Seddon was willing to offer, at least in 1895. Counsel for the Wai 36 Tuhoe claimants was right to point out that almost nothing of this assistance made it into the Act. The Crown, however, was also right to stress that legislation was not necessarily needed to deliver the kind of assistance discussed. The Crown preferred to rely on Seddon's memorandum as the sum total of its undertakings in this respect. We noted, however, evidence from Brad Coombes that Carroll thought the Crown bound to increase food supplies in Te Urewera, and a concession by Cecilia Edwards that social and economic assistance had been discussed on 7 September in broader terms than Seddon's memorandum captured. The historians who gave evidence to us agreed that Seddon intended to provide assistance in health and education. Assistance with economic development, especially for farming, had been agreed between Carroll and the delegation of Te Urewera leaders, but Seddon was yet to be convinced. In our view, it ought not to have been a stretch for the Liberals to contemplate economic assistance, at least of the kind they were offering to settlers in the 1890s. Overall, the details of the package (like other details in the agreement) needed to be worked out in the future, in partnership between the Crown and the General Committee.

9.5.4

We do not consider that the Crown breached the Treaty in 1896 by not including specific details – or a general undertaking – for social and economic assistance in the Act. It was put to us that only some such legislative undertaking could have compelled the Crown to act. We find that the Crown's undertaking to assist the peoples of Te Urewera was integral to the promises it had made of active protection, and of promoting their welfare and prosperity. The Crown was obliged to deliver on those promises. We will consider the question of whether it did so in forthcoming chapters of this report. We make no findings here on what the Crown had agreed to in terms of future protection and management of forests, birds, flora and fauna, and waterways. We will consider those issues too in forthcoming chapters.

Having considered the content of the September agreement and the question whether the Act gave it effect, we are left to answer the final question in this chapter: did the 1896 Act faithfully represent the agreement of the Crown and the leaders of Te Urewera and bind them together in a genuine Treaty-based relationship? Or were the defects which we have found to exist within it so serious as to be fatal for that purpose?

In our view, the Premier's speech on the Bill to the House of Representatives makes it clear that Donald McLean's compact was being honoured and given effect by the Crown. In attempting to do so, the Government of the day recognised that the peoples of Te Urewera were already self-governing in a self-contained district, although – in the Premier's view – this was beginning to break down. This is a fundamental point. Parliament was not conferring self-government on Te Urewera. It already existed. Under the Treaty of Waitangi, it was to be honoured and protected by the Crown. The Act's provision for tribal/district and hapu/block committees, with powers to be defined in the future, was meant to give recognition (and powers recognised by the law) to the tribes. The Crown's intention was to change a de facto situation to a de jure one. As we found in chapter 8, the peoples of Te Urewera had long been ready to adapt the form of their governing committee to one acceptable to the Crown, so long as this won it recognition and legal powers from the State. But we emphasise that the Act did not create self-government where none had existed before. Maori authority – tino rangatiratanga or mana motuhake – was to be given a vehicle: tribal committees.

Our second point is that any Act of Parliament which accorded legal powers to institutions for the purposes of 'local self-government' has constitutional significance. The exercise of public power by local representative institutions is a core part of our constitution. In the Urewera District Native Reserve Act, the Crown was recognising that Maori were 'entitled', as Seddon put it, to have their own district authorities and to exercise the powers of self-government. The Crown argued before us that nothing unusual was happening here in constitutional terms. We disagree. This was the first time the colonial State had recognised a Maori district in this way: to be set aside entirely as a reserve for its people, and

to be governed by them through a legally empowered local authority. For many decades previously, New Zealand Governments had steadfastly refused to grant Maori requests for legal powers of self-government, as Seddon acknowledged in the House. The Central North Island Tribunal has traced the long history of Governments' refusal to create self-governing 'native districts' under the Constitution Act of 1852, or by other means.[482] The Urewera District Native Reserve Act was a constitutional first for New Zealand, and for Maori.

Nor was the Urewera District Native Reserve Act about 'local government' in any restricted sense. First, full control of all tribal affairs had long been discussed as a role of the General Committee. Inside the reserve, Maori custom was to continue and to be protected. As the Government's representative had put it in the upper house, the Government was going to 'go very much further than any other legislation has done in giving legal sanction to those customs and habits by putting them into an Act of Parliament'.[483] Maori in the reserve were, as the Premier said, 'to govern themselves in accordance with their own traditions'.[484] This was Maori self-government – mana motuhake – and it enshrined the operation of Maori law (or 'custom' and 'traditions', as it was referred to in Parliament). This was surely a unique constitutional feature at that time.

Thirdly the General Committee was to be the body with which the Government consulted on matters affecting the district. There was an expectation at the time that dialogue with – and consultation by – the Government would continue. The events of 1894 to 1896 must have encouraged this belief. The Premier told the chiefs of Te Urewera in 1895 that as part of the 'local government' arrangements, 'in matters that arose between the Government and the Tuhoe the central committee would act as the medium of communication'.[485]

The fourth point is that all the land in the region came under the power of the governance bodies, through the Urewera Commission (which was supposed to have a Tuhoe majority and to work with hapu), through the block committees, and through the General Committee. This control of all land (and with it all resources) in the district gave the collective leadership of Te Urewera greater power than the average local authority. We agree with the Central North Island Tribunal that for Maori people at this time the ability to fully manage and control their own resources as a community was a significant part of self-government.[486] 'Land management' is, on the face of it, too restrictive a term.

Fifthly, the full range of the committees' local government responsibilities and powers had not yet been prescribed. We presume that they could have exercised judicial as well as

482. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 165–410
483. NZPD, 1896, vol 96, p 262
484. NZPD, 1896, vol 96, pp 166–167
485. *New Zealand Times*, 24 September 1895 (Marr, 'Urewera District Native Reserve Act 1896 and Amendments' (doc A21), p 59)
486. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 203

executive functions (such had been the case for the Native Councils planned by McLean in the 1870s, and for Bryce's native committees in the 1880s).[487] In any case, they were supposed to have the full powers of local government. This aspiration had the potential to be realised (as opposed to what the Central North Island Tribunal found with regard to the limited responsibilities given to Maori Councils in 1900).[488]

In all these ways, the argument that the term 'local government' would be something less than self-government or tribal autonomy is not supported by the context in which the Act was passed.[489] But it is fair to say, as we believe the claimants have acknowledged, that full independence was no longer a political reality. Colonial laws would have force in Te Rohe Potae from now on. In a sense, this was at the heart of Tuhoe's strategy, as Tamati Kruger explained it: they used the law to protect themselves from the law. As counsel for Nga Rauru recognised, the key would now be a partnership between the General Committee and the Crown.

This brings us to consider the relative weight of the flaws in the 1896 Act: the elements within it which failed to best reflect the Crown's agreement with the leaders of Te Urewera. The two most serious flaws were the requirement in section 8 that individual shares in the land be identified and the role provided potentially, although not definitely, for the Native Land Court. In our view, it was these provisions of the Act that might have undermined the very concept of the Urewera District Native Reserve as agreed between the Crown and the leaders of Te Urewera. Importantly, however, those provisions did not prescribe that result and nor can it be said that, when seen in their true context, they anticipated or encouraged that result. That is why we have concluded that a fully consensual relationship under the Treaty of Waitangi was established by the negotiations of 1894 to 1895, the agreement of September 1895, and the consequential honouring of that agreement in the enactment of the Urewera District Native Reserve Act.

Tamati Kruger stated that this was not so much a treaty in its own right as a fulfilment and renewal of McLean's compact between a new generation of leaders. We agree. We see a clear line between the compact of 1871 which was never formalised in law, the failure to honour it in the intervening years, the explanation of the compact to Premier Seddon in 1894, and his decision to formalise, honour and carry it out in 1895 and 1896. As he said in Parliament, the reservation of the district, and the placing of its administration in the hands of its Maori people, would honour the promises of Donald McLean, and was long overdue. It seems clear to us that there is a constitutional significance to such arrangements between the Crown and tribes when they recognise and respect each other's existence and authority.

487. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 283–285, 288, 306–312, 314, 317–319, 342–343
488. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 387–400
489. Edwards, 'The Urewera District Native Reserve Act 1896', pt 1 (doc D7(a)), p xii

9.5.4

Overall, we find that – with few exceptions – the Crown acted consistently with Treaty principles in 1894 to 1896. It placed its relationship with the peoples of Te Urewera on a genuine Treaty-based, and unique constitutional footing. It sought and acquired the people's agreement to recognise the Queen, the Government and the law. It provided for the legal recognition of their self-government. And it promised them the active protection and mutual benefit inherent in the Treaty.

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CHAPTER 10

'HE KOOTI HAEHAE WHENUA, HE KOOTI TANGO WHENUA': THE NATIVE LAND COURT AND LAND ALIENATION IN THE RIM BLOCKS OF TE UREWERA, 1873–1930

Tetahi ropu taurekareka ko Te Kooti Whenua Maori. He Kooti haehae whenua. He Kooti tango whenua. Ko te hunga whakakino, whakawai, i o matou hapu, i o matou iwi, i o matou tipuna.

Ani Te Whatanga Hare, brief of evidence, 8 December 2003 (doc B27), pp 26–27

An invidious group is the Native Land Court. It is a court that slashes land, it is a court that takes land. It is a court that makes us evil: it tempts us, tempts our hapu, our tribes, and our ancestors.

Ani Te Whatanga Hare, simultaneous translation of evidence,
11 December 2003, Tataiahape Marae, Waimana

10.1 Introduction

In this chapter, we review claims about the Native Land Court, and about the massive loss of land that took place in the Urewera 'rim' blocks before 1930. These blocks, totalling around half a million acres, encircled the Urewera District Native Reserve. Each 'block' was constructed by a survey plan. It represented the drawing of lines through land claimed by multiple hapu and iwi, so that boundaries could be defined, titles issued, and the land could be used in the colonial economy. Buyers or tenants needed certainty as to what they were transacting, and with whom. As we saw in chapters 8 and 9, Tuhoe, Ngati Whare, and Ngati Ruapani supported Te Whitu Tekau. They resisted the process of obtaining Crown-derived titles from the Native Land Court, as well as the sale or lease of land. Other iwi, including Ngati Manawa, wanted to lease their land (and make strategic sales). They went to the Court as the only means of getting a title that could be used for that purpose. The result, as we shall see, was the gradual encirclement of the interior Te Urewera lands by blocks created through survey and Court awards, which could be sold or leased by the individuals listed

on their titles. Despite the overwhelming Maori preference for leasing, only 18 percent of this land remained in Maori ownership by 1930.

How do we account for the success of the Court in hearing applications for, and granting, titles to so much land, despite strong and sometimes concerted Maori opposition? And how is the alienation of 82 percent of the land to be explained, given the repeated statements of Maori communities and leaders that they wanted to keep and in some cases develop their ancestral lands? To a very large extent, the answer to these questions lies in a critical part of the Native Land Court regime: the removal of the authority of tribal communities over their land. As the Native Land Laws Commission put it in 1891: 'The alienation of Native land under this law took its very worst form and its most disastrous tendency. It was obtained from a helpless people. . . . The strength which lies in union was taken from them.'[1]

The claimants told us that individuals could never govern or alienate tribal land under custom. Yet the native land laws provided for individuals to apply for the investigation of title, and for the absolute ownership of communal land to be granted to lists of individuals holding shares in a block. Worse, the law did not allow those individuals to form collective or corporate bodies to restore community control. Nor did any individual have an individual piece of land that they could farm; all the law allowed was for each person to sell or lease a paper share, and nothing else. As we shall see, this was effectively the case in the rim blocks of Te Urewera until 1900. There was a short but important hiatus from 1900 to 1905, followed once again by the disempowerment of tribes and hapu communities from 1909 and 1913 onwards. It is a sorry record, which does little credit to the Crown.

Crown counsel made the following important concessions:

- Maori who did not wish to participate in the Native Land Court could not in fact avoid participating, at the risk of losing their lands, and were forced to incur its costs;
- the Native Land Act 1873 contributed to individualisation of title and the alienation of land;
- survey costs were a heavy burden for some (perhaps many) Maori communities, and the Crown could have eased this burden;
- in Crown purchasing, dealings with individuals were more common in the 1890s, the period when most Urewera 'rim' purchases occurred;
- the native land laws did not allow Maori the option of a corporate model of management until 1894;
- Crown policy was generally in favour of the alienation of Maori land; and
- over time, the Crown failed to recognise the significance of Maori community and kinship in relation to land.

As we shall see, the Crown qualified many of these concessions, or offered explanations in mitigation. It did not make any admissions of Treaty breach.

1. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 625)

Fortunately, we were assisted in our task of evaluating claims about the Native Land Court by previous findings of the Waitangi Tribunal. Although the Crown relitigated many of them in our inquiry, we do not see the need to revisit those generic findings which in our view applied equally in Te Urewera. Before defining the matters still at issue in this chapter, we set out the earlier Tribunal findings on which we rely.

10.2 Previous Waitangi Tribunal Findings Accepted by this Tribunal

This Tribunal is by no means the first to undertake an examination of the Native Land Court regime. At the time we were hearing evidence in Te Urewera, only a limited number of Tribunal reports contained in-depth studies of the Court's operations in particular areas, most notably *Rekohu*, *Turanga Tangata Turanga Whenua*, and the *Mohaka ki Ahuriri Report*.[2] In the last few years, four additional reports have been published containing extensive examinations and analyses of the Native Land Court system and its operation and effects in the Central North Island, Hauraki, Kaipara and Te Tau Ihu.[3] In each of those inquiries, the Tribunal received evidence about the general purpose of the land court system and the social context within which it took effect, as well as detailed evidence of the court's processing of land in the particular district, and the Crown's conduct with regard to that land. Each tribunal has made findings of a general nature as well as findings specific to its inquiry district.

We are fortunate to be reporting at a time when there is a wealth of published Waitangi Tribunal reports about the Native Land Court system. Having studied the evidence presented to us and the earlier Tribunals' reports, we are satisfied that a number of generic issues about the Court regime have now been so well-explored and authoritatively determined that there can be no justification for our retraversing them. Therefore, we begin our consideration of the Native Land Court as it operated in Te Urewera by setting out a number of key conclusions reached by the Tribunal in previous reports, about the operation of the Native Land Court system, and its impact on customary owners and their authority over their land and waterways, that we accept apply equally in Te Urewera.

2. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001); *Turanga Tangata Turanga Whenua: The Report on the Turanganui a Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004); *The Mohaka ki Ahuriri Report*, 2 vols (Wellington: Legislation Direct, 2004)

3. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, 4 vols (Wellington: Legislation Direct, 2008); *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006); *The Kaipara Report* (Wellington: Legislation Direct, 2006); *Te Tau Ihu o Te Waka a Maui: Report on Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2008)

10.2

That leaves us to concentrate, in the body of this chapter, on the operations of the Court and Crown agents in Te Urewera, and to identify any local features that are similar to, or different from, those which the Tribunal has identified in other districts.

At the time the Native Land Court first exercised its jurisdiction in Te Urewera, the Native Land Act 1873 was in force. It was not the first legislation to provide for customary land to be converted to a form of title that could be transferred to settlers or the Crown: it followed the Native Lands Acts of 1862, 1865, 1866, 1867, and 1869.[4] As the Turanga Tribunal has noted, the 1873 Act affirmed the underlying premises of the earlier native land legislation, which were that:

> Maori land would remain open to private purchasers, title would continue to be investigated by an independent court operating in accordance with English judicial norms; that title would be ultimately transformed into an English form of tenure; and the preoccupation of the law would remain the supervision of the process of transfer from Maori into Crown and settler hands.[5]

Although the first Native Lands Act in 1862 had established a differently composed court, by 1865 the Native Land Court was an English-style court with Pakeha judges and 'native assessors' appointed by the Governor. Under the 1873 Act, an assessor or assessors could 'sit at a Court' only when required by a judge and when they did sit, their concurrence was not necessary to the validity of any order or judgment of the Court.[6] This was amended in 1874, to require one or more assessors to sit in every Court, and the concurrence of at least one assessor in every judgment.[7] We accept that the role of assessors could sometimes be important, although often the minute books reveal little about it. We also accept that in some districts there was a level of Maori input to Court decisions, by means of out-of-court agreements. The Hauraki Tribunal found:

> that the Maori assessors could and occasionally did play a significant role in the court, and that the court commonly allowed or required claimants to draw up lists of names outside the court for inclusion on titles, a practice that may have contributed to genuine Maori consensus.[8]

Nonetheless, from 1886, the agreement of the assessor was no longer required for a range of decisions, including (for example) the imposition of survey liens.[9] Then, from 1894, the

4. See Waitangi Tribunal, *Hauraki Report*, vol 2, chapter 15, for an examination of the pre-1873 native land legislation
5. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 398
6. Native Land Act 1873, s 15
7. Native Land Act Amendment Act 1874, s 5
8. Waitangi Tribunal, *Hauraki Report*, vol 2, p 777
9. Native Land Court Act 1886, s 9

assessor's concurrence was no longer required at all.[10] The role of the assessor was the only formal involvement of Maori in the Court's decisions, other than as litigants. The original 1862 Court took the form of a panel of local rangatira, chaired by a Pakeha magistrate.[11] From 1865, however, assessors were rangatira drawn from outside the district in which the Court was operating. All judges were Pakeha. This, then, was a Court of 'outsiders', as the Rekohu Tribunal found.[12]

We turn now to consider a series of conclusions that have been established by previous Tribunal inquiries, and which we accept are equally applicable to the Te Urewera Inquiry District:

- A system to decide titles to distinct parcels of land was necessary for the use of that land in the colonial economy.
- The main purpose of the native land laws was to facilitate the transfer of land from Maori to settlers.
- The underlying customary title to land was communal, usually held at hapu level, and could not be freely alienated without recourse to the collective.
- The Treaty recognised tribal and communal land rights, to which individual rights were subordinate.
- The establishment of the Native Land Court was contrary to tino rangatiratanga and in breach of the principles of the Treaty. This point has three main components:
  - the Native Land Court was imposed on Maori without their agreement or consent;
  - the Court usurped Maori communities' right to determine and control their title to land; and
  - the Court was an inappropriate forum for the determination of customary title.
- The Native Land Act 1873 introduced a form of individualised land title which was in breach of Treaty principle.
- The native land laws did not provide for community management of Maori land before 1894, which was in breach of the principles of the Treaty.
- The Treaty provided for the settlement of New Zealand and the alienation of land for that purpose. At least some alienations, whether by lease or sale, were voluntary and of potential benefit to Maori. Nonetheless, if the sale of land continued to the point where communities were seriously harmed, then the explanation must be something other than the voluntary agency of those communities.
- The Crown had a duty to ensure that tribes retained a sufficient land base for their social, cultural, and economic needs, both for customary purposes and to develop in the new economy.

We discuss these points in turn.

10. Native Land Court Act 1894, s 18
11. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 412
12. Waitangi Tribunal, *Rekohu*, p 146

10.2.1 A system to decide titles to distinct parcels of land was necessary for the use of that land in the colonial economy

In many areas throughout New Zealand, Maori wanted to use their land in the colonial economy. The pre-1865 system, in which Crown purchase agents had decided which Maori had the right to alienate particular blocks of land, was discredited by the early 1860s. As the Hauraki Tribunal observed, some kind of system was required to avoid a repeat of the Government's disastrous Waitara purchase, which had triggered war in Taranaki.[13] The Turanga Tribunal found that engagement in the new economy required 'precise boundaries and certainty of ownership'.[14] Any title system had to deliver on these two points. The Hauraki Tribunal accepted that some simplification of overlapping customary rights might be needed for that purpose, so long as Maori were consulted about (and gave their agreement to) the nature and form of any new titles. They also had to have a genuine choice as to whether they would bring their land under a new title system.[15]

10.2.2 The main purpose of the native land laws was to facilitate the transfer of land from Maori to settlers

The Hauraki Tribunal considered detailed evidence from the Crown (which has also been filed in this inquiry), to the effect that the Government was motivated in introducing the native land laws by a 'civilising mission': Maori would receive the benefit of a Western, individualised form of title. In other words, the Crown's aim was benevolent, and its actions were taken in good faith. The Tribunal accepted that this was one of the Crown's aims, but found that its main aim in creating the Native Land Court was to facilitate the transfer of land from Maori to settlers.[16] To avoid a charge that the 'civilising mission' was merely a cloak for settler self-interest, various tests had to be met: Maori consent to and cooperation with the design and implementation of the native land laws; serious discussion with Maori about the constant amendment of the legislation to ensure that the changes were what they wanted; and evidence that the Acts did include 'realistic provisions for Maori advancement as well as that of settlers'.[17] The Crown's policies and practices did not meet these tests. The Hauraki Tribunal concluded that the 'civilising mission' was a motivation secondary to that of facilitating the acquisition of remaining Maori land.[18]

The Turanga Tribunal also evaluated the Crown's aims from the evidence available in its inquiry, and came to the same conclusion. It was known that Maori did not want the Court; thus, its introduction was primarily for the benefit of settlers, and its machinery

13. Waitangi Tribunal, *Hauraki Report*, vol 2, p 710
14. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 439; see also *He Maunga Rongo*, vol 2, p 441
15. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 781–782
16. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 663–671, 710, 778
17. Waitangi Tribunal, *Hauraki Report*, vol 2, p 671
18. Waitangi Tribunal, *Hauraki Report*, vol 2, p 778

> *the whole object of appointing a Court for the ascertainment of Native title was to enable alienation for settlement. Unless this object is attained the Court serves no good purpose, and the Natives would be better without it, as, in my opinion, fairer Native occupation would be had under the Maoris' own customs and usages without any intervention whatever from outside. Therefore, in speaking of the Native Land Court, this test to it must, I consider, be applied – viz, that there should be a final and definite ascertainment of the Native title in such a way as to enable either the Government or private individuals to purchase Native land.*
>
> T W Lewis, under-secretary, Native Department, statement in evidence to the Native Land Laws Commission, 1891 (David Williams, brief of evidence, 20 February 2004 (doc C3), p 26)

was deliberately designed to bring about the transfer of the bulk of Maori land into settler ownership.[19]

10.2.3 The underlying Maori customary title was communal and could not be alienated without recourse to the collective

In chapter 2, we reflected on the relationship between the peoples of Te Urewera and the land, and on the role of rangatira who, in accordance with tikanga, exercised authority on behalf of their hapu, and protected their lands and resources. The complex web of rights in land that were organised by tikanga has been the subject of considerable evidence in and findings by the Waitangi Tribunal during the past 30 years. We adopt this account of Maori communal and individual land rights from the *Muriwhenua Land Report*:

> The fundamental purpose of Maori law was to maintain appropriate relationships of people to their environment, their history and each other. In this it was by no means unique amongst the laws of the world but the emphasis was different. There was no equivalent to the English common law whereby people could hold land without concomitant duties to an associated community, or no parallel to the English social order wherein large land holdings could influence one's status in local society. For Maori, the benefits of the lands, seas, and waterways accrued to all of the associated community and the individual's right of user was as a community member. Similarly, rangatira held chiefly status but might own nothing. It was their boast that all they had was for the people. As the proverb went, the most important thing in the Maori world was not property but people. . . .

19. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 408, 526–532

10.2.3

The Maori feeling for the land has often been remarked on, and should need no more elaboration than an outline of the philosophical underpinnings of land-related values. In terms of those values, it appears to us, Maori saw themselves as users of the land rather than its owners. While their use must equate with ownership for the purposes of English law, they saw themselves not as owning the land but as being owned by it. They were born out of it, for the land was Papatuanuku, the mother earth who conceived the ancestors of the Maori people. Similarly, whenua, or land, meant also the placenta, and the people were the tangata whenua, which term captured their view that they came from the earth's womb. As users of the earth's resources rather than its owners, they were required to propitiate the earth's protective deities. This, coincidentally, placed a constraint on greed.

Attachment to the land was reinforced by the stories of the land, and by a preoccupation with the accounts of ancestors, whose admonitions and examples provided the basis for law and a fertile field for its development. As demonstrated to us in numerous sayings, tribal pride and landmarks were connected and, as with other tribal societies, tribe and tribal lands were sources of self-esteem. In all, the essential Maori value of land, as we see it, was that lands were associated with particular communities and, save for violence, could not pass outside the descent group. That land descends from ancestors is pivotal to understanding the Maori land-tenure system. Such was the association between land and particular kin groups that to prove an interest in land, in Maori law, people had only to say who they were. . . .

The community's right to land, in pure terms, was by descent from the earth of that place . . . The individual's right was different, and is generally seen as a right of user arising from membership of the associated community – so that, for the individual, descent alone was not enough. Descent gave a right of entry, but, since Maori had links with many hapu and could enter any one, use rights depended as well on residence, participation in the community and observance of its standards. . . .

The main right, however, lay with the community in general. As a consequence, deceased forebears and generations to come had as much interest in the land as any current occupier. This view, once again, compelled punctilious observance of constraints on resource depletion.

Thus, while there existed a complex variety of individual rights to use or take resources in different ways and at diverse times – rights that individuals regarded as their own – the individuals' enjoyment of any part of the district was because they belonged to the local community. Access to that community was primarily through descent, and then also, but less perfectly, by incorporation. There was no right of land disposal independent of community sanction.[20]

20. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), pp 21–24

10.2.4 The Treaty recognised tribal and communal land rights, to which individual rights were subordinate

The extract from the *Muriwhenua Land Report* (above) makes plain that the customary land rights of an individual were derived from, and subordinate to, the rights of the community. The Waitangi Tribunal has long recognised that article 2 of the Treaty promises to protect Maori tribal and communal land rights, which are the primary rights that underpin Maori society. In 1987, drawing on the korero of John Rangihau of Tuhoe, the Orakei Tribunal found that:

> The acknowledgement in the Maori text, of the 'tino rangatiratanga' of the Maori over their lands necessarily carries with it, given the nature of their ownership and possession of their land, all the incidents of tribal communalism and paramountcy. These . . . include the holding of the land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion. A consequence of this was that only the group with the consent of its chiefs could alienate land.[21]

10.2.5 The creation of the Native Land Court was contrary to tino rangatiratanga, in breach of the principles of the Treaty

This point has three inter-related elements:

- the Native Land Court was imposed on Maori without their agreement or consent;
- the court usurped Maori communities' right to determine and control their title to land; and
- the court was an inappropriate forum for the determination of customary title.

On the first matter, we accept the Hauraki Tribunal's statement of the circumstances surrounding the introduction of the Native Land Acts, and its conclusion that the absence of consultation with Maori was inconsistent with Treaty principle. The Hauraki Tribunal noted that, at the national level, Maori involvement in the planning of the new native land regime was confined to the Kohimarama conference in 1860, which was 'convened mainly to rally support for the Government's stand in Taranaki'.[22] That conference was not attended by chiefs from Taranaki or Waikato; nor, we can add, was there attendance from Te Urewera (see ch 3). And although, at the conference, there was a generally positive reaction to the idea of a state-sponsored tribunal ascertaining tribal rights, there were different views about the composition of such a body, and that subject was to be discussed further at local and national level. But there was no other national conference.[23] Instead, Governor Grey set up

21. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (*Wai 9*) (Wellington: Waitangi Tribunal, 1987, reprinted with minor corrections by GP Publications, 1996), p 190
22. Waitangi Tribunal, *Hauraki Report*, vol 2, p 672
23. Waitangi Tribunal, *Hauraki Report*, vol 2, p 673

his New Institutions (which, as we saw in chapter 3, were discussed with Te Urewera leaders in 1862 but taken no further there).

The Hauraki Tribunal considered that if the introduction of the New Institutions was intended by the Crown to be a form of consultation or testing of local level Maori opinion about the two main planks of the Native land system (the registration of titles followed by direct dealing with settlers), then 'the answers returned were negative or indifferent, rather than positive'.[24] That Tribunal also noted that one witness before it, a Crown historian, had devoted over 100 pages of evidence to the analysis of numerous draft Bills and paper schemes that passed between governors, ministers, officials and the Colonial Office in the years 1859 to 1862 'without a single mention of their being referred to Maori'.[25] The Tribunal concluded:

> It may reasonably be supposed that there was some informal discussion in each district between officials, settler politicians, and rangatira about land tenure and land law generally, but the claimants are amply entitled to their view that there was no formal consultation between the Government and Maori leadership on the embryo Native Lands Act itself; such consultation might have come about if, for example, a Kohimarama-type assembly had been convened to consider a draft Bill. It will be recalled there were no Maori members of Parliament at this time.[26]

Turning to the second matter, we accept the Taranaki Tribunal's finding that the Treaty vested the authority over Maori lands in Maori, including the right of Maori to maintain their own way of reaching agreements. Therefore:

> To the extent that it presumed to decide for Maori that which Maori should and could have decided for themselves, the Native Land Court encroached on Maori autonomy and was acting contrary to the Treaty of Waitangi. It follows that the legislation that permitted of that course was also inconsistent with Treaty principles.[27]

The Turanga Tribunal explained further that the Crown, as a result of the cession of 'sovereignty' or 'te kawanatanga katoa', secured the right to make laws for the regulation of Maori title, including the transfer of that title. But that right was subject to important restrictions:

> By the terms of the second article, the Crown offered two crucial guarantees in the context of the native title system. The first was that Maori title would be respected. This was

24. Waitangi Tribunal, *Hauraki Report*, vol 2, p 674
25. Waitangi Tribunal, *Hauraki Report*, vol 2, p 674. The Tribunal referred to a report by Dr Donald Loveridge, which was also filed in our inquiry: 'Evidence of Donald Loveridge concerning the origins of the Native Land Acts and Native Land Court in New Zealand', report commissioned by the Crown Law Office, 2000 (doc A124)
26. Waitangi Tribunal, *Hauraki Report*, vol 2, p 674
27. Waitangi Tribunal, *Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 282

> most explicitly stated in the English text promise to protect Maori in the 'exclusive and undisturbed possession of their lands'. The second was that Maori control over Maori title would also be respected. This is best encapsulated in the Maori text promise of 'te tino rangatiratanga o o ratou whenua'. There can be no question but that both promises were absolutely fundamental to the Treaty bargain.[28]

The result was that:

> the Crown's right to make laws for the regulation of Maori title could not be used to defeat that title or Maori control over it. On the contrary, the Crown's powers were to be used to protect Maori title and facilitate Maori control.[29]

Thus, 'the Native Lands Acts, in providing for the operation of the Native Land Court, expropriated from Maori the power of deciding questions of title'.[30] The Crown installed an alien institution as the determiner of Maori title.

Turning to the third matter, the Rekohu Tribunal focused on the fact that, from 1865, the Native land system not only failed to utilise existing Maori institutions to resolve title disputes, but also created an inappropriate body for that role:

> An aspect of rangatiratanga was that, to the extent practicable, Maori would control their own affairs. That must have included the development of their own institutions to resolve disputes between tribes. We have seen how runanga were developed to handle disputes within the tribes, and how the Native Lands Act 1862 envisaged a panel of chiefs to resolve land rights disputes between tribes. Both envisaged a form of court under Maori control for the resolution of Maori disputes.
>
> We have also seen, however, that Chief Judge Fenton drafted a new Act – the Native Lands Act 1865 – that would vest control of Maori dispute resolution in Pakeha judges. This change, which was implemented by the Crown, was contrary to Treaty principles in our view.
>
> . . . . .
>
> The first constraint on the ability of the Native Land Court to manage Maori custom was that the judges were outsiders looking in.[31]

We accept that Native Land Court judges in the nineteenth and early twentieth centuries were prevented from carrying out satisfactorily the primary function of the Native Land Court – to determine the customary ownership of the land – partly because of who and what they were. Contemporary settlers were simply not equipped to comprehend the imperatives and nuances of Maori kinship and reciprocity. An indication of the complex-

28. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 534
29. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 534
30. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 533
31. Waitangi Tribunal, *Rekohu*, pp 144–146

ity of the task entrusted to the Native Land Court judges has been provided by the Central North Island Tribunal:

> The transformation of layers of customary rights into the inflexible new titles was a job for experts, not for outsiders. It required a knowledge not only of whakapapa, but of which relationships were crucial ones, and of the dynamics that underlay those relationships. It required a knowledge of which divisions of land would work, and which would not. It required an understanding of the vicissitudes of the distant and the recent past, and how they had impacted on different groups; and of the emergence of newer groups as part of the age-old processes of hapu formation. It required also a finely balanced appreciation of how rights surrendered in one area might justly be compensated for in another. Above all, it required consensus among those whose rights were at stake – even if, on occasion, this might take time.[32]

In light of this, we accept the Rekohu Tribunal's assessment:

> No matter how well meaning the judges may have been, and no matter the extent of their former experiences with Maori, the tendency, which was only natural, was to conceptualise of native custom in terms of their own concepts and experience. The tendency was also to cope with customary complexities by reducing them to overly simplistic rules, and then to apply them without the customary pragmatism of Maori or the Maori sense of justice.[33]

In the circumstances, as the Te Tau Ihu Tribunal found, mistakes and distortions of custom took place.[34]

10.2.6 The 1873 Native Land Act introduced a form of individualised land title, which was in breach of the principles of the Treaty

Two possible ways to establish the ownership of Maori land were introduced by the 1873 Native Land Act: the memorial of ownership and the Crown grant.

A memorial of ownership was drawn up by the Native Land Court after a judge had investigated a claim to particular (surveyed and mapped) land, and satisfied himself as to who were its 'owners according to Native custom'. The memorial listed the names of all the individuals who the court identified as owners, their hapu and (when the majority of owners required it) their so-called 'relative shares' (s 47). Drawn on the memorial, or annexed to it, was a plan of the land concerned, based on the survey and map that had to be provided to the court. Every memorial of ownership contained the condition that the owners had no power to sell or make any other disposition of the land other than a lease for no more than

32. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 485
33. Waitangi Tribunal, *Rekohu*, p 146
34. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 780

> *the 1873 Native Land Act introduced two significant changes to Maori land tenure. First, it allowed Maori customary land to be alienated, and secondly, it individualised that alienation process.*
>
> Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 533

21 years (s 48). However the Act expressly provided that this did not preclude the land being sold where all the owners agreed; nor did it prevent any partition of the land (s 49).

The result, as the Central North Island Tribunal explained, was that:

> 'Memorials of ownership' were records of the membership list of landowning hapu at the time the court award was made. But although the land technically remained customary land, those named on the memorial now held individual shares in the land which, contrary to the rules of aboriginal title and the pre-emption clause of the Treaty, became alienable to private buyers and lessees.[35]

Upon the application of owners, the title to land under a memorial of ownership could be converted to a freehold title by order of the Native Land Court, followed by the Governor issuing a Crown grant for the land. Crown grants could only be made for blocks or partitions which had ten or fewer owners or were held under certificates of titles issued under earlier Native land legislation.[36]

There has been much debate in earlier Tribunal inquiries as to whether the 1873 Act promoted individualisation of title and fostered excessive alienation.[37] The Turanga Tribunal focused specifically on the question whether the title system introduced by the 1873 Act resulted in Maori alienating more land in Turanga than if community title had been recognised from the outset.[38] As to the nature of the title conferred by memorials of ownership, the Turanga Tribunal concluded that such memorials provided 'a kind of virtual individual title' that 'individualised the sale of Maori land'.[39] In similar vein, the Hauraki Tribunal found that the memorial of ownership created a 'hybrid title' that 'was not a truly individual title, but a form of multiple title which allowed each individual to sell his or her interests piecemeal.'[40]

35. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 447
36. Native Land Act 1873, s 80
37. See the debate between Bob Hayes, Paul Goldstone, Dr Michael Belgrave, Professor Ward and others, discussed at length by the Turanga and Hauraki Tribunals: *Turanga Tangata Turanga Whenua*, chapter 8; *The Hauraki Report*, vol 2, chapter 16
38. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 469–532
39. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 441, 443
40. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 784

10.2.6

The closing submissions in the Te Urewera inquiry were made after the publication of the Turanga report and well before the publication of the Hauraki report. The Crown submitted to us, as it had to the Turanga and Hauraki Tribunals, that the memorial of ownership under the 1873 Native Land Act provided 'a type of communal title'.[41] An individualised title, it was argued, was one that could be alienated by an individual owner without reference to other owners. The 1873 Act, however, required the land court to be satisfied that all owners who had agreed to sell or lease land did in fact agree to that course of action. Thus, it was submitted, the 1873 Act did not allow alienation by any individual without reference to other owners: all those who agreed to alienate had to confirm that in court before the alienation could occur.[42]

We endorse the Turanga Tribunal's rejection of the Crown's argument.[43] The changes made to customary tenure by the 1873 Act, the Turanga Tribunal concluded, expropriated from Maori communities 'both the community title itself and the community's right to control land sale and retention strategies.'[44] The main planks of the Tribunal's position were as follows:

- There was no requirement that purchasers deal with the community of owners as a community in securing agreement for sale.[45]
- Individual trading of interests was not discouraged: while s 87 rendered unenforceable (but not illegal) private dealings in land before it was Crown-granted in freehold, if the court was satisfied that, of the owners listed on the memorial of ownership, all involved in the deal agreed to it, the deal would be upheld as valid. Further, advance payments to individual owners were counted as part of the price offered by a prospective purchaser: if they had not counted, it would have discouraged dealing in land before it was freehold.[46]
- The Crown was not bound by s 87: its dealings with individuals before land was Crown-granted were effective once those individuals partitioned out their interests.[47]

41. Crown counsel, closing submissions, June 2005 (doc N20), topics 8–12, p 15
42. Ibid
43. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 439–444, 519–521
44. Ibid, p 533
45. Ibid, p 443
46. Ibid, p 442
47. In his evidence for the Crown in the Hauraki inquiry, also filed in our inquiry (doc A125, pp 84–85), Robert Hayes stated that: 'Prior to the 1873 Act, the Crown was free to purchase individual interests either before or after the land in question had passed through the Court. The 1873 Act did not alter that position.' In support, Hayes cited sections in each of the 1865, 1866, 1867, and 1873 Native Land Acts that enabled the Court to complete inchoate agreements between Crown Land Purchase Officers and Natives, and also sections of the Immigration and Public Works Acts 1871 and 1872 that, for specified purposes, allowed Crown purchase of land not held under a certificate of title. Hayes also adverted to a general principle of the common law that the Crown is not bound by an Act of Parliament unless the contrary is stated or necessarily implied in the Act.

- The Act contemplated 'any number of collective owners' wanting to partition out their interests for sale (s 59), and no single community decision to sell was required before that could occur.[48]

While the 1873 Act required a majority of owners (but not the entire community) to agree to allow sellers to partition out their interests for sale (s 65),[49] from 1880, an individual could partition out his or her interests without restraint.[50]

From these, the Tribunal concluded:

> Thus, any formal power of chiefs, by tikanga, to prevent individuals from selling was overridden in effect by the philosophy of the 1873 Act and the specific terms of section 59. Nor did the community by consensus have any veto against the sale of individual interests. By the terms of section 65, if a majority agreed to allow the sellers to partition out their interests for the purpose of sale, the court could do so. Within seven years, this majority requirement was dropped. Any individual could partition out his or her interests.[51]

As the Turanga Tribunal found, the effects were far-reaching. The 1873 Act (and its successors):

- made Maori titles usable in colonial commerce only through sale or lease;
- made sale or lease achievable only by the transfer of individual undivided interests;
- rendered community decision-making irrelevant thereby; and
- did all this in the face of the clearly expressed wishes and actions of all but a few Maori.[52]

10.2.7 The native land laws did not provide for community management of Maori land before 1894, which was in breach of the principles of the Treaty

The fact that land held under a memorial of ownership could be sold by means of the serial purchase of individual owners' interests underpins the point, conceded by the Crown in our inquiry and in previous inquiries,[53] that the Native Land Act 1873 did not provide a corporate management mechanism for owners. Nor did the law allow Maori to create their own

48. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 443
49. Robert Hayes, 'Evidence of Robert Hayes on the Native Land Legislation post-1865 and the operation of the Native Land Court in Hauraki', report commissioned by the Crown Law Office, 2001 (doc A125), pp 71–72
50. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 442. The reference to 1880 onwards is to the Native Land Court Act 1880, ss 43, 44, and Native Land Division Act 1882, s 12 (both discussed in the Hauraki report at p 731)
51. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 443
52. Ibid, p 446
53. See, for example, Waitangi Tribunal, *The Hauraki Report*, p 729

corporate bodies by putting their land in trust. Such an attempt to restore a form of communal title over the land was held by the Supreme Court to be illegal.[54]

In previous inquiries, the Crown has defended its good intentions, arguing that the destruction of Maori communalism was seen as necessary, and in the best interests of Maori. The individualisation of Maori titles to land was held to be for their own social and economic improvement. This was the thinking of the time, and thus unavoidable, whether or not we agree with it today. It was not reasonable, argued the Crown, to have expected politicians to think and act other than according to the honestly-held views of their time. In response to such arguments, the Central North Island Tribunal made three points, with which we agree.

First, the Tribunal noted the response of Apirana Ngata in 1913, to a statement by one of his parliamentary colleagues on the perils of communalism, that this was 'Pakeha claptrap', and not how Maori saw things. Maori views on how their land should be managed were, under the Treaty, of paramount importance.[55]

Secondly, the Tribunal observed that contrary views could be (and were) expressed by settler politicians.[56] The Tribunal noted the proposals of WL Rees, member of the House of Represenatives, to recognise tribal titles and set up tribal management committees in the 1880s:

> Rees emphasised that British law and policy-makers were in fact entirely comfortable in dealing with common property through a variety of legal mechanisms. There was no genuine or insurmountable problem in that respect. These mechanisms included corporations and joint stock companies, community bodies (such as county or borough bodies), and the Crown itself. If nineteenth-century politicians were to be truly fair and consistent, Rees argued, then all such bodies by which European community lands were held in common and administered by representatives should be dissolved, and their assets held by all interested individuals as separate, saleable titles.
>
> Clearly, if Rees could think in that way and propose community titles for Maori land in the 1880s, it was at least possible for the Crown to have kept the Treaty guarantee of tino rangatiratanga over tribal lands. In 1894, a decade later, Sir Robert Stout told Parliament that, in his view, Maori must be dealt with 'as they are, and not as we would like them to be', which meant dealing with them as communal bodies . . . 'the Maoris are a communal people, and we ought to allow them committees to manage their land – committees of owners'.[57]

Thirdly, the Central North Island Tribunal noted the many occasions in the nineteenth century when settler governments seriously contemplated giving legal powers of control

54. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 488–489; see also *He Maunga Rongo*, vol 2, pp 521–532
55. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 431; see also vol 1, pp 178–189
56. See also Waitangi Tribunal, *Hauraki Report*, vol 2, pp 786–787
57. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 422

> *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 land 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 runs through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of attempts to amalgamate the Maori race into our social and political system. It was hoped by the individualization of titles to the 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.*
>
> Henry Sewell, Minister of Justice, 29 August 1870 (Waitangi Tribunal, *Hauraki Report*, vol 2, p 669)

and land management to corporate Maori bodies. We need say no more on this point, as we have already traversed it in chapters 8 and 9, except to note Ballance's block committees of 1886, the provision for incorporations in 1894, the committee management system set up for the Urewera District Native Reserve in 1896, and the Maori Land Councils of 1900.[58]

We agree with the Central North Island Tribunal that Maori management of their lands by community bodies was entirely feasible in the circumstances of the time. In our inquiry, the Crown submitted that early native land legislation sought to strike a balance between provisions for communal ownership and recognition of the rights of individuals, but accepted:

> that a reasonable criticism of the early regime is that the statutes themselves did not provide, in addition to the other forms of title, the option of a tight corporate management akin to the incorporation model established in 1894. This type of model might [have] involve[d] a committee with powers to deal with the land, accompanied by an inability of individual owners to exit the corporate body by partition.[59]

Nonetheless, the Crown also argued that the law did compel private buyers to deal with collectives, and that the Government's own purchases were made from communities, not individuals. We will return to these questions in the main body of the chapter. We will also consider whether the native land laws provided effectively for community management and decision-making in the rim blocks after 1894, when the provision for incorporations was first made.

58. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 422
59. Crown counsel, closing submissions (doc N20), topics 8–12, p 13

10.2.8 The Treaty provided for the settlement of New Zealand and the alienation of land for that purpose. At least some alienations, whether by lease or sale, were voluntary and of potential benefit to Maori. Nonetheless, if the sale of land continued to the point where communities were seriously harmed, then the explanation must be something other than the voluntary agency of those communities.

As the Muriwhenua Fishing Tribunal found, the Treaty provided for two peoples in one land, envisaging that some Maori land would be alienated to settlers, for the mutual benefit of both peoples.[60] Article 2 of the Treaty provided for Maori to control the pace and extent of settlement: they were to retain their land for so long as they chose to do so. As we discussed above in 10.2.3 and 10.2.4, this power of choice rested with Maori communities and their rangatira. As we also noted in 10.2.7, the native land laws did not provide a legal mechanism for communities to make such decisions. The power of choice was transferred to individuals. Yet it has been hard for New Zealanders, grappling with the complexities of their history, to understand what this really meant. Maori individuals chose to sell, and were paid. Does the fault for excessive land loss therefore lie with Maori?

The Turanga Tribunal has provided the definitive answer to this question, which we adopt:

- Land selling, in and of itself, was not necessarily damaging to Maori communities. In fact sales, if controlled, could benefit communities in the new economy;
- Communities, if left to themselves, might have been expected to make strategic sales to meet a range of requirements: providing cash flow (given that there were few alternatives to producing this from their land) and injecting funds for development;
- Having said that, no rational community bound by kinship, would choose to sell land to a level that threatened the continued existence or well-being of that community, if there were reasonable alternatives. In other words, no community would choose to sell land to the point of self-destruction;
- If, on the facts, land sales occurred at a level that undermined community existence or well-being, then this cannot have been the result of rational community choice. The explanation for divestment on this scale must lie elsewhere.[61]

As we noted in section 10.2.2, the Court system was designed (among other things) to facilitate the alienation of land from Maori to settlers. The removal of the power of choice from communities and their leaders, guaranteed to them in the Treaty, and its transfer to individuals, meant the removal from them also of control of the speed and extent of alienation. This broke an explicit Treaty promise to hapu and their rangatira.[62] We shall test

60. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (*Wai 22*), Wellington, 1989, pp 194–195; see also *Te Tau Ihu*, vol 1, p 5
61. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 510–511
62. Ibid, p 446

how the system worked in Te Urewera later in this chapter. Here, we note that this was an intended outcome, not a design flaw. The Turanga Tribunal pointed to the findings of Justice Richmond, who observed the effect of the native land laws very clearly in 1873: 'the procedure of the Court has snapped the faggot band, and has left the separate sticks to be broken one by one'.[63] It was a graphic and compelling image, showing the extent to which the process was understood and thus knowingly left to operate from the 1870s to the end of the nineteenth century.

10.2.9 The Crown had a duty to ensure that tribes retained a sufficient land base for their social, cultural, and economic needs, both for customary purposes and to develop in the new economy

We agree with the Central North Island Tribunal, which found as follows:

- The essential Treaty 'bargain' also anticipated the alienation of land for settlement, in which Maori would retain a sufficient land and resource base for their customary lifestyle and – as they chose – for development in the new economy. Both peoples were expected to prosper and benefit.
- In its dealings for Maori land – whether directly or in regulating private transactions – the Treaty requires the Crown to actively protect Maori iwi and hapu in retention of a sufficient base, to act scrupulously and with utmost honour, to deal fairly and equitably, and to obtain full, free, and informed consent to any transactions. These principles were enunciated throughout the nineteenth and twentieth centuries, in the language of the times, and were both reasonable and achievable. These are the standards by which the Crown's purchase of Maori land, and its regulation of private alienations, must be measured.[64]

We also agree with the Central North Island Tribunal that the findings of the Stout-Ngata commission (1907) provided a standard by which the Crown's actions in respect of Maori land for the rest of the twentieth century should be assessed. The Tribunal stated that the commissioners clearly explained the nature of the Crown's duty to Maori. The commissioners:

- Accepted the duty of the State to provide land for its increasing population, but asserted its duty also to ensure that at the same time it 'does no injustice to any portion of the community, least of all to members of the race to which the State has peculiar obligations and responsibilities'.[65]

63. Justice Richmond, 'Hawke's Bay Native Lands Alienation Commission Act, 1872: Reports by Chairman of Commission, Mr Justice Richmond', 1873 (Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 432)
64. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 442
65. Ibid, p 440

- Pointed to the Crown's responsibility not just to the present generation, but to those who followed; and not just to individual owners, but to communities of owners.
- Urged that Maori lands, because they were tribal, were different from individually held property; 'in one sense they may be said to be impressed with a trust'. Thus the Crown had a duty to ensure that the tribe was not destroyed. It must ensure that individuals were not empowered to alienate what remained of the tribal land base.[66]

10.3 Issues for Tribunal Determination

Having set out the findings of earlier Tribunal inquiries on which we rely, we turn now to the matters still at issue in Te Urewera. In the sections that follow the key facts (sec 10.4), we pose each issue as a question, then set out a summary answer, the essential differences between the parties, our analysis of relevant evidence and submissions, and our findings.

The issues are:

- Why did the Native Land Court commence operations in Te Urewera? Why and how did the peoples of Te Urewera engage with it?
- Was the Crown made aware of Court decisions that were alleged to have resulted in significant injustice, and did it provide appropriate remedies?
- What were the Crown's purchase policies and practices in Te Urewera?
- What were the costs to Maori of securing new titles to their land in the Native Land Court? Were these costs fair and reasonable?
- What protection mechanisms were there for Maori in respect of the alienation of land, and how effective were those mechanisms in Te Urewera?
- What were the impacts on the peoples of Te Urewera of the operation of the Native Land Court, and of the alienation of their 'rim' blocks?

Before addressing each of these questions in turn, we set out the key facts about the Native Land Court regime's operation in the Urewera rim blocks.

10.4 Key Facts

As we described above, this chapter deals with the Native Land Court's investigation of title to the 'rim' blocks, which encircled the core lands of what became, in 1896, the Urewera District Native Reserve. It also covers the alienation of land in those blocks, from the 1870s to the 1920s. Much of the chapter is concerned with the content and effects of the native land laws, by which the Crown established and maintained a regime to govern titles

66. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 440

(including survey, investigation, partition, and succession) and alienation. The laws were amended almost annually, with periodic replacement of the whole statutory regime. In 1873, 1880, 1886, 1888, 1894, 1900, 1905–1907, 1909, and 1913, the regime was either totally replaced with new legislation or very significantly amended.

Many of the facts about these laws (or their interpretation) were contested in our inquiry. The Native Land Laws Commission found in 1891, when the system was still operating:

> So complete has the confusion both in law and practice become that lawyers of high standing and extensive practice have testified on oath that if the Legislature had desired to create a state of confusion and anarchy in Native-land titles it could not have hoped to be more successful than it has been. Were it not that the facts are vouched upon the testimony of men whose character is above suspicion and whose knowledge is undoubted, it would be well nigh impossible to believe that a state of such disorder could exist.[67]

This was because, as many witnesses told the commission, complex laws had been amended so often and in such contradictory ways. There were a series of interlocking Acts passed over many years:

- the Native Land Acts, which governed the Native Land Court and the new Maori land titles system, and the alienation of Maori land;
- the Immigration and Public Works Acts and Native Land Purchase Acts[68], which specified some of the powers of the Crown when purchasing Maori land; and
- the Native Lands Frauds Prevention Acts, which provided for trust commissioners to vet and certify purchases of Maori land against statutory standards.

In later sections of this chapter, we will explore key features and some of the detail of these Acts, and the regime established by them. In this section, we outline briefly the facts about the title investigation and alienation of the land that became the 11 rim blocks. Some of this information is summarised in tables, to provide an easy reference point for readers.

10.4.1 Land dealt with under the 1873 regime

As we saw in chapter 8, Donald McLean's Native Council Bills failed in 1872 and 1873. That marked the end (for the time being) of attempts to set up Maori bodies to decide their own land entitlements. At the same time, McLean was preparing a major new Native Land Act to replace the regime set up in 1865. This new Act was the principal law governing the Native Land Court and the alienation of Maori land from 1873 to 1886. It was amended

67. 'Report of the Commission on Native Land Laws', 1891 (Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 468)

68. Variously named the Government Native Land Purchase Act, the Native Land Purchase Act, the Native Land Purchase and Acquisition Act

10.4.1

Who Could Apply for Title Investigation?

1873: 'any [two or more] natives'

1880: any three or more Maori

1883: any single Maori

1886: 'Natives [two or more] claiming to be owners of, or interested in, Native land'

1894: Any 'person claiming an interest therein'

significantly in 1880 but the fundamentals of the 1873 regime were retained until 1886 (and beyond).

In brief, the Native Land Act 1873 provided for a Court of record consisting of a judge and one or more assessors. The judges were mostly former officials or military officers, and only a minority were legally trained. Assessors were rangatira from outside the district. From 1874, at least one assessor had to agree to the Court's decision. From 1883, Maori district committees could also do a preliminary investigation, for the information of the Court.

The Court's main task was to investigate Maori customary title to blocks of land, as mapped on a survey plan. Title investigation could not proceed without a survey, although partitions were allowed without one. Any Maori could apply for a survey and an investigation of title. We will traverse the rules for surveys in section 10.8. In essence, the cost of surveys was to be agreed in advance, and the Court could award land to the Crown or to surveyors to recoup such costs. In conducting its title investigations, the Court could hear evidence and examine witnesses, or it could give effect to voluntary agreements reached out of Court. For most of the nineteenth century, lawyers were banned from the Native Land Court or could appear only with the permission of the judge. Cases were conducted by 'Native agents' (for the Maori claimants and counter-claimants) and by purchase agents or officials (for the Crown). Later, the Court's business became increasingly concerned with partitions, successions, conveying of land to settlers or the Crown following purchase, and survey liens.

Any aggrieved party could apply for a rehearing. The decision whether or not to grant a rehearing was made by the Governor in Council (1873–1880) and then the Chief Judge (from 1880 onwards). A rehearing was held by a judge and assessor (1873 to 1880) and then by two judges and one or more assessors (1880 to 1886).

The Court issued a memorial of ownership, which had to list every man, woman, and child with an interest in the block before it. These interests were not identified on the ground, and were held to be equal until further defined by the Court. They were supposed

to be defined in this way before partition. From 1880, memorials were renamed certificates of title. Land under this form of title could not be sold privately unless all owners consented, or a majority agreed to partition the land for the purpose of a sale.[69] Any transaction before these conditions were met was technically 'void' (of no effect and unenforceable), although not illegal. As we saw in section 10.2, and as we discuss further in section 10.9, the ownership of land was effectively individualised from the moment a title issued, and each owner could alienate his or her interest.

In tandem with the Native Land Acts, the Crown's powers to purchase Maori land were supplemented by the Immigration and Public Works Acts and by the Government Native Land Purchase Act 1877. The Crown gave itself certain advantages, including the power to make advances on land that had not passed through the Court, the power to proclaim a monopoly over land that it wanted to purchase, and the power to buy undivided interests and seek a partition from the Court.

The native land laws also provided a series of protection mechanisms. Briefly, these included:

- Restrictions on alienation: from 1878, the Court had the power to recommend that restrictions be placed on titles, preventing alienation without the consent of the Governor in Council. From 1880 to 1886, the Court had a positive duty to inquire as to whether Maori would be made landless without restrictions, and to impose them where necessary.
- Reserves: from 1873, officials with the title of district officer were supposed to work with Maori communities to identify key land for reservation, to ensure sufficient land was retained for immediate use and as endowments for the future. The position of district officer was abolished in 1886.
- Vetting of purchases: from 1870, trust commissioners had to check transactions to ensure that the price had been paid, that it had not consisted of alcohol or weapons, and that it was fair. They also had to certify that Maori had understood the transaction, that signatures had been properly witnessed, that no trust had been contravened, and that no Maori owner would be rendered landless. The Native Land Court did its own series of parallel checks. The position of trust commissioner was abolished in 1894.

This was the system in operation from 1873 to 1886. During that period, land in the west of our inquiry district was passed through the Court, and parts of it were then alienated to the Crown and private buyers. We concentrate here on the basic information about each of these blocks: when they were passed through the Court, to whom they were awarded, and when they were sold.

The first three blocks passed through the Court in 1878:

69. The law as to who could apply for a partition (and under what circumstances) varied from time to time, but the variations are not relevant to this chapter. For a fuller discussion, see Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 457–459.

The Value of £1 in Today's Terms

In this chapter, we discuss rents, purchase prices, commercial land values, and the costs of surveys and Court processes. We believe it is helpful if readers have a sense of the significance of the amounts involved, in today's terms.

The Reserve Bank of New Zealand provides an inflation calculator which can be used to calculate, in today's dollars, the value of money in the past. The figures produced by using the calculator are guides, not official calculations.

The figures presented here are taken from the general (CPI) category of the inflation calculator. The Reserve Bank's website advises that, for the years after 1914, the general (CPI) category uses the 'all groups' Consumer Price Index ('CPI') published by Statistics New Zealand. However, for the years 1862 to 1914, the CPI has been estimated and is not an 'official' figure or of the same quality as the published CPI.

With that caveat in mind, the following figures are the estimated cost in the first quarter of 2010 of a basket of goods and services that would have cost £1 in the first quarter of each of the years listed. (For example, a basket of goods and services that cost £1 in 1885 would cost $166.84 today.)

£1 of goods and services in these years	Cost in 2010 dollars
1865	$98.52
1875	$120.15
1885	$166.84
1895	$170.08
1905	$154.83
1915	$132.87

- Waimana (10,491 acres) was claimed by Tuhoe and Te Upokorehe. It was awarded to 12 Tuhoe chiefs in a list submitted by Tamaikoha. He then applied for a rehearing (acknowledging that his list was incomplete), as did Te Upokorehe claimants. A rehearing was held in 1880, at which the list of owners was expanded to 66 names, including seven Te Upokorehe individuals.
- Waiohau 1 (14,464 acres) was awarded to Ngati Haka Patuheuheu and Tuhoe. Some Ngati Manawa and other individuals were included in the list of owners. Waiohau 2 (1100 acres) went to Ngati Pukeko. Tuhoe made several applications for rehearing but the Chief Judge dismissed them.

Block name	Original area (acres)	Crown purchase	Private purchase	Deficit found on resurvey	Remaining Maori land
Waimana	10491		5440		5051
Waiohau 1	14464		7000		7464
Kuhawaea	22309		21694	29	586
Heruiwi 1–3	25161	20910		767	3484

Table 1: Alienations in the rim blocks of Te Urewera, 1878–88

- Heruiwi 1–3 (25,161 acres) had been largely deserted during the recent wars. Before it went through the Court, the Crown leased it from Ngati Manawa and proclaimed it as under negotiation for purchase. The block was awarded to 56 individuals (mainly of Ngati Manawa and Ngati Apa, with a few Ngati Hineuru).

In 1881, the Native Land Court investigated the title of Matahina (78,860 acres).[70] The claims of Ngati Haka Patuheuheu, Ngati Hamua, Ngati Rangitihi, and Ngati Hinewai (a hapu of Rangitihi) were rejected. The Court awarded title to Ngati Awa, including those Ngati Hamua 'who have become incorporated with Ngati Awa'.[71] Ngati Rangitihi petitioned the Government, and Haka Patuheuheu applied for a rehearing. Their application was dismissed by the Chief Judge in 1882. After this rebuff, Ngati Haka Patuheuheu claimed to have negotiated an agreement with Ngati Awa, making a rehearing unnecessary. Nonetheless, the Government decided to grant a rehearing by special legislation, which took place in 1884. This time, Ngati Haka Patuheuheu were awarded 2000 acres (Matahina C and C1). Ngati Hamua received 1500 acres (Matahina B), while 1000 acres went to Ngati Rangitihi (Matahina D). As the Treaty claims of Ngati Awa have been settled, we make no further observations about Matahina A and Matahina B.

The final block dealt with under the 1873 regime was Kuhawaea (22,309 acres), south of Waiohau on the Rangitaiki River. The great bulk of it, Kuhawaea 1 (21,694 acres), was awarded to 92 owners (identified as Ngati Manawa) in 1882. A small piece (586 acres) was awarded to 33 owners (identified as Ngati Apa). The Court's decision was challenged by Tuhoe, who claimed to have not been notified of the hearing, and by Ngati Rangitihi, whose claim had been rejected. The Chief Judge refused both applications for rehearing. He was later found to have acted illegally, because he did not hear the applicants. A Tuhoe petition about this in the 1890s was referred to the Urewera commission for investigation.

70. Originally 85,000 acres, part of it was cut out because it had already been dealt with by the Court as part of Kaingaroa 1.

71. Philip Cleaver, 'Matahina Block', a report commissioned by the Waitangi Tribunal, 1999 (doc A63), p 45

Thus, the Court decided titles to five blocks between 1878 and 1884. For three of those blocks – Waimana, Kuhawaea, and Heruiwi 1–3 – pre-Court leases were turned into sales by the buying up of individual interests. Just under half of Waimana and almost all of Kuhawaea was bought by private lessees. The Crown was the lessee for Heruiwi 1–3. It purchased the bulk of the block by 1881, and the remaining pieces in the 1890s. Waiohau and Matahina had a different history. Half of Waiohau was purchased by a settler through fraud (see ch11). The small Matahina C, C1, and D blocks, however, remained intact in the nineteenth century. (Readers are referred to the maps at the conclusion of this chapter.)

10.4.2 Title investigations under the 1886–88 regime, and alienations under the Liberals

After Kuhawaea in 1882, no more title investigations were held in the rim blocks until 1889–1890, when hearings began for the whole of the eastern side of the district, and the remaining lands in the west. Ruatoki, ever the exception, was not heard until 1894, the last of the rim blocks to pass through the Court (but still heard under the 1886–1888 regime.) As we saw in chapter 8, Tuhoe fought a long battle over the survey and hearing of Ruatoki. This helped trigger negotiations between the Crown and the leaders of Te Urewera, resulting in a new arrangement in 1896 to ban the Native Land Court from the uninvestigated parts of the rohe potae.

The Native Land Court Act 1886 repealed all previous native land laws. It was amended significantly by a new Government in 1888. The fraud prevention laws were also overhauled in 1888, but the Government Native Land Purchase Act of 1877 remained in force until 1892. The combined 1886–88 regime governed title investigations for most of the land in the rim blocks. Basically, the native land laws and the Court continued to operate much as we have described above. Relevant changes included revisions to the regime for approving surveys and survey costs, the possibility of using a sketch plan for investigating title, the temporary abolition of restrictions on alienation (restored in 1888), a requirement that the Chief Judge hold a hearing on applications for rehearing, and the specific exemption of Crown purchases from inquiry by the trust commissioners.

In 1892, the Liberal Government expanded the powers of the Crown, including giving it a new power to cancel restrictions so that it could purchase land. In 1894, the Liberals also restored Crown pre-emption. They abolished the trust commissioners, set up an Appellate Court to replace the rehearings system, and made an assessor's agreement no longer necessary for Court decisions. In 1893, a Validation Court was set up (virtually the Native Land Court in another guise) to allow faulty or incomplete purchases to be validated.

Other changes in this period, such as the ability of private purchasers to obtain partitions, were not relevant to Te Urewera. There were no private purchases in the rim blocks in the 1890s. Significant changes are discussed later in this chapter, in the relevant sections.

The following blocks had their title investigated by the Court in 1889 to 1891:

- Tahora 2: Estimated at 213,350 acres, this large district formed much of the eastern boundary of the Urewera District Native Reserve. Many groups claimed land in this 'block', including Tuhoe, Whakatohea, Te Aitanga a Mahaki, Te Whanau a Kai, and Ngati Kahungunu. Parts of it were known to the tribes as Te Wera, Te Papuni, and Te Houpapa. Crown purchase agents negotiated with tribal leaders to buy land under those names, and advances were made. Ultimately, however, a secret survey by Charles Alma Baker took place in the late 1880s, enabling applications to the Court by individuals of Ngati Patu. After much protest about the survey and the hearing, an out-of-court arrangement was made between the tribes. The main part still contested in Court was the award of 2F to Ngati Kahungunu. There were several applications for rehearing, which resulted in adjustment to the lists of owners, but did not disturb the tribal awards. Some applications were not granted (including that of Tuhoe). Ngati Tamaterangi's claim was rejected at the rehearing. There was also a rehearing of the survey lien, which led to a reduction in its value. Restrictions on alienation were placed on the titles of most subdivisions.

  The outcome was the award of land to named individuals of the following tribes:

  - Tahora 2A: Tuhoe and Te Upokorehe
  - Tahora 2AD: Tuhoe
  - Tahora 2AE: Tuhoe
  - Tahora 2B: Whakatohea (Ngati Ira)
  - Tahora 2C: Te Whanau a Kai and Te Aitanga a Mahaki
  - Tahora 2F: Ngati Kahungunu
  - Tahora 2G: Tuhoe (see table 3 for acreage of partitions)

  The Crown purchased interests in Tahora 2 in the 1890s, and also obtained a large amount of land in partial satisfaction of survey costs (see table 2). Its interests were partitioned in 1896. The residue of Tahora 2C, 2F, and 2G was placed in the Carroll-Pere Trust (see ch12).
- Waipaoa: Located to the south of Tahora 2, this block of 39,302 acres was surveyed by Ngati Kahungunu leaders in the mid-1880s. Tuhoe claimed to have not received notice of the hearing, at which Ngati Kahungunu (and some Ngati Ruapani) obtained title to Waipaoa. There were no applications for rehearing. The Crown was awarded Waipaoa 1 and 2 in satisfaction of survey costs, with part of the boundary running through Lake Waikareiti. From 1897 to 1903, the Crown purchased interests in Waipaoa (see table 2). In 1903, the Court abolished previous partitions and awarded new blocks (Waipaoa 3 and 4) to the Crown, leaving the non-sellers with around half of Waipaoa (as Waipaoa 5).
- Heruiwi 4: This block (also called Heruiwi East) contained 75,000 acres. It overlay the territories of several iwi. Tuhoe lands were to the north-east, Ngati Manawa to the north-west, and Ngati Hineuru to the south-west and south-east, where their lands

10.4.2

Block name	Original area (acres)	Maori land in 1888	Crown purchase	Awarded to Crown for survey costs	Crown takings for public works	Retained as Maori land in 1904
Heruiwi 1–3	25,161	3484	3484			0
Heruiwi 4	75,000	75,000	69,670	67		5263
Kuhawaea	22,309	586			0	586
Matahina C, C1	2000	2000				2000
Matahina D	1000	1000				1000
Tahora 2 (less 2B, 2B1)*	152,544	152,544	69,809	5922		76,813
Tuararangaia 1	3500	3500				3500
Waimana	10,491	5051				5051
Waiohau 1	14,464	7464			78	7386
Waipaoa	39,302	39,302	13,990	5822		19,490
Whirinaki	31,500	31,500	17,060	4790		9650
Total	377,271	321,431	174,013	16,601	78	130,739

* We have not included figures for the large Tahora 2B block (approximately 46,904 acres) and 2B1 (13,902 acres), which were awarded to Ngati Ira of Whakatohea, who were not claimants in our inquiry.

Table 2: Alienations in the rim blocks of Te Urewera, 1888–1904
Note: We have not discussed public works takings in this chapter, but we have included them in our tables for the sake of completeness.

shaded into those of hapu associated with Ngati Kahungunu. The hearings in 1890 to 1891 were contested, and the block was subdivided as follows:

- Heruiwi 4A: Ngati Hineuru
- Heruiwi 4B, 4D, 4F–I: Ngati Manawa
- Heruiwi 4C: Tuhoe descendants of Tauheke
- Heruiwi 4E: Ngati Kahungunu (see table 3 for partition acreages)

Restrictions on alienation were placed on the titles for 4A–C, and 4F. There were many applications for rehearing, all of which were dismissed. In the 1890s, the Crown purchased 4D, 4E, 4G, 4H, and 4I, almost the whole of 4F and 4B, and over half of 4A. Only Tuhoe's block (4C) remained intact (see table 3).

- Whirinaki: This block (31,500 acres) was regarded by iwi as part of the Te Whaiti district. It was surveyed in 1887, on the application of Ngati Apa, and proceeded to hearing in 1890. The main contest was between Ngati Apa and Ngati Manawa, which was virtually an internal struggle between rival leaders of closely related kin. The Court awarded three-fifths to Ngati Apa and two-fifths to Ngati Manawa. Ngati Apa were granted a

Block name	Original area (acres)	Maori land in 1888	Crown purchase	Awarded to Crown for survey costs	Crown takings for public works	Retained as Maori land in 1904
Heruiwi 4A	5880	5880	3657	67		2156
Heruiwi 4B	9276	9276	8868			408
Heruiwi 4C	2195	2195				2195
Heruiwi 4D	6200	6200	6200			0
Heruiwi 4E	3143	3143	3143			0
Heruiwi 4F	7634	7634	7130			504
Heruiwi 4G	10,520	10,520	10,520			0
Heruiwi 4H	14,509	14,509	14,509			0
Heruiwi 4I	15,643	15,643	15,643			0
Tahora 2A	24,668	24,668	11,666	921		12,081
Tahora 2AD	3456	3456	206	230		3020
Tahora 2AE	3584	3584	2081	105		1398
Tahora 2C	96,424	96,424	48,452	3465		44,507
Tahora 2F	22,556	22,556	6996	1099		14,461
Tahora 2G	1856	1856	408	102		1346
Whirinaki 1	18,900	18,900	8685	2945		7270
Whirinaki 2	12,600	12,600	8375	1845		2380

Table 3: Alienations in the blocks partitioned at original title hearing, 1888–1904

Note: The figures in this table present the same information as those in table 2, but are particularised for the partitions made at the original title hearings.

rehearing, which resulted in virtually the same decision, and left it to the iwi to divide the block in two. Restrictions on alienation were placed on both Whirinaki 1 and 2. The Crown obtained more than two-thirds of Whirinaki in the 1890s, partly through survey costs but mostly by purchase (see table 2).

- Tuararangaia: This block (8,656 acres) lay to the south of the Bay of Plenty confiscation line, and to the west of the Rangitaiki River. The interests of a number of tribal groups overlapped in this border area. A disputed survey was conducted in 1885 but the block was not heard until 1890 to 1891, when Judge Gudgeon awarded Tuararangaia 1 to Tuhoe, Tuararangaia 2 to Ngati Pukeko, and Tuararangaia 3 to Ngati Hamua and Warahoe. There were two applications for rehearing from Ngati Awa, both of which were

dismissed. Due to the settlement of Ngati Awa claims, we do not address the further history of Tuararangaia 2 and 3. Restrictions were placed on the title of Tuararangaia 1, and no part of it was alienated in the nineteenth century.

- Ruatoki: We have already discussed the disputed survey of Ruatoki in chapter 8. The Court awarded title to Tuhoe hapu in 1894, and restrictions were placed on its alienation. Appeals were heard in 1897 but Ruatoki became part of the Urewera District Native Reserve, and its title was reinvestigated by the Urewera commission (see ch13).

10.4.3 Twentieth-century alienations

By 1894, title to all of the rim blocks had been decided. After that, the Court's role was mainly to partition land, either for purchases or for hapu/whanau subdivisions, to allocate survey costs, and to decide successions. By the turn of the century, the Liberal Government's purchase policies had aroused such universal Maori condemnation that the Crown introduced a self-imposed moratorium on purchasing in 1899. (This lasted until 1905.) After negotiations with the leaders of the Kotahitanga (Maori Parliament movement), new legislation was introduced in 1900, more reflective of Maori wishes. Maori Land Councils were set up for districts, with some members to be elected by local Maori, and others to be appointed by the Crown. The majority of members were to be Maori. If they chose to, iwi could vest their lands in these councils to be leased on their behalf. The councils could not sell this land. In 1905, the councils were turned into district Maori Land Boards, with no elected Maori representatives, and only one Maori appointee (of three). In most districts, the Crown could resume purchasing, except that an experiment in compulsory vesting was tried in Tairawhiti and Northland. In our inquiry district, the unsold half of Waipaoa (Waipaoa 5) was compulsorily vested in the Tairawhiti District Maori Land Board in 1906. Almost all of it was later sold while vested in the board.

In 1909, the Liberal Government overhauled and consolidated the native land laws in a major new enactment, the Native Land Act 1909. One key feature of this Act for Te Urewera was that it cancelled all restrictions on alienation. From then on, the Maori Land Boards were supposed to check transactions to ensure that Maori were not rendered landless. Also, a new system was set up to replace the collection of individual signatures on deeds. At the request of the Crown or private purchasers, the board summoned meetings of assembled owners (with a quorum of five) to vote on proposed sales or leases. The board had to confirm decisions before they could be given effect. In 1913, the Reform Government reintroduced Crown purchase of individual interests. Private buyers still had to use the meetings

Block name	Original area (acres)	Maori land in 1904	Crown purchase	Awarded to Crown for survey costs	Crown takings for public works*	Crown land by gift	Private purchase	Deficit or surplus found on resurvey	Retained as Maori land in 1930
Heruiwi 1–3	25,161	0							0
Heruiwi 4	75,000	5263	2195	489				+73	2652†
Kuhawaea	22,309	586			3		592	+9	0
Matahina C, C1	2000	2000		1334	14				652
Matahina D	1000	1000		920					80
Tahora 2 (less 2B)	152,544	76,813	6630		521	3	23,698	1597	44,364†
Tuararangaia 1	3500	3500		881		2619			0
Waimana	10,491	5051			49		873		4129
Waiohau 1	14,464	7386			6		173	+193	7400†
Waipaoa	39,302	19,490	17,398						2092†
Whirinaki	31,500	9650	1534		8		48	+335	8395†
Total	377,271	130,739	27,757	3624	601	2622	25,384	987	69,764

* This category (in this table and in table 5) includes land taken for public works for which the owners did not ask to be compensated

† As at 1930, there were undivided Crown interests in the Heruiwi 4A2B, Tahora 2AE3(2), Waipaoa 5A2, Waipaoa 5C, and Whirinaki 1(4B1B) blocks. The Crown had also been provisionally awarded 348 acres in Waiohau 1A as payment for survey costs, but the award had been suspended while the Crown negotiated with the owners of the Waiohau 1A11, 1A12 and 1A13 blocks over the purchase of more land. The marked figures indicate that the Crown was part-owner of the land.

Table 4: Alienations in the rim blocks of Te Urewera, 1904–30

Block name	Original area (acres)	Maori land in 1904	Crown purchase	Awarded to Crown for survey costs	Crown takings for public works	Crown land by gift	Private purchase	Deficit *or surplus* found on resurvey	Retained as Maori land in 1930
Heruiwi 4A	5880	2156		489				+73	1740
Heruiwi 4B	9276	408							408
Heruiwi 4C	2195	2195	2195						0
Heruiwi 4D	6200	0							0
Heruiwi 4E	3143	0							0
Heruiwi 4F	7634	504							504
Heruiwi 4G	10,520	0							0
Heruiwi 4H	14,509	0							0
Heruiwi 4I	15,643	0							0
Tahora 2A	24,668	12,081	6447					3317	2316
Tahora 2AD	3456	3020			15		3101	+220	124
Tahora 2AE	3584	1398					1082	+696	1012
Tahora 2C	96,424	44,507	183		458		19,514	+2971	27,323
Tahora 2F	22,556	14,461			48	3		2591	11,819
Tahora 2G	1856	1346						+424	1770
Whirinaki 1	18,900	7270	1534		2	6		+335	6063
Whirinaki 2	12,600	2380					48		2332

Table 5: Alienations in the partitions of the rim blocks, 1904–30

The Alienation of Tahora 2 Lands while Vested in the East Coast Trust

In 1896, the individual shares purchased by the Crown were partitioned out of Tahora 2. For the southern Tahora 2 lands (2C, 2F, and 2G), the residue blocks, which amounted to 60,000 acres, were vested in the Carroll–Pere trust. In 1902, that land was transferred (along with lands outside our inquiry district held in trust by Carroll and Pere) to a board of Pakeha businessmen, called the East Coast Native Trust Lands Board. In 1906, the board was replaced with a single commissioner. While vested in this trust, some 20,000 acres (one-third of the land) was sold between 1905 and 1930. The figures for these alienations are included in tables 3 and 4, and in our statistical analyses for this chapter, but we examine Treaty claims about the sales and the trusts in chapter 12. Despite the alienations, this land represented the majority of land still in Maori ownership in the rim blocks in 1930.

of owners system.[72] Native Minister William Herries did away with the Maori member of the board, reducing each board to two members, the local Land Court judge and registrar.

Under the 1909 regime, a significant amount of land was alienated in Te Urewera (see table 4). Outside this system, the East Coast Trust sold sections of Tahora 2C to the Crown and private buyers (see ch12).

Having subtracted Ruatoki and the land awarded to Ngati Awa and to Ngati Ira, we conclude that Maori in our inquiry district retained 69,764 acres of the rim blocks (18.5%) by 1930. In reality, the amount of remaining Maori land was less than this, since the Crown was part-owner in several blocks, not having yet partitioned its undivided interests. In terms of its completed purchases, the Crown had bought 220,680 acres (59%) of the land awarded to our claimants in the rim blocks. It had also acquired 20,225 acres (5.4%) directly for survey costs. Private purchases accounted for a further 59,518 acres (15.8%). A total of 1,783 acres (0.5%) had disappeared because of inaccurate surveys. This amount was greater than the 679 acres (that we know of) taken for public works. In addition, Maori had gifted 2622 acres to the Crown. We note too the significance of the many twentieth-century purchases: the Crown bought more than a fifth of the Maori land that was left in 1905 between 1909 and 1930, while private purchasers acquired another 19.4 per cent on top of this. Also in the twentieth century, the Crown acquired 5.2 per cent through survey liens, gifts (principally Tuararangaia 1), and public works takings. Significant inroads were made on a narrow Maori land base in the twentieth century, after the larger-scale purchases of the 1880s and 1890s.

72. For land with fewer than 10 owners, the Crown or private purchasers could deal directly with the owners from 1909 onwards. In Te Urewera, this power was mainly used to purchase or lease land in the subdivisions of the Waimana block.

10.4.3

Block name	Maori land at start of period	Crown purchase	Awarded to Crown for survey costs	Crown takings for public works	Crown land by gift	Private purchase	Deficit found on resurvey	Maori land at end of period
1878–88	377,271	20,910				34,134	796	321,431
1888–1904	321,431	174,013	16,601	78				130,739
1904–30	130,739	27,757	3624	601	2622	25,384	987	69,764
1878–1930	377,271	222,690	20,225	679	2622	59,518	1783	69,764

Table 6: Total alienations in the rim blocks of Te Urewera, 1878–30

10.5 Why Did the Native Land Court Commence Operations in Te Urewera? Why and How Did the Peoples of Te Urewera Engage with It?

Summary answer: *The native land laws allowed 254,806 acres (the Waimana, Tahora 2, Kuhawaea, and Tuararangaia blocks) to be brought before the Court on the basis of applications from individuals who either had no valid claim to the land or did not have their tribe's agreement to take the land to Court. This was almost half of the land in the rim blocks, which is of itself evidence of a very serious failing on the part of the Crown's native land laws. Even where claims were filed by chiefs with a mandate to do so, this did not mean that the system was fair for other groups who also had rights in the land under claim. The rim blocks constituted border areas where customary rights overlapped. Unwilling groups were forced into Court (to avoid losing their lands) in Waimana, Kuhawaea, Heruiwi 4, Whirinaki, Tuararangaia, Ruatoki, Waipaoa, and Tahora 2 (some 422,058 acres or 78 per cent of the rim blocks). There was an element of agreement among all parties in Heruiwi 1–3, Waiohau, and Matahina that these lands must come before the Court, once one party in those lands had initiated a survey. Groups who did not make counter-claims, such as Ngati Whare, lost everything. Those who failed to appear (sometimes because they had not been notified) also lost everything.*

Equally important, the Crown used its pre-title dealings to bring about applications to the Court. This was the key factor in pulling Heruiwi 1–3 and Matahina into the Court (almost 20 per cent of the land), and also important for Kuhawaea, Tahora 2, and Waipaoa (a total of 70 per cent of the area in the rim blocks). One-off factors, such as the Government's approval of the secret survey of Tahora 2, in the face of universal Maori opposition, also contributed to forcing unwilling groups into the Court.

Thus, the tribes with land in the rim blocks were forced into the Court in a manner that breached the fundamental Treaty guarantee of tino rangatiratanga. The native land laws were clearly at fault. In addition, the Crown's manipulation of the system to force more land into the Court was in breach of its Treaty duties.

10.5.1 Introduction

As discussed in the report *Turanga Tangata Turanga Whenua*, the content of the native land laws was not the subject of consultation with tribal leaders in the various regions, and nor was their consent obtained for the creation of the Native Land Court or for its introduction into their districts (see sec 10.2). Nationwide, many Maori leaders resisted the Court and protested against its destructive impact, while still resorting to it as the only legal means for bringing their lands and peoples into the new economy. In Te Urewera, the leaders of Tuhoe and Ngati Whare (including Ngati Haka Patuheuheu) reached a collective decision that surveys, leases, land sales, and the Court would be banned from their rohe potae. This organised opposition to the Court remained the stance of Tuhoe and Ngati Whare from the 1870s to the 1890s (see ch8).

10.5.2

On the western and eastern sides of the rohe potae, the interests and rohe of other tribal groups overlapped with those of the groups which had formed Te Whitu Tekau. In the west, Ngati Manawa were divided about land sales. Some leaders wanted to maintain their alliance with the Crown, and to use the Court to lease or sell land. Others followed the Hawkes Bay repudiation movement and sought to prevent further title investigations and sales. Ngati Awa and Ngati Pukeko were similarly divided. Ngati Rangitihi joined the rest of Te Arawa in trying to lease land but prevent sales and keep it out of the Court. In the east, the tribal leaders of Turanga were officially opposed to the Court but felt they had no choice but to use it to protect hapu interests, despite their protests. Ngati Kahungunu of upper Wairoa and the Whakatohea hapu of Opotiki also resisted title investigation and sales in our inquiry district.

We turn now to a key question for our inquiry. Given the strong and consistent opposition of many Maori to the Native Land Court, why was it able to commence operations in Te Urewera, and why and how did the peoples of Te Urewera engage with it?

10.5.2 Essence of the difference between the parties

In our inquiry, the claimants argued that the native land laws established a system that forced their participation, whether they were willing or unwilling. Almost all the claimants in our inquiry submitted that they had opposed the Court politically, but had had no choice but to turn up and defend their claims to customary land or risk its permanent loss. Counsel for Ngati Manawa, however, accepted that his clients had made willing use of the Court, although they were, he argued, no better off for having done so.[73] Ngati Whare, at the opposite extreme, had enforced an absolute boycott of the Court, and in doing so had lost all their lands outside the Urewera District Native Reserve.[74]

According to the claimants, elements of the Court and the Crown's purchase systems were integrated so as to force as much land into Court as possible, with a view to acquiring it for settlement. Counsel for Wai 36 Tuhoe submitted: 'So began the Crown's programme of securing the co-operation of loyalist chiefs, advancing tamana [payments], securing leases and promoting claims through the Native Land Court.'[75] This 'imposition and implementation' of the Court was entirely self-serving on the Crown's part, designed to break Maori autonomy and to part Maori from their lands.[76]

The key features of these integrated systems, as complained of by the claimants, were:

73. Counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), pp 23–24
74. Counsel for Ngati Whare, closing submissions, 2005 (doc N16), pp 44–55
75. Counsel for Wai 36 Tuhoe, closing submissions, pt A, 31 May 2005 (doc N8), p 13
76. Ibid, pp 11–14

- Two or three individuals could force land into the Court, even where they did not represent their own hapu, let alone anyone else, and even where they were later found not to be owners of the land.[77]
- Government officials made advance payments (tamana) on land, either for lease or purchase, with the intention of forcing it into Court. This was most explicit in the Crown's leases, where the Government stipulated that it would not pay rent until the land received a Court title. Purchase advances also triggered applications to the Court, either by those who were the recipients of the advances, or by groups who feared the sale of their land by others if they did not get a Court title for it first. Even the Government's proclamation of an intention to negotiate could force people to apply to the Court.[78]
- Even where those who had signed leases or received advances (and then made applications to the Court) did represent a group of owners, the law forced all other groups into Court to defend their interests or risk losing them. This was common in border regions such as the western and eastern extremities of the Urewera inquiry district.
- All claimants were dragged unwillingly into the Court in at least one of the rim blocks.[79] Some claimants faced this experience repeatedly.[80]

By means of these systems, the Crown got around Maori resistance and opposition to the Court, even though that opposition was sincere and stated repeatedly to the Government.[81]

In addition, the claimants complained of features of the Court–purchasing systems, which they felt had seriously damaged their interests in particular cases. Ngati Kahungunu, Tuhoe, Te Whanau a Kai, and Te Aitanga a Mahaki criticised the secret survey of Tahora 2, and the Government's ultimate approval of the survey and plan, which forced that huge block into Court against the wishes of the many groups with valid interests in the land.[82] Tuhoe and Ngati Haka Patuheuheu complained of the notification procedures, which they argued had failed in the cases of Kuhawaea, Waiohau, and Waipaoa, resulting in their losing customary land.[83] While almost all claimants wanted an alternative process to the Native Land Court (and the individualised titles that it created), Ngati Whare in particular argued that without a proper inquisitorial process, they lost everything.[84]

77. Counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 63–64, 82–83; counsel for Wai 36 Tuhoe, closing submissions, pt B, 30 May 2005 (doc N8(a)), pp 65–66; counsel for Ngati Haka Patuheuheu, submissions by way of reply, 8 July 2005 (doc N25), pp 18–20

78. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 112–113, 117–120; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 34–35, 38; counsel for Ngati Hineuru, closing submissions, 30 May 2005 (doc N18), pp 15–17

79. See, for example, counsel for Wai 621 Ngati Kahungunu, closing submissions, 30 May 2005 (doc N1), p 75;

80. See, for example, Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 65

81. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 10–11, 34–35

82. See, for example, counsel for Te Atianga a Mahaki, submissions by way of reply, 8 July 2005 (doc N22), pp 2–12

83. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 37–38, 85; counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 36

84. Counsel for Ngati Whare, closing submissions (doc N16), p 52; see also counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), pp 8, 19; counsel for Wai 36 Tuhoe, submissions by way of reply, 9 July 2005 (doc N31), p 9

10.5.2

The Crown acknowledged that the Native Land Court regime could require those who otherwise did not want to participate to do so, or risk losing their lands.[85] There was, however, a demonstrable need for a forum to determine competing claims, and use of the Native Land Court showed a willingness on the part of many groups to resort to it for that purpose, even among Tuhoe.[86] Also, applications to the Court were usually from tribal leaders, not from unrepresentative individuals.[87] The laws had a number of provisions to prevent false or exaggerated applications going ahead, although the Crown accepted that those provisions had not stopped Tahora 2 from being brought before the Court by individuals found not to be owners.[88]

In the Crown's view, groups had a right to bring their lands before the Court. The Crown's obligation was to protect their right to do so, and to free minorities from a collective veto where that was their wish.[89]

In terms of the operation of its purchase programme, the Crown accepted that commercial transactions would draw Maori into the Court. That, after all, was its purpose – to enable Maori and non-Maori to make binding contracts on the basis of secure titles. But the Crown denied that it used land transactions to force land into Court, especially with a view to breaching the boundaries of Te Whitu Tekau's rohe potae. Rather, the Crown emphasised the role of private leases in Waimana, Waiohau, and Kuhawaea, and its willingness to withdraw from its own negotiations where Maori and settlers wanted it to. Counsel did accept that Government leases required the land to be taken to Court before rent would be paid, but argued that this was simply necessary to ensure that the Crown was paying rent to the correct owners. Nonetheless, the Crown accepted that it had encouraged Heruiwi 1–3 and Matahina into the Court through its pre-title dealings. By contrast, the same thing did not happen to Te Wera and Te Houpapa (Tahora 2), which suggests that the system did not always have such an effect.[90]

In terms of specific claims, the Crown argued that there was no evidence of a general failure in notification procedures. In the cases of Kuhawaea and Waipaoa, counsel suggested that the evidence does not in fact prove that Tuhoe were not notified.[91] With regard to the survey of Tahora 2, the Crown accepted that it had had significant consequences for the claimants, but denied that Government officials had acted improperly or illegally in approving the survey and plan. There had been 'sharp practice' by the surveyor, but, while

85. Crown counsel, closing submissions, June 2005 (doc N20), topics 8–12, pp 3, 10, 25
86. Crown counsel, closing submissions (doc N20), topics 8–12, pp 3, 8–9, 17–19, 25, 56
87. Crown counsel, closing submissions (doc N20), topics 8–12, pp 3, 24–25
88. Crown counsel, closing submissions (doc N20), topics 8–12, pp 26–28
89. Crown counsel, closing submissions (doc N20), topics 8–12, pp 9–10, 17–19
90. Crown counsel, closing submissions (doc N20), topics 8–12, pp 10–11, 18–19, 24–26, 66–74
91. Crown counsel, closing submissions (doc N20), topics 8–12, pp 3, 29–30

there was considerable opposition, there was – on balance – a sufficient level of consent for authorising the survey.[92]

10.5.3 Tribunal analysis

(1) *The Rangitaiki Valley and Te Waimana*

On the western side of our inquiry district, the Rangitaiki Valley was the home of many tribal communities; the network of their overlapping rights was extensive. The land had been much fought over in the nineteenth century, most recently in the conflict between Te Kooti, Urewera tribes, and the Crown. From 1873, soon after the end of this war, until 1877, the Native Land Court was not allowed to sit in this district. The Native Land Act 1873 gave the Crown power to stop the Court from sitting if its operation posed a threat to the peace. The extension in 1874 of the original ban for four years, across a large part of the central North Island (including the Rangitaiki Valley), was partly designed to prevent conflict among Te Arawa, many of whom were adamantly opposed to the Court, but the primary reason was the Crown's wish to secure its purchase monopoly in the region.[93] Thus, it did not suspend pre-title dealings in this land, and it was these dealings which ultimately brought about applications from some tribes in the Rangitaiki Valley, forcing others into the Court. To the east, the Waimana block was part of this history of pre-title dealings, although it was not affected by the suspension of the Court. Unlike the other blocks, it was forced into Court by an application from individuals later found not to be owners. To the west and south of Waimana, the Heruiwi 1–3 and Matahina blocks were brought into Court as a result of Crown purchase operations. Kuhawaea came before the Court as a combined result of Crown and private purchase negotiations. Waiohau too was the subject of private pre-court dealings.

(a) ***The system of pre-title dealings brings about applications to the court, 1873–82:*** The title of Professor Judith Binney's report is 'Encircled Lands'.[94] The Native Land Court was seen as laying siege to the rohe potae, surrounding it with surveyed blocks and forcing its borders ever inwards. In this conception of the history of Te Urewera, the Court was a tool in the Crown's purchasing programme.[95] Alec Ranui, in his evidence for Ngati Haka Patuheuheu, put it this way:

92. Crown counsel, closing submissions (doc N20), topics 8–12, pp 28, 41, 49, 55–61
93. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage 1*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 2, pp 461–466
94. Judith Binney, 'Encircled Lands', report commissioned by the Crown Forestry Rental Trust, 2002, vols 1 (doc A12) and 2 (doc A15)
95. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 11–14

10.5.3

Our ancestors couldn't work out what was in the mind of the Crown. Once, they even closed the Native Land Court so that the Crown alone was able to buy land. We weren't allowed to sell to anyone else.

That was the beginning of buying land around the fringes of Te Urewera and up to the gateway of Te Urewera. What the Government wanted was the entire land mass of Te Urewera.

The Crown went from here [Waiohau] to Horomanga and to Hikurangi [in the UDNR]. First chipping away at it, and then swallowing the entire land.[96]

On the western side of the inquiry district, the system of pre-title dealings was the key mechanism by which the Crown sought to obtain land for settlement in the Rangitaiki Valley, and push its authority and influence further inland from the confiscated coast. For the claimants, this was a calculated policy designed to undermine and destroy their rohe potae.[97] The primary evidence for this is a report from J Wilson to Native Minister McLean.[98] Wilson was a purchase agent whose activities were important in bringing Kuhawaea and Waimana into the Native Land Court. We have already referred to this document in chapter 8, where we discussed its import for the policies of Te Whitu Tekau. But we quote it at length here, as it gives a rare glimpse into the strategies underlying what sometimes seem like random attempts to purchase anything and everything. Wilson wrote in June 1874:

I have the honor to make the following General Report, and in doing so I would respectfully explain that it has been permitted to extend over a longer period in order that I might have something more certain to say on a number of transactions, each more or less important, and each as yet-imperfect in itself; but all tending in one direction; viz [namely] the setting aside of the ring-boundary – the rohe-potae – which the Uriwera Seventy [Te Whitu Tekau] have set up to enclose in many instances the lands of other tribes.

I would not imply that the Uriwera Seventy meant to claim the ownership of land that does not belong to them. On the contrary they say some of this land is not ours, but we are more or less connected with its owners, and as the boundaries between us are not always clearly defined and there may be some dispute in some cases about them, therefore we draw this rohe-potae to prevent leases and sales, and within it we assume entire control of all lands.

In this way the Seventy try to hinder the owners of about 920,000 acres on the Whakatane and Rangitaiki side from doing as they like with their own – and these owners are principally friendly natives who are most anxious to lease their lands for the sake of an income.[99]

96. Alec Ranui, brief of evidence, 14 March 2004 (doc C14(a)), p 21
97. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 11–14, 34
98. Ibid, pp 13, 34
99. Wilson to Native Minister, 1 June 1874 (Judith Binney, comp, supporting papers to 'Encircled Lands', vol 1, various dates (doc A12(a)), pp 43–44)

A number of key points emerge from this short policy summary. One is that the desperation of 'friendly' tribes to lease their land (not sell it) was the means by which the Crown obtained land and introduced the Court into the Rangitaiki Valley. The second is that the emphasis, at least as a land purchase agent saw it, was practical, not political. Wilson was not interested in undermining Maori autonomy, except so far as that was necessary to break down resistance to land sales. The Crown made this point in its submissions, arguing that Wilson's letter showed a determination to purchase land no matter what, rather than a grand political conspiracy against Te Whitu Tekau.[100]

Thirdly, Wilson mentioned what has always been a key point in the Crown's defence of its actions: that all groups should be free to do 'as they like with their own'. In their closings, Crown counsel put to us that it was 'necessary also for the Crown to be responsive to individuals or groups whose aims or goals differed from the majority by freeing them from a collective veto'.[101] Further, the Crown argued that 'it would require exceptional circumstances to deny the right of communities of owners to pass their lands through the Court'.[102] In taking this stance in the nineteenth century, the Crown acted deliberately to undermine the tino rangatiratanga of tribal communities, and also treated the 'right' of individuals and part-owners to alienate land without the consent of all as if it were long-standing, rather than introduced recently in the native land acts. From Wilson's letter, however, we note also that Te Whitu Tekau accepted overlapping customary rights within their outer boundaries. What was necessary was a mechanism supported by all the tribes, that would allow them to come together and make collective decisions on how (or whether) to use that land, and for whose benefit. As we saw in section 10.2, that mechanism was not the Native Land Court.

Resistance to the Court was expressed by many leaders in Te Urewera. As we have seen in chapter 8, Te Whitu Tekau represented the collective will of Tuhoe and Ngati Whare. Leaders of border hapu sometimes went against that will, but the policy of resistance to leases, sales, and the Court remained in place to 1896 and beyond. Indeed, so determined was that resistance that Premier Richard Seddon, after visiting Te Urewera in 1894, finally agreed to a unique system of title investigation for the district in 1895 (see ch 9). From 1877 to 1896, however, if the peoples of Te Urewera wanted to make any commercial use of their land, they had no choice but to use the Native Land Court. Counsel for Wai 36 Tuhoe submitted: 'We argue that the Crown should have honoured the decision by Tuhoe (through its recognised body politic and endorsed by all of its senior chiefs) to not allow its lands to proceed through the Native Land Court and should have instigated something akin to the UDNRA much earlier.'[103]

100. Crown counsel, closing submissions (doc N20), topics 8–12, p 10
101. Ibid, p 19
102. Ibid, p 10
103. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 35

10.5.3

In the 1870s, there was concerted pressure from Crown agents, of the kind described by Wilson, to breach the 'ring-boundary' and acquire land. Settlers were also interested in direct dealings in Te Waimana and the Rangitaiki Valley. As Robert Hayes described, the Crown placed itself in a privileged and powerful position vis-à-vis both these settlers and Maori.[104] The Turanga Tribunal also relied on Mr Hayes' evidence:

> We were reminded by Mr Hayes, at an early stage in our inquiry, that the rules relating to the private purchase of Maori land interests as provided by sections 59 to 68 of the 1873 Act did not constrain the Crown. Crucially, the Crown was not affected by section 87, which declared the purchase of individual interests void until confirmed by the court. Nor did it need to await judicial investigation of ownerhip. In fact, the Crown could buy land from its owners even before the owners had been ascertained in the court. The Crown had one other valuable advantage. By the terms of section 42 of the Immigration and Public Works Amendment Act 1871, and section 3 of the Government Native Land Purchases Act 1877, it could exclude private purchasers [and lessees] from acquiring interests in any block in which the Crown was actively negotiating to lease or purchase. Put bluntly, the Crown could, by proclamation in the *Gazette*, give itself a monopoly whenever it wished to.[105]

A key feature of the Crown's purchasing machine, and its integration with the Native Land Court, was that the Government entered into leases as a stepping stone to purchases. As counsel for Ngati Manawa submitted, those leases were a mere pretence. The Crown had no intention of actually becoming a tenant, by farming or subletting so that settlers could develop the land. Rather, the lease was considered solely as a foothold that would almost inevitably turn into a purchase.[106] Nor, in most instances, did the Crown intend to pay its rent. This was a particularly important feature of the system in the Rangitaiki Valley, where the Native Land Court was suspended from 1873 to 1877. The Government leases usually included clauses that the Crown would not pay rent until title was determined, and that the owners could not deal with anyone else during the period of the (30-year) leases. This was the key means by which the lessee forced the lessors into Court once its suspension was lifted – unless they got a title, the Crown would not pay them rent. Even then, getting rent out of the Crown was no easy matter – but owners were not to know that before they applied to the Court.[107] We shall examine how the system worked in detail in section 10.7. Here, we note that this was a tool that the Crown used to pull land into the Court.

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104. Crown counsel, closing submissions (doc N20), topics 8–12, pp 65, 71

105. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 474

106. Counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), pp 20–21; see also Michael Macky, 'Summary of report on "Crown Purchasing in the Central North Island Inquiry District 1870–1890" relevant to the Urewera inquiry district', February 2005 (doc L13), pp 3–5

107. Macky, 'Summary' (doc L13), pp 3–5; Tracy Tulloch, 'Heruiwi 1–4', report commissioned by the Waitangi Tribunal, 2000 (doc A1), pp 23–24, 28–30

In the 1870s, all tribes in the Rangitaiki Valley tried to insist on leases instead of purchases. We have already noted the policies of Te Whitu Tekau. In addition, Ngati Rangitihi supported Te Arawa in their stance of leases (not sales) and a ban on the Court.[108] Ngati Manawa tried to insist on leases, but their 'friendly' chiefs were more willing than others to use the Court to finalise them.[109] Although we are not dealing with the claims of Ngati Awa in this report, we note that they too tried to lease rather than sell Matahina.[110] Resistance to the Court (and to sales) was broken down by the application of considerable pressure over a number of years. In particular, this was achieved by the creation of Government leases that did not actually lead to development of the land or income from rents, and the exclusion of any other kind of dealing in (or use of) the land while it was under these leases.

(b) ***Waimana:*** The first block to actually pass through the Court was Waimana. Ironically, this block was something of an exception to the pattern that we have just outlined. As we have seen in chapter 8, Tamaikoha's people occupied some of the most valuable farm land remaining to Tuhoe after the confiscation. In his attempts to develop this land for pastoral farming, Tamaikoha entered into a cooperative arrangement with Frederick Swindley. The latter ran his cattle on most of the block (about 8000 acres of it) under an informal lease. Te Whitu Tekau eventually sanctioned this lease, on the condition that the land not be surveyed or taken to the Court. Tamaikoha – and Rakuraku, after he moved back onto the land – abided by this agreement.[111] At first, their rivalry did lead to an early application for hearing, but this was withdrawn in 1874 with the agreement of all parties.[112] In 1877, however, Joseph Kennedy, who was living in Gisborne, put in an application for the survey and hearing of Te Waimana on behalf of Te Upokorehe.[113] This caused some consternation among Tuhoe. Tamaikoha and Rakuraku felt that they had no choice but to file their own application, and to control their own survey of the land.[114] Even so, Hetaraka Te Wakaunua protested against this land being surveyed.[115]

The Crown has conceded in our inquiry that its legislation permitted unwilling tribes to be forced into the Court process, or to risk losing everything. Counsel maintained, however,

108. Andre Paterson, brief of evidence, 26 March 2004 (doc C38), p 6

109. David Armstrong, 'Ika Whenua and the Crown, 1865–1890: A Summary of the evidence of David Anderson Armstrong', 16 July 2004 (doc F8), pp 3–4, 6–9

110. Philip Cleaver, 'Matahina Block', a report commissioned by the Waitangi Tribunal, 1999 (doc A63), pp 20–22, 47–49

111. Jeffrey Sissons, 'Waimana Kaaku', a report commissioned by the Crown Forestry Rental Trust, 2002 (doc A24), pp 26–28, 31–38

112. Brent Parker, 'Timeline relating to the Waimana Block' 19 January 2005 (doc K4(a)), p 2

113. Sissons, 'Waimana Kaaku' (doc A24), pp 41–42. From Parker's evidence, it appears that Kennedy first made an application for hearing in 1875, but a survey was not ordered until 1877 (perhaps on a fresh application for survey from Kennedy). This triggered the Tuhoe application for a survey and hearing in 1877. (Parker, 'Timeline' (doc K4(a)), pp 2–3)

114. Sissons, 'Waimana' (doc A24), pp 42–43

115. Parker, 'Timeline' (doc K4(a)), p 4

Could Individuals Apply for Title Investigation and Were those Applications Vetted?

We summarise the relevant provisions as follows:

Native Land Act 1873

Section 34: 'any natives' (two or more) can apply for title investigation.
Section 37: A District Officer is to examine claims and report to the Judge (including whether there are counter-claims).
Section 38: A Judge is to hold a preliminary investigation to make sure the application is in accord with the wishes of the 'ostensible owners'. If the judge is satisfied that the application is bona fide, and if the District Officer has not reported unfavourably, and if the peace will not be disturbed, then the claim should proceed.

Native Land Act Amendment Act 1878 (No 2)

Section 6: Judges no longer have to make a preliminary inquiry unless there is a 'particular or urgent' reason for doing so.

Native Land Court Act 1880

Section 16: any three or more Maori may apply for title investigation.

Native Land Laws Amendment Act 1883

Section 17: any single Maori may apply for title investigation.

Native Committees Act 1883

Section 14: Native District Committees may inquire into title (where a block is passing or is about to pass through the Court) and may report their findings to the Court for its information.

Native Land Court Act 1886 (repealed all earlier Acts except Native Committees Act)

Section 17: 'Natives claiming to be owners of, or interested in, Native land' may apply for title investigation. (Minimum of two individuals.)

Native Land Court Act 1886 Amendment Act 1888

Section 26: The Registrar is to forward all applications for investigation of title to the relevant Native District Committee. If the Committee sends a report on it, the Court shall consider the report before proceeding. If parties consent, the Court may determine the application on the basis of the report (without any further investigation), or may truncate the investigation.

Native Land Court Act 1894 (repealed all earlier Acts except Native Committees Act)

Section 17: Any single 'person claiming an interest therein' can apply for the Court to exercise its jurisdiction on any matter, including for title investigation.

that applications were made by leaders on behalf of groups with rights, and not by unrepresentative individuals or groups without rights.[116] Counsel for claimants suggested that there is no evidence that Joseph Kennedy was a leader of Te Upokorehe, and pointed out that he was not found to be an owner in the block (either upon hearing or rehearing).[117]

According to the Crown, this situation should not have been possible because of its 1873 system of pre-investigation checks:

- District Officers were supposed to identify all hapu and iwi interests in lands proposed for survey and hearing, with the assistance of assessors and chiefs, and supply that information to the court.
- The applications had to include a description of the land, the names of the interested tribes and hapu, and to name any other interested persons. Applications had to be notified publicly by officials and in the *Gazette* and *Kahiti*.
- Judges were to make preliminary inquiries as to whether the application was in accordance with the wishes of the 'ostensible owners', and whether a hearing would disturb the peace, before ordering a survey.[118]

As far as we can tell, none of these features was operative in the Waimana case or protected the interests of Tuhoe in that block, except that the owners did find out in time to put in their own claim. The 1873 Act allowed claims to be filed by any two individuals (amended in 1880 to require a minimum of three).[119] Also, the year before the Waimana hearing, the requirement for judges to make preliminary inquiries was abolished.[120] (This part of the Act had been resisted by the judges in any case, and was virtually a dead letter.[121]) There is no evidence of a District Officer making a preliminary inquiry for Waimana. When Tuhoe found out about Kennedy's application, which was approved for survey and hearing, they

116. Crown counsel, closing submissions (doc N20), topics 8–12, pp 10, 25
117. Counsel for Ngati Haka Patuheuheu, submissions by way of reply, 8 July 2005 (doc N25), p 19
118. Crown counsel, closing submissions (doc N20), topics 8–12, p 26
119. Native Land Act 1873, s 34; Native Land Court Act 1880, s 16
120. Native Land Act Amendment Act 1878 (No 2), s 6
121. Robert Hayes, 'Evidence of Robert Hayes on the Native Land Legislation post-1865 and the operation of the Native Land Court in Hauraki', report commissioned by the Crown Law Office, 2001 (doc A125), pp 20, 80–81, 87

had no choice but to file their own claim, or have the land investigated on a rival claim and survey. According to Sissons, who examined the relationship between Tuhoe and Swindley, it is likely that without the Court investigation, 'Tuhoe leaders and Swindley would have continued to adhere to their lease agreement for the mutual long-term benefit of both parties'.[122]

As we shall see, however, the Court title made Tuhoe vulnerable to the purchase of individual interests. In self-defence against other purchasers (particularly Mrs Jemima Shera), Swindley had to start buying up interests as soon as the land had passed the Court. In Sissons' view, this could have been avoided if tribal leaders had been allowed to keep the land out of the Court.[123] We note, however, that in giving up on Te Waimana, the Crown had not resiled from its policy of trying to breach the rohe potae at all possible kuaha (entry-points). Rather, McLean agreed to bow out for the meantime and allow private interests free reign in this block. This was because Swindley's business partner (Kelly) had agreed to the Government acquiring parts of it later for settlement.[124] This very agreement would probably have forced the land into Court at some point, even if Joseph Kennedy had not filed his application in 1877.

(c) ***Heruiwi 1–3, Waiohau, Matahina, and Kuhawaea, 1873–82:*** Waimana was brought under the native land laws by the application of individuals, and not by pre-title dealings. For Heruiwi 1–3, Matahina, and Kuhawaea, however, the Crown's pre-title dealings were the critical factor. In Waiohau, a private lease pulled the land into Court.

As we have seen, the Native Land Court was not allowed to sit in the Rangitaiki Valley before 1877. In the meantime, Crown agents entered into lease agreements with some of the customary owners of Heruiwi 1–3 and Matahina, as well as making advances on Kuhawaea and Waiohau. In March 1874, Henry Mitchell and Charles Davis paid £100 as a deposit on the lease of Heruiwi 1–3. A lease was signed in February 1875, with a second payment of £50. After that, the Crown only paid another £10, even though it was supposed to be paying £100 a year. Unlike most of the Mitchell-Davis leases, this one lacked the usual stipulation that the Crown would not pay rent until title was decided by the Court. Nonetheless, Tracy Tulloch noted that the payment dates in the lease were crossed out, and no money was in fact paid.[125] Ngati Manawa's historian, Peter McBurney, observed that the Crown did not pay its rent on the tribe's other leases either. As a result: 'Increasingly dependent on the colo-

122. Sissons, 'Waimana Kaaku' (doc A24), p 43
123. Sissons, 'Waimana Kaaku' (doc A24), pp 42–43, 58–59
124. McLean to Wilson, 24 December 1873 (Binney, comp, supporting papers to 'Encircled Lands' (doc A12(a), p 42). The arrangement was that the Government would buy the parts suitable for agriculture, while Kelly (and Swindley) kept the parts suitable for pastoral farming. Both parties believed that the Swindley lease would be turned into a purchase, and that title would inevitably be granted by the Native Land Court.
125. Tracy Tulloch, 'Heruiwi 1–4' (doc A1), pp 23–24, 28

nial cash economy, and denied the rent owed them by the Crown, Ngati Manawa had little option but to put their land through the Native Land Court soon after it was reinstated."[126]

As we have seen, the suspension of the Court was lifted in 1877. Ngati Manawa had already had Heruiwi 1–3 surveyed the year before, and in August 1877 the tribe applied for a hearing. The Government also applied for a hearing to determine the Crown's interest, but in 1878 the Court sat to hear the Ngati Manawa application. There is no doubt that this hearing was a deliberate act on the part of Ngati Manawa's leaders.[127] Tuhoe did not make a counter-claim, and Tama Nikora's reports do not mention any Tuhoe interest in Heruiwi 1–3.[128] Ms Tulloch identified a Ngati Hineuru counter-claim, but this seems to have been settled out of court by the inclusion of a few Hineuru individuals in the title.[129] It is not clear to us whether Ngati Hineuru were properly able to participate in decision-making for this block, given that most of them were still living in exile on the coast.[130]

The other block brought before the Court in 1878 was Waiohau. In 1873 to 1874, Ngati Haka Patuheuheu had debated whether to lease land east of the Rangitaiki River – Waiohau and Kuhawaea – with other Te Whitu Tekau leaders.[131] In Bernadette Arapere's view, Te Whitu Tekau was 'genuinely concerned about the borderland hapu who were considered vulnerable to the government's pressures to lease'.[132] Counsel for Ngati Haka Patuheuheu, relying on the evidence of Kathryn Rose and Robert Pouwhare, submitted that these border hapu sometimes had to defy the tribal collective. They had returned from Te Putere in dire economic straits, and they faced pressure from Crown and private negotiations with their neighbours (Ngati Manawa and Ngati Awa).[133] Counsel suggested:

> In not participating in such transactions Ngati Haka Patuheuheu were facing a threat that they would lose control over much of their lands. Not unsurprisingly, given that the hapu was a struggling community, advances were no doubt welcome and the community would have sought the benefit from the leasing of their lands.[134]

In 1874, lease arrangements were finalised with settlers willing to take the risk that their dealings were 'void' under the Native Land Act. Wi Patene and Mehaka Tokopounamu promoted the lease, which eventually ended up in the hands of W F Chamberlin. Binney and Arapere agreed that it was pressure from Chamberlin which brought this land into

126. Peter McBurney, brief of evidence, 2004 (doc F7), p 9
127. Tulloch, 'Heruiwi 1–4' (doc A1), pp 23–28
128. See Tama Nikora, 'Tuhoe and the Rangitaiki', 2004 (doc C30), and Tama Nikora, brief of evidence for the third week of hearing, 18 March 2004 (doc C31)
129. Tulloch, 'Heruiwi 1–4' (doc A1), pp 27–28; counsel for Ngati Hineuru, closing submissions, 30 May 2005 (doc N18), p 16
130. Counsel for Ngati Hineuru, closing submissions (doc N18), p 22
131. Bernadette Arapere, 'A History of the Waiohau Blocks', a report commissioned by the Waitangi Tribunal, 2002 (doc A26), p 23
132. Arapere, 'Waiohau' (doc A26), p 24
133. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 112, 117–120
134. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 112

the Court in 1878.[135] It may have been surveyed without the knowledge of the wider Tuhoe leadership, although this is not certain.[136] In any case, it was pre-title dealings by people desperate to acquire rents that ultimately brought this land into Court, despite the Te Whitu Tekau ban.

At the same time as Mitchell and Davis were trying to get leases of Heruiwi and Waiohau, they also dealt with various tribal communities for a lease or purchase of Matahina/Pokohu. This large piece of land (some 85,000 acres) was a point of intersection between tribal groups, many of whom had permanent residences in different parts of the block.[137] In 1874 to 1875, a lease was negotiated with Ngati Awa, led by Rangitukehu. It contained the usual clauses forbidding other dealings in the land, and specifying that rent would not be paid until the Court decided title. As part of their negotiations, Mitchell and Davis paid an advance of £50 to Wi Patene for Ngati Haka Patuheuheu. They also met with Ngati Rangitihi, who were receptive to the idea of leasing 'Pokohu', as the land was known to them.[138]

Inconclusive dealings with a number of groups resulted in great tension in the region. A series of hui was held to try to resolve the matter in 1876, including a two-day hui at Te Umuhika, attended by 300 people. A jury of ten chiefs and assessors confirmed that all the payments so far had been made to people with valid rights in the land. Wi Patene later recalled this hui, which he called a 'Commissioner's Court', and pointed out that it had found in his favour.[139] Counsel for claimants noted that this kind of inter-tribal hui, with a jury of leading chiefs, was one of many contemporary alternatives to the Native Land Court. But people had to go to the Court because only it had legal powers.

In 1877, the suspension of the Native Land Court was lifted. In April 1878, the Crown precipitated Land Court action by proclaiming Matahina as under negotiation for purchase. While still paying small advances on the rent to Ngati Haka Patuheuheu, it negotiated a deed of sale with eight Ngati Awa leaders in 1879.[140] As part of this purchase negotiation, Ngati Awa applied for a survey and hearing of title. As we have noted above, both Ngati Rangitihi and Ngati Haka Patuheuheu were part of wider groupings that formally opposed sales and the Court. Yet, as a result of the Crown's leasing activities and its payment of advances on rent, and the inability of anyone to actually get regular rents, all the groups living on 'Matahina' cooperated with Ngati Awa's survey. While Rangitukehu led the survey,

135. Arapere, 'Waiohau Blocks' (doc A26), p 24; Judith Binney, 'Encircled Lands, Part Two: A History of the Urewera 1878–1912' report commissioned by the Crown Forestry Rental Trust (doc A15), p 46

136. Arapere, 'Waiohau' (doc A26), p 36. Arapere's interpretation here may be based on a misreading of 'money' as 'survey' in the source she relied upon. See Makarini Te Waru and others to Fenton, 1 August 1878 (Gwenda Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46, doc H4(f)), p 37)

137. When this block was heard by the Court, the claimants discovered that several thousand acres of it had been included in the Kaingaroa 1 purchase. Hence, Matahina was reduced to 78,860 acres.

138. Cleaver, 'Matahina' (doc A63), pp 18–20

139. Kathryn Rose, 'A People Dispossessed: Ngati Haka Patuheuheu and the Crown, 1864–1960', a report commissioned by the Crown Forestry Rental Trust, 2003 (doc A119) pp 72–73

140. Rose, 'A People Dispossessed' (doc A119), p 81; Cleaver, 'Matahina' (doc A63), pp 20–21

The Settlement of Ngati Awa Claims

In 2003, the Crown and Ngati Awa entered into a deed of settlement. This agreement settled all Ngati Awa historical claims (including those of Ngati Pukeko). In 2005, Parliament passed the Ngati Awa Claims Settlement Act, which (among other things) removed the jurisdiction of the Waitangi Tribunal to inquire further into the historical claims of Ngati Awa. In our inquiry, Ngati Awa appeared with a watching brief and made submissions on matters of relevance to their mana and customary rights (which we consider further below, in section 10.6). We have no jurisdiction to comment on issues as between Ngati Awa and the Crown. We do, however, need to explain how events regarding the Matahina block (and other events involving Ngati Awa) affected the claimants in our inquiry. Any findings of Treaty breach should not be taken to include Ngati Awa.

Ngati Haka Patuheuheu, Ngati Rangitihi, Ngati Hinewai, and Ngati Hamua all took part in conducting the surveyors over what they believed were their pieces, and even had their alternate lines surveyed. According to Wi Patene, Rangitukehu had had no choice but to accept their control of parts of the survey. It seems, therefore, that the Crown's efforts to turn the lease into a sale forced the land into Court, but that all the involved groups cooperated in the survey. The non-selling, leasing groups had no choice but to accept a Court investigation if they wanted the Crown to pay its rent. Ngati Awa, on the other hand, had had to apply for a title as part of its agreement to sell land to the Crown.[141]

In Kuhawaea, to the south of Waiohau, J A Wilson had opened negotiations in 1874, and the land was proclaimed as under Crown monopoly later in the year. Wilson believed that he had made enough advances to make the block worthless to his competitor, Hutton Troutbeck, who had entered into an informal private lease. Unlike the Crown, Troutbeck actually had to pay his rent (£300 a year), but he faced the double insecurity of an informal lease over land proclaimed as under Crown monopoly. As a result, he made concerted efforts to get the land surveyed and passed through the Court, and to get the Government to accept a refund of its advances (technically to be paid back by the owners, but actually by him). Some of the younger leaders of Ngati Manawa supported Troutbeck, but the tribe was deeply divided. Unlike the position they had taken in Heruiwi 1–3, the senior Ngati Manawa leaders now opposed a survey and the Court. From 1878 to 1882, the District Officer (and others) consistently advised the Government not to act on the applications for survey, due to the weight of opposition within the tribe.[142] Ngati Manawa's experience of the

141. Cleaver, 'Matahina' (doc A63), pp 21–31, 35. Due to food shortages, hearings were cancelled in 1880, so that the block was not heard until 1881.

142. Binney, 'Encircled Lands', vol 2 (doc A15), pp 35–42

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Court by this time had been one of loss; instead of leading to the completion of leases and the payment of rents, its titles were facilitating quick and large-scale sales to the Crown.

In 1878, Harehare Atarea and a Ngati Manawa Committee wrote to the Government:

> Na e hoa, kaore matau e pai kia ruritia taua takiwa, kare rawa atu matau e pai. Ka waiho taua takiwa mo matau mo a matau tamariki. He kupu tuturu tena na matou katoa – wahine, tane, kuia, tamariki, koroua.
>
> Now friend, we do not agree to that area being surveyed, we do not agree at all. That place is to remain for ourselves and our children. This is the firm intention of all of us – women, men, elderly women, children, elderly men.[143]

Harehare still stood firm in 1881, trying to stop the surveying of Kuhawaea: 'This is a word of ours to you about the survey of the Kuhawaea block, we do not approve neither will [we] ever consent to the survey being carried out, because the Creator does not make land a second time for me hereafter.'[144] But, as Professor Binney pointed out, the Government was ultimately more interested in recovering its 'lien' on the block than in preventing a disputed survey. In 1882, the Native Minister decided to accept a refund and lift the proclamation on Kuhawaea, so he approved the survey.[145]

Pre-title dealings and Land Court applications often had a domino effect. In the face of the Troutbeck lease, Crown advances, a proclamation of the block as under negotiation, and Ngati Manawa applications for hearing, Ngati Haka Patuheuheu put in their own application to the Court in 1878.[146] Nonetheless, it was a Ngati Manawa claim that was surveyed and heard in 1882. Neither group had really wanted this land in the Court, but Troutbeck's alliance with select Ngati Manawa leaders – and the Crown's approval of a disputed survey in the face of considerable opposition – had forced it there.

Ngati Haka Patuheuheu did not contest Ngati Manawa's claim at the hearing in 1882. By this time, the two groups had reached an agreement over the land. There is considerable evidence of this oral agreement from both sides.[147] In essence, Haka Patuheuheu agreed not to contest Ngati Manawa's claim to certain lands (including Kuhawaea), in return for an assurance that they would be put in the title. This did not happen at the Kuhawaea hearing,

143. Harehare Atarea and the Committee of Ngati Manawa, 27 November 1878, quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 39

144. Harehare Atarea and others to Native Minister, 14 April 1881, quoted in Peter McBurney, 'Ngati Manawa and the Crown, 1840–1927', a report commissioned by the Crown Forestry Rental Trust, 2004 (doc C12), pp 288–289

145. Binney, 'Encircled Lands', vol 2 (doc A15), pp 41–42

146. Binney, 'Encircled Lands', vol 2 (doc A15), p 38

147. This evidence is summarised by counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 100–104. It includes evidence from Robert Pouwhare (witness for Ngati Haka Patuheuheu), Kathryn Rose (witness for Ngati Haka Patuheuheu), and Peter McBurney (witness for Ngati Manawa).

Notification Failures

Under the native land laws in force from 1873 to 1889, notification of hearings was mainly the responsibility of the Court and the Government. The most common form of notification was advertisement in the Maori *Gazette* (*Kahiti*). There was also an informal notification system, based on communication between officials and Maori, and between Maori in their own networks. From the evidence before us, there were three serious failures in the notification system. The first was Kuhawaea in 1882. Tuhoe applied for a rehearing, based on the claim that they had been sent the wrong issue of the *Kahiti*. The second was the partition hearing for Waiohau in 1886, the decision in which Ngati Haka Patuheuheu appealed on the basis that they had not been present because they had not received notice. The third was the hearing of Waipaoa in 1889. In that instance, Tuhoe did not apply for a rehearing, but Numia Kereru later explained to the Urewera Commission that they had not attended because they had not known of the hearing. We agree with counsel for claimants that failure to attend – for this reason or any other – could result in serious consequences.

where only Wi Patene and Mehaka Tokopounamu were included in the list.[148] Ngati Haka Patuheuheu applied for a rehearing as a result.

Tuhoe also applied for a rehearing of Kuhawaea. They claimed that they had not received a copy of the *Kahiti* advertising this hearing, and so had not attended.[149] We will return to the question of rehearings below, in section 10.6. Here, we note that notification procedures were sometimes chancy in Te Urewera. Counsel for claimants relied on the evidence of Clementine Fraser, who concluded that this period was 'marked by inconsistent communication systems'.[150] We agree with the Crown that there is no evidence of a systemic problem in our inquiry district – almost all the Urewera hearings were attended by at least some representatives of the people who needed to be there.[151] But where there was a failure of notification, as there was in three notable instances in our inquiry district, the effects were catastrophic for any who missed the opportunity to have their case heard and who lost land as a result.[152] Kuhawaea was one such instance.

148. Kathryn Rose, 'A People Dispossessed' (doc A119), pp 79–80; Binney, 'Encircled Lands', vol 2 (doc A15), pp 42–43
149. Nicola Bright, 'The Alienation History of the Kuhawaea No 1, No 2A, and No 2B Blocks', a report commissioned by the Waitangi Tribunal, 1998 (doc A62), pp 51–52
150. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 38, 85; Clementine Fraser, 'Tuhoe and the Native Land Court 1866 to 1896: A Summary', February 2004 (doc C10), p 7
151. Crown counsel, closing submissions (doc N20), topics 8–12, p 30
152. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 85

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In sum, 152,385 acres of land in Te Urewera had come before the Court by 1882. This represented about 28 per cent of the rim blocks.[153] Despite the resistance of tribal leaders to the imposition of the Court, especially those of Te Whitu Tekau, they could not prevent pre-title dealings and the inevitable Court applications that followed. For Waiohau and Kuhawaea, private leases (and intertribal competition) created the pressure that forced these blocks into Court. In Kuhawaea, the Crown was also a major player in achieving that outcome, having made advances, proclaimed the land as under negotiation for purchase, and then withdrawn its opposition at a crucial moment, allowing Troutbeck and some younger Ngati Manawa leaders to force through a survey and Court hearing in the face of great tribal opposition. In Matahina, the Crown had made advances on the rent to many groups but refused to pay the rent regularly until the Court had investigated title. This, as well as its purchase negotiations with Ngati Awa, overturned the 1876 hui decisions and forced the land into Court. Similarly, in Heruiwi 1–3, the Government's refusal to pay rent on its lease compelled Ngati Manawa to seek title investigation. Waimana was something of an exception, because Tuhoe managed to keep their private lease out of the Court until their hand was forced by an application from outside the block. The individuals who led this application, Joseph Kennedy and his brother, were not found to be owners.

The cases of Waimana and Kuhawaea demonstrate that the law allowed people to get hearings who did not have a mandate from the great majority of owners. The main factor, though, in imposing the Court on Te Urewera in practice, was the manner in which the Crown conducted its pre-title dealings. Unwilling groups were forced into Court in several cases as a result. Those who made applications, such as Ngati Manawa and Ngati Haka Patuheuheu, dealt with the Court for a mix of more positive reasons as well – they wanted and needed to start using their lands in the colonial economy. But, as counsel for Ngati Haka Patuheuheu submitted, there was no real choice involved: it was either the Land Court or informal leases with private settlers. According to Sissons, such leases were not as precarious as they seemed, so long as the relationship between landlord and tenant was good. But Chamberlin and Troutbeck engineered title investigation with the same persistence as the Crown. At least, however, they did pay rent. A Crown lease, on the other hand, forced land into Court unless the owners were willing to tie their lands up without ever getting any rent.

In the claimants' view, this was a system without choices: they had to go to the Court if they wanted to use their lands in the economy; they had to accept individualised title in the form of a memorial of ownership (as no other was on offer) if they went to the Court; and they had to participate (either as claimants or counter-claimants) or risk losing everything.[154]

From 1882 to 1889 there were no more Court hearings on the western side of the inquiry district. Then, in the short space of two years, another 115,156 acres was passed through the

153. This percentage does not include the 'four southern blocks'.

154. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 56

Court. This land was made up of three blocks: Heruiwi 4, Whirinaki, and Tuararangaia. It is to these blocks that we now turn.

(d) ***Heruiwi 4, Whirinaki, and Tuararangaia, 1882–91:*** In 1879, the Government paid its last advances in Te Urewera. As we shall see, the Native Minister reviewed purchase practices and decided to stop the system of pre-title dealings and advances. He also decided to stop entering into leases (as the first step in a purchase). From the early 1880s, the Government confined itself to buying up the shares of individuals whose land already had a Court-determined title. In the case of leases and purchases started under the old system, however, the Government still pursued them where the land looked a valuable prospect for settlement. Otherwise, purchase operations were rationalised and some pre-title leases and purchases abandoned, so long as advances were repaid (either in money or land).[155] As we have seen, the Government withdrew from Kuhawaea on that basis in 1882. Thus, one of the primary forces that had pulled Rangitaiki blocks into the Court was discontinued.

With the easing of this pressure, there were no more Court hearings on the western side of the district for several years. Tuhoe continued to resist surveys, sales, and the Court. As we saw in Chapter 8, they constituted a new tribal committee in 1888, with the involvement of all the leading chiefs. Rakuraku wrote to the Native Minister, on behalf of the Committee, that:

> all surveys are to be considered and dealt with by the Committee only, not by any one or two individuals or more [and also gold prospecting] . . . Friend the Native Minister do you sanction the resolutions which we have passed, seeing that the sole object of these two resolutions is to prevent bloodshed in connection with our lands and prevent other people or hapu's dealing with them and thereby produce trouble . . . Do you carefully consider the matters and as the matters referred to are favourable to us, let them also receive favourable consideration from you, for the general good of the two peoples Native and European.[156]

New surveys and hearings were undertaken by Ngati Manawa in the 1880s. Harehare Atarea and other Ngati Manawa leaders had tried in vain to prevent the sale of Heruiwi 1 and the hearing of Kuhawaea. But, as counsel for Ngati Manawa submitted, poverty, debt, and intermittent crop failures drove them to deal ever more extensively in their lands – and that, in turn, required them to take those lands to Court.[157] As early as 1882, Harehare sought to subdivide Heruiwi 4, the large (75,000-acre) stretch of territory to the south of Heruiwi 1–3. This resulted in a survey and applications for hearing in the mid-1880s.[158] Then, the situation worsened with the Mount Tarawera eruption and competition for scarce resources between

155. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 607–613
156. Rakuraku Rehua and others to the Native Minister, Te Waimana, 30 September 1888 (Binney, comp, supporting documents to 'Encircled Lands' vol 2, various dates (doc A15(a), pp 4–5)
157. Counsel for Ngati Manawa, closing submissions (doc N12), pp 23–30
158. Tulloch, 'Heruiwi 1–4' (doc A1), pp 46–47

Ngati Manawa and their close relatives, Ngati Apa. This resulted in a Ngati Apa survey of Whirinaki (31,500 acres) in 1887, and an application for hearing.[159]

Harehare Atarea at first obstructed this survey but eventually agreed to let it go ahead.[160] It seems unlikely, though, that Ngati Manawa were unwilling parties to Whirinaki going to Court. Atarea wanted to have a single survey of all Ngati Manawa's claims, rather than just of Whirinaki (controlled by Ngati Apa).[161] Also, when writing to the Court in 1885 about the hardship incurred by the location of its sittings, Atarea had referred to future Whirinaki hearings, even though no claim had been filed about that block. He clearly saw it as inevitable that all land in which Ngati Manawa had an interest would end up coming before the Court.[162]

According to Mr McBurney, those who rallied around the tribal name 'Ngati Apa' at this time were concerned at how much land had been sold to the Crown, and were anxious to throw off the leadership of Harehare Atarea. Also, they saw that land sales always followed in the wake of Court hearings, and that benefit could only come if as many shares as possible were awarded to a smaller number of owners. Thus, two closely related groups that had previously acted together now vied for ownership in the Court, and the right to deal exclusively in the lands. As further evidence for this explanation, and the straitened circumstances of the applicants, McBurney noted that there was no longer much concern with putting representatives of closely related iwi in the titles. Feasts to celebrate land sales became more like 'wakes' than the displays of mana common earlier.[163]

Whirinaki and Heruiwi 4 were both heard in 1890. Harehare Atarea had been pressing for Heruiwi to be heard since 1885, when the survey was completed. We have no definite information on why it took so long for this block to be heard.[164] Whirinaki, too, was surveyed in 1887 but not heard until 1890. Ms Tulloch suspected that the timing of the hearings arose from the Government's increased interest in Te Urewera lands at the end of the decade.[165] As we saw in chapter 8, there was indeed a more concerted pressure on Tuhoe from 1889 onwards, focused on gold, access to the rohe potae, and – ultimately – the push for surveys, Court titles, and land. In the face of Government pressure and Tuhoe resistance, Tulloch noted the significance of Atarea's speech to Premier Seddon at Galatea in 1894, in which he stressed Ngati Manawa's alliance with the Crown, and their opening of the country by means of surveys (and the Court):

> through the co-operation of the Ngatimanawa and Ngatiwhare, this country is now opened up . . . All the surveys in this country were effected by the Ngatimanawa in obedience to the

159. Tracy Tulloch, 'Whirinaki', a report commissioned by the Waitangi Tribunal, 2002 (doc A9), pp 23–25
160. Tulloch, 'Whirinaki' (doc A9), p 25
161. Ibid, p 28
162. McBurney, 'Ngati Manawa and the Crown, 1840–1927' (doc C12), p 274
163. Ibid, pp 270–273
164. Tulloch, 'Heruiwi 1–4' (doc A1), pp 48–49
165. Tulloch, 'Whirinaki' (doc A9), p 34

behest of the Government against all opposition; and every survey we have carried through successfully. All this land you see here was handed over unconditionally to the Government. We always acted under the instructions of the Government.[166]

In Heruiwi 4, Ngati Manawa claimed solely through their ancestor Tangiharuru, and tried to exclude the descendants of Apa. This shut out Ngati Hineuru, who had been admitted (as individuals) in Heruiwi 1–3. Thus, Ngati Hineuru made a counter-claim. They were not dragged unwillingly into Court, however, as they had originally assumed that they were included in the Manawa claim, and so had cooperated with the survey.[167] Ngati Marakoko, a hapu related to both Ngati Manawa and Tuhoe, accompanied the survey party over the land claimed by them, and also did not contest the survey or hearing. The wider Tuhoe leadership had not known of the survey until after it was completed, when it was too late to try to prevent it. Ngati Marakoko had acted without their knowledge.[168] Thus, while Tuhoe were not willing to have surveys or hearings, they had little choice but to turn up or risk losing their customary rights to the land.

Whirinaki was also heard in 1890. Ngati Apa claimed the block exclusively, shutting out all of their very close kin. There were counter-claims from Ngati Manawa, Ngati Rangitihi, and Tuhoe. In Ms Tulloch's view, Tuhoe either had to participate in this hearing or risk losing their interests, hence their unwilling attendance at Court. Ngati Rangitihi, too, seemed to have had no say in the survey or the bringing of this land to Court.[169]

The other block heard by the Court in 1890 was the much smaller Tuararangaia block (8656 acres). The first application for survey was filed in 1884 by Te Whaiti Paora, a chief of Ngati Hamua and Ngati Haka Patuheuheu, on behalf of Ngati Hamua, Warahoe, and Tuhoe. He did not, however, represent all the people in whose name he made the application. Charles Alma Baker surveyed the block in 1885, conducted over the land by Te Whaiti Paora and the young Patuheuheu chief, Mehaka Tokopounamu. As Peter Clayworth explained, it was soon evident that the tribes had not known about this application. The survey was obstructed by Ngati Awa and Warahoe. Theodolites were broken and the party taken back to Te Teko. After some negotiation, Ngati Awa agreed to the survey and the party returned to the block, only to be stopped again by Tuhoe. This obstruction resulted in the contraction of the block (by moving the eastern line), but it was allowed to go ahead on

166. AJHR 1895, G-1, p 65 (Tulloch, 'Whirinaki' (doc A9), p 34)
167. Tulloch, 'Heruiwi 1–4' (doc A1), p 47
168. Tulloch, 'Heruiwi 1–4' (doc A1), pp 47, 54–56. Ngati Marakoko are a hapu of Ngati Manawa, intermarried with Nga Potiki of Tuhoe. Their claim to land in the south of Heruiwi 4 was made jointly with Tuhoe, but on the basis of descent from Tangiharuru (Ngati Manawa) to the west, and from Tauheke (Nga Potiki) to the east. The Court awarded Heruiwi 4C to the descendants of Tauheke.
169. Tulloch, 'Whirinaki' (doc A9), pp 27–28, 34

the insistence of Ngati Haka Patuheuheu.[170] Tuhoe, as Tamaikoha put it, still 'objected to the survey as a survey'; in other words, they still objected to it in principle.[171]

Despite this objection, Tuhoe had no choice but to turn up in Court or lose their interests. Tamaikoha, one of the leading opponents of the survey, gave evidence for Tuhoe at the hearing. Because of the way the system operated, Tuhoe were counted as one of three claimant tribes for the block, on the application of a chief who clearly had not represented them when he filed it. The counter-claimants were Ngati Pukeko and Ngati Awa. Some Warahoe supported Paora's claim, while others supported the Ngati Awa counter-claim.[172] It is not clear how many Ngati Haka Patuheuheu had originally supported the application. As we have seen, Mehaka Tokopounamu supported Te Whaiti Paora. Te Makarini Te Waru also ended up supporting the survey, when the young people got into trouble. He may have been instrumental in reducing its scope, telling the Court: 'I confined myself to present boundaries because I know the antipathy of Tuhoe to surveys over their lands.'[173] In any case, there was no choice but to support the claim at hearing or lose the land to others. As Dr Clayworth pointed out, this hearing was a sequel to those of Matahina and Waiohau, and part of an ongoing contest between Tuhoe and Ngati Awa for control of the Rangitaiki lands.[174] To stay away was to forfeit that contest.

(e) ***Total boycott:*** the Ngati Whare claim: In our inquiry, the Crown accepted that unwilling groups had to attend the Court or risk losing their lands.[175] The group who perhaps were the most tenacious in their refusal to engage with the Court were Ngati Whare, who made no claims or counter-claims in any of the blocks in which they had interests. By 1891, all of these blocks – Heruiwi 1–3, Kuhawaea, Heruiwi 4, and Whirinaki – had passed through the Court.[176] Some people with Ngati Whare affiliations did appear in court, 'albeit not claiming as Ngati Whare'.[177] As a result, a few tribal members were put onto title lists as individuals – the law did not provide for them to represent the majority of the tribe, who did not get on these lists.[178] Ngati Whare's non-attendance was described as a boycott by Peter McBurney.[179] Ngati Whare strictly upheld Te Whitu Tekau policies, refusing to make claims or counter-claims, or to apply for rehearings when title decisions became known. As a result, although more individuals got in than they had realised until researching their Treaty claims, and in

170. Peter Clayworth, 'A History of the Tuararangaia Blocks', a report commissioned by the Waitangi Tribunal, 2001 (doc A3), pp 48–49, 54–56, 58, 61
171. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), p 49
172. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 48–78
173. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), p 49; see also pp 54–56
174. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 51–52
175. Crown counsel, closing submissions (doc N20), topics 8–12, pp 3, 10, 25
176. Richard Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi: A History', June 1999 (doc A27), pp 87–92
177. Counsel for Ngati Whare, closing submissions (doc N16), p 48
178. Counsel for Ngati Whare, closing submissions (doc N16), pp 49–51
179. Peter McBurney, brief of evidence, undated (doc F7), p 24

two cases (Whirinaki and Kuhawaea) hapu were included in lists, Ngati Whare lost their customary rights in these lands.[180]

There is little doubt that they had had valid rights. Ngati Manawa and other witnesses said so at the time in the Native Land Court and the Urewera Commission.[181] In the Court, for example, Ngati Manawa leaders had actually claimed Heruiwi 4 on behalf of Ngati Whare as well as Ngati Manawa.[182] In the second Urewera commission (1907), Harehare Atarea said:

> In the days of our old men, Harehare, Tamoti, Te Mokena, Puritia, Kuratau, Te Wikiriwhi; Te Parata and Ngati Manawa and Ngati Whare. I saw these old men. Their word then was that Te Whaiti belonged to Ngati Manawa and Ngati Whare. This word of theirs applied to Kaingaroa, Whirinaki, Heruiwi and Kuhawaea.[183]

Ngati Whare argued that the Crown must take responsibility for their losses, having set up a system by which those present in Court could acquire absolute title to lands shared with people who were absent. The interests of those who did not or could not attend the Court were not protected. Indeed, McBurney suggests that there was an element of deliberate 'ignoring' on the part of the Court: 'The Court responded by ignoring those who refused to recognise it, which effectively abrogated their rights'.[184] Whether or not that is so, claimant counsel suggested that Ngati Whare's boycott of the Court should not have been allowed to deprive them of their rights. Rather, the fault lay with the Court's process, which was limited to the evidence (claimants and objectors) appearing before it.[185]

The rights of Ngati Whare were discoverable upon inquiry, even if they had not turned up in Court. Indeed, Heruiwi 4 was claimed in their name (as well as Ngati Manawa's). The problem was that little evidence was taken in Court unless blocks were contested. A 'reasonable body' of evidence was heard for Whirinaki and Heruiwi 4, but:

> Even then it does not appear that the Court ever tried to inquire beyond the evidence before it. While this was standard procedure for the Court, it was inadequate for Ngati Whare. The failure of the Crown to ensure that the Court operated in a truly inquisitorial capacity rather than simply addressing the evidence as submitted to it, particularly when there is knowledge of the opposition of certain groups in the area to the operation of the Court, is a failure of active protection.[186]

180. Counsel for Ngati Whare, closing submissions (doc N16), pp 44–55, and Schedule 1, p 141. Ngati Whare told us that Ngati Wharekohiwi were included in a list for Whirinaki and a group of Ngati Te Au were included in Kuhawaea, but were not distinguished as such within the lists of owners.
181. Counsel for Ngati Whare, closing submissions (doc N16), pp 49–51
182. Tulloch, 'Heruiwi 1–4' (doc A1), p 50; Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi' (doc A27), pp 33–34, 90
183. Mair Minute Book 2 (1907), quoted in Boast, 'Ngati Whare and Te Whaiti-nui-a-Toi' (doc A27), p 34
184. McBurney, brief of evidence (doc F7), p 24
185. Counsel for Ngati Whare, closing submissions (doc N16), p 52
186. Counsel for Ngati Whare, closing submissions (doc N16), p 52

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The Crown did not address this claim directly in its closing submissions. Counsel did, however, point to the preliminary investigations of District Officers and judges provided for under the 1873 Act, which were of a more inquisitorial nature than Court hearings and were supposed to ensure that applications were bona fide. In particular, the District Officers were supposed to identify iwi and hapu with interests in the land, for the information of the Court.[187]

In terms of the blocks at issue in the Ngati Whare claim, we note that the duty of judges to conduct preliminary inquiries was abolished in 1878. It had no relevance, therefore, to the hearing of Kuhawaea, Heruiwi 4, and Whirinaki.[188] Mr Hayes, in his evidence for the Crown, noted that its abolition was criticised at the time, because it did away with a safeguard to 'ensure that all parties having an interest in the land were able to be represented in Court'.[189] The judges, however, had refused to carry out this part of the Act anyway. We note their concern that it might be seen to compromise their impartiality.[190]

Similarly, the position of district officer was abolished by the time that Heruiwi 4 and Whirinaki came before the Court.[191] As the Crown pointed out, there is evidence that a District Officer advised against the survey of Kuhawaea, due to the substantial opposition to it.[192] But there is no evidence of any information provided to the Court as to customary rights in that block. Judgments were clearly reached in Court on the basis of the evidence alone (or the out-of-court arrangements) presented to it. The Pouakani Tribunal observed that this was a well-known feature of the Court in its early decades.[193]

(f) ***Ruatoki, 1891–94:*** By the time title was awarded for Tuararangaia in 1891, 267,541 acres of western lands had passed through the Native Land Court. This represented just under half (49.4%) of the rim blocks. In this year, as we saw in chapter 8, the Government tried to overcome Tuhoe resistance to surveys and the Court by sending a major delegation, led by the Governor, to visit Te Urewera. Although the Governor and Native Minister were not permitted further than Ruatoki, a major split ensued within the Tuhoe leadership. Hitherto, their leaders had resisted surveys (where they found out about them in time) and had protested, but had largely turned up in Court to defend claims to land that overlapped with the rohe of other iwi. The exception was Waimana, where Tamaikoha and Rakuraku had insisted on filing a claim, rather than risk losing this land to a claim from outsiders. Ruatoki, however, was core Tuhoe land in which they admitted no other claims. For the Court to operate there

187. Crown counsel, closing submissions (doc N20), topics 8–12, p 26

188. Under section 6 of the Native Land Act Amendment Act 1878 (no 2), judges were no longer required to conduct a preliminary investigation, unless there was a 'particular or urgent' reason for doing so.

189. Hayes, 'Evidence on the Native Land Legislation' (doc A125), p 95

190. Hayes, 'Evidence on the Native Land Legislation' (doc A125), pp 20, 80–81, 87

191. The role of District Officers was abolished when the Native Land Act 1873 was repealed in 1886.

192. Crown counsel, closing submissions (doc N20), topics 8–12, p 27

193. Waitangi Tribunal, *Pouakani Report* (Wellington: Brookers, 1993), p 241

was an unthinkable violation of their collective decision-making. Nonetheless, there had been applications to the Court by Ngati Awa, Ngati Pukeko, and Ngai Tai, although Ngati Awa did not press for a survey, admitting to Resident Magistrate Bush that Ruatoki could only be surveyed by Tuhoe. The Crown's historian, Cecilia Edwards, noted that Tuhoe knew of and were worried about these applications. They played a part in triggering the Tuhoe applications of 1891 (see ch8).

As we have seen, a fraught period of intra-tribal conflict, obstruction of surveys, arrests, and imprisonment followed, as the Government tried something it had not really dared before in the case of contested surveys: it insisted on surveying in the teeth of any and all opposition. As a result, Ruatoki was heard by the Court in 1894, bringing a further 21,450 acres under its individualised titles. This meant that 53.3 percent of the rim blocks had now passed the Court on this side of our inquiry district.

(2) *The eastern lands*

On the eastern side of the Urewera inquiry district, a quarter of a million acres of land passed through the Native Land Court in 1889. This took the form of two blocks, Tahora 2 and Waipaoa.[194] Tahora 2 was a vast area of land, encompassing 213,350 acres. The rohe of the iwi of Te Urewera, Wairoa, Opotiki, and Turanga met and overlapped there to a very significant extent. By the time that it came to be surveyed (1887), it was already bounded by the confiscation line in the north, and by Native Land Court surveyed blocks on its eastern and southern sides. Only the western boundary remained to be defined. Tribal districts known to their inhabitants as Te Wera, Te Houpapa, Te Waimaha, and Te Papuni were all contained within it.

To the south, Tahora 2 was bounded by the Waipaoa block, which had been surveyed by 1885. Waipaoa contained some 39,000 acres, east of Lake Waikaremoana and north of the Ruakituri and Taramarama blocks. Ngati Kahungunu, Ngati Ruapani, and Tuhoe all claimed customary rights and authority in parts of this land.

(a) ***The system of pre-title dealings brings about applications to the court, 1879–87:*** Tahora 2 and Waipaoa were the subject of intermittent Crown attention from 1879 to 1888, but – unlike the case with some of the western lands – this did not result directly in the passing of the land through the Court. The hearing of Tahora was brought about by the Crown's legitimising of a secret survey in 1888, and by an application from individuals later found to have no rights. This in turn triggered applications that brought Waipaoa before the Court in the same year.

The eastern lands were subject to much less attention from Crown or settlers, and less pressure, than the western blocks. There were no attempts from settlers to get informal

194. Tahora 1 was a small piece of land that never existed except in theory. The boundaries of Tahora 2 and Waipaoa are described in the Key Facts section.

leases or to run sheep and cattle in these remote, rugged lands. As we discussed in chapter 7, the Crown's main focus in the east in the mid-1870s (in terms of our inquiry district) was the four southern blocks. Having effectively acquired this land in 1876, the Government seems to have intended to continue dealing with Ngati Kahungunu, pushing north into Waipaoa and Tahora 2. Brent Parker noted a proclamation in 1876, under the Immigration and Public Works Act 1871, in which the Crown notified its intention to negotiate for the purchase of Te Waimaha and Te Papuni lands.[195] The boundary markers indicate that these districts were contained in what later became the Tahora block.[196]

Despite the 1876 proclamation, the Government does not appear to have pursued leases or purchases in the proclaimed lands until 1879. In that year, two Crown purchase officials negotiated offers to sell land in 'Te Wera' and 'Te Houpapa'. George Preece, based in Opotiki, negotiated with two Tuhoe and Whakatohea leaders, Rakuraku Rehua and Hira Te Popo. Colonel Thomas Porter, based in Gisborne, negotiated with a group of Turanga chiefs, led by Wi Pere. The two purchase deals were concluded on the same day, 25 June 1879, and seemed to cover much the same area of land (under two different block names).[197]

According to Professor Binney, the Tuhoe offer was likely brought about by tribal competition for this land, and the knowledge that it was also being negotiated at Turanga with Wi Pere.[198] This may be so, although the two purchase agents were not working together, and Preece was much annoyed with the Turanga competition, calling their claim to sell Te Houpapa 'absurd'.[199] He advised the Government that 'Natives of half a doz tribes will object to the boundaries'.[200]

For the Turanga peoples, this purchase came during a period in which they were trying to protect their lands by making strategic choices to control and limit transactions. Kathryn Rose explained that Te Houpapa was believed to contain about 100,000 acres. Wi Pere, on behalf of Ngati Maru, Ngati Rua, Te Whanau a Kai, and Ngai Tapuae, offered the Crown about 20,000 acres, hoping to raise capital to pay for a survey and to develop the rest.[201] Inevitably, this would involve taking the land to the Native Land Court. As the Turanga Tribunal found, Wi Pere and other leaders hated the Court and the 'utter disempowerment' that it stood for, but they had to participate:

195. Brent Parker, 'Tahora No 2 Block', report commissioned by the Crown Law Office, 2005 (doc L7), p 2. Mr Parker observed that Te Papuni was wrongly spelt as Te Papanui in the proclamation, but the boundary markers indicate that the district referred to was in the Tahora block.

196. Parker, 'Tahora No 2' (doc L7), p 2

197. Peter Boston and Steven Oliver, 'Tahora', a report commissioned by the Waitangi Tribunal, 2002 (doc A22), pp 13–17

198. Binney, 'Encircled Lands', vol 2 (doc A15), pp 70–71

199. Binney, 'Encircled Lands', vol 2 (doc A15), p 71; Boston and Oliver, 'Tahora' (doc A22), pp 16–17

200. Kathryn Rose, 'Te Aitanga-a-Mahaki and Tahora 2: Extracts from Reports Written by Kathryn Rose for Te Aitanga-a-Mahaki Claims Committee', compiled in 2002 (doc A77), p 5

201. Ibid, pp 4, 9; Kathryn Rose, 'Summary of "Te Aitanga-a-Mahaki and Tahora 2: Extracts from Reports Written by Kathryn Rose for Te Aitanga-a-Mahaki Claims Committee"', 2004 (doc I12), p 1

> They knew the Court was there and had to be engaged with. To turn one's back on it risked losing jealously guarded rights to a competitor willing to file a claim. The Court was an evil but, for the time being anyway, an unavoidable evil.[202]

Tuhoe opposition was even more 'resounding' than that of Turanga iwi, but Tuhoe were 'equally trapped'.[203] We have no concrete information about how much land was thought to be contained within the Tuhoe and Whakatohea offer of Te Wera, or how much of that land they actually intended to sell. Nor is there evidence of immediate opposition from other Tuhoe chiefs. It should be remembered that the Tuhoe collective will had been set aside just the year before, when Waimana and Waiohau had been taken through the Court. Leading the offer of Te Wera in 1879 was the Waimana chief Rakuraku, with Tamaikoha joining him in accepting an advance payment. For the moment, it seemed that the will of these border chiefs had prevailed within Tuhoe. On 19 September, the Government paid £100 to these chiefs, as well as to Hira Te Popo of Whakatohea, Rakuraku's brother Mihaera, Netana Rangiihu, and 19 others.[204] At the beginning of the month, the Crown had also advanced £200 to Wi Pere (of the £1000 he had requested). For the Turanga chiefs, the Government planned to pay a further £300 in advances. But the Tuhoe chiefs were told that they would get no more money until the land had been surveyed and brought before the Court. Wi Pere would also get nothing above £500 until he had obtained Court titles for Te Houpapa.[205] At this time, the Government was no longer spreading its tamana (advances) so widely, although still using them essentially as downpayments for a court hearing as well as an eventual purchase. The system itself was abolished by the end of 1879 but its effects lingered. Where pre-title negotiations were underway, they were allowed to continue.

The fact that Crown agents were negotiating simultaneously with different groups for virtually the same land was soon exposed. Tuhoe and Whakatohea leaders came straight to Gisborne to object to any survey of their lands as part of Te Houpapa, while Ngati Kahungunu protested as well.[206] In his evidence for the Crown, Brent Parker accepted that these two purchase attempts resulted in a rush of rival applications for surveys and hearings.[207] Groups had to protect their interests from each other (and from anyone who might accept Crown purchase offers or apply to have overlapping interests surveyed). This was a classic feature of the Native Land Court system. It had to be used because it was the only means of legal protection vis-à-vis the Crown and other tribes. In this case, however, the Government realised that it had provoked vociferous opposition from all the tribes in a large region. The head of land purchasing, Richard Gill, defended the Government's

202. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 424, as quoted in counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 11
203. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 11
204. Binney, 'Encircled Lands', vol 2 (doc A15), p 71
205. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 4; Binney, 'Encircled Lands', vol 2 (doc A15), p 71
206. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 4; Binney, 'Encircled Lands', vol 2 (doc A15), pp 71–72
207. Parker, 'Tahora No 2' (doc L7), pp 5–6

actions as necessary to get things started across as wide an area as possible, without having to arrange and survey smaller slices, leaving it for the Court to decide the 'tribal awards' later.[208]

At first, Gill decided to back off from the purchases. The payment of advances was suspended and the local agents were advised that the Government would not try to start surveys.[209] 'Do not,' he instructed Porter, 'force on any more work than is absolutely necessary.'[210] In October 1881, Porter sent in a new offer to sell Te Houpapa, and in December of that year the Government gazetted the block as under negotiation for purchase. This provoked a fresh application to survey Te Wera from Rakuraku. Preece persuaded Te Waru Tamatea, the upper Wairoa leader who had been exiled to Waiotahe in the eastern Bay of Plenty, to drop his objections to the purchase. Gill met with Rakuraku in early 1882 and obtained his agreement that two men – Paora Haupa and Aporo Matahuaka – should oversee the survey. Gill then went to Gisborne in March 1882 to see if he could obtain agreement to proceed with Te Houpapa.[211]

Professor Binney commented: 'The right to initiate the survey had become the subject of competition. Rakuraku's application was intended to obstruct Wi Pere, as the latter acknowledged.'[212] Gill thought it was pointless to conduct a separate survey of Te Wera, which was actually included in Te Houpapa, but Wi Pere told him in March 1882 that nothing could be surveyed yet – 'the boundaries will be disputed by Te Uriwera and the survey stopped'.[213] Gill tried to insist that the survey of Te Houpapa go ahead, despite their objections, but left the meeting when the Turanga leaders could not agree. At the same time, also hanging over everyone's heads, there had been an application to survey Waimaha (which overlapped with Tuhoe's 'Te Wera' and Wi Pere's 'Te Houpapa') from Te Waru's people in exile at Opotiki: 'The right to survey Te Wera and Te Houpapa had become locked into a terrible contest of mana, on which neither Wi Pere nor Rakuraku nor Te Waru could obtain agreement.'[214]

One of the features of this kind of competition, where groups had to file applications to the court as the only way to protect their interests, was that it often had a domino effect and brought in new tribes and new lands. The Crown's proclamation of Te Houpapa as under negotiation in 1881 had a major impact on Ngati Kahungunu of Wairoa. Not only did they protest against any survey of their interests without their consent, they also responded with an application of their own to survey the Waipaoa block. In Cathy Marr's view, this move – spearheaded by the Reverend Tamihana Huata and Hapimana Tunupaura at a hui in 1882

208. Boston and Oliver, 'Tahora' (doc A22), p 17
209. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 5; Binney, 'Encircled Lands', vol 2 (doc A15), p 72
210. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 5
211. Boston and Oliver, 'Tahora' (doc A22), pp 18–19
212. Binney, 'Encircled Lands', vol 2 (doc A15), p 74
213. Binney, 'Encircled Lands', vol 2 (doc A15), p 73
214. Binney, 'Encircled Lands', vol 2 (doc A15), p 74

– was the direct result of the 1881 proclamation, and of the various applications in which others appeared to claim their interests in Te Papuni.[215] Yet, this move in its turn created pressure on other groups. A rival application for Waipaoa was filed by other Ngati Kahungunu hapu a month later.[216] At the same time, Huata and Tunupaura knew that they were bringing in the Waikareiti lands without the agreement of those who lived in that western part of the block. In 1883, Preece noted Huata's view that both Waipaoa and Waikareiti should be surveyed under the one application, and then divided later by the Court if necessary.[217] The Waikaremoana/Waikareiti community affected by this proposed survey did not get involved by filing an application in their turn. Why not? In Tama Nikora's view, the history of the four southern blocks had had a profound impact on how far these people were able to defend their position in Waipaoa.[218] We note here that they stayed away from any and all involvement with the Court over their Waikareiti lands for the next seven years.

The evidence of Cathy Marr, and also of Michael Belgrave and Grant Young, commented in detail on the factors that brought about the Waipaoa application. Essentially, they saw it as a combination of 'push' and 'pull'. While the court system offered opportunities on the one hand, there was no choice but to use it on the other – and with an extra push to put in a claim before the Crown transacted with others. Belgrave and Young cautioned against taking too negative a view of those who did make applications to the Court. In the first place, there was an insurmountable pressure, in that the Native Land Court was the only way to secure a legal title for protection from other tribal claims. In Ms Marr's view, this was an especially powerful pressure in border regions such as Waipaoa and Tahora, where the court system was particularly damaging to the traditional (though not always peaceful) accommodation of a variety of overlapping interests. Also, the Kahungunu chiefs saw an advantage in being claimants rather than counter-claimants, and in controlling exactly which lands were surveyed and where boundaries were located. Ms Marr compared this approach to that of Tuhoe, and of the Ruapani who were aligned with Tuhoe, who resisted the court rather than trying to use it, and who lost interests later as a result. Ultimately, however, Belgrave, Deason and Young agreed with Marr that the filing of the first application for Waipaoa was the result of the Crown's attempts to purchase land in neighbouring Tahora, and the Court applications from other tribes that that had generated.[219]

The Ngati Kahungunu application in October 1882 for a survey of Waipaoa was accepted immediately by the Government. In the meantime, other Tuhoe leaders had finally inter-

215. Cathy Marr, 'Crown Impacts on Customary Interests in Land in the Waikaremoana Region in the Nineteenth and Early Twentieth Centuries', a report commissioned for the Waitangi Tribunal, 2002 (doc A52), p 231
216. Cathy Marr, 'Waikaremoana' (doc A52), p 232
217. Emma Stevens, 'Report on the History of the Waipaoa Block, 1882–1913', 1996 (doc A51), p 13
218. Tama Nikora, 'Waikaremoana', 2004 (doc H25), pp 51–73
219. Cathy Marr, 'Waikaremoana' (doc A52), pp 226–233; Michael Belgrave, Anna Deason, and Grant Young, 'The Urewera Inquiry District and Ngati Kahungunu: An Overview Report of Issues Relating to Ngati Kahungunu', a report commissioned by the Crown Forestry Rental Trust, 2003 (doc A122), pp 7–10

vened in the three-way contest between Rakuraku, Wi Pere, and Te Waru over the Tahora lands. Kereru Te Pukenui informed Porter that 'he had banned all surveying within his borders up to Maungapohatu'.[220] Porter reported this prohibition to the Native Department. In June 1882, Rakuraku said that he was still willing to have Te Wera surveyed, but that 'te urewera' were objecting so it could not be done.[221] Tama Nikora commented:

> Rakuraku appeared to pursue the survey of Te Wera because he feared that Wi Pere might seize control of the land if he did not. Nonetheless, the senior chiefs of Tuhoe such as Te Wakaunua and Kereru Te Pukenui still objected to surveying either Te Wera or Te Houpapa.[222]

In the evidence of Professor Binney, an impasse existed by June 1882. The Urewera leadership would not allow the surveying of Te Wera to be carried out by others, whether from Turanga or from Wairoa. At the same time, however, Tuhoe themselves did not want it surveyed from their own side, despite Rakuraku's initiative.[223] In these circumstances, Wi Pere later claimed that an agreement was negotiated between Te Urewera and Turanga leaders, not to let the survey happen until the Government had reformed the native land laws.[224] He told the Court in 1889: 'In 1882 it was arranged between us & Urewera if survey took place we should arrange particulars of survey. We came to an arrangement that until new laws passed it should remain unsurveyed.'[225]

Professor Binney was sceptical about the negotiation of such an agreement in 1882. She noted that it did not prevent a further Turanga application to survey Te Houpapa in 1883.[226] The new purchase agent at Gisborne, John Brooking, claimed that this application arose from a meeting of all parties interested in the block. Boston and Oliver doubt this assessment, and Ms Rose's evidence is that this new application was led by Te Whanau a Kai rangatira Pimia Aata and Peka Kerekere. Wi Pere does not seem to have been involved.[227] In any case, the new Te Houpapa request brought an immediate and strong protest from Ngati Kahungunu, and the Government decided not to try to proceed with a survey.[228]

From 1883 to 1888, neither the Government nor the tribal leaders took any further action over the many intersecting blocks that had been claimed in the Tahora lands, apart from a

220. Binney, 'Encircled Lands', vol 2 (doc A15), p 74
221. Binney, 'Encircled Lands', vol 2 (doc A15), p 74; Rakuraku to Te Kira (Gibbs), 19 June 1882; File note: Bush to Gill, 19 June 1882 (Brent Parker, comp, supporting papers to 'Tahora No 2', various dates (doc L7(a)), pp 86–87)
222. Nikora, 'Waikaremoana' (doc H25), p 52
223. Binney, 'Encircled Lands', vol 2 (doc A15), p 74
224. Binney, 'Encircled Lands', vol 2 (doc A15), pp 74–75; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 18
225. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 18
226. Binney, 'Encircled Lands', vol 2 (doc A15), p 75
227. Boston and Oliver, 'Tahora' (doc A22), p 22; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 6–7
228. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 7. This decision was also taken because there was no surveyor available, but the primary reason was the (by then) years' worth of opposition to surveying this land from all quarters.

brief flurry of activity in 1885. Whakatohea applied for a survey of Te Wera, Te Tahora, and Te Kaharoa in that year. The chiefs and a significant number of others signed the application, for hapu including Ngati Rua, Ngai Tama, Ngati Ira, Te Upokorehe, Ngati Patu, and Ngati Ngahere. In response, Tuhoe chiefs applied for a hearing of Te Kaharoa, which appears to have been described as land in the northern part of the Tahora block. This claim was registered but it could not be heard for lack of a survey.[229] The Tuhoe chiefs seem to have been satisfied, as they had placed their claim on record but did not want a survey or Court title.

The Government, on the other hand, took no action at all over the Tahora lands. According to Assistant Surveyor General Percy Smith, its long-term policy was to wait until the tribes had come to an agreement before trying to start a survey.[230] While the Government waited, its advances constituted – in the words of Professor Binney – a permanent 'lien' on the land.[231] Focusing on the period from 1879 to 1883, Rose and Binney agreed that the Crown had put pressure on Te Urewera and Turanga leaders to get these lands surveyed and into the Court.[232] Focusing on the longer period from 1879 to 1888, Parker concluded rather that the Crown was not pushing at all to take its advances and purchases forward. For him, the significance of these events was that all the various tribes had tried to take land in Tahora to the Native Land Court, long before Baker's survey.[233]

In the meantime, the survey of Waipaoa had taken place between 1883 and 1885. There had been some delays. The surveyor accused Ngati Kahungunu of obstruction. The chiefs responded that they had objected to his trying to survey the Crown's claim (the Matakuhia block) first, when its size could not possibly be known until the survey was completed (and its cost known).[234] After the completion of the survey in 1885, there was no pressure to bring this land before the Court. The Crown was not trying to buy it, and there was no private interest in it. While the Crown wanted to cut out its survey block (Matakuhia), it was content to wait while interest accumulated on the survey debt, increasing the amount of land that it could claim later. As will be recalled, Ngati Kahungunu leaders had applied for this survey in October 1882, in response to the Government's gazetting of its intention to purchase overlapping lands (and on the basis of court applications from other tribes). As Marr noted, the October initiative came from inland hapu, and it resulted in a rival Ngati Kahungunu application for hearing in November 1882. This second application was withdrawn in 1884 (for reasons unknown). This meant that there were no extant applications for hearing. The Waikaremoana/Waikareiti people had not put in a claim, the November 1882

229. Parker, 'Tahora No 2' (doc L7), pp 5–6
230. Binney, 'Encircled Lands', vol 2 (doc A15), p 79
231. Binney, 'Encircled Lands', vol 2 (doc A15), p 71
232. Binney, 'Encircled Lands', vol 2 (doc A15), pp 71–78; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 4–8
233. Parker, 'Tahora No 2' (doc L7), pp 6, 18
234. Stevens, 'Waipaoa' (doc A51), pp 10–15. As we shall see in section 10.8, the chiefs had signed a (later disputed) agreement that survey costs would be paid in land. The name attached to the forfeited land was Matakuhia.

claim had been withdrawn, and the original application had only been for a survey, not for a hearing. The leaders of all groups seem to have been content to leave matters in this state for the next few years, since the Crown made no move to advance its purchase of land in Te Papuni district. It was not until 1888 that fresh Court action over Tahora triggered new applications for Waipaoa.[235] We will return to this development below.

(b) ***The 'secret survey' of Tahora 2:*** In the mid to late 1880s, the Government was interested in pursuing its purchase of Te Wera and Te Houpapa, but could not see a way forward. In 1887, Charles Alma Baker began a secret survey of both of these purchase areas (and of the wider, 213,000-acre region eventually called Tahora 2). We need to consider the circumstances of this survey in some detail, as it was a matter of great grievance to the claimants in our inquiry, and the subject of many specific allegations of Treaty breach. Baker himself saw the survey as intimately connected with the Government's desire to carry its purchases forward and get the land into court. By 1887, he had already embroiled the Goverment in strife over the Oamaru block, which was on the eastern border of Tahora 2. Baker had received approval to survey 15,000 acres for a set fee in 1885. He had, however, in the course of the survey managed to expand it first to 75,000 acres, and then to 100,000 acres, at a vastly greater price. This was done in the face of significant Maori opposition. Was Baker punished for this? On the contrary, the Government decided to advance him half his costs in May 1887, and to have the land brought quickly into the Court so that the full cost of the survey could be recovered.[236] T W Lewis, the under-secretary of the Native Department, urged his Minister that this would be a 'good bargain for the Govt'.[237] These lessons from Oamaru were applied directly to Tahora 2.

Baker first tried to get Government approval for a survey of the Tahora lands in January 1887. He asked Percy Smith, the Assistant Surveyor General, whether:

> the adjoining block 'Te Wera' which is under negociation for purchase, can be done at the same time, it would of course be a saving of expense if both were done together. Te Wera is very uncertain as to area.[238]

Baker was influenced by the point that the Government had wanted to purchase this land but had been unable to get it surveyed.[239] He said so himself, but with the added gloss that the Native Land Purchase Department[240] had secretly given him the go ahead: 'He says he

235. Marr, 'Waikaremoana' (doc A52), pp 229–241
236. Binney, 'Encircled Lands', vol 2 (doc A15), pp 69–70, 77–78
237. Lewis to Native Minister, 27 May 1887, quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 78
238. Percy Smith to Surveyor General, 17 January 1887, quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 77
239. Binney, 'Encircled Lands', vol 2 (doc A15), p 70
240. In 1879, the land purchasing branch of the Native Department was made a separate department, called the Native Land Purchase Department. Its under-secretary was Richard Gill. The Native Department, however, remained the primary influence on Government policy, with TW Lewis as its under-secretary. In 1885, Native Minister Ballance brought the land purchasing operations back into the Native Department.

was lead [*sic*] to believe that Govt. would approve of the survey being completed, by one of the officers of the Land Purchase Dept. in Wellington, if it could be done without any Native difficulty, on account of the Govt advances on Te Wera.'[241] Percy Smith, however, was adamant that he had given a very different steer when Baker tried to get approval a second time in November 1887:

> [Baker] proposed to do the Tahora or Wera Block at the same time [as finishing Oamaru] in the interests of the Opotiki claimants. I told him he should not attempt this as there were difficulties . . . and that until he had the proper statutory authority, he could not obtain any security for his work. He went away to finish Oamaru, and the next thing I hear is that he has finished the Tahora survey as well . . .[242]

The key point is that Baker's experience with Oamaru had turned out well, because the Government – as he knew – wanted to get that land into Court. Ultimately, the same was to prove true for Tahora 2. All the same, counsel for Te Whanau a Kai agreed with the Crown's submission that it was not responsible for Baker having conducted a secret survey.[243]

The facts of the 'secret survey' can be recited briefly. Apart from Baker's own approaches to the Government in January and November 1887, there had been a telegram requesting it in April 1887 from Tauha Nikora. This young man had originally applied for the Oamaru survey as well. He was joined in this new application by his sister Maria, who was Baker's de facto wife. The third applicant was called Te Hautakuru, and these young people claimed on behalf of a Whakatohea hapu, Ngati Patu.[244] Professor Binney suggested that the request was clearly the work of Baker, with the young people his 'instruments in the whole affair'.[245] Be that as it may, the Government did not grant permission for the survey, although, as we have seen, Baker later claimed to have had a secret nod from land purchase officials. While supposedly completing the survey of Oamaru (which was part of the eastern boundary of Tahora 2), Baker proceeded to survey the western boundary line of Tahora. From the evidence of Brent Parker, all that is known about the survey is that ten observations and measurements were made, starting in December 1887 and finishing in March 1888. There is no definite evidence as to whether any lines were actually cut, although Baker himself said later that he had not completed the work.[246]

Even before Baker had started his secret survey, word had got out about his intentions, leading to protests from the east coast. The Minister of Lands assured James Carroll in December 1887 that a surveyor was 'in the locality', but it was to complete a survey of

241. Percy Smith to Surveyor General, 22 February 1888, quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 79
242. Percy Smith to Surveyor General, 22 February 1888, quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 79
243. Counsel for Te Whanau a Kai, submissions by way of reply, July 2005 (doc N27), p 9
244. Binney, 'Encircled Lands', vol 2 (doc A15), pp 77–78
245. Binney, 'Encircled Lands', vol 2 (doc A15), p 78
246. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 12; Parker, 'Tahora No 2' (doc L7), pp 9–10, 16, 18. Baker told Lewis in April 1888 that the survey was not finished, and that some lines still needed to be cut.

Oamaru.[247] In February 1888, while the survey was underway, Hetaraka Te Wakaunua and Numia Kereru wrote to the Native Minister:

> This is to inform you of a 'ruuri tahae' (secret survey) which has been made through our land at Maungapohatu. The person who is doing it is Baker. We object to it, stop it. Do you therefore let us know the person who applied for it, the persons or tribe.[248]

Although 'ruuri tahae' was translated as 'secret survey', we note that it literally means a 'thieving' or 'stealing' survey. As we shall see, this was a prophetic description of Baker's work. By the time the Native Minister replied to this letter, the survey was already a fait accompli. A plan existed, and Baker was in communication with both the Native Department and Percy Smith, trying to get it certified. In March, the Surveyor General, McKerrow, concerned that the Native Minister had misled Wi Pere and others in his belief that no survey was going on, decided that the whole matter had to be put in the hands of the Native Department:

> We cannot acknowledge Mr Alma Baker's survey until we have the authority of the Native Dept. His undertaking the survey, notwithstanding your [Smith's] warning to the contrary, seems a very irregular proceeding, and has led the Dept to put words in the Native Minister's mouth, which, to Wi Pere must appear false.[249]

From this point onwards, the key influence on policy was T W Lewis, under-secretary of the Native Department. On 7 April, he advised his minister that the 'only way I see out of the difficulty is for Mr Baker to apply "de novo" – go on the ground & repeat his survey'.[250] He had already told Baker to offer this solution to Percy Smith and, if Smith agreed, then Lewis thought that Baker's survey should ('in justice to the native claimants at Opotiki') be approved.[251] Mitchelson, however, rejected this advice at first. He minuted:

> Mr Baker had no right to undertake the survey without first obtaining permission to do so and as He was warned by the Survey Department. He did the work at his own risk and must now take the consequences.[252]

Nonetheless, the Minister agreed to Lewis' solution later in the month. When he did so, on 25 April 1888, Mitchelson added an extra proviso. Baker had first to obtain the consent of all interested Maori in writing, after which the survey could receive official authorisa-

247. Binney, 'Encircled Lands', vol 2 (doc A15), p 78
248. Hetaraka Te Wakaunua and Numia Kereru to Native Minister, 24 February 1888, quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 69
249. Surveyor General, 16 March 1888 (Binney, 'Encircled Lands', vol 2 (doc A15), p 80)
250. Lewis to Native Minister, 7 April 1888 (Binney, 'Encircled Lands', vol 2 (doc A15), p 79)
251. Parker, 'Tahora No 2' (doc L7), p 12
252. Mitchelson, minute, 7 April 1888 (Binney, 'Encircled Lands', vol 2 (doc A15), p 69)

tion 'upon the understanding that the lines are gone over again and the survey properly completed'.[253]

In June 1888, the *Kahiti* advertised a hearing of Tauha Nikora's claim for Tahora 2.[254] Also advertised for hearing was the old 1885 Tuhoe claim for Te Kaharoa, which was understood to be part of the same lands.[255] In response, James Carroll forwarded a Turanga protest to the Native Department. Then, at the August hearing of these two claims, Judge Wilson sent a telegram to the Native Department:

> The natives here say that under these names an immense country has been secretly surveyed by a Mr Baker at the instance of a young Opotiki native named Tauwha Nikora and I fear of his friends [ie Baker's friends] . . . this is Uriwera Country to a great extent & Uriwera natives here are excited at alleged interference with the lands they claim. At the urgent request of the Uriwera I have settled this matter so far as this session at Opotiki is concerned by dismissing these cases for want of a plan.[256]

It appeared that Baker had still not obtained the consent of anyone other than his original supporters. Even while the hearing was underway, however, a new application had been received from Tauha Nikora for approval to survey Tahora 2. Judge Wilson discovered this on 9 August. He sent a second telegram, noting the absurdity of applying for authorisation of a survey that had already been completed. In his view, Baker had broken the law and should receive a strong censure from the Government – perhaps the cancellation of his certification as a surveyor, a step which would have prevented Baker from resubmitting his Tahora survey at a later date.[257] Counsel for Te Aitanga a Mahaki pointed to the judge's view that this kind of punishment was the only possible deterrent (and therefore the only protection for Maori).[258] The judge stated in open Court:

> The punishment for the surveyor I cannot define, perhaps the cancellation of his license. This is the protection that the law gives to the natives. Surveys of this nature might be made in any part of New Zealand if permitted and spurious claims be set up thereas to the great anxiety and annoyance of the owners of the land. These transactions cannot be made undetected. Blocks belonging to important tribes may be interfered with in this manner by any younger man ~~like Tauha~~ & I will see that the surveyor's conduct does not pass unnoticed . . . This survey has been made and the consent applied for [afterwards]. An infraction of the law has been taken place. The land in question belongs to several tribes and no single man

253. Parker, 'Tahora No 2' (doc L7), pp 12–13
254. Binney, 'Encircled Lands', vol 2 (doc A15), pp 80–81
255. Parker, 'Tahora No 2' (doc L7), pp 18, 21
256. Wilson to Lewis, 8 August 1888 (Binney, 'Encircled Lands', vol 2 (doc A15), p 81)
257. Binney, 'Encircled Lands', vol 2 (doc A15), p 81; Parker, 'Tahora No 2' (doc L7), p 14; Opotiki Minute Book 3, 9 August 1888, fol 247
258. Counsel for Te Aitanga a Mahaki, submissions by way of reply, 8 July 2005 (doc N22), pp 7–8. See also Boston and Oliver, 'Tahora' (doc A22), pp 40–41

Sections 79 and 80 of The Native Land Court Act 1886

79. The Court shall not, except on application of the Governor as aforesaid, receive in evidence or use or accept any plan of land the subject of any proceeding or order, unless such plan shall be certified by the Surveyor-General, or some officer authorized by him for the purpose, to be 'approved'.

80. The Surveyor-General, or other such officer as aforesaid may refuse to certify a plan to be 'approved' if—

(a) Such plan, and any survey on which it is based, be not the work of a surveyor who holds a certificate of competency from the Surveyor-General;

(b) If such surveyor before entering upon such survey had not the authority of the Surveyor-General in writing for making such a survey.

~~could~~ ought to have made the application for the survey. Section 80 subsection B of the law has been disregarded. [Emendations in original.][259]

In the above quotation, certain words were crossed out in the Opotiki minute book. As we see it, the replacement of 'no single man could have made the application for the survey' with 'no single man ought to have made the application for the survey' is very telling about the state of the law.

Nikora's August application was the second step in the process by which the survey was approved. The first step had been back in April 1888 when, instead of leaving Baker to take the consequences as initially planned, the Minister had accepted Lewis' advice and instructed the surveyor to obtain consent and go over his lines again. Now, a fresh application for a survey had been filed in August. Again, Lewis' advice was crucial.

In response to the new application, the Assistant Surveyor General, Percy Smith, sent a memorandum to McKerrow. In it, he noted that there had been applications for hearing from Ngati Ira, Ngati Patu, and Te Upokorehe, and also 'a letter from the Whakatohea & Urewera saying they wish the map to be authorised'. A telegram to the opposite effect had come to him from Rakuraku and others, also purporting to be on behalf of 'the Whakatohea & Urewera'. His conclusion: 'there is a good deal of division amongst the people'. Smith then noted that the 'East Coast people' also had not (and would not have) supported the application. He told his superior: 'Perhaps the Native Department would advise, under these conflicting Circumstances.'[260]

259. Opotiki minute book 3, 9 August 1888, fol 247

260. Percy Smith to Surveyor General, [18] August 1888 (Parker, supporting papers (doc L7(a), p 233)

According to Crown counsel, based on Parker's analysis of this memorandum in particular, there was sufficient evidence of consent to justify authorising the survey. The Crown 'acknowledge[d] that the decision to authorise was made in the face of considerable opposition'.[261] But a 'balancing exercise' was carried out: 'What can be said is that the government balanced the level of consent against the level of dissent, concluding that there was sufficient consent to authorise the survey.'[262] Claimant counsel, on the other hand, submitted that evidence of opposition to the survey was 'universal', based in part on the many protests received before this application (and during the August hearing at the very time that it was received), and also long after the application was authorised.[263]

On Smith's advice, the matter was referred to the Native Department. In Professor Binney's evidence, what was uppermost in officials' minds was to get access to the land.[264] This is supported in the documents supplied by Mr Parker.[265] On 18 August, Lewis tackled the question of whether Baker should be punished. In doing so, he probably had in mind the Surveyor General's discretion to reject a plan if the surveyor was not certified. Lewis asked Mitchelson if he wanted to act on Judge Wilson's suggestion of punishing Baker (by revoking his certification). The under-secretary advised that Baker had already been 'called to account for his unauthorised survey & has offered an explanation – I do not think it necessary to proceed further in the direction of censure or punishment for his offence.'[266] Mitchelson minuted this as 'Seen'.

Then, on 20 August, Lewis wrote to the Native Minister:

> Mr Baker's unauthorised survey of Tahora has very much complicated matters. Had the work not been done I should have recommended that the Survey be authorised & the land brought before Court in the ordinary way. As it is I think it would be desirable to consult Mr Carroll with a view to the removal of the obstruction of the E C natives. *It would of course be very desirable to have the title to this large block determined.* [Emphasis added.][267]

Edwinson minuted 'Accordingly' on this memorandum. On 27 August, Lewis told the Chief Judge that the unauthorised survey was a 'difficulty . . . to get rid of'.[268] Four days later, on 31 August, he gave his most crucial piece of advice to the Minister: 'I think the best way of dealing with this matter is for Mr Smith to authorise the Survey'.[269] Mitchelson agreed, and the Surveyor General was notified. On 4 September, once 'clearance' had come

261. Crown counsel, closing submissions (doc N20), topics 8–12, p 49
262. Crown counsel, closing submissions (doc N20), topics 8–12, pp 58–59
263. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 15–17; counsel for Te Aitanga a Mahaki, submissions by way of reply (doc N22), pp 5–6; see also Binney, 'Encircled Lands', vol 2 (doc A15), p 88
264. Binney, 'Encircled Lands', vol 2 (doc A15), p 83
265. Brent Parker, comp, supporting papers to 'Tahora No 2', various dates (doc L7(a))
266. Lewis to Native Minister, 18 August 1888 (Parker, supporting papers (doc L7(a)), p 246)
267. Lewis to Native Minister, 20 August 1888 (Parker, supporting papers (doc L7(a)), p 234)
268. Binney, 'Encircled Lands', vol 2 (doc A15), p 83
269. Lewis to Native Minister, 31 August 1888 (Parker, supporting papers (doc L7(a)), p 229)

10.5.3

The Role of Native District Committees in Dealing with the Tahora 2 Survey Application

In 1883, the Government had surrendered to intense Maori pressure and created a system of district committees, designed in theory to provide for Maori input into Court decisions. (In reality, as the Native Land Laws Commission found in 1891, the committee system was a 'hollow shell' and a 'mockery'.[1]) During the hearing of Tahora survey costs in 1889, the Court's Assessor, Nikorima Poutotara, said that he had 'form[ed] an opinion that this Survey was undertaken without reference to Native committee. I also take into consideration that the Gov decided matters should be referred to the Native committee.' Baker replied that he was 'informed in Native Office that the surveys were referred to Native committees as merely a matter of form'.[2]

Tahora 2 was a large region in which tribal districts (and therefore district committees) intersected. As we discussed in chapter 8, Tuhoe were not properly represented on a district committee, and had tried to get the Government to recognise their own committee in 1888 without success. The evidence as to whether the August application was referred to any of the relevant committees is mixed. It appears from an 1889 petition, and from what was said in Court, that Baker may have tried (and failed) to get the Opotiki district committee to approve his application in August 1888.[3] The evidence is inconclusive. In any case, any decision from the committee was not binding on the Crown. This lack of true Maori power and representation in decision-making was a fatal weakness in the native land laws.

1. Waitangi Tribunal, *He Maunga Rongo*, p 340
2. Opotiki minute book 6, fols 10–11
3. Tiaki Paniwihi and others to Native Minister, 28 January 1889 (Parker, comp, supporting docs to 'Tahora No 2', (doc L7(a)), pp 213–214)

from the Native Department, the Surveyor General formally authorised Baker to survey Tahora 2.[270]

This was a crucial decision. We agree with the submission of counsel for Te Whanau a Kai that 'a number of highly-placed government officials colluded to pull off what might be called a "swifty" towards the end of 1888 in an effort to drape a cloak of legality over Baker's survey'.[271] The September authorisation of the survey was the first key step in draping this cloak of legality over it.

What needs to be noted, however, is that the Government knew the terms of its April instructions to Baker had not been fulfilled. In August 1888, the Minister requested that the survey be authorised, but that his original terms still be insisted upon. The full text of Lewis' advice, which the Minister minuted as 'approved', was: 'I think the best way of dealing with

270. Binney, 'Encircled Lands', vol 2 (doc A15), p 84
271. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 21

this matter will be for Mr Smith to authorise the Survey in terms of your memo of the 25th April last on SG 7189/370 & that Mr Carroll is informed so that he can notify the East Coast natives who are interested.'[272] The Minister's April 'memo', to which Lewis referred, had stated:

> Mr Baker to be informed that the authority can only be given upon his receiving from the natives their consent and forwarding the same to the Assistant Surveyor General and if such is in proper form, authority can be given upon the understanding that the lines are gone over again and the survey properly completed.[273]

As Mr Parker noted, the likeliest explanation of the three-month gap between the authorisation (4 September) and the certification of the already-existing plan (26 November) was that time was allowed for Baker to fulfil these conditions.[274]

Mitchelson appears to have stuck by his conditions. On 1 December, in response to the advertising of Tahora 2 for hearing, James Carroll sent an urgent telegram to Mitchelson: 'did you give authority to Baker's survey – you promised not until matters were cleared up'.[275] The Minister replied on 3 December:

> The authority for the Survey of Tahora No 2 was approved by me on condition that Mr Baker received from the Natives their consent and forwarded the same to Assistant Surveyor General. That Lines should be gone over again and Survey properly completed. This was communicated to you in Wellington.[276]

Eight days before the minister sent this response, however, the Surveyor General had certified Baker's plan for Tahora 2 on 26 November 1888. Under the Native Land Court Act 1886, this meant that the case could now proceed to court, and that the owners determined by the court would have to pay for the survey.

In Mr Parker's evidence, there is no way of knowing whether Baker met the second of the minister's stipulations – that the lines should be 'gone over again'.[277] Counsel for Te Whanau a Kai pointed out that Baker's official work book for Tahora ended in March 1888. It was unlikely, in counsel's view, that Baker would have done anything extra – or, indeed, could have done so without being driven off the land.[278] This point cannot be determined conclusively.

There is overwhelming evidence that Mitchelson's first requirement – that Maori should consent – had not been met. As well as protests before the scheduled hearing (which had

272. Lewis to Native Minister, 31 August 1888 (Parker, supporting papers (doc L7(a)), p 229)
273. Mitchelson, minute of 25 April 1888 on Baker to Smith, 18 April 1888 (Parker, 'Tahora No 2' (doc L7), pp 12–13)
274. Parker, 'Tahora No 2' (doc L7), pp 16–17
275. Carroll to Native Minister, 1 December 1888 (Parker, supporting papers (doc L7(a)), p 224)
276. Mitchelson to Carroll, 3 December 1888 (Parker, supporting papers (doc L7(a)), p 223)
277. Parker, 'Tahora No 2' (doc L7), pp 16–17
278. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 24

The Governor's Power to Stop the Court

Section 16 of the Native Land Court Act 1886 reads:

> It shall be lawful for the Governor before the commencement or at any stage of a proceeding under this Act, by notice in writing or by telegram to the Chief Judge or a presiding Judge, to declare that such proceeding shall not be proceeded with; and upon the receipt of such notice the jurisdiction of the Court in respect of such proceeding shall cease. Any such notice may be revoked by the Governor by writing, and thereon the jurisdiction of the Court shall revive.

No restrictions were placed on the Governor's exercise of this power.

been set down for December), the hearing itself was dominated by objections to the survey. On the opening day, 'speaker after speaker challenged the legitimacy of the survey'.[279] A petition objecting to it was read out, carrying 528 signatures on behalf of hapu from Te Urewera, Turanga, and Ngati Kahungunu. All the leading chiefs of the many different hapu whose land had been forced into court agreed that the survey should never have taken place and that the hearing should not proceed. The hearing was adjourned (to allow Turanga people the opportunity to attend), and the leaders of all the main tribal groups took advantage of this hiatus to send more petitions, objecting to the survey and the title investigation.[280]

Professor Binney commented: 'The evidence of universal opposition from senior tribal leaders to this hearing was overwhelming, if the minister chose to listen. But he did not.'[281] Under section 16 of the Native Land Court Act 1886, the Governor had the power to stop the Court at any stage of its process (on the advice of his ministers). The Native Minister could have intervened if he chose. We note that Mitchelson had failed to ensure that his own condition of Maori consent was met before the survey was certified, he had ignored the Court's strongly expressed view that Baker should be punished, and now he failed to intervene and prevent the hearing when statutory power existed to do so. It was a serious catalogue of failures.

When the hearing resumed in February 1889, Rakuraku said: 'We are at a loss to understand how in reference to application of two or three persons as against the voice of a large body of people, the Court can't take into consideration the application of the people.'[282]

279. Binney, 'Encircled Lands', vol 2 (doc A15), p 87
280. Binney, 'Encircled Lands', vol 2 (doc A15), pp 87–88
281. Binney, 'Encircled Lands', vol 2 (doc A15), pp 88–89
282. Opotiki Minute Book 4, 6 February 1889, quoted in Boston and Oliver, 'Tahora' (doc A22), p 47

Was the Survey Illegal? Did the Surveyor General Act Outside the Law?

Counsel for Te Whanau a Kai and counsel for the Crown agreed that Baker had not broken the law, and that the Surveyor General had the legal authority to certify the plan. The Native Land Court Act 1886 discouraged unauthorised surveys but it did not make them illegal. The Crown submitted that there had been protections to ensure bona fide surveys before 1886, but that these had been repealed. Under section 80 of the 1886 Act, the Surveyor General had the discretion to either certify or not certify the plan. He had two instances in which he could refuse his certification, but he was not required to withhold it in either instance. Crown counsel and counsel for Te Whanau a Kai agreed on these points.[1]

Nonetheless, counsel for Te Whanau a Kai considered that the Surveyor General (and the Native Minister and his officials) acted improperly. The September authorisation of the survey was 'essentially an attempt to circumvent the legislation by removing the grounds for exercise of the Surveyor-General's discretion'. It was not technically retrospective, because Baker had to go over the lines again – it was an authorisation to redo, not do, the survey – but this was a pretence: 'In exercising his discretion [in November] the Assistant Surveyor General was able to say, or pretend rather, that Baker had received permission to carry out his survey.' Everyone knew when Baker had really done the survey, and vociferous opposition to it was clear to the Government. To treat Baker's survey as an authorised one was 'a travesty of the law'. Although nothing illegal had been done, there was an 'improper exercise of a statutory discretion at the point of certification of the plan'.[2]

We accept claimant counsel's submissions on these points.

1. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 21–27; Crown counsel, closing submissions (doc N20), topics 8–12, pp 60–61
2. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 25–26

Rakuraku added: 'it is our fear in the event of our wishes not being complied with some disturbance of a serious nature might arise.'[283]

The Court had done its best and was now resigned:

> if a wrong has been done it has not been done by us, and they must seek their remedy elsewhere. We can confine ourselves to our own duties only. If a Surveyed plan is produced the law requires us to proceed with case and give decision. Outside that we should go outside our province to comment upon.[284]

283. Opotiki Minute Book 4, 6 February 1889, quoted in Boston and Oliver, 'Tahora' (doc A22), p 47
284. Opotiki minute book 6, fol 9 (quoted in Binney, 'Encircled Lands', vol 2 (doc A15), p 97)

10.5.3

As we see it, the Court would only have discretion not to proceed if the claimants withdrew their claim – something which Tauha Nikora and his co-applicants refused to do.[285] Thus, given the presence of a certified plan, the title investigation had to proceed. The key factors which forced the hearing upon all these unwilling tribes were the secret survey, the Government's conditional agreement to the survey in April 1888, the Surveyor General's authorisation of the survey in August 1888, his certification of the plan in November of that year, and the Minister's failure to ensure that his conditions were met or take appropriate action when they were not.

Could the Surveyor General have exercised his discretion not to certify the plan? Section 80 of the Native Land Court Act 1886 permitted the Surveyor General to reject plans in two circumstances: the surveyor did not have a certificate of competency; or the surveyor 'before entering upon such survey had not the authority of the Surveyor-General in writing for making such a survey'.[286] We agree with counsel for Te Whanau a Kai that the Surveyor General could have refused to certify the plan under section 80, but did not do so because the Government had a strong desire to see the land brought before the Court.[287] Further, because authorisation had been given retrospectively in September, on conditions that had still not been met by November, it is our view that there was a positive duty on the Surveyor General to have withheld his certification. We also agree with counsel for Te Aitanga a Mahaki that the Native Minister, having imposed conditions, ought to have inquired as to whether they had been met.[288] Indeed, no inquiry was necessary to demonstrate that consent had not been obtained. While the Crown submits that it was not necessary to get everyone's consent, this was not the condition laid down at the time, and it is difficult to see that anyone's agreement had been obtained, other than that of the individuals from Ngati Patu who had requested the survey in the first place. Underlying all its actions, the Government's ultimate goal was to see the hearing take place. As T W Lewis observed in August 1888, endorsed by the Native Minister: 'It would of course be very desirable to have the title to this large block determined.'[289] For this reason, the survey was approved against almost universal opposition.

(c) ***Tahora 2 and Waipaoa come before the court:*** In February 1889, the substantive hearing of claims to Tahora 2 took place in the Native Land Court. The claimants were Tauha Nikora, Te Hautakuru, and others claiming to speak for Ngati Patu, a hapu of Whakatohea. There were counter-claims from all the major tribal groups in the region. The claimants were found to have no interests in the block at all. The counter-claimants, having failed in their united attempt to prevent the land from being heard, had no choice but to accept the title

285. Parker, 'Tahora No 2' (doc I7), pp 25–26
286. Native Land Court Act 1886, s 80
287. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 24–26
288. Counsel for Te Aitanga a Mahaki, submissions by way of reply (doc N22), pp 6,12
289. Lewis to Native Minister, 20 August 1888 (Parker, supporting papers (doc I7(a)), p 234)

investigation and its creation of lists of owners with individual, transferable interests. Wi Pere told the Court that in 1882, the Tuhoe and Turanga chiefs 'came to an arrangement that until new laws passed it should remain unsurveyed. The result of this survey has been that those hopes have been entirely frustrated as to our being able to hold this land.'[290] Even so, as we shall see in the next section, the tribal leaders attempted to protect this large region by making it inalienable and putting it into a trust.

The Crown suggested that – given the number of times people had tried to bring this land into Court in the early 1880s – it was only a matter of time before it ended up there anyway.[291] We agree. The integration of the Crown's purchasing machine with the native land laws was designed to bring about just such a result. We do not, however, accept the Crown's submission that the competition over Tahora 2 demonstrated the need for the Native Land Court as a forum to sort it out.[292] The evidence before us is that the tribal leaders in this huge block negotiated an out-of-court arrangement of their respective interests in 1889. Knowing that the land had to be separated into discrete blocks, each with a list of owners, the chiefs did this work outside the Court. Professor Binney considered this an important achievement, given the immediate tensions over Te Kooti's abortive visit to Gisborne, and the longer-term rivalry over these lands.[293] In our view, this was one of many proofs that Maori did not in fact need the Court to settle these matters, yet they were trapped into accepting its individualised title.

One area did remain in dispute. Hetaraka Te Wakaunua challenged the Ngati Kahungunu claim to parts of Te Papuni (Tahora 2F). In doing so, there is evidence that he went against a collective decision by Tuhoe leaders to cooperate with Wi Pere.[294] This decision seems to have been brought about in part by Te Kooti, who told the Tuhoe chiefs: 'don't have anything to do with these things, let Wi Pere have the conduct of them.'[295] This was later resented by some Tuhoe leaders, who disputed the Court's award of all of Tahora 2F to Ngati Kahungunu. In any case, the Tuhoe involvement in the other aspects of the Tahora 2 hearing was led by Tamaikoha, who was not a follower of Te Kooti.

Thus, the 213,000-acre Tahora 2 block was dragged into Court in 1889, on the application of individuals who not only did not represent their own hapu, but who were found to have no interests in the land. But the effects of this event were not limited to Tahora. Cathy Marr suggested that the gazetting of Tahora for hearing in 1888 resulted in new applications to

290. Opotiki Minute Book 5, 12 April 1889, fol 342. See also Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 18

291. Crown counsel, closing submissions (doc N20), topics 8–12, p 59

292. Ibid, p 56

293. Binney, 'Encircled Lands', vol 2 (doc A15), pp 89–90

294. Binney, 'Encircled Lands', vol 2 (doc A15), pp 89–90

295. Tutakangahau's evidence to the Urewera Commission, 1901, quoted in Cecilia Edwards, 'The Urewera District Native Reserve Act 1896, Part 2: 'Title Determination Under the Act, 1896–1913', report commissioned for the Crown Law Office, November 2004 (doc D7), p 116

hear Waipaoa.[296] It will be recalled that the original 1882 applications for Waipaoa had been provoked by Crown purchase efforts and court applications affecting Ngati Kahungunu claims in Te Papuni. But by 1885, when the survey of Waipaoa was completed, both the purchases and the applications had stalled. Things had been quiet since 1883. In that circumstance, although they now had a survey plan, the Ngati Kahungunu leaders kept Waipaoa out of the Court.

This situation changed when Tahora 2 was advertised for hearing three years later. On 12 November 1888, Hapimana Tunupaura and Tamihana Huata objected to the hearing of lands claimed by them – Te Wera, Papuni, Waimaha, and Waipaoa – in this hearing.[297] Thus, thinking that Waipaoa was caught up in Nikora's claim, they filed an application for a hearing of Waipaoa in December 1888 (to be based on their own map). Two other applications for Waipaoa were filed in the same month. The first was from Wiremu Nuhaka, who had filed the Ngati Kahungunu counter-claim back in 1882, and there was a new claim by Meretene Te Rongo.[298] In January 1889, the Crown also applied to have its interests in Waipaoa (Matakuhia) awarded to it.[299]

Ngati Ruapani claimed in our inquiry that they were not a party to these applications, and that they were dragged unwillingly into court as a result of them.[300] Tuhoe claimed the same, and that they had had no notice of the hearing, so that only one of their representatives was actually present, resulting in the defeat of their case. It is clear that Tuhoe and Ngati Ruapani had no part in the 1882 application for survey, which led to the production of a plan by 1885. As we noted earlier, Huata recognised the existence of other interests when he told Preece that the Waikareiti lands might need to be divided from Waipaoa by the Court, although he still wanted it all surveyed under one (his) survey. In 1889, Tunupaura explained what had happened when the survey reached Waikaremoana. He said that Winitana, Hori Wharerangi, and Wi Hautaruke and other chiefs had not objected to the survey, nor did they obstruct it. Wi Hautaruke, in his evidence for Tuhoe, replied that both he and Hori Wharerangi had in fact objected to the survey. One Ngati Ruapani leader, Hapi Tukahura, had cooperated and conducted the survey of the western part of the block. According to Hautaruke, this was because he got paid to do so. Ms Marr notes that the survey was not physically obstructed by the Waikaremoana chiefs.[301] During this period, in part because of the Te Whitu Tekau policies, and in part because of the words of Te Kooti, neither Ruapani nor Tuhoe filed a claim for Waipaoa.

296. Marr, 'Waikaremoana' (doc A52), p 240
297. Binney, 'Encircled Lands', vol 2 (doc A15), p 86
298. Marr, 'Waikaremoana' (doc A52), p 240
299. Stevens, 'Waipaoa' (doc A51), pp 16, 21; Marr, 'Waikaremoana' (doc A52), pp 240–241
300. Counsel for Ngati Ruapani (Wai 945), closing submissions, 30 May 2005 (doc N13), pp 26–27; counsel for Ngati Ruapani (Wai 144), closing submissions, 3 June 2005 (doc N19), app A, paras 97–108
301. Marr, 'Waikaremoana' (doc A52), p 236

While the same was also true of Tahora, a delegation of Tuhoe (led by Tamaikoha) did turn up in Court to fight the Tahora case. Why did the same not happen in Waipaoa?

In part, the answer was that some Waikaremoana people had made a prior arrangement with Ngati Kahungunu. Robert Wiri drew our attention to a 1946 Appellate Court case, in which Ngati Ruapani described the 1889 ownership lists for Waipaoa as 'ex parte'; that is, done by one side in the absence of the other.[302] At some point between Hapi Tukahura's involvement in the survey and the Court's sitting, a key segment of Ngati Ruapani allied themselves with Ngati Kahungunu and trusted Huata and Tunupaura to include them in the ownership of Waipaoa. It was thus left to the 'loyalist' chiefs to conduct the case in Court.

Evidence about the out-of-court arrangements emerged during the hearings. As Tama Nikora and Cathy Marr explained, there had been a hui of Ngati Kahungunu on the block, where they decided which hapu names would be put into the title. Tunupaura told the Court:

> In connection with my putting the whole land through the Court we had a meeting at my place. We ascertained there were 8 hapus entitled to the land. They were N'Hinganga, N'Tewahanga, N'Tapuwae, N'Hinetu, N'Mihi, N'Poroara, N'Hika, N'Ruapani. We decided at our meeting that they were entitled to the land. There are many hapus interested in the land but we amalgamated them and gave them in under these names.[303]

This was an alliance of upper Wairoa and Waikaremoana hapu, which rejected the claims of other Kahungunu hapu (and any wider tribal claim).[304] Hapimana Tunupaura denied that one purpose of this alliance was 'ousting the Ureweras', but another Kahungunu witness said that the hui had decided, urged by Tunupaura, to ally with their Turanga relations to set up a combined case for Waipaoa, Te Wera, and Tahora, opposing the claims of 'the Uriwera, Ngaitai and Whakatohea to those blocks'.[305] Ngati Kahungunu's historians suggested that the actual alliance in Waipaoa was with Ngati Ruapani, 'apparently for the purpose of excluding Tuhoe'.[306] The evidence at the 1946 Appellate Court case confirmed that Ngati Ruapani had stayed away from the Court: 'We made our arrangements with Hapimana and we did not attend.'[307] One Ruapani leader, Hapi Tukuhaura, did attend. His evidence, in conjunc-

302. Robert Wiri, 'Te Wai-Kaukau o Nga Matua Tipuna: Myths, Realities, and the Determination of Mana in the Waikaremoana District', MA thesis, University of Auckland, 1994 (doc A35), pp 232, 236, 238
303. Chief Judge Native Land Court Minute Book, 14 February 1890, quoted in Grant Young and Michael Belgrave, 'The Urewera Inquiry District and Ngati Kahungunu: customary rights and the Waikaremoana lands', a report commissioned by the Crown Forestry Rental Trust, July 2003 (doc A129), pp 72–73
304. Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), p 74; Marr, 'Waikaremoana' (doc A52), pp 243–247
305. Marr, 'Waikaremoana' (doc A52), p 232
306. Young and Belgrave, 'Customary Rights and the Waikaremoana Lands' (doc A129), p 64
307. Tairawhiti Appellate Court Minute Book 27, fol 40; see also fols 24–25

tion with that of the Kahungunu witnesses, defeated the case of the sole Tuhoe witness, Wi Hautaruke. (Both sides claimed to speak for and represent the absent Ruapani people.[308])

Rangi Mataamua explained that Wi Hautaruke was a man of authority within the Waikaremoana community. He was considered to represent many Tuhoe hapu, to be an 'ambassador' for the tribe, and to have been its representative in the Court.[309] But Hautaruke was not the senior Waikaremoana chief; that was Te Makarini Tamarau. So why was Hautaruke the only Tuhoe leader present? According to Numia Kereru's evidence later in the Urewera Commission, Tuhoe were not present because they had not been notified of the hearing. They would not have attended in great numbers anyway, given Te Kooti's injunction against the Court.[310] But, as Tutakangahau pointed out, too much was at stake to stay away from the Court altogether.[311] Given the attendance of Tuhoe leaders in sufficient strength at Tahora 2 and the four southern block reserve hearings, we accept that this is the likeliest explanation for why they were (in contrast) absent from the Waipaoa hearing. This was not the first or the last failure of the notification procedures in our inquiry district. At the same time, we accept that Ngati Ruapani had not sought a survey or hearing of Waipaoa, and stayed away from the Court deliberately.[312] We note, however, that they had – at some point before the hearing – come to an arrangement with the Ngati Kahungunu chiefs to include them in the title for the western part of the block.

In sum, Ngati Kahungunu leaders, fearing for their interests in Waipaoa after the advertisement of Tahora 2, put in a fresh application for hearing at the end of 1888. This application was a representative one, filed on behalf of upper Wairoa and Waikaremoana groups. It forced everyone else into Court. Counter-claims from other Kahungunu groups were filed, but Ngati Ruapani and Tuhoe did not put in rival applications for Waipaoa. As a result of the Kahungunu application, these groups had no choice but to defend their interests in Court or lose them. At some point before the 1889 hearing, Tunupaura forged an alliance with some of the Ngati Ruapani of Waikaremoana, resulting in their staying away from Court and leaving matters to Tunupaura to arrange on their behalf. Other Ruapani and Tuhoe, who were not a party to this arrangement, failed to turn up to defend their rights – probably because they had not received notification of the hearing. As a result, those who were not a part of Tunupaura's arrangements were shut out of the title. In the evidence of the Ngati Kahungunu historians, this was a deliberate alliance to exclude Tuhoe. The Crown has conceded that unwilling groups were forced into Court, to avoid the risk of losing everything. Both Waipaoa and Tahora 2 are very clear examples of this system at work. Tuhoe (and Ngati Ruapani aligned with Tuhoe) did lose out in Waipaoa, because they were not present. What needs to be remembered, too, is that the Ngati Kahungunu leaders themselves were

308. Marr, 'Waikaremoana' (doc A52), pp 247–256
309. Rangi Mataamua, brief of evidence, 2004 (doc H21), pp 3–6
310. Marr, 'Waikaremoana' (doc A52), pp 241, 248
311. Edwards, 'The UDNRA, Part 2' (doc D7), pp 116–117
312. They, of course, had no need to know the time and place of hearing, since they did not plan to attend.

reluctant to put Waipaoa through the Court. Despite having had a survey plan since 1885, they did not file an application for hearing until they felt they had to in the face of rival claims in Tahora 2.

10.5.4 Treaty analysis and findings

In all cases in the Urewera rim blocks, title investigations were initiated by Maori.[313] According to claimant counsel, this did not represent freedom of choice. Rather, Maori were either pushed or pulled into making applications, often by factors beyond their control. This included the ability of unmandated individuals to make applications. There was also the need to get in first before neighbours (who would then control the survey), or before the Crown initiated a lease or purchase with other groups. Poverty, debt, and the need to start using the land in the colonial economy could also force it into Court, as in the case of Ngati Manawa. Unless settlers like Swindley were prepared to live with an informal lease, then there was no choice but to use the Court, and to accept its individualised titles. The only other choice was not to use the land. Such a choice was preferred by Tuhoe in many instances, but Crown dealings (especially leases) pulled land into Court in the border areas. This sometimes happened on the application (or with the agreement) of Tuhoe hapu, regardless of the collective policies of Te Whitu Tekau. The Crown accepted that unwilling groups were often forced into Court, but argued that title investigations were almost always initiated by representative leaders of hapu with valid claims. The Crown, we were told, had an obligation to free minorities from a collective veto, and to uphold the right of hapu to bring their lands into Court.

Only half of the land in the rim blocks was brought into Court by tribal leaders acting on behalf of at least one group with a valid claim. In the cases of Waimana and Tahora 2, land was brought into the Court process by individuals who probably did not represent their own hapu, and were found not to be owners in the land. This represented 41 percent of the land in the rim blocks. Also, Kuhawaea and Tuararangaia were brought into Court on the application of young chiefs who did not have the support of the groups on whose behalf they made their applications. (Counsel for Wai 36 Tuhoe suggested that the title investigation of Ruatoki was also an example, because it was initiated by Ngati Awa, who were found not to be owners.[314] We do not accept this submission. Applications from other tribes did influence the decision of some Tuhoe leaders to make their own application for Ruatoki, but we do not consider that they were the main factor in this decision.) Thus, the native land legislation allowed 254,806 acres to be brought before the Court on the basis of applications from young chiefly individuals who either had no valid claim to the land or did not repre-

313. Technically, the Crown had the power at times to initiate title investigation for blocks where it had acquired interests, but it did not use this power in Te Urewera.

314. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 12

sent an agreed position on the part of their tribal groups. This was almost half of the land in the rim blocks, and was therefore a very serious failing on the part of the Crown's native land laws.

Even where claims were filed by representative chiefs, this did not mean that the system was fair for other groups with rights in the land under claim. The rim blocks constituted border areas where customary rights overlapped. But the native land laws allowed a single hapu or group to file a claim. Unwilling groups were forced into Court to avoid losing their lands in Waimana, Kuhawaea, Heruiwi 4, Whirinaki, Tuararangaia, Ruatoki[315], Waipaoa, and Tahora 2 (some 422,058 acres or 78 per cent of the rim blocks). We accept, on the other hand, that there was an element of agreement among all parties in Heruiwi 1–3, Waiohau, and Matahina that these lands must come before the Court, once one party in those lands had initiated a survey.

In the case of Ngati Whare, their boycott of the Court resulted in their exclusion from all titles, apart from a few individuals who were put on the lists. This could not have happened if the native land laws had continued to provide for preliminary inquiries outside the Court, instead of limiting matters to the evidence (or voluntary agreements) in Court. Tuhoe, Ngati Haka Patuheuheu, and Ngati Rangitihi, despite their opposition to the Court on principle, did make claims or counter-claims and turned up to defend them when necessary. In our view, these tribes' rejection of the Court ought to have been honoured by the Crown, and an alternative process negotiated with them. They should not have been put in a position of having to accept the Court or lose their lands. Turning up, of course, did not guarantee appropriate recognition of customary rights in these fraught border lands. But Ngati Whare certainly paid a high price for their principles.

Crown leases – and refusal to pay rents until the land was brought into Court – were a factor in pulling Heruiwi 1–3 and Matahina into the Court. Other Crown pre-title dealings, including payment of advances, purchase negotiations, or proclamations that land was under negotiation, were also factors in Matahina, Kuhawaea, Tahora 2, and Waipaoa. As we see it, the Crown's pre-title dealings were the key factor in Heruiwi 1–3 and Matahina (19 per cent of the rim blocks), and also important in these other blocks (a total of 70 per cent of the area in the rim blocks). There was a noticeable slowing of Court activity in Te Urewera in the mid to late 1880s when the Government stopped its pre-title dealings. Private leases were important in bringing Kuhawaea and Waiohau before the Court, but otherwise were not a significant factor in this inquiry district.[316]

On top of the impact of this widespread Crown tactic, the impact of particular omissions on the part of the Crown had a dire effect on some groups. These included the failure of

315. Our inclusion of Ruatoki here refers not to the applications by other tribes, which did not bring about the hearing, but to the forced participation of Tuhoe hapu as a result of applications by other Tuhoe hapu.

316. We do not include Waimana here because Swindley's private lease had no role in drawing the land into Court.

notification procedures in Kuhawaea and Waipaoa, which resulted in Tuhoe missing out on attending those hearings (and losing customary lands in consequence). We shall see below (sec 10.6) whether the Crown's provision for rehearings was an adequate remedy in these cases.

We note also the particular circumstances in which Tahora 2 finally came before the Court. Despite the fact that the particulars of Baker's unauthorised survey became well known, despite the Land Court's censure of his proceedings, and despite the Minister's setting of conditions for the authorisation of the survey, which should have protected all claimant groups, ultimately they were not protected at all. The Minister failed to ensure his own conditions were met – and his own department succeeded in ensuring that the land went to the Court, as it had long sought. Although, as Crown counsel observed, this only affected one block and was not a systemic issue, we note that it affected nearly 40 percent of the land in the rim blocks, and was thus a very significant exception.

As we saw in section 10.2, the Crown imposed the Native Land Court on the peoples of Te Urewera without consulting them or obtaining their consent. Since Te Whitu Tekau had made its opposition to the Court clear, the Government was on notice that groups which claimed customary rights in all the rim blocks actively objected to the Court. Nonetheless, the Court was able to sit and decide titles to half a million acres of land, because the law either deprived Maori of choices or severely constrained them. This was inconsistent with the Treaty, which guaranteed the tino rangatiratanga of Maori communities over their land. Some were pulled into the Court: it was the only vehicle by which they could use their lands in the new economy, however much they might have objected to it in principle. Others were pushed: applications by non-mandated individuals, or by one group of rights-holders among many, forced unwilling tribes into the Court. The Crown's native land laws compelled these groups to participate. When they did not – or were absent for other reasons, such as a failure of notification – they lost their rights. Further, the Crown's system of pre-title dealings helped drag land into the Court, against the wishes of groups of customary owners. This was the case for some 70 percent of the land in the rim blocks. For Heruiwi 1–3 and Matahina, it was the primary factor.

The imposition and operation of a land title system with no choices – or no choice but one, rejected in principle but inescapable in practice – was in breach of the Treaty. We find the Crown in breach of the principles of active protection and autonomy, and of the plain meaning of article 2, for setting up a system that compelled Maori to participate against their wishes, and took their land from them if they did not. We reject utterly the Crown's argument that it had a duty to free individuals from the decisions of the collective. This kind of revolutionary change to customary ownership – which, after all, consisted of rights derived from Maori law and protected by the Treaty – was one that only Maori could make, through their own deliberations in their own institutions.

We also find the Crown in breach of its Treaty duty to act with scrupulous honesty and fairness, by manipulating its pre-title dealings to force land into the Court, again against the wishes of many of its owners.

Finally, it was the Crown's wish to see Tahora 2 processed through the Court that led to the Government's approval of the secret survey. The Native Minister refused to stop the Court in the face of universal Maori pleas before and at the 1889 hearings. The Minister's condition, that Maori agree to the survey before it could be confirmed, was dispensed with in order to get title decided and alienation underway. We find the Crown in breach of its Treaty duties actively to protect Maori interests, to recognise Maori authority over their lands, and to act with the utmost honesty and good faith, in its actions over the Tahora 2 survey and the resultant Court hearings.

The immediate prejudice was threefold:

- First, the very advantage touted by settler proponents of the Court was prejudicial: anyone who wanted to use their land in the economy, or who had to make a claim in Court to avoid losing their rights, ended up with a title consisting of a list of individual owners (see sec 10.2). As we shall see in the following sections, this form of title was crucial in facilitating the transfer of land from Maori to the Crown, against the wishes of tribal communities and their leaders.
- Secondly, those Maori who either took the risk of not appearing, or who failed to appear because they were not notified, lost any rights they had in the land under claim.
- Thirdly, decisions about customary entitlements were removed from community control; from the point of title investigation onwards, all future decisions (as to succession, the rights of those who had left the district, and other matters regarding the management of titles) would be made by the Court, not by the hapu. We will address these points further, and consider the longer-term prejudice, in section 10.10.

10.6 Was the Crown Made Aware of Court Decisions that Were Alleged to Have Resulted in Significant Injustice, and Did it Provide Appropriate Remedies?

Summary answer: *The Court investigated and awarded titles in Te Urewera rim blocks from 1878 to 1894. The Crown was made aware that all of these title decisions were alleged to have resulted in significant injustice. In all cases, there were either applications for rehearing or petitions to Parliament. There were also complaints made directly to ministers or officials. In our view, the volume of complaints is a symptom of the fact that the Native Land Court was the wrong body to decide titles in the rim blocks. Neither the Court nor its form of title was capable of dealing with the complex, overlapping customary rights in these contested border lands. The*

Crown maintained, however, that it provided an adequate remedy by investigating complaints and referring them to judicial bodies for resolution. The outcome was usually that Parliament or the Chief Judge either dismissed complaints or sent applicants back to the Native Land Court for rehearing. Sending aggrieved Maori back to the Court simply resulted in a rerun of the same defective process. Neither the Chief Judge nor the Court was adequately equipped to deal with these matters. The Crown ought to have empowered Maori to decide their own titles, as they requested. Nonetheless, having set up the Native Land Court, the Crown could have provided a better body to investigate and determine whether grievances about the Court's decisions were well-founded, such as the first Urewera commission.

The Crown's acts and omissions were in breach of Treaty principles. The claimants in our inquiry have been left with a lasting grievance, because, as they see it, the Native Land Court wrongly deprived them of ancestral lands. In reaching these findings, we do not offer a view on whether individual Court decisions fairly reflected customary rights.

10.6.1 Introduction

In the previous section, we discussed the manner in which the rim blocks came before the Court for title investigation in the nineteenth century. We turn now to consider grievances arising from the Court's awards at those hearings. Essentially, the claim is that the Native Land Court was the wrong body to decide customary entitlements, and the form of title that it could award was incapable of fairly reflecting customary arrangements. The result was that its decisions deprived people of their ancestral land. Many claimant witnesses complained of particular Court decisions, still viewed today with anger and distress.

These claims pose a dilemma for the Tribunal. Legal orthodoxy holds that the Native Land Court is not the Crown or an agent of the Crown, and its decisions are not the decisions of the Crown. At the beginning of this section, we set out the arguments about this issue, as well as the approach and findings of previous Tribunals. We then consider the remedies provided by the Crown in the nineteenth century, when faced with complaints about the decisions of the Court. These included the right to apply for a rehearing, the right to petition Parliament, and the actions taken in response to successful petitions. On this question, the Crown did not make any concessions. Its view was that it had done everything necessary and appropriate to correct injustices arising from Court decisions.

We begin our discussion with an outline of the essential differences between the Crown and claimants.

10.6.2 Essence of the difference between the parties

At a general level, the claimants argued that the Native Land Court was the wrong body to decide their customary entitlements, whether at initial title investigation or on appeal. Relying on the findings of the Tribunal in previous reports, they maintained that the Court was ill-equipped to decide complex questions of the customary law of another society. Titles needed to be determined within that society. In particular, the claimants (and also Ngati Awa) argued that the rim blocks in Te Urewera were border areas of such significant tribal overlap that all the worst features of the Court system were exacerbated. The Crown's remedies were of no real help: in most cases, applications for rehearing were declined, and the Court's decisions were barely altered if a rehearing (by the same Court) took place; and there were almost no concrete remedies as a result of petitions to Parliament. The Crown should have been aware – given so much dissatisfaction – that there was a systemic problem with the Court in Te Urewera.[317]

In response, the Crown argued that the Native Land Court was capable of giving effect to out-of-court arrangements, and fully competent to decide title in the rim blocks. It accepted that there was a high degree of overlap, and that this probably explained why almost all of the Court's decisions were appealed. Nonetheless, the Crown maintained that in providing judicial processes to deal with appeals or petitions – namely, a rehearing by the Native Land Court or a special commission of inquiry – it had done all that was required of it to provide a remedy for potential injustices arising from the Court's title investigations. Also, the Crown maintained that the form of title granted by the Court was necessary for participation in the colonial economy, and that the claimants agreed to sacrifice some of the complexity of their tenure when they decided to apply to the Court for a title usable in that economy.[318] (In this part of their submissions, Crown counsel took no account of their previous admission that unwilling groups were forced to participate in the court (see sec 10.5.2).)

In terms of particulars, the parties debated some issues which we have found it unnecessary to determine. Much of the difference between the Crown and claimants focused on the performance of individual judges (and whether they were biased), and the content of particular title decisions. We do not make findings on these matters. We set out our reasons for this in the next section (sec 10.6.3), and also the parties' arguments on the propriety of our re-examining the individual decisions of the court.

317. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 62, 68–72, 78–81, 88, 96–99 (these generic submissions were adopted by most claimants); counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 37–39; counsel for Ngati Awa, closing submissions, 3 June 2005 (doc N15) pp 9, 21; counsel for Ngati Hineuru, closing submissions (doc N18), pp 23–24

318. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 17–20, 37–39, 87–95

10.6.3 Tribunal analysis

(1) *The claims*

For some claimants in our inquiry, their most serious grievance about the Native Land Court system was its title decisions, which they believe awarded their ancestral land to others. This was a heartfelt grievance for many of the tangata whenua witnesses who appeared before us. Speaking of Matahina, for example, Alec Ranui of Ngati Haka Patuheuheu told us:

> Na te mea, ahakoa i tukuna he tono mai i a Patuheuheu Ngati Haka, i tautohetia a Matahina e o matau tipuna Mehaka Tokopounamu raua ko Wi Patene Tarahana, kare te kooti whenua i aro ake. Ka hoatu ka whakawhiwhia te nuinga o Matahina kia Ngati Awa ka toe mai ko nga maramara noaiho kia Patuheuheu Ngati Haka. Ka nui te takariri o matau tipuna ki te kooti whenua mo tenei tahae whenua na te mea ko matau te mana whenua te mana tangata i runga i a Matahina.
>
> Even though Patuheuheu Ngati Haka sent our claims, our ancestors Mehaka Tokopounamu and Wi Patene Tarahanga sent their claims for Matahina [to the Court], the Native Land Court did not take any notice. They gave instead, awarded the bulk of Matahina to Ngati Awa, – and the morsels were given to us, to Patuheuheu Ngati Haka. Our ancestors were clearly agitated with the Native Land Court for this theft of land because we asserted mana over Matahina.[319]

We heard similar evidence about Matahina and other blocks from many witnesses. We summarise the claims as follows:

- Ngai Tamaterangi claimed that their customary rights as a tribal entity were not recognised by the Native Land Court in the Waipaoa and Tahora 2 blocks, but that individuals whom they consider as members of their group were included in the titles.[320]
- Ngati Haka Patuheuheu argued that the Native Land Court system was incapable of doing justice to overlapping customary rights of different kinds and extent, and claimed in particular that Court decisions had been unjust to them in respect of Tuararangaia and Matahina. Ngati Haka Patuheuheu also claimed that individuals were wrongly left out of some of the title lists.[321]
- Wai 36 Tuhoe claimed that, due to failures of notification, judicial bias, or undue Crown influence on the proceedings, the Court failed to award them their fair and proper share of Waiohau, Matahina, Kuhawaea, Tahora 2F, and Waipaoa.[322]

319. Alec Mahanga Ranui, brief of evidence, 14 March 2004 (doc C14(a)), pp 6, 17
320. Counsel for Ngai Tamaterangi, closing submissions, 30 May 2005 (doc N2), pp 4, 53–57
321. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 62–72, 78–81, 88–104
322. Counsel for Wai 36 Tuhoe, closing submissions, pt C (doc N8(b)), pp 2–4

10.6.3

- Ngati Whare alleged that their interests were wrongly overlooked in Heruiwi 1–3, Kuhawaea, Whirinaki, and Heruiwi 4, because the Court was not required to follow a more inquisitorial process.[323]
- Ngati Ruapani argued that some of their number who lived at Waikaremoana were wrongly left out of the ownership list for Waipaoa.[324]
- Ngati Rangitihi claimed that they were were 'stripped of their traditional interest' in Matahina by the Court, and that the small piece of land awarded to them on rehearing was an inadequate recognition of their customary rights.[325]
- Ngati Hineuru argued that their share of Heruiwi 4(4A) did not recognise the full extent of their customary interests because the Court was the wrong institution to be deciding such matters, and that they should also have been awarded land in 4F.[326]

In closing their case, Ngati Rangitihi stated that for them, our inquiry was not just about the actions of the Crown, but was 'also about the recognition of the extent of their mana and the continuing defence of their traditional rohe'.[327] Ngati Awa kept a watching brief in our inquiry, making submissions in defence of Native Land Court awards of land to them in the nineteenth century. Ngati Manawa and Wai 621 Ngati Kahungunu also defended the decisions of the Court on their own terms. We need to consider, therefore, whether we have jurisdiction to consider the decisions of the Native Land Court at all, and whether we are being asked to act as a virtual court of appeal from its decisions, rather than to make findings as to whether or not the Crown has breached the Treaty.

(2) *Can the Waitangi Tribunal consider decisions of the Native Land Court?*

The question of whether the Tribunal can consider decisions of the Native Land Court has been settled decisively by the Rekohu Tribunal. In that inquiry, the Tribunal found that the Native Land Court was not 'the Crown', nor was it an agent of the Crown, within the meaning of the Treaty of Waitangi Act 1975.[328] We agree.

In determining whether the Tribunal could investigate the Court's decisions, however, the Rekohu Tribunal relied on the view of Justice Heron that it could not avoid looking at the results of the Court's actions in respect of Treaty grievances. Ultimately, the Tribunal found that the key point for its jurisdiction came after the Court's decision. If, in the Tribunal's view, the Court's decisions were unjust and inconsistent with Treaty principles, then it had to consider whether or not any omission of the Crown to intervene was in breach of the Treaty.[329] The Waitangi Tribunal 'may properly give consideration to whether the Native

323. Counsel for Ngati Whare, closing submissions (doc N16), pp 44–55
324. Counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, para 108
325. Counsel for Ngati Rangitihi, closing submissions (doc N17), pp 11–15
326. Counsel for Ngati Hineuru, closing submissions (doc N18), pp 22–24
327. Counsel for Ngati Rangitihi, closing submissions (doc N17), p 2
328. Memorandum of Tribunal, 5 October 1994 (Wai 64 ROI, paper 2.67), pp 11, 18–21
329. Ibid, pp 18–21

> *I want to know why only some descendents of Tamaterangi received shares in the Tahora and Waipaoa blocks.*
>
> Katarina Kawana, brief of evidence, 29 November 2004 (doc 129), para 34

Land Court has acted inconsistently with Treaty principles and, if it so finds, to determine whether the Crown omitted to take appropriate action to remedy the situation to the extent such action was practicable'.[330]

In agreeing with this finding, the Te Tau Ihu Tribunal noted:

> In doing so, we do not question or impugn the legality of the court's decisions. Those decisions stand unless altered by a duly empowered court or by legislative action. The Waitangi Tribunal is not an appellate court.[331]

The Te Tau Ihu Tribunal considered the appropriateness of Crown intervention in the decisions of a Court, in terms of legal and Treaty principles, and in terms of how Governments viewed it at the time. As that Tribunal noted, the fundamental principle at stake was that Maori should have been empowered to decide their own land titles.[332] As we discussed earlier in this chapter (sec 10.2), that was also the finding of the Tribunal in the *Rekohu Report*, *Turanga Tangata Turanga Whenua*, and *He Maunga Rongo: Report on Central North Island Claims*.

The Central North Island Tribunal and Te Tau Ihu Tribunal both quoted Native Minister Donald McLean in 1872:

> They [Maori] were themselves the best judges of questions of dispute existing among them. No English lawyer or Judge could so fully understand those questions as the Natives themselves, and they believed that they could arrive at an adjustment of the differences connected with the land in their own Council or Committee, very much better than it would be possible for Europeans to do. He [McLean] hoped honorable members would accord to the Native race this amount of local self-government which they desired. He believed it would result in much good, and whatever Government might be in existence would find that such Committees, with Presidents at their head, would be a very great assistance in maintaining the peace of the country.[333]

330. Memorandum of Tribunal, 5 October 1994 (Wai 64, paper 2.67), p 22
331. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 780
332. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 779
333. Donald McLean, 22 October 1872, NZPD, 1872, vol 13, p 895 (Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 190); see also Waitangi Tribunal, *Te Tau Ihu*, vol 2, pp 779–780

10.6.3

As the Te Tau Ihu Tribunal explained, it was thus conceived at the time that 'fairer, more just decisions could be arrived at by Maori bodies interpreting and applying their own customary law'.[334] The imposition of the Native Land Court to make these decisions instead was a fundamental breach of the Treaty. In the Tribunal's view, it inevitably resulted in 'court-created entitlements which distorted or mistook custom'.[335] The Turanga Tribunal agreed that, in some cases, the Tribunal ought to consider whether particular decisions were 'unsafe' in that respect, justifying a Crown intervention at the time.[336]

This basic problem with the Court posed a dilemma in terms of another fundamental principle, that the courts should be independent of the executive. Government action to change the findings of a Court is a serious matter, and is usually 'confined to changing legal principles rather than particular decisions'.[337] From time to time, however, the nineteenth-century Parliament passed legislation ordering that individual titles or whole classes of titles be put back to the Native Land Court for reinvestigation.[338] The Governments of the day received many petitions and protests about decisions of the Court. Rather than fixing the systemic problem, their response was to investigate the complaints in a parliamentary select committee and then refer individual cases back to the Court (or sometimes to a commission of inquiry). The Native Affairs Committee noted, in respect of a petition before it in 1887 to 1888:

> If the discontent of the Natives left out [of the title] is to be weighed (without a legal rehearing) there is no title in the country worth the paper it is written on. That there has been a great deal of injustice and miscarriage of justice with regard to Court titles seems to be beyond dispute but the evil would be multiplied many fold if the Government set itself to override the law and to indirectly or directly review titles.[339]

Thus, the Government's policy (and practice) was to send each individual case for reinvestigation, if persuaded that an injustice had occurred.[340] It is this policy that we, in turn, are required to examine against the principles of the Treaty in terms of how it operated in Te Urewera. The Rekohu and Te Tau Ihu Tribunals agreed that, although it did nothing to fix the underlying problem that affected all cases, it did give scope for particular injustices to be corrected.[341] One problem with the approach, as we shall see, is that it restricted the Crown's Treaty obligation of active protection to intervening in particular decisions

334. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 780
335. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 780
336. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 661–662
337. Waitangi Tribunal, *Rekohu*, p 147
338. Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 781
339. Native Affairs Committee of Parliament, undated minute (1887–1888), Le 1/1887/8 Archives NZ (Waitangi Tribunal, *Hauraki Report*, vol 2, pp 754–755)
340. Waitangi Tribunal, *Te Tau Ihu*, vol 2, pp 781–783
341. Waitangi Tribunal, *Rekohu*, p 147; Waitangi Tribunal, *Te Tau Ihu*, vol 2, p 781

which had come to its attention, whether directly by Maori complaint or indirectly from the reports of officials.[342]

(3) *Should this Tribunal consider Court decisions affecting claimants in our inquiry?*

If the Tribunal has jurisdiction to evaluate Court decisions and subsequent Crown actions, the question becomes: should we do so in the circumstances of our particular inquiry? Here, we note that practice has varied. The Rekohu Tribunal, the Turanga Tribunal, and the Te Tau Ihu Tribunal all accepted the necessity, in certain circumstances, of evaluating the Native Land Court's capacity to arrive at decisions on customary entitlements, some of its particular decisions, and then the subsequent protests and Crown actions about those decisions. The Hauraki Tribunal, on the other hand, preferred not to comment on the findings of the Court in particular cases.[343]

(a) *The parties' arguments:* In our inquiry, the Crown noted that all the cases in the rim blocks were contested and all decisions appealed. In counsel's view, this was unusual, reflecting the nature of these blocks as border districts. The Crown made no submission as to whether or not we should evaluate particular Court decisions – rather, it assumed that we would do so. Counsel submitted that the Court was an appropriate body to decide contested titles, and that there was a system in place to correct any 'irregularities' of process or substance in the Court's decisions. This system consisted of the ability to apply for a rehearing, the investigation as to whether a rehearing should be granted, and the rehearings themselves. The Crown noted that the great majority of applications for rehearing were turned down in Te Urewera. Counsel suggested that we must not take this as a pattern, but should investigate the decisions on a case by case basis. Also, the Crown argued that the claimants' right to petition Parliament provided a further check on unsafe Court decisions. For any grievances not brought to its attention, however, it could not be held responsible.[344]

The claimants argued that we should consider particular decisions as to whether an injustice had taken place, and then in terms of whether the Crown provided an appropriate remedy. Ngati Awa took the opposite position. We consider their submissions in some detail here, as they were closer to agreement than appeared at first sight.

We received submissions on the issue as a matter of principle from counsel for Wai 36 Tuhoe and from counsel for Ngati Haka Patuheuheu. Counsel for Wai 36 Tuhoe concentrated on the role of the Crown in particular Native Land Court decisions. He began by recommending the approach of the Turanga Tribunal:

342. Waitangi Tribunal, *Te Tau Ihu*, vol 2, pp 781–783
343. Waitangi Tribunal, *Hauraki*, vol 2, pp 781–782
344. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 17–20, 37–39, 87–95

10.6.3

The Tribunal has been cautious about reviewing the merits of the rulings of the Native Land Court in relation to interests as between Maori. However, in the *Turanga Report* the Tribunal did review the merits of the Court's rulings on the basis that '. . . in some instances the Tribunal can properly be called upon to consider whether the Crown responded appropriately to a decision of the Native Land Court, and to judge that response in terms of the principles of the Treaty of Waitangi. We accept also that the threshold to be met before intervention can be justified so long after the actual hearing should be a high one. A useful standard would be whether the decision of the Court when viewed against the evidence which was or should have been before it was so demonstrably unsafe (in meaning or right) as to have justified the intervention of the Crown at the time.'[345]

In addition, argued counsel, the Tribunal can properly review Court decisions where the Crown's actions directly or indirectly influenced the outcome. The Crown was obliged to intervene and correct faulty decisions that were arrived at by its own undue influence on the process.[346] It was not an 'impartial spectator of Court applications'.[347] In Tuhoe's view, the Waipaoa decision was unduly influenced by the prior history of the four southern blocks (see ch 7).[348] In the case of Matahina, there was an 'obviously close relationship between Rangitukehu [of Ngati Awa] and the Crown and its officers'.[349] The claimants suggested too that Judge Mair was biased because he had fought against Tuhoe. Most importantly, the pre-title leasing arrangements were leading towards sale (and a particular award of ownership).[350]

Counsel for Wai 36 Tuhoe suggested that there was a second instance in which the Crown should have intervened, regardless of how safe or unsafe any particular decisions might have seemed. This was the situation where the whole framework of decision-making was so obviously faulty that all decisions were (in some way or other) contrary to custom. The Crown should have intervened in that instance, regardless of whether or not specific complaints were made.[351] Tuhoe argued that the contested lands of the rim blocks, where so many tribal interests met and intersected, were an obvious example. If there had to be a Court at all, then the Court at least needed to be able to recognise and award a 'legal equivalent' to customary interests that differed from 'outright fee simple interests'.[352] The inability of the Court system to do this meant that its decisions were inevitably distorted. The Crown,

345. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 37. The quotation from *Turanga Tangata Turanga Whenua* is at pp 661–662 of that report.
346. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), pp 37–39
347. Ibid, p 38
348. Ibid
349. Ibid
350. Ibid, pp 38–39
351. Ibid, pp 37–39
352. Ibid, p 39

they argued, 'should have ensured that the Court system operated fairly to arrive at an outcome that reflected custom.'[353]

Counsel for Ngati Haka Patuheuheu provided generic submissions on behalf of all claimants. He too suggested that the kind of title that the Court could award was crucial to the problem. It 'crystallised many usufructory rights and/or overlapping interests in a single and absolute interest holder'.[354] These 'Crown-derived titles did not provide for the subtle and complex interests in land that existed under tikanga Maori'.[355] Customary owners were fixed in time by the memorial of ownership, rather than determined from time to time as in tikanga. Also, the frozen snapshot of individual interests often missed out individuals or whanau. This was alleged to have occurred, for example, in the titles for Tuararangaia, Waimana, Kuhawaea, Heruiwi 1–3, and Ruatoki. In particular, counsel pointed to the example of Tuararangaia 2, which, he argued, was awarded to Ngati Pukeko because they had a history of canoe-building from resources in the area. Under the Native Land Court system, a group that exercised some (relatively minor) rights to resources could either end up missing out altogether, or could end up with an absolute title to land.[356] The native land laws 'created "winners and losers" when the customary system provided for all'.[357]

The most disputed block in our inquiry was Matahina. In the submission of claimant counsel, it was 'a further example of how the range of overlapping or shared rights could not be recognised adequately by the Crown-derived titles'.[358] Judge Brookfield appears to have believed that the counter-claimants possessed some interests, but felt compelled to award the entire area to the group he considered to be dominant – Ngati Awa. But at rehearing the Court did recognise Ngati Haka Patuheuheu and Ngati Rangitihi as having had a customary claim based on occupation.[359] The decisions of 1881 and 1884 show 'that the Judges saw different grounds and custom for customary rights to land':

> It is submitted that in a block where there were numerous overlapping claimants and the lands were contested the Court did not have a mechanism, nor the type of title at its disposal to recognise such overlapping interests. It is submitted that the decisions in 1881 and 1884 reflect the inability of the Court to properly reflect the overlapping interests in Matahina.[360]

Ngati Awa's watching brief allowed them to put their point of view about any claim that they perceived as challenging their interests, their traditions, and the reputations of

353. Ibid, p 39
354. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 62
355. Ibid, p 68
356. Ibid, pp 69–70
357. Ibid, p 70
358. Ibid, p 71
359. Ibid
360. Ibid, pp 71–72

their rangatira.[361] Ngati Awa were also concerned about any claim that tried to 'redraw the boundaries set down by the Native Land Court and the awards made to Ngati Awa':

> It almost seemed as if a fresh hearing of the title investigations was sought by some claimants along with amended awards for the blocks.
>
> Counsel submits that this would not be an appropriate role for the Tribunal and there are substantial difficulties associated with such a role.[362]

Counsel for Ngati Awa observed that the Court heard these cases some 120 years ago. Information available today is less than (or different to) that available to the Native Land Court at the time.[363] He relied on the *Ngati Awa Settlement Cross-Claims Report*, which found:

> Irrespective of what further hearings there are of evidence relating to these lands, it is likely that it will always be very difficult, from the distance of approximately 120 years, to unravel what happened in the various Native Land Court hearings, and what (if any) different awards ought to have been made.[364]

Nonetheless, Ngati Awa agreed with some of the key points made by the claimants in our inquiry:

> That is not to say that the Native Land Court was an appropriate institution. Clearly, it was a flawed institution that wreaked havoc on the participants. Therefore, Counsel accepts that it is within the Tribunal's jurisdiction to make broad findings that the Crown failed to ensure that the Court adequately recognised the customary interests of claimant groups or enabled the Court to deal with overlapping interests. Counsel's main point is this level of inquiry does not require a complete and full examination of the Native Land Court cases or precise findings on boundaries and acreages.
>
> More importantly, it can be done without discrediting or challenging the claims of Ngati Awa either before the Native Land Court or the Waitangi Tribunal.
>
> If that submission was accepted then there would be little need for any detailed submissions on the particular cases before the Tribunal.[365]

In particular, Ngati Awa agreed with the main point put forward by counsel for Ngati Haka Patuheuheu about Matahina:

361. Counsel for Ngati Awa, closing submissions (doc N15), p 8
362. Ibid
363. Ibid
364. Waitangi Tribunal, *Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002), p 78 (counsel for Ngati Awa, closing submissions (doc N15), p 8)
365. Counsel for Ngati Awa, closing submissions (doc N15), p 9

> This Tribunal taking an objective view might find that all the iwi can claim some form of interest in Matahina and that the interests overlap. The Tribunal might also comment on the inability of the Native Land Court system to deal with shared or overlapping interests. Related to this might be a finding that because of that inflexibility, the customary interests in the block were not adequately recognised or provided for.[366]

We are encouraged by this point of broad agreement. Counsel for Ngati Awa disputed many of the specific criticisms made by claimant witnesses about the Matahina hearings and judgments.[367] But this concession, in our view, is very much to the point. It is in accord with the submissions of Tuhoe and others that the Court was incapable of making fair decisions in the particular circumstances of the Urewera rim blocks.

The Crown, however, did not agree with these submissions. It did accept that there was a significant degree of overlapping customary rights in the rim blocks. Counsel did not, however, accept that the kind of title awarded by the Court was inappropriate in that situation. The new titles were not supposed to replicate customary tenure, but to deal with new ownership and management issues in the post-1840 world.[368] They were intended to make 'fixed and certain that which was fluid multilayered and complex'.[369] Even so, the Crown argued that collective ownership was still provided, albeit without any form of collective control or management.[370] 'The Crown,' we were told, 'can be criticised for a failure over time to fully appreciate the significance of community and kinship to Maori society and how this is critically linked to land.'[371] But it was very difficult to create mechanisms to both reflect this and enable participation in the colonial economy:

> Although it may have been possible for the new forms of title to have made provision for an overlay of residual rights from the customary system, they would have impacted significantly on the ability to deal in those lands.[372]

Thus, the Crown denied that its form of title was inevitably going to cause problems in the circumstances of the rim blocks. Also, it denied any undue influence on Court decisions (as claimed by Tuhoe). Hearings took place in open court with direct examination of witnesses. Mechanisms to ensure safety in title determination included clear application processes, authorised surveys, notification procedures, preliminary inquiries, and competent judges and assessors. In particular, the Crown denied that there is any evidence of bias amongst the judges. Also, the facilitative approach of the Court (encouraging Maori to agree where possible, instead of imposing a decision) led to appropriate title judgements. If

366. Counsel for Ngati Awa, closing submissions (doc N15), p 21
367. Counsel for Ngati Awa, closing submissions (doc N15), pp 13–22
368. Crown counsel, closing submissions (doc N20), topics 8–12, pp 3–4, 10, 17–20
369. Crown counsel, closing submissions (doc N20), topics 8–12, p 18
370. Crown counsel, closing submissions (doc N20), topics 8–12, p 17
371. Crown counsel, closing submissions (doc N20), topics 8–12, p 19
372. Crown counsel, closing submissions (doc N20), topics 8–12, p 20

there were any mistakes, either in process or in the substance of decisions, the system provided a remedy in the form of rehearings and petitions to Parliament. In the Crown's view, these remedies worked well in Te Urewera.[373]

(b) ***This Tribunal's approach:*** The claimants argued that there were three interlocking factors to consider:

- the kind of title that the Court could award (which influenced the nature and content of its decisions);
- the question of whether the title adjudication system was so patently unsuited to the circumstances of the rim blocks that all the Court's decisions must have been flawed; and
- the particular influences on – and flaws in – each individual decision of the Court.

First, we consider the question of whether the new titles had to simplify customary ownership so that land could be leased, sold, or made security for loans. We accept that security of title was required for dealings in the new economy (see sec 10.2). Lessees, buyers, and lenders needed to know that they were acquiring a reliable title from the right people. The Crown argued that new forms of title could have made 'provision for an overlay of residual rights from the customary system', but that this 'would have impacted significantly on the ability to deal in those lands'.[374] It will become clear in the next section (sec 10.7) that the title actually created by the native land laws was vested in a list of individuals, and that settlers or the Crown had to deal with each one of them in seeking to acquire land. As we shall see in section 10.10, borrowing was virtually impossible on what became perceived as an unsafe 'multiple' title. The Turanga Tribunal found that these new titles did not facilitate Maori participation in the colonial economy in any meaningful way.[375] What was required – as the Crown has conceded – was some form of community title or corporate management mechanism, that would have provided security of dealing on the one hand, and genuine Maori decision-making and choices on the other.

Such a mechanism could have encompassed any number of overlapping or layered rights, according to the people's preferences. We accept that economic dealings required a regular and reliable interface between Maori and settlers. Tribal committees, representing groups with overlapping, layered rights, could have provided such an interface. Claimant counsel pointed out that corporate titles would have better mirrored customary rights while still enabling Maori and settlers to deal in the economy.[376] We agree. As we saw in chapter 9, with the Urewera District Native Reserve, and as we shall see in chapter 12, with the East Coast trusts, what was necessary was for the Crown to negotiate an appropriate form of collective

373. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 37–39, 87–95
374. Crown counsel, closing submissions (doc N20), topics 8–12, p 20
375. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 439–446, 527–537
376. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 8

title with tribes. It would be up to Maori to determine what kind of rights (and in what degree) would be recognised and represented in their decision-making bodies. This was what the Treaty guaranteed to them (see sec 10.2).

Secondly, we note a general agreement on the part of all parties that we should examine the remedies provided by the Crown in the event of a challenge to the Court's decisions. Not all of those contested decisions related to the Court's ability to decide customary title. Some applications for rehearing concerned failures of notification (Kuhawaea) or survey liens (Tahora 2 and Matahina D – see section 10.8). We further note the agreement between Ngati Awa and the claimants in our inquiry that the Court was particularly ill-equipped to reach appropriate decisions in border areas such as the rim blocks. Ngati Awa accepted that the Matahina decisions can be fairly criticised because 'customary interests in the block were not adequately recognised or provided for', as a result of the Court's inability to deal properly with shared or overlapping rights.[377] While the Crown does not accept this point, it argued that we should examine each block on a 'case by case basis' to determine whether the outcome of rehearings and petitions had been fair. Claimant counsel submitted that we should also consider the evidence for a systemic problem, and whether a systemic solution (rather than intervention in particular cases) was appropriate.

We do not see the necessity to examine the evidence before the Court in each case, nor to determine whether, in our view, an appropriate decision was reached for particular blocks. All of the Court's decisions were the subject of either rehearing applications or petitions to Parliament (sometimes both). In our view, the evidence is clear that the Native Land Court was not the appropriate body to investigate and decide customary title in these contested border lands. The Crown's fundamental point was that its remedy for potential injustices was to refer them to 'judicial bodies for resolution'.[378] In almost all cases, this judicial body was the Native Land Court. It follows that if the Native Land Court was the wrong body to make the initial decision, it was also the wrong body to correct injustices arising from those decisions. This includes both the Court's power to grant absolute and final titles on rehearing, and the Chief Judge's power to decide whether or not a rehearing was justified in the first place.

We turn next to consider in detail the remedies provided by the Crown, in the event of Maori dissatisfaction with the decisions of the Native Land Court.

(4) *The remedies provided by the Crown*

The Crown and claimant positions may be reduced to two fundamental points: the Crown argued that by referring complaints to judicial bodies, whether as ordinary rehearings or as a result of petitions, it took the appropriate action; and the claimants argued that this remedy fell woefully short of the Crown's Treaty obligations, because using the Native Land

377. Counsel for Ngati Awa, closing submissions (doc N15), p 21
378. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 95

Court simply perpetuated the flaws of earlier decisions, while other bodies provided no concrete remedies.

(a) ***Rehearings:*** As Crown counsel pointed out, aggrieved Maori had a right to apply for a rehearing.[379] For the blocks dealt with in 1878, the decision whether to grant a rehearing was made by the Governor in Council.[380] Tuhoe leaders (and the original Te Upokorehe applicants) sought a rehearing of Waimana, which was granted. The tribal award was not changed, but the list of owners was increased from 12 to 66, as arranged by Tamaikoha out of court.[381] Tuhoe do not quarrel with this decision. A rehearing was also sought for Waiohau 2 (which had been awarded to Ngati Pukeko). The Government refused Tuhoe's applications, on the advice of the judge who heard the case (Judge Halse) via the Chief Judge.[382]

From 1880, the Chief Judge made the decision as to whether a rehearing should be granted.[383] In 1882, he turned down Tuhoe's applications for a rehearing of Kuhawaea, on the advice of Judges Puckey and O'Brien, without hearing the applicants. This was later found to have been illegal.[384] In the same year, the Chief Judge rejected applications for a rehearing of Matahina, but one was granted later by special legislation (see below).[385] In 1885, Chief Judge Macdonald also turned down Ngati Haka Patuheuheu's application for a rehearing of the partition of Waiohau 1 (see ch 11). This, too, was done without hearing the applicants, and was later found to have been unlawful.[386]

From 1888, the Chief Judge was required to decide rehearing applications in open court, with the concurrence of an assessor.[387] Under this revised system, applications were heard for the rehearing of Tahora 2, Waipaoa, Heruiwi 4, Whirinaki, and Tuararangaia. Most of these applications were dismissed. Rehearings were granted for Whirinaki (which ended with virtually the same result as the original hearing), and for some of the applicants in Tahora 2, and for one applicant in Waipaoa. In the course of this process, ownership lists were adjusted to include additional individuals. The tribal claims for rehearing were either rejected by the Chief Judge or, as in the case of Ngai Tamaterangi's claim for inclusion in Tahora 2, failed at the rehearing. No rehearings were granted for Heruiwi 4

379. Crown counsel, closing submissions (doc N20), topics 8–12, pp 88, 92–95
380. Native Land Act 1873, s 58
381. Sissons, 'Waimana' (doc A24), pp 40–51
382. Arapere, 'Waiohau' (doc A26), pp 34–37; Gwenda Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46, doc H4(f)), pp 22–46
383. Native Land Court Act 1880, s 47
384. Bright, 'The Alienation of Kuhawaea' (doc A62), pp 51–52, 59; Judge Puckey, 25 November 1882 (Bright, comp, supporting documents to 'The Alienation of Kuhawaea' (doc A62(a)), p C13)
385. Cleaver, 'Matahina' (doc A63), pp 47, 50
386. Robert Hayes, 'A report on certain aspects of the history of the Waiohau block', report commissioned by the Crown Law Office, February 2005 (doc L15), pp 13–14
387. Native Land Court Act 1886 Amendment Act 1888, s 24

Te Upokorehe

Our people spent some time on the Waimana lands. I believe we were awarded some interests through the Native Land Court. As I said before we consider we have interests there through Ngati Raumoa, but would never say we could tell Tuhoe what to do there. We just support our Tuhoe whanaunga at Waimana.

Hohepa Kereopa told me that the word Waimanakaaku was started when Ngati Raumoa moved. They kept moving their kai and things in their pits so they built the shed over a pit and buried it over a pit hence they called that the kaaku. Koina nga korero, nga Hohepa enei korero.

When I think of Upokorehe living in Waimana I think it was out of whanaungatanga. We relate through all those peoples, Te Whakatane and through to Tamakaimoana. These days, I'm satisfied if Upokorehe, keep their affairs regarding Te Moana o Tairongo to the Ohiwa side of the confiscation line, that way we're not treading on one another's toes . . .

Anyway I only want the Tribunal to be aware that we have claims. I know this Urewera Tribunal is not going to look into them. We just want the Tribunal to be aware of Upokorehe when it looks at Te Moana-a-Tairongo and the Ohiwa region including the Waimana and Tahora block lands. We are cautious that the Tribunal should not overlook us when it does this work for the Urewera Inquiry as we are tangata whenua in Ohiwa and we have customary interests in the region.

Charles Aramoana, brief of evidence, 14 January 2005 (doc J46), pp 11, 13

and Tuararangaia.[388] (Ngati Manawa do not quarrel with the outcome of the Whirinaki rehearing.[389])

In 1894, the Liberal Government created a Native Appellate Court, with a guaranteed right of appeal from the Native Land Court. The new Court consisted of the Chief Judge, who would appoint two judges to hear appeals, drawn from a pool of Native Land Court judges also appointed to the Appellate Court. The new Court could sit with an assessor, but the assessor's concurrence was not required in its decisions.[390] Ruatoki appeals were heard by this new Appellate Court but, as we shall see in chapter 13, Ruatoki titles were cancelled in 1900 and reinvestigated by the Urewera Commission.

388. Boston and Oliver, 'Tahora' (doc A22), pp 88–121; Belgrave and Young, 'Customary Rights and the Waikaremoana Lands' (doc A129), pp 60–64, 72–75; Tulloch, 'Heruiwi 1–4' (doc A1), pp 63–66; Fraser, 'Tuhoe and the Native Land Court' (doc A103), pp 123–124; Tulloch, 'Whirinaki' (doc A9), pp 30–32

389. Counsel for Ngati Manawa, closing submissions (doc N12)

390. Native Land Court Act 1894, ss 79–95. We note too that the assessor's concurrence was no longer required in the Native Land Court.

10.6.3

According to Crown counsel, all applications were decided appropriately on their merits, with the exception of those dismissed illegally by the Chief Judge in the 1880s.[391] As will be evident from the preceding account, there was much dissatisfaction with the Court's decisions, some of it resulting in applications for rehearing. The majority of applications for rehearing were dismissed, either by the Chief Judge (from 1880 onwards) or on his advice (in the case of Waiohau in 1878). While ownership lists were revised for Waimana, Tahora 2, and Waipaoa, no tribal awards were changed as a result of rehearings.

(b) ***Petitions:*** As the Crown noted, petitions were investigated by the Native Affairs Committee. Successful petitions were usually investigated further by the Government, and then referred to a judicial body 'for resolution'.[392] Apart from the fraudulent partition of Waiohau 1 (see ch 11), Urewera petitions about the decisions of the Court were concentrated in the 1890s.

(i) *Heruiwi 1–3*

Some Ngati Manawa owners of Heruiwi 1–3 petitioned that they had been wrongly left off the ownership list. Gilbert Mair had pencilled them in after the hearing, but this had had no legal effect. Ultimately, the Government decided that a mistake had been made, but that there was no remedy because the land had been sold (to it).[393] In our view, the Crown – having just purchased Heruiwi 2–3 – had land available for a remedy.

(ii) *Kuhawaea*

Ngati Haka Patuheuheu petitioned about Kuhawaea, and their claim to have missed out because they were not notified of the hearing. Chief Judge Davy advised the Native Affairs Committee that his predecessor had dismissed their rehearing applications illegally, and the matter was referred to the Urewera Commission for inquiry.[394] In the Crown's submission, this was in itself an adequate remedy, and all that was required of it in the circumstances.[395] The commission heard the petition in 1899, considering both the Court minutes from the original hearing, and fresh evidence from Ngati Manawa, Ngati Haka Patuheuheu, Ngati Hape, and Tuhoe. Unfortunately, the historians in our inquiry were not able to locate the commission's report.[396] The Crown argued that there was no evidence as to whether any

391. Crown counsel, closing submissions (doc N20), topics 8–12, p 95
392. Crown counsel, closing submissions (doc N20), topics 8–12, pp 94–95
393. Counsel for Ngati Manawa, closing submissions (doc N12), p 54; Tulloch, Heruiwi 1–4 (doc A1), pp 37–39
394. Bright, 'Kuhawaea' (doc A62), pp 59–60
395. Crown counsel, closing submissions (doc N20), topics 8–12, p 95
396. Bright, 'The Alienation of Kuhawaea' (doc A62), p 60; Edwards, 'The UDNRA, Part 2' (doc D7), p 73. Edwards suggested that the commission might not have written an actual report, but rather arranged for Ngati Haka Patuheuheu to have a greater share of UDNR land than they were customarily entitled to.

> *Let us talk about Kuhawaea. Under pressure from the Crown, Ngati Manawa and Patuheuheu Ngati Haka came to some agreements – that we would not cross claim on Kuhawaea. And that Ngati Manawa would include Patuheuheu Ngati Haka into Kuhawaea. In the end only two members of Patuheuheu Ngati Haka were registered on the list of land owners. This was one aspect of the Native Land Court and its divide and rule tactic which irked us. The majority of Patuheuheu Ngati Haka were excluded from the lands of Kuhawaea.*
>
> *That's one big issue – if you didn't go to Court you lost your lands.*
>
> *Secondly, even if only a few people turned up at Court – the Court awarded the land to a handful of people. This is shocking!*
>
> Alec Ranui, brief of evidence, 14 March 2004 (doc C14(a)), p 18

compensation ever resulted, but this was contradicted by its own witness, Cecilia Edwards, who confirmed that no compensation was ever paid to the claimants.[397]

In the submission of Wai 36 Tuhoe, the only remedy that the Urewera Commission could have made of its own accord was to have compensated Ngati Haka Patuheuheu with an increased share of land in the Urewera District Native Reserve, but that would have been 'robbing from "Pita" to pay "Paora"'.[398] According to Cecilia Edwards, this may well have been the reason for giving Ngati Haka Patuheuheu a bigger share than they might otherwise have got in the Hikurangi-Horomanga block.[399] The tribe raised Kuhawaea with the Government again in 1908. Carroll seems to have forgotten the 1898 decision to put this grievance before the commission. He responded that the matter should 'stand over', unless or until steps were taken to 'rectify errors in respect of Urewera lands', in which case the Kuhawaea claim could be made the subject of inquiry. According to Edwards, no further action was ever taken.[400]

(iii) *Tahora 2*

After the failure of their claim at the rehearing, Ngai Tamaterangi sent a petition to Parliament in 1890. Rewai Rangimataeo headed the petition, supported by 165 others. The successful Ngati Kahungunu claimants, headed by Tamihana Huata (with 203 others), sent a counter-petition denying that there was any need to reopen the Tahora 2 title, which had

397. Crown counsel, closing submissions (doc N20), topics 8–12, p 95; counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 33

398. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 17

399. Edwards, 'The UDNRA, Part 2' (doc D7), pp 69, 72–73

400. Edwards, 'The UDNRA, Part 2' (doc D7), p 72; Edwards, cross-examination by counsel for Ngati Haka Patuheuheu, 13 April 2005 (transcript 4.14, pp 210–211)

Counsel for Ngati Haka Patuheuheu Cross-examines Cecilia Edwards about the Crown's Remedy for Kuhawaea

Williams: I suppose the issue for me, though, is that the Crown still didn't provide any remedy to this issue.

Edwards: That's right. That's right.

Williams: Despite knowing that it was a matter that had, well, the application had been illegally dismissed.

Edwards: That's right. The remedy, if you like, was a soft remedy which was to provide for a process of somebody to look into the matter and there was no hard result.[1]

1. Cecilia Edwards, cross-examined by counsel for Ngati Haka Patuheuheu, 3 March 2005 (transcript 4.14, p 210)

already been heard twice. The Native Affairs Committee made no recommendation on either petition.[401] As far as we know, that was the end of official protest about the titles to Tahora 2, although complaints were made to the Urewera Commission later in the 1890s.

In addition to these petitions, the Tuhoe leader Tamaikoha sent one in 1903, complaining about the partition of Tahora 2A. Tuhoe and Te Upokorehe had sent a representative (John Balneavis) to the Validation Court in 1896 to look after their interests. According to Tamaikoha's petition, Balneavis had partitioned Tahora 2A so as to obtain all the best land for a small minority of the owners. On the advice of the Chief Judge, Parliament cancelled the partition in 1906, ordering a rehearing by the Native Land Court. As a result of this hearing in 1907, the objectionable partition was not renewed and the whole of 2A3 was vested in the 1896 non-sellers.[402] This remedy satisfied the owners, except that on survey the block was found to be a lot smaller than it was supposed to have been. The Crown's awards (2A1 and 2A2) were not adjusted downwards to compensate.[403]

(iv) *Waipaoa*

In 1894, Hapimana Tunupaura (and 52 supporters) petitioned Parliament, asking for the return of land in Waipaoa. This was presumably the 100 acres awarded to the Crown in Waipaoa 1, on which Ngati Kahungunu claimed to have homes and an urupa. The Chief Judge had dismissed their application for a rehearing of this claim. The Native Affairs

401. 'No 264, 1890 – Rewai Rangimataeo and 165 others', AJHR, 1891, I-3, p 10; 'No 300, 1890 – Petition of Tamihana Huata and 203 Others', AJHR, 1891, I-3, p 14

402. Boston and Oliver, 'Tahora' (doc A22), pp 166–167

403. Boston and Oliver, 'Tahora' (doc A22), pp 164, 169–171

Committee recommended this petition for favourable consideration by the Government, but – from the evidence available to us – no action was taken at the time.[404]

(v) *Ruatoki*

In 1898, there were three petitions to Parliament about Ruatoki. Mehaka Tokopounamu and Numia Kereru sent petitions seeking to revisit the title and ownership lists, while Te Mahurehure hapu wanted the partitions cancelled. These petitions (and the whole question of the Ruatoki title) were referred by Parliament to the Urewera Commission.[405] We will consider substantive questions relating to Ruatoki in chapter 13, where we address the Urewera Commissions and their outcomes. Here, we note the different treatment of Ruatoki in the 1890s: the automatic hearing of all appeals, and the reference of subsequent complaints to a body of tribal and Government commissioners for further inquiry and settlement. This was very different from the treatment of the other rim blocks, as we have seen. In our view, this was the least that could have been accorded all complaints about the title decisions of the Native Land Court in Te Urewera.

(c) ***The special case of Matahina:*** In 1883, special legislation was passed to order a rehearing of the title to Matahina. In 1881, the Native Land Court dismissed the claims of Ngati Haka Patuheuheu, Ngati Hamua, Ngati Rangitihi, and Ngati Hinewai (a hapu of Rangitihi), and awarded sole title to Ngati Awa. Tuhoe and Ngati Manawa had withdrawn their claims early in the proceedings, after checking the boundaries of the block. Ngati Haka Patuheuheu applied for a rehearing but their application was dismissed by the Chief Judge in 1882.[406] Ngati Rangitihi sent a petition to the Native Minister two weeks after the initial hearing, but this was not treated as an application for rehearing.[407]

After their rebuff by the Chief Judge, Ngati Haka Patuheuheu negotiated an agreement with Ngati Awa with regard to the contested part of the block south of the Waikowhewhe Stream. In the meantime, the assessor had informed the Chief Judge that he had made a mistake when inspecting the land, having inspected land at Pokohu but not Matahina.[408] This is an example of a rehearing brought about not by an application or a petition but on the advice of officials that the Government should intervene. While rare, it did happen. The Native Department reached the view that 'injustice has been done to some natives shut out of the block'.[409] The Premier decided that the Government could not finalise its purchase negotiations with Ngati Awa until this matter was rectified. When Ngati Haka Patuheuheu wrote to the Government, advising that they had sorted out their claim to land south of

404. 'Petition of Hapimana Tunupaura and 52 others' AJHR, 1894, I-3, p 4
405. Oliver, 'Ruatoki' (doc A6), p 83
406. Cleaver, 'Matahina' (doc A63), p 47
407. Potter, brief of evidence (doc C41), pp 39–40, 53
408. Cleaver, 'Matahina' (doc A63), pp 49–50
409. Lewis to Gill, 20 September 1882 (Cleaver, 'Matahina' (doc A63), p 49)

Waikowhewhe with Ngati Awa, and no longer wanted a rehearing, the Government decided to proceed anyway. As a result, the Special Powers and Contracts Act of 1883 authorised the Native Land Court to rehear Matahina.[410] Despite the Government's view that injustice had been done, the legislation specified that rehearings were necessary because of procedural flaws, 'having no relation to the several titles on the merits'.[411]

We have no detailed evidence on the 1882 agreement between Ngati Awa and Ngati Haka Patuheuheu, other than the latter's view at the time (expressed to the Government) that it had satisfied their claim.[412] Professor Mead did not refer to it in his evidence for Ngati Awa.[413] Nonetheless, the rehearing permitted the Ngati Rangitihi claim to also be reconsidered, which otherwise would have remained unheard.

At the rehearing, the Court, composed of two judges, reached a different conclusion and granted 2000 acres to Ngati Haka Patuheuheu, 1500 acres to Ngati Hamua, and 1000 acres to Ngati Rangitihi. The claimants endorsed the view of Philip Cleaver, which was that these awards were so small as to actually constitute a decision against them, despite the change of the Court's award in principle.[414] Nonetheless, this is the only example from Te Urewera in which a rehearing changed tribal awards in any significant degree. The law did not provide for any appeal from this rehearing decision. As far as we are aware, the claimants did not try to petition Parliament about the outcome. It has, as witnesses from Ngati Rangitihi and Ngati Haka Patuheuheu told us, remained a serious grievance for them, passed down from generation to generation.[415]

(5) *The Urewera commission: an alternative model for investigation and remedy?*

As we saw in chapter 9, the Liberal Government agreed to an alternative to the Native Land Court process for the Urewera heartland, which was set aside as the Urewera District Native Reserve in 1896. Instead of using the Court, title to land in the reserve would be determined by a commission. The majority of commissioners (five) would be Tuhoe chiefs, assisted by two senior Government officials. As we will discover in chapter 13, this commission was close to the people, it sat on their own lands, and it was extremely well attended. As a result, claims were debated and contested vigorously, with a wealth of evidence uncovered and recorded. Two of the rim blocks, Kuhawaea and Ruatoki, were referred to the commission for it to inquire into petitions and grievances, and – in the case of Ruatoki – to reinvestigate and settle the titles. As part of its deliberations, the commission discovered many grievances and issues about the titles of the other rim blocks. Ngati Whare, for example, raised

410. Cleaver, 'Matahina' (doc A63), pp 49–51
411. Special Powers and Contracts Act 1883, s 4 (Cleaver, 'Matahina' (doc A63), p 50)
412. Cleaver, 'Matahina' (doc A63), p 50; Robert Pouwhare, brief of evidence (doc C15(a)), pp 35–36
413. Hirini Moko Mead, brief of evidence, undated (doc L23)
414. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 71–72
415. See, for example, Pouwhare, brief of evidence (doc C15(a)), pp 35–37; Potter, brief of evidence (doc C41), pp 40–44; Nikora, brief of evidence for third hearing (doc C31), pp 8–11

the claims to non-UDNR lands that they had not presented to the Native Land Court.[416] It seems to us that the Urewera Commission was a unique opportunity for the Crown to have provided a regional investigation of Maori dissatisfaction with the decisions of the Native Land Court in the rim blocks, with a view to remedying any injustices that had occurred.

Was the Crown aware of such dissatisfaction? The answer to this question is 'yes'. As we have seen in this section, every Court decision had been contested by applications for rehearing and/or petitions to Parliament. By 1894, when the Appellate Court was established, it must have seemed clear to the Crown that Court decisions in the rim blocks had been particularly contested. Yet few of these applications or petitions had been granted. Maori leaders expressed their discontent to the Government as opportunity arose, although, as we saw in chapter 8, contact between Tuhoe and officials was fairly limited in the 1880s, before the Governor's visit in 1891. By the late 1890s, contact was more regular and sometimes intense. In 1898, for example, an Urewera delegation to the premier pressed the case of Kuhawaea on him (among other matters).[417]

Even Ngati Whare, who had refused to attend the Court or seek rehearings, made their unhappiness known when possible. In 1894, during the premier's first ever vist to Te Whaiti, the titles of Whirinaki and Heruiwi were raised with him. Unfortunately, the exact complaint was not recorded in the minutes, but Seddon responded:

> As to the investigation of title to the Whirinaki and Herewera [Heruiwi] blocks, the Government have no power over the law. When once a decision is arrived at, the Government have no power over rehearings, and cannot interfere, unless there has been absolute fraud. The Supreme Court is the only tribunal that can interfere. But it would be well if you were to reduce to writing the matters complained of, and send the particulars down to me, so that I may make inquiries as to how the affair stands.[418]

John Hutton and Klaus Neumann suggested that Ngati Whare may have raised these blocks privately with Carroll. Both blocks were well past the legal time limit for rehearing applications.[419] In any case, Seddon's reply was somewhat disingenuous, since the Government frequently ordered inquiries or rehearings for blocks when fraud was not an issue. The Supreme Court, on the other hand, was not a remedy for Maori aggrieved by Native Land Court title decisions. Hutton and Neumann observed that there was no further action from Seddon.[420]

416. Counsel for Ngati Whare, closing submissions (doc N16), pp 51–52
417. Edwards, 'The UDNRA, Part 2' (doc D7), p 65
418. 'Pakeha and Maori: A Narrative of the Premier's Trip through the Native Districts of the North Island', March 1894, AJHR, 1895, G-1, p 73 (John Hutton and Klaus Neumann, 'Ngati Whare and the Crown, 1880–1999', report commissioned by the Crown Forestry Rental Trust, 2001 (doc A28), p 102)
419. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), pp 101–102
420. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 102

10.6.4

As we noted in the case of Matahina, the Government could take action when its officials were convinced that injustice had resulted from Court decisions, even in the absence of applications or petitions. In our view, the Urewera Commission was a prime opportunity for the investigation of Kuhawaea and Ruatoki to have been put on a broader footing. Evidence of Maori complaints about titles, such as the Tahora 2 decisions, came up in the Commission even when it was not looking for them.[421] Had the commission been tasked with a regional inquiry, to ensure that justice had been done in the rim blocks, it would clearly have been able to find answers. As Carroll noted, when referring Kuhawaea to the commission, it had to deal with 'all the adjoining lands' and so could 'easily make remarks acquainted with the facts and position of affairs'.[422] We note, of course, that the tribal composition of the first commission was not necessarily suitable for such a task. Membership of the commission – or of a commission entrusted with this task – would have had to have represented all the tribes interested in the rim blocks, with Government commissioners to advise and assist.

One of the Government's interests was to ensure the validity of its title for the land that it had acquired from Maori since title determination.[423] Reopening Kuhawaea or Ruatoki was no threat to it in that respect, whereas it had much to lose if incorrect decisions had been made in the blocks in which it had made significant purchases. On the other hand, the private sale of Kuhawaea put much of the land beyond the reach of an effective remedy. In both cases, Crown (formerly Maori) land or financial compensation were available options for remedies.

10.6.4 Treaty analysis and findings

A profound wrong has been done to the peoples of Te Urewera. They ought to have been provided with a form of community title more reflective of customary arrangements. Also, as we noted in section 10.2, Maori ought to have decided their own land entitlements. This was fundamental to the Treaty. It has been the finding of the Tribunal in other inquiries, and we saw the force of it in our own. The Crown argued that by providing a judicial process, either in the form of rehearings or as a result of petitions, it had satisfied its obligations to correct injustices brought to its attention. We disagree. To refer complaints arising from the Native Land Court back to that Court was simply to perpetuate and entrench the wrong. We agree with the Rekohu and Te Tau Ihu Tribunals that the Court was not the correct body to decide customary titles, and that it necessarily produced decisions that distorted or

421. See, for example, Edwards, 'The UDNRA, Part 2' (doc D7), pp 116–117; Belgrave and Young, 'Customary Rights and the Waikaremoana Lands' (doc A129), pp 63–64

422. J Carroll, minute, 10 October 1898 (Bright, comp, supporting documents to 'The Alienation of Kuhawaea' (doc A62(a)), p B5)

423. See, for example, Cleaver, 'Matahina' (doc A63), pp 49–51; Tulloch, 'Heruiwi 1–4' (doc A1), pp 38–39

mistook custom (see sec 10.2). The claimants in our inquiry have been left with enduring grievances.

We repeat again the submissions of Ngati Awa with respect of Matahina, which pointed the way:

> This Tribunal taking an objective view might find that all the iwi can claim some form of interest in Matahina and that the interests overlap. The Tribunal might also comment on the inability of the Native Land Court system to deal with shared or overlapping interests. Related to this might be a finding that because of that inflexibility, the customary interests in the block were not adequately recognised or provided for.[424]

In the case of Matahina, a rehearing was ordered by Parliament as a result of the Government's discovery that the assessor may have made a procedural error, and its conviction that injustice had been done to those left out of the title. Although Ngati Haka Patuheuheu and Ngati Rangitihi were not satisfied with the outcome, the rehearing exhausted their legal and political options. Parliament was hardly likely to intervene a second time to order another rehearing. What this highlights is that the Government's chosen remedy was to send contested titles back to the very Court – with its inherent flaws – that had made the decisions in the first place. The claimants and Ngati Awa agreed that the Court was simply incapable of dealing with the overlapping interests in border areas, and that its form of title was particularly ill-suited to such cases. This was true for all the rim blocks in Te Urewera.

(1) *Did petitions provide an alternative or back-up remedy?*

As with rehearing applications, most of the petitions to Parliament were not granted. In the case of Heruiwi 1–3, it was decided that the land had been sold anyway, and there was no remedy for the petitioners. Since the land had been sold to the Crown, we consider that a remedy could still have been found, especially since it had only just purchased Heruiwi 2–3. For Kuhawaea, no effective remedy was provided in the form of actual compensation. Petitions about the title to Tahora 2 were not granted. For the partition of Tahora 2A3, however, Parliament did provide an effective remedy. Petitions for the return of land awarded to the Crown in Waipaoa 1, especially in respect of an urupa, did not have had any positive outcome at the time. Petitions about Ruatoki were referred to the Urewera Commission (see ch13).

Petitions, therefore, did provide some scope for remedial action. As we see it, only one actually succeeded in providing any concrete remedy – the Tuhoe petition about the partition of Tahora 2A3.

424. Counsel for Ngati Awa, closing submissions (doc N15), p 21

10.6.4

In most cases, however, the claimants in our inquiry did not petition Parliament. Nor, sometimes, did they apply for a rehearing. In part, the costs may have dissuaded them. By the time Waipaoa was heard, for example, Tuhoe had already been turned down twice for applications based on failure to notify them of a hearing. It may not have seemed worth the cost of trying a third time. Others, such as Ngati Whare, made informal approaches to the Government, rather than official petitions. As we have seen, this strategy had no greater success.

In sum, the right to apply for a rehearing was an illusory remedy. Most applications were turned down. For those that were granted, rehearings involved essentially the same Court and kind of title that were, in our view, particularly inappropriate for the overlapping claims in the rim blocks. Alternative inquiry processes, such as the Urewera Commission, could have been used instead. The commission itself, or a more representative variant of it, was well placed to carry out a regional inquiry in the 1890s, and to uncover injustices in the title decisions that had preceded it. Such an inquiry would have enabled the Crown to remedy any injustices while it still owned the majority of land it had just acquired from Maori in the rim blocks. That an inquiry was held for Kuhawaea and Ruatoki shows the potential available in this respect, although the outcome for Kuhawaea was disappointing. Petitions provided an uncertain avenue of relief for those who made them, but most did not.

We find that the Crown provided a system of title investigation (and of titles) that was in breach of the Treaty. Having set up such a system, the Crown then failed to provide Maori with adequate remedies when the Native Land Court – as it must inevitably do – reached decisions that were unacceptable to one or more parties in the overlapping claims to the rim blocks. The right to apply for a rehearing was ineffective on two grounds: most applications were dismissed; and those that were granted could only be heard in the same inappropriate system that had decided the titles in the first place. Further, the right to petition Parliament resulted in a real remedy in only one case (the partition of Tahora 2A).

The Treaty principle of redress, which has been discussed by the Tribunal in many reports, required the Crown to provide fair and effective redress for well-founded grievances, so as to restore the honour and integrity of the Crown, and the mana and status of Maori. As the Te Tau Ihu Tribunal found, past remedies provided by the Crown must be measured according to this Treaty principle.[425] We find the Crown in breach of this Treaty principle of redress, as well as the principles of autonomy and active protection, for these various acts and omissions. We find too that these Treaty breaches were avoidable in the circumstances of the time. The Crown could have empowered Maori to decide their own titles, as they requested. It could also have remedied well-founded grievances after inquiry by a body such as the first Urewera commission. Although we have decided not to comment on particular title decisions, we are certain that all claimants in our inquiry were prejudiced as

425. Waitangi Tribunal, *Te Tau Ihu*, vol 1, pp 5–6

a result of these Treaty breaches. We will outline aspects of that prejudice in section 10.10 below.

10.7 What Were the Crown's Purchase Policies and Practices in Te Urewera?

Summary answer: *Between 1881 and 1930, the Crown purchased almost 60 percent of the rim block land that had been awarded to the claimants in our inquiry. Most of this land was acquired in the 1890s. The unfair and coercive nature of the Crown purchase machine was observed by the Stout–Ngata Commission in 1907:*

> *Theoretically the Crown does not buy unless the owners are willing to sell. But the experience of half a century shows—(1) that in the absence of competition produced by restrictive legislation, and in the face of encumbrances due to litigation and survey costs, circumstances are created which practically compel the Maori to sell at any price; (2) that the individualisation of titles to the extent of ascertaining and defining the share of each individual owner in a tribal block owned by a large number gives to each owner the right of bargaining with the Crown and selling his interest; it gives scope to secret dealing, and renders practically impossible concerted action on the part of a tribe or hapu in the consideration of the fairness or otherwise of the price offered, or in the consideration of the advisability of parting at all with the tribal lands.*[426]

We agree. The Crown's deliberate exploitation of its monopoly powers, of the hardship and debts of Maori individuals, and of the empowerment of the individual over the community, made it virtually impossible for hapu to negotiate price, reserves, or the decision to sell in the first place. Individuals were picked off one by one. Prices were unfairly low. In all the lands purchased by the Crown, a reserve for sellers was set aside in only one block. In such circumstances, it is not possible to speak of willing sellers or meaningful consent. As the Native Land Laws Commission observed in 1891: 'The alienation of Native land under this law took its very worst form and its most disastrous tendency. It was obtained from a helpless people . . . The strength which lies in union was taken from them.'[427] *The Crown claimed in our inquiry that – in spite of the system it had set up – it had conducted its nineteenth-century purchases with groups and their leaders. This was not in fact so in almost all instances.*

There were brief signs of hope between 1899 and 1905, when Crown purchasing was abolished and Maori were given the opportunity to vest their land in (partly representative) Maori Land Councils for leasing only. Carroll's reforms were soon swept away, however, and Crown

426. 'Native Lands and Native Land Tenure (General report on lands already dealt with and covered by interim reports', 11 July 1907 (Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 28–29)

427. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 625)

purchasing resumed in Te Urewera from 1909. The Crown's twentieth-century purchase policies and practices were along much the same lines as in the nineteenth century, and were just as unfair and coercive. While theoretically re-empowering owners to make group decisions, the Native Land Act 1909 actually set the quorum for meetings of assembled owners so low as to enable tiny minorities to make the decision to alienate ancestral land. Those who were absent from a single meeting (usually the great majority) could have their land sold without their consent. No follow-up meeting or other process was required to obtain their views or consent. Worse, in 1913 the Reform Government restored the Crown's power to purchase individual interests, for occasions when it could not convince even small minorities of owners to sell. At the same time, the Crown had resurrected its nineteenth-century powers to exclude private competition. There was some improvement in price with the setting of Government valuation as a minimum in 1905, although the Crown still had to resort to purchasing individual interests when meetings of owners would not sell at its prices (or at any price).

The Crown's purchase policies and practices were in serious breach of the Treaty, to the significant prejudice of the claimants in our inquiry.

10.7.1 Introduction

From 1840 to 1862, the Treaty of Waitangi provided that Maori could alienate or retain their land as they wished, but if they chose to alienate, they could do so only to the Crown. In 1862, the Crown waived its right of pre-emption and provided for the direct purchase or lease of Maori land by settlers. After the debacle of the Waitara purchase, which had led to war in Taranaki, the Crown's system of buying land was discredited and it largely withdrew from the land market. In 1869, however, Donald McLean (chief purchase commissioner under the old system) became Native Minister. Under his superintendence, the Crown resumed purchasing land. Maori then had a choice: enter into a relationship with settlers (or speculators) and sell or lease privately; or deal with the Crown. It became one of the great questions of the day, whether colonisation worked fastest and best under Crown or private buying. From the 1870s onwards, the Crown legislated to give itself a series of advantages in the market, over both private buyers/lessees and Maori owners. Also, as we saw in section 10.2, the Native Land Court and its titles were designed to facilitate (sometimes almost compel) the transfer of land out of Maori ownership. A Crown purchase machine was created that ground its way through Maori opposition and obtained some 65 percent of the land in the rim blocks by 1930.[428] Private buyers, on the other hand, acquired only some 16 percent. In this section, we consider claims that the Crown's purchase policies and practices were in breach of the principles of the Treaty of Waitangi.

428. The Crown acquired 59 percent of the land awarded to our claimants by direct purchase, and a further 5.4 percent by takings in satisfaction of survey costs. We discuss survey costs in section 10.8.

The Claim about the Structural Unfairness of the Crown Purchase System

Counsel for Ngati Manawa submitted:

> it may be useful to reduce the Crown purchasing system to its core essentials so that its structural unfairness becomes plain. Supposing I wish to purchase a house, but that the transaction has the following aspects:
>
> a. I, the Crown, have unlimited resources, and the would-be seller, Ngati Manawa, though fond of its house, is desperately poor, indeed starving.
> b. The seller is not allowed to sell the house to anyone but me,
> c. While I am making up my mind about whether I want the house or not, or how much I feel like paying for it, which can be for as many years as I like (decades, sometimes), the owners are not allowed to mortgage or lease their house or give it away to anyone else (if they dare to do so that is a criminal offence).
> d. I get to say what the house is worth, and there is no way this can be challenged.
> e. If the house is owned by four people as tenants in common, the two who do not sell will have to pay some of the costs of subdivision, and if they don't or can't they will be made to hand over some of their portion to me.
> f. If the house is owned by four people, and three of them decide not to sell, I can still buy the interest of the person who will sell, and force the rest to meet some of the costs of cutting out the portion of the seller.
> g. If I have bought one of the shares and am trying to buy the rest from the others I can take out injunctions stopping the remaining owners from cutting down trees (even for their own use) and if they do so I can force them to pay some of the profits to me.
>
> All the above are standard aspects of the Crown purchasing system as it operated in its settled classic form from around 1880–1920. It was in my submission a deeply unfair and one-sided system.[1]

1. Counsel for Ngati Manawa, closing submissions (doc N12), p 40

10.7.2 Essence of the difference between the parties

The claimants argued that the Crown's purchase of land in the rim blocks was in breach of the Treaty. In their view, its purchase policies created a set of interlocking features that stacked the deck against Maori resistance to sales, and their preference for leasing (or for not dealing in their lands at all). The main features of the Crown purchase machine in the nineteenth century were:

10.7.2

- *Exclusion of the private sector:* From 1871 onwards, the Crown had a variety of mechanisms to exclude private competition. The most important of these were its monopoly powers under the Government Native Land Purchases Act 1877, the Native Land Purchase Act 1892, and the Native Land Act 1909. In addition, full pre-emption was reimposed on the country from 1894 to 1909. In the claimants' view, these monopoly powers made it virtually impossible for Maori to resist selling land, and at the Crown's low prices.[429]
- *Pre-title dealings:* The claimants, especially Ngati Manawa, argued that the Crown used leases and advances to gain a foothold in the land, and then used them to overcome opposition to sales. As a result of Maori resistance to permanent alienation, the Crown had to accept leases, but it did so solely to gain 'leverage as a purchaser'.[430] It had no intention of farming the land or subletting it to settlers. Instead, it used its refusal to pay rents to force Maori – who were not allowed to deal with anyone else – to eventually sell the Crown the freehold.[431] At the same time, advances (whether for purchase or lease) were used to break down the opposition of cash-starved communities to dealing in their lands.[432]
- *Undivided share buying:* According to the claimants, the standard Crown purchase practice was to buy the undivided interests that its own native land laws had created, and then seek a partition from the Native Land Court when it had reached the limit of individuals prepared to sell. Non-sellers, even prominent rangatira, could do little to prevent this piecemeal acqusition of shares. This was especially so because of the poverty that drove individuals to sell their paper shares, which were otherwise of little practical use to them, in order to meet short-term consumption needs. Maori poverty combined with Crown monopolies and the kind of title created by the Court to virtually compel sales, outside the control or even the scrutiny of the tribal community and its leaders.[433]
- *The costs of obtaining title:* An integral part of the system, in the claimants' view, was the costs of obtaining title, more particularly the costs of surveys. These contributed to the pressures on Maori to sell land.[434] We will address this issue in a section 10.8.

In the twentieth century, the Crown purchasing system was temporarily suspended from 1900 to 1905, and then reintroduced in full force in 1909. Ngati Kahungunu and Ngati Ruapani raised an issue particular to this period. The Maori Land Settlement Act of 1905

429. Counsel for Ngati Manawa, closing submissions (doc N12), pp 41–46
430. Counsel for Ngati Manawa, closing submissions (doc N12), p 20
431. Counsel for Ngati Manawa, closing submissions (doc N12), pp 20–21, 50–51;
432. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 112; counsel for Tuawhenua, closing submissions, 30 May 2005 (doc N9), pp 95–96; counsel for Ngati Rangitihi, closing submissions, 1 June 2005 (doc N17), pp 22–24
433. Counsel for Ngati Manawa, closing submissions (doc N12), pp 23–24, 45–46; counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 52
434. Counsel for Ngati Manawa, closing submissions (doc N12), pp 46–47

allowed the Native Minister to vest land compulsorily in boards for leasing. According to the claimants, this happened in the case of Waipaoa 5, yet ultimately failed to prevent its sale.[435]

From 1909 to 1913, the Crown had to buy land from a meeting of assembled owners. It could still impose a monopoly to prevent any private competition, including leasing. In the claimants' view, the quorum set by legislation for such meetings was so low as to create a travesty of group decision-making.[436] Even so, the Crown was still unable to get owners to agree to sales, especially at its low prices. The law was amended in 1913 to permit the Crown to buy individual interests again. In the claimants' submission, this enabled the Crown to circumvent even the minimal community controls reinstated in 1909. Economic circumstances were such that targeted individuals had little choice but to sell, and to sell at the Crown's prices.[437]

On the overall question of prices, the claimants argued that the Crown – by exploiting the interlocking features outlined above – was able to take away the power of the owners to negotiate in any meaningful sense. As a result, it was able to impose low prices on them. The claimants accepted that it is difficult to be sure what a fair price might have been. There are indications from prices paid by the Crown for similar land (or the same land later), and from the amounts offered by private parties, that the Crown's prices were too low. In the claimants' view, this reinforces general evidence that monopolies were widely believed at the time to drive prices down. Also, they pointed to the evidence of Dr Donald Loveridge that prices almost doubled in the years after 1905, once Government valuation was made the compulsory basis for a minimum price. In Loveridge's view, this showed that prices were too low in the preceding decades. For the 1890s, by contrast, there were no safeguards in the legislation to require a fair or independent valuation as part of setting prices for Maori land.[438]

The Crown focused its closing submission on the claimants' nineteenth-century issues. In essence, the Crown denied most of the key claimant allegations, and argued that the others had been greatly exaggerated.

As its starting point, the Crown pointed out that its purchase of land was provided for in the Treaty – not all land alienations will be breaches. Maori had positive as well as negative reasons to sell land, including the raising of money for farming. The Government had an obligation to act in good faith, fairly, reasonably and honourably: 'Conducting transparent

435. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 65–67; counsel for Ngai Tamaterangi, closing submissions (doc N2), p 54; counsel for Wai 945 Ngati Ruapani, closing submissions (doc N13), pp 31–34; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, paras 132(m), 137–139

436. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 41

437. Counsel for Ngati Manawa, closing submissions (doc N12), pp 47–48

438. Counsel for Ngati Manawa, closing submissions (doc N12), pp 34–38; counsel for Te Whanau a Kai, closing submissions (doc N5), pp 11, 31; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 70–71

negotiations with proper rights holders is in line with this duty.'[439] The Crown submitted that by and large, Crown purchase practice met this standard in the Urewera rim blocks. Claimant historians, in the Crown's view, have exaggerated the extent to which its agents dealt with individuals at the expense of the community.[440] The evidence 'repeatedly refers to negotiations with hapu and Chiefs and various public meetings being held to discuss alienation issues'.[441] Individual signatures were obtained, but it was 'generally (although not always)' as a result of agreements reached with hapu or chiefs.[442] Crown counsel did make one important concession: 'It does however seem that dealings with individuals rather than groups became more common in the 1890s, the period of time when the majority of Urewera purchasing occurred.'[443] Even so, counsel pointed out that Richard Seddon (like earlier Native Ministers) preferred group dealings in the 1890s.[444]

The Crown accepted that it had given itself extraordinary powers in respect of buying individual interests, which it often denied to private parties. 'At this time,' we were told, 'it was considered reasonable to expect that the Crown and its agents would be scrupulous in the exercise of these powers. The Crown's performance in the exercise of these powers needs to be examined on a case-by-case basis.'[445]

In terms of leases and pre-title dealings, the Crown argued that their importance has also been exaggerated. They were only relevant to Crown purchases in two of the eleven blocks: Heruiwi 1–3 and Matahina.[446] In other blocks, the Crown abandoned pre-title dealings 'where they were not welcome'.[447] In the Crown's view, it usually dealt with willing sellers who had full powers of negotiation. There was evidence of Maori successfully rejecting its purchase attempts (as in Kuhawaea). It does not appear to have tried to interfere if private persons wanted to lease or buy land.[448] The Crown noted that its refusal to pay rents could be a source of 'annoyance', but argued that it was necessary to ensure that the correct owners were identified by the Court first.[449] In the case of Heruiwi 1–3, the Crown admitted that its refusal to pay rent after title determination was an appropriate 'matter for Tribunal inquiry'.[450]

In terms of its monopoly powers, the Crown argued that they were a legitimate attempt to 'protect its negotiations from private interference'.[451] As with other 'extraordinary' powers,

439. Crown counsel, closing submissions (doc N20), topics 8–12, p 68
440. Ibid, pp 6, 68
441. Ibid, p 68
442. Ibid, p 6
443. Ibid
444. Ibid, p 66
445. Ibid, p 6
446. Ibid, pp 6, 66–70
447. Ibid, p 6
448. Ibid, pp 6, 68–72
449. Ibid, pp 73–74
450. Ibid, p 70
451. Ibid, p 74

the Crown's duty was to ensure that its agents acted with scrupulous fairness.[452] The question, however, of whether the Crown 'abused its monopoly powers of purchase' is not a significant issue for the rim blocks. The Crown only purchased a 'few blocks' under such powers, and there is insufficient evidence to show whether the monopoly powers 'had any material impact on the purchase price paid'. Also, there was strong evidence that negotiations over price 'were considered and robust'.[453] Maori sometimes rejected offers or negotiated price increases.[454]

The Crown accepted in theory that a monopoly could lower prices when Maori 'wanted to sell or had no choice but to sell':

> However, for this issue to be answered comprehensively, a systematic study would be required of those blocks where the Crown invoked its power to exclude competition and blocks sold privately in the same period (evidence in Heruiwi is that the Crown paid more than the maximum it had intended to). Even then, care must be taken to ensure that those factors that go towards influencing the sale price (eg quality of land, location of block, period of purchase) are comparable, no evidence on the record does this.[455]

In terms of twentieth-century issues, the Crown did not make any closing submissions on the compulsory vesting of Waipaoa 5, the 1909 land purchase system, the 1913 amendments to it, or any of the purchases that took place from 1909 to 1930. In its opening submissions, the Crown denied that any Te Urewera land was compulsorily vested in a board under the 1905 Act, but did not otherwise address these issues.[456] In its statement of response to the particularised claims, the Crown either denied most of the specific allegations or reserved its position on them.[457] In response to claims about the sale of Heruiwi 4C by a small minority of owners, counsel noted: 'The Crown accepts that a question arises as to the adequacy of the safeguards for the majority of owners against the actions of a minority of owners under its regime governing meetings of assembled owners under the 1909 Act.'[458]

452. Ibid, p 65
453. Ibid, p 6
454. Ibid, pp 6, 67–68
455. Ibid, p 75
456. Crown counsel, opening submissions, February 2005 (paper 2.780), p 15. See also Crown counsel, opening submissions, 11 April 2005 (paper 2.819).
457. We note that many issues for the period 1909–30 were not raised in the particularised claims. It was only after the hearing of evidence, when their full import was revealed, that some matters became the subject of claimant closing submissions. The Crown's statement of response, therefore, is not entirely helpful in deriving the Crown's position on matters not covered in its closing submissions.
458. Crown counsel, final statement of response, 11 June 2003 (paper 1.3.2, SOC 2), p A138

10.7.3 Tribunal analysis

(1) *Pre-title dealings*

As we have seen in section 10.5, the Crown's pre-title dealings were important in bringing a number of blocks into the Native Land Court. They were less successful, however, in ultimately securing the alienation of land in those blocks. The Crown argued that the importance of its pre-title dealings has been overstated.[459] We agree. Only in Heruiwi 1–3 and Matahina did significant sales occur as a result of those pre-title dealings. We discuss Heruiwi 1–3 in this section. We do not, however, consider the Crown's purchase of land in Matahina in any detail. The use of pre-title dealings to get Matahina into the Court has already been discussed, and was of relevance to the claimants in our inquiry. The method by which the Crown purchased land from Ngati Awa after title was decided, however, is not a matter for this Tribunal.

(a) ***Heruiwi 1–3:*** As we discussed above, the Native Land Court was suspended in the Rangitaiki Valley from 1873 to 1877. One reason was the conflict among Te Arawa over use of the Court, and the extent of opposition to it operating. Another reason, however, was the Government's desire to exclude private competition for land, since only the Crown was allowed to purchase land before title investigation. (While some settlers were still willing to risk transactions, especially informal leases, the suspension of the Court discouraged others.) The Crown's exclusion of a private market became an enduring theme in Te Urewera rim blocks, as we shall see below. Even with some of its private competitors dissuaded, Government purchase agents found it very hard to get agreement to land sales. A policy was developed of entering leases instead. As counsel for Ngati Manawa submitted, these were not genuine leases. There was no intention of farming the land, or of subletting so that it could be developed by settlers. Nor, as it turns out, was there a genuine intention to pay rent. The sole purpose of the lease was to establish a foothold in the land, and tie it up, without returns to its owners, until they were forced to sell.[460]

In its submissions, the Crown argued that its leases were not 'one-way-roads'.[461] They did not always result in sales. Counsel conceded, however, that in the two instances where the Crown was able to complete lease agreements – Heruiwi 1–3 and Matahina – the leases were in fact turned into sales.[462] As Te Arawa rangatira Te Rangikaheke observed, a Government lease was nothing more than bait on a hook. The hook was the eventual purchase of the land.[463] This was Government policy. The Colonial Secretary told Parliament in 1874:

459. Crown counsel, closing submissions (doc N20), topics 8–12, p 70
460. Counsel for Ngati Manawa, closing submissions (doc N12), pp 20–21, 50–52
461. Crown counsel, closing submissions (doc N20), topics 8–12, p 70
462. Ibid, pp 69–70
463. Armstrong, 'Ika Whenua and the Crown' (doc F8), p 5

Blocks outside the Ambit of this Report

Due to the Ngati Awa Claims Settlement Act 2005, the Tribunal is not considering post-title Crown actions in relation to the following rim blocks:

Matahina A1–A6	74,200 acres	Awarded to Ngati Awa
Matahina B	1,500 acres	Awarded to Ngati Hamua
Tuararangaia 2	1,000 acres	Awarded to Ngati Pukeko
Tuararangaia 3	4,156 acres	Awarded to Ngati Hamua and Warahoe
Waiohau 2	1,100 acres	Awarded to Ngati Pukeko

We note that, while those Ngati Hamua and Warahoe who are affiliated to Ngati Whare and to Tuhoe participated in this inquiry, no claims were made about Matahina B or Tuararangaia 3.

Also, Whakatohea were not claimants in this inquiry. As a result, we make no specific findings about them in relation to Tahora 2B (60,806 acres), which was awarded to Ngati Ira and Whakatohea in 1889.

> it was not always possible to get the freehold of Native land . . . [but] in practice, the cession of freehold generally followed the leasing of the land [and] the leases were being taken as a preliminary to the expected acquisition of the freehold. . . . It was the business of the Government to carry out the wishes of Parliament by acquiring an estate from the Natives in the North Island, and he thought it was best to obtain that estate. It was perfectly well known that, in dealing with Native land, the first step was the lease, and that obtained, the freehold inevitably followed in time.[464]

How did this work in practice in Heruiwi 1–3?

Ngati Manawa were in a difficult position when they returned to war-ravaged lands in the early 1870s. They were already in debt to benefactors such as Gilbert Mair, and they struggled to grow or buy enough food in the 1870s and 1880s. Relying on the evidence of McBurney, Armstrong, and Tulloch, claimant counsel emphasised the number of times tribal leaders or officials reported the tribe's dire situation to the Government in these decades.[465]

The Ngati Manawa strategy, in the absence of capital to develop their lands, was to use them in the colonial economy while retaining ownership. Leasing seemed the ideal solution, and it was favoured over sales by all the claimants in our inquiry. With the Native

464. Daniel Pollen, July 1874, NZPD, 1874, vol 116, p 209 (Tulloch, 'Heruiwi 1–4' (doc A1), p 23)
465. Counsel for Ngati Manawa, closing submissions (doc N12), pp 23–24, 28–30

Land Court suspended, however, the main potential tenant was the Crown. At first, Ngati Manawa offered to lease land on what officials thought were 'absurdly high terms'.[466] In the monopoly era of the 1870s, these terms were soon knocked down. In 1874, Mitchell and Davis[467] advanced £100 of rent for Heruiwi, and then finalised a lease with 47 signatories in February 1875. Another advance of £50 was made the day after the lease was signed. This was clearly, as the Crown suggested, a negotiation with chiefs on behalf of their community. The terms were: £100 per annum for the first decade; £150 per annum for the second decade; and £200 per annum for the third decade.[468] The lease included a clause that the owners were not allowed to sell or in any other way deal with their land for thirty years: 'This illustrates what strange kinds of "leases" these transactions were: it is unusual for a supposed tenant to dictate in a lease that the landlord is forbidden from alienating the leased land or taking a mortgage over it.'[469] Unlike similar leases, however, this one did not include the stipulation that the Crown would not pay rent until the Court decided title. Even so, the schedule of specific dates for payment was crossed out.[470]

Apart from one more advance of £10, the Crown paid no rent between the signing of the lease in 1875 and the investigation of title in 1878. The Court was allowed to hear Rangitaiki lands by this time, but in March 1878 the Crown renewed its monopoly over Heruiwi by proclaiming it as under negotiation for purchase. If the owners wanted a return on their land, they could only get it from the Crown. But the Government continued refusing to pay rent after the Court decided title. Mitchell made some small payments in 1878 and 1879, but otherwise pointed out to his superiors that the rent was due. Despite requests from both Mitchell and Ngati Manawa, the Government took the view that survey costs and previous advances exceeded what was owing in back rents. Mitchell disagreed. By February 1881, the Government owed £353 on the lease. Ngati Manawa and Ngati Hineuru threatened to repudiate the lease in 1881, but by this time the Government was already negotiating to buy the land.[471]

In March 1881, Richard Gill informed the Native Minister that the owners of Heruiwi were anxious to sell it to the Crown. In April, the owners advised that they would re-enter the land if the rent was not paid, and a group of senior leaders (including Harehare Atarea) informed the Minister of their opposition to any sale.[472] By May, Gill admitted that the owners 'have no desire to sell the block and prefer the rent being regularly paid'. Instead, the 'offer to sell was brought about by myself [Gill]', because the Government wanted to recoup

466. Tulloch, 'Heruiwi 1–4' (doc A1), p 23
467. Henry Mitchell and Charles Davis were Crown land purchase agents operating in the Rangitaiki and neighbouring districts. Together with Captain JA Wilson, later a Native Land Court judge, they were responsible for attempting to lease or purchase land for the Crown on the western side of Te Urewera in the 1870s.
468. Tulloch, 'Heruiwi 1–4' (doc A1), pp 23–24
469. Counsel for Ngati Manawa, closing submissions (doc N12), p 51
470. Tulloch, 'Heruiwi 1–4' (doc A1), p 24
471. Tulloch, 'Heruiwi 1–4' (doc A1), pp 24, 28–31
472. Tulloch, 'Heruiwi 1–4' (doc A1), pp 30–31

the rent advances by turning the lease into a purchase, and then put settlers on the land.[473] Having extorted an offer to sell for £4000, Gill advised that the Crown should pay £2500 – but sweetening the deal by also paying back rents.[474]

In May, Gill offered the Minister three options: carry out the lease and pay rent; abandon the lease and remove the monopoly proclamation; or buy the land (and pay back rent). Even though he knew from Gill and Harehare Atarea that Ngati Manawa and Ngati Hineuru did not want to sell this land, and preferred that the Government honour its lease, the Minister accepted Gill's advice to turn the lease into a purchase.[475]

In June, Gill reported that 'the natives are unanimous as to sale'.[476] This was untrue. Rawiri Parakiri and some of his people had agreed to the sale (at £3000), but Mair noted: 'Harehare refused to sell saying that he would put up ripekas [crosses] all over the land and in 2 years all the Europeans will vanish into thin air'.[477] Later in the same month, private purchasers offered £2000 more than the Government was prepared to pay, but the law prevented the owners from considering this offer.[478]

The owners of Heruiwi were faced with little or no choice. Their land was tied up under lease and a proclamation that prevented them from considering the much higher offer from private buyers. Their tenant, the Crown, was refusing to pay the rent and insisting on them selling the land to it. Even so, the owners would not – as a group – agree to the sale. In this circumstance, Mair advised the Government that he could get a majority of signatures by purchasing undivided individual shares, and then applying to the Court for a partition. In this way, he thought he could get around most of the opposition, although there would still be a small core of non-sellers.[479] Gill agreed, instructing: 'Buy so many interests as you can . . . '[480] As part of the negotiations, there were to be no more advances to 'the Ngatimanawa for food' after the purchase was concluded.[481] We accept, however, that the Crown did not count its rent advances as part of the purchase price.[482] It was only the unpaid rents that were used to make the price appear higher.

On 29 June, even before Mair had collected any signatures, the Native Minister exercised his power to apply to the Court for the Crown's interests to be excised. In September, the owners also applied for a partition, and it was this application that the Court heard in December 1881. Mair produced a deed with the signatures of 48 of the 56 owners. The

473. Gill to Native Minister, 9 May 1881 (Berghan, 'Block Research Narratives' (doc A86), p 567)
474. Tulloch, 'Heruiwi 1–4' (doc A1), p 31
475. Tulloch, 'Heruiwi 1–4' (doc A1), p 31
476. Tulloch, 'Heruiwi 1–4' (doc A1), p 32
477. Gilbert Mair, diary (Tulloch, 'Heruiwi 1–4' (doc A1), p 32)
478. Tulloch, 'Heruiwi 1–4' (doc A1), p 32
479. Tulloch, 'Heruiwi 1–4' (doc A1), p 32
480. Gill to Mair, 20 June 1881 (Tulloch, 'Heruiwi 1–4' (doc A1), p 32); Berghan, 'Block Research Narratives' doc A86), p 568
481. Tulloch, 'Heruiwi 1–4' (doc A1), p 32
482. Tulloch, 'Heruiwi 1–4' (doc A1), p 32

Crown had paid out £2,142 to the 48 sellers: 1/56 each of £2500.[483] The additional sum of £500 (classified by the Government as overdue rent) does not appear to have been paid. On 2 July 1881, before purchasing individual interests, Mair made a single payment of £174 2s 8d. This was probably paid to non-sellers as well as sellers, since Mair's diary shows that Harehare Atarea was present.[484] As we shall see in section 10.8, the Crown seems to have deducted survey costs and advances from the £600 rent actually due, and £174 was the sum that was left. The Government had originally planned to sweeten the deal with an extra £500; but only paid £174 of it. The Court awarded the Crown 20,910 acres (Heruiwi 1). The eight non-sellers did not turn up at the hearing, but Mair explained that he had negotiated with tribal leaders that the non-sellers would get two separate pieces of land (Heruiwi 2–3). The Court took the word of Mair and the sellers to this effect.[485]

(b) ***Other pre-title dealings:*** The sale of Heruiwi 1–3 exhibited all the hallmarks of the system complained of by the claimants. A lease agreement, in combination with a Government monopoly, was used to virtually compel the owners to sell to the Crown. An ongoing refusal to pay the rent for six years (from 1875 to 1881) was a key part of the Government's strategy. In the knowledge that the majority of owners did not want to sell this land, the Government resorted to purchasing individual shares, subverting tribal decision-making and the authority of rangatira as the representatives of the community. The owners were forced to accept the Crown's price, despite a higher offer from private buyers, and their own demand for a higher price at the beginning of negotiations. Purchasing from individuals took away any collective bargaining power. Payment of back rents was used to make the price look better, ignoring the fact that the Crown was legally obliged to pay its rent.

The Crown pointed out, however, that its other lease negotiations in Te Urewera were less successful. As we have said, Matahina was locked into a Crown lease, and then part of it was awarded to the Crown in 1884 in satisfaction for survey costs and advances. The claimants in our inquiry, Ngati Rangitihi (Matahina D) and Ngati Haka Patuheuheu (Matahina C and C1), were not part of this purchase. Their small Matahina blocks were mostly acquired later by the Crown to satisfy survey charges secured by liens (as we shall see in section 10.8). In this case, however, the Crown was wrong to say that its rent advances were not turned into purchase advances.[486] When Ngati Haka Patuheuheu received money on Matahina/Pokohu in the 1870s, this was advances against rent owing on the lease. In 1884, however, those payments were treated as advances for purchase. Mair recommended that the tribe be allowed to refund the money, as otherwise it would entitle the Crown to half of their small piece

483. Crown counsel, closing submissions (doc N20), topics 8–12, pp 68–69; Berghan, 'Block Research Narratives' doc A86), pp 566–569
484. McBurney, 'Ngati Manawa and the Crown' (doc C12), p 294
485. Tulloch, 'Heruiwi 1–4' (doc A1), p 33; Berghan, 'Block Research Narratives' doc A86), p 569
486. Crown counsel, closing submissions (doc N20), topics 8–12, pp 69, 74

The Alienation of Matahina

In 1884, the Crown obtained 8,500 acres of Matahina A for survey costs and in satisfaction of its pre-title advances. In the 1880s, another 6000 acres of Matahina A1 was alienated to pay for a second survey (of the subdivisions), and 19000 acres was sold to private parties, with the Court partitioning this land in 1891. Most of the remaining Ngati Awa land (the A blocks) was sold to private purchasers in the 1920s. There were further small sales in the 1960s, and part of the remaining land ended up in the Tarawera Forest scheme.

In 1907, the Crown took 513 acres of Matahina B for survey costs. Another 587 acres was sold to a private forestry company in the 1930s. A further 166 acres was sold in the 1960s.

In 1907, the Crown took 667 acres from Matahina C and C1 for survey costs (see sec 10.8). In the 1930s, the remaining land was included in the Ruatoki development scheme but it was not developed. This land was eventually amalgamated, part was swapped with other Matahina land, and the new block (called Matahina F) was vested in the Tuhoe–Waikaremoana Maori Trust Board in the 1980s and leased for forestry.

In 1907, the Crown took 920 acres of Matahina D for survey costs, leaving only 80 acres for the Ngati Rangitihi owners (see sec 10.8). The remaining land became part of the Tarawera Forest deal in the 1960s (a joint venture in exotic forestry, involving the Crown, Tasman Pulp and Paper, and thousands of owners of Maori land).

About one per cent of Matahina remained in Maori ownership by the 1990s, before the return of Crown forest lands to Ngati Awa as part of their Treaty settlement.[1]

1. See Cleaver, 'Matahina' (doc A63); Cleaver, 'Summary of "Matahina"' (doc C8), p 19

of Matahina. The Government agreed, and Ngati Haka Patuheuheu had to pay back their share of the rent advances as if they had been a downpayment for purchase.[487]

Other than Matahina and Heruiwi, the Crown was not able to complete any pre-title lease or purchase negotiations. Advances were made on Kuhawaea, Ruatoki, and Tahora 2. In the case of Ruatoki, most of the £50 advance was collected up by Tuhoe leaders and returned to the Government.[488] Wilson gave up on this block – and also on Waimana, where the Government had a secret arrangement with the lessee's business partner to get land later.[489] As Crown counsel observed, the Government was sometimes willing to bow out where non-speculators had made arrangements with Maori.[490] It was usually the case that bona fide settlers who wanted to start farming would accept informal leases, despite Government

487. Rose, 'A People Dispossessed' (doc A119), pp 93, 122
488. Steven Oliver, 'Ruatoki Block Report', report commissioned by the Waitangi Tribunal, 2002 (doc A6) p 48
489. McLean to Wilson, 24 December 1873 (Binney, comp, supporting papers to 'Encircled Lands' (doc A12(a)), p 42)
490. Crown counsel, closing submissions (doc N20), topics 8–12, pp 66–72

monopoly proclamations. This was the case in Kuhawaea and Waiohau, although it took a long time for the Government to finally agree to give up its proclamation over Kuhawaea. The lessee paid back the Government advances. As we have seen in section 10.5, the Crown's decision to withdraw from Kuhawaea was the main factor in allowing the survey (and Court hearing) to proceed, over the wishes of the great majority of owners. In the case of Waiohau, Ngati Haka Patuheuheu had some discussions with Wilson about a Government lease in 1874, but that was as far as it went. No advances were paid, and the chiefs entered into private leases instead.[491]

The Crown suggested that these blocks show it was only prepared to deal with willing sellers. When Maori refused to lease or sell, it graciously withdrew.[492] In our view, it shows rather that the Crown was only able to buy land where it had managed to obtain a lease and thus a stranglehold over a block. Even then, it had to resort to individual purchases to get Heruiwi 1. In this respect, the Court titles (with their lists of individual owners) proved fatal to Maori ability to hold onto their land, and to insist on leases rather than sales. This was also the case in Waimana and Kuhawaea, where lessees immediately started buying individual interests, as soon as title was granted. The lessees had little choice, as there was nothing to stop a competitor from buying up interests.[493] The Court titles effectively circumvented the tino rangatiratanga of hapu communities. The Government could still choose to deal with tribal leaders at public hui. But if, as in the case of Heruiwi 1, it decided not to do so, then the Court titles enabled it to get the land from individuals. Poverty was the driver – individuals found themselves with little choice, selling for small prices that sustained whanau for a while, but could not (by their very nature) contribute to community development of the land.[494]

On the eastern side of our inquiry district, there were pre-title dealings in Waipaoa and Tahora 2. For Waipaoa, it consisted of an arrangement to pay for the survey in land, a block called Matakuhia. We will deal with that arrangement in section 10.8. In the case of Tahora 2, Government negotiations to purchase Te Wera and Te Houpapa were stymied from 1879 to 1889. Although advances were paid to Tuhoe and Whakatohea (£100) and to Turanga leaders (£200), this occurred towards the end of the Government's system of pre-title dealings. In the very year that these advances were paid, the Native Minister decided to put an end to the practice. As we shall explain shortly, in the early 1880s, the Government withdrew from live negotiations that were based on such advances, in cases where the land was of no great

491. Rose, 'A People Dispossessed' (doc A119), pp 67–70, 92

492. Crown counsel, closing submissions (doc N20), topics 8–12, p 72

493. See, for example, the pressure that Jemima Shera's purchasing of interests must have placed on Swindley from the very beginning. Sissons, 'Waimana Kaaku' (doc A24), pp 40–43, 50, 52–54, 58–59

494. Counsel for Ngati Manawa, closing submissions (doc N12), pp 23–24, 28–30; counsel for Wai 144 Ngati Ruapani, closing submissions (doc N19), app A, para 143; Brian Murton, 'The Crown and the Peoples of Te Urewera: The Economic and Social Experience of Te Urewera Maori, 1860–2000', report commissioned by the Crown Forestry Rental Trust, 2004 (doc H12), pp 227–236

value, or the purchase was not worth pursuing. As we saw in section 10.5, the Native Land Purchase Department continued to push pre-title negotiations in Tahora 2 until 1882. From then on, the Government played a waiting game – it would not move until the tribes could agree on surveying the land (see section 10.5.3 above).

By the time Tahora 2 was finally heard by the Court, it came under the Liberal Government purchase policies of the 1890s. The advances were irrelevant by then as a means of levering a purchase, although the Crown still insisted on getting land for its £200 advance to Wi Pere for the Turanga hapu.[495] The Tuhoe–Whakatohea advance, however, was allowed to lapse.[496]

Thus, we agree with the Crown that the significance of pre-title dealings has been exaggerated in terms of actual land alienation. In our view, these dealings were more important for drawing land into the Court (see 10.5). Where the Crown managed to complete lease negotiations, however, this proved critical to later purchase. This was the case for Heruiwi 1.

(2) *Purchases under Liberal Government policies, 1890 to 1909*

In 1879, the Native Minister decided to abolish the system of pre-title dealings. Advances and leases had proved useful in getting a foothold in many blocks, but payments had been scattered across vast territories over several years, without always resulting in completed purchases. Nor had the Crown's agents in the 1870s been motivated by specific settlement strategies. Their goal was to secure as much land as possible, over as wide an area as possible. In the early 1880s, the Government retrenched. It abandoned some negotiations, as too difficult or pointless to pursue (while insisting that advances be repaid in land or money). Energies were refocused on land of immediate economic value for settlement.[497] As we have seen, the primary example of this in Te Urewera was the reluctant abandonment of Kuhawaea in 1882.

At the same time, a new strategy was developed – of which we saw an early example in Heruiwi 1 – confining negotiations to the purchase of individual interests after title was decided by the Court. If Maori could keep their land out of the Court, then the Government would not try to buy it. As soon as Court titles were obtained, however, purchase agents moved in – as we shall see in the case of land put through the Court in Te Urewera from 1889 onwards. The bulk of the Crown's purchases in the rim blocks took place in the 1890s, under this system.

It was not, however, the only option available to the Government. There had been a hiatus in the mid-1880s, when John Ballance experimented with a system of block committees, which could vote to put their 'surplus' land in the hands of a commissioner to auction for lease or purchase. Maori did not take up this option, mainly because they had wanted the

495. Boston and Oliver, 'Tahora' (doc A22), p 137
496. Boston and Oliver, 'Tahora' (doc A22), p 137. At first, the Crown intended to recover this advance in 1891 to 1892, but eventually the matter lapsed (with no explanation).
497. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 556–558, 607–613

commissioner to act in conjunction with their tribal committees, rather than having full and sole power over the land. Even so, Maori protested vehemently when Ballance's Act was scrapped and free trade was reintroduced in the late 1880s, along with a resumption of Crown purchasing.[498] The Liberals too experimented with boards, auctions, and leasing from time to time, as Maori opposition to sales matched the Government's intense efforts to buy land in the 1890s. We shall return to some of these alternatives in the following sections.

The poverty that had driven land dealings in Te Urewera in the previous decades remained a factor in the 1890s. As Binney and Murton explained, individuals were vulnerable to a range of pressures. Without capital for development, they were living a precarious existence, growing crops on marginal lands and surviving on income from seasonal work (outside Te Urewera). Traditional resources were either out of reach – at Ohiwa – or in decline. As a result, the effects of natural disasters, such as floods or crop failures, were more exaggerated than earlier in the century.[499] Life was harsh, 'tempered only by the fact that this was their ancestral land'.[500]

This was the situation in Te Urewera when the Liberals came to power in 1889. Their policy was to buy as much Maori land for settlement as possible. Leasing made it on to the agenda from time to time, when Maori opposition forced it there, but always at the price of Maori giving up control of their land to Crown agents to lease. The Liberals' preference was to settle small farmers on good land, but – as with most nineteenth-century governments – they were prepared to purchase anything and everything, and sort out the settlement side later. Maori collectives (tribal and pan-tribal) who opposed this agenda were considered hostile. Even the Liberals, however, were not necessarily convinced that the Urewera interior was suitable for close settlement. They wanted its supposed gold and minerals, its timber, and ultimately (if they could get it) land for larger-scale pastoral farming.

The Liberals' aggressive purchase programme netted 2.7 million acres of Maori land between 1891 and 1900.[501] Their unprecedented success in such a short time evoked a huge groundswell of Maori opposition. This centred on the Kingitanga and the nationwide Kotahitanga movement, which sought Maori self-government, abolition of the Native Land Court, Maori committees to decide their own titles and manage their own lands, and – as an absolute minimum – an end to Crown purchase of Maori land.

At first, the Liberals were prepared to rely on the usual method of creating a monopoly – proclaiming land as under negotiation for purchase, and then renewing the proclamation

498. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 347–356, 366; Ballance's Act referred to here was the Native Lands Administration Act 1886

499. Binney, 'Encircled Lands', vol 2 (doc A15), pp 34–35; Murton, 'The Economic and Social Experience of Te Urewera Maori' (doc H12), pp 218–236, 249–308

500. Binney, 'Encircled Lands', vol 2 (doc A15), p 35

501. Tulloch, 'Heruiwi 1–4' (doc A1), p 85

from time to time so as to maintain a state of siege for the Maori owners.[502] Then, in 1893, they passed experimental legislation involving a return to some of Ballance's ideas from the mid-1880s. A majority of owners could choose to sell their land to the Queen, hand it over to the Queen to be leased, or hand it over to a board to be auctioned for sale or lease. This Act (the Native Land Purchase and Acquisition Act 1893) envisaged independent valuations of land and an end to individual dealings, but it never came into force.[503] Instead, most Liberal purchases from 1894 to 1899 took place under the Native Land Court Act 1894, which re-imposed Crown pre-emption on the whole country. Under this Act, Maori could either sell their individual interests to the Crown, or they could hand the land over to a board to lease or sell it on their behalf. Also, for the first time since 1886, the Government provided for a legal entity that could represent the owners of blocks as a collective. Owners were allowed to vote to incorporate themselves, but not in cases where the Crown had acquired a 'right or interest' in their land.[504] For Te Urewera, this ruled out many of the rim blocks because the Crown had commenced purchases or acquired survey liens.

In our inquiry, the claimants were particularly critical of the Crown's failure to provide for collective authority in its Court titles. Tama Nikora, for example, told us:

> In my view customary tenure was changed as a result of the Native Land Court determining title as individuals were given absolute interests and there was no provision for 'corporate governance.' Prior to the Native Land Court Tuhoe did operate by corporate governance through traditional leadership structures. All the evidence that I have seen indicates that Tuhoe did not want any change and that Tuhoe had observed from a distance the adverse impacts of that change on other iwi. Hence the strong stance taken by Te Whitu Tekau.[505]

The Crown accepted that it had not provided a corporate mechanism for managing Maori land, as would have been appropriate, but argued that it finally did so in 1894.[506] As we have noted, however, this option could not be taken up in Te Urewera rim blocks, where the Crown had (or soon after) acquired interests or rights.

The Turanga Tribunal found that Maori communities would not have willingly divested themselves of almost all their assets for almost no return (see sec 10.2).[507] One explanation for how this happened was the purchase of individual interests. As Kathryn Rose argued, this was a known and deliberate technique to overcome the resistance of communities and

502. The Government Native Land Purchases Act 1877 was repealed in 1892. Its monopoly provision was replaced by section 16 of the Native Land Purchases Act 1892.
503. Cecilia Edwards, 'The Urewera District Native Reserve Act 1896', report commissioned for the Crown Law Office, 2004, vol 1 (doc D7(a)), pp 81–90
504. Native Land Court Act 1894, ss 117–134
505. Tama Nikora, brief of evidence for third hearing week, 18 March 2004 (doc C31), p 18
506. Crown counsel, closing submissions (doc N20), topics 8–12, p 13
507. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 510–511

tribal leaders to land sales.[508] She noted the strategy as described by WJ Wheeler, a purchase officer involved in buying Tahora 2:

> The owners . . . *must be dealt with individually*, as the majority of them, if assembled in public meeting, would be filled with righteous indignation, of the thought of parting with their birthright for a mess of pottage; but within 24 hours, the same persons would gladly sell, if they could do so unobserved by their fellows. [Emphasis in original.][509]

As we shall see, this was a common strategy in Te Urewera in the 1890s, and it struck at the core of Maori communities' and leaders' ability to prevent sale of ancestral land for immediate consumption needs. It was roundly condemned by the claimants. Colin (Pake) Te Pou pointed out: 'When the Maori customs were robust, an individual person could never sell it [the land].'[510] Counsel for Ngati Haka Patuheuheu, based on what he saw as the consequence of the individual titles created from 1873 onwards, submitted: 'Such individual interests could be picked off by Crown purchase agents and private interests, despite, and irrespective of, any tribal or chiefly decision or right of veto.'[511]

We note too that this process fell far short of standards articulated to Tuhoe, Ngati Manawa, and Ngati Whare by the Liberal premier, Richard Seddon. Crown counsel submitted: 'In the 1890s, Seddon also insisted that the Crown deal with groups.'[512] As we saw in the previous chapter, the premier visited Te Urewera in 1894, trying (among other things) to persuade Maori of the benefits of disposing of land under his 1893 Act. We discussed that visit (and Seddon's messages) in more detail in chapter 9. Here, we note that he promised that committees of owners, or the majority of the owners themselves, would make deliberate decisions as to whether their lands were surplus. If so, then the majority of owners would decide if the land should be leased or sold. The premier emphasised the option of leasing, but also suggested that the Government could invest purchase moneys on behalf of sellers if they wanted a long term benefit from permanent alienation. Whether leasing or selling, however, the choice was to be a deliberate one made by the community. In either case, the Government itself did not want to take their lands from them.[513] Then, in 1895, Seddon agreed to special arrangements in the heart of Te Urewera, to meet the wishes of Te Urewera leaders: local committees and a central, tribal committee would manage their lands. Only the tribal committee had the power to sell land in the Urewera District Native Reserve. At this very time (1894 to 1895), Government agents working in the rim blocks

508. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 23–26, 33–37
509. Wheeler to Sheridan, June 1896 (Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 34)
510. Colin (Pake)Te Pou, brief of evidence, 26 March 2004 (doc C32(a)), p 12
511. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 67
512. Crown counsel, closing submissions (doc N20), topics 8–12, p 66
513. See, for example, 'Pakeha and Maori: A Narrative of the Premier's Trip through the Native Districts of the North Island', March 1894, AJHR, 1895, G-1, pp 54–56, 82

were buying up individual interests in Heruiwi 4, Whirinaki, and Tahora 2, and were about to do so in Waipaoa and Heruiwi 2–3.

Further, the Government had been warned against individual purchasing by its own royal commission on the native land laws, which had reported to it back in 1891. The commissioners found that the Native Land Acts had 'drifted from bad to worse', and that private (often secret) individual purchasing had replaced the 'old public and tribal method of purchase':

> All the power of the natural leaders of the Maori people was undermined . . . An easy entrance into the title of every block could be found for some paltry bribe [advance]. The charmed circle once broken, the European gradually pushed the Maori out and took possession. Sometimes the means used were fair; sometimes they were not. The alienation of Native land under this law took its very worst form and its most disastrous tendency. It was obtained from a helpless people . . . The strength which lies in union was taken from them.[514]

The Liberals' purchase of individual interests netted massive amounts of land in the North Island in the 1890s (including the majority of the land purchased by the Crown in the Urewera rim blocks). Maori opposition was so strong and united nationally by the end of the decade that the Crown finally agreed to stop purchasing land in 1899, in the face of massive Maori discontent. This self-denying policy lasted from 1899 to 1905, when the Crown resumed purchasing. In the meantime, after reaching a negotiated agreement with the Kotahitanga parliament, the Liberal Government passed legislation in 1900 designed to put the settlement of New Zealand on a new footing. Maori could now choose to vest their land in district Maori Land Councils, which would have a Maori majority (partly elected). The councils would have the power to lease (but not sell) the land. For five years, this policy (called 'taihoa' or 'by and by') was tested.[515] Would Maori vest enough land in the councils, and would settlers be willing to take it up on lease?

In 1905, with Kotahitanga disbanded and Maori apparently reluctant to use the councils on a large scale, the Liberals began the dismantling of the 1900 system. In the view of the Central North Island Tribunal, the system had been a promising one that was not given a fair trial. Instead, the Government removed the elected component and turned the councils into boards, with a Pakeha majority.[516] Also, the Native Minister was given power to vest land compulsorily in the boards, but only for the purposes of leasing. This new compulsory system was trialled in two districts.[517] The Tairawhiti district included part of our inquiry district, and the Waipaoa 5 block was vested compulsorily for leasing in 1906 (as we shall see in more detail below). Outside of the two districts specified in the 1905 Act, Crown

514. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 625)
515. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 665–666, 671–675
516. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 675–682
517. Stevens, 'Waipaoa' (doc A51), p 42

purchases resumed. In 1909, towards the end of the Liberal era, the native land legislation (and purchasing system) was overhauled and a new Native Land Act passed. We shall discuss that Act and its consequences for Te Urewera in the next section.

(a) ***Heruiwi 4 – the exception to the rule?:*** Heruiwi 4 (some 75,000 acres) was awarded to Ngati Manawa, with small sections for Ngati Hineuru (4A), Ngati Kahungunu (4E) and Tuhoe (4C). Even as the title orders were being made out, it was clear that Ngati Manawa intended to sell some of their land. The Court noted, with respect to 4G, 4H, and 4I: 'Mehaka hands in a list of owners for a portion of the main block which is not to have any restrictions as N' Manawa has been put to great expense in the surveys of Heruiwi and Whirinaki blocks.'[518] In February 1891, soon after the lists were settled, tribal leaders offered to sell 4G, 4H, and 4I (just over 40,000 acres) to the Crown. The land had been set aside to pay for survey costs and other expenses. At first, the Government was interested because a mistake was made – it thought that the more valuable 4A and 4B, next to the Crown's land in Heruiwi 1, were being offered. When Harehare Atarea renewed the tribe's offer in late 1891, the Government lost interest when it realised that the land was not very valuable for settlement. Even so, the Government was prepared to buy the land if it could be done quickly and for a minimal price. The majority of owners agreed to a lower price, and signed a deed in February 1892. Others signed in March and April of that year.[519]

Thus, the first major alienation of land in Te Urewera under the Liberals was carried out by tribal leaders on behalf of the community, with deeds signed by the majority as a group. This seemed promising, even though it happened that way in part because the Crown did not want the land very much, and the community had to pay its debts. (Payments, however, were made to individuals, not the community through its leaders.[520])

In the same year, Ngati Manawa offered to sell 4D to the Crown. In this case, signatures appear to have been collected individually over a couple of months, with 11 of the 14 grantees agreeing to sell. But this block too was sold after an offer from tribal leaders (Harehare Atarea in particular). By October, all remaining resistance had been overcome by individual negotiations, and the sale was completed. As part of this sale, one of the grantees, Toha Rahurahu, was paid a price much higher than his share was worth, on condition that he withdraw his application for a rehearing of 4E.[521] In 1893, after the resolution of applications for rehearing, the Crown also purchased the neighbouring 4E from Ngati Kahungunu. We have no information as to whether group discussions preceded the purchase, but the transaction was clearly made piecemeal with individuals. The first signature was obtained in 1892, from Toha Rahurahu when he agreed to withdraw his application for rehearing,

518. Native Land Court, Whakatane minute book 3, 1 December 1890, fol 240 (Berghan, comp, supporting documents to 'Block Research Narratives', various dates (doc A86(l)), p 3925)
519. Tulloch, 'Heruiwi 1–4' (doc A1), pp 71–75
520. Ibid, p 74
521. Ibid, pp 75–76

before the Crown had begun the process of getting other signatures.[522] It was still chasing the signatures of five of the 13 owners later in 1893.[523] We know too that payments were made individually.[524]

By 1893, the majority of Heruiwi 4 had been sold, much of it on the basis of group decisions to do so. In that year, however, there were also offers to sell land in two of the most valuable parts of Heruiwi, where the communities were living and trying to sustain themselves by cropping. These parts (4B and 4F) had had restrictions placed on the titles, because tribal leaders wanted to prevent their sale. In 1893, Harehare Atarea sought to sell 6,000 acres of this land to the Crown. This decision cannot have been taken lightly.[525] By this time, Ngati Manawa had sold the great bulk of their 'magnificent heritage' to the Crown at – as Gilbert Mair put it – the Crown's 'own price'.[526] They had acquired no lasting benefits. In 1893, their economic situation had been rendered desperate (again) by flooding and crop failures. Harehare Atarea told the Native Minister: 'What is the use of the land if the owners die of starvation?'[527]

In this instance, however, a tribal offer to sell was converted into the purchase of individual interests, so that the Government could acquire much more than the owners (as a collective) wanted to sell. Atarea had offered 6,000 acres. He wanted to partition the land, setting aside this area and putting in a minimum number of owners so as to allow a quick and ready sale. This plan was abandoned when the Government agreed to the sale, and Atarea expected to sell limited pieces of 4B and 4F without partitioning. Instead, the Crown purchased individual shares over a two-year period, obtaining 16,000 acres.[528]

The purchase of individual interests was also a feature in the Crown's acquisition of Heruiwi 4A, which had been awarded to Ngati Hineuru. Along with 4B, this was the most valuable part of the block, and it was a major site of tribal residence and cropping. There was no offer to sell this land. Rather, the Crown – which wanted the land for homesteads for settlers on its neighbouring Heruiwi 1 – began purchasing individual interests in 1895, and partitioned its interests out in 1899. By this time, the Crown had acquired 3724 of the 5880-acre block, which was supposed to have been inalienable and which its community did not want to sell.[529]

Thus, Ngati Manawa and other owners sought to sell some of Heruiwi 4 in the early 1890s, in order to pay for survey costs and other debts. These early transactions were made as a

522. Berghan, 'Block Research Narratives' (doc A86), p 579
523. Kelly to Sheridan, undated (1893) (Berghan, comp, supporting documents to 'Block Research Narratives' (doc A86(m)), p 4317)
524. Tulloch, 'Heruiwi 1–4' (doc A1), p 76. Witnesses for Ngati Kahungunu, including Niania (doc 138), Belgrave and Young (doc A129), and Belgrave, Young, and Deason (doc A122), do not mention this block.
525. Tulloch, 'Heruiwi 1–4' (doc A1), pp 77–78
526. Mair to Bird, 20 December 1922 (McBurney, 'Ngati Manawa and the Crown' (doc C12), p 464)
527. Harehare Atarea to Native Minister, 18 January 1893 (Tulloch, 'Heruiwi 1–4' (doc A1), p 78)
528. Tulloch, 'Heruiwi 1–4' (doc A1), pp 77–79
529. Tulloch, 'Heruiwi 1–4' (doc A1), pp 84–85

result of offers by tribal leaders, and seem to have involved a majority decision to sign deeds. In 1893, however, the Crown began to buy individual interests way beyond what the owners had offered to sell (in 4B and 4F). Two years later, in 1895, the Government began to buy individual interests in land that it wanted (4A), even where there had been no offer to sell. This was a worrying trend, also reflected in other Urewera rim blocks.

(b) ***Tahora 2, Whirinaki, and Heruiwi 2–3 – purchasing of individual interests predominates:*** In 1889, Wi Pere explained to the Native Land Court that Urewera and Turanga leaders had agreed to keep Tahora 2 out of the Court until the native land laws were reformed. Their efforts were defeated, however, making it (as he said) almost impossible for them to hold onto the land.[530] It was in this circumstance that an agreement was apparently reached between all the major tribal groups in Tahora 2 to convey this enormous block to Rees and Pere on behalf of the New Zealand Native Land Settlement Company. The full history of the company, and the need for such a vehicle to circumvent the individualisation of the native land laws, has been described by the Turanga Tribunal.[531] Here, we note that the Crown's historian, Michael Macky, doubted the existence of an 1889 agreement, since it was never produced in Court.[532] On the face of it, such an alignment of tribes was unlikely. Nonetheless, leaders from Te Urewera, Wairoa, Turanga, and Opotiki had already reached an agreement to divide this land into separate parcels for the Court in 1889. That agreement was helped by the fact that Wi Pere was a leader within Ngati Kahungunu as well as Te Aitanga a Mahaki and Te Whanau a Kai. Tuhoe cooperation appears to have been secured by Te Kooti, who had instructed their leaders to leave matters to Wi Pere to arrange.[533] While the evidence is not entirely conclusive, we think it likely that there was a second agreement involving Pere and the New Zealand Native Land Settlement Company.

This very agreement may have inspired the early and determined purchasing efforts of Crown agents.[534] As we noted above, purchase agents in the 1890s used the picking off of individual interests (often in secret) to get around the opposition of tribal leaders. Wi Pere, in particular, tried very hard to prevent individuals from selling. The Government instructed its agents that Pere should not be recognised 'beyond his own individual interest'.[535] This reflected a very deliberate refusal to recognise the customary role and authority of rangatira.

At first, tribal leaders had offered the Crown a piece of land in the middle of the block (about 20,000 acres) to satisfy the survey lien. There were rumours that they might be

530. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 18
531. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 486–494, 539–585
532. Michael Macky, 'Report of Michael Macky in respect of Tahora and the East Coast Trust', report commissioned by the Crown Law Office, January 2005 (doc I8), pp 6–7
533. For the role of Te Kooti, see Tutakangahau's evidence to the Urewera Commission in 1901, set out in Edwards, 'The Urewera District Native Reserve Act 1896, Part 2' (doc D7), p 116
534. Boston and Oliver, 'Tahora' (doc A22), p 123
535. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 23

Experiments in 'Recollectivising': Trusts, Companies, and the Validation Court

Tahora 2, a large area of land in which the interests of Urewera, Wairoa, Opotiki, and Turanga tribes overlapped, became caught up in the efforts of East Coast Maori leaders to restore corporate title and control over land that had been individualised by the Native Land Court. These efforts were led by Wi Pere, a tribal leader of Te Whanau a Kai, Te Aitanga a Mahaki, and Rongowhakaata, who also had links with Ngati Kahungunu. Pere forged an alliance with colonial lawyer and politician WL Rees. Together, they first tried to put land into a series of trusts (called the Rees–Pere trusts), but they could not get the Government to pass empowering legislation, and the courts ruled that Maori land could not be placed in trust under the current native land laws. In 1881, Pere and Rees tried an alternative: a joint-stock company. Land was transferred from the Rees-Pere trusts to the New Zealand Native Land Settlement Company. Like the trusts, its goal was to restore Maori community control of land alienation (this time in partnership with Auckland businessmen), enabling strategic sales for the benefit of both settlers and Maori.

The Turanga Tribunal, which considered the history of the company in some detail, found that it failed because of its high debts, some poor business decisions, and lack of Government support. In 1888, the Bank of New Zealand forced the company into liquidation, the year before the Maori owners of Tahora 2 supposedly conveyed their land to it. After a mortgagee sale in 1891, the company's surviving lands were vested in new trustees (Wi Pere and James Carroll). The Carroll–Pere trust staggered on until 1902, when the Government intervened to save the land from further mortgagee sales (see ch 12).

In the meantime, the Government had set up a Validation Court in 1893, the purpose of which was to validate bona fide agreements between Maori and settlers, where these were impeded by supposedly minor or technical violations of the native land laws. In 1895, Pere and Rees tried to use this Court to put a stop to the Crown's purchase of individual interests in Tahora. In 1896, as we shall see, the Court vested some surviving sections of Tahora 2 in the Carroll–Pere Trust. We will consider these matters further in section 10.9 below, and in chapter 12, which deals with claims about these lands after they were placed in trust.[1]

1. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 486–494, 539–585

willing to sell a lot more in order to get development capital. But in June 1893 the Native Minister, determined to impose a lower price than was on offer, instructed his officials to begin buying individual interests.[536] A monopoly was proclaimed over the block in early

536. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 21–28

1894 (rendered unnecessary later that year, when pre-emption was restored nationwide).[537] Tribal leaders and community sanctions were powerless to stop individuals from selling.[538] Indeed, the Government made some efforts to subvert community leaders, and pay them to get others to sell. The only definite evidence of this, though, is among Whakatohea.[539]

As noted, Wi Pere led resistance to the sale of individual interests. The Minister instructed that other Maori should be reminded that Pere had accepted an advance back in 1879, and that that advance should be recovered in land. Pere, working closely with Rees, tried to impose some kind of coordinated control on the alienation of interests, and in particular tried to negotiate for reserves, but the Government refused to deal with them. By 1895, with the Crown having acquired a large interest, unknown in scope and location, Rees and Pere tried to put a stop to the purchasing altogether by applying to the Validation Court for recognition of the 1889 trust deed.[540] As part of that application, they sought information from the Crown as to what interests it had purchased. The Gisborne purchase agent, Wheeler, refused to supply any information:

> 1st. because *many who had sold have only done so on obtaining from me a distinct promise that neither Wi Pere or any other Native should be made acquainted with their sales*, and 2nd. because I understand that information is wanted to bring Tahora into the Validation Court and stop Government purchases until such time as Government agrees to the terms prepared by Wi Pere; who is working solely in the interests of the Natives. [Emphasis in original.][541]

We note the Crown's recognition of Pere's motive in working to protect Maori interests, and that this was considered reason enough not to work with him. This underlines the inherent conflict in the Crown's role as both a purchaser of Maori land and a protector of Maori interests.

In 1895, the Crown countered the Rees–Pere application to the Validation Court with its own application to the Native Land Court to have its interests defined and partitioned. When the Court sat to hear the Crown's application in April 1896, the Government had acquired individual interests amounting to 124,403 acres (plus 1000 acres in satisfaction of Pere's advance, and 6,291 acres for Charles Alma Baker's survey lien). From 1896, most of the unsold Maori land in Tahora 2 was (relatively) safe in the Carroll–Pere trust, and the Government concentrated on surveying its newly acquired lands.[542] Outside the trust, however, the land of Tuhoe and Te Upokorehe (the surviving parts of 2A) and of Ngati Ira (2B)

537. 'Notice of Entry into Negotiations for Acquisition of Native Lands by Her Majesty', 9 February 1894, *New Zealand Gazette*, 1894, no 12, p 266
538. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 21–28
539. Boston and Oliver, 'Tahora' (doc A22), p 126
540. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 23–28
541. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 26
542. Boston and Oliver, 'Tahora' (doc A22), pp 122–163

was still vulnerable to the purchase of individual interests. Crown agents continued to buy up shares after the definition of the Crown's portions in 1896. Because it was already under way before the Crown's moratorium on new purchases in 1899 (see below), the collection of signatures in 2A continued from 1896 until 1901. The Court awarded the Crown 638 acres (Tahora 2A2) in recognition of these further purchases.[543]

Similarly to Tahora 2, all purchases in Whirinaki were conducted on the basis of acquiring individual interests. In 1895, the Crown took over the survey liens for Whirinaki 1 and 2, and began its purchasing campaign. Tribal leaders had tried to protect the land by getting the Court to make it inalienable. As we shall discuss in more detail below (in section 10.9), the Crown simply ignored the restrictions on alienation and purchased it anyway. By the end of the year, the Government had acquired two-thirds of Whirinaki (17,039 acres by purchase, 4,439 acres by survey lien).[544]

As in Tahora 2, tribal leaders were unable to place any brakes or controls on the selling. The Native Minister, James Carroll, did agree to set aside a 400-acre reserve, containing kainga and cultivations. Harehare Atarea went to Wellington and asked for this reserve to be increased to 1000 acres. Patrick Sheridan, who was the official in charge of the Crown's purchase operations at this time, replied that it was up to Ngati Manawa how many shares were sold – if they wanted to keep 1000 acres, they could do so. This reply was disingenuous at best, given the way the land purchasing machine operated.[545] Sheridan instructed Richard Gill, the purchase agent on the ground, to give Ngati Manawa 'every facility for making what reserves they desire . . . as long as they do not pick the eyes out of the block.'[546] The result was that only the original 400 acres was reserved. Otherwise, about a third of the block was retained by a minority of the original owners when the Crown partitioned out its interests. The Crown did not attempt to purchase more of Whirinaki before the end of the century (although it did get more land from the fresh surveys that were needed).[547]

Towards the end of the decade, the Crown also purchased Heruiwi 2–3, the small remnants which had been preserved from the partitioning of the Crown's share of the original Heruiwi block (Heruiwi 1) back in 1882. The Government began by informing the owners of survey costs long overdue, and then proceeded to purchase the eight individual interests

543. See the departmental returns (year ending 31 March) of land purchased by the Crown: AJHR, 1897, G-3, p 11 (380 acres); AJHR, 1898, G-3, p 12 (50 acres); AJHR, 1900, G-3, p 11 (92 acres); AJHR, 1901, G-3, p 7 (146 acres). There is a discrepancy between the 668 acres claimed to have been purchased by the Crown, and the 638 acres awarded by the Court in 1907. Boston and Oliver were aware that this land was said to have been purchased by the Crown, but could provide no further information – see Boston and Oliver, 'Tahora' (doc A22), p 167. The Crown also purchased 1614 acres of Tahora 2B from Ngati Ira, over the period 1896 to 1898.

544. Tulloch, 'Whirinaki' (doc A9), pp 37–41

545. Tulloch, 'Whirinaki' (doc A9), p 43

546. Sheridan to Gill, 17 November 1895 (Tulloch, 'Whirinaki' (doc A9), p 43)

547. Tulloch, 'Whirinaki' (doc A9), pp 43–46

over a two-year period. By 1897, when the Crown sought an award from the Native Land Court, nothing of the original Heruiwi 1–3 block remained in Maori ownership.[548]

(c) ***Waipaoa – the final push:*** The Waipaoa block was heard by the Native Land Court in 1889. According to Cathy Marr, the Government began to consider its purchase from that point onwards. This was delayed, however, by applications for rehearing, and then by the lack of any certainty as to the boundaries of Waipaoa 3–10, which had been awarded to Ngati Kahungunu and Ngati Ruapani but not surveyed.[549] The Government was interested in these 'back country' blocks, even though they were not very attractive for settlement. This was partly because of interest in Lake Waikareiti and its surrounds for scenery preservation, and partly because this area was considered a crucial foothold in opening up Te Urewera.[550] Despite the creation of the Urewera District Native Reserve in 1896, the Government's purchase officials were still dedicated (as Wilson had been in the 1870s) to opening the district for settlement. These sentiments were shared – and in some ways led – by Percy Smith, who by then was Surveyor General.[551]

In 1896 to 1897, the Government made a decision to proceed with purchasing, on the basis that the internal boundaries could be computed with 'sufficient accuracy' for a deed plan, and that they would be rendered obsolete anyway by the Crown's purchase of the entire block.[552] In opening his negotiations, W Wheeler noted that he had received offers to sell from some owners, a point confirmed by Sheridan. To some extent, therefore, the purchase was initiated by both the Crown and at least some of the owners.[553] There were, however, no group negotiations, no opportunity to negotiate a price or extent of purchase, and no opportunity to make reserves or specify the location of interests. Instead, individual signatures were collected from 1898 to 1903. This appears to have been a slow process, conducted in some secrecy.[554] Counsel for Wai 621 Ngati Kahungunu described it as 'predatory'.[555]

Opposition to the purchase was led by Wi Pere, as had been the case in Tahora 2. In 1899, Pere protested to the Government that the purchasing was being done in secret (Sheridan had denied that it was even going on). He also claimed that the purchase was proceeding in defiance of the wishes of the chiefs, and of an agreement between Maori leaders and Premier Richard Seddon.[556] We do not have detailed evidence on the agreement raised by Pere. We note that the Government did agree to stop purchasing Maori land nationally in 1899. It appears to us that the continued collection of signatures was in defiance of the

548. Tulloch, 'Heruiwi 1–4' (doc A1), pp 81–83
549. Marr, 'Waikaremoana' (doc A52), pp 266–268
550. Stevens, 'Waipaoa' (doc A51), pp 3–4, 36
551. Stevens, 'Waipaoa' (doc A51), p 36
552. Stevens, 'Waipaoa' (doc A51), pp 31–33
553. Stevens, 'Waipaoa' (doc A51), pp 32, 34
554. Marr, 'Waikaremoana' (doc A52), pp 268–269
555. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), p 65
556. Stevens, 'Waipaoa' (doc A51), pp 35–37

Native Land Laws Amendment Act of that year. Section 3 provided that Maori land would not be alienated to the Crown from the commencement of the Act, except where a written agreement had already been made. In that case, the purchase 'may be completed in so far only as is necessary for the adjustment of boundaries and partition of the respective interests of the Crown and Native owners'.[557] As we see it, the only action that the Crown could take was to apply for a partition of its interests. This was in keeping with the Premier's undertaking to Maori leaders.

The 1899 Act was due to expire at the end of the next session of Parliament.[558] By then, it had been replaced by the Maori Land Administration Act of 1900. The new Act allowed Crown purchases 'in progress' at the time of its passage to be completed.[559] This was broader than the 1899 Act, and allowed the Government to continue collecting signatures for Waipaoa (as well as Tahora 2A). By 1903, the Crown was ready to partition its interests. It had purchased the undivided shares of 350 owners, although it had still not acquired a majority of the land left after the taking of 5,822 acres for the original survey costs. The deeds had recorded the whole block as 'sold', but the Crown gave up trying to complete the purchase of outstanding interests in 1903.[560] We have no evidence as to why this decision was made.

In February 1903, the Crown applied to the Native Land Court for an award of its interests. Further, the Minister had asked the Court to 'abolish [the previous] partitions and cut out Crown's interest in one block'.[561] It appears from the minutes of the hearing that the Government brought this proposal to the Court and presented the Maori owners with it then and there. We have no information of how many (or which) owners were present. The Crown's lawyer asked for 'a little time for them to consider it'. This was followed by out-of-court discussions, and then the hearing resumed on the same day.[562]

At first, it appeared that the Crown's proposal was changed as a result of these discussions, to concentrate its interests in two blocks, one on the eastern side and one in the west. But this was not the case. The Crown had changed its mind sometime between filing the original application and turning up at the hearing. A Government surveyor had already prepared a description of the boundaries of the two blocks that the Crown wanted.[563]

A single non-seller testified that he approved 'on behalf of the people to the partition as now proposed'.[564] Although the minutes are not clear, this appears to be Arani Kunaiti of

557. Native Land Laws Amendment Act 1899, s 3
558. Ibid, s 5
559. Maori Land Administration Act 1900, s 34
560. Stevens, 'Waipaoa' (doc A51), pp 37–39
561. Wairoa Native Land Court, minute book 12, 7 February 1903, fol 83
562. Ibid
563. Ibid, fols 83–84
564. Ibid, fol 83

Ngati Kahungunu.[565] The Kunaiti whanau had major interests in Waipaoa.[566] When there were no objections, the Court approved the Crown's proposal, annulled the old subdivisions, and created three blocks.[567] Two (Waipaoa 3 and 4) were awarded to the Crown (13,990 acres). The other block, Waipaoa 5 (19,490 acres) was retained by the non-sellers. By means of its original acquisition of land for survey costs (Waipaoa 1–2) and its purchase of individual interests, the Crown had now obtained about half of the original Waipaoa block.[568]

In our inquiry, Ngati Ruapani were critical of this process.[569] Waipaoa 4, awarded to the Crown, was in the west of the block. It not only took in a taonga, Lake Waikareiti (already partly in Waipaoa 2), but it also included all the land in which Ngati Ruapani had customary interests. Although not all Ngati Ruapani had sold, they thus lost their land and were put with all the other non-sellers into a block in which they had no customary associations.[570]

In Cathy Marr's view, the partitioning of Waipaoa had favoured the Crown's interests at the expense of the claimants'. The Government had been able to purchase only by a secret process of buying scattered individual interests, with no certainty as to where they were located or whether they would be useful for settlement. Then, in the process of partitioning, all the Crown's shares were consolidated into two complete blocks (contiguous to its earlier awards), and non-sellers were 'lumped together' in a single part of the old block. This arrangement ignored their original agreements as to where (in Waipaoa 3–10) their hapu interests had been located.[571] The process of uncontrolled selling had been converted into controlled partitioning, reorganising and reallocating the land with a view to saving the Crown from the consequences of blind buying. Of course, this would not have been necessary if the Government had been able to achieve its original goal of buying all interests in Waipaoa. It also might have been avoided if the owners of Waipaoa had been able to afford to survey their old subdivisions.

We have no information on what the owners' view of this was at the 1903 hearing. It may be that they agreed to it, as the simplest way of separating Crown and non-seller interests in the eight blocks. Also, consolidated interests may have seemed more useful than partitioning each of the eight blocks with the Crown. There were no objections, but it is not possible to say how many owners were present, or whether Kunaiti spoke for all non-sellers. It was unlikely that he spoke for Ngati Ruapani. Regardless, we accept that Ngati Ruapani non-sellers were not well served by this arrangement. The loss of Lake Waikareiti in particular was a heavy blow. Also, whether or not Kunaiti spoke for all the Ngati Kahungunu owners, Richard Niania explained that they too have concerns about how non-sellers lost rights and

565. Wairoa Native Land Court, minute book 12, 7 February 1903, fol 83
566. Richard Niania, brief of evidence (doc I38), pp 40–41
567. Wairoa Native Land Court, minute book 12, 7 February 1903, fols 83–84
568. Stevens, 'Waipaoa' (doc A51), pp 38–40
569. Counsel for Ngati Ruapani, closing submissions (doc N13), pp 30–31, 33–34
570. Marr, 'Waikaremoana' (doc A52), pp 270–271
571. Marr, 'Waikaremoana' (doc A52), pp 268–271

Crown Purchase of Individual Interests in Te Urewera in the 1890s

Heruiwi 4D	6,200 acres	(Tulloch, 'Heruiwi 1–4'(doc A1))
Heruiwi 4B and 4F	16,000 acres	(Tulloch, 'Heruiwi 1–4'(doc A1))
Heruiwi 4A	3,657 acres	(Tulloch, 'Heruiwi 1–4'(doc A1))
Heruiwi 4E	3,143 acres	(Tulloch, 'Heruiwi 1–4' (doc A1)
Tahora 2	124,403 acres	(Boston and Oliver, 'Tahora 2' (doc A22))
Whirinaki	17,309 acres	(Tulloch, 'Whirinaki' (doc A9))
Heruiwi 2–3	3,484 acres	(Tulloch, 'Heruiwi 1–4'(doc A1))
Waipaoa	13,990 acres	(Stevens, 'Waipaoa' (doc A51)

customary associations with their land in this way.[572] It is simply not possible for us to say how far there had been any free and informed consent to the scheme.

(d) ***Outcomes of the Liberals' purchase programme:*** When the Crown stopped purchasing in Waipaoa in 1903, it brought the Liberals' nineteenth-century programme of purchasing individual interests to an end. We pause here to review its outcomes. In sum, by 1893 the Crown had moved to purchasing such interests in the remnants of Heruiwi 4. In the same year, it began buying undivided shares in the Tahora 2 blocks, and in 1895 it started the same process in Whirinaki and Heruiwi 2–3. In 1898 it started buying individual interests in Waipaoa, which it pursued until 1903. As a result of these purchases of undivided shares from individuals, the Crown acquired 187,916 acres.[573] It had also bought 40,672 acres of Heruiwi 4 on the basis of an early purchase conducted with tribal leaders and a majority of the owners. Thus, the Crown had purchased a total of 228,588 acres by 1903.

If we take into account that we are not including Matahina A and B, Waiohau 2, Tahora 2B and 2B1, Tuararangaia 2 and 3, and Ruatoki in our calculations, then – in the 1890s – the Crown had purchased almost half of the land awarded to our claimants. It had acquired further land for survey costs (see sec 10.8).

(e) ***Waipaoa – from individual purchasing to compulsory vesting:*** From 1903 (the end of the Waipaoa purchase) to 1905, the Crown was not allowed to buy any more Maori land in Te Urewera. This self-denying rule had been introduced in 1899, but it was gradually weakened from 1905, until full Crown purchasing was restored in 1909. In the meantime, however,

572. Niania, brief of evidence (doc 138), p 39

573. We do not include the purchase of individual interests in Tuararangaia 3 in this calculation, as that land was purchased from hapu connected to Ngati Awa (whose claims have been settled).

10.7.3

Waipaoa 5 became caught up in the experimental arrangements instituted by the Liberals, to try to progress settlement by means of leasing. As the Central North Island Tribunal has found, the Native Minister, James Carroll, was determined to preserve sufficient Maori land for the development and wellbeing of his people. In 1905, in a desperate attempt to stave off renewed purchasing, he agreed to the compulsory vesting of land in boards for the purpose of leasing (not selling) it. Compulsion was considered necessary because Maori had not vested enough land in the 1900 Councils of their own free will.[574]

This arrangement was part of a package enacted in the Maori Land Settlement Act 1905. The district land councils of 1900 (with elected Maori representatives and a Maori majority) were abolished. They were replaced by boards appointed by the Crown, with a Pakeha majority. In two districts, Tairawhiti and Te Taitokerau, the Crown would not purchase any land before 1908. In the meantime, the Native Minister would have the power to take Maori land in those districts compulsorily, if he considered that it was not 'required or suitable' for occupation by its owners, and vest it in the board. The board was entrusted with administering the land in the best interests of its owners. It could create reserves for their use and occupation, for papakainga, urupa, fisheries, birding, or timber. Having decided whether or not to reserve any of the land, the board then had the task of classifying its quality and dividing it up into allotments for leasing. The usual process was a public auction of the leases, but first the board could set aside allotments to lease to the owners themselves. The board was not allowed to sell the land.[575]

In 1906, Waipaoa 5 was taken compulsorily by the Native Minister and vested in the Tairawhiti Maori Land Board. We have no evidence as to how or why the Minister made this decision. The owners had no legal right to be consulted, and their agreement was not required. It emerged later, however, that Wi Pere had done some kind of deal with Carroll. As part of taking the land compulsorily, the Minister agreed that 8000 acres of it would be reserved for the owners.[576] Did the Minister have the legal power to make or enforce this deal? From our reading of the 1905 Act, it seems that the only thing the Minister could have done to enforce this arrangement, at least in terms of law, was to have negotiated the location of the 8000 acres with the owners and then left it in their possession. He did not have the power to require the Board to reserve it.[577] (He could, of course, have asked the Board to do so, but this did not happen.)

The *Poverty Bay Herald* predicted that Maori who had 'long been suspicious of the operations of native land settlement' would have 'full confidence that they will be fairly and justly treated under the new law'.[578] The Board cut up the block into sections for leasing,

574. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 676–679

575. Maori Land Settlement Act 1905, ss 2–3, 8–9, 20(3); see also Stevens, 'Waipaoa' (doc A51), pp 45–46

576. Stevens, 'Waipaoa' (doc A51), pp 47–49; Porter to Fisher, 5 October 1907, MA 1906/1137, Archives NZ, Wellington; Porter to Fisher, 11 December 1907, MA 1906/1137, Archives NZ, Wellington

577. Maori Land Settlement Act 1905, s 8

578. *Poverty Bay Herald*, 15 October 1906, quoted in Stevens, 'Waipaoa' (doc A51), p 47

The Return of T W Porter

In chapter 5, we last saw T W Porter accompanying and advising the Ngati Porou forces in the hunt across Te Urewera for Te Kooti. In the 1870s, Porter commanded the East Coast Militia and acted as a Government purchase agent, credited with acquiring one million acres for the Crown. In 1879, as we saw earlier in this chapter, he negotiated the unsuccessful purchase of Te Houpapa with Turanga leaders, and tried to ease this purchase through to completion in the early 1880s. Porter became a major in 1885, and he was also Mayor of Gisborne for a period in the 1880s. In 1889, he commanded the force sent to prevent Te Kooti from reaching Gisborne, which (as we saw) impinged on the negotiations between iwi over Tahora 2 in that year. In 1890, Porter became a lieutenant-colonel. In 1901 to 1902, he commanded New Zealand forces in the South Africa War. He also commanded the Ninth Contingent in 1902 and was appointed a full colonel. After further military commands, Porter was appointed president of the Tairawhiti district Maori Land Council in 1905. He continued as president when the council was reconstituted as a board. In this capacity, he was in charge of the abortive leasing of Waipaoa 5, and approached the Government about whether there had been a condition on the vesting of that land, as to reserving 8000 acres to be farmed by its owners. Porter left the land board in 1908 and took no further part in affairs of relevance to this report, other than to write a biography of Major Rapata Wahawaha, and to contribute to the historical research of James Cowan on the New Zealand wars. During the First World War, Porter commanded New Zealand's National Reserve. He died in 1920.[1]

1. Additional biographical information comes from: J A B Crawford, 'Porter, Thomas William, 1843–1920', *Dictionary of New Zealand Biography*, updated 22 June 2007, http://www.dnzb.govt.nz.

reserving 2000 acres for the owners on the eastern side. It was not until after the sections had been advertised that the Board found out about the arrangement between Carroll and Pere to reserve 8000 acres. This occurred because Arani Kunaiti and 'several others have been trying to co-operate with Europeans in working the 8000 acres'.[579] The board's president, Colonel Porter, referred the question to the Native Department, and also pointed out that the board's 2000-acre reserve did not really provide for the 'Urewera'. He asked the department whether it was thought necessary to reserve land for them (which, in this context, meant Ngati Ruapani). The Department replied that it was not, so the existing reserve arrangement of 2000 acres was retained.[580] If the Minister understood himself to have agreed to an 8000-acre reserve, he took no action to fulfil the agreement.

579. Porter to Fisher, 11 December 1907, MA 1906/1137, Archives NZ, Wellington
580. Stevens, 'Waipaoa' (doc A51), pp 48–50

10.7.3

As we noted above, the Board was supposed to consider leasing to the owners first, before proceeding with a more general auction.[581] There were six sections to be leased. Some of the Ngati Kahungunu owners (backed by Wi Pere) wanted to lease three of them, but they did not want to pay rent. As a result of disputes between the Board and Ngati Kahungunu segments of the owners about this, none of the land was leased and the proposed auctions did not take place.[582]

The land remained in limbo from 1907 to 1909, vested in the board but not able to be leased. In 1909, the law was changed to allow the Crown to buy land that had been compulsorily vested under the 1905 Act. We shall consider that change, and the sale that followed, in the next section.

(3) *Crown purchasing in Te Urewera rim blocks, 1909–30*

A new system of Crown purchasing was established by the Liberal Government in 1909. The Native Land Act of that year was a major overhaul of the land legislation and policies of the preceding decades. It established a system which endured (with amendments) until 1953. The major political architects of the Act were the Native Minister, James Carroll, and the member for Eastern Maori, Apirana Ngata, who had just presided with Sir Robert Stout over a huge stocktake of Maori land. The main legal architect of the Act was John Salmond, the future Solicitor General. Together, they created a sophisticated machine for the alienation of Maori land in the twentieth century.

The Central North Island Tribunal has discussed the 1909 legislation in some detail. We refer readers to that discussion.[583] Here, we summarise the main features of relevance to Crown purchasing in Te Urewera. First, there was an end to Carroll's version of 'taihoa', with its focus on large-scale leasing. Full powers to purchase Maori land were restored to the Crown and private settlers. Leasing was still provided for if Maori owners were able to insist on it. But the 1905 boards were there to stay, with expanded powers to monitor, facilitate, and give legal effect to the alienation of Maori land. Secondly, the practice of purchasing undivided individual interests was abolished.[584] Purchasers (including the Crown) had to approach the local land board and ask it to summon a meeting of the owners.[585] These meetings, Carroll told Parliament, were designed to restore community decision-making. They were 'practically a resuscitation of the old runanga system, under which from time immemorial the Maori communities conducted their business'.[586] The Crown would be bound by the decision of the majority (in value) at the meeting. It did not, however, have to go ahead with the purchase if the terms were not favourable to it. The only exception to this process

581. Maori Land Settlement Act 1905, s 8(g)
582. Stevens, 'Waipaoa' (doc A51), pp 49–50
583. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 682–692
584. Native Land Act 1909, s 370
585. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 686
586. NZPD, 1909 (Tulloch, 'Heruiwi 1–4' (doc A1), p 122)

was in the case of land owned by ten or fewer owners. The Crown could buy such land directly from individuals.[587] Although the rim blocks included some very small partitions in Waimana and Waiohau by this period, with ten or fewer owners, we know of only one Crown purchase of this kind before 1930.[588]

We pause here to discuss some of the criticisms of the meeting of assembled owners system, as it was the key tool for alienating Maori land in this period. In her evidence on Heruiwi 4, Tracy Tulloch has assembled a range of views on the matter. Citing Professor Alan Ward, Tulloch suggested that Carroll's intention was to return to 'runanga' a 'collective control over their own lands' and to give 'rangatiratanga a legal recognition'.[589] Professor Richard Boast, however, pointed out that this supposed collective was 'not any of the natural units of Maori society but the accidental and artificial one of block owners'.[590] Thus, if wider tribal groups and their leaders were to have a say, it would have to be outside the meetings' system.

Perhaps the most telling criticism, however, was that the legislation did not ensure that meetings were truly representative even of the block owners. The quorum was set at only five owners. Given that many blocks had hundreds of owners, this was a risibly low standard. Counsel for Wai 36 Tuhoe was critical of this provision of the Act.[591] Professor Ward, on the basis of a nationwide study, concluded that it 'commonly meant that the owner group as a whole was not consulted'. Creating the institution of owners' meetings could have gone part way to fulfilling the Treaty, but in fact it 'bypassed the need for a full consensus of the owners (or even a clear majority of the owners) and ignored or overrode the wishes of owners not present at crucial meetings'.[592]

The Central North Island Tribunal found it hard to reconcile this provision with Carroll's stated intention to reconstitute groups of owners as runanga. 'If it was not simply cynical,' the Tribunal observed, 'the choice of such a minimal quorum must reflect a lack of confidence among both judges and parliamentarians about the extent to which Maori would participate in the new system of administration and alienation.'[593] The Hauraki Tribunal found the provision to be 'manipulative', intended to allow minorities to alienate land without the involvement or sometimes the knowledge of most owners.[594] The Tribunal's inter-

587. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 686; Native Land Act 1909, pts 13, 18, 19

588. The Crown's purchase of individual shares in Waipaoa 5C, which had nine owners, is the only example of which we are aware. The Crown had purchased the interests of seven of the nine owners by 1928. See MA/MLP 1 1910/129 (cited in Stevens, 'Waipaoa' (doc A51), app 1, p 6).

589. Alan Ward, *National Overview*, 3 vols (Wellington: GP Publications, 1997), vol 2, p 389 (Tulloch, 'Heruiwi 1–4' (doc A1), p 104)

590. P Spiller, J Finn, and R Boast, *A New Zealand Legal History* (Wellington: Brooker's Ltd, 1995), p 161 (Tulloch, 'Heruiwi 1–4' (doc A1), p 104)

591. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 41

592. Ward, *National Overview*, vol 2, p 390 (Tulloch, 'Heruiwi 1–4' (doc A1), p 105)

593. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 688. The Native Land Court judges were mentioned here because they had been heavily consulted in the framing of the new law.

594. Waitangi Tribunal, *The Hauraki Report*, vol 2, p 897

pretation was informed by the significance of the 1905 Act in its inquiry district. Under that Act, which reintroduced Crown purchase in some districts, the Crown could compulsorily buy the interests of non-selling minorities.[595] This seems to have been a key stepping stone to the low quorum set for meetings of owners in 1909. We will test the applicability of these views to the way the system operated in our inquiry district.

Getting a quorum of Maori owners has always been a problem for institutions set up in the twentieth century, as John Ruru of Te Aitanga a Mahaki told us.[596] But the decision to alienate land permanently was so important that the threshold should have been a high one. In that sense, we can compare the 1909 Act to the standard set by Ballance's legislation back in 1886. The Native Land Administration Act of that year had required that block committees be elected by a majority of owners. Similarly, although it was honoured mostly in the breach, much nineteenth-century legislation had required partitions and alienations to have the assent of the majority. The consequences of setting a much lower standard in 1909 will become clear later in this section.

The 1909 legislation was amended by the Reform Government in 1913. Despite its low quorum requirements, too many meetings of owners were rejecting the Crown's offers to buy their land. As claimant counsel submitted, T W Fisher (head of the Native Department) became increasingly frustrated by this. In 1913, he urged the Government to exempt itself from the process: 'It is further desirable, in the larger blocks, where a number of owners are concerned, and a motion to sell has been defeated by a not fully representational meeting, that provision should exist for the Crown to acquire individual interests.'[597] We are at a loss to understand why the solution to non-representational meetings would be purchasing from individuals.

Nonetheless, the Native Minister, William Herries, agreed with this recommendation. In the Native Land Amendment Act 1913, the Crown's power to buy undivided individual interests was restored. It was not, however, confined to the situations described by Fisher, but rather operated across the board. The Government could still buy from a meeting of owners (which was easiest in the first instance) but, if the meeting rejected its offer, then it could proceed with 'piecemeal acquisition of undivided shares.'[598] According to Ms Tulloch, this strategy was deliberately applied in our inquiry district. In 1921, an official commented about Te Urewera: 'The Natives were keenly averse to selling and it was impossible to purchase by assembled owner meetings, and therefore individual purchase had to be adopted.'[599]

595. Waitangi Tribunal, *The Hauraki Report*, vol 2, pp 853–854
596. John Ruru, brief of evidence, no date (doc I47), p 4
597. TW Fisher, 'Native Land Courts and Maori Land Boards: (Report from the Under-secretary, Native Affairs, on the working of the) for the year ending 31st March, 1913', 18 May 1913, AJHR, 1913, G-9, p 2 (counsel for Ngati Manawa, closing submissions (doc N12), p 47). See also Tulloch, 'Whirinaki' (doc A9), p 98
598. Counsel for Ngati Manawa, closing submissions (doc N12), p 48
599. Memorandum to Native Minister, 23 March 1921, quoted in Tulloch, 'Heruiwi 1–4' (doc A1), p 122. This official was referring to purchases in the UDNR as well. See Alan Ward, *An Unsettled History*, p 157

This was a frank admission of the Crown's willingness to bypass the protection of community authority insofar as this was represented by the meetings of assembled owners. Tulloch called this the Crown's 'divide and buy' tactic.[600]

In the submission of counsel for Ngati Manawa, it was common for Crown offers to be rejected at meetings, because the price was too low or because the owners 'did not want to sell at any price'.[601] The Crown would then proceed to buy individual interests, eventually acquiring enough to justify a partition. Although the community collectively turned down the Crown's offer, 'targeted individuals would of course sell due to personal economic circumstances which in the case of Ngati Manawa in the late 1920s can be assumed to have been somewhat dire'.[602] We will test these submissions in this section.

The Reform Government also changed the composition of Maori Land Boards in 1913. The nominated Maori members were removed, and the board simply became the Native Land Court judge and registrar in any particular district. At the same time, board scrutiny was no longer required for Crown purchases, in cases where the Government decided to bypass the meeting of owners' provision and buy from individuals.[603] Elaborate machinery was created for the Crown to lease Maori land, and (unlike in the 1870s) sublease it to settlers for development. Technically, therefore, leasing to the Crown was a viable option for Maori owners who wanted to retain their ancestral land.[604] We note, however, that the Crown made no offers to lease land in Te Urewera between 1909 and 1930.

Fundamentally, these were the basics of the Crown purchasing system from 1913 to 1930. Private parties still had to buy or lease through meetings of owners and the board, which was supposed to check the adequacy of price or rents, validity of deeds, and the amount of land left to each individual owner. The Crown, on the other hand, could circumvent this system whenever it chose. It could also, as before, establish a monopoly to shut out prospective purchasers or lessees. Under the 1909 Act, the Crown could prohibit private dealings for one year, with the option of extending that for six more months.[605] The Reform Government extended this power in 1913, to allow two-year prohibitions. This meant that the prohibition had to be renewed after two years (extended to three years in 1916), not that the monopoly had to end after two years.[606]

(a) ***The 1909 system in operation – Waipaoa 5:*** By 1909, much of the land in the rim blocks had been sold to the Crown or private buyers. There were few large pieces left to attract

600. Tulloch, 'Heruiwi 1–4' (doc A1), p 122
601. Counsel for Ngati Manawa, closing submissions (doc N12), p 48
602. Counsel for Ngati Manawa, closing submissions (doc N12), p 48
603. Tulloch, 'Whirinaki' (doc A9), p 98
604. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 687
605. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 686
606. Native Land Amendment Act 1913, s 111; Native Land Amendment and Native Land Claims Adjustment Act 1916, s 8

the attention of Government officials. (In case they missed any, the 1913 Act required the Native Land Court to report any land to the Government that it believed was not being used.[607]) The largest remaining concentration of Maori land, outside the East Coast Trust, was Waipaoa 5, which had been vested in the Tairawhiti land board but had still not been leased by 1910.

From 1905 to 1908, land taken compulsorily for leasing under the 1905 Act could not be sold. This was changed, however, in the Native Land Act 1909. The board was still not allowed to sell such land, nor was the Crown allowed to buy it from the board.[608] Nor could the owners get it back.[609] Section 368, however, allowed the Crown to buy it from a meeting of assembled owners.[610] Alternatively, section 346 allowed the assembled owners to pass a resolution empowering the board to sell half of it by public auction.[611] Soon after this law change, the Waipaoa 5 owners wrote to the Native Minister, pointing out that leasing had not occurred and they were not able to get any benefit from their land. Some of the owners, therefore, wanted to sell their interests (10,000 acres). The Wairoa owners, however, did not want to sell. Thus, about 9000 acres would need to be reserved for them.[612]

In response to an approach from this group of owners, the board debated the matter and decided to offer the whole block to the Crown (without reserving any). In compliance with the Act, however, the board could not sell this land to the Government. Rather, the Government had to make an offer and ask the board to call a meeting of owners. The board asked the Native Department to make an offer, and the department agreed. On 25 October, Carroll offered to buy the whole block at Government valuation.[613]

The board convened a meeting of owners on 16 November 1910. The meeting was attended by 55 owners, which was well in excess of the minimum number of five, although still far short of the full number of owners (at least 342).[614] There was some tension between Ngati Kahungunu and Ngati Ruapani at this meeting. It will be remembered that Ngati Ruapani

607. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 687

608. Native Land Act 1909, ss 291 (the board is allowed to sell other land but not this land), 366 (the Crown is allowed to buy other land from the board but not this land).

609. The only provision for returning this land under the 1909 Act was a stipulation that this would happen in 1957, if it was still unleased by then (Native Land Act 1909, ss 286, 290). The Reform Government, however, provided for land taken under the 1905 Act to be revested in its owners by order in council (Native Land Amendment Act 1913, s 96). This amendment was introduced after the sale of Waipaoa 5B to the Crown.

610. Native Land Act 1909, s 368

611. Native Land Act 1909, s 346. This section empowered a meeting of assembled owners to authorise the board to treat this land (which came under part XV of the Act) as if it came under part XIV, under which the board was supposed to divide the land in two – half for leasing, and half for sale by public auction.

612. Berghan, 'Block Research Narratives' (doc A86), pp 718–720

613. Stevens, 'Waipaoa' (doc A51), p 51

614. Berghan, comp, supporting papers to 'Block Research Narratives' (doc A86(r)), pp 6203, 6216–6218. We use the phrase 'at least' because our calculation of the total number of owners is often based on the original title orders, and does not take into account expansion as a result of successions. Usually, successions were in arrears. When Bowler purchased individual interests in Heruiwi 4A2B in the 1920s, which had 124 owners when it was created in 1915, he had to organise 40 successions so that he could purchase interests from live owners.

had already lost all their ancestral land when they were relocated to Waipaoa 5. With the land tied up in the board and no one seeming to want to lease it, they (and some Ngati Kahungunu) were anxious to get a return on it by the only option left them. Arani Kunaiti proposed limiting the sale to 11,000 acres, but he was outvoted at the meeting by 52 votes to three.[615]

The board, in confirming the resolution to sell, noted that this was a 'large majority'.[616] It took no account of the fact that 84 percent of owners had not attended the meeting (as, indeed, it was not required to do). We note, however, that the intention to reserve about 8000 acres of this land was a long-standing one. It had been part of Wi Pere's arrangement with Carroll in 1906. The owners had tried to get farming started on that land while it was in the hands of the board. Then, the 1910 approach to the Crown conceded that the non-sellers wanted to keep about 9000 acres. This was still the case at the meeting of owners, where Kunaiti proposed to retain 8000 acres. But because the sellers dominated this particular meeting (with 16% of owners present), the desire of many Ngati Kahungunu owners to retain a substantial share of their ancestral land was defeated.

Also, the only dissentients whose interests would be looked after were those who had been at the meeting. Thus, the board recommended cutting out sections for Arani Kunaiti and Tangi Whareraupo, who dissented from the sale.[617] Seventy-two names were put into the title for Kunaiti's section (5A). The 1909 Act required those who voted against a resolution to sign a memorial of dissent at the meeting.[618] In 1913, the Reform Government specified what this meant: that any owner who had not dissented in writing within three days of the meeting was 'deemed to have consented'.[619] In 1915, this three-day period was extended to a week.[620] What this most likely meant in practice was that only those who were present at meetings and dissented in writing could get their interests cut out by the Native Land Court. In this way, the Government tried to prevent owners who, for whatever reason, did not attend the meeting from overturning its decision later.

In 1913, the board (which by then consisted of the local Land Court judge and registrar) was given powers of partition. In 1910, however, the Waipaoa 5 sale had to wait until the dissentients' interests were partitioned out by the Court. In the meantime, the stark reality behind the sale had emerged. The sellers were living in what the board described as 'very straitened circumstances' and were desperate for the purchase money.[621] When the Government refused to advance any of it, the president actually did so himself, in the belief

615. Berghan, comp, supporting papers to 'Block Research Narratives' (doc A86(r)), p 6216; Stevens, 'Waipaoa' (doc A51), pp 51–52
616. Stevens, 'Waipaoa' (doc A51), p 52
617. Stevens, 'Waipaoa' (doc A51), pp 52–54
618. Native Land Act 1909, ss 344–345
619. Native Land Amendement Act 1913, s 100(2)
620. Native Land Amendment and Native Land Claims Adjustment Act 1915, s 4
621. Stevens, 'Waipaoa' (doc A51), pp 52–53

that their situation was urgent. In September 1911, the Court awarded 16,785 acres to the Crown and 2,705 acres to the two non-sellers. There was a further delay, however, because the non-sellers appealed this decision (believing their shares entitled them to more land). The sellers made repeated approaches to the Government for their money in 1912, which they were 'very anxious to have', while the appeal process dragged on.[622] Storekeepers, too, wrote to the Crown, because Maori were drawing supplies on credit against this delayed payment. The Government responded that the sellers had received one advance (to help them survive a 'trying winter') but would get no more until the title was sorted out.[623] It is difficult to avoid the conclusion that the owners had to sell this land to eat.

By 1913, the titles had been resolved and the Government was ready to start surveying the land for settlement. At this point, however, a second meeting of owners was required. This was because the original offer had been to buy the land at Government valuation (£1 per acre) but a fresh valuation had dropped to 13s 1d per acre. Knowing that the sellers were desperate, the Government ignored the board's protests and played hardball with the owners: they could either accept the new price or the Government might back out of the purchase. The board called a meeting of owners on 20 May 1913. We have no information on how many owners attended this meeting. The meeting resolved to sell to the Crown at the much lower price (£11,000, down from £16,785), while communicating the sellers' great disappointment to the Government.[624] Although we do not know the proportion of owners attending, this does not appear to us to have been the act of willing sellers.

By means of this new mechanism, the Crown had thus obtained the great bulk of Waipaoa 5.

(b) ***The 1909 system in operation – Heruiwi 4:*** By the early 1910s, the Government's purchase efforts were focused on the large, unsold territory of the Urewera District Native Reserve. In the rim blocks, the great majority of Heruiwi 4 had already been sold, but the Tuhoe section – Heruiwi 4C – had survived the 1890s intact. With Tuhoe under severe pressure and beginning to agree to sales in the Reserve, a group of Heruiwi 4C owners approached the board about selling this land. On 1 September 1911, the board convened a meeting, which resolved to sell to the Crown for 12s 6d an acre.[625] Between December 1911 and February 1913, the owners wrote to the Government at least five times, urging it to buy this land. This initiative appears to have been led by Waaka Paraone of Ruatoki, who said that he represented about 60 owners, and that they had no choice but to sell because of their 'trials'. Also, the land was 'outside the boundary line of Tuhoe' (meaning the UDNR).[626] The offers to sell, therefore, were coming from a group representing about 40 percent of the owners. Ms

622. Stevens, 'Waipaoa' (doc A51), pp 53–55
623. Ibid, pp 54–58
624. Ibid, pp 58–60
625. Berghan, comp, supporting documents to 'Block Research Narratives' (doc A86(m)), p 4363
626. Tulloch, 'Heruiwi 1–4' (doc A1), p 101

Tulloch interpreted their 'trials' to mean the economic deprivation of Tuhoe at that time. Even so, a second meeting of owners in 1913 refused to sell at the Crown's price, which was five shillings an acre. This meeting was attended by 25 out of 152 owners.[627]

The owners held out until 1915, and then they informed the board that they would have to accept the Government's price. A third meeting of owners was called on 8 April 1916. Only 11 owners (7%) were present. They all voted to accept the Crown's offer.[628] Counsel for Wai 36 Tuhoe condemned the 1909 Act for allowing such a low proportion of the owners to make a decision binding on all the rest.[629]

A year after the Crown's purchase of 4C, it attempted to buy 4A2B. Heruiwi 4A had been awarded to Ngati Hineuru. The 1740-acre 4A2B was the only piece left after the Liberals' purchases. The Crown owned all the land around it and wanted to secure this last bit as well. At first, the board called two meetings in February 1917 but could not get a quorum.[630] Finally, in July, the Crown's offer to buy the land at Government valuation was rejected by a quorate meeting (six present out of at least 124), but the meeting made a counter-offer to sell at a special valuation. The original valuation had dated back to 1914, and was increased by a new valuation carried out in 1917. Even so, a fresh meeting of owners in 1919 (five present) still thought the offer too low, and resolved not to sell. In this instance, the Government seems to have rejected its option of buying individual interests, and decided to go for the easier option of simply calling meeting after meeting. A second meeting in August 1919 did not reach the quorum of five owners, and nor did a third meeting in December of that year. Finally, in March 1920, another meeting was called and managed to get a quorum. Again, the Crown's offer of 8s an acre was rejected. The owners made a counter-offer of £3 an acre.[631]

At this point, the Government decided to stop calling meetings and opted for purchasing individual interests. It did increase the price (to 10s). For the next 12 years, W H Bowler carried out the frustrating process of trying to buy interests from scattered owners, and organising Court succession orders so that he could buy from living owners. By 1933, the Crown had shares worth 841 acres (just under half the block). The slow progress partly reflected the fact that this small piece of land was not of overwhelming importance to officials. The purchase stalled in 1933, because the Government had run out of funds to buy more interests. The Crown did not give up, however, and partition its interests. Over the next ten years, the Crown acquired a few more acres (and the majority of shares).[632] The Crown's interests were not finally resolved until the 1960s (see the forthcoming chapter on timber issues).

627. Tulloch, 'Heruiwi 1–4' (doc A1), pp 102–103
628. Tulloch, 'Heruiwi 1–4' (doc A1), p 102
629. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 41
630. Berghan, comp, supporting documents to 'Block Research Narratives' (doc A86(m)), p 4334; Tulloch, 'Heruiwi 1–4' (doc A1), p 105
631. Tulloch, 'Heruiwi 1–4' (doc A1), pp 105–106
632. Tulloch, 'Heruiwi 1–4' (doc A1), pp 106–112

10.7.3

(c) ***The 1909 system in operation – Tahora 2:*** Most of the land in Tahora 2 had been purchased by the Crown in the 1890s, or ended up vested in the East Coast Trust (see ch 12). The Tuhoe and Whakatohea subdivisions remained largely outside the trust.[633] In Tahora 2A, which had been awarded to Te Upokorehe and Tuhoe, most of the land was sold to the Crown in the 1890s. The block that survived was called 2A3, containing 8226 acres.[634] In September 1910, the Crown proposed that 2A3, as well as what was left of the neighbouring Tuhoe blocks, 2AE and 2AD, be vested in the Maori Land Board and then sold to it by the board. A meeting of owners was called for November 1910 to vote on this proposal but could not reach agreement. No resolution was passed. The Crown waited while the land was surveyed (which took years), until competition from a consortium of Auckland businessmen led to a renewed Crown offer in 1914. To protect its monopoly, the Government used its powers to proclaim Tahora 2A3 as under negotiation, making any private offers illegal. Also, the Crown planned to use its new powers under the 1913 Act if the meeting rejected its offer. The Government instructed the Urewera purchase agent, Bowler, to attend the meeting and start collecting signatures. The first 1914 meeting failed because there was no quorum. The board tried again on 20 November, when the meeting rejected the Crown's offer.[635]

As soon as this meeting was over, Bowler began purchasing individual interests. From 1915 to 1921, a fresh prohibition on private dealings was placed on the land each year. Under that monopoly, Bowler slowly bought up individual signatures, ignoring protest from Maori who did not want this land to be sold. The Government's view was that the objectors could simply cut out their individual interests as non-sellers, when it decided that it had purchased enough to warrant a partition. By 1921, the Crown had acquired shares worth 5446 acres, but a decision was made not to subdivide the land but to leave it in limbo until the Crown's interests were defined in the Urewera consolidation scheme (see ch 15). In the meantime, a 'special effort' was made to buy more interests, but without netting more than a few hundred acres. In 1922, the Crown partitioned its share of Tahora 2A3. As Boston and Oliver noted, this process disempowered owners, who could only derive any economic benefit from their unlocated shares by selling them to the Crown under monopoly conditions.[636]

In 1910, the Government had wanted to buy all the remaining Tuhoe interests in Tahora 2. As well as 2A3 (shared with Te Upokorehe), these were 2AD2 (3276 acres) and two surviving sections of 2AE. In November 1910, a meeting of owners resolved to accept the Crown's offer

633. Tuhoe owned 2AD, 2AE and 2G. Of these sections, only 2G2 was put into the East Coast Trust. Tuhoe also shared ownership of 2A with Te Upokorehe. Section 2B was owned by Ngati Ira and Whakatohea. None of this land ended up in the trust. The remnants of the sections awarded to Ngati Kahungunu (2F) and to Te Whanau a Kai, Ngati Rua, Ngati Maru, and Ngati Hine (2C) were vested in the trust. We discuss the fate of land in the trust in chapter 12.

634. Originally, this block was thought to have contained 11,343 acres. This was reduced drastically when the land was surveyed (and the Crown's awards in 2A1 and 2A2 were not reduced.)

635. Boston and Oliver, 'Tahora' (doc A22), pp 172–174

636. Ibid, pp 174–178, 194

of 9s 6d per acre for 2AD2. The number of owners present at the meeting was not recorded, although it must have met the minimum requirement (5 of the 267 owners). The sale was not confirmed by the board, however, because there were doubts about the Government valuation. A new valuation found the land to be worth an extra 3s an acre. The Government approached the board, asking if it needed to call another meeting for a new resolution to sell at this price. In the meantime, however, the owners had had better offers from private buyers. The board, charged with protecting the interests of the owners, offered to confirm the original resolution to sell to the Crown if the Government would match the new prices. The Native Department decided to withdraw from negotiations. It soon emerged, however, that the 1910 meeting had not represented the wishes of all the owners. When the land was sold to Dillicar in 1912 (by a meeting of just 12 owners), many of the Tuhoe owners soon protested that they had not wanted to sell 2AD2. Boston and Oliver concluded that some of the protest was about the urgently needed money, and delays in paying it.[637] Be that as it may, the meeting of owners system was clearly an unsafe way of determining the collective will of the owners.

(d) ***The 1909 system in operation – Whirinaki:*** Around one-third of the Whirinaki block survived in Maori ownership into the 1900s. In 1911, the Crown tried to buy the small Whirinaki 1(2) section (330 acres), the only flat land left in the north-west of Whirinaki, where the owners were living and cultivating. The meeting of owners rejected the Crown's offer. We do not know what proportion of owners attended the meeting, which was held in nearby Murupara. At this time, well before the 1913 amendment, the Crown had no choice but to accept the meeting's verdict. Tulloch noted that the Government made no further attempts to buy this land.[638]

In the same year, the Government made an offer for Whirinaki 1(4B1), a block of 3,283 acres. This block was sandwiched between Crown lands that became state forests, and the Government wanted it for forestry. In this case, the offer arose because of an approach from W H Bird, on behalf of the owners. He told Ngata that the rugged, timbered 4B blocks should be sold to raise capital for farm development elsewhere. At the assembled owners' meeting, however, the Crown's offer was rejected. We do not have the exact number present, but there were only 24 owners in this block (with a total of 132 shares). Those who wanted to sell represented 59 shares. Again, because this was before the 1913 amendment, the Crown could not pursue individual interests. The Government advised the owners to partition the block so that Bird and his people could sell their share. They took up this option. The Court partitioned the block in 1913, awarding 1533 acres (section 1(4B1A)) to those who wanted to sell, and a B block to the non-sellers (1749 acres).[639]

637. Boston and Oliver, 'Tahora' (doc A22), pp 196–205
638. Tulloch, 'Whirinaki' (doc A9), p 57
639. Tulloch, 'Whirinaki' (doc A9), p 57

10.7.3

The Crown tried again in 1914, this time making an offer to the eleven owners of 4B1A. In the meantime, some owners had continued to press the Government because they needed capital for farm development. Five owners (32 out of 62 shares) attended the meeting and accepted the Crown's offer unanimously.[640] At the same time, the Government was also determined to get the non-sellers' section (4B1B). In 1914, it issued a prohibition to prevent any private dealings in the land. Then, it asked the board to call a meeting in 1915 for both the 4B1B block and the 4B2 block (3656 acres). When the 4B2 block was created in 1902, it had 41 owners. Eight were present at the 1915 meeting and voted to reject the Crown's offer. The Government had proposed to pay 3s an acre, and the owners asked for 100s an acre instead. The 4B1B owners also rejected the Crown's offer. This meeting was attended by four owners (out of 14), as well as a trustee for a fifth owner, and a yet-to-be-appointed successor to another. These owners asked for 20 shillings an acre, in response to the Government's offer of four shillings.[641]

Even though there were only relatively small numbers of owners in these blocks, the Government decided not to pursue individual interests. By 1923, some of the resolute non-sellers of 4B1B told the board that they were 'now anxious to sell'.[642] A second meeting of owners was called in October 1923, but it again rejected the Crown's price (which was the same as it had been in 1915). The Government refused to buy at the owners' much higher price, but forestry officials were very interested in this land and encouraged the calling of a third meeting of assembled owners in 1925. This time, all the owners attended the meeting, which was held at Murupara. The Crown raised its offer to 7s 6d, which it had good reason to think the owners would accept, but the meeting again voted against the Crown's price. The meeting informed the Government that it could have their land for £1 an acre.[643]

The forestry service advised that the land was not wanted immediately – it would be many years before the timber could be made profitable. The Crown (unlike the owners) could afford to wait. The Government therefore decided once again to embark on the slow process of buying individual shares, insisting on the rejected price of 7s 6d. At first, the owners stood firm, but by 1927 some individuals had begun to sell. Two years later, in 1929, the Crown had acquired the interests of ten owners (50 of the 70.5 shares). The remaining individual owners were adamant that they would not sell their shares. Instead of partitioning, the Government decided to wait them out while the timber was still unusable. Eventually, the Government resumed individual purchasing in the 1960s.[644]

640. These figures have been rounded. The actual figures are: 31 7/9 shares out of 61 2/3 shares.

641. Tulloch, 'Whirinaki' (doc A9), pp 56, 58–60; Berghan, comp, supporting papers to 'Block Research Narratives' (doc 86(r)), pp 6454–6455

642. Registrar, Waiariki District Maori Land Board, to Under-secretary, Native Department, 2 June 1923 (Tulloch, 'Whirinaki' (doc A9), p 60)

643. Tulloch, 'Whirinaki' (doc A9), pp 60–61

644. Tulloch, 'Whirinaki' (doc A9), pp 61–64

The Crown Gives Up on Some Blocks

In some cases, the Crown did not pursue purchases after its offer failed at a meeting of assembled owners:

- *Matahina D* – having acquired most of Matahina D by survey costs, the Government sought to buy D2 in 1910 at 10 shillings an acre. The meeting at Te Teko was not able to get a quorum of five owners. The Crown did not pursue this purchase further.[1]
- *Tahora 2AD2, 2AE1(2)* – when the Crown failed to obtain these blocks in 1910, it did not stand in the way of private purchasers in 1911 (who obtained both blocks when the Maori land board approved resolutions to sell).[2]
- *Waiohau 1A11, 1A12, 1A13* – meetings of owners at Whakatane in 1916 could not get a quorum of five owners. The Government decided not to pursue these blocks because they were considered worthless for settlement.[3]
- *Whirinaki 1(2), 1(4B2)* – when meetings of owners rejected the Crown's offer for section 1(2) in 1911, and for 1(4B2) in 1915, it did not pursue these blocks further at that time (see above).

1. Cleaver, 'Matahina' (doc A63), pp 86–87
2. Boston and Oliver, 'Tahora 2' (doc A22), pp 198–205, 212–215; 'Notice of Meeting of Owners under Part XVIII of the Native Land Act, 1909', 19 October 1910, *NZ Gazette*, 1910, no 95, p 3853
3. Berghan, comp, supporting documents to 'Block Research Narratives' (doc A86(q)), pp 6090–6093

(e) ***Exceptions to the rule – the Crown buys individual interests without calling a meeting first:*** In two cases, the Crown purchased individual shares without trying a meeting of owners first. It will be recalled that Waipaoa 5 was vested in the Tairawhiti Maori Land Board, and that the Crown had purchased the great bulk of it in 1910–13 (Waipaoa 5B). The dissentients at the meeting had had their interests partitioned as Waipaoa 5A (2624 acres) and 5C (81 acres). Ngati Kahungunu owners, led by Arani Kunaiti, were known to be very opposed to selling this land. It is telling that in such circumstances, the Crown did not bother trying to call meetings of owners. Instead, it proceeded straight to the purchase of individual interests. In 1915, three of the 72 owners of 5A offered to sell their interests to the Crown. They held 59 out of 2489 shares. In response, the Government authorised the purchase of individual shares in 5A (and later in 5C as well). The largest share holders, the Kunaiti whanau and Tangi Whareraupo, held out against the purchase agent, so the Crown had only acquired 575 acres of 5A by 1918.[645]

645. Belgrave, Deason, and Young, 'The Urewera Inquiry District and Ngati Kahungunu' (doc A122), pp 17–19; Berghan, 'Block Research Narratives' (doc A86), pp 723–729

10.7.3

In October 1916, the board called a meeting of 5A owners to consider three lease proposals. The first involved revesting the land in its owners for leasing to a neighbouring settler. This was rejected by 26 owners (in an 'almost unanimous' vote) because they wanted to farm the land themselves. The second proposal was for a lease to one of their own, which was defeated by 366 shares to 200, with 12 owners voting. The second proposal was for a lease to three other owners so that they could farm the land, which was carried by the same margin. The lease, however, seems to have fallen over.[646] This was because the Governor in Council issued a prohibition order for Waipaoa 5A on 16 October 1916.[647] The Government had got wind by telegram of the owners' intention, which would have interfered with its purchase efforts.[648] As a result of the prohibition, the board could not confirm the lease.

Having stymied the leasing proposals, the Crown continued with its attempts to buy this land. Officials noted that it would be 'useless to have meetings of assembled owners called'.[649] They knew that the owners wanted to farm, not sell. The purchase agent confirmed that the non-sellers controlled the majority vote, and a meeting should not be called. Worse was to follow. In order to prevent any competition from leasing, the Crown continued to use its powers to prohibit private alienations for the next few years. We find this an extraordinary move on the part of the Crown in the circumstances. Even though the land had been compulsorily vested in the board for the very purpose of leasing, the board was forbidden from carrying out its task. In 1924, however, the board tried to break the deadlock, proposing to the Crown that it should be allowed to lease the block.[650]

By this time, the Government had acquired almost half of 5A (1277 acres out of 2624) and the majority of 5C (56 ½ acres out of 81). But it was reluctant to partition yet for fear of driving up the price of remaining shares. In 1925 the owners petitioned Parliament, noting that they had a meeting house, four houses, and two urupa on this land, yet it was lying idle because of the purchase agent's activities, and the prohibition on leasing. They asked for the land to be revested in them so that 'the tribe could work it as a communal farm'.[651] The board, on the other hand, wanted to lease to a European: 'If the Te Reinga Natives occupy the land, it is only reasonable to assume that the Te Reinga blackberry will accompany them and their stock.'[652]

646. Belgrave, Deason, and Young, 'The Urewera Inquiry District and Ngati Kahungunu' (doc A122), p 19; Berghan, 'Block Research Narratives' (doc A86), pp 724–727; Berghan, comp, documents in support of 'Block Research Narratives' (doc A86(r)), pp 6168–6169, 6172, 6175

647. 'Prohibiting all Private Alienation of certain Native Land', 16 October 1916, *New Zealand Gazette*, 1916, no 120, p 3301

648. Herries to Nolan, 13 October 1916 (Berghan, comp, supporting papers to 'Block Research Narratives' (doc A86(r)), p 6181)

649. Under-secretary to Goffe, 31 October 1916, quoted in Berghan, 'Block Research Narratives' (doc A86), p 725

650. Belgrave, Deason, and Young, 'The Urewera Inquiry District and Ngati Kahungunu' (doc A122), p 19; Berghan, 'Block Research Narratives' (doc A86), pp 725–729

651. Tahi Rapata and others to Coates, 29 April 1925 (Berghan, 'Block Research Narratives' (doc A86), pp 730–731)

652. Registrar to under-secretary, 30 April 1925 (Berghan, 'Block Research Narratives' (doc A86), p 731)

The board proceeded with a lease to a settler (presumably the Crown's prohibition had expired), and the owners appealed to the Native Minister: 'This is our land, and not the Board's,' they told the Minister.[653] Even with such an appeal before it, however, the Government refused their request to intervene and permitted the lease, which did not need the owners' approval. Then, in 1927, the Crown partitioned part of its share of 5A (613 acres) for a scenic reserve. It remained co-owners with Maori in the new 5A2.[654] The claimants were not able to clarify for us the ultimate fate of 5A2 and 5C, although we know that the Crown had purchased the majority of 5C by then.[655]

The Crown's actions in respect of this block were reprehensible. It is true that the legislation empowered it to act as it did. In 1909, the power to alienate land vested compulsorily in the board under the 1905 Act was introduced. It was confined to a meeting of assembled owners. Then, in 1913, the Crown was given power to buy individual interests in any land, including vested lands.[656] That it was still obstructing the owners' wishes in 1925 – when there was growing official understanding of the importance of assisting Maori owners to farm their lands – suggests a myopic determination to carry through its policy in respect of this block. That policy had never been guided by the interests of the owners. In our view, the Crown clearly abused this power to buy interests in Waipaoa 5A and 5C, in the knowledge that the owners wanted to farm this land, and did not want to sell it. The Crown persisted in the face of their collective opposition, knowing that it was 'useless' to even try getting agreement from a meeting of the owners.

The other block purchased without use of the meetings of owners system was Tahora 2AE3(2). This block of 1012 acres had been awarded to 11 owners in 1896. The decision to purchase individual interests seems to have been one of convenience. Bowler was already buying up shares in Tahora 2A3, so he was given permission to do the same in 2AE3(2) in 1921. Without any collective bargaining power, owners had no choice but to sell (or not) at the Government's price. Also, the individual purchasing was supported by a prohibition against any other alienations, which was renewed as needed. In two months, Bowler obtained $5\frac{3}{5}$ of the 11 shares. Further progress was delayed while successions were decided. By 1922, the Crown had acquired a majority of shares ($6\frac{22}{45}$), totalling 596 acres.[657]

Over the next six years, the purchase agent collected most of the outstanding signatures while the prohibition orders remained in constant effect. In 1928, the last few interests were owned by people who simply could not be found. The prohibition order was renewed from

653. Taohe Robert and others to Coates, 15 July 1925 (Berghan, 'Block Research Narratives' (doc A86), p 732). We note that this name was given variously as Taahi, Taohe, and Tahi.

654. Berghan, 'Block Research Narratives' (doc A86), p 732; Belgrave, Deason, and Young, 'The Urewera Inquiry District and Ngati Kahungunu' (doc A122), p 20

655. Belgrave, Deason, and Young, 'The Urewera Inquiry District and Ngati Kahungunu' (doc A122), p 20; Niania, brief of evidence (doc 138), p 43. Paula Berghan's block narrative ends in 1928 (see Berghan, 'Block Research Narratives' (doc A86), p 732).

656. Native Land Amendment Act 1913, s 109

657. Boston and Oliver, 'Tahora' (doc A22), pp 216–218

1930 to 1933, because the Government was anxious to join this land with neighbouring blocks and get it settled. By 1933, after 12 years of hunting, there were two outstanding non-sellers, and succession orders for two other owners who had died in the interim. The Crown finally gave up in 1934 and partitioned the block, getting all of it except for five acres. (It obtained the final five acres in 1936.[658])

(f) ***The 1909 system in operation – a summary:*** By 1930, the Crown had acquired additional land in Waipaoa 5, Heruiwi 4, Tahora 2, and Whirinaki 1 by means of the meetings of assembled owners system, supplemented by individual purchasing where necessary. The presence of only a minority of owners on the day allowed the sales of Waipaoa 5 and Heruiwi 4C, despite evidence of substantial dissent from the decision among the owners of Waipaoa 5. It cannot be denied that some owners were ready (even desperate) to sell this land. For most, there was no other way to get any return from it. But given the Government's stated intention of returning to the collective decision-making of runanga, the meeting of assembled owners system was far from satisfactory. In only one case, Whirinaki 1(4B1A) were all the owners clearly willing sellers. They wanted to sell this piece of land to raise capital for farming.

The power afforded the Crown in the 1913 Act to buy individual interests – reviving its powers under earlier Acts – was used selectively in those blocks whose owners refused to sell their land. We agree with the Central North Island Tribunal, which found:

> We consider that the negative impacts of purchasing undivided shares were well known to Parliament in 1913, and that Herries' explanation for the resumption of this policy [that private purchasers had too many advantages over the Crown] cannot stand as a justification for it. It was only a few years since Seddon had stated that when the number of Maori people was set alongside the amount of Maori land remaining, it would be 'manifest injustice to take more land from them under the old system. If that system were continued . . . we would have claims for land on behalf of landless Natives'. And in the Legislative Council in 1911, Dr Findlay was critical of those who declared that the solution of the land problem was to individualise native title so that each person could sell their title, ending up landless.[659]

The Crown used this power in the case of Heruiwi 4A2B, Tahora 2A3, and Whirinaki 1(4B1B); .this was its method for overcoming the repeated refusal of the owners to sell their land. We accept the submission of claimant counsel: 'Nothing illustrates more clearly the Crown's willingness to circumvent and undermine community attempts to control the land alienation process.'[660]

658. Boston and Oliver, 'Tahora' (doc A22), pp 218–223
659. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 689
660. Counsel for Ngati Manawa, closing submissions (doc N12), p 48

Other Meetings of Assembled Owners

By our calculation, there were at least 50 meetings of owners called for the rim blocks between 1909 and 1930. Nine meetings were called for Matahina A blocks, three for Waiohau 2, two for Matahina B2, two for Tuararangaia 2B, and one for Tuararangaia 3B2. We are not inquiring into the particular history of these blocks after their award of title, so we have not considered these meetings.

For the remaining blocks, there were seven meetings called for the purpose of voting on sales or leases to private buyers. We have discussed some of them where relevant to Crown offers. All but two of these meetings took place between 1911 and 1916. We will consider them further in section 10.9.

We have shown that the Crown tried to buy Heruiwi 4A2B at seven meetings from 1917 to 1920. There was no quorum at four of these meetings. At two, a tiny minority of owners refused the Crown's offer. We do not know how many people were present at the final, decisive meeting, but it seems clear that if the majority of owners had wanted to accept the Crown's offer, they had had plenty of opportunities to do so. In the case of Tahora 2A3, the Crown tried three meetings from 1910 to 1914. The first meeting could not agree, the second meeting could not get a quorum, and the third meeting rejected the Crown's offer. (Again, we do not know how many owners were present at the decisive meeting.) For Whirinaki 1(4B1B), the Crown knew from the 1911 meeting and the 1913 Land Court partition that it was dealing with the people who had not wanted to sell. At three meetings, held over a decade from 1915 to 1925, the owners' position changed – they were ready to sell, but not at the Government's price. All the owners were present at the final meeting, which rejected the Crown's price for the third time. (By the 1960s, when individual purchasing again resumed in Whirinaki, Henry Bird observed that the owners were still clinging to their last pieces because they had lost almost all their ancestral land.[661])

In all three blocks, the Crown's pursuit of individual interests was at prices rejected by meetings of owners, and it took place over a long period of time.[662] In Tahora 2A3, officials made private competition illegal and purchased shares for eight years, after which they finally sought a partition. But in the cases of Heruiwi 4A2B and Whirinaki 1(4B1B), the Government did not in fact give up and seek to divide its interests from the non-sellers' when it finally ran out of sellers in the 1930s. Instead, there was a long hiatus from the

661. Tulloch, 'Whirinaki' (doc A9), p 73

662. The Crown did increase its price slightly for Heruiwi 4A2B, but this still fell far short of what the owners had said they wanted at their meeting, and on the basis of which they had rejected the Crown's offer.

1940s to the 1950s, after which the Crown resumed purchasing individual interests. In the meantime, nobody could use the land.

The details of the Crown's determined actions to buy these blocks do not make comfortable reading. In the case of Waipaoa 5A and 5C, and of Tahora 2AE3(2), the Crown did not even bother with trying to get agreement from a meeting of owners first. This was clearly a strategy to circumvent the known opposition of Ngati Kahungunu to selling their land in Waipaoa 5. In Tahora 2AE3(2), it was more a matter of convenience. A long process of attrition ensued, before the Crown finally purchased all eleven shares in this block over a 15-year period.

(g) ***The special case of Tuararangaia – Tuhoe gift land to the Crown:*** In 1891, the Native Land Court divided Tuararangaia between Tuhoe (1), Ngati Pukeko (2), and Ngati Hamua and Warahoe (3). The Tuhoe section, Tuararangaia 1, had survived the 1890s intact. In 1907, the Government took a quarter of the block for survey costs. Then, in 1910, the Native Minister applied to the Court for the owners of the remainder to form an incorporation. This step was taken on the recommendation of the Stout–Ngata commission.[663] Erueti Pene appeared for the owners at the hearing and said that they had agreed to incorporating.[664] We note that this was the first incorporation created in the Urewera rim blocks since the provision was enacted in 1894.

A meeting of assembled owners was called to elect a management committee. The committee included some Tuhoe and Ngati Haka Patuheuheu leaders of the day: Erueti Biddle, Miki Te Wakaunua, Te Ranui, Mika Rangitaiki, Akuhata Te Kaha, Natana, and Te Purewa. In 1912, this committee offered about 40 percent of the block (1000 acres) to the Crown as an endowment for Maori colleges, in order to obtain higher education for their people. The other 60 percent was proposed for development as dairy farms, although there was no capital to do so.[665] The 1909 Act allowed the committees of incorporations to sell or lease land, but there was no specific provision for them to make gifts of it.[666] In any event, the Government felt it necessary to call a meeting of assembled owners to confirm the proposed gift. We have no information on how many attended this meeting at Ruatoki in 1912, but we do know that Tuhoe chiefs led the discussion and supported the proposal, hoping for a college to be established at Ohiwa. The resolution passed and was confirmed by the Maori Land Board.[667]

663. Robert Stout and Apirana Ngata, 'Native Lands and Native-Land Tenure: Interim Report of Native Land Commission on Native Lands in the County of Whakatane', 23 March 1908, AJHR, 1908, G-1C, pp 4–5
664. Clayworth, 'Tuararangaia' (doc A3), p 97
665. Clayworth, 'Tuararangaia' (doc A3), pp 98–102
666. Native Land Act 1909, ss 327–337. See also Parts 13, 18, and 19 for other relevant sections.
667. Clayworth, 'Tuararangaia' (doc A3), pp 99–102; Tama Nikora, brief of evidence for third hearing week (doc C31), p 16

What About the Trees and the Money?

The Crown's milling of the timber on the education endowment land was a significant grievance for the claimants.[1] Tama Nikora, in his evidence at our Waiohau hearing in 2004, told us:

> In August 1912 at Tauarau, Ruatoki, the Tuhoe owners resolved to cede 1000 acres of Tuararangaia 1B to the Crown for a college to be established for the children of Tuhoe, Ngati Awa and Te Arawa in the Ohiwa region. The Maori version of the resolution is clear in its stipulation of the purpose of ceding of the land – my translation is to be preferred. The school was never built although the trees on the land were milled by the Crown. In 1971 Tuhoe submitted to the Honourable Duncan McIntyre, Minister of Maori Affairs, while visiting Tuhoe at Mataatua, Ruatahuna, that the land should be returned. The land was eventually returned and is now committed to forestry. The Crown has never accounted to the Tuararangaia 1B owners for its ownership of the land for 55 years in breach of the gifting and the money it pocketed from milling the timber.[2]

In his evidence for the Crown, Brent Parker found that no use of the endowment land was made until the late 1940s, when milling became profitable in conjunction with neighbouring Crown land. In 1951, Tuhoe asked for the land to be returned to them as farms for returned servicemen. The Government replied that the land was unsuitable for farming, and was being milled for the Education Department, which would use the money for Maori schools and colleges. The Forest Service, however, deducted 10 percent from the timber money in payment for its services, and also a sum for appraising the timber. After deductions, only £8212 was paid to the Education Department.[3] The Crown concedes that there is no evidence that it was used for Maori education.[4] The evidence of Parker and the claimants was in agreement that no Maori college was established at Ohiwa. The land was returned to Tuhoe in 1972.

In a forthcoming chapter, we will consider the basis upon which the Crown held this land, and the disposition of the proceeds of sale of the trees.

1. Colin (Pake) Te Pou, brief of evidence, 26 March 2004 (doc C32(a)), p 13
2. Tama Nikora, brief of evidence for third hearing week (doc C31), p 16
3. Brent Parker, 'Report in relation to Tuararangaia Education Endowment', 4 April 2005 (doc M15)
4. Crown counsel, closing submissions (doc N20), topic 39, p 35

In 1914, the management committee offered the rest of the block to the Crown as a donation to the war effort. As we shall see in chapter 14, Tuhoe chiefs were positioning themselves as against Rua Kenana in terms of supporting the war, and allying with the Crown. Numia Kereru was one of two chiefs who proposed this gift to the committee, which voted unanimously to make the offer. In addition to the committee's offer, 39 Tuhoe leaders signed

a letter to the prime minister in support of it. While the Government had felt that it could accept land as an educational endowment, this time it decided that it had no legal power to accept Maori land to help pay for the war.[668] Tuhoe, it was noted, were 'well endowed with land but have no money, in fact [they are] practically penniless.'[669] The Government decided that it would have to buy the land, and have Tuhoe donate the money to the War Fund.[670] In 1915, it provided specifically for such situations in the Native Land Amendment and Native Land Claims Adjustment Act, empowering meetings of owners to donate money from purchases 'for patriotic purposes', and empowering the boards to effect these donations.[671]

A meeting of owners was called at the end of 1914 to discuss the Government's proposal. There were 719 owners in this 1B block. The meeting was attended by 25 of them, with 16 proxies. The Native Land Court judge (and board president) believed that this was a 'well attended' meeting.[672] The owners resolved (by 54 shares to 1) to sell the land to the Crown, and donate the proceeds. The single dissenter was, however, an important one – Te Oti Tutakangahau, whose family supported Rua. The reasons for and against this decision were political. As Judge Browne commented, it was highly unlikely that Tutakangahau would actually take his share of the money if it was kept out for him.[673]

Thus, Tuhoe gifted all that was left of Tuararangaia 1 to the Crown in 1912 and 1914. Peter Clayworth observed that the tribe was cash-poor, and owned this rough land that was not very valuable for farming. They had no permanent kainga on it, using it mainly for hunting. In this situation, Tuhoe offered gifts to the Government in the hope of improving and solidifying their relationship, establishing reciprocity, and getting college-level education for the tribe.[674] At the same time, Clayworth questions whether such a small number out of 719 owners was 'a fair representation of the wishes of the owners'.[675] There was nothing to show that these people, with legal rights acquired under the native land laws, had assented to the gifts. Tama Nikora also took this view, noting that the decision was taken by 5.7 percent of the owners, holding 6.4 percent of the shares.[676] He commented: 'I have struggled to understand the decision to give away this land when Tuhoe was fighting to retain land in the UDNR.'[677]

We accept the point that the Crown, having created legal interests for landowners, did not protect those interests by ensuring the owners assented to the gifts. The meeting of owners

668. Clayworth, 'Tuararangaia' (doc A3), pp 104–105
669. Powhare (working for the Maori Land Board) to Massey, 5 September 1914 (Clayworth, 'Tuararangaia' (doc A3), p 104)
670. Clayworth, 'Tuararangaia' (doc A3), p 105
671. Native Land Amendment and Native Land Claims Adjustment Act 1915, s 5
672. Clayworth, 'Tuararangaia' (doc A3), p 105
673. Clayworth, 'Tuararangaia' (doc A3), pp 105–106
674. Clayworth, 'Tuararangaia' (doc A3), p 107
675. Clayworth, 'Tuararangaia' (doc A3), p 106
676. Tama Nikora, brief of evidence for third hearing week (doc C31), p 17
677. Tama Nikora, brief of evidence for third hearing week (doc C31), p 16

provision, with its quorum set so low, was virtually useless for that purpose. On the other hand, the owners had set up an incorporation. The gifts were the work of its committee, and clearly had support from the wider tribe and some of its leaders. This was, in our view, an example of the tribe, rather than the Crown, using the meetings of owners system for its own purposes, and exercising tino rangatiratanga despite having no legal rights to this land. It is the only example of this that we can point to in the rim blocks for this period.

In 1951, Takarua Tamarau sought the return of this wartime gift for the purpose of settling Tuhoe returned servicemen on it.[678] The Minister of Maori Affairs, EB Corbett, looked into it and discovered that the Education Department was in the process of milling its 1000 acres. Corbett turned down Tuhoe's request, replying:

> The suggestion that the land be used for the settlement of Maori ex-servicemen is not a new one, but the reports available to me indicate that the land is in any case not suitable for farming. Certainly its inaccessibility and general condition make it unlikely to be considered for development at the present time.[679]

This cannot have been the reciprocity anticipated by Tuhoe when they made their gift. By this time, the land was evidently usable for forestry purposes, if not for farming.

(4) *Prices and valuation under a Government monopoly*

In this inquiry, the Crown argued that the question of whether it 'abused its monopoly powers of purchase' is not a significant issue for the rim blocks. The Crown only purchased a 'few blocks' under such powers.[680] Crown counsel accepted in theory that a monopoly could negatively affect prices, but argued that there is not enough evidence to show if its monopoly powers 'had any material impact on the purchase price paid'.[681] It would seem not, given the evidence of strong bargaining by Maori.[682] The claimants, on the other hand, were adamant that the Crown's monopoly powers had been a dominant force in its purchase of their land in the rim blocks. As part of that force, Maori had had little choice but to sell, and no choice but to sell at the Crown's price. There was no independent vetting of prices, no safeguards to ensure that Maori got a fair price, and above all no market to establish a value for the land. The Crown, we were told, kept prices low by excluding private competition; this was in no one's interest but its own.[683]

678. Brent Parker, 'Report of Brent Parker in relation to Tuararangaia 1B Education Endowment', report commissioned by the Crown Law Office, 4 April 2005 (doc M15), p 4; Corbett to Under-secretary, Maori Affairs, 16 April 1951 (Parker, comp, supporting documents to 'Tuararangaia 1B Education Endowment' (doc M15(a)), p 8)

679. Corbett to Takarua Tamarau (draft) 25 May 1951 (Parker, comp, supporting documents to 'Tuararangaia 1B Education Endowment' (doc M15(a)), p 9)

680. Crown counsel, closing submissions (doc N20), topics 8–12, p 6

681. Ibid, pp 6, 75

682. Ibid, p 6

683. Counsel for Ngati Manawa, closing submissions (doc N12), pp 34–37, 41–45; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 71

10.7.3

(a) ***How often did the Crown use its monopoly powers to exclude competition?*** The first issue we need to address is how extensively the Crown used monopoly powers to exclude private competition. In the submission of Crown counsel, it was 'only a few blocks' and therefore of little importance. We test that submission in this section.

In the nineteenth century, Te Urewera was first affected by monopoly powers in two ways. First, the Crown gave itself legislative power to exclude private dealings in any land wanted for gold mining, special settlements, or railways.[684] This was extended in 1874 to include land under Crown lease, so that the Government could protect its ability to turn the lease into a purchase. The Immigration and Public Works Act was quite specific on this point.[685] Secondly, the Government had used the leases themselves to exclude competition. As we noted earlier, the Heruiwi 1–3 and Matahina leases included provisions that the landlords were not allowed to sell the land or make any kind of transaction with anyone other than their tenant, the Crown. This provision meant that the first Crown purchases of relevance in our inquiry – Matahina and Heruiwi 1–3 – were conducted under a monopoly.

We make no further reference to Matahina, but we note that in 1878 the Crown proclaimed Heruiwi under the Government Native Land Purchases Act 1877.[686] As claimant counsel submitted, this Act represented a broadening of the Crown's powers from those conferred by the Immigration and Public Works Acts. Under the new Act, the Government could proclaim a monopoly over any land on which it had paid money or entered negotiations.[687] Heruiwi 1–3 remained under proclamation until the Crown completed its purchase in 1881.[688]

The next significant Crown purchases took place under the Liberals in the 1890s. They revamped the Crown's monopoly powers, repealing the 1877 Act and passing a new Native Land Purchases Act in 1892. Its monopoly powers were virtually identical to those conferred by the 1877 Act, but this was revised again in 1894. In that year, the Liberals restored full Crown pre-emption. Most of the Liberal land purchasing in Te Urewera was conducted under the 1894 Act, including Heruiwi 2–3, Waipaoa, and Whirinaki. Most of the Tahora 2 purchasing was also under this Act, as was the final buying up of interests in Heruiwi 4.

The Native Land Court Act came into force on 23 October 1894. By that time, purchasing had been going on in Tahora 2 for about a year, and in Heruiwi 4 for three years. Claimant counsel put to us that these lands were purchased under a virtual monopoly, even so.[689] As we shall see in section 10.9, restrictions were placed on the alienation of almost all the Tahora 2 blocks, and on Heruiwi 4A, 4B, 4C, and 4F. These restrictions were imposed at the request of Maori leaders to make their land inalienable. Instead, as claimant counsel

684. Immigration and Public Works Act Amendment Act 1871, s 42
685. Immigration and Public Works Act 1874, s 3
686. Tulloch, 'Heruiwi 1–4' (doc A1), p 24
687. Counsel for Ngati Manawa, closing submissions (doc N12), p 42
688. Tulloch, 'Heruiwi 1–4' (doc A1), pp 24, 31, 40
689. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 31–32, 35

submitted, they worked in practice to exclude private purchasers but not the Crown.[690] This was a particularly bitter outcome of the supposed 'protection' mechanisms. Before the nationwide re-imposition of pre-emption, the Crown purchased all the unrestricted parts of Heruiwi 4, and also began buying interests in the restricted 4B and 4F. Its purchase of shares in 4A (also restricted) took place later in the decade, under the 1894 Act.[691]

Purchasing in Tahora 2 began about a year before pre-emption was restored and continued in 1895. The Crown's interests were partitioned in 1896. Ms Rose argued that the Crown prohibited private negotiations for Tahora 2 in late 1893, using its powers under the 1892 Act.[692] The earliest *Gazette* notice that we have been able to locate took effect on 9 February 1894.[693] This means that the Crown had reimposed pre-emption on Tahora 2 eight months before it did so nationally. As claimant counsel noted, almost all the Tahora 2 blocks were supposed to be inalienable, which had the effect of excluding any private competition even before the February 1894 proclamation.[694]

We conclude that the Liberals' nineteenth-century purchases in Te Urewera were all conducted under monopolies of one form or another, except for some 50,000 acres of Heruiwi 4. Their biggest twentieth-century purchase – Waipaoa 5B – also took place under a monopoly. This was because the Crown had given itself exclusive power to buy vested land under the 1909 Act. This was not, however, a total monopoly situation, as Waipaoa 5 could still have been leased to private parties by the board. The Crown, however, took steps to prevent such leasing when it later moved to acquire the non-sellers' land (Waipaoa 5A).

Crown purchases under the 1909 Act were not always carried out in monopoly conditions. From the evidence available to us, the Crown only used its special powers for blocks which it cared enough about to purchase individual interests. In the case of Tahora 2A3, the Crown prohibited private dealings before the meeting of owners, to exclude competition from an Auckland syndicate, and then kept the prohibition on the block while it bought up individual shares.[695] With nearby Tahora 2AE3(2), the Crown purchased individual interests without a meeting first, making private dealings illegal for 15 years while it did so.[696] Similarly, it bought up interests in Waipaoa 5A without a meeting, putting a prohibition on the land to prevent the board from leasing it.[697] Whirinaki 1(4B1B) was also proclaimed while the Crown tried to purchase it at meetings of owners, although the prohibition had

690. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 31–32, 35
691. Tulloch, 'Heruiwi 1–4' (doc A1), pp 71–81, 84–85, 90
692. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 24
693. 'Notice of Entry into Negotiations for Acquisition of Native Lands by Her Majesty', 9 February 1894, *New Zealand Gazette*, 1894, no 12, p 266
694. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 31–32, 35
695. Boston and Oliver, 'Tahora' (doc A22), pp 172–175, 177–178
696. Boston and Oliver, 'Tahora' (doc A22), p 216
697. 'Prohibiting all Private Alienation of certain Native Land', 16 October 1916, *New Zealand Gazette*, 1916, no 120, p 3301. This prohibition was extended or renewed from 1917 to 1924, as per the following volumes of the *New Zealand Gazette*: 1917, no 150, p 3788; 1919, no 125, p 3198; 1920, no 81, p 2686; 1921, no 32, p 788; 1922, no 91, p 3171; 1923, no 83, p 2896; 1924, no 35, p 1289

10.7.3

Government Monopoly Powers over Maori Land

The Government's power to establish a monopoly over Maori land was created by legislation. We summarise the relevant provisions:

1871

Immigration and Public Works Act Amendment Act: In order to acquire land for gold mining, special settlements, or railways, the Governor can put a notice in the *Gazette* that such land is under negotiation. It then becomes unlawful for any private person to deal in that land (s 42).

1874

Immigration and Public Works Act: All private dealings are prohibited in any land leased by the Crown from Maori, 'until the Governor has exercised his option to purchase the lands' or the lease expires. The Governor has to put a notice of all such land in the *Gazette* (s 3).

1877

Government Native Land Purchases Act: Where the Crown has paid any money or opened any negotiations for the purchase of Maori land, it is not lawful for anyone else to have dealings in it. The Governor has to notify such lands in the *Gazette*, as well as any withdrawal from negotiations (ss 2–3). District Land Registrars are to ensure that a caveat is recorded for all such lands, and that no deeds affecting such lands are registered under the Land Transfer Act (ss 4–5). (This Act was in force from 1877 to 1892.)

1892

Native Land Purchases Act 1892: The Governor can put a notice in the *Gazette* that the Crown is in negotiation for any Maori land, making it unlawful for private parties to buy or acquire any kind of right in that land until the notice is withdrawn by the Governor. Notices expire within two years (s 16). Registrars are to put caveats against all such lands, and to refuse to register any deeds affecting them (s 17). When the notice takes effect, the Crown may evict anyone from the land except its owners, or a person who obtained a lawful interest before the land was proclaimed (s 18).

1894

Native Land Court Act: Full Crown pre-emption is restored over Maori land, except where bona fide leases or purchases were underway or in negotiation at the time the Act was passed (ss 117–118).

1909

Native Land Act: The power of Maori owners to sell or lease their land to private parties is restored

(for the first time since 1894) (pts 13, 17, 18). Where any Crown negotiation for Maori land is contemplated or underway, the Governor can issue an Order in Council prohibiting private dealings for up to one year. The prohibition can be extended for six months (s 363). For the first time, as well as making any private transactions void, the legislation prescribes a penalty: offenders can be imprisoned for three months or fined £200 (ss 364–365).

1913

Native Land Amendment Act: Prohibitions can be extended for 12 months (instead of six months). Successive prohibitions should not be longer than two years each (s 111).

1916

Native Land Amendment and Native Land Claims Adjustment Act: Prohibitions can be extended for two years (instead of 12 months). Successive prohibitions should not be longer than three years each (s 8).

1917–30

The power to prohibit private dealings was not removed or further amended between 1917 and 1930.

lapsed by the time the Government started buying individual interests.[698] There was no prohibition, however, over Heruiwi 4A2B or Waipaoa 5C. In the case of Waipaoa 5C, the 81-acre block was thought too small and steep to be of any interest other than as a scenic reserve, so no prohibition was considered necessary.[699]

Thus, all land purchased by the Crown in the rim blocks in the nineteenth century was acquired under a monopoly, with the exception of parts of Heruiwi 4. Some land was also purchased under monopoly conditions in the twentieth century. In the latter case, monopolies were a tool to help buy individual interests, especially after a meeting of owners had rejected the Crown's offer. We do not accept, therefore, the Crown's submission that its monopoly powers only affected a 'few blocks', and were not a significant factor in the rim blocks.[700]

The formal justification for these powers, of course, was not that the Crown could get an advantage against Maori in its negotiations. The usual explanation was that bona fide settlers needed to be protected from speculators, who might otherwise outbid the Crown,

698. Tulloch, 'Whirinaki' (doc A9), pp 59–62
699. Berghan, 'Block Research Narratives' (doc A86), p 726
700. Crown counsel, closing submissions (doc N20), topics 8–12, p 6

lock up the land, and then get most of the profit from cutting it up and re-selling it to genuine farmers.[701] There were other ways of providing for this without giving the Crown sole powers to buy Maori land. One suggestion, often advanced in the nineteenth century, was for Maori land to be sold or leased at public auction.[702] We will return to this proposal below. A second option, used in the legislation from time to time, was to limit the amount of land that any one individual or company could accumulate.[703]

Another question was whether the Crown would have faced much competition if it had not imposed a monopoly in Te Urewera. There was interest from settlers in the Rangitaiki lands in the 1870s and 1880s, and also in lands close to settled areas such as the Waimana and Galatea estates in the late nineteenth and early twentieth centuries. Mostly, however, there was not a lot of private interest in the more remote, rugged, forested areas of Te Urewera, such as Heruiwi 4, Whirinaki, and Tahora 2 in the period before pre-emption was reimposed nationally. As we have seen, the timber resources of parts of the rim blocks could not be profitably exploited until much later in the twentieth century. The real impetus for buying land was a public one, not a private one. The settler parliament was determined to obtain land for 'settlement' under the Liberal and Reform Governments, regardless of how suitable that land actually was for farming by those who had been promised readily accessible land.

Against this point, we note that Maori did not necessarily know whether settlers might be interested in leasing or buying their lands, and were not allowed to find out while prohibited from dealing with private parties. The 'market' could not be tested for much of the period under review. Instead, there were rumours that this consortium or that farmer was interested in paying a much higher price. Prohibitions, especially when extended for year after year after year, contributed to a climate where people felt they had few or no choices. This was so, even if there were not really many settlers wanting to lease their lands. We think, therefore, that the monopoly powers were important but their importance should not be overstated for Te Urewera.

(b) ***Was there robust bargaining?*** The Crown conceded that its monopoly could have reduced prices in theory but not necessarily in practice, so we need to assess whether its powers did in fact make it harder for Maori to get a fair price. According to the Crown, evidence of Maori bargaining, and of the Crown increasing prices as a result, shows that monopolies did not leave Maori powerless. The claimants, on the other hand, argued that the extent to which the Crown privileged itself in negotiations did take away most of the owners' ability to bargain, to make free and willing choices, and to obtain a fair price.

701. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 289–290; vol 2, pp 465, 556–557, 571, 576–580, 600–603, 689, 705
702. Waitangi Tribunal, *Hauraki Report*, vol 2, p 749
703. See, for example, the Native Land Act 1909, Part 12

As we discussed above, Heruiwi 1 was purchased in 1881 as the culmination of a long period in which the land was tied up in a lease, with the Crown refusing to pay the rent. The process by which the Government decided its price, and the degree to which Maori could bargain in that process, is instructive.

The initial price was influenced by a local agent, Gilbert Mair, who gave his view of what the owners wanted. No process was undertaken to value the land, or to consult the owners directly – who, as it turned out, did not want to sell. The department's first thinking was that up to £3000 should be paid, and that rent should not be included. This maximum dropped by £1000 soon after, and then the department began to supplement its offer by including rent money that it owed to the owners anyway. At first, the owners (who still did not want to sell) insisted on £4000. They were later offered £500 more than this by private buyers, but that offer could not be taken up because of the monopoly. One section of owners gave in and was willing to take a lower price of £3000. But the Native Minister approved a price of £2500 (plus rents owed), and then the price was set. To get around continued resistance, individual interests were purchased at the Crown's price.[704] It was later asserted in the Native Land Court: 'The sale was arranged before the whole of the Tribe and the sum offered and named by Captain Mair accepted.'[705] This was simply untrue.

There was not much genuine bargaining involved in any of this. The Crown set its own price, for its own reasons, and prevented any collective bargaining by buying up individual interests. As the 1891 commission observed, more generally: 'The strength which lies in union was taken from them.'[706]

This proved to be the pattern in our inquiry district for the rest of the nineteenth century. The only exception to it was the early purchases in Heruiwi 4. In 1891, Ngati Manawa wanted to sell much of the interior lands, 4G, 4H, and 4I (some 40,000 acres). As their main reason for doing so was to meet survey and other costs, we will discuss the bargaining over this land in section 10.8. Here, we note simply that this sale was very different from that of Heruiwi 1. There was an informal valuation from the Surveyor General, a negotiation between the Government and the owners, and agreement on a compromise price between the two parties.[707]

The purchase of 4D (1892) and 4E (1893) followed a different pattern. Again, 4D was offered for sale by Ngati Manawa leaders, who asked for 2s 6d per acre. As far as we can tell, there was no effort to appraise the worth or utility of this land. The Government simply accepted the offer, but reduced the price to 2s 3d. Owners were not given an opportunity to bargain. Individual signatures were purchased over two months in 1892. This process of private

704. Tulloch, 'Heruiwi 1–4' (doc A1), pp 30–33
705. Native Land Court, Opotiki minute book 2, 13 December 1881, fols 155–156 (Tulloch, 'Heruiwi 1–4' (doc A1), p 34)
706. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', AJHR, 1891, G-1 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 625)
707. Tulloch, 'Heruiwi 1–4' (doc A1), pp 71–73, 88

buying allowed the Government to pay one owner £15 for his share, when it was only worth £2.1.2. This was to induce him to withdraw his application for the rehearing of 4E, which he duly did. When 4E was purchased the following year, the Government paid the same price (2s 3d per acre). We have no information on whether there were any group negotiations at the beginning, but we do know that individual shares were purchased. One owner tried to hold out for a higher price but eventually accepted the Government's money.[708]

The difficult economic circumstances of the individual owners were just as important as any monopoly in facilitating Government acquisition of land at whatever price it set. In 1893, Harehare Atarea offered the Crown 6000 acres of Heruiwi 4B and 4F (some of Ngati Manawa's best land). Flooding and crop damage had made the tribe desperate. The Minister set the price at 3s an acre. We have no information on how this amount was determined. The owners agreed to accept that price for the 6000 acres, but the Government's individual purchasing actually netted 10,000 acres more at the same price, something that had never been negotiated or agreed.[709]

From 1895 to 1899, the Government also bought most of Heruiwi 4A, and the non-sellers' share of Heruiwi 1–3. In the case of Heruiwi 2–3, the Government asked the Surveyor General's opinion on its value. Smith replied that the land was of no great importance, except to get rid of the prospect of Maori neighbours for settlers of Heruiwi 1. He suggested 1s 6d for Heruiwi 2, and 2s or 2s 6d for Heruiwi 3. The Government rounded this to a single offer of 2s per acre for both blocks. The owners had already accepted a £100 advance from a private purchaser, but this transaction had not been completed. The legislation allowed for existing private purchases to be completed within a set time, but the owners agreed to pay back the £100 if the Government paid them £400. Two years' of purchasing individual signatures followed, at the end of which the Government had acquired the whole of the land for £373.8.0. Heruiwi 4A was some of the most valuable land in the block, but we have no information as to how the Government decided its price. We do know that it took three years to buy up individual shares. In that circumstance, collective bargaining over price was simply not possible.[710]

Thus, the later purchases in Heruiwi 4 were marked by some group initiatives at the beginning, but prices were set by the Government and imposed by means of individual purchasing, without allowing Maori collective power to bargain (or even to agree or disagree collectively to a price).

This was also the pattern for other Liberal purchases in Te Urewera in the 1890s. Back in 1879, when the Government was trying to buy land in Tahora 2, TW Porter negotiated with Turanga leaders on the basis of 4s an acre. In the west, however, negotiations with Rakuraku and Hira Te Popo had proceeded on an estimated value of 2s 6d to 3s per acre. In 1893, the

708. Tulloch, 'Heruiwi 1–4' (doc A1), pp 75–76
709. Tulloch, 'Heruiwi 1–4' (doc A1), pp 77–79
710. Tulloch, 'Heruiwi 1–4' (doc A1), pp 81–85, 88

Government negotiated with individuals for 2s an acre.[711] As we discussed above, there were no negotiations with tribal leaders in 1893, or any attempt to reach agreement on a price in advance of individual purchasing. Kathryn Rose observed that this was a deliberate tactic to impose prices that the owners would not accept 'as a body'.[712] Bruce Stirling commented:

> Thus, land that was considered to be worth four shillings or three shillings per acre in 1879 was deemed to be worth just two shillings per acre in 1893. This reflects the reality that prices were based less on value and more on the minimum price the Crown could impose; its ability to push the price down, rather than land's value, was what changed in the intervening years.[713]

At first, as we shall see in more detail in section 10.8, tribal leaders had sought to sell enough land to the Government to clear the survey debts, offering it at five shillings an acre. Percy Smith's opinion was sought, and he advised that the land was mountainous and inaccessible. The value would increase when road access was provided, but until then he thought it only worth two shillings per acre. The owners faced a threat of compulsory sale to pay the survey lien, and so they lowered their offer (for that land only) to three shillings. But this was not a negotiation, and the Crown did not deal further with tribal leaders. Rather, it imposed Smith's price of two shillings an acre through individual purchasing.[714]

The acquisition of individual interests in Whirinaki began in 1895. The Government's price was three shillings an acre. We have no information on how this was calculated. There were no group negotiations for Whirinaki, and no opportunity to bargain over the price. Individuals could accept the Crown's price or not sell their interest – that was the only choice open to them.[715] The same was true of Waipaoa. In that case, Percy Smith was consulted and suggested a price of three shillings an acre. Back in 1890, when Ngati Kahungunu leaders had been arguing over the survey lien, they insisted that their land was worth five shillings per acre. There was no opportunity, however, for them to bargain with the Government over price. Individual interests were purchased from 1898 to 1903, without any group negotiations or any collective agreement to the price.[716]

Things might have improved for owners from 1909 with the introduction of a new process: group decision-making through meetings of assembled owners. At the same time, the Crown had to offer Government valuation as its minimum price. But, as we have already seen, the Government was not always willing to negotiate with groups despite its emphasis on the benefits of the new system. Then, in 1913, it abandoned even the semblance of

711. Bruce Stirling, 'Te Urewera Valuation Issues', report commissioned by the Tuhoe-Waikaremoana Maori Trust Board, February 2005 (doc L17), pp 71–72
712. Rose, 'Te Aitanga a Mahaki and Tahora 2' (doc A77), p 35
713. Stirling, 'Te Urewera Valuation Issues' (doc L17), p 72
714. Boston and Oliver, 'Tahora' (doc A22), pp 124–127
715. Tulloch, 'Whirinaki' (doc A9), pp 38–41, 48–52
716. Stevens, 'Waipaoa' (doc A51), pp 29, 32–38

consultation with the owners collectively. Under amending legislation, it had the power to buy individual interests, either after or instead of a meeting of owners (it still had to pay Government valuation as a minimum price). The results were as follows.

In one instance, the Crown's offer was immediately accepted (Whirinaki 1(4B1A)) by a meeting of owners. This followed an earlier meeting of owners for the parent block, and the partitioning of the interests of those who wanted to sell.[717] The only other example of an immediate acceptance of the Crown's offer was Tahora 2AD2. In that case, however, the price was based on an out of date valuation, and the Crown bowed out when a private buyer offered more.[718] In two cases (Whirinaki 1(2) and 1(4B2)), the Crown accepted the decision of a meeting of owners to reject its offer, without pursuing it further.[719]

In one instance (Heruiwi 4C), the Crown waited for five years until a third meeting of owners finally agreed to its price.[720] In a second case (Waipaoa 5B), the Crown clearly imposed its price on a meeting of owners. It will be recalled that the Crown dropped its price two years after making an agreement, from £16,785 to £11,000, based on a more recent valuation. Technically, the Crown could do this because its offer had been to buy at Government valuation. Both the board and the owners had no choice but to accept this, because the Government threatened to withdraw from the purchase, and the owners were desperate (see above). They had taken on debt and had no choice but to sell. This appears to us prima facie to be both a breach of contract and economic duress.

In three instances, the Crown resorted to individual purchasing when meetings of owners rejected its offers:

- Heruiwi 4A2B: At the first meeting, in 1917, the owners called for a special valuation. The Crown increased its offer as a result of that valuation, but its new price was rejected at meetings in 1919 and 1920. At the final meeting, the Crown offered 8s an acre and the owners refused to sell at less than £3. The Government then purchased individual interests, increasing the price slightly to 10s an acre. Individual owners had to sell (or not) at the Crown's price.[721]
- Tahora 2A3: A meeting of owners rejected the Crown's offer in 1914, so the Government used its power to buy up individual interests at the rejected price.[722]
- Whirinaki 1(4B1B): meetings of owners rejected the Crown's offers in 1915 and 1923. All owners were present at a third meeting in 1925, which rejected an offer of 7s 6d,

717. Tulloch, 'Whirinaki' (doc A9), pp 57–59
718. Boston and Oliver, 'Tahora' (doc A22), pp 198–201
719. Tulloch, 'Whirinaki' (doc A9), pp 57–60
720. Tulloch, 'Heruiwi 1–4' (doc A1), pp 101–105; Berghan, comp, supporting documents to 'Block Research Narratives' (doc A86(m)), p 4363
721. Tulloch, 'Heruiwi 1–4' (doc A1), pp 105–112
722. Boston and Oliver, 'Tahora' (doc A22), pp 174–175

demanding £1 instead. The Crown then purchased individual interests at the rejected price.[723]

In three other cases, Waipaoa 5A and 5C, and Tahora 2AE3(2), there was no opportunity to negotiate a price at all, because the Crown proceeded straight to purchasing individual interests at its own price, without calling a meeting of owners (see above).

We conclude that, in most instances when the Crown proceeded with a purchase under the 1909 system, Maori owners were not able to negotiate a price for their land. Their negotiating positions were either worn down by time and desperation (Waipaoa 5B and Heruiwi 4C), or subverted by individual purchasing (Whirinaki 1(4B1B), Heruiwi 4A2B, Waipaoa 5A, Waipaoa 5C, Tahora 2A3, and Tahora 2AE3(2)).

Overall, from 1881 to 1930, we see little evidence of the 'robust' negotiations claimed by the Crown. In almost all cases, the only choice was to sell at the Crown's price or not at all. In most cases, prices were not negotiated with a group or leaders in advance of a purchase, but were imposed on individuals. This happened, too, in instances where negotiations started at the collective level, but the owners refused to sell (or refused to sell at the Crown's price.) The Crown submitted that in most blocks, purchases took place as a result of agreements reached 'with tribal groupings or Chiefs, with individual signatures also required'. Counsel added: 'Terms, including price, were negotiated not imposed.'[724] In our view, the evidence demonstrates that the opposite was often the case.

In light of the evidence, we think that the hardship experienced by Maori in the absence of capital to develop their lands, and the subversion of tino rangatiratanga by dealing with individuals, were the key drivers of sales at the Crown's prices. Monopoly powers played a part, by preventing Maori from seeking a better price or testing the market value of their lands.

(c) ***Did the Crown itself set fair prices before 1909, despite excluding market competition?***

According to Robert Hayes, the Crown gave itself 'extraordinary' powers that it did not allow private parties, including the power to purchase individual interests and to prohibit any other dealings. In his view, this was explicable by the need for central promotion of settlement and development, but he also commented:

> one may reasonably expect that the Crown and its agents would be scrupulous in the exercise of these powers. The code pertaining to private dealings required that the transaction, at least from 1870, not be contrary to equity and good conscience. In short, the transaction had to be fair, including the consideration paid.[725]

723. Tulloch, 'Whirinaki' (doc A9), pp 58–64

724. Crown counsel, closing submissions (doc N20), topics 8–12, p 68

725. Hayes, 'Evidence on the Native Land Legislation' (doc A125), pp 164–165; Crown counsel, closing submissions (doc N20), topics 8–12, p 65

10.7.3

We turn now to the question of whether, having removed the checks of market competition, the Government itself acted to ensure that its prices were fair, and not simply the lowest that it could impose. In doing so, we note that the owners' asking price was not intrinsically 'right'. It represented what they hoped to get for the land. But there was an inherent conflict of interest if the purchaser had the one-sided power to decide the value of the land and to set the price.[726] This was, said counsel for Ngati Manawa, 'an enviable position for any purchaser of real property to be in (I wish I had been allowed to value my own house before I paid for it)'.[727]

As we have seen, there was little or no opportunity to bargain in many cases in Te Urewera. That being so, the Crown's obligation was to ensure that it did not abuse its power to dictate prices.

In the Crown's submission, we lack sufficient evidence to determine what would have been a fair price for each piece of land, and so the question of whether prices were fair is simply unanswerable. This is a circular argument: there was no 'market' so there was no basis of comparison for the prices paid by the Crown, but it was precisely because the Crown had banished any market that it could set its own prices. Counsel submitted:

> The Crown accepts that in theory a monopoly in the nature of the Crown excluding private competition could negatively affect the price Maori could command for their land where they wanted to sell or had no choice but to sell. However, for this issue to be answered comprehensively, a systematic study would be required of those blocks where the Crown invoked its power to exclude competition and blocks sold privately in the same period (evidence in Heruiwi is that that the Crown paid more than the maximum it had intended to). Even then, care must be taken to ensure that those factors that go towards influencing the sale price (e.g. quality of land, location of block, period of purchase) are comparable, no evidence on the record does this.[728]

In his reply submission, counsel for Ngati Manawa pointed out that it was too late to decry the lack of research after the end of hearings, and that the Tribunal must try to answer the question from the evidence available to it.[729]

The claimants made four points in support of their case. Counsel argued first that we can rely on evidence that Crown monopolies were widely known at the time to drive down prices. This includes, for example, the investigations and reports of the Rees-Carroll Commission in 1891 and of the Stout–Ngata Commission in 1907.[730] The Central North Island Tribunal pointed out that the need to pay Maori a fair price for their land was a major

726. Stirling, 'Te Urewera Valuation Issues' (doc L17), p 32
727. Counsel for Ngati Manawa, closing submissions (doc N12), p 34
728. Crown counsel, closing submissions (doc N20), topics 8–12, p 75
729. Counsel for Ngati Manawa, submissions by way of reply (doc N26), pp 3–4
730. Counsel for Ngati Manawa, closing submissions (doc N12), pp 35–36; counsel for Te Whanau a Kai, closing submissions (doc N5), pp 32–34; counsel for Ngati Manawa, submissions by way of reply (doc N26), pp 3–4

theme in parliamentary debates and politicians' speeches of the time. There were many contemporary criticisms of Government monopolies in that respect.[731] 'We have no right,' Sir Robert Stout told Parliament in 1894, 'to seize their land at a price less than they can get for it in the open market from other people.'[732]

In 1891, James Carroll (of the Native Land Laws Commission) gave a minority report to Parliament, objecting to the reimposition of pre-emption on the whole country. He discussed its operation before 1862, arguing that it enabled the Government to secure Maori land for 'the more favoured subjects of Her Gracious Majesty' at ludicrously low prices.[733] This had also been the case wherever it had been used since: 'Evidence adduced before the Commission proved conclusively that, where the Government interposed with its pre-emptive right, as was the case in the King-country, the Natives could not obtain a fair price for their land.'[734]

In Carroll's view, this was 'simply confiscation'. Maori had 'but one market' and had to sell at the Crown's prices or not at all. The unfairly low prices made it impossible for Maori to accumulate enough capital to develop their remaining lands, which was the whole point of selling land in the first place.[735]

The commission's majority report advocated full pre-emption in terms of purchasing, although it argued that Maori should still be able to lease their lands to settlers through a board. In the commission's opinion, pre-emption was the only way to get out of the mess that decades of private dealings had created, and to ensure justice to both Maori and settlers. Again, speculation was an important theme: the 'public as a whole' should benefit from opening Maori land, and not just a 'small class'. But the commission did not address the issue of monopoly or price – it presumed that the Crown would deal justly with Maori.[736]

As we have seen, the Government did not accept Carroll's minority report on this point, and pre-emption was reintroduced nationally in 1894. Some fifteen years later, the Stout-Ngata Commission commented on the outcome:

> While restricting private alienation, Parliament had reserved the right of the Crown to purchase 'on such terms as might be agreed upon between the Crown and the owners.' This was the fiction. In practice the Crown bought on its own terms; it had no competition to fear; the owners had no standard of comparison in their midst, such as the rents of land under lease or profits from farming might have afforded; they had been reduced by cost of

731. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 435–436; 581; see also Stirling, 'Te Urewera Valuation Issues' (doc L17), p 27

732. Robert Stout, 28 September 1894, NZPD, 1894, vol 86, p 388 (Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 436)

733. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 32–33

734. James Carroll, 'Note by Mr Carroll' (counsel for Te Whanau a Kai, closing submissions (doc N5), p 33)

735. James Carroll, 'Note by Mr Carroll', AJHR, 1891, Session II, G-1, pp xxviii-xxix

736. 'Report of the Commission Appointed to Inquire into the Subject of the Native Land Laws', 23 May 1891, AJHR, 1891, Session II, G-1, pp xix-xxi

> litigation and surveys, by the lack of any other source of revenue, to accept any price at all for their lands. The price paid was a recognition of the aboriginal rights, and a necessary step in the extinction of those rights, but the Government kept steadily in view the welfare of the colony. The price was, in our opinion, below the value. It was the best possible bargain for the State. It was in accordance with the will of Parliament, and it opened up a vast territory to the land-seekers. The Executive, no doubt, conceived it was furthering the interests of general settlement, even if it rated too low the rights of the Maori owners and its responsibility in safeguarding their interests.[737]

While these observations were made about the King Country, they show the accuracy of Carroll's predictions. Claimant counsel suggested that they applied equally in Te Urewera.[738] Mr Stirling pointed to the Commission's general report for 1907, in which it observed that Maori across the North Island had not been willing sellers for the previous half-century. A key component of a system which 'practically compel[s] the Maori to sell at any price' was the Government's monopoly powers.[739]

The Crown accepted that there had been contemporary criticism of its monopoly prices. Counsel noted that there was a school of thought that Maori would only obtain 'full value' for their lands if all dealings were under the direct superintendence of the Crown. Under this way of thinking, the Crown should always ensure a fair outcome for Maori (full value for their lands) and for poorer settlers, who otherwise would be shut out by wealthier capitalists.[740] The main mechanism proposed in practical terms was for Maori land to be sold or leased for the highest price it could get at public auction.[741] Ballance had provided for this in 1886, and the Liberals tried it too in 1893. It was also a dominant idea in the Acts of 1900 and 1905. But the problem for Maori with this way of dealing in lands was always the strings attached: usually, that they give up all control of their land to non-representative boards, and often that their land be dealt with compulsorily in this way. It was the element of compulsion that effectively killed the 1893 Act. As Seddon later noted, compulsion was not actually needed.[742] Purchase of individual interests proved a less obvious but more insidious strategy.

Auctions may have been a fairer way of determining a market value for Maori land, but they were not adopted in our inquiry district (except for the attempt to auction leases of Waipaoa 5). The Crown, on the other hand, pointed out that it did not always go for

737. Robert Stout and Apirana Ngata, 'Native Lands in the Rohe-Potae (King Country) District (an interim report)', 4 July 1907, AJHR, 1907, G-1B, p 4

738. Counsel for Ngati Manawa, closing submissions (doc N12), p 36

739. Robert Stout and Apirana Ngata, 'Native Lands and Native Land Tenure (General Report on Lands Already Dealt With and Covered by Interim Reports)', 11 July 1907 (Stirling, 'Te Urewera Valuation Issues' (doc L17), p 28)

740. Crown counsel, closing submissions (doc N20), Parts 8–12, p 8

741. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 686–687, 711, 713, 726, 749, 784, 843, 857

742. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 585

The Compulsory Element of the 1893 Act

In 1893, Parliament enacted the Native Land Purchase and Acquisition Act, which supplemented (but did not replace) the Native Land Purchases Act 1892. The new Act offered an alternative system to individual purchasing. If the Government wanted to acquire certain land in a proclaimed district (s 4), it could ask a Native Land Purchase Board to report on the character of the land, its suitability for settlement, the desirability of acquiring it, and its value (s 6). Maori were to be represented on the board by their MP and a Maori Commissioner, to be appointed by the Chief Judge from a list of candidates supplied by the Maori members of Parliament (s 3). Having obtained the board's report, the element of compulsion kicked in. The Government could require the owners to choose either to sell the land to the Queen or to have it leased by a land board as if it were Crown land (ss 7–12). If the land was still in customary title, the Governor could direct the Native Land Court to decide titles (s 13). The only limits were that the Governor was not allowed to acquire pa, kainga, or cultivations, and he had to ensure that the owners had sufficient other land for their 'maintenance' (ss 14–15).

If the owners did not want to sell or lease, then two-thirds (or 'so many of them as may be deemed to satisfactorily represent the whole') could petition the board for their land not to come under the Act (s 26). From the wording of section 26, we take it that the Government intended to agree to such petitions, so long as they represented the authentic wishes of the owners. This, however, was never tested because no districts were proclaimed under the Act. Alternatively, a minority of dissentients could get their interests partitioned out from any sale or lease (s 32). If land was withdrawn from the Act, then the owners could sell or lease as they chose – but only if they first tried to do so by public auction (s 26).

Although this Act was never brought into force, it was Premier Seddon's main platform for telling Tuhoe, Ngati Whare, and Ngati Ruapani in 1894 that majorities of owners would be empowered to make deliberate decisions about their land (see ch 9).

the lowest possible price.[743] We accept this point. In the case of some Heruiwi blocks, the Government paid more than the lowest price that had been suggested. Also, under the 1909 system, the Crown sometimes increased its prices – occasionally because Government valuations (which set minimum prices) had gone up in the interim, or because there was simply no prospect of getting a sale through at the original price. In one notable case (Waipaoa 5B), it reduced its price, even though Government valuation was supposed to set a minimum, not a maximum, price.

743. Crown counsel, closing submissions (doc N20), topics 8–12, pp 67, 75

10.7.3

The second point in support of the claimants' case was the change in prices after 1905. Counsel emphasised the evidence of the Crown's historian, Dr Loveridge, that prices almost doubled after Government valuation was introduced as a minimum price in that year. In Loveridge's view, this was evidence that prices had been too low in the decades before 1905, rather than evidence of a sudden rise in values.[744] The Central North Island Tribunal considered it was hard to quibble with such an obvious conclusion – as do we.[745]

An associated issue was the question of how the Crown actually determined its prices before Government valuation became the norm. What mechanisms did it use? As we have discussed above, the Government often relied on the estimates of its local land purchase agents, or – in the 1890s – on an estimate from the Surveyor General. Counsel for Wai 36 Tuhoe pointed to the existence of a fairer mechanism in the Native Land Purchase and Acquisition Act 1893.[746] When this bill was introduced, the Government explained that it would give Maori owners 'every opportunity of seeing that their lands are properly and fairly valued before they are called upon in any way to deal with them'.[747] Carroll supported the new system, as he told Parliament, 'so that it cannot be said that the Government are getting land out of the Natives for little or nothing'.[748]

This 1893 system involved appointing a purchasing board, on which Maori would be represented. Land would be valued by 'three indifferent persons, one to be appointed by the Board, one by the Native owners', and a third to be chosen by both.[749] If the owner and the Board could not agree on the third valuer, one would be appointed by a Supreme Court judge. The value fixed by the majority of these three people (if they were not unanimous) would be binding on the Crown, and also form the standard for ensuring that prices at auction were fair.[750]

The 1893 Act was never used, because its powers of compulsion were not needed. This meant that its system of appointing independent valuers, with owner input, was also never used. The claimants argued that this part of the Act at least would have been much fairer than the system used in Te Urewera in the 1890s.[751]

744. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 11; counsel for Ngati Manawa, closing submissions (doc N12), p 36; Donald Loveridge, cross-examination by counsel for Ngati Manawa and re-examination by Crown counsel, 13 April 2005 (transcript 4.16(a)), pp 289–291, 316–317. See also Donald Loveridge, 'The Development of Crown Policy on the Purchase of Maori Lands, 1865–1910: A Preliminary Survey', 2004 (Wai 1200, doc A77), p 71. The Crown filed the summary for this report (doc L6) in our inquiry, but did not file the report itself. This report was, however, relied on by the parties.

745. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 582

746. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 70–71

747. J McKenzie, 31 August 1893, NZPD, 1893, vol 81, p 514 (Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 84). McKenzie was the Minister of Lands.

748. J Carroll, 31 August 1893, NZPD, 1893, vol 81, p 536 (Edwards, 'The Urewera District Native Reserve Act 1896', vol 1 (doc D7(a)), p 86)

749. Native Land Purchase and Acquisition Act 1893, s 6(1)

750. Native Land Purchase and Acquisition Act 1893, ss 6(1), 7, 17

751. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 70–71; see also Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 70–71

Although we have no evidence for some blocks, the usual practice for the Liberals was to consult Percy Smith, the Surveyor General. He advised on the price to be set for Heruiwi 4G, 4H, and 4I, Heruiwi 2–3, Tahora 2, and Waipaoa. Smith's informal opinion was thus as technical as it got. Bruce Stirling, in his evidence for the claimants, was very critical of this process:

> During his many years of surveying work Smith had varying degrees of familiarity with most districts throughout the North Island. However, his appraisals of value were not based on a current inspection of the land; being more typically based on his memories of the area in question or his assessment of surveyors' reports. More importantly, they were coloured by his own prejudices towards the retention by Maori of their land. Sometimes his recommended rates were adopted, and sometimes they were not, but in any case such estimates certainly could not be equated to a valuation, as that term came to be defined in the late nineteenth century.[752]

Also, Stirling and Boast criticised the process for refusing to take prospective values into account. If the land was wanted for farming, or if there was little prospect of early logging, then valuable timber was simply ignored. This was an important feature in many of the rim blocks, yet 1890s price estimates were set largely without taking the value of timber into account as a commercial resource.[753] We have seen that, in the case of Tahora 2, Smith admitted that the land would be worth more when roads were built. The Crown could maximise its own value by waiting until after purchase to build roads or railways. It was also in a position to simply wait until infrastructure developed around its acquisitions.[754]

For the claimants, the key point was that until 1905, there were no safeguards in the legislation, no independent valuations, and no requirements for such to set a minimum price. There ought to have been 'an independent valuing system which took the special problems relating to Maori freehold land into account'.[755] This is not to suggest that Government valuations, even though they led to a significant price rise, were without flaws.[756] In this chapter, we do not address the question of valuation for the post-1905 period. We leave that to our later discussion of the Urewera District Native Reserve, where it was a primary issue (see ch 15). Here, we agree with the claimants that the 1893 Act showed an awareness of the need for fair, independent valuations, and that – although known – this need was not acted

752. Stirling, 'Te Urewera Valuation Issues' (doc L17), p 71
753. Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 26, 56–61; Richard Boast, 'The Crown and Te Urewera in the 20th Century: A study of Government policy', report commissioned by the Waitangi Tribunal, December 2002 (doc A109), p 9
754. Counsel for Ngati Manawa, closing submissions (doc N12), p 37
755. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 31
756. Counsel for Ngati Manawa, closing submissions (doc N12), pp 36–37; Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 29–53

10.7.3

Purchasing at Government Valuation, 1909–30

In his evidence for the claimants, Bruce Stirling highlighted some disturbing issues about Government valuation in the period from 1905 to 1921. First, the Valuer General uncovered in 1911 what appears to have been a systematic, nationwide undervaluing of Maori land. Secondly, although the Valuer General tried to correct this situation, his own policy of holding down Government values in the face of a price boom (from the First World War to the early 1920s) exacerbated it instead.[1] This would not have been such a problem in the rim blocks, if the Government had used its valuations as a minimum price. Instead, they were almost always taken as the maximum that the Crown would pay. Sometimes, a special valuation was carried out, and the Government occasionally increased its price in the face of opposition at meetings of owners. But, as we have seen, the Crown also had the options of waiting out opposition over a number of years (as in Heruiwi 4C), or purchasing individual interests at prices rejected by meetings of owners. Since the latter option took place over a long period (sometimes decades), this meant that the original valuation was soon out of date, even if it had been fair in the first place. These are all matters of concern for the Crown's purchases of land in Te Urewera rim blocks under the 1909 system, even though Government valuation did at least raise the prices being offered by the Crown.

1. Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 29–53

upon in the 1890s. Thus, no system of independent valuations was in place when there was considerable buying in the rim blocks.

The third point made by the claimants was that it is possible to test some prices in an 'indicative way'.[757] As Bruce Stirling showed in his evidence, we can compare the Crown's prices with each other, to establish at least some indication of what it was prepared to pay for similar (or the same) land in different circumstances or at different times.[758] We note the caution from Professor Murton, that we need to take into account the possibility of the under-valuing of lands used for comparison. At first sight, he argued, Urewera prices were 'not much below those at which the Crown bought much better quality land around Gisborne in the 1890s'.[759] Yet, Turanga lands were also under-valued, as was noted in Crown evidence for that inquiry.[760] We can also compare the Crown's price to offers from private parties, where those are known. Although we lack comprehensive evidence – indeed, such

757. Counsel for Ngati Manawa, closing submissions (doc N12), p 37
758. Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 70–92
759. Murton, 'The Economic and Social Experience of Te Urewera Maori' (doc H12), p 225
760. Murton, 'The Economic and Social Experience of Te Urewera Maori' (doc H12), p 225

evidence might not exist – what there is supports the general picture that nineteenth-century monopoly prices were too low.

Mr Stirling's discussion of the price set for Tahora 2 in the 1890s (2s an acre) pointed to higher prices offered in 1879 (3s and 4s an acre), and the much higher value given the land in the Validation Court in 1900 and 1901. There, it was valued for mortgage purposes at 10 shillings an acre in 1900, and as high as 19 shillings an acre in 1901. (The Crown was still purchasing in Tahora 2A for 2s an acre at this time.[761]) Similarly rugged land at Mangatu was worth about £1 an acre in 1900. Mr Stirling's calculations were based on rentals equating to 5 percent of the value of the land.[762]

After compulsory valuations were introduced in 1905, Tahora 2A3 was valued at between 12s 6d and £1 per acre in 1910, and Tahora 2AD2 was valued at 12s 6d an acre in 1911. A private buyer was willing to pay £1.2.6 for 2AD2 in that year.[763] As we have discussed, Dr Loveridge referred in his evidence to a doubling of prices after Government valuation became a compulsory minimum price in 1905. The value of Tahora 2, however, was from six to ten times what the Crown had paid for it from 1893 to 1901. It is difficult to escape the conclusion that Tahora 2 had been significantly undervalued.

Similar evidence was provided for other blocks. In the case of Waipaoa, for example, the Crown was purchasing interests at 3s an acre in 1903. Government valuation put the price of the unsold half of Waipaoa (Waipaoa 5) at £1 an acre in 1910.[764] This dropped to just over 13s in 1913, but the value of Waipaoa 5A was given as £1 an acre in 1915, and just under that in 1917.[765] Thus, land valued at 3s an acre in 1903 was fairly consistently valued at £1 an acre from 1910 to 1917. The value of Waipaoa 5 had increased almost six times from what the Crown had paid for the rest of the block. The original purchase price was clearly too low. And that is without taking into account that the Crown acquired Lake Waikareiti without any special payment, despite its value as a food resource and cultural treasure to local Maori.[766] As counsel for Nga Rauru o Nga Potiki reminded us, commercial values are not the only ones that matter. Land has value that cannot be expressed in dollar terms. To see it purely from the perspective of the 'market' is to hide 'what a great deal of people regard as intrinsically valuable, important, and creative'.[767]

761. 'Lands Purchased and Leased from Natives in North Island: Presented to both Houses of the General Assembly pursuant to the Provisions of "The Native Land Purchases Act, 1892." Return (in continuation of G-3 of 1900) of Native Lands purchased and leased, or under Negotiation, in the North Island, showing Area, Expenditure, etc, to 31st March, 1901', AJHR, 1901, G-3, p 7

762. Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 71–74

763. Boston and Oliver, 'Tahora' (doc A22), pp 172–174, 198–200

764. Stevens, 'Waipaoa' (doc A51), pp 34, 59

765. Berghan, 'Block Research Narratives' (doc A86), pp 722–724, 727; Stevens, 'Waipaoa' (doc A51), pp 58–60

766. Many claimants spoke of the physical and cultural riches of Lake Waikareiti. See, for example, Rangimarie Pere, brief of evidence, 18 October 2004 (doc H41(a)), pp 11–13

767. Counsel for Nga Rauru o Nga Potiki, submissions by way of reply, 8 July 2005 (doc N33), p 21

10.7.3

In terms of private offers in the nineteenth century, we note that there were none that we know of for the land purchased by the Crown, except in the case of Heruiwi 1. In that instance, a private consortium offered £2000 more than the Crown. As we have seen, private buyers were interested in Waimana, Waiohau, and Kuhawaea. For the less accessible, forested parts of the rim blocks, there does not appear to have been any private interest in the 1890s. That may be, of course, because the land was either restricted from alienation, or under Crown pre-emption – in other words, there was no opportunity for a private market to develop. In other districts, however, there were often private offers (or rumours of them) even after the Crown had imposed a monopoly. This probably reflects the point that forestry was really a twentieth-century opportunity for these lands – its potential seemed distant in the 1890s. There was, however, more private interest in these blocks by the 1910s and 1920s.

The fourth point in support of the claimants' case was that the kind of 'market' that existed for Maori land, and the kind of prices that it could command, was dictated by the native land laws. The level of price was controlled by the kind of title that could be obtained, and what could be done with that title. If Maori land had been commodified differently, so that purchasers had to buy a different kind of title, prices would also have been different.[768] As Professor Boast put it:

> The Crown *created* a particular commodity, that is undivided shares in Maori land, which it then itself bought. Had the property rights of the Urewera people been commodified in some other way, they might have had a very different value, or may not have been as freely alienable; as it was, however, customary tenure was commodified in a manner which made it highly and very readily alienable by individuals to the Crown at low prices, and – in the case of UDNR blocks at least – where the Crown was the only legal buyer in any event.
>
> The question is thus not 'did the Crown pay a fair market price'? The issue is, rather, was it fair and appropriate that the property interests of Tuhoe and the other tribes were commodified in the particular way they were. Was this commodification disadvantageous to them and advantageous to the Crown in terms of setting prices? [Emphasis in original.][769]

This was closely tied to questions of political power (who made the law), and to how Professor Murton measured the 'economic capability' of Maori at this time; the lawmakers empowered individuals, giving them a title that they could do little with save sell – and sell to the Crown at its own price. Then, having individualised title and title negotiations, the Crown blamed individual failings for poverty.[770]

We note first that there was the expensive business of Maori getting a saleable title in the

768. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), pp 7–11
769. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), pp 10–11
770. Counsel for Ngati Manawa, closing submissions (doc N12), pp 83–85; Murton, 'The Economic and Social Experience of Te Urewera Maori' (doc H12), pp 40–86

first place, which made it harder for them to hold out against even low offers. We discuss this in section 10.8. Secondly, the law created a title that could be sold by individuals outside the control of the community of owners. This title was cheaper to buy than if a purchaser had to negotiate a price with a group and its leaders.[771]

In 1907, the Stout–Ngata Commission explained how these two things came together with Maori poverty and Crown monopolies to ensure low prices:

> Theoretically the Crown does not buy unless the owners are willing to sell. But the experience of half a century shows—(1) that in the absence of competition produced by restrictive legislation, and in the face of encumbrances due to litigation and survey costs, circumstances are created which practically compel the Maori to sell at any price; (2) that the individualisation of titles to the extent of ascertaining and defining the share of each individual owner in a tribal block owned by a large number gives to each owner the right of bargaining with the Crown and selling his interest; it gives scope to secret dealing, and renders practically impossible concerted action on the part of a tribe or hapu in the consideration of the fairness or otherwise of the price offered, or in the consideration of the advisability of parting at all with the tribal lands.[772]

Thus, in the commission's view, the monopoly was only one part of the equation. Maori were driven to accept the Crown's low prices by the costs they had incurred in obtaining their titles, and because the law did not let them negotiate as a group. The evidence in our inquiry confirms what was obvious to Commissioners Stout and Ngata a hundred years ago.

Given:

- the many contemporary observations that the Crown's prices were too low,
- the structural factors that facilitated lower prices,
- the jump in prices after Government valuation became compulsory, and
- the indicative evidence that particular prices were too low,

we conclude that the claimants were not paid a fair price for their land in the rim blocks from 1881 to 1903.

10.7.4 Treaty analysis and findings

There can be no doubt, after considering the evidence recited in this section, that the Crown's purchase policies and practices were unfair and coercive. As such, they were in breach of the plain meaning of article 2 of the Treaty, and of its principles. We cannot but echo the findings of the Native Land Laws Commission in 1891, and of the Stout–Ngata

771. Boast, 'The Crown and Te Urewera in the 20th Century' (doc A109), pp 7–11

772. Stout and Ngata, 'Native Lands and Native Land Tenure (General Report . . .)', 11 July 1907 (Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 28–29)

10.7.4

Commission in 1907, that the purchase of tribal lands from individuals was particularly coercive in both principle and practice.

As we saw in section 10.2, the Crown's destruction of the authority of Maori communities was deliberate. It disempowered Maori, who were denied the right to negotiate prices, reserves, or even the decision to sell at all, through their customary leaders and by community consensus. If there is one theme running through the history of the Urewera rim blocks, from 1881 to 1930, it is this practice of dealing with what the 1891 commission called 'helpless' individuals. The deck was stacked against them. The Crown behaved in a predatory manner, exploiting their poverty, their debts, and the fact that almost the only thing they could do with their individual paper interest was to sell it. We saw in many instances that when the tribal community preferred to lease or to make small, strategic sales, the Crown bypassed the community's wishes by picking off individual interests one by one. This was a flagrant breach of the tino rangatiratanga protected and guaranteed by the Treaty. We state without reservation that the system set up by the Crown coerced Maori to sell their lands to it, and at unfairly low prices. This was in breach of the principle of active protection.

The components of the Crown's purchase machine were (individually and collectively) in breach of the Treaty. We note, in particular:

- the Crown's dealing with individuals to bypass and defeat community opposition to sales (seen at its most flagrant in Heruiwi 1–3, Heruiwi 4, Tahora 2, and in response to failed resolutions at meetings of assembled owners);
- the Crown's use of monopoly powers to (i) exclude private competition (including settlers who might have leased the land), (ii) take away Maori choices (save to sell to the Crown), and (iii) keep prices unfairly low;
- the Crown's use of leases to exclude private competition and to acquire a foothold for purchasing, without any genuine intention to lease and sublet the land, and its refusal to pay rent so as to extort a purchase;
- the Crown's payment of unfairly low prices, and its refusal to make reserves for sellers;
- the extremely low quorum requirement for meetings of assembled owners, so as to disenfranchise the majority of owners and obtain their land without consent;
- the 1913 amendment to bypass meetings of assembled owners altogether;
- the Crown's exploitation of Maori poverty, including the expense of surveying land and taking it through the Court, to acquire as many interests as it could (see also section 10.8); and
- the Crown's determination to purchase any and all Maori land, regardless of Maori interests or whether it was really needed for settlement, leading even to the purchase of the Waipaoa lands vested compulsorily in a Maori Land Board for leasing only.

This purchase machine, with its interlocking policies and practices, coerced Maori to part

with their land, in a manner utterly inconsistent with the Treaty of Waitangi. The prejudice suffered by the claimants was serious. They lost almost two-thirds of their land in the rim blocks by means of this system. While it is clear that some of this land would have been sold anyway, under a more fair and Treaty-consistent system, the outcomes ought to have been very different. Maori were poor before they sold to the Crown, and they were still poor afterwards. We will explain the prejudice in more detail below in section 10.10.

In addition, we make specific findings about the Crown's actions in respect of the Waipaoa block. In seeking (and obtaining) the re-partition of Waipaoa 3–10, with the result that it obtained all of the land in which Ngati Ruapani had customary interests, without their clear and considered consent, the Crown breached its Treaty duty actively to protect their lands and interests. In legislating for the compulsory vesting of land, and in so vesting Waipaoa 5 without the consent of its owners, the Crown breached the plain meaning of article 2 of the Treaty, and its duty to consult and obtain the free, willing, and informed consent of Maori to the alienation of their land. In then providing for land acquired compulsorily for leasing (with sale specifically prohibited) to be sold, the Crown breached its duty actively to protect the land and interests of Ngati Ruapani and Ngati Kahungunu. By failing to respect the repeated requests for reservation of some 8000–9000 acres of Waipaoa 5, the Crown denied the known wishes of Ngati Kahungunu owners to retain their land, and breached its Treaty duty actively to protect their lands and interests. In exploiting the poverty and desperation of the Ngati Ruapani and Ngati Kahungunu sellers of Waipaoa 5B, and virtually compelling them to accept a lower price than first offered, the Crown breached its Treaty duty to act with scrupulous fairness.

Then, in prohibiting leasing of land vested compulsorily for that purpose, so as to pursue its purchase of individual interests in Waipaoa 5A, the Crown acted in bad faith towards the Ngati Kahungunu owners, and failed actively to protect their land and interests. Also, the Crown refused to call a meeting of assembled owners, knowing that they preferred to farm their land and not sell it, using instead its power under the 1913 Act to pick off individual interests over a number of years. This was a deliberate subversion of the tino rangatiratanga of the Ngati Kahungunu owners of Waipaoa 5A and 5C.

This is an appalling record, in which the Crown abused its position and power over the owners of Waipaoa for decades, so as to obtain land piecemeal from an unwilling but disempowered Maori community. While some of the methods were atypical, because this land was the only block vested compulsorily in our inquiry district, the broader themes were much the same as for every other piece of land in the rim blocks.

It beggars belief that the Crown was playing an even hand between settlers and Maori, as it should (the Treaty principle of equity). One only has to imagine what the consequences would have been had the Crown aimed such policies and machinery at European land.

10.8 What Were the Costs to Maori of Securing New Titles to their Land in the Native Land Court? Were these Costs Fair and Reasonable?

Summary answer: *The major costs faced by the peoples of Te Urewera in securing new titles to their land were survey costs. In addition they inevitably faced court fees, and costs associated with attending hearings (none of which were held in Te Urewera itself). But the costs of survey were high, and were inescapable, since the law required the production of a survey plan before the court could issue orders for title. The Crown's survey costs regime for land which went through the land court, was based on the premise that Maori would pay the costs – even though the colony itself was the prime beneficiary of the process of defining blocks, creating survey maps, and the clothing of Maori land with titles which facilitated its alienation. Maori were not consulted when the regime was instituted, and despite officially expressed concern over the years about the impact of the costs, the decision that Maori should pay was never revisited. When the law was amended, its focus was largely on refining processes for ensuring that unpaid charges were recovered from Maori owners in land.*

In Te Urewera, 30,968 acres were alienated in order to meet boundary survey charges. The cost to Maori owners was £3918, £2632 of which was met by awards to the Crown amounting to 19,385 acres, while £1286 was paid directly in cash or by deduction from money owed to the owners by the Crown. Converted to land area, the direct payments were equivalent to 11,583 acres.

Many groups had entered court unwillingly, as the result of applications by others, not because they wished to sell, or benefit from sale, yet they still had to meet their share of the costs of boundary surveys. In the absence of any system for charging owners a standard proportion of survey costs, those costs were often inequitable. When the Crown was awarded land in satisfaction of survey costs, a further charge was imposed on the non-sellers, who had to pay part of the costs of surveying the resulting partition. It was a vicious cycle. The system itself was very unfair and in some cases, consumed the majority of the block. In the context of rapid land alienation and the inability of communities to control it, the taking of additional land for survey costs has left a strong sense of injustice among the peoples of Te Urewera.

The Crown conceded that it could have taken further steps to ease the burden of survey costs. It accepted that survey costs were a heavy burden for many Maori communities or groups.

10.8.1 Introduction

The costs of securing new titles to their land in the rim blocks, under the Crown's Native land legislation, was an important issue for Te Urewera claimants. Such costs included court fees, and the associated costs of attending hearings in towns where the court sat. In particular, the claimants were concerned – then and now- about survey costs. From the time when the land court was established, provision was made in the land legislation for the conduct

and authorisation of surveys of land going before the court for title investigation, the provision and approval of survey plans, and the payment of survey costs. In districts like Te Urewera, Maori applications to the court meant the arrival of surveyors and the making of survey plans, for the first time. Boundary surveys of 'parent' blocks were done first, followed by partition surveys as blocks were divided by the court among claimant groups, or the Crown sought to subdivide out the interests it had purchased.

From the time the first Native land legislation was passed, Parliament assumed that Maori owners would pay the costs of survey – either in cash or in land. The land court was empowered to award costs to the surveyor or (if the Crown had made the survey) to the Crown. Generally owners paid these costs in land.

In this section, we address the following sub questions:

- Should Maori have had to pay for the survey of their land?
- What survey costs did the peoples of Te Urewera face? Were survey costs fair and reasonable?
- What court and other fees did they face, and what were the associated costs to them of court hearings?

We then assess the issue of costs in light of the Treaty of Waitangi and make our findings.

10.8.2 Essence of the difference between the parties

The claimants argued that survey costs were often a heavy burden. The Crown imposed a Native Land Court system which required surveyed titles, and Maori had to take their land to the court to achieve security of title.[773] The court could not conduct an investigation of title without a survey of the external boundary. It was a 'fundamental flaw' in the system that the Crown could approve surveys before title was determined, which meant that a debt was applied to all the land within the survey. In a majority of cases, hapu who had not applied for survey or court investigation still had to go to court, and then pay their share of the survey costs.[774] Counsel for the Wai 621 Ngati Kahungunu claimants for instance submitted that in allowing Tahora 2 to be brought before the court, the Crown imposed substantial survey costs and forced a land court title on Ngati Kahungunu without their consent.[775] And counsel for Ngati Ruapani submitted that they were forced into a hearing of the Waipaoa block which they had not wanted, and then had to pay survey costs, though they had taken no part in pre-hearing negotiations between Ngati Kahungunu and the Crown

773. Counsel for Wai 36 Tuhoe, closing submissions, pt B, 31 May 2005 (doc N8(a)), p 69
774. Counsel for Ngati Haka Patuheuheu, closing submissions, 31 May 2005 (doc N7), pp 107–109; counsel for Ngati Manawa, closing submissions (doc N12), pp 32–34
775. Counsel for Wairoa Waikaremoana Maori Trust Board, closing submissions, 30 May 2005 (doc N1), pp 67–68

about surveying. They then lost much of their interest in and around Lake Waikareiti through the taking of lands to pay for survey costs.[776]

The claimants stated, moreover, that the initial title investigation was only the start of survey costs. Subsequently, blocks had to be repeatedly resurveyed, as the court partitioned them among various groups of owners. If the Crown took land as payment for a survey, or took over a survey lien, Maori had to pay the cost of cutting out the area transferred to the Crown.[777] If the Crown bought undivided interests, the block would then be partitioned into Crown and non-sellers' sections and the non-sellers then had to pay a proportionate amount of the partition survey on a pro rata basis.[778] Thus, the system punished non-sellers ('the very ones who wanted to keep their land').[779] The fact that those who did not wish to sell their land (non-sellers) nevertheless had to pay survey costs was a particular grievance.

The effects of the system were also unequal. Some groups had to bear particularly high survey costs. Ngati Haka Patuheuheu stated that they lost over two-thirds of their land to the Crown in Matahina C and C1 to cover survey costs; and Ngati Rangitihi pointed to the glaring impact of such costs in Matahina block D which had been awarded to them, stating that they had forfeited 92 per cent of the block. The Wai 36 Tuhoe claimants submitted that the Crown was awarded 12,304 acres for survey liens in respect of land awarded to Tuhoe in the Tahora block.[780] In the Waipaoa block, counsel for Ngati Ruapani submitted, 5822 acres were taken for survey costs, and the Crown ignored complaints that the survey was inadequate anyway.[781] Ngati Manawa stated that they lost 4775 acres in Whirinaki 1 and 2.[782] The claimants submitted that the Crown's tabulation of survey costs for the rim blocks showed that from 15 to 20 per cent seemed to be standard; this was a 'very high transaction cost'.[783]

The Crown conceded that it could have taken further steps to ease the burden of survey costs. It accepted that survey costs were a heavy burden for many Maori communities or groups, and gave the examples of Matahina C, C1, and Tuararangaia 1 blocks in which such costs 'raise concern'.[784] Counsel further conceded that in the case of these particular blocks, in which the Crown moved to secure orders in its favour to pay survey liens in 1907, '[t]he clearing of these liens . . . was perhaps unfairly abrupt'.[785] In other words, the Crown moved

776. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions, 30 May 2005 (doc N13), pp 28–34
777. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 107
778. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 9,
779. Counsel for Te Whanau a Kai, closing submissions, 30 May 2005 (doc N5), p 7; counsel for Ngati Manawa, closing submissions (doc N12), pp 46–47; counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 107–108
780. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 69
781. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 27
782. Counsel for Ngati Manawa, closing submissions, 2 June 2005 (doc N12), pp 33–34
783. Counsel for Te Whanau a Kai, submissions by way of reply, July 2005 (doc N27), p 8
784. Crown counsel, closing submissions, June 2005 (doc N20), topics 8–12, pp 5, 45
785. Crown counsel, closing submissions (doc N20), topics 8–12, p 5

to secure land for its liens – and did secure it – with little warning. Counsel invited the Tribunal to scrutinize these grants by the court, as well as survey costs initially awarded by the court in respect of Tuararangaia.[786]

The Crown suggested, however, that the greatest contributor to the relatively high cost of surveys was the 'low market value' of much Urewera land. Urewera Maori 'were not fully immersed in the cash economy', and surveyors inflated the costs of surveys because of the economic risk they took in surveying, given that it was not clear when they would be paid.[787] The claimants pointed to low valuations of Maori land, sometimes 'improperly low' when survey costs were being assessed.[788]

There was limited agreement only between the claimants and the Crown on what kind of surveys were necessary in the Te Urewera rim blocks. The claimants argued that expensive theodolite surveys were not necessary, since much Te Urewera land could not justify a high level of definition at a high level of cost. Magnetic (compass) surveys would have been substantially cheaper.[789] The Crown acknowledged that the issue of using compass rather than theodolite surveys as a possible cheaper means of defining title had arisen a number of times in the inquiry (see box). It submitted that where Maori wished to participate in the new economy absolute boundaries were in fact necessary.[790] Undertaking lower quality surveys would not have resulted in any saving long term.[791] But some of the benefits to 'non-sellers' through establishment of their title, such as farming, or gaining finance, might perhaps have been achieved through a simpler (and less expensive) form of title definition.[792]

The claimants and the Crown were not in agreement about who should have paid survey costs. The claimants queried whether Maori should have had to pay such costs at all. Counsel for Te Whanau a Kai argued that the benefits of surveys of Maori land and of alienable titles in fact accrued to purchasers. This was a 'public good'. Given the Crown's view that those who benefit should pay, it followed that 'where the prime beneficiary of a policy or programme is the public, then it is the public who should pay'.[793] If Maori were to be liable for survey costs, a system where the costs were fixed at a percentage of a block – no more than 5 per cent – would have been fairer; the government should have met the balance.[794] Counsel added that for Maori 'these "benefits" were more illusory than real'. Maori owners were not able to gain mortgage finance on the security of Maori land titles; and in

786. Crown counsel, closing submissions (doc N20), topics 8–12, p 47
787. Crown counsel, closing submissions (doc N20), topics 8–12, p 46
788. Counsel for Ngati Rangitihi, closing submissions, 1 June 2005 (doc N17), pp 19, 21; counsel for Te Whanau a Kai, closing submissions, 30 May 2005 (doc N5), pp 2, 11, 34; counsel for Wai 36 Tuhoe, closing submissions, pt A, 31 May 2005 (doc N8), pp 40–41
789. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 72, 116–117
790. Crown counsel, closing submissions (doc N20), topics 8–12, pp 50–51; topics 18–26, p 65
791. Crown counsel, closing submissions (doc N20), topics 8–12, p 5
792. Crown counsel, closing submissions (doc N20), topics 8–12, p 40
793. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), pp 7–8
794. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 7

any case if it really was one of the objectives of the Maori land system – as the Crown said – to give Maori a reliable security in order to facilitate mortgage borrowing, the Crown had 'failed lamentably in that goal'.[795] Counsel for the Wai 36 Tuhoe claimants suggested that there might be 'some justification' for Maori vendors meeting survey costs where Maori applied to the court for title with the '*express* intention' of selling land; Tuhoe, he added, never took land to the court for that purpose.[796]

On the question of survey leading to land alienation, the claimants submitted that survey costs were sometimes a major aspect of alienation to the Crown. Counsel for Te Aitanga a Mahaki stated that such costs 'initiated a cycle of debt that added pressure to sell or cede the land'.[797] Counsel for Ngati Manawa pointed to Peter McBurney's evidence that survey costs were a 'major aspect of alienation of land to the Crown'; while counsel for Tuhoe suggested that survey liens triggered alienation of Tuhoe lands in three blocks, and probably contributed to alienation in several more.[798] Moreover the Crown failed to consider whether communities retained sufficient land for themselves before 'compulsorily' taking lands for survey costs.[799]

On the payment of survey costs, the Crown responded that those to whom benefit accrued should contribute to the cost. The claimants had provided no analysis of 'what benefit arose from survey and where that benefit lay'.[800] Maori who wished to trade in land clearly benefitted from having secure legal title, and they could recover the cost through subsequent transactions. Urewera Maori did exactly that when they negotiated sales or leases. It was 'entirely appropriate' that those who wished to participate in the new economy were 'primarily responsible' for survey costs.[801]

For non-sellers, the Crown admitted, the benefits were 'less obvious'. But it was 'not unreasonable' that those who wanted their rights identified even if not to trade in the new economy, should have contributed to survey costs. They gained the benefit of a secure title, and thus the ability to transact in land in the longer term. It was unlikely, the Crown submitted, that they, or their successors, would have maintained their intention not to sell or lease.[802] In other words, Maori were always going to deal in their land at some point.

The Crown accepted that under its survey regime, land could be sold to satisfy survey costs by the charge-holder, and from 1894 the Crown reserved the right to purchase survey

795. Counsel for Te Whanau a Kai, submissions in reply (doc N27),p 7
796. Counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), p 69
797. Counsel for Te Aitanga a Mahaki, closing submissions, 30 May 2005 (doc N6), p 12
798. Counsel for Ngati Manawa, closing submissions (doc N12), p 32; counsel for Wai 36 Tuhoe, closing submissions, pt B (doc N8(a)), pp 69–70
799. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 109–110
800. Crown counsel, closing submissions (doc N20), topics 8–12, pp 5, 46
801. Crown counsel, closing submissions (doc N20), topics 8–12, pp 5, 40, 46–47
802. Crown counsel, closing submissions (doc N20), topics 8–12, p 40

charges. It submitted that its survey regime was designed to ensure that Maori had their land surveyed, and to provide both them and the surveyors with some protection.[803]

In respect of court costs, the claimants pointed to the great impact of those costs, and of indirect hearing costs as a result of the land court system.[804] No sittings were held within Te Urewera, and claimants were prejudiced by the venues of court sittings, and their expense.[805] They challenged the view that Maori should have been required to pay court costs even though they might be unwilling participants in hearings.[806]

The Crown submitted that court costs were 'not substantial' in relation to the value of the land or the cost of running the Court. It conceded that there 'is some evidence of hardship in meeting food costs'. The Crown submitted that there is 'very little specific evidence' that the location and timing of the hearings caused difficulties for Urewera hapu. The court was 'generally sensitive' to seasonal demands when it came to setting hearing dates, and though locations were sometimes inconvenient for some, the court had to choose locations that were generally acceptable.[807]

10.8.3 Tribunal analysis

(1) *Should Maori have had to pay for the survey of their land?*

In the land court era, the impact of survey costs on Maori was universal, and we first consider whether they should have had to pay those costs at all.

It seems remarkable to us that in a colonial society where, by the early 1860s, such large regions of the North Island remained unsurveyed, decision-makers quickly adopted the position that the costs of surveys Maori had to undertake in order to secure title to their land should in general be borne by Maori. Nor, as the claimants pointed out, was it just the boundary surveys. Where interests in land were sold and the Crown portion later partitioned out, a proportion of the cost of surveying the Crown partition might fall on the remaining Maori owners who had not sold their interests because they wished to keep their land. Where the Crown cut out land as payment for survey costs owing, the cost of that survey also was added to the debt of the Maori owners.

The Crown's explanation in its submissions to us was to apply a 'simple principle . . . whoever accrues benefit should contribute to cost'. This led it to the conclusion that Maori who wished to have secure title to their land so that they could participate in the new economy

803. Crown counsel, closing submissions (doc N20), topics 8–12, p 45
804. Counsel for Ngati Rangitihi, closing submissions (doc N17), p 25
805. Counsel for Wai 36 Tuhoe, closing submissions, pt A (doc N8), p 36; counsel for Ngati Hineuru, closing submissions (doc N18), pp 37–38; counsel for Ngati Manawa, closing submissions (doc N12), pp 28–30
806. Counsel for Tuhoe-Waikaremoana Trust Board (Wai 36), submissions by way of reply, 9 July 2005 (doc N31), p 12
807. Crown counsel, closing submissions (doc N20), topics 8–12, pp 32–33

The Eye that Eats Land

I noho pouri o matau tipuna ki nga mahi a Te Karauna, a Te Kawanatanga a nga kooti a ture, kooti a whenua. I pouri nga tipuna ki nga kai ruri whenua me nga karu kai whenua [the eye that eats land] (theodolites).

Our ancestors remained angry with the Crown, the Government, the law Courts and the Native Land Court. They were angry with the surveyors and their theodolites.

Alec Mahanga Ranui (Ngati Haka Patuheuheu), brief of evidence, 14 March 2004 (doc C14), para 7; and English translation (doc C14(a)), p 13

should indeed have been 'primarily responsible' for survey costs.[808] The view of expert witness Mr Hayes – which claimant counsel challenged as being more appropriate to modern conveyancing practice – was that 'it is appropriate for the land owners to meet survey and other costs in evidencing title so as to be able to transact in their land'.[809] The Crown also considered the position of Maori who did not wish to trade in their land, admitting that the benefits of 'secure legal title' to them were 'less obvious'. Counsel suggested that '[l]ittle practical thought' had been given to how a system of title might distinguish between those intending to enter the new economy, and those who wished to stay outside it – but who might well change their minds later. And counsel concluded that those who wanted their rights identified but not to trade in their land might reasonably have been expected to contribute to survey costs too, since they did get some benefit from a secure title, for instance access to finance or facilitated farming. It was unlikely that owners (or their successsors) would have refrained completely from selling or leasing land.[810]

We agree with the claimants that the Crown's justification of the application of its principle that 'those who benefit should contribute to cost' (to paraphrase), was one-sided. The assumption evidently was that Maori – and only Maori – benefited from securing legal title and from trading in their land. We do not think this is a well-founded assumption.

First, it is dubious whether Maori generally did benefit from the new titles. As we pointed out at the beginning of the chapter (sec 10.2), this Tribunal has adopted the findings of earlier tribunals that the introduced title system was imposed on Maori, that it undermined community management of land and control of alienation, and that the Crown's failure to provide a legal collective title which would give good security to lenders meant that Maori

808. Crown counsel, closing submissions (doc N20), topics 8–12, p 40

809. Robert Hayes, 'Evidence of Robert Hayes on the Native Land Legislation post 1865 and the Operation of the Native Land Court in Hauraki', 17 January 2001 (doc A125), p 118; see also counsel for Ngati Rangitihi, submissions by way of reply, 8 July 2005 (doc N28), p 4

810. Crown counsel, closing submissions (doc N20), topics 8–12, p 40

communities were severely disadvantaged in the new economy. Moreover, as we have indicated, the benefits of new titles to the peoples of Te Urewera, in the overall context of Crown purchase policy and practice in the region, were limited – and were widely seen to be limited. In the majority of the blocks before us, leaders who had wanted to keep tribal lands out of the court found that they had no alternative but to engage when individuals of their own or (more commonly) other iwi filed applications (see 10.5). On those occasions when considered decisions were made by iwi leaders to initiate surveys and court applications, poverty and debt, rather than a wish to seize the benefits of the new economy, were also triggers. For these reasons, the Crown's argument that it would have been difficult for a title determination system to separate out those who wanted titles from those who did not, misses the point. The system itself produced the dilemma. It facilitated the entry into the court of those who – for a range of reasons – sought title. It did not provide for community determination of titles or even for community decision-making such that all those with rights would have been involved in the decision to go to court. It did not provide for legal community titles which would have allowed owners to make collective decisions as to the sale or lease of some lands, and the development (through borrowing) of some or all of those it wished to keep. In such circumstances Maori owners generally might have been better persuaded of the merits of their contributing to survey costs. We add that the Crown's stated expectation that Maori were always going to sell or lease their land at some point suggested the inexorability of its Native land system.

Secondly, in its consideration of benefit from surveys, the Crown did not consider the national benefit, despite the fact that the Maori contribution to the public good through their payment of survey costs was acknowledged at the time. The public good, moreover, was generally understood in this period to be synonymous with Pakeha settlement. Consideration of payment of survey costs should be set in the context of New Zealand's development as a colonial society whose governments (central and provincial) were in the process of providing a range of infrastructure for economic development. To saddle its indigenous people – particularly those who had scarcely entered the market economy – with the cost of surveying large tracts of North Island land was inequitable. All the more so when, as governments constantly stressed, this land was in the main intended for settlers. This was particularly the case because such costs became an issue in the context of the Crown's decision in the early 1860s to distance itself from the purchase of Maori lands whose ownership had not been determined by any kind of judicial process. The dangers of such buying became evident in the Waitara purchase of 1859–60, which led to war. Clearly it was in the national interest that the Crown provide a better system of purchase, preceded by some form of title determination. Yet in the course of this basic reform of purchase processes, responsibility for surveys shifted, as by a sidewind, onto Maori. Previously, the Crown had paid for the survey of land (both purchases and reserves) itself.

10.8.3

(a) ***The origins of the Crown's decision that Maori should pay for survey costs:*** The original decision that Maori should pay for surveys of their land in the land court era was taken in 1862 when legislation providing for land courts to determine title was introduced. We make two points about this decision. First, there is little evidence that responsibility for such costs, a matter of great concern for Maori, was much discussed at all at that time. Secondly, though the cost of survey of Maori land was raised, and on occasion was debated in the years that followed, the debate focussed largely on such issues as whether the level of cost was fair, and how it could be reduced. From time to time, the question of *who* should pay was raised. But it did not engage the attention of parliament.

We have no evidence in the published record of discussions that preceded what seem to have been the crucial first decisions on the charging of survey costs. More than one bill was prepared in 1862 when a system for Maori title determination and land transaction was mooted. The second of these, prepared by F D Bell, Native Minister in the Domett Government, which came to power in August 1862, provided for courts presided over by a magistrate, and composed 'wholly or partly' of Maori, to ascertain titles and grant certificates of title. Where lands were not to be reserved for the Maori owners, then after they had been surveyed and the boundaries marked, a certificate of title could be awarded to the 'tribe community or individuals' entitled to it. Such surveys, Loveridge notes, could be paid for with public funds.[811] Maps and surveys requested by the Maori owners 'of any native lands' were to be charged to a native purposes fund. The Government would pay for survey costs.

But in the Bill that was enacted, a change had been made to this provision. Survey costs were to be repaid by Maori owners (see box). As Bell explained in his Minute of November 1862, which set out the main provisions of the Bill, clause 28 enabled the Governor to 'advance money for Native surveys'. Once a tribe had applied to the court, and its title had been investigated, the court would 'cause the land to be carefully surveyed and marked off on the ground, and a proper plan of it made' before reaching a decision. And where an entire tribe was subsequently named as owners in a certificate of title, they might propose a plan for the sale, lease or other dealings in their land, and raising money on the security of their land for various purposes, including 'paying for their surveys.'[812]

There is no reference in the parliamentary debates to survey costs, but Loveridge records that the Bill was considered in committee between 1 and 5 September 1862 and it was 'very substantially altered' during this period – though exact details 'are in short supply'.[813]

811. Donald M Loveridge, 'Précis of "The Origins of the Native Lands Acts and Native Land Court in New Zealand"', January 2005 (doc I5), pp 23- 24

812. Bell's minute on the Native Lands Bill, 5 November 1862 in Donald Loveridge, 'Evidence of Donald Loveridge concerning the origins of the Native Land Acts and Native Land Court in New Zealand', 3 November 2000 (doc A124), Appendix 14, pp 330–331

813. Donald Loveridge, 'Evidence of Donald Loveridge concerning the origins of the Native Land Acts and Native Land Court in New Zealand' (doc A124), p 172

The Origin of the Idea that Maori, not the Government, Should Pay Survey Costs

Clause 15 of Bell's Native Lands Bill 1862 stated:

> The Governor may, at the request of the native proprietors, cause maps and surveys to be made of any native lands, and may defray the costs thereof out of, and charge the same against any fund specially appropriated to native purposes.[1]

Section 28 of the Native Lands Act 1862 (reserved for Her Majesty's pleasure, 15 September 1862) stated:

> The Governor may at the request of the Native Proprietors cause Maps and Surveys to be made of any Native lands and may defray the costs thereof out of and charge the same against any Fund specially appropriated to Native Purposes *such cost to be repaid by the Native proprietors in such manner as the Governor may direct*. [Emphasis added.][2]

1. Auckland *Southern Cross*, 2 September 1862, transcribed by Donald Loveridge (doc A124), app 12, p 316
2. Donald Loveridge, evidence concerning origins of Native Land Acts and Native Land Court in New Zealand, (doc A124), app 13, p 323

Settler parliamentarians, as Loveridge has argued, were preoccupied in this period with other issues which were of concern to them: whether Native title should be recognised; how Maori customary rights should be converted into Crown titles; whether Maori themselves should be empowered to define their own titles (through courts); whether Maori should be free to dispose of their own lands (without the restrictions of Crown pre-emption), to name but a few. Beside such fraught issues, survey costs were evidently rather less pressing.[814]

By the time the Native Lands Act 1865 was passed the principle that Maori would pay survey costs was firmly established. There is no mention of survey costs in the parliamentary debate of the legislation.

(b) ***Recognition of the costs of survey to Maori:*** Despite the fact that the question of Maori payment for surveys seemed to have been settled by Parliament, responsibility for those costs was subsequently discussed by officials. Mr Hayes drew our attention to the fact that the Inspector of Surveys, Theophilus Heale, had considerable sympathy for the 'undue bur-

814. Donald Loveridge, 'Evidence of Donald Loveridge concerning the origins of the Native Land Acts and Native Land Court in New Zealand' (doc A124), pp 166, 173, 188

Some Survey Terms Used in this Chapter

Triangulation: a technique used in surveying to determine distances using the properties of a triangle.

Historically, a baseline was measured using a surveyor's chain on areas of relatively even ground. A triangle could then be formed by establishing a survey station at each end of the baseline, with a third station established at a distant point to one side of the line. These three stations are referred to as triangulation or trigonometric stations (commonly called trig stations).

Using a suitable theodolite (see description below) set up at each station in turn, the three angles of the triangle could be determined to a known accuracy. Having the length of one side and the internal angles allows the lengths of the other two sides to be calculated using simple trigonometry. The newly calculated sides could then be used as the base of further triangles and so on until a local area or a whole region was covered by triangulation.

This process allowed all surveys in the area to be oriented in the same terms and enabled them to be connected to one another to prevent newly created property boundaries from overlapping.

den of survey costs on Maori'.[815] In his 1867 report to J C Richmond on 'Surveys under the Native Lands Act', Heale's main topic was how to achieve systematic survey of North Island lands. He pointed out that surveys had been poorly conducted since the establishment of the colony; they had been made by compass meridian and had not been triangulated; there were gross discrepancies in those that had been done, and there were 'hundreds' of detached maps and no record maps on which they could be delineated.[816]

To Heale, the operation of the Native land legislation opened new opportunities to rescue the situation by establishing a complete system of triangulation.

Heale saw such a system beginning in Auckland province, but capable of being extended to cover the whole island. We note in particular what he had to say about survey costs. He thought it not his job to say how the cost of surveying land north of Auckland should be defrayed; but he did state that the work was 'one of a true National character' (see box on page 688).[817]

815. Robert Hayes, 'Evidence of Robert Hayes on the Native Land Legislation post 1865 and the Operation of the Native Land Court in Hauraki', 17 January 2001 (doc A125), p 101

816. AJHR, 1867, A-10B (Robert Hayes, 'Evidence of Robert Hayes on the Native Land Legislation post 1865 and the Operation of the Native Land Court in Hauraki', 17 January 2001 (doc A125), p 101). A record map is a reference composite map kept in the main surveying office that acted as an index.

817. Theoph. Heale, 'Report by Mr Heale on the Subject of Surveys under the Native Lands Act', 2 August 1867, AJHR, 1867, A-10B, pp 4–5

Theodolite: an instrument used for measuring horizontal and vertical angles. It comprises a small mounted telescope set on a tripod, which is rotatable in both horizontal and vertical directions. Horizontal angles were usually converted to bearings (directions measured 360 degrees clockwise from 'true' north) by orienting the theodolite on existing survey lines or using sun or star shots. A theodolite can be used on hilly ground – but does need to be leveled to the horizontal plane by means of foot-screws attached to its base to provide bearing (or angles).

The main difference between a theodolite survey and a magnetic survey is that theodolite surveys use 'true north' as an origin, while magnetic surveys use 'magnetic north', whose direction moves over time as the magnetic pole moves.

Magnetic surveys: collected angular information by the use of a compass. A compass or a 'compass theodolite' (a theodolite with a compass built into its frame) was used to orientate the first observation to magnetic north. Subsequent bearings were determined by either the compass or the compass circle in the theodolite, or by observing lines with a theodolite orientated in terms of the first ('origin') bearing.

Heale raised the question of what proportion was 'in justice chargeable to the present land claimants' (Maori). He was concerned about the costs of altering 'the tenure of two-thirds of the country' – a desirable object – and about placing 'undue [financial] pressure on the Native Land Claimants' in the course of such an important project.[818] In 1871 he repeated his belief 'that the result of relieving the Native landowners from the task of paying for their surveys, would soon be greatly to extend the operation of the Native Land Court, and at no distant date to put an end to Maori tenure, with its interminable disputes and excitement [as he put it]'.[819]

Heale thus clearly flagged the issue of who should pay for surveys, in light of the fact that surveying great tracts of North Island land was a major undertaking from which the colony would benefit. And there was some recognition in the period that Maori, by paying for surveys, did contribute to the public good. Chief Judge Fenton himself commented in August 1871 on the fact that Maori 'now indirectly contribute such large sums to the public surveys'.[820] Haultain, in his 1871 report on the working of the Native Land Acts, pushed

818. Theoph. Heale, 'Report by Mr Heale on the Subject of Surveys under the Native Lands Act', 2 August 1867, AJHR, 1867, A-10B,p 5
819. Heale to Chief Judge, 7 March 1871, AJHR, 1871, A-2A, p 20
820. Judge Fenton to McLean, 28 August 1871, AJHR, 1871, A-2A, p 11

10.8.3

Heale, Inspector of Surveys, on the Cost of Surveys of Northern Lands

whether this work is looked upon as an effort to set the Geography and Topography of the whole country on a sound basis, or whether it is considered specially as a means of forwarding the operation of the Native Lands Court, it is one of a truly National character. In the former point of view it will ultimately effect [give rise to] the value of every estate in the country, and lay the foundation for great future facilities in defining properties, planning public works, forming districts for political and municipal purposes, and for carrying out the far-seeing operations with a view to the culture, which characterize the Government of a civilised people.

'Report by Mr Heale on the Subject of Surveys under the Native Lands Act',
2 August 1867, AJHR, 1867, A-10B, p 5

strongly for the government to take complete responsibility for surveys, stating that the additional expenses,

> if not fully met by the payments from the Natives, would be a charge against the Provinces, which ought not to object to pay for the extension of a department which has, within the last five years, cost little over £10,000, and has put into their possession maps of survey for more than two and a half million acres of land, the cost of which has been paid for entirely by the Natives, and the value of which is estimated, by Mr Heale, at nearly £100,000.[821]

In other words, Maori had made a substantial financial contribution to the production of public survey maps – which the provinces, which benefited from that contribution, should acknowledge.

Some years later, George Preece, the Resident Magistrate at Napier, revived the question of who should be responsible for survey costs in two successive reports to the Native Affairs department (published in 1882 and 1883) on Maori affairs in his district (which included Wairoa). Preece evidently felt strongly about the need to find a solution to the difficulties both Maori and settlers faced in land transactions, particularly the costs involved. He urged that the government should adopt a new system for the alienation of Maori land, undertaking its survey, sale and leasing, and acting as the agent for the owners. But he went further, and suggested that the Government should also foot the bill: 'the lowest possible commission should be charged by the Government to the Natives, say 5 per cent. on the price realized by the land, to cover survey, commission and all charges.'[822]

821. Haultain to McLean, 18 July 1871, AJHR, 1871, A-2A, p 6
822. G A Preece to Under-secretary, Native Department, 2 July 1883, AJHR, 1883, G-1A, p 9

Mr William S Moorhouse, Ashley Electorate, Speaking in 1880

The whole of the expense of the surveys necessary to adjudication by the Native Land Court I would advise the Legislature to undertake free of any charge to the Natives. I would further recommend a remission of all Native Land Court and Crown-grant fees. The acceptance of this recommendation, so far as may be gathered approximately from various indications, would increase the direct annual expense of the Native administration, inclusive of surveys, by about £20,000 per annum.

W S Moorhouse, 28 July 1880, NZPD, 1880, vol 36, p 565

This would assist settlers, who faced great difficulties buying land held under memorials of ownership, and getting good title; and it would reassure Maori that they were getting 'the highest marketable value of their lands, and that the proceeds were not being swallowed up by expenses'.[823] Even if the government suffered a loss, 'the country would gain by the speedy settlement of lands now unoccupied by Natives'.[824] In other words, Preece too was thinking of the public good. In his view, the public good was not served by what he implied was considerable Maori mistrust of a system which did not deliver to them a good price for their lands.

Despite the clear flagging of the issue of who should pay survey costs by officials such as Heale and Preece, however, this never became a major issue for political debate. It surfaced only occasionally – as as in the speech of William Moorhouse, a Canterbury member of the House of Representatives, who urged that the government should carry the whole cost of surveys of Maori land (see box). But it did not lead to serious debate.

The matter was not revisited when the Government began to borrow large sums for immigration, public works and development (including Maori land purchase) from 1870. In this context we might have expected survey costs to be shouldered wholly or largely by the Crown. They were costs that would not have loomed large in government budgets- though to Maori owners they were substantial –and payment up front generally quite beyond their means. This was recognised at the time: the Chief Judge himself referred in 1871 to 'the frightful expenses of the present system of surveying'[825]; and in the debate on the Native Land Bill in 1873 Dr Pollen (the Colonial Secretary) referred to the expense associated with the land court that was 'most oppressive to the Natives . . . the mode of survey'.[826] The reduction of survey costs was thought important enough at that time to be mentioned specifi-

823. G A Preece to Under-secretary, Native Department, 2 July 1883, AJHR, 1883, G-1A, p 9
824. G A Preece to Under-secretary, Native Department, 2 July 1883, AJHR, 1883, G-1A, p 9
825. Judge Fenton to McLean, 28 August 1871, AJHR, 1871, A-2A, p 11
826. Daniel Pollen, 25 September 1873, NZPD, 1873, vol 15, p 1366

cally in the preamble to the 1873 Act: 'Whereas it is highly desirable to establish a system by which the Natives shall be enabled at a less cost to have their surplus land surveyed, their titles thereto ascertained and recorded, and the transfer and dealings relating thereto facilitated.'[827]

But attempts to tackle the problem by having the government take over (though not pay for) all surveying, and removing private surveyors from the field, did not succeed. It was generally understood that private surveyors were expensive because their uncertainty as to when they would be paid was reflected in their costs; this itself pointed to the fact that Maori could not pay them.[828] But the urgings of Chief Surveyor Heale that costs could be lowered quite dramatically (by more than half) if the government took over complete responsibility for surveys (though not for all their costs) – as well as facilitating proper triangulated surveys throughout the island – led to only partial reform.[829] The 1873 Act provided that where Maori had approached the Governor to seek a survey, it would be carried out under the control of the Inspector of Surveys; and the Inspector also had to authorise every other survey undertaken. Thus, the Inspector of Surveys gained more control over surveying – but private surveyors continued to operate, in Te Urewera as elsewhere.[830] In 1873, some parliamentarians opposed their exclusion because they feared government monopoly; others argued that Maori might resent having their access to private surveyors removed. Only between 1880 and 1886 did surveys required by the court have to be made by surveyors employed by the Surveyor-General.[831] The Premier, Seddon, was still arguing for the abolition of private surveys in 1894.[832]

We turn now to consider the Crown's survey regime.

(c) ***The nature of the Crown's survey regime:*** The Crown, in its submissions to us, emphasised the nature of the survey regime it provided for Maori land; the Crown took 'full control of regulating surveys' and survey charges; it also prohibited the forced sale of land by private surveyors or chargeholders.[833]

The Crown drew on Robert Hayes' evidence on Native land legislation (originally presented in the Hauraki inquiry), which included a useful summary of the statutory regime governing the survey of Maori land from 1865 -1909. Hayes, acknowledging the problems that survey costs posed for Maori, argued that it was evident from the history of legislation regulating the survey of Maori land that the Crown was 'mindful' of such problems, and

827. The Native Land Act 1873, Preamble
828. Daniel Pollen, 25 September 1873, NZPD, 1873, vol 15, p 1366
829. Heale to Chief Judge, 7 March 1871, AJHR, 1871, A-2A, p 18
830. Native Land Act 1873, ss 69, 74
831. Native Land Court Act 1880, s 39; Native Land Court Act 1886, s 79
832. Richard Seddon, 28 September 1894, NZPD, 1894, vol 86, p 373
833. Crown counsel, closing submissions (doc N20), topics 8–12, pp 45, 47

The Statutory Regime Governing the Survey of Maori Land – Some Key Provisions

1873

Claimants required to satisfy the Inspector of Surveys that they are able to pay for surveys in cash or willing to convey to the Crown the equivalent value in land; where payment is to be satisfied in land, the owners are to agree upon the area and location of that land; no future survey charges could be recovered in any court of law unless creditor demonstrated that the survey was authorized by the Inspector of Surveys: Native Land Act 1873.

1878

Court empowered to award surveyor payment of his survey costs in money or in land: Native Land Act Amendment Act 1878 (No 2).

1880, 1882

A survey plan implied not to be essential for the investigation of a claim; but a certificate of title or Crown grant could not issue until a plan had been deposited with the court. All plans to be approved by the Surveyor-General; Crown may survey land at request of the claimants and if the declared owners fail to pay the survey costs, court empowered to order a defined portion to be sold by public auction, or vest land equivalent in value in the Crown; Court empowered to execute all instruments necessary to convey land in satisfaction of survey debts; Court empowered to direct payment of the whole or part of the survey costs where the land or any part is awarded to persons other than the claimant: Native Land Court Act 1880 and Native Land Division Act 1882.

1882

Person impeding survey undertaken in terms of the Act deemed to be guilty of contempt of the court: Native Land Division Act 1882.

1886

Certified map required before court able to investigate title, although the Governor might allow an investigation based on a sketch map. Plans to be certified by the Surveyor-General; all surveys to have prior written authority of Surveyor-General and surveyor must hold certificate of competency; court empowered to make charging order in favour of surveyor to secure survey cost, with such orders to have the effect of a mortgage; and to make a charging order in favour of the Surveyor-General for surveys undertaken at request of claimants; charging orders to bear interest at 5 per cent per annum; court to authorise a surveyor to survey land and where that order has been approved by the Surveyor-General, the surveyor to enter the land and undertake the survey; obstructing a

survey so authorised an offence: Native Land Court Act 1886, which repealed the 1873 Act and its amendments.

1894

Offence to obstruct survey; court empowered to charge land by way of mortgage to secure survey charges certified as reasonable by the Surveyor-General or Commissioner of Crown Lands or, with approval of Native Minister, to vest in the surveyor the equivalent in land; no sale under the charging order (mortgage) to be made until 6 months after Native Minister is notified of the intention to exercise the power of sale; Minister entitled to purchase the amount claimed where mortgagees notified their intention to exercise the power of sale; court empowered to charge interest on its charging orders at a rate it deems fair and reasonable but not exceeding 5 per cent pa: Native Land Act 1894, which repealed earlier legislation.

1895

Holders of unsatisfied charging orders (made before 1894 Act) entitled to convert them to a mortgage under the 1894 Act; Court empowered to charge interest at 5 per cent per annum from date of the Chief Surveyor's approval of survey, with interest to accrue for no longer than five years: Native Land Laws Amendment Act 1895.

1896

Crown entitled to purchase all survey charging orders, and pay any money due for surveys and for all future surveys: Native Land Laws Amendment Act 1896.

Source: Robert Hayes, 'Evidence of Robert Hayes on the Native Land Legislation post 1865 and the Operation of the Native Land Court in Hauraki', 17 January 2001 (doc A125), pp 106–111

that it 'increasingly took a "hands-on" approach.'[834] His summary traverses powers bestowed by legislation on the Native land court in the decades after 1865. It is too detailed to reproduce here, but we have drawn on it to categorise the main kinds of provisions in the legislation as outlined by Mr Hayes (see box).

Hayes argued that the purpose of the regime was 'to ensure that Maori had the opportunity to have their lands surveyed, and provided them and the surveyors (or lienholders)

834. Robert Hayes, 'Evidence of Robert Hayes on the Native Land Legislation post 1865 and the Operation of the Native Land Court in Hauraki' (doc A125), p 106

Some Definitions

Debt: *an obligation on one person to pay another.*

Lien: *a right which one person has to retain [or restrain the disposition of] the property of another or to have a charge over it until the debt owing by the other is paid.*

Charge: *an encumbrance on the land which charges the land with payment of the debt. It is like a mortgage over the land which secures the debt by giving [the charge-holder] priority over the owner(s) interests in the land.*

Waitangi Tribunal, *The Pouakani Report*, pp 206–207

with a measure of protection'. In his view, protection for Maori was evident both in the Crown's assumption of control over surveys, and in its prohibition of the forced sale of Maori land by lienholders.[835]

We accept that there were protective aspects to the legislation. For Maori, the requirement that surveyors hold a certificate of competency, that all surveyors have prior written authority of the Surveyor General for a particular survey, and that from 1886 regulations prescribed standard rates for surveys, did seem to afford some protection.[836] Maori benefitted from what the Hauraki Tribunal called an 'improvement in professional standards'.[837] In one example before us, Heruiwi 4 (75,000 acres), S Percy Smith, the Surveyor General, intervened to reduce the costs the owners faced. The surveyor, Chas Clayton, claimed he had agreed with the Maori owners of the block that the price would be 2d an acre – which would have resulted in a charge of £625. But after the government agreed to advance the survey cost, Smith assessed the value of the surveyor's work at 1 1/2d acre, and also pointed out that deductions should be made under the schedule ratio. Clayton accepted the reduced rate per acre, but not the deductions, but was overruled by the government.[838] The charge remained at £343 17s 8d, the amount originally sent to the court by the assistant surveyor-general.[839] The surveying plan was approved.

835. Robert Hayes, 'Evidence of Robert Hayes on the Native Land Legislation post 1865 and the Operation of the Native Land Court in Hauraki', 17 January 2001 (doc A125), p 118

836. 'Survey Regulations under "The Land Act, 1886"', 20 May 1886, *New Zealand Gazette*, 1886, no 30, pp 634–642

837. Waitangi Tribunal, *The Hauraki Report*, 3 vols (Wellington: Legislation Direct, 2006), vol 2, p 738;

838. Tulloch, 'Heruiwi 1–4' (doc A1), p 47

839. The Crown's figure is £343 18s 8d, but Berghan gives £343 17s 8d: see Berghan, 'Block Research Narratives of the Urewera 1870–1930' (doc A86), pp 574, 585.

10.8.3

Hone Heke on the Proposal to Charge Interest on Survey Costs

Hone Heke, the member for Northern Maori, said, in relation to the proposal to charge interest on survey costs contained within the Native Land Court Bill 1894:

> Now, it is very unfair that, where surveys are forced on the Natives whether they like it or not, the charges for the survey should be laid upon the land, and that they should be charged a cruel interest of 5 per cent. on the principal. If the Natives are unable to pay such survey-cost, the interest to be paid continues. I think that is very unfair . . . I think the rights of the Natives should be acknowledged.[1]

When the Bill was before the committee of the whole House, Heke moved an amendment to clause 64, to provide that survey costs should not bear interest. The vote went against him; the amendment was lost by the overwhelming majority of 37 to nine.[2]

1. Hone Heke, 28 September 1894, NZPD, 1894, vol 86, p 385
2. Native Land Court Bill in Committee, 3 October 1894, NZPD, 1894, vol 86, p 499

It is hard not to conclude that in respect of costs the chief concern underlying the legislation was to ensure that surveyors were paid and that Maori owners paid them. The Crown acknowledged in submissions that after 1878 a 'compulsory element' applied to ensure satisfaction of survey liens, although 'authorisation of a process that included forced sale was, over time, significantly reduced'. Counsel stated that from 1894 the effective power to sell Maori land for survey costs moved from the court to the Crown. The Crown reserved the right to purchase survey charges, and a charge-holder who wished to exercise their 'power of sale' had to give the Crown six months' notice.[840] These changes were not directed at the imposition of survey charges but merely moderated their enforcement. This provided an opportunity for the Crown to protect Maori interests. At the same time, however, Maori faced penalties for not discharging survey debt promptly; from 1886 interest was added to charging orders. This was a further provision to assist recovery of such debt. Hone Heke objected in vain to a similar provision in the 1894 Native Land Court Bill (see box).

In 1895, as we have noted, such interest charges were limited to a period of five years.[841] This could have been a double-edged sword: while it limited the time for which interest could run, it was likely to provoke enforcement at the end of five years unless the Crown intervened to take over the charge.

840. Crown counsel, closing submissions (doc N20), topics 8–12, p 45
841. Native Land Laws Amendment Act 1895, s 67

Survey costs often aroused Maori anger at the time; they still do – as as is shown by Mr Ranui's statement (which we quoted at the start of this section), and the damning term karu kai whenua (eye that eats land), which Maori applied to the theodolite. That is because surveys were inextricably linked with the processes of colonisation, and land loss. Maori had to grapple with them in the context of determined Crown purchase through various means: protection of its monopoly, pre-title dealings and undivided share buying. This was a very different context from that of the established landowners whom Mr Hayes evidently had in mind when he argued that it was appropriate for owners to meet the costs of proving title so they could transact in their land. To many Maori, the equation of survey costs with acres seemed further evidence of the Crown's very large appetite for their land.

(2) *What survey costs did the peoples of Te Urewera face? Were survey costs fair and reasonable?*

We consider first the survey costs incurred by the peoples of Te Urewera in their 'rim' blocks in the latter part of the nineteenth century as a result of block boundary surveys, and (in several cases) awards to the Crown to clear survey debts. The Crown suggested that it was important to consider such costs on a block by block basis, and the evidence enables us to do that, although in the case of two private purchases we do not know what part of the cost – if any – Maori owners may have met. For the sake of completeness, however, we list these blocks in our table. Boundary costs, as claimants pointed out, hardly give a complete picture of survey costs they faced, because later partitions meant that charges continued to accrue. In some cases they were also charged a proportion of costs for surveying out land awarded to the Crown. But the chief concern of claimant and Crown submissions was the initial round of survey costs, and that is the focus of our analysis.

In its closing submissions, the Crown responded to a Tribunal issue about the impact of survey liens and costs on the ability of the peoples of Te Urewera to retain and develop their lands. It began by providing a table setting out its estimate of the cost of survey for each of the rim blocks, which noted how the survey cost was discharged in each case, and 'where land was used to satisfy the debt, what proportion of land was utilised for that purpose'. The figures it gave were based on figures given in the research reports, and are given on page 696.

Note that:

1. The Crown's table included also a column headed 'How survey cost discharged' which is not reproduced here. We draw on the material in that column in the discussion below.
2. The Crown specified that sub-divisional surveys were not included in its consideration of costs.[842]

842. Crown counsel, closing submissions (doc N 20), topics 8–12, p 45

Block	Size (acres)	Cost of survey	Proportion of block used to satisfy debt where land was used
Heruiwi 1–3	25,161	£179	
Heruiwi 4	75,000	£343 18s 8d	1.1 per cent
Kuhawaea	22,309		
Matahina C, C1			53.7 per cent
Matahina D			84.6 per cent
Tahora 2	213,350	7.8 per cent	
Tuararangaia	8,656	£347 5s 4d	18.8 per cent
Tuararangaia 1, 2, 3B			25 per cent
Waimana	10,491		0
Waiohau	5,564 (*sic*)	No infn on record	
Waipaoa	39,302		14.8 per cent
Whirinaki	31,500	£665 17s 6d	14.33 per cent
Ruatoki	21,450	£625 12s 6d	0

Table 7: The Crown's survey costs table

Note: Certain blocks have been omitted from the table; see note 3 on page 696

Source: Crown counsel, closing submissions (doc N20), topics 8–12, pp 42–44

3. Although these blocks are included in the Crown's table, we are unable, as we have noted, to comment on Tuararangaia 2 and 3, Matahina A1 to A6, Matahina B, and Waiohau 2 (which are outside our inquiry district).

On the basis of its table, the Crown stated that between zero and 18.8 per cent of each block was used to satisfy the original boundary and partition surveys- where land was used for this purpose.[843]

On our analysis of survey costs, the rim blocks fall into four categories:

- Blocks in which survey costs are not known, or were not paid by Maori owners.
- Blocks in which survey costs were under 5 per cent of the block area or block purchase value.
- Blocks in which survey costs were between 6 per cent and 26 per cent of the block area or block purchase value.
- Blocks in which survey costs were over 50 per cent of the block area or block purchase value.

843. Crown counsel, closing submissions (doc N20), topics 8–12, p 45

We will refer to the Crown's table as we discuss each group of blocks. Our analysis of costs met by Maori is, however, of broader scope than the Crown's; where a lien was not paid off in land, we have calculated a percentage of block purchase value, by determining how much land the lien would have equated to (see table 8).

Summary of Land Lost to Survey Costs: Tribunal Figures

Total land lost directly to survey costs	19,385 acres
Equivalent acreage for amounts paid	11,583 acres
Total survey costs expressed in acres	30,968 acres

(a) ***Blocks in which boundary survey costs are not known, or were not paid by Maori owners:*** For Waimana, the figure entered in the Crown's table is nil; the Crown stated that a private party paid the title investigation survey cost.[844] The survey lien was £131 2s 9d, on top of the court costs (hearing, rehearing and partition hearing costs). Sissons gives a figure for court costs of £17; the total therefore was at least £148.[845] We note briefly that the private buyer, Swindley, tried to recoup from Tuhoe the costs he paid, and was foiled only by strong opposition. Swindley, who secured 4804 acres (Waimana 1A) in 1885 in the wake of his purchase of individual shares, paid 'at least some of the expenses' associated with the Waimana hearings (1878, 1880, and 1885) and partitions.[846] The survey lien was recorded as having been paid on 10 March 1885, soon after the court made its orders at the conclusion of the partition hearing.[847] Sissons states that Numia Kereru later gave evidence in court that Swindley had sought to recover the money from Tuhoe. According to contemporary sources, this was normal practice where private buyers made surveys. Tuhoe were unable to repay Swindley and Kereru said that they offered 1000 acres to him 'as compensation . . . *for his expenses in connection with all the Courts*' (emphasis in original).[848] One thousand acres represented a third of Waimana 1C, one of the two blocks retained by the non-sellers.[849] Negotiations between Swindley and Tuhoe over the issue broke down – not, it seems, because of the

Waimana
10,491 acres
Cost of survey not paid by Maori

844. Crown counsel, closing submissions (doc N20), topics 8–12, p 44
845. Jeffrey Sissons, 'Waimana Kaaku: A History of the Waimana block', report commissioned by the Crown Forestry Rental Trust, June 2002 (doc A24), p 56
846. Sissons, 'Waimana Kaaku: A History of the Waimana block' (doc A24), p 57
847. Crown Counsel, 'Timeline relating to the Waimana Block', 19 January 2005 (doc K4(a)), p 12
848. The offer of this thousand acres was made to Te Kooti as well as to Swindley, and it may have been agreed with Swindley that part of the land was to go to Te Kooti; Sissons suggests that this was because Rakuraku and others hoped that Te Kooti would move to Waimana. Whakatane Native Land Court, minute book 8, 11 Aug 1905, fol 187 (Sissons, 'Waimana Kaaku: A History of the Waimana block' (doc A24), p 57)
849. Sissons, 'Waimana Kaaku: A History of the Waimana Block' (doc A24), p 55

10.8.3

Block	Survey lien	How paid for	Area of equivalent value to survey costs (and percentage of block area)
Heruiwi 1–3	£178 17s 4d	£178.17.4 deducted by Crown from rent owing to lessors	1800 acres (given price per acre for Heruiwi 1)* (7.2%)
Heruiwi 4	£343 17s 8d	67 acres included in Crown purchase of Heruiwi 4A1 to cover survey lien outstanding for 4A2 (£10 1s 5d); liens not charged for other Heruiwi 4 blocks, as taken into account in Crown offer price	67 acres from Heruiwi 4A non-sellers (3.0%); for remainder of lien, up to 2575 acres (given average price per acre paid for pre-1900 purchases) (3.5%)†
Whirinaki	£665 17s 6d	4439 acres included in Crown purchase award to cover survey liens	4439 acres (14.1%)
Kuhawaea	Not known	Not known	Not known
Waiohau 1	£200	£200 paid by owners directly to surveyor	1474 acres (given price per acre for Waiohau 1B)‡ (10.2%)
Tuararangaia 1	£212 14s 7d (share of original lien for whole block (£347 5s 4d) and charge for detaining surveyor, plus £36 10s 11d interest, and £30 for cutting out Crown award)	881 acres awarded to Crown	881 acres (25.2%)
Matahina C, C1	£222 16s 6d (includes £27 interest, and £60 for cutting out Crown awards)	1334 acres awarded to Crown	1334 acres (66.7%)
Matahina D	£92 9d (includes £15 12s 6d interest)	920 acres awarded to Crown	920 acres (92.0%)
Ruatoki	Nil (had been £625 17s 6d)	Lien unable to be pursued after inclusion in Urewera District Native Reserve; subsequently Native Land Court orders cancelled	Not applicable
Waimana	Not applicable (had been £131 2s 9d)	Paid by purchaser (Swindley) on owners' behalf	Not applicable

Tahora 2 (excluding 2B,2B1)	£1313 16s 1d (total £1823 4s 3d for all Tahora 2 includes £223 4s 3d interest; reduced from Baker's claim for £1887 7s 11d plus interest after rehearing)	£573 4s 8d deducted from payments to sellers, plus 5922 acres awarded to Crown from non-sellers' portion (meeting remaining cost of £740 11s 5d)	11,656 acres[§] (7.6%)
Waipaoa	£687.16.7 (includes interest of £114 13s 6d)	5822 acres awarded to Crown	5822 acres (14.8%)
Total	£3918 (does not include charges for Kuhawaea, Waimana, Ruatoki, or Tahora 2B and 2B1)	£2632 paid off through award to Crown of 19,385 acres; £953 paid directly (withheld by Crown from amounts due to owners, or paid by owners to surveyor); £320 cancelled by Crown upon purchases (accommodated in price set for Heruiwi 4 blocks); £13 left outstanding on Heruiwi 4F2 and 4B2; unknown reimbursement made to Swindley	30,968 acres (approx) out of 344,471 acres (area excludes Waimana, Kuhawaea, Ruatoki, and Tahora 2B and 2B1) (9.0%)

* £178.17.4 is 7.2% of the Crown price for whole block in 1881 (when Heruiwi 1 was bought) of £2500; the equivalent proportion of 25,161 acres is 1800 acres.

† 67 acres equates to 3.0% of the Heruiwi non-sellers' area before survey taking (2156 acres + 67 acres = 2223 acres). £9033 (approx.) was used to purchase 69,670 acres (combined area of 4A1 (less 67 acres), 4B1, 4D, 4E, 4F1, 4G, 4H, 4I). At this purchase rate £333.17.3 (£343 17s 8d less £10.1.5) would buy 2575 acres. Comparing this figure with the area excluding the Heruiwi 4A non-sellers' area (72,777 acres i.e. 75,000 acres less 2223 acres) gives a proportion of 3.5%.

‡ The £950 used to purchase Waiohau 1B (7000 acres) equates to a price of £1962.19.5 for the whole of Waiohau 1 (14,464 acres). £200 is 10.2% of £1962.19.5; the same ratio in land is 1474 acres to 14,464 acres.

§ From the 60,806 acres in Tahora 2B and 2B1, the sellers contributed the equivalent of 4633 acres (at 2d out of 2s per acre for survey costs) and non-sellers 369 acres. Deducting these from respectively 10,367 and 6291 acres for the whole block of 213,350 acres gives 5734 acres and 5922 acres, a total of 11,656 acres out of 152,544 acres at a proportion of 7.6 per cent.

Note: Where the lien was not paid off in land, the percentage was calculated by determining how much land the lien would have equated to, based on respective prices per acre in the cases of Heruiwi 1, Heruiwi 4 (pre-1900 purchases combined), Waiohau 1B, and Tahora 2 (1889–1896 purchases).

We have derived our overall percentage figure from those blocks where the final survey costs actually met by the Maori owners are known. Thus we have not included in the calculation Ruatoki (which was ultimately paid by the Crown), Kuhawaea and Waimana.

Table 8: Survey costs in Te Urewera rim blocks: Tribunal figures

amount of land offered, but because of Kereru's opposition to giving land at all. Whether Swindley recouped any of his costs from the owners in other ways, we do not know.

Kuhawaea

For Kuhawaea, the Crown has entered no figure. It stated in its costs table that it appeared that survey costs in Kuhawaea were met by a private purchaser, adding that there was no discussion of this on the official record.[850] Counsel for Ngati Haka Patuheuheu accepted that 'it does appear that the survey costs were met by a private purchaser [Troutbeck] with regard to the Kuhawaea Block'.[851]

Ruatoki

For the Ruatoki block, the Crown's table gives nil for survey costs discharged by Maori owners in Ruatoki. This was because the survey lien (for the survey made in 1893) was wiped when the block became part of the Urewera District Native Reserve.[852] The Ruatoki owners were thus spared payment of the boundary survey costs which had been incurred (at £625 these were high) by the passing of the UDNR Act, and the decision that their block would in fact be included in the Reserve. Ruatoki had been partitioned in 1894, and on 22 September 1898 the survey lien was divided between Ruatoki 1, 2, and 3. A lien of £275 12s 6d was placed on Ruatoki 1; and £175 on each of the other two blocks.

But the survey lien is noted on the survey ledger as having been cancelled in 1898.[853]

Heruiwi 4
Survey lien £343 17s 8d
3.5 per cent of block purchase value

(b) *Blocks in which survey costs were under 5 per cent of the block area or block purchase value:* Only one block falls into the category of blocks where survey costs were under 5 per cent of the block area or block purchase value: Heruiwi 4. The Crown submitted that the survey costs to the owners represented 1.1 per cent of the block's area. It purchased 64,913 acres and paid £294 2s 0d as a proportion of the survey cost. A survey lien of £49 15s 8d was divided over the 10,087 acres remaining in Maori hands. This, it says, was discharged by 67 acres of land.[854] However, the 67 acres that the Crown refers to only accounts for the non sellers' contribution to the survey costs. It also represents only a part contribution, as around £13 of survey debt owed by the non-sellers on the 4B2 and 4F2 blocks remained undischarged.

There was no designated contribution by the Heruiwi 4 sellers to survey costs, but it seems unlikely that the Native Land Purchase Department would not have sought to recoup these costs when the Crown purchased the land. We have converted the £331 of survey costs (ie, the approximately £344 less £13) into an equivalent land area, on the basis of the average price paid per acre by the Crown in all its pre-1900 purchases. This land area was 3.5 per cent of the total area of the block.

850. Crown counsel, closing submissions (doc N20), topics 8–12, pp 42–43
851. Counsel for Ngati Haka Patuheuheu, submissions by way of reply, 8 July 2005 (doc N25), p 25
852. Crown counsel, closing submissions (doc N20), topics 8–12, p 44
853. Steven Oliver, 'Ruatoki Block Report', report commissioned by the Waitangi Tribunal, July 2002 (doc A6), pp 83–84
854. Crown counsel, closing submissions (doc N20), topics 8–12, p 43

Heruiwi 1–3, Waiohau, Whirinaki, Waipaoa, Tahora 2, Tuararangaia 1

(c) ***Blocks in which survey costs were between 6 per cent and 26 per cent of the block area or block purchase value:*** Most of the blocks for which we have evidence fall into the category for which survey costs were between 6 and 26 per cent of the block area or block purchase value. We comment here on the costs themselves. In the next section, we consider whether they were fair and reasonable, granted the underlying assumption that Maori should have paid some costs of survey.

A number of common issues emerge from a study of survey costs in these blocks. They include:

- costs charged to owners who had not been consulted at all, or had been inadequately consulted, by those who applied for survey, translating into awards of their land to the Crown;
- unpaid survey costs triggering subsequent alienation on a substantial scale; and
- how land was valued for survey costs, and the impact of that valuation on the amount of land taken.

Heruiwi blocks 1–3
25,161 acres
Cost of survey
£178 17s 4d
7.2 per cent of block purchase value

We begin with Heruiwi, a block subject to pre-title dealings dating from the mid 1870s. As a result, a unique issue has arisen: whether the owners did in fact pay the survey costs. As we saw in section 10.7, survey costs became entwined with:

- the price to be paid for the block;
- advances;
- back-rents; and
- adjustment of the latter two between sellers and non-sellers.

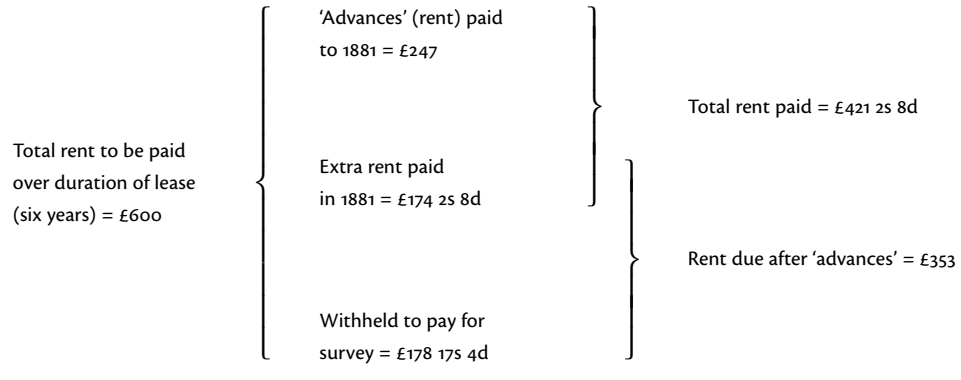
The question of payment of survey costs for the block has not been easy to unravel. We are inclined to think, however, that the costs were in fact carried by the Maori owners – though they were not satisfied in land. It seems that the owners met the survey costs through Crown deduction of the amount from back rents it owed the owners by 1881.

We comment first on what the costs were. The Crown entered no figure in the column of its survey costs table designating the proportion of each block used to satisfy debt. It did refer to 'consideration of discharge for Crown rent for leased block (£100 per annum)'.[855] The Crown recorded that it was awarded 20,910 acres after purchase of shares in the block, and stated that it covered survey costs for this 'section'.

The evidence available to us on survey costs of Heruiwi 1–3 produced a range of figures. In its table, the Crown gave the cost of survey as £179. It noted that a higher figure of £314 10s was given by Berghan and Fraser, but did not comment on the discrepancy.[856] The figure of £179 for the survey cost was sourced to Tulloch, who cites Native Land Purchase Department under-secretary Richard Gill. Gill stated in an 1878 memorandum that the

855. Ibid, p 42
856. Ibid

10.8.3



Heruiwi survey costs in relation to Crown rent owed, and paid

The total rent paid (£421 2s 8d) plus the amount spent buying out the sellers' shares in the land (£2142 16s) gave the recorded purchase price of £2563 18s 8d.

Crown had spent £178 17s 4d on the Heruiwi survey.[857] Berghan gives two slightly different figures of around £314, but in fact her sources record exactly the same figure. On 23 August 1878, the Inspector of Surveys informed the Chief Judge that survey charges due on the block amounted to £314 10s 3d.[858] Then, on 17 November 1881, Percy Smith telegraphed a list of survey liens registered in the land court which included that for Heruiwi, and gave the same amount.[859] It seems to us that the higher figure (£314) is what Maori agreed to pay for the survey at the outset, while the lower one (variously given as £178 or £179) is the actual survey cost that was charged against the block. The £314 was almost certainly based on a Maori agreement to pay threepence per acre for the survey; the original area as given on the Heruiwi plan was 25,161 acres –which at threepence an acre gives a cost of £314 10s 3d. (We note below that there was a similar discrepancy between the contract price and the cost price in the case of Heruiwi 4 block.) And the survey cost for Heruiwi was recorded in the official returns from 1877 as £178 17s 4d, under the heading 'Incidentals.'[860] We return to these figures below.

Our view as to how the survey costs seem to have been met is based on a comparison of the various figures recorded as owing to the Maori owners, and paid to them, over several

857. Kathryn Rose, 'The Bait and the Hook: Crown Purchasing in Taupo and the Central Bay of Plenty in the 1870s', p 232 (Tracy Tulloch, 'Heruiwi 1–4', report commissioned by the Waitangi Tribunal, September 2000 (doc A1), p 24); see also Peter McBurney, 'Ngati Manawa and the Crown 1840–1927', March 2004 (doc C12), p 281

858. Paula Berghan, comp, supporting papers to 'Block Research Narratives', vol 12 (doc A86(l)), p 4022

859. Paula Berghan, 'Block Research Narratives of the Urewera 1870–1930', July 2001 (doc A86), p 569; see also Berghan, comp, supporting papers to 'Block Research Narratives', vol 12, p 4154

860. 'Lands Purchased and Leased from Natives in North Island', 1 September 1877, AJHR, 1877, C-6, p 11. There was a small increase in the amount over the years that followed.

years, in the evidence before us. The payment of the survey costs, as we have noted, is intertwined with that of the back rents owing on the Heruiwi lease, which dated from 1875 – and with payments made by the Crown as advances on the purchase of the block.

If we add the two amounts together – the sum paid by the Crown in back rents, and the sum it paid to the owners in advances (a total of £421 2s 8d), and deduct this from the amount owing to the owners for back rents (£600), the result is £178 17s 4d – which was the cost of the boundary survey. The evidence before us is as follows:

- In March 1880, when Henry Mitchell, the land purchase officer, first raised the question of an offer of Heruiwi block with the Native Department, he referred to the lease agreement then in force: 'All the Heruiwi Grantees signed deed of lease back rentals date from 1875, survey costs to be deducted'.[861] That is, the survey costs were to be deducted from the back rentals.
- Gill, the under secretary at the Native Department, reported details of the Heruiwi lease to the Native Minister on 9 May 1881, when the purchase of the block was under consideration. He stated that '£247 only has been paid on rent account leaving £353 due on 2nd of last Feb[ruar]y . . . but the advances rent £357 [*sic*] will be increased by the cost of survey'.[862] This important statement shows that Gill knew that the total owing to the Heruiwi owners for rents (1875–1881) was £600 (that is, £247 plus £353). We note that he had recorded the Heruiwi survey costs himself in 1878 as £178 17s 4d – a quite separate amount from those he gave for the rents.[863]
- The official published record shows that at that time £247 had indeed either been paid as rent or been advanced to owners since 1874; and that the survey cost (£178 17s 4d, which had crept up to £183 12s 4d by 1881) was recorded separately under the heading 'Incidentals'.[864]
- We are not aware however that the £353 to which Gill referred was in fact paid to the Heruiwi owners. The only sum we know of was the £174 2s 8d paid on 2 July 1881. According to both Mitchell and Gilbert Mair (who was sent to conduct this particular purchase), this sum was paid to the owners alongside sums paid to sellers (these amounted to £2142 16s). Mitchell specifies that the £174 was for the Heruiwi lease.[865] We also know from Mair's diary that the back rents had been a major topic of discussion

861. Mitchell to Gill, 25 March 1880, MA-MLP 1, 1897/193, pt 2, Archives New Zealand (Berghan, comp, supporting papers to 'Block Research Narratives', vol 12 (doc A86(l)), p 4148–4149)

862. Gill to Native Minister, 9 May 1881, MA-MLP 1, 1897/193, pt 2, National Archives (McBurney, 'Ngati Manawa and the Crown 1840–1927' (doc C12), p 289)

863. Gill, memorandum, [c 30 July 1878], MA 1 1878/2903 (McBurney, 'Ngati Manawa and the Crown, 1840–1927' (doc C12), p 281)

864. Tulloch, 'Heruiwi 1–4' (doc A1), pp 28–29; Tulloch's table is drawn from several years of returns of lands purchase and leased or under negotiation in the North Island published in the *Appendix to the Journals of the House of Representatives*.

865. McBurney, 'Ngati Manawa and the Crown, 1840–1927' (doc C12), p 295

The Final Cost of Heruiwi 1–3, as Listed in Official Figures

The final figure of £2786 15s 0d comprised the £2563 18s 8d given as the purchase price, and £222 16s 4d listed as Incidentals.[1] It is clear from the correlation between the initial amount listed in the official tables as Incidentals (£178 17s 4d), and Gill's identical 1878 record of the survey cost, that the £222.16.4d included the survey cost (we note an additional figure of £36 entered as an incidental charged to the Heruiwi lease in 1878).[2]

1. The £2563 18s 8d is made up of the £2142 16s paid to the sellers, and £421 2s 8d, the total of the advances paid by the Crown up to 1881, and the back rent paid in 1881.

2. See Tulloch, 'Heruiwi 1–4' (doc A1), p 29. McBurney records that these incidentals included mapping and surveying expenses, and reimbursement for clothes destroyed by fire at a survey camp: McBurney, 'Ngati Manawa and the Crown, 1840–1927' (doc C12), p 282.

at the time (though he does not tell us more than this.)[866] In addition, £247 had already been paid (as advances) up till 1879. These sums total £421 2s 8d. Thus, as we noted above, if we deduct those amounts (totalling £421 2s 8d), from the total £600 owing to the owners for back rents, we arrive at a figure of £178 17s 4d. This was the exact cost of the Heruiwi boundary survey.

- If we look at the figures in another way, we note that the total figure officially recorded as the cost of the Heruiwi purchase was £2786 15s. This is evidence that figures which Mair gave the court at the subdivision hearing in 1881 as the agreed payment to Maori were not what was actually paid. On that occasion he mentioned a total figure of £3000, which he said would have included £500 for back rents.[867] But the figures actually paid were lower because the Crown did not succeed in buying the whole block (24,394 acres) and the court thus awarded it only 20,910 acres.[868]

Thus, the Crown included the survey costs as part of the overall cost of the acquisition of the Heruiwi 1 block (separate from the purchase price). But the evidence suggests that though it paid the costs directly (to the survey department), it also deducted them from the back rents owing to the owners, who thus carried the costs themselves.

We conclude that:

- the survey was charged at the actual price of £179, not the £314 which we assume to be the contract price;

866. Mair Diary, #31 25 June – 1 July 1880, MS Papers 92, fol 52, Alexander Turnbull Library (Peter McBurney, comp, document bank to 'Ngati Manawa and the Crown 1840–1927', various dates (doc C12(a)), pp 101–102)

867. Opotiki Native Land Court, minute book 2, 13 December 1881, fol 155

868. We thus discount Tulloch's suggestion, based on Mair's figure of £500, that the sellers' share of the back rents would have been some £428: Tulloch, 'Heruiwi 1–4' (doc A1), p 35.

- the entire cost price of the boundary survey was paid (leaving no parent block boundary survey liens outstanding after the purchase of Heruiwi 1); and
- on the evidence before us, the actual price of boundary survey was subtracted from the rental due to all the owners (so that both sellers and non-sellers paid the cost of the survey).

It is our view that the Crown withheld the sum of £178 17s 4d from the amount owed the owners for back rents, to cover the survey costs. Thus, though the Heruiwi owners did not have to pay for the boundary survey in land at the time of the Crown purchase, they did in fact carry the cost of the survey. This was 7.2 per cent of the value of the land.

(i) ***Further survey costs:*** Following the award to the Crown of the bulk of the block in 1881 (20,910 acres), those who had not sold were awarded Heruiwi 2 (2,484 acres) and Heruiwi 3 (1,000 acres). The Crown states that a 'proportion' of the survey cost over Maori-owned sections (Heruiwi 2 and Heruiwi 3) was registered as liens. The Auckland district survey office notified the court on 17 August 1883 that any surveying liens against Heruiwi block were to be cancelled, and replaced by a lien for £18 for Heruiwi 2, and £12 6s for Heruiwi 3.[869] The Crown's statement is based on the description of the costs to the land court by the Crown's representative Kallender in 1895. What he said was that the charges were a 'proportion of the original survey charge' over the parent Heruiwi block.[870] In fact, in light of our calculations above, these must have been the costs of cutting the boundary lines between the two blocks and Heruiwi 1. Thus £30 6s was charged to the non-sellers' blocks. The Crown, drawing on Tulloch's statement that she located no record of payment of these charges, states that no evidence is provided concerning how these liens were discharged.[871] In the absence of evidence we cannot assume either that the Maori owners ultimately paid them, or that the charges were remitted.

Waiohau 1
14,464 acres
Cost of survey £200
10.2 per cent of block purchase value

The Crown entered no figure in its table for Waiohau; it stated that this was because there was no information on the recond about survey costs. Some information has however come to light. The purchase of Waiohau was a private one, and we do not have an exact figure for it. The issue of payment for the Waiohau survey came up during Judge Wilson's inquiry into the legality of the partition and sale of Waiohau 1B. Harry Burt, cross-examined by Mehaka Tokopounamu as to who surveyed Waiohau 1, stated that he did not know. Judge Wilson intervened to state that Mr Edgecumbe had done the survey. At that point, Mehaka Tokopounamu stated: 'We paid for it. We paid the surveyor £200 for survey.'[872] We note that

869. Berghan, comp, supporting papers to 'Block Research Narratives', vol 12 (doc A86(l)), pp 4015–4017
870. Maketu Native Land Court, minute book 14, 6 May 1895, fol 99
871. Crown counsel, closing submissions (doc N20) topics 8–12, p 42
872. Battersby (doc C1(a), p 157

10.8.3

The Waipaoa Survey Agreement (English Text), November 1882

We the undersigned owners of the Waipaoa and Matakuhia Blocks in the Waikaremoana and Tuahu Survey Districts, which we desire to have surveyed agree to pay for such survey in land, to be marked off and surveyed under the direction of the Chief Surveyor of Hawke's Bay.

The payment in land to be at the rate of one acre for every two shillings of the cost of the survey.

We further agree that the land to be given in payment for the survey shall have a frontage to the Ruakituri River, extending from Erepeti upwards as shewn[sic] on the sketch in the margin, provided that the boundary shall extend back from the River a distance of from one to two miles.

The land to be given in payment for the survey is indicated by red tint on the sketch.

21 November 1882, agreement to pay in land for the survey of the Waipaoa and Matakuhia blocks, LS 20/89 v1 (Emma Stevens, 'Report on the History of the Waipaoa Block, 1882–1913', May 1996 (doc A51), p 11

Burt claimed that he had paid his solicitor a bill for £30, part of which was for surveying. But he did not argue with Tokopounamu.[873]

While it is possible Tokopounamu may have rounded off the total, his evidence given before a judge was unchallenged. It is difficult to give a comparison with other blocks on how much the survey cost relative to the value of the land. But if we use Soutter's £950 purchase of Waiohau 1B in 1886 as a benchmark, on a pro rata basis, Waiohau 1 would have been worth approximately £1960. Thus the survey cost paid by Ngati Haka Patuheuheu is likely to have been equal to 10.2 per cent of the block.

Waipaoa
39,302 acres
(survey award to Crown 5822 acres)
14.8 per cent of block area
Amount owing for survey by 1888
£687 16s 7d (including interest of £114 13s 6d)

Waipaoa, as we have seen in an earlier section, was also subject to pre-title dealings by the Crown – but of a rather different kind. In Waipaoa, a specific agreement was made before title investigation about the payment of survey costs.

The agreement was a written one between the Crown and two Ngati Kahungunu chiefs, Hapimana Tunupaura and Tamihana Huata. It was signed in November 1882 as the chiefs sought to protect Waipaoa lands in the wake of Crown attempts to buy land in neighbouring Tahora. According to Ms Stevens, the Surveyor General approved the survey on condition that the Chief Surveyor at Napier negotiate an agreement with the Ngati Kahungunu

873. Battersby, 'Waiohau 1' (doc C1),p 40

applicants, as to the price per acre (see box). Such agreements were provided for by section 72 of the Native Land Act 1873, which required the 'fixed rate' to be paid for the survey to be specified and whether the costs were to be met in land or money. The Waipaoa agreement did not specify a fixed rate for the survey.

Stevens notes that the agreement went beyond the conditions of the Surveyor General, in that it specified a particular piece of land at the eastern end of the Waipaoa, known as the Matakuhia block, to pay the survey costs.[874] The Crown submitted to us that the agreement was 'an attempt to ensure that disputes were avoided and that payment for the survey was forthcoming'.[875]

The Crown did secure its payment in land (5822 acres), but in the years that followed there was considerable tension, both among the claimants to the court, and as between the claimants and the Crown. We can categorise the problems arising from the Waipaoa pre-title survey agreement as follows:

- Uncertainty on the part of the chiefs about the terms and meaning of the agreement.
- The size of the Crown award for survey costs, which Huata and Tunupaura challenged on the basis of valuation of the land.
- The allocation of survey costs among those the court found to be owners, after its investigation of title.
- The court award of land due to the Crown differed from that in the pre-title agreement; it was to be taken not in one block but in two blocks, half from land awarded to Ngati Kahungunu, and half from land awarded to Ngati Ruapani and Ngati Hika.
- The subsequent inclusion of land in and around Lake Waikareiti within the area to be awarded from the Ngati Ruapani blocks to the Crown

We refer briefly to these points. In respect of the chiefs' uncertainty as to the terms and meaning of the agreement, we note that although Preece stated that the chiefs had understood the price when they signed, Huata sought changes immediately after the agreement to the rate at which land was to be paid for the survey – at one acre for every three shillings, rather than the two shillings recorded in the agreement. Evidently he hoped that less land would be taken. At the later court hearing Tunupaura said they had understood the land to be cut off would be a security for the cost of survey.[876] It is not clear whether this was because there had been miscommunication from the outset, or because by 1889 some of the unwelcome ramifications of the agreement were evident. But the position of the Ngati Kahungunu chiefs that the Crown was seeking too much land for survey costs was evident from the beginning. Their concerns were also increased during the survey process itself, when the surveyor Henry Ellison was said to have tried to lay off the Matakuhia block

874. Stevens, 'Report on the History of the Waipaoa Block' (doc A51), p 11
875. Crown counsel, closing submissions (doc N20), topics 8–12, p 54
876. Emma Stevens, 'Report on the History of the Waipaoa Block', May 1996 (doc A51), p 12; Cathy Marr, Crown Impacts on Customary Interests in land in the Waikaremoana Region in the Nineteenth and Early Twentieth Centuries', September 2002 (doc A52), pp 234–235

before he surveyed the rest of Waipaoa. Ellison would later claim he had been obstructed, and would submit a claim to the land court in 1888, citing his 'detention' while carrying out the survey.[877] His claim was not successful. Huata told Preece he had simply asked Ellison to leave the survey of the Matakuhia block until the whole of the block had been surveyed. He did not see how Ellison would know how much land to lay off until the final cost of the survey had been calculated.[878] Nor, indeed, do we.

When the Waipaoa block finally went before the court in 1889, the size of the Crown award to cover cost of the survey, and thus the valuation of the land, became an issue. In 1886 the Surveyor General was informed that the cost of the survey amounted to £573 3s 1d; though by 1889 it had increased, because of interest charges, to £687 16s 7d.[879] The cost of the survey in land, according to a certificate issued in 1888 under the Native Land Act 1886, was the Matakuhia block of 5,822 acres, which had been marked on the certified plan of Waipaoa.[880] (According to Stevens, the Chief Surveyor later dismissed Ellison's survey as being 'unreliable'; but we have no further information on his views.[881]) When the court was preparing to make its award to the Crown for survey costs, it raised the issue of reallocating the award in two blocks, rather than one. At that point, the claimants discussed the matter among themselves, and agreed to give the Crown a total of 2000 acres, 'one in the portion already surveyed off, on the Govt Boundary [*sic*] & the other portion at Waikareiti'.[882]

The judge at once rejected this suggestion: the court alone would decide what the government would have, but in any case the proposal for 2000 acres 'cannot be entertained.'[883] Tunupaura's attempts to reopen the matter, first by seeking a rehearing to secure a return of some of the land Ngati Kahungunu lost in the award, and then by appealing to the Native Minister, Edwin Mitchelson, were also unsuccessful. Tunupaura complained that the two blocks acquired by the Crown were far too large and the valuation per acre settled on had been too low. He hoped that 'the price [valuation] per acre be fixed at 5/- because Waipaoa is fine land notwithstanding it being covered with forest'.[884] Lewis, the Under Secretary, minuted on 18 April that Tunupaura should be informed that 'the award of land to the Crown cannot be reopened'.[885] And that was the reply Tunupaura received.

877. Stevens, 'Report on the History of the Waipaoa Block' (doc A51), p 14
878. Ibid, p 13
879. Wairoa Native Land Court, minute book 3B, p 160
880. Stevens, 'Report on the History of the Waipaoa Block' (doc A51), pp 14–15
881. Ibid, p 40
882. Wairoa Native Land Court, minute book 3B, 16 April 1889, fol 159
883. Ibid, fol 160
884. Tunupaura to Mitchelson, March 1890, MA-MLP 1 1910/129 vol 1 (Berghan, 'Block Research Narratives of the Urewera 1870–1930' (doc A86), p 716); see also Paula Berghan, comp, supporting papers to 'Block Research Narratives', vol 18 (doc A86(r)), p 6234
885. Lewis to Native Minister, 18 April 1890, MA-MLP 1, 1910/129 vol 1, cited in Berghan, 'Block Research Narratives of the Urewera 1870–1930' (doc A86), p 716; see also: Berghan, comp, supporting papers to 'Block Research Narratives', vol 18 (doc A86(r)), p 6233

The Crown submitted to us that the 1882 valuation of the land at two shillings an acre was comparable to that placed on other land in the vicinity at that time, and that Judge Wilson considered it appropriate in 1890.[886] But we note that in 1897, when the Crown embarked on purchase in Waipaoa, the Surveyor General advised that the starting price per acre should be 3 shillings.[887] Tunupaura's determined attempt after the court's decision to have the valuation increased is evidence that Ngati Kahungunu considered it unjust. We note that they did not think payment as such was unjust; it was the amount the Crown wanted. As Tunupaura put it: 'We consider that this is a heavy loss to us for the portions set apart to pay for the survey are much too large especially as the entire block only contains 39,302 acres.'[888]

Not surprisingly, a further issue that emerged from the pre-title agreement was the allocation of survey costs among those the court found to be owners in the Waipaoa block. The court was critical of the government for specifying a block to be taken before the owners of that block had been determined by the court. It pointed out that it could not have been known in 1882 whose part of the land the survey costs had been charged against:

> In the Govt case the land has been taken in a portion of the Block to recoup the survey, before the owners of the block & of that portion were known. Now the block is in two parts belonging to two sets of owners, but owing to the pressure brought by Mr Baker to bear on the natives, the portion of land for payment of survey was taken from one set of owners only. In that Mr Baker has placed the Govt in a false position.[889]

The law in fact was quite clear that the owners had to be declared by the court first, before a particular piece of land could be agreed on in payment of survey costs, and it was the court that was empowered to order a 'defined portion, to be ascertained and agreed upon between the Inspector and the Native owners of any land so surveyed' to be transferred by the owners to the Crown for survey costs.[890] Having flexed its muscles, the court upheld (under 1886–88 legislation) the Government's claim to land for the survey costs. As we have seen, it moved to award the Crown two blocks in different parts of Waipaoa, stating that this would be fairer, because Ngati Kahungunu and Ngati Ruapani would then share the costs (see box).

Was the allocation to Ngati Ruapani of half the survey costs (or, rather, their equivalent in land) fair? There are two issues here. The first is whether any should have been charged to Ngati Ruapani. Counsel for the Wai 945 Ngati Ruapani claimants pointed out rightly

886. Crown counsel, closing submissions (doc N20), topics 8–12, p 53

887. S P Smith to Sheridan (minute), 22 April 1897, MA-MLP 1910/129 (Stevens, 'Report on History of the Waipaoa Block' (doc A51), 34)

888. Hapimana Tunupaura to the Native Minister, March 1890, MA-MLP 1910/129 (Berghan, comp, supporting papers to 'Block Research Narratives', vol 18 (doc A86(r)), pp 6234–6238)

889. Wairoa Native Land Court, minute book 3B, 15 April 1889, fol 158 (see also: Stevens, 'Report on the History of the Waipaoa Block' (doc A51), p 21)

890. Native Land Act 1873, s 73

The Award of Land to the Crown for Survey Costs in Waipaoa Block, 1889

The court awarded the Crown 5822 acres to be taken in two blocks of 2911 acres each (designated Waipaoa 1, at the eastern end of Waipaoa, and Waipaoa 2, at the western end).

The court awarded eight other divisions of the block to Maori: part 3 to Ngati Hinaanga, part 4 to Ngati Wahanga, part 5 to Ngati Poroara, part 6 to Ngati Tapuae, part 7 to Ngati Mihi, part 8 to Ngati Hinetu, part 9 to Ngati Hika, and part 10 to Ngati Ruapani and Ngati Hika.

Waipaoa 2 (2911 acres) was cut out from Waipaoa 10, the block awarded to Ngati Ruapani and Ngati Hika (leaving them 2909 acres).

Sources: Wairoa Native Land Court, minute book 3B, 28 April 1889, fol 166; Emma Stevens, 'Report on the History of the Waiapaoa Block, 1882–1913', May 1996, pp 35–36, map 8

that the survey agreement had been made entirely by two Ngati Kahungunu leaders.[891] As we pointed out in section 10.5, however, the survey was not obstructed by Waikaremoana chiefs, and one Ngati Ruapani leader had cooperated with it. Hapi Tukahara identified himself as a 'member of Ngatiruapani' at the hearing, and stated that he had conducted the survey on part of the block (from Aniwaniwa to Pukepuke) 'on behalf of Ruapani', because 'we owned this part of the block'.[892] He denied the statement of Wi Hautaruke (claiming through Ruapani and Tuhoe) that Tukahara had helped because he was paid wages. The court's view at the time was that those with interests in the land had endorsed the Ngati Kahungunu arrangement by assisting with the survey and agreeing to have their case heard based on the survey plan.[893] It is possible of course that they did so because they considered it better to be involved than not, once the survey was under way.

The second issue is the whether the costs were shared fairly across the owners of the various subdivisions. That hinges on the identity of Ngati Hika, who received a separate award in Waipaoa 9, as well as being included with Ngati Ruapani in Waipaoa 10. Waipaoa 9 (12,600 acres) was over twice the size of Waipaoa 10 (5020 acres) and was awarded to 45 owners of Ngati Hika. Waipaoa 10 was awarded to 132 owners (including 31 Ngati Hika, who were also in Waipaoa 9). The Crown's survey costs block was cut out of Waipaoa 10 – the

891. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), pp 27–28

892. Marr, 'Crown Impacts on Customary Interests in land in the Waikaremoana Region in the Nineteenth and Early Twentieth Centuries' (doc A52), p 252

893. Wairoa Native Land Court minute book 3B, 12 April 1889, fol 146 (quoted in Marr, 'Crown Impacts on Customary Interests in land in the Waikaremoana Region in the Nineteenth and Early Twentieth Centuries' (doc A52), p 255)

smaller of the two blocks, with the most owners. Ngati Hika were claimed as a hapu by both Ngati Kahungunu and Ngati Ruapani, and Tunupaura told the court that he had put Ngati Hika on both the western and eastern sides of the block because they had rights on both sides.[894] In other words, if Waipaoa 9 and 10 are taken together as land awarded to Ngati Ruapani and its hapu, then over half the parent block went to Ngati Ruapani. If however the award of Waipaoa 10 was intended to include only those Ngati Hika who had the closest links to Ngati Ruapani, then the Crown award fell heavily on those owners in Waipaoa 10. We cannot take the matter any further.

A further grievance for Ngati Ruapani arose from the court's decision to change the allocation of land to the Crown for survey costs. After Waipaoa 2 was designated, the boundary in the west of the block was drawn to take in a third of Lake Waikareiti. Counsel for the Wai 945 Ngati Ruapani claimants submitted that the decision to adopt the deposited plan, with the boundary running across the lake rather than to its edge (the latter as shown in a very basic drawing made by Dennan, the Crown's representative in court) 'was made entirely by a handful of officials in the Survey and Native Land Purchase departments'.[895] The Crown maintained that the land court selected the Lake Waikareiti boundary, citing the concern of officials at its inclusion of part of a lake.[896] But the sketch plan deposited in the court, certainly by May 1889, must, we assume, have been supplied by a surveyor, or a Crown official; the court simply received the plan.[897] Stevens states that it was the discrepancy between the two plans that aroused concern within the Survey Department. An application for a rehearing was considered – and the idea rejected. The Surveyor General, S Percy Smith, however, commented:

> that the Under Secretary of the Native Department had said that he had talked to Williams [the Chief Surveyor at Napier] about the matter in Napier recently and that they had agreed that the boundary as set forth on the plan that had been deposited with the court should be accepted as the correct one.[898]

This was the plan showing the boundary crossing the lake. Percy Smith himself was not very happy with the boundary (perhaps because it reduced the amount of dry land in the Crown's award). One possible motive for putting the boundary through Waikareiti, however, was to reduce costs, as the judge had instructed that the cost of surveying this unforeseen

894. Stevens, 'Report on the Hisory of the Waipaoa Block' (doc A51), p 24

895. Counsel for Ngati Ruapani (Wai 945) and Te Heiotahoka 2B, Te Kopani 36, and Te Kopani 37 (Wai 1033), closing submissions (doc N13), p 28

896. Crown counsel, closing submissions (doc N20), topics 8–12, p 52

897. The sketch was enclosed in a note from Brooking, registrar of the land court, to Sheridan at the Native Office, Wellington, on 17 May 1889. See Berghan, comp, supporting papers to 'Block Research Narratives', vol 18 (doc A86(r)), pp 6247–6248

898. SP Smith to Chief Surveyor, Napier, 17 July 1889, LS 20/89, vol 1 (Stevens, 'Report on the History of the Waipaoa Block' (doc A51), p 25)

Tahora 2 Survey Costs: Key issues

Did those found by the court to be owners in Tahora 2 have to pay the survey costs, even though the survey had been done in secret, and the owners had not wanted one?

Why were the tribal owners not able to cut out the block they chose within Tahora 2 to pay the survey costs?

How were the survey costs ultimately paid?

partition in the western part of the block should be met by the Crown.[899] (This was despite an earlier request by the Crown's representative that the court consider whether the government would receive extra land for the cost of the survey that would now be required.[900]) We consider the impact of this boundary for those who claimed rights in the lake in a later section of the chapter.

Tahora 2 (whole block): 213,350 acres. 16,658 acres effectively purchased to satisfy lien (£1036 10s 4d deducted from payments to sellers, plus 6291 acres awarded to Crown from non-sellers' portion): 7.8 per cent of block area. Amount owing for survey (by 1893) £1823 4s 3d, including £223 4s 3d interest

Tahora 2 (excluding 2B and 2B1): 152,544 acres. 11,656 acres effectively purchased to satisfy lien (£740 11s 5d deducted from payments to sellers, plus 5922 acres awarded to Crown from non-sellers' portion): 7.6 per cent of block area Amount owing for survey (by 1893) £1313 16s 1d

We turn next to Tahora 2. In our marginal summary, there are firstly figures for the whole of Tahora 2 (since our discussion of the survey below necessarily relates to the whole block) and, secondly, figures for Tahora 2, *excluding* Tahora 2B and Tahora 2B1, which were awarded to Ngati Ira (Whakatohea).

In Tahora 2, as in Waipaoa, there was a history of pre-title dealings, and we have already outlined the Crown's encouragement of the early surveys in the region made by Charles Alma Baker. We have also discussed the circumstances in which Tahora 2 was dragged into the land court as a result of applications by individuals who did not represent their hapu, and were found not to have interests in the land (see sec 10.5). Central to the progress of the hearing was the survey secretly done by Charles Alma Baker in 1887–88, leading to the completion of a plan. As we have seen, the plan was eventually approved by the Government – despite its knowledge of forcefully expressed Maori opposition, and the agreement among all the leading chiefs of the many hapu that the survey should never have taken place and the hearing should not proceed.

The question of who should pay for the survey arose immediately, once the court had given judgment in the case. In submissions, the Crown did not really address the claimants' concerns, reflecting those of many rangatira at the time, about loss of land for an unwanted survey. It accepted however, that once the survey went ahead, it was 'an important part of the chain of events that led to title investigation and loss of land and money'; but, as we

899. Wairoa Native Land Court, minute book 3B, 16 April 1889, fol 163
900. Stevens, 'Report on the History of the Waipaoa Block' (doc A51), pp 21–22

Provisions Regarding Payment to Surveyors:
Sections 81, 82, and 83 of the Native Land Court Act 1886

81. If at any time it be made to appear to the Court that it has been certified by the Surveyor-General, or any other officer authorized by him for the purpose, that money was owing to any certified surveyor by Natives for any plan used or accepted as aforesaid, or for the survey on which such plan was founded, and that any such sum or any part thereof is still owing and unpaid, the Court may make an order in favour of such surveyor, that the estate and interest in the land the subject of such survey of the Natives owing such money shall be charged with the payment to such surveyor of the amount so owing.

Such charge shall have the effect of a mortgage of such estate and interest in favour of the surveyor.

82. If any claimant or counter-claimant to Native land shall have had the same surveyed at his own cost, and on investigation of the title to such land it shall be found that other Natives are entitled to the whole or any part thereof, it shall be lawful for the Court, in case it shall order a certificate of title to any other than the Natives who made such survey, to order also that the whole or a proportionate part of the cost of such survey and of the plan used by the Court the result of such survey, shall be paid to the Natives who made such survey by the Natives in whose favour the order for a certificate is made.

Such order shall have the effect of a mortgage of the land the subject of such certificate in favour of the claimant for the amount mentioned in such order.

83. Instead of making such order in favour of the Natives aforesaid, the Court may make it in favour of any certificated surveyor to whom it may appear that such Natives are indebted for the cost of such survey and plan, provided that such plan be 'approved' as aforesaid.

have seen, it also considered that title determination was bound to have occurred at some point anyway – and with it, presumably, a survey.[901]

(ii) ***Did those found to be the owners of Tahora 2 have to pay the survey costs, even though the survey had been done in secret, and the owners had not wanted one?:*** The question of the survey lien went before the court after the title investigation concluded. On 12 April 1889, Baker applied for survey costs of £1887 7s 11d. Counsel for Te Whanau a Kai described this sum as

901. Crown counsel, closing submissions (doc N20), topics 8–12, p 59

'staggering . . . a ruinous expense to the owners'.[902] And he submitted that 'the legality of the survey is a less significant point than the issue as to whether the Tahora owners should have ended up having to lose land for a survey they did not ask for and did not want'.[903] For once the surveying plan had been certified (although, as we have seen, it should not have been), the court took the view that it had no choice but to accept any charging order that the surveyor might seek to place on the land.

Was this the case? The claimants did not think so; they questioned the court's decision. Baker applied for his costs under sections 81, 82, and 83 of the Native Land Court Act 1886.[904] The claimants pointed to the evidence of Professor Binney, who questioned the court's interpretation of the Act on this point. She cited sections 81 and 83, stating that the court was not in fact *required* to make orders: the Court 'may make an order' in favour of the surveyor. Counsel for Te Whanau a Kai also maintained that the provisions of sections 82 and 83 were not mandatory. He submitted that section 82 allowed the court to order that where a claimant or counter-claimant had paid for a survey, other parties whose rights were recognised by the court could share in the survey costs. And section 83 gave the court 'yet another option' in such cases: it might make an order in favour of the surveyor himself, if it seemed that Maori were indebted to him for the survey and plan costs. Given these provisions, counsel submitted, the court 'could have turned Baker down'. But he concluded that though the legislation did leave the court 'some room for manoeuvre' in practice the court did not consider it had a choice.[905]

Counsel queried Judge O'Brien's statutory interpretation skills; but we note that Judge O'Brien had in fact sought advice from the Chief Judge about his power to award survey costs in the case. Chief Judge Seth Smith's reply was that when judgment had been given O'Brien might proceed to deal with the surveyor's claim at once. If Baker's employers (ie, Nikora and Hautakuru) were found to be the owners of the land, then section 81 of the Act would apply. If other Maori were found to be the owners then sections 82 and 83 would apply.[906]

In our view, the judge had no room to move at all. Section 82 gave the court authority to award costs in situations where those who had made the survey were found not to be owners. Those who were not owners had no land to which a charge for the survey costs could be attached. Awarding no survey costs was not an option; the entire regime was based on the premise that Maori would pay the costs. For this reason, the opposition of tribal leaders to the survey charges was not likely to have gained much traction – despite

902. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 17
903. Ibid, p 19
904. O'Brien, file note, 12 June 1889, NLC 89/ 252, Tahora 2A file, Tairawhiti Maori Land Court
905. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 28
906. O'Brien to Chief Judge, not dated and Smith to O'Brien, 19 December 1888, Tahora 2A file, Gisborne Maori Land Court (Peter Boston and Steven Oliver, 'Tahora', report commissioned by the Waitangi Tribunal, June 2002 (doc A22), p 81)

its unanimity, and despite the judge's stated sympathy with their position. At the survey costs hearing, opposition to the charge was expressed by all those who gave evidence – Pere, Tamaikoha of Tuhoe, and Ngaiti of Ngati Wahanga and Ngati Hinaanga. Wi Pere attacked the survey on all counts – and argued that in the circumstances those who had undertaken it should pay for it.

The Judge acknowledged the anger of those in court; but it was at this point that he said he had no choice – if the survey and the plan had been certified, the court must award the surveyor his costs. But he left the door open to the parties to challenge the amount.[907] He then awarded the full sum to Baker, making two orders. The first charged the sum owing to Baker on Tahora 2. The second was an order that the costs be 'apportioned according to acreage' on each of the twelve Tahora divisions (when their acreages should be ascertained); the Maori owners of each division should meet their proportionate share of the cost.[908] (We consider the significance of these orders below.) The spokesmen for the owners expressed their anger about the award in strong terms: Wi Pere said that we will not pay a single penny'; Tamaikoha stated: 'I shall leave this confiscation of the land to be decided by some other authority as to whether it is right or wrong.'[909] And Ngaiti said that: 'if this Court proceeded to make awards under the Act of course that was the Court's only course but I on the part of all the people – distinctly state that we will not pay the cost of this Survey.' Pere pointed out that most of the Tahora land was inalienable, and that the Maori owners could not raise a mortgage aganist it.[910]

Wi Pere cabled the Native Department at once to warn that the owners would not pay Baker:

> Tahora No 2 awarded to us. Applicants for survey found not entitled – Their names not in list even. According to new Act [1886] survey costs awarded owners[,] unanimously objected. If govt pay surveyor they do so at their risk. People found Owners of land will not pay survey. Am sending letters with reasons – gave objections to Court.[911]

And applications filed immediately after the decision were for both a title and survey lien rehearing. Wi Pere's lawyers applied for a rehearing of the lien on several grounds. O'Brien responded in a memorandum to the Chief Judge, stating his readiness to reduce the lien if the owners could give him convincing reasons why he should; but said that they had rejected the payment of the lien outright. 'My sympathies' he wrote, 'were wholly with the

907. Opotiki Native Land Court, minute book 6, 12 April 1889, fol 9

908. 13 April 1889, Gisborne minute book 24, pp 222–223; Boston and Oliver, 'Tahora', pp 83–84. We have discussed the assessor's opposition to charging an award against the owners elsewhere in this chapter.

909. Binney, 'Encircled Lands, Part 2: A History of the Urewera 1878–1912' (doc A15), p 98; 12 and 13 April 1889, Gisborne minute book 24, pp 220, 222; Boston and Oliver, 'Tahora' (doc A22), p 84

910. Opotiki Native Land Court, minute book 6, 12 April 1889, fol 10; 13 April 1889, fol 15

911. Wi Pere, Wiremu Pomare and others, 13 April 1889, NLPD 1889/142, MA-MLP 1/1900/101 (Judith Binney, 'Encircled Lands, Part 2: A History of the Urewera 1878–1912' (doc A15), p 98)

people, who I thought had a real grievance, but it seemed my duty to give the surveyor his order, leaving the parties to apply for a rehearing, & I did so.'[912] The Chief Judge, Seth Smith, did subsequently grant the application for a rehearing of the survey lien on 5 March 1890, on several grounds – among them that the owners, having not been consulted at the time of the survey, had had no opportunity to negotiate the survey cost. This was particularly damaging because regulations under the 1886 Act made provision for survey rates in accordance with block size, but Tahora 2 was so large it was off the scale the survey cost had to be settled by negotiation.[913] But the chief judge also stated that the legality of the survey itself would not be revisited. His position, in summary, was that: 'The Native owners have reaped the benefit of the survey and ought therefore to pay for it.'[914]

(iii) ***Why were the tribal owners not able to cut out the block they chose within Tahora 2 to pay the survey costs?:*** A second issue is the attempts of the tribal leaders to meet the survey charge, and their inability to do so in the way they wished. The Tahora survey lien was reheard in October 1891 by Judge David Scannell. In the circumstances it was not surprising that William Rees, Wi Pere's lawyer, reported that an agreement had been reached between his clients and Baker's lawyer, that the amount of the charge should be set at £1600. As Rees pointed out, the charge – with interest –otherwise amounted to about £2000. Baker – who had earlier tried to get Wi Pere to drop his application for a rehearing of the survey costs – agreed to pay £200 himself in a 'private arrangement'.[915] (No further information was given about this arrangement.)

Rees advised the court that the owners had reached agreement with Baker that the £1600 would be a charge on the whole Tahora 2 block. He and Pere also explained that the owners proposed that a piece of land, at its narrowest point, be cut out as soon as possible to pay off the charge; it would be sold by the four tribes for that purpose. The northern portion of this tract was to be the share of 'Urewera' and Whakatohea; the southern portion that of Ngati Kahungunu and Te Aitanga a Mahaki.[916] Rees told the court that the owners intended to seek permission for the proposed sale, and to have restrictions lifted from that part of the block.[917]

Once the court had ordered the £1600 charge in favour of Baker, Rees approached the Native Minister on behalf of the Maori owners to ask the Government to take over the

912. O'Brien to Chief Judge, 12 June 1889, Tahora 2A [no registration number], Tairawhiti Maori Land Court (Boston and Oliver, 'Tahora' (doc A22), p 92)

913. Boston and Oliver, 'Tahora' (doc A22), p 94

914. Order for rehearing of survey lien, Tahora No 2, H G S Smith, 5 March 1890, BOF 1498, box 1098, Rotorua Maori Land Court (Boston and Oliver, 'Tahora' (doc A22), p 94)

915. Binney, Encircled Lands, vol 2, p 99

916. WL Rees, and Wi Pere, 30 October 1891, Gisborne minute book 22, pp 249–250

917. Binney states that Tamaikoha had earlier provided for meeting Tuhoe survey costs; when he sought restrictions on blocks awarded to them, he sought none on Tahora 2AE2 (1792 acres) or on Tahora 2B1 (Binney, Encircled Lands, vol 2,pp 93–4, 100)

charge. He reiterated that the owners were prepared to cut out a portion of the block adjoining lands held by the Crown; Baker's solicitor, A E Whitaker was travelling to Wellington and would point out on a tracing the part of the block proposed. It is clear this was a serious offer.[918] Boston and Oliver state that this was 'a strip of land separating the northern and southern portions of Tahora No 2'.[919] Part of the tract was 2B1, and it seems, they suggest, that the remainder was in 2C3. At the same time Rees indicated that the Maori owners would sell further land to the Crown.

The Government's response pointed to the extent of the problem that payment of the survey costs would pose for the owners. Cadman replied that the Government would be prepared to accept the offer and purchase the lien, but that it had first to be assured that indisputable title to the proposed block had been conferred on the owners. 'On no account', he added in his minute, 'can the Govt. first take over the lien & then open negotiations for land in satisfaction thereof.'[920] In other words, the Government had to be assured that the survey charge was tied to the actual land the owners were offering. Binney states that the process of sorting out the lien would prove to be 'neither smooth nor quick'; and the owners would lose by it.[921]

In fact, the problem was a glaring one. The root of it lay in the unusual circumstances of the Tahora survey, which was commissioned by people found ultimately to be non-owners.

Judge O'Brien, as we have seen, had had his doubts from the beginning about how to proceed, and had sought the advice of Chief Judge Seth Smith as to how he should apportion survey costs. Could he make an order for the whole amount, and direct that survey costs be charged proportionately on each division of the block once those divisions had been ascertained? The chief judge's reply was that O'Brien would need to defer any order to apportion survey costs until the subdivisions were surveyed. The judge could make an order charging the whole block, but he (the chief judge) doubted whether the court could apportion it to the divisions afterwards; in fact he did not think such an order could be registered.[922]

As we noted above, the chief judge referred Judge O'Brien to sections 82 and 83 of the Native Land Court Act 1886.[923] These were the sections that applied where non-owners had made a survey as in Tahora 2. Where the non-owners had also paid for the survey, s 82 empowered the court to order that they be repaid by those found to be owners of the surveyed land. The section specified that the court's order was to take effect as a mortgage of the surveyed land in favour of those who had paid for it. Section 83 applied where the

918. Rees and Day to Native Minister, 5 November 1891, MA-MLP, series 1, box 59, record 1900/101, Archives NZ, Wellington

919. Rees and Day to Native Minister, 5 November 1891, NLPD 1891/349, MA-MLP 1 1900/101, Archives New Zealand, cited in Boston and Oliver, Tahora (doc A22), p 124, and Binney, Encircled Lands, vol 2, A 15, p 100

920. A. Cadman, minute, 1 December 1891, Coversheet 91/349, MA-MLP, series 1, box 59, record 1900/101, Archives NZ, Wellington

921. Binney, Encircled Lands, vol 2 (doc A15), p 100

922. Boston and Oliver, 'Tahora' (doc A22), p 81

923. Smith to O'Brien, 19 December 1888, Tahora 2A file, Tairawhiti Maori Land Court

survey had not yet been paid for. In that case, the court could order that the owners of the surveyed land owed the surveyor his costs, and put a charge on the land in favour of the surveyor. Thus, those found to be owners of the surveyed land would take it subject to a mortgage to the surveyor for the amount of his costs.

In the survey lien hearing it was clear that the Judge had taken the Chief Judge's advice. He stated in the court that: 'we must award surveyor costs of survey on such survey and plan being duly approved'. And, as we have seen, he made two orders – one attaching the charge for the costs to Tahora 2, and one that the costs should be attached to the divisions when they were surveyed. This was the Judge's response to his dilemma about charging the costs (about which he again consulted the chief judge); as he noted privately, he doubted his power to make orders until the areas of the block divisions had been ascertained, since the orders 'were to be based on area & to have the effect of a definite charge by way of mortgage'.[924] Baker had surveyed Tahora 2; but Tahora 2 had been awarded in large divisions – which were not surveyed – some of which had immediately been subdivided. Lists of names for memorials of ownership had been put in for the various divisions of the block – not for Tahora 2. But the charge, by ss 82 and 83, was tied to the whole block Baker had surveyed; and this was the only charge the Crown could safely have taken over, given those provisions.[925] As we will see, the court's decision, and the Government's caution – both reflecting the circumstances of the survey itself- were to have far-reaching consequences.

(iv) ***How were the survey costs ultimately paid?:*** The Native Minister's cautions about accepting Rees' offer of land to meet the survey costs, led to a stalemate. The owners now had to find another method of paying the huge lien –and not only the lien, but the mounting interest on it. It was clear that the owners could not take on the further cost of the subdivision surveys, so that the lien could be shared among the various divisions. Rees's legal partner, V G Day, wrote again in April 1893 conveying an offer from 'Wiremu Pere and other Native owners' that the Government purchase 20,000 acres in the centre of the block, so placed that 'one half would be taken from the land of each of the two principal hapus owning the land'. Though the land court had 'found that it had no power' to cut out a block in satisfaction of the lien, he said, the owners had always been willing to sell some land to pay it off.[926] They were now nervous about the increase in the amount they owed and were anxious to pay it off 'before the whole of the land is eaten up with interest'. So they

924. O'Brien, file note. 12 June 1889, NLC 89/252, Tahora 2 A file, Tairawhiti Maori Land Court

925. Sheridan of the Native land purchase office raised another obstacle, from his point of view, namely Rule 15 of the Native Land Court, which he interpreted as meaning that 'no further partition' of the block could be made for the time being. Sheridan to Rees and Day, 27 May 1893, MA-MLP 1, box 59, 1900/101, Archives New Zealand,cited in Binney, Encircled Lands, vol 2, doc A15, p 100

926. Victor Grace Day to Minister for Native Affairs, 20 April 1893 MA-MLP, series 1, box 59, 1900/101, Archives NZ, Wellington

offered to sell to the Crown at five shillings an acre.[927] We note that they intended to offer more land than would have met the survey costs, doubtless in an attempt to make the offer attractive to the Crown. Sheridan, however, in his reply at the end of May 1893, conveyed the Government's counter-offer of two shillings an acre – based on Percy Smith's advice that the land was 'exceedingly broken and inaccessible'. He added that the only possible solution was for the Crown to buy undivided shares across the whole block, and hold back from each a proportionate amount of the survey lien.[928]

Soon afterwards Baker's solicitors – Whitaker and Russell – pushed the issue and served notice of a forced sale to recover the lien – which remained attached to the whole block. Day again appealed to the Government to intervene and buy part of the land on the following grounds:

- If a forced sale took place, the land would probably not realise more than would simply pay off the lien – despite the huge size of the block
- Because of the Native land legislation, the Maori owners could not raise the money to pay off the lien themselves; they could not deal in the land because of the large number of owners and the size of the block
- A Government purchase of part of the block would clear the lien and would protect the interests of the owners in the greater portion of the block.[929]

Boston and Oliver considered that the proposed forced sale 'gave the government leverage to extract a low price for the land', and it is clear that it strengthened the Government's hand; Sheridan commented to Cadman that 'The holder of the survey lien is not in a position to dispose of the land to satisfy the liens. Partition surveys of the extent of £2000 will be necessary before titles can issue.'[930]

That is, the Government was well aware that another £2000 would have to be paid for partition surveys, on top of the £1800 or so already owing, before titles could issue, the liens could be registered against the divisions of the block, and Baker could recover the amount owing to him. Clearly the owners were not in a position to pay for the extra surveys. The Minister's response to Day, that the Government would offer two shillings for the whole block 'or for an area sufficient to cover survey lien on obtaining a land transfer title from either the Native owners or any other person' was thus hardly helpful.[931]

In short, because the survey costs had been charged against the whole Tahora block – so that a discrete piece of land could not be cut off to meet survey costs – and because

927. Day to Cadman, 20 April 1893, MA-MLP, series 1, box 59, record 1900/101, Archives NZ, Wellington (Boston and Oliver, 'Tahora' (doc A22) p 124)

928. Sheridan to Day, 27 May 1893, MA-MLP, series 1, box 59, record 1900/101, Archives NZ, Wellington. See also Boston and Oliver, 'Tahora' 9doc A22), p 124

929. Day to Minister for Native Affairs, 2 June 1893, MA-MLP, series 1, box 59, record 1900/101, Archives NZ, Wellington

930. Sheridan to Cadman, no date, MA-MLP 1, box 59, 1900/101, Archives NZ, Wellington (Boston and Oliver, 'Tahora', (doc A22) p 125)

931. Sheridan to Day, telegram (undated), MA-MLP, series 1, box 59, record 1900/101, Archives NZ, Wellington

the surveyor's solicitors were threatening the sale of the whole block, the way was open for the Crown to start buying individual shares on its own terms. We cannot see that the Government made any real attempt to assist the owners, or to meet them halfway. Instead, Crown negotiations for Tahora No 2 began in August 1893, and it bought undivided individual interests. It rejected an offer from owners to increase the amount of land they would sell to the Government to 50,000 – 100,000 acres at three shillings an acre. Instead the Native Minister held firm on two shillings, and on purchase from individual owners. The Government did 'not feel disposed to make any arrangement with the holder of the survey lien'.[932] Moreover, Brooking, the Crown's purchase agent, deducted 2d per acre from each share he purchased, as a contribution to the survey lien – that is, as counsel for Te Whanau a Kai noted, the real price per acre was 1s 10d. Brooking's initial calculations were made on the basis of the original lien of £1887 7s 11d rather than the £1600 awarded in 1891; but the mistake was later rectified by officials. After interest of 5 per cent was added to the £1600, however, the amount owed by the owners was still £1823 4s 3d. This sorry episode for the owners, not at all of their making, added power to the Crown's purchase machine.

In February 1896, the Crown sought definition of its interests in the Tahora 2 blocks. At the hearing in April, R J Gill (on behalf of the Crown) laid before the court information about Crown purchases, stating the area purchased by the Crown and the proportion of each block owed by Maori to settle the survey lien, which the Crown now took over. No subdivisional surveys had yet been done, and Gill estimated the size of each block. The Napier District Surveyor pointed this out, commenting that no registration of the lien could occur until the completion of the subdivisional surveys. But, according to Boston and Oliver, officials decided to prepare certificates for each subdivision anyway.[933] Ultimately, then, the lien was divided and charged against each of the Tahora blocks – as opposed to the owners' wish to consolidate it. Crown purchases had accounted for more than 124,000 acres (or some 58 per cent of the block).[934]

By means of the twopence per acre deduction the Crown secured £1,036 10s 4d (56 per cent of the total owing) from the sellers. Binney points out that the money went into a consolidated fund held by Baker's solicitors towards repayment of the lien, without crediting any interest towards the fund.[935] In other words, as the sellers' contribution was collected, it was imprudently held in a non interest-bearing account, rather than earning interest or being applied to paying off the interest-bearing lien. The remaining £786 13s 11d debt was recovered from the non-sellers in land amounting to 6,291 acres, valued at 2s 6d per acre.[936] If one-twelfth of the Crown's land purchasing is added (that is, twopence out of two

932. Day to Minister for Native Affairs, 10 June 1893,and draft reply approved by Cadman, 26 June 1893, MA-MLP, series 1, box 59, record 1900/101, Archives NZ, Wellington
933. Boston and Oliver, 'Tahora' (doc A22, p 135
934. Boston and Oliver, 'Tahora' (doc A22) pp 131–3
935. Binney, 'Encircled Lands' (doc A15), pp 101, 105–106
936. Boston and Oliver, 'Tahora' (doc A22), pp 134–136

The Payment of the Tahora 2 Boundary Survey Lien

Survey lien agreed to at 1890 rehearing	£1600
Plus interest at 5 per cent per annum	£ 223 4s 3d
Total value of survey lien	£1823 4s 3d
Paid towards survey lien	
Sellers' contribution	
(twopence out of 2s per acre price retained	
by Crown from sale of 124,403 acres)	£1036 10s 4d*
Non-sellers' contribution	
(Crown award of 6,291 acres at 2s 6d per acre)	£ 786 13s 11d
Total paid	£1823 4s 3d

* As one-twelfth of the proceeds from the sale of 124,403 acres were consumed in meeting the sellers' contribution, this equates to the entire proceeds from selling 10,367 acres.

Consequently, the Crown acquired 16,658 acres of Tahora 2 (6,291 acres plus 10,367 acres) solely by virtue of the survey lien. Excluding Tahora 2B and 2B1, the Crown acquired 5922 acres from the non-sellers and 5734 acres from the sellers, a total of 11,656 acres.

shillings) to the 6,291 acres, then effectively 16,658 acres of Tahora 2 land were used to satisfy the Crown's lien for the boundary survey.

The Crown's calculation is that the survey costs amounted to 7.8 per cent of the whole block.[937] With that we agree. Our calculation of the costs for Tahora 2 excluding Tahora 2B and 2B1 is that they amounted to the slightly lower proportion of 7.6 per cent.

This figure was a more moderate proportion than in a number of other blocks, and we might well accept that the land would have gone before the court at some point and, under the existing system, the survey costs would have become a lien on the land anyway. But it is very unlikely that one immense block would have gone before the court had the various tribal owners themselves made the decision to seek title investigation. Had smaller surveyed blocks been involved, survey charge orders would more easily have been registered, and parts of the blocks cut out to meet survey costs. It is because the various tribal groups with rights in the land were opposed not just to the secrecy of the survey, but also to its outcome – the dragging of such a huge block into the court – that they were so frustrated.

937. Crown counsel, closing submissions (doc N20), topics 8–12, p 44

10.8.3

Underlying their deep-seated anger was the perception that the law had worked not only to allow their land to be manipulated into the court against their wishes, but to ensure that they could not escape the full costs associated with such a suspect process. As it was, the costs had to be charged against the whole block; they could not be charged against all its divisions until they were surveyed, which the owners – already burdened with an enormous lien – could not afford. Early on, the owners put forward the sensible suggestion that, to share the charges fairly among the various tribal groups who had rights in such an artificially constructed block, they should select a tract which allowed them all to contribute. But they were stymied by the law.

It is clear that the owners' inability to dispose of the survey costs as they had wished, with one piece of land in one hit, left them vulnerable. The threat of Baker's solicitors to force a sale of Tahora 2 failed to prompt a sympathetic or constructive response from the Government to the unusual situation in which the owners found themselves.

We conclude that the Crown took advantage of the situation to start purchasing as much land as possible in the block on its own terms, and at its own price, dealing with individuals in a climate very much to its advantage.

Because the original, secret, survey had involved such a huge block, tribal leaders' attempts to control the process of alienation triggered by their survey costs dilemma and to retain the major part of the land, or to sell strategically for development purposes, were doomed. And the Crown's low purchasing price enabled it to take more land for the survey costs.

Whirinaki
31,500 acres
Survey lien £666
Amount of land to satisfy the lien: 4439 acres
14.1 per cent of block area

In Whirinaki, as in Tahora, the Crown moved to enforce the payment of the lien for the original boundary survey by deducting the amount owing both from sellers (as it simultaneously bought into the blocks), and non-sellers. Not only this, but the remaining owners were charged a share of the cost of surveying out the land owing to the Crown for the original set of survey costs, with interest added.

The Whirinaki survey was carried out in 1887, but liens were not attached to the title until after a rehearing in 1893. They were payable to the surveyor Henry Mitchell. Whirinaki 1 was charged with a lien of £399 10s 6d, and Whirinaki 2 with a lien of £266 7s – that is the survey was charged at approximately fivepence an acre.[938]

Following the bankruptcy of surveyor Henry Mitchell in 1894 (see below for a discussion of Mitchell's debts), the Crown took over the survey liens on the two blocks in 1895. By that time, interest of £18 2s 10d had accrued (ultimately that sum was not collected from the owners, as the Crown forgot to ask for it at the court hearing).[939] The Crown moved to settle the liens by taking land at some three shillings an acre. Tulloch states that it is 'unclear' how this figure was arrived at, as there is no information in the relevant files as to what factors may have been taken into account in deciding it. At the same time, the Crown began to

938. Tracy Tulloch, 'Whirinaki', report commissioned by the Waitangi Tribunal, January 2002 (doc A9), p 37
939. Ibid, p 39

1887 Whirinaki Survey Costs: Liens Charged to Blocks in 1893

Whirinaki 1	£399 10s 6d
Whirinaki 2	£266 7s
Acreage of land paid by owners to satisfy liens	4439 acres

purchase individual interests in the blocks, and –as in Tahora 2 – a proportion of the lien was deducted from payments made to those Maori selling, while the non-sellers gave up land in proportion to their share of the lien. Tulloch states that the Maori owners carried the full cost of the original lien of £666, which was paid in land amounting to 4,439 acres.[940] The Crown's purchases over and above the area needed to satisfy the lien amounted to just over 17,000 acres.

Further survey costs were incurred in Whirinaki after surveys were made in the wake of the Crown purchases. Subsequently, Sheridan of the Native Land Purchase Office sent a memo to the surveyor general requesting that the original survey lien on the blocks be withdrawn so that the Crown could gain its certificate of title. He added that 'The residue of these blocks still held by the Natives although, now freed from liability in respect of the original survey lien, are chargeable with a reasonable proportion of the partition surveys for which fresh liens should be lodged.'[941]

Remaining Maori-owned blocks totalling 10, 349 acres acquired liens amounting to £50 15s 11d, on which interest was charged at 5 per cent per annum.[942] In 1899, the Crown took further land from two of the blocks to discharge these liens, amounting to 351 acres. This brought the total paid by the owners of Whirinaki lands to £718 9s 5d, equating to 4790 acres (15.2 per cent of the block).[943] There were still outstanding liens against some small Whirinaki subdivisions in 1917.

(v) ***Whirinaki as an example of the costs of later partitions of a block:*** Whirinaki was one of several rim blocks in which the level of partitioning went well beyond the boundary survey and first partition, whose costs owners had to meet as they secured initial title to their land. Though claimants' submissions concentrated on the first round of costs, they often noted that survey costs continued to accrue as later partitions were made. In the Whirinaki,

940. Ibid, pp 38–39

941. Sheridan to Surveyor General, 29 July 1897, closed file 258, Whirinaki Corr 1911, Rotorua MLC (Berghan, 'Block Research Narratives of the Urewera 1870–1930', (doc A86), p 740)

942. In fact, the final sum was £52 11s 11d, as the Crown did not collect on the £2 8d lien owing on Whirinaki 2(1), which was an inalienable reserve.

943. Tulloch, 'Whirinaki' (doc A9), pp 44–47

Survey Costs in Whirinaki 2 (3B2A) Block

Within the blocks developed for farming, the experience of the owners of what became Whirinaki 2(3B2A) was probably typical. In 1895, they were among the 148 owners of the 12,600 acre Whirinaki 2 block, who ended up including an extra 1775 acres within the sale of 10,150 acres to the Crown, in order to meet the boundary survey cost of £266 7s.

Four years later, the 49 non-sellers (who had been awarded the 2050 acre Whirinaki 2(3) block), gave up another 70 acres of land to pay for the cost of separating the Crown and non-sellers' awards. This had amounted to £2 8d for Whirinaki 2(1) and £10 8s 2d for Whirinaki 2(3).[1]

The first internal division of owners' interests within the Whirinaki 2(3B) block then occurred in 1903; on this occasion, it was split five ways, the resulting new blocks ranging in size from the 80 acre Whirinaki 2(3B2) block up to the 746 acre Whirinaki 2(3B3) block.[2] The available evidence does not reveal the cost of surveying out these partitions, although some indication may be gained from the partitioning of the neighbouring 2(1) block (which encompassed 400 acres) in 1911. In 1916, liens totalling just over £82 were registered against the five blocks that were created by this partition, with the closest in size to the Whirinaki 2(3B2) block having a lien against it of £13 11s 8d.[3]

The Whirinaki 2(3B2) block itself was to remain intact until 1921, when just under half of the block was sold to the settler Thomas Anderson. The non-sellers had their interests cut out as the 40 acre 2(3B2A) block, with the survey lien subsequently registered against it coming to £14 18s 5d. When it is considered that Anderson only paid £47 15s 9d for his 38 acres, this price was extraordinarily high in comparison.[4] It is likely, however, that the cost of actually getting a surveyor from Whakatane or Rotorua was to blame. In the breakdown of costs for the survey of the Whirinaki 2(3B3) block in 1926, the field work and plan drawing both accounted for about one-third of the £34 7s 6d each, but the other one-third was for travel time and expenses.[5]

1. Tulloch, 'Whirinaki' (doc A9), pp 32, 38, 43–44
2. Berghan, comp, supporting papers to 'Block Research Narratives' (doc A86(r)), pp 6284–6287)
3. Berghan, comp, 'Block Research Narratives' (doc A86), p 743; Tulloch, 'Whirinaki' (doc A9), p 138
4. Tulloch, 'Whirinaki' (doc A9), pp 116, 133, 138
5. K M Graham, chief surveyor, to the registrar, Rotorua Native Land Court, 2 July 1926 (Berghan, comp, supporting papers to 'Block Research Narratives' (doc A86(r)), pp 6409–6410)

Waiohau, Waimana and Ruatoki blocks, each of which contained land capable of supporting economic utilisation at the level of the family farm, this was certainly the case. Over time, the owners' common holdings on these blocks were broken up as individuals and whanau sought to cut out their interests into properties that they could develop, or alter-

Issues Arising from the Tuararangaia Survey

What were the bases of the costs charged to the owners in 1898?

What was the basis of the court's award in land to the Crown in 1907?

natively sold or leased areas to neighbours or external purchasers.[944] These multiple levels of partition meant that survey costs were an ongoing burden for owners. A typical example is the owners in Whirinaki 2 (3B2A) (see box). These costs were less frequent for owners of blocks such as Tahora 2 and Waipaoa, but here they were still generated by each round of Crown purchasing.

In Tuararangaia, similar issues related to survey costs arose in respect of the application for survey, and its undertaking without the knowledge of a number of groups with rights in the land. But there were also particular issues in this block relating to the amount of land lost to the owners as extra costs were loaded onto them:

- the later charging of 'the Urewera tribe' for delays caused to the surveyors (as a result of lack of consultation at the outset);
- the award of land to the Crown for unpaid liens in 1907;
- a clerical error which increased the size of that award; and
- later deductions for surveys that were not carried out.

The Crown has expressed its concern about the basis of the Tuararangaia costs, and their impact on those who had to pay them.[945]

Tuararangaia 1
3500 acres
Crown award, 1907:
881 acres
25.2 per cent of the block value
Amount charged against Tuararangaia 1 for survey in 1907 £146 3s 8d including detention charge of about £45
Plus about £36 10s interest, plus £30 for cutting out Crown award: total £212 14s 7d

(vi) ***What were the bases of the costs charged to the owners in 1898?*** The Tuararangaia survey, like Tahora 2, was carried out by Charles Alma Baker, in 1885; the cost (as recorded in 1893) was £347 5s 4d. It seems probable that this was the agreed price, as it accords approximately with a price of sevenpence an acre, which was the fee set for blocks of Tuararangaia's size in 1886.[946] For charges as at 1898, see box over.

How did these charges arise? Peter Clayworth has documented the events which led to the application for extra costs for surveying delays, on the basis of evidence given in the course of the 1890–91 Tuararangaia title investigation; as we noted above, it is evident that

944. See, for example, Sissons 'Waimana Kaaku' (doc A24), pp 69–95
945. Crown counsel, closing submissions (doc N20), topics 8–12, pp 45–47
946. 'Survey Regulations under "The Land Act, 1885"', *New Zealand Gazette*, 1886, no 30 p 636

10.8.3

The Survey Department's Application for Survey Costs, 1898

Total for the three Tuararangaia blocks	£260 7s 3d
Total in survey costs	£155 1s 3d
Additional amount sought for 'detention'of surveyors (39 days)	£105 6s
Claim against Tuararangaia 1(3500 acres)	£140 8s 3d
Proportion of detention charge owed by Tuararangaia 1	'about £39'

Te Whaiti Paora (described as a chief of Ngati Hamua and Patuheuheu[947]) did not represent all the people in whose name he applied for survey in 1884. As we understand it:

- After Te Whaiti Paora's application, he and Mehaka Tokopounamu of Patuheuheu guided the surveyor Baker over the block; the party included two young Tuhoe men.
- Other parties who claimed rights in the land had no prior knowledge of the survey; the survey party was discovered by some young men out pig hunting, who reported it to leaders of Ngati Awa and Warahoe; a party of Warahoe and Ngati Awa went to interrupt the survey; Penetito Hawea of Ngati Awa later claimed to have led this group, who stopped the survey party north of Moetahanga stream, confiscated the survey instruments (the theodolite was said to have been broken), and escorted them back to Te Teko.
- Evidently after negotiation, Penetito Hawea agreed to allow the survey to continue, and accompanied the party to mark out the eastern boundary of the block.
- When the survey party moved into the eastern part of the block, when a line was to be cut marking the eastern boundary, they were stopped again, this time by a group of Tuhoe, at the Kotorenui stream; the survey party again returned to Te Teko; subsequently the party returned (this time accompanied by Hawea's son), and the survey of the eastern boundary was completed.[948]

In 1898, Kallender, who appeared in court on behalf of the Crown, made no statement about who had detained the surveyors, and produced no evidence in support of his claim. Akuhata Te Kaha objected to the charge for delays on the ground that the surveyor had come onto the land before some of the owners had consented to the survey. The court however made the order in favour of the Crown. Immediately afterwards the Tuararangaia No 2 case was called, and Tamati Waka objected to the costs for delay because Ngati Pukeko

947. Peter Clayworth, 'A History of the Tuararangaia Blocks', report commissioned by the Waitangi Tribunal, May 2001 (doc A3), p 48

948. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 48–49, 84–85

had not delayed the survey; they had neither applied for the survey, nor did they know it was being made. At this point Judge Wilson stated 'that the N'Pukeko [*sic*] tribe should not be made to suffer for delays caused by the Uriwera tribe'. But to pacify the Chief Surveyor, he would amend the order just made for Tuararangaia 1 'by adding thereto the proportion of the £12 7s due [the total claimed for delays against Tuararangaia 2] to recoup the Survey Depart'.[949] (It seems the court also transferred part of the same charge against Tuararangaia 2 to Tuararangaia 3B.)

It is alarming that the survey office should have claimed over £100 for survey delays over the whole block, dividing the amount by three so that the charge would fall on all the owners, without producing any evidence as to who was deemed responsible – or why 39 days should be claimed.[950] It is more alarming that in such circumstances the judge should have accepted the claim – and should so lightly have dismissed the objections made on behalf of the Tuararangaia 1 owners, and a Tuararangaia 3 owner, while accepting those made on behalf of Tuararangaia 2 owners. His comment that the delays had been 'caused by the Uriwera tribe' indicates that he was not familiar with the circumstances of the survey, that he evidently did not consider he ought to enquire into them, and that he was prepared simply to hold Tuhoe, the iwi, responsible.[951] We endorse the Crown's statement in its closing submissions that the amount was charged against Tuararangaia 1 (and 3B) blocks 'on the pretext that "the Urewera tribe" [as a tribe] were responsible for the delays. As Clayworth demonstrates, this is not the case.'[952] As the Crown submitted, it is thus 'not clear on what basis Wilson considered it appropriate to award such costs.'[953]

Judge Wilson himself gave no explanation of his award, but it seems to us that he may have found himself in difficulties in his evident wish to meet the Crown claim – as indeed the Chief Surveyor doubtless found himself in difficulties establishing a legal basis for the claim. At the time the survey was made (1885) the only provision in force relating to penalties for obstructing a surveyor was section 13 of the Native Land Division Act 1882, which referred specifically to surveyors authorised to enter on land to which the Act applied – that is land held under a title derived through the land court, the division of which might be sought by a Native grantee or grantees. The provision was not relevant to the Baker survey of Tuararangaia. Subsequently the legislation did provide more generally for penalties for obstruction of surveys, but we note that the offence was capable of commission only by a particular individual or individuals, who could be fined or imprisoned for their conduct. It was not an offence able to be committed by, or attributable to, an entire tribe in a corporate

949. Whakatane Native Land Court, minute book 6, 8 December 1898, fol 115
950. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), p 91
951. Ibid, p 86
952. Crown counsel, closing submissions (doc N20), topics 8–12, p 47
953. Ibid

sense, or for which land could be taken, directly or indirectly, by the enforcement of a survey lien.[954]

The Chief Surveyor was not able to cite such provisions because they postdated the 1885 survey, and he thus fell back on a charge based on lost surveying days (though we do not know how this was calculated). There was provision from 1886 for a surveyor to record periods of detention in a 'Return of Work Form' under the category 'Detention by Native opposition or other cause', but there is no evidence that Kallender submitted such a form to the court.[955] Nor could we find any provision under which the court might make an order for costs against owners for days lost through detention of a surveyor.

The result of the court's decision was that an amount was charged against the land of all 716 owners. No offence had been alleged against them, or proved. It is beyond doubt that some of them would not have known of the incident or that the allegation was being made, nor that the court was about to adjudicate on the issue. They were not summonsed or notified or given the opportunity to be heard. In any event, the Crown sought and got land for the commission of an unproven summary offence. We cannot imagine that European land would be taken in such a fashion.

What was the basis of the court's award in land to the Crown in 1907? Because the Tuararangaia 1 owners did not (or could not) pay the original costs, they subsequently faced further costs. In 1907, the Chief Surveyor applied to the Native Land Court for an award in land for unpaid costs in various Matahina and Tuararangaia blocks; the application was advertised in the *Gazette* of 4 July for hearing at a court sitting on 7 August. In fact, it was on 27 September that the Crown cases were called and it was then that the Crown representative, Mr Ballantine, told the court, speaking of all the blocks in the Crown application: 'I have been here for several days and have invited the owners to pay up for the charging orders in their cases, but they have not done so, and I must now ask the Court to cut out of each block a sufficient area in each case to pay the survey charges &c.'[956]

The charge against Tuararangaia 1 at the time the Crown applied for hearing had been £146 3s 8d (of which over £45 – some 30 per cent – was the charge for obstruction of the survey). It is hard to imagine that the Tuararangaia 1 owners were greatly inclined to meet that particular cost. Some owners may have been aware of the Crown's application, if they had seen the *Gazette* notice. We assume that at least some owners were in court – not because any spoke, but because it was recorded in the minutes at the end of the Tuararangaia cases that: 'In these three cases the orders will not be made until the rising of the Court.'[957] This suggests that the court was prepared to give the owners a short breathing space to make the

954. Native Land Court Act 1886, s 90; Native Land Court Act 1894, s 64
955. 'Form of Annual Return by Field Surveyors', 20 May 1886, *New Zealand Gazette*, 1886, no 30, p 639. See also: 'Survey Regulations under "The Land Act 1885"', *New Zealand Gazette*, 20 May 1886
956. Whakatane Native Land Court, minute book 9, 27 September 1907 fol 177
957. Whakatane Native Land Court, minute book 9, 27 September 1907 fol 179

Court Award to the Crown in Tuararangaia 1, 1907

Original (unpaid) charge	
(including over £45 for obstruction charge)	£146 3s 8d
Interest of 5 per cent for five years increased charge to	£182 14s 7d
Plus cost for cutting out Crown award	£ 30*
Total charges on the block	£212 14s 7d
Award to Crown (25.2 per cent of the block)	881 acres

* Peter Clayworth, ' A History of the Tuararangaia Blocks' (doc A3), p 88

payments required. The payments had, however, just gone up by nearly 50 per cent (see box facing).

The Tuararangaia owners thus lost over a quarter of their block to survey costs. We add that they lost out in this award in three further respects:

- In what the Crown referred to it as a 'mathematical error' (which seems to have been the case), the area taken from Tuararangaia 1 was recorded as 881 acres, when it should (on the basis of the given valuation of the land) have been 851 acres.[958] (The Crown has accepted this mistake, which cost the owners an additional 30 acres)
- The valuation itself, at five shillings an acre, is questionable (see box over).
- The Crown failed to survey the boundaries of the areas to be cut out- despite the extra charge (in land) which the Tuararangaia owners paid for this purpose. A surveyor sent to start a second series of surveys was transferred to another department before he had made much progress. Clayworth's evidence was that a 1915 document 'clearly shows that the boundary lines of the subdivisions within the original Tuararangaia block were drawn on the 1885 plan without benefit of a proper survey'.[959] A memo from the Chief Surveyor of the South Auckland district written in 1982 'also clearly states that the original subdivision of Tuararangaia 1B was drawn up without a survey'.[960] In other words, the owners had lost further acres of their land merely to fund the drawing of lines on a map.

The story of survey costs and land loss in Tuararangaia 1 is not a happy one, as the Crown has conceded. It points to repeated carelessness of Maori owners' rights on the part

958. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), p 8
959. Ibid, p 93
960. Ibid

The Valuation of Tuararangaia 1 in 1907

There is a lack of evidence as to how the value of five shillings an acre was arrived at by the court or the Crown. Clayworth stated that he had been unable to find any reference to any on-site valuation of the Tuararangaia block before 1914.[1] Stirling thought it possible that Charles Buckworth, the local land agent and local body valuer who had given an 'estimate' of the value of Matahina blocks to the Crown, may have supplied an estimate for Tuararangaia. (There was no appeal in the case of Tuararangaia, so Buckworth was not called to give evidence about the block, as he was later in Matahina D. But his Matahina evidence, as we will see, reveals he had not inspected the land and knew it only in a 'general' sense.) A formal valuation required the land to be inspected.

There is some evidence about the value of Tuararangaia from mid 1912. Judge Browne, who had to estimate the value of Tuararangaia 1B (1000 acres), relied on the sales of adjacent (and unnamed) lands to guide him and estimated the value of the block at 15 shillings to £1 per acre. That is, three to four times (not five times, as Stirling says) the 1907 estimate relied on by the Crown, which is similar to the gap between the 1907 estimate for Matahina D and the value of the land in 1910.[2]

The first Government valuation located for Tuararangaia dates from 1914, and is for Tuararangaia 2B (793 acres). District Valuer Burch, who conducted the valuation, did not refer to any previous valuation of the Tuararangaia lands. He valued it (saying the land was not worth a great deal) at six shillings per acre (the owners sought £1 per acre). There was no valuation of the southern 1000 acres of Tuararangaia 1B when its owners offered it to the Crown as an education endowment in 1912. But land in the northern part of the block was valued at ten shillings per acre when it was sold as a donation to the war effort in 1915. Stirling notes that it is not clear on what basis the value of the land was considered to have doubled since 1907, since again the land had not been inspected, and suggested it may have been a reciprocal gesture to acknowledge Tuhoe's patriotism.[3] On the other hand, that is less than the value Judge Browne gave Tuararangaia 1B in 1912.

We conclude that the ascription of a value to the Tuararangaia land in 1907 was casually made – and the low value translated into a high award to the Crown.

1. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), p 87
2. Bruce Stirling, 'Te Urewera Valuation Issues', report commissioned by Tuhoe Waikaremoana Trust Board, February 2005 (doc L17), pp 85–86
3. Stirling, 'Te Urewera Valuation Issues' (doc L17), pp 87–88

Issues Relating to the Matahina blocks C, C1, and D

What were the circumstances in which the 1907 awards to the Crown were made?

What awards did the court make to the Crown in 1907?

What were the circumstances of the owners at the time of the awards?

Did the owners of the three Matahina subdivisions seek surveys?

Was the valuation of the Matahina C, C1, and D blocks fair?

of Crown officials and the land court; and it underlines the severe impact that legislative provisions penalising owners for the non-payment of liens could have.

Matahina C and C1 1000 acres each Award to Crown for survey debt (1907): 667 acres each: 66.7 per cent of block area Matahina D 1000 acres Award to Crown for survey debt (1907): 920 acres: 92 per cent of block area

(d) ***Blocks in which boundary survey costs were over 50 per cent:*** The issues in the three Matahina blocks before us are similar to those in Tuararangaia; they include the amount of land taken in 1907 to discharge survey debt which had earlier accrued, the authorisation of the survey of the Matahina subdivisions, and the valuation of the land on which the award to the Crown was based.

The Crown has expressed its concern at the proportionate costs for surveys of small blocks, noting in particular Matahina C, C1, and D. Matahina C and C1, each of 1000 acres, were awarded to Ngati Haka Patuheuheu after a rehearing of the Matahina block (1884); Matahina D (also 1000 acres) was awarded to Ngati Rangitihi. The figures the Crown gives as necessary for the clearance of survey liens in 1907 were: for Matahina C: 667 acres, for C1: 667 acres, and for Matahina D: 920 acres.[961] We consider here the circumstances in which so much of the small blocks awarded to Ngati Haka Patuheuheu, and to Ngati Rangitihi, should have been taken for survey costs.

(i) ***What were the circumstances in which the 1907 awards to the Crown were made?*** The background to the awards was unusual in some respects. The survey in question was made in 1885 following a rehearing of the Matahina block and orders for ten new subdivisions; it was organised by Henry Mitchell in response to a request from 'at least some of the block's owners', and carried out by Mr Brigham.[962] (This followed an earlier boundary survey of the whole block, and the award to the Crown of 8500 acres for that cost.) In 1891, Mitchell applied to the court for the 1885 survey costs to be charged against each of the subdivi-

961. Crown counsel, closing submissions (doc N20), topics 8–12, pp 43, 45
962. Philip Cleaver, 'Matahina Block', a report commissioned by the Waitangi Tribunal (doc A63), p 68

sions (except Matahina A1 and Matahina A6). The court made the orders asked for, which included £54 charged against Matahina C and C1, and £62 10s against Matahina D.[963]

In March 1894, Henry Mitchell was declared bankrupt in the Auckland Supreme Court. Tulloch states that he had carried out surveys in the Rotorua, Bay of Plenty and Galatea districts on borrowed money in the late 1880s and early 1890s (Hutton Troutbeck for instance, made him advances), but he 'ran into difficulties when the Maori owners of the blocks were unable to sell the land to private buyers in order to to settle the survey debts'.[964] We note that Mitchell was acting as agent for a company which had earlier been involved in negotiations for the purchase of part of Matahina A1; he told the court in February 1891 that he had a 'beneficial interest in the land, as well as a survey lien on it'.[965] He secured a partition of 19,000 acres from Matahina A1 block (which became A1B) in favour of himself and James Wilson, both 'apparently representing an Australian syndicate'.[966] Whether such investments led to his financial difficulties we do not know. In February 1891 Mitchell had however been awarded 6000 acres of Matahina A1 to cover survey charges on Matahina A2, A3, and A4.[967] When he became bankrupt, all the money owed to him for surveys became the property of the official assignee, John Lawson. Charging orders were obtained, and registered as mortgages against four Matahina blocks, including Matahina C and C1, and D in October 1896 (in accordance with the Native Land Act 1894 and its amendments). The Official Assignee's solicitor, E T Dufaur, wrote to the Surveyor General, asking that the Government take over the survey liens. This proposal was rejected, and on 8 December 1897, the blocks were included in a list of 17 blocks advertised to be sold. (Most of the blocks were connected with the bankruptcy of another surveyor, Oliver Creagh, whose liens had also become the property of the official assignee; his surveys however were unconnected with those of Mitchell.[968])

The Department of Lands and Survey was concerned about the proposed sale, since there were restrictions on the titles of a number of the blocks. These did not in fact include the Matahina blocks (see sec 10.9). The Solicitor-General, whose opinion on the legality of the sale was sought in October 1897, concluded that the Supreme Court would 'restrain any such intended sale'. But the Official Assignee persisted with the sale. Even after the Crown deposited the amount of the survey lien, interest and registration fees on all the blocks (amounting to £703) with the Public Trustee, the Official Assignee readvertised the sale at a

963. Philip Cleaver, 'Matahina Block', a report commissioned by the Waitangi Tribunal (doc A63), p 68
964. Tulloch, Whirinaki, (doc A9),p 37
965. Whakatane Native Land Court minute book, 6 February 1891, fol 254 (Philip Cleaver, 'Matahina Block', a report commissioned by the Waitangi Tribunal (doc A63), p 70)
966. Whakatane Native Land Court minute book, 6 February 1891, fol 254 Cleaver, 'Matahina Block' (doc A63), p 73
967. Cleaver, 'Matahina Block' (doc A63), pp 68–70
968. E T Dufaur to J A Tole, 17 December 1897, and advertisement of sale, newspaper excerpt, undated, LS1 29805 (Crown counsel, comp, supporting papers to 'Matahina C and C1 Issues relating to the Survey of the Blocks: Documents to Accompany the Historical Evidence of Dr John Battersby', various dates (doc A41(a)), pp 30–33, 35)

Breakdown of Costs for Matahina C and C1 (1907)

Survey costs	£ 54 0s 0d
Order and registration fee	£ 2 5s 1d
Registration of transfer	£ 0 5s 0d
Crown Solicitor's fee	£ 0 10s 8d
Official Assignee's costs	£ 10 12s 10d
Crown Solicitor's fee	£ 0 4s 8d
Total	£ 67 18s 3d*
Interest added	£ 13 10s 0d
Total	£ 81 8s 3d
Cost of cutting out area for Crown	£ 30 0s 0d
Final total for each block	£111 8s 3d

Court order: 667 acres (valued at three shillings an acre)

* These figures were provided by the court registrar in 1925.

later date (13 January 1898), holding out for the payment of other expenses, 'such as advertising auction sale, Solicitor's costs &c'.[969] The issue 'dragged on', according to Battersby, but the sale of the land was averted. Battersby stated that in preventing the sale, the Crown had 'incurred considerable costs over and above the initial survey liens, including registration of the mortgage, costs of advertising the sale and the Official Assignee's legal fees'.[970]

(ii) ***What awards did the court make to the Crown in 1907?*** The Crown moved to secure the various amounts owing on the Matahina blocks from their Maori owners in mid 1907. Among the applications to be heard at a sitting of the land court on 7 August 1907 were several from the Chief Surveyor, Auckland land district, in respect of four Matahina blocks and three Tuararangaia blocks. The applications were made under s 65 of the Native Land Court Act 1894, 'that a defined portion of land may be vested in applicant, in lieu of survey costs'.[971] The costs listed in the notice for the three blocks with which we are concerned here were:

969. Mueller to Assistant Surveyor-General, 9 December 1897, LS 29805 (Crown counsel, comp, supporting papers to John Battersby, 'Matahina C and C1 Issues relating to the Survey of the Blocks: Documents to Accompany the Historical Evidence of Dr John Battersby', various dates (doc A41), p 11

970. Crown counsel, comp, supporting papers to 'Matahina C and C1 Issues relating to the Survey of the Blocks: Documents to Accompany the Historical Evidence of Dr John Battersby', various dates (doc A41(a)), p 11

971. 'Native Land Court Notices', 22 June 1907, *New Zealand Gazette*, no 58, p 2021

10.8.3

Breakdown of Costs for Matahina D

Amount owing for survey charges and costs	£78	8s	3d
Corrected in court minute book to	£76	8s	3d
Interest	£15	12s	6d
Total	£92	0s	9d*

Valuation of land at two shillings an acre: 920 acres

* Rounded to £92

Matahina C	£67 18s 3d
Matahina C1	£67 18s 3d
Matahina D	£76 8s 3d

The applications were heard by the court on 27 September. We have already mentioned Mr Ballantine's appearance on behalf of the Crown, and his statement that despite his presence for several days, the owners of Matahina and Tuararangaia had not yet offered to pay the costs owing. He therefore asked the court to cut out enough land in each case to pay 'the survey charges &c' (see box).[972]

We note that it appears that the court did not include the legal costs when it made the assessment in land (since at three shillings an acre a total of £100 rather than £111 gives 666 acres).[973]

The court noted that this was 'all the block except [80?] acres in the NE corner'.[974] Evidently in light of this, no figure was given for the cost of cutting out the Crown's land; the appropriate additional amount would have meant a total greater than the acreage of the block.

Though no owner objections were recorded to these awards, there was clearly confusion about them. The court recorded that the Matahina orders should remain 'in abeyance' until the end of the court's sitting in Whakatane and Opotiki 'as the owners are not clear about the charges in some instances, and hope to be able to me[et] some of the cases by paying up'.[975]

972. Whakatane Native Land Court, minute book 9, 27 September 1907, fol 178

973. A note about sources for these overall figures: See T Anaru to Under-secretary, Native Department, 21 January 1925 (T R Nikora, comp, supporting papers to 'Matahina C & C No 1 Blocks', vol 1, 17 May 1995 (doc A39(a)), p 40). The court itself recorded the figures as £67 18s 3d (correcting its own first figure of £67 13s 8d), plus £13 10s interest for Matahina C and C1, which would have given a total figure of £81 8s 3d for each block: Whakatane Native Land Court, minute book 9, 27 September 1907, fol 179.

974. Whakatane Native Land Court, minute book 9, 27 September 1907, fol 179

975. Ibid

It seems a reasonable assumption that any Matahina owners who were present in court were having some difficulty understanding the increase in the charges, and the amount of their blocks the court had awarded to the Crown. In its costs table presented to us, the Crown separated out the proportion of the Crown credit over Matahina C, C1,and D blocks relating to survey alone, recording 53.7 per cent in the case of the first two blocks, and 84.6 per cent for Matahina D.[976] In other words, the Crown did not count the interest and legal fees. As we have seen, the basis of the amount awarded to the Crown in 1907 was not clear even then: the legal fees seem not to have been counted, but the interest was. But from the point of view of the Maori owners at the time, we doubt that the details mattered much.

To pay Crown charges, Matahina C and C1 owners (Ngati Haka Patuheuheu) were to lose 66.7 per cent of their land; Matahina D owners (Ngati Rangitihi) 92 per cent. The greater part of those charges were in fact survey charges, and they were obviously disproportionate and unjust.

We note that it was ironic that the Crown should now take so much of the land in the blocks, when ten years before it had sought to stop the mortgagee sales in the interests of the Maori owners. And the Matahina blocks were also protected in 1897 by Government concern for the majority of the other blocks advertised for sale, whose titles were restricted.

(iii) ***What were the circumstances of the owners at the time the awards were made?:*** None of the owners evidently came forward with payments, and the court's orders therefore took effect.[977] We do not think it surprising that the owners did not meet the costs involved. Ngati Haka Patuheuheu were in a particularly distressing position at the time. We discuss in chapter 11 the circumstances in which their entire community at Te Houhi was forced to evacuate their homes and their land, in the wake of a series of questionable land transactions, culminating in a Supreme Court decision in June 1905 that the title of a settler, Margaret Beale, was good even though it derived from a fraudulent transaction on the part of another settler, Harry Burt. The judge, Edwards, acknowledged that the defendants had 'suffered a grievous wrong.'[978] The people of Te Houhi were finally forced to leave their village during May–June 1907; Binney states that many fled into the Urewera mountains, and only returned some time later to their new settlement site at Waiohau.[979]

The timing of the Crown's applications to the court to secure Matahina land to clear the owners' debts to the Crown must thus come into question. We have recorded the Crown's concession that the 'clearing of these liens [Matahina and Tuararangaia] in 1907 was perhaps unfairly abrupt';[980] and we welcome a concession on this matter. An acknowledgment of the particular circumstances of both Ngati Haka Patuheuheu and Ngati Rangitihi at the

976. Crown counsel, closing submissions (doc N20), topics 8–12, p 43
977. Cleaver, 'Matahina Block', (doc A63), p 75
978. Binney, 'Encircled Lands', (doc A15), p 336; (1905) 24 NZLR 885 (Wai 46 R01, doc F2 (b) p 128)
979. Binney, 'Encircled Lands', (doc A15), p 346
980. Crown counsel, closing submissions (doc N20), topics 8–12, p 5

Tuhoe View of the Crown's Decision to Seek Charging Orders in 1907

it was not possible for Patuheuheu to consider payment of survey costs for Matahina C & C No 1 in 1907, if indeed they knew anything about it, because Patuheuheu were still then affected by wrongful dispossession from Waiohau 1B or Te Houhi and their very means of existence. Given the plight of Patuheuheu, the Crown should not have taken land from Patuheuheu.

Tama Nikora, 'Matahina C & C No 1 Blocks', vol 1, doc A39(a), p 14

time might also have been appropriate at this point. We find it hard to believe that the Chief Surveyor at Auckland could have been unaware of the troubles of the Te Houhi community in particular, given the publicity surrounding the Supreme Court hearing in Auckland, and subsequent hearings of charges in the same court against some of those arrested for 'forcible detention' of the Te Houhi land, as the Beales sought their eviction. The Government had certainly been aware of the progress of events at Te Houhi.[981]

We have no evidence that the timing on the part of the Government in respect of the Matahina C and C1 blocks was deliberate; but it could hardly have been worse. Whether any Ngati Haka Patuheuheu owners were present in court is not clear (the court, as we have seen, referred to the confusion of some owners and their hope of being able to avoid the Crown take of land- but it referred generally to owners of the four Matahina blocks before the court). But even if Ngati Haka Patuheuheu owners had, at such a time of upheaval, seen the *Gazette* notice, and even if some owners were in fact present in court, we are inclined to agree with Tama Nikora that payment for survey costs of Matahina C and C1 would hardly have been possible. Not only was their community and its means of survival being dismantled, but they already had legal fees arising from their recent troubles to cope with (see box).[982]

Ngati Rangitihi were also in a difficult position at the time. The Central North Island tribunal noted a report of the Stout-Ngata commission, published in 1908, which focused on Rotorua and Thermal Springs District Lands. The commission, reporting on Ngati Rangitihi at Matata, noted that the iwi (in the wake of the Tarawera eruption) was mainly located in the coastal area. Ngati Rangitihi were anxious to acquire ownership of the 2000 acre coastal Hauani reserve which the Government had made available to them after Tarawera. The people had understood the land was a gift, but found that they were supposed to pay rental, which they could not pay. They therefore decided to sell their share of the Pokohu block in

981. Binney, 'Encircled Lands', (doc A15), pp 336–346

982. T R Nikora, comp, supporting papers to 'Matahina C & C No 1 Blocks', vol 1, 17 May 1995 (doc A39(a)), pp 13–14. See also Binney, 'Encircled Lands' (doc A15), p 347

order to buy the Hauani reserve and another small reserve on which they were living, and to stock the reserve. They numbered over 4000 people, the commission reported, and they were occupying fewer than 200 acres at Matata, which could not support them.[983]

(iv) ***Did the owners of the three Matahina subdivisions seek surveys?*** The claimants raised the issue whether the Maori owners of Matahina C, C1, and D had in fact sought survey of their small subdivisions in the first place. Counsel for Ngati Rangitihi stated that it was clear that Ngati Rangitihi did not request the survey for the 'meagre interest' the court had awarded them in the block; yet Matahina D was surveyed anyway.[984] Counsel for Ngati Haka Patuheuheu submitted that the injustice of the high cost of the survey charges against their blocks was compounded by the fact that they 'had never sought to alienate their interests in the Matahina Block and nor had they sought any survey of the block'.[985]

The question of Ngati Haka Patuheuheu involvement in seeking a survey in 1884 was at issue between Crown and claimant historians. Mr Cleaver examined the arguments of both parties as presented to the Wai 46 inquiry in light of the (limited) evidence.[986] He concluded that the Ngati Awa chief Rangitukehu was evidently involved in requesting the 1885 survey of the whole Matahina block, though there is evidence that some among Ngati Awa were 'strongly opposed' to the survey. He thought it possible that Rangitukehu might have requested the survey only of the Ngati Awa subdivisions of the Matahina block (comprising by far the greater part of the land). If that were so, however, Mitchell would still have had to survey the portions that had not been awarded to Ngati Awa because of shared boundaries. (Given the location of the Matahina C, C1 and D blocks in relation to the Matahina A blocks, all the boundaries of the C and D blocks would have been surveyed anyway in the course of survey of the outer boundary or the A block partitions; the only boundary not in this position was the boundary between C and C1.) Cleaver noted that Dr Battersby did not present evidence to show that Patuheuheu and Ngati Haka were involved with the survey, but he agreed with Battersby that it was 'impossible to conclusively assert that [they] . . . were not involved' in it. One 'outspoken' owner in Matahina C who had been in court in 1891 had not objected to the charges at the time. There is not enough evidence, in Cleaver's view, to reach a firm conclusion.

We are persuaded, however, by Mr Nikora's argument that there was no logical reason for Patuheuheu and Ngati Haka to have sought an expensive survey of land that was 'relatively unproductive'.[987] In particular, as Cleaver points out, there is no evidence that they

983. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims*, revised ed, 4 vols (Wellington: Legislation Direct, 2006), vol 2, pp 644–6

984. Counsel for Ngati Rangitihi, closing submissions (doc N17), p 16

985. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 108

986. Cleaver noted that the most important file on the issue of survey costs, which dealt with the 1885 survey, appears to have been either 'lost beyond recovery' or destroyed. Cleaver, 'Matahina Block' (doc A63), p 81

987. Nikora, 'Matahina C & C No 1 Blocks', p 12

ever tried to sell the blocks – and thus a key 'logical reason' is removed from the frame.[988] It is more likely than not, in our view, that Ngati Haka Patuheuheu did not seek a survey. We have no evidence as to whether they approved it or not. The loss of much of the block to survey charges should be considered in that context.

(v) ***Was the valuation of the Matahina blocks fair?:*** We turn finally to the issue of the valuation of the land awarded the Crown for survey costs and fees. This is important for the simple reason that the low values at which the court assessed the land in the three blocks meant that a high acreage was awarded. Bruce Stirling made the point graphically when, after considering the evidence, he stated that the 1907 value of Matahina C was 'likely to have been somewhere between three to six times what the Crown estimated, or 9 to 15 shillings per acre', rather than the three shillings which was the value the court worked on. (By our calculations, three to five times.) 'These sorts of values would have reduced the land lost to survey liens in 1907 to between 148 and 247 acres in each block, rather than the 667 acres that was instead taken.'[989] (Stirling's calculations are based on the total figure for the blocks of £111 8s 3d, rather than the lower figure of £100.)

We note first, that Ngati Rangitihi did appeal against the Crown's taking of land from Matahina D, and their case was heard in the Appellate Court at Maketu in March 1909. Cleaver states that the appellant, Hemana Mokonuiarangi, cited three grounds: the absence of the appellants when the case was heard; the fact that the appellants' successors had not been appointed, and the valuation of the land at the low price of two shillings per acre. In court, however, he addressed only the third issue- the valuation of the land taken. Challenging the valuation, and claiming that there was totara on the block which – though not accessible at the time, might be one day – he called for a new one. In his view, the open land was worth two shillings an acre, and the forest £1 an acre.[990] The Crown representative Mr Ballantine explained that two shillings an acre was the Valuation Department estimate which, he said, was 'all I had to go on'.[991] Ballantine's witness, Mr Buckworth, the Whakatane County Council's valuer, told the court he had never visited the block, but knew the Matahina area 'generally'. He described Matahina D in rather scathing terms, as 'very inaccessible' and 'practically valueless'.[992] He thought two shillings was too high a price for the land. The Appellate court upheld the land court's decision. In its judgment the court stated that Mokonuiarangi had provided no evidence to support his assertion that the valuation had been too low. It was guided, in short, by Buckworth's statements.[993]

988. Cleaver, 'Matahina Block' (doc A63), pp 78–79
989. Stirling, 'Te Urewera Valuation Issues' (doc L17), p 84
990. Cleaver, 'Matahina Block' (doc A63), p 77
991. President's Appellate Court minute book 10, 8 March 1909, p 108 (Cleaver, 'Matahina Block' (doc A63), p 77)
992. President's Appellate Court minute book 10, 8 March 1909, fol 109 (Cleaver, 'Matahina Block' (doc A63), p 77)
993. Cleaver, 'Matahina Block' (doc A63), p 77

Cleaver, considering the value of Matahina D, pointed to a Crown offer soon afterwards in January 1912 to buy part of the block (Matahina D2) for £40, or 10 shillings an acre. The offer was based on valuations carried out by officers of the Valuation Department. (This followed special valuations of several Matahina blocks, including Matahina D, carried out by Tai Mitchell in 1910. Mitchell valued Matahina D at 16s 6d per acre – which however the Valuation Department disputed, reducing the valuation of all the blocks.[994]) About half of Matahina D2 was forested, and Cleaver thus considered the price offered for the land in 1912 gives an accurate indication of the value of the remaining area of the Matahina D block. He concluded that:

> The Crown's offer to purchase Matahina D2 for 10 shillings an acre strongly suggests that an improperly low value was ascribed to Matahina D when 920 acres of the block was acquired for survey costs. It seems unlikely that the value of this land could have increased by 500 per cent in the five years between 1907 and 1912.[995]

We agree.

For Matahina C and C1, Cleaver suggests, it is unclear whether the land taken for survey costs was appropriately valued. In the absence of a Crown offer to buy in 1912, no valuation of those blocks was carried out. The Crown and claimant witnesses, Battersby and Nikora, thus compared the 1907 valuations with those of surrounding blocks, and they did not agree on how the evidence available should be weighed. Cleaver's view was that Battersby and Nikora's assessments were not made on the basis of a comparison of the physical characteristics of the blocks, which in his view was a crucial criterion. As he pointed out, the subdivisions of Matahina block were considered of different value in 1907, presumably on the basis of access, soil fertility, and quantities of standing timber: Matahina C blocks were valued at three shillings an acre, Matahina B at five shillings, and Matahina D at two shillings, Battersby, he noted, provided no details of the characteristics of the Matahina C blocks, and thus no real basis for his conclusion that the 1907 'Government valuation' of those blocks 'seems a standard value comparable to that of surrounding land at the time'.[996] In any case, we note, there was no proper Government valuation in 1907, based on inspection of the land- and there should have been.

Stirling, while acknowledging that the Matahina C blocks seem to have contained no millable timber, and that Crown officials continued to have a low opinion of their value, pointed to two factors which should be considered in evaluating the price on which the Crown survey award was based. The first was the 'acknowledged gap between government valuation and market price' which he considered more important than comparability of land, where there is evidence of market prices being offered for adjoining land (see box over).

994. Stirling, 'Te Urewera Valuation Issues' (doc L17), p 79; Cleaver, 'Matahina Block' (doc A63), pp 84–85
995. Cleaver, 'Matahina Block' (doc A63), pp 77–78
996. Cleaver, 'Matahina Block' (doc A63), p 81

Market Prices Offered for Adjoining Land

Waiohau 1B South and North (across the river from the Matahina C blocks): sold for 11s 5d an acre and 12 shillings respectively (1907) – four times the estimated value of parts of the Matahina C blocks taken for survey costs.

Waiohau 2 block (nearby): Government valuation 11 shillings an acre (1914), after owners offered to sell, less than 1913 valuation of 16 shillings an acre; but after private purchasers bid for the land, the Government offer increased to £1 15s 6d per acre.

Source: Stirling, 'Te Urewera Valuation Issues' (doc L17), p 81

Valuations of Other Matahina Blocks, 1910

Matahina B special valuation: almost twice the Crown's 1907 estimate.

Matahina D: eight times the Crown's 1907 estimate.

The second factor was evidence pointing to the under-valuing, or under-estimating, of all other Matahina blocks in 1907 (see box over).

The scale of undervaluing of Matahina C, Stirling has suggested (as we noted above) is likely to lie somewhere between these two figures – that is, somewhere between three and six (five) times the 1907 estimate.[997]

Stirling's figure is itself, very obviously, an estimate. But his overall point is about the absence of a proper valuation for Matahina C land at the time survey costs were awarded to the Crown; and about the translation of a low estimate into a very substantial acreage. We have not been able to establish any requirement in 1907 for the court to secure a Government valuation when awarding survey costs. But the Crown's standard had been established in 1905 in the Maori Land Settlement Act, which provided that the Crown had to buy Maori land at Government valuation; prices paid could not be less than the capital value of the land assessed under the Government Valuation of Land Act 1896. The purpose of that provision was to ensure that Maori land was not undervalued. Other sections in the 1905 Act relating to the lease of land vested in or managed by Maori Land Boards, also use the capital value of the land as assessed under the Government Valuation of Land Act 1896 as a benchmark. And it is clear from the fact that the Crown's representative Ballantine

997. Stirling, 'Te Urewera Valuation Issues' (doc L17), p 84

> *In these Native Land Court proceedings, we suffered badly as [a result of] the cost of surveys and other actions, in other words, we paid for our own colonisation.'*
>
> David Potter of Ngati Rangitihi, brief of evidence (doc C41), p 25

called a valuer as his witness at the Matahina D appeal hearing that valuation was considered appropriate in relation to survey costs – even if, in this case, it had not properly been carried out.

It is hard to see why a Government valuation should not have been required in the case of survey costs – given that it was specified in every other transaction relating to Maori land after 1905. The importance of such a valuation to Maori owners was no less in this context than in any other.

The story of Matahina C, C1, and D survey costs reflects badly on the Crown, and we acknowledge the Crown's concession made in our hearings that in these cases survey costs were a 'heavy burden'.[998] Matahina illustrates the worst case scenario for owners – but one that was always possible under the Crown's legislative regime. The Crown suggested that the small size of the blocks was a factor in the outcome; but for the Ngati Haka Patuheuheu and Ngati Rangitihi owners, these blocks – all that was left of their taonga tuku iho – were highly valued, and the impact of the liens was acutely felt. The commercial valuation of land, of course, took no account of traditional values and uses.

(e) ***Were survey costs fair and reasonable?*** This is the key issue before us. It was contested between the Crown and the claimants –though the Crown made welcome concessions in respect of particular blocks. Crown counsel conceded further that the Crown 'could have taken further steps to ease the burden of survey costs'.[999]

We begin with the figures themselves (see table 8). The total amount for survey costs for the blocks for which we have figures was £3918. Of this, £2632 was paid by Maori owners in land amounting to 19,385 acres, while £1286 was paid directly (withheld by the Crown from amounts due to owners, or paid by owners to surveyors).Converted to land area, the direct payments were equivalent to 11,583 acres. Together, payments made by the Maori owners in land and cash amounted to 30,968 acres. This is equivalent to 9.0 per cent of the total land area of 344,471 acres in the blocks subject to survey costs. The overall proportion should, however, be treated with caution since the individual block ratios span a wide range. The 10 blocks for which we have figures, or can calculate them, range from 3.5 per cent to 92 per

998. Crown counsel, closing submissions (doc N20), topics 8–12, p 46
999. Crown counsel, closing submissions (doc N20), topics 8–12, p 40

cent; one is under 5 per cent, seven are in the 6 to 26 per cent category, and at the upper end, three are over 50 per cent. These were, we stress, almost entirely figures for the first round of boundary survey costs. They do not include subsequent partition costs, other than costs for partitioning out the land secured by the Crown to meet unpaid survey costs.

These figures themselves tell us something about the allocation of survey costs to Maori land. Costs fell on different groups of owners inequitably. The system, as counsel for Te Whanau a Kai, submitted, was arbitrary and unfair.[1000] Given that these costs had to be met by all Maori owners, this was not acceptable. The basis of the allocation of costs had not, as far as we are aware, been considered. Nor does there seem to have been any systematic monitoring of their impact on those groups who had to pay them. Otherwise, we must expect that inequities would have become evident, and would have been addressed. Counsel for Te Whanau a Kai, who considered it 'arguable [. . .] whether Maori should have had to pay survey costs at all', given the public benefit derived from individualisation of titles, suggested that if any costs were to be charged to them, they should have been fixed as a percentage of the block, with the Crown paying the rest. He suggested 'no more than 5 per cent of a block's value' – a figure that echoed George Preece's 1883 suggestion.[1001]

We do not feel comfortable suggesting a particular percentage ourselves, but we think that a minimal percentage in the vicinity of 5 per cent would have been suitable.as a starting point, and subject to adjustment either way for factors such as accessibility, size, and terrain. We agree that, where Maori embarked on dealing in their lands, they should have made some contribution to the survey costs; but that it should not have exceeded a relatively small share of the land concerned. The survey costs in only one of the inquiry district blocks were under 5 per cent. It is clear that figures of over 10 per cent were too high, and that, where costs amounted to over 50 per cent of the land, this was completely unacceptable. Even a seemingly more moderate figure of 7.8 per cent in such a big block as Tahora, when expressed in money or acres, aroused justifiable anger among Maori owners.

The question of what proportion of survey costs Maori might have paid raises the further questions:

- Whether full surveys were needed for title investigation
- Whether full surveys were needed where sale was not the immediate object

The claimants asked whether expensive theodolite surveys were necessary in the Te Urewera rim lands. Would not cheaper magnetic (compass) surveys have sufficed? Would not sketch plans have been adequate? We note that Tuhoe raised the issue of the cost of surveys repeatedly with the Crown in the mid 1890s, and that Premier Seddon finally made a concession on this point, realising that the leaders were anxious because 'the subdivision surveys seem to you a first proceeding in order to take possession of your lands.'[1002]

1000. Counsel for Te Whanau a Kai, submissions in reply (doc N27), p 8
1001. Counsel for Te Whanau a Kai, closing submissions (doc N5),p 7
1002. 'Urewera Deputation, Notes of Evidence', pp 20–21 (Marr, Supporting Papers (doc A21(b)),pp 184–185

When the Urewera District Native Reserve Act 1896 was passed, providing for the central Te Urewera lands to be constituted a Native reserve and (among other things) for a new process for determining land titles within the reserve, it required only that ownership be investigated on a sketch plan prepared and approved by the Surveyor General as 'approximately correct'. The cost of the sketch plans would be borne by the Government.[1003] In other words, the Crown recognised Te Urewera anxieties about survey costs, and was prepared to act to meet at least some of those costs. (We discuss the issue of the extent of its concession on costs in chapter 9.)

Mr Nikora, himself a surveyor for many years, argued that in the case of the Matahina C blocks:

> it just did not make any sense to carry out a survey to accuracy in length of 0.02 metres when the end result was to lose two thirds of the land. A magnetic survey would have been satisfactory. A full legal title survey in 1885 was just not necessary because Patuheuheu were not wanting to sell their land.[1004]

His last point is a telling one. We have shown that in over three quarters of the rim blocks unwilling groups were pulled into the court on the back of applications by others, simply in order to protect their rights. And in the 1890s (when most purchasing occurred in Te Urewera rim blocks), the completion of court hearings and the titling of land was the signal for Crown purchase agents to move in to buy individual interests. Only in a minority of cases did a considered decision to take land to the court to sell come first. In these circumstances we must ask why magnetic surveys would not have sufficed until transactions were imminent. Crown counsel, considering the benefits of surveys to non-sellers –which they suggested included 'farming, finance security, leasing, licenses for timber extraction, etc', conceded that some 'could perhaps have been achieved by a more simple (and less expensive) form of definition'.[1005] They added that there might have been 'significant practical difficulties' in separating out those who merely wanted to have their rights identified and secured, but who did not wish to sell or lease, from those who wanted secure title so they could 'take up new economic opportunities'.[1006] We return to the point we made earlier, that had communities been provided with legal title, and been empowered to make collective decisions about their lands, such difficulties would hardly have loomed so large. And if communities had been in a position to manage decisions as to alienation of certain blocks, they could also have managed the process of securing more accurate surveys sufficient for title registration purposes under the Land Transfer Act, as they were needed. In short, the

1003. Urewera District Native Reserve Act, s 7
1004. Tamaroa Raymond Nikora, Statement of Evidence (doc c31),p 15
1005. Crown counsel, closing submissions, Topics
1006. Crown counsel, closing submissions, topics 8–12, p 40

question of survey costs cannot be considered in isolation from the Crown's processes for title determination and land purchase.

(f) ***The inescapable costs faced by Maori owners – Crown policies of the 1880s and 1890s:*** A number of the grievances of Te Urewera claimants about survey costs can be traced to particular Crown policies. They include:

- Unauthorised surveys, and the charging of the resulting survey costs to those found to be owners.
- Penalties for those who obstructed surveys.
- The charging of survey costs to the land of those Maori owners who did not wish to sell.
- Charging Maori owners who had not been able to meet survey debts interest of up to 5 per cent per annum.
- Charging the costs of cutting out land owed to the Crown in payment of survey costs, to the Maori owners of the block in question.
- Lack of provision for valuation of Maori land being taken for survey costs.

(g) ***Unauthorised surveys, and the charging of the resulting survey costs to those found to be owners:*** Crown processes which allowed individuals to pull land into the court without the mandate of their hapu were reflected in the survey regime itself. Any claimants were able to embark on a survey. The fact that authorisation of surveys was an issue in several of these blocks underlines the lack of provision for community decision-making and consensus on starting surveys. The most dramatic, and terrible example before us is that of Tahora 2. Not only were two individuals able to instigate a survey which was conducted in secret, but that survey was certified by the Surveyor General. The result was a hearing of a huge block in which many tribal groups had interests, and the foisting of the costs of that survey on those found to be owners, when those who had contracted with the surveyor were found to have no rights. The Native Land Court Act 1886 contained provisions which ensured that, where non-owners made a survey, the costs of the surveyor would still be met by those who were found to be owners. Even so, parliament cannot have foreseen an outcome such as that in Tahora 2, where very high costs had to be met by a number of different tribal groups –who found themselves unable to share the costs imposed on them by cutting out a tract of land carefully chosen for that purpose, because the law did not allow it. The survey charge, by law, rested on the whole unwieldy block that had been secretly surveyed. Given the unique situation, the duty of the Crown (before it started buying individual interests) was to intervene, and amend the legislation – at the very least to make special provision for Tahora 2. It was not unusual to include a section or sections in a Native land statute dealing with a specific block. Seddon, the Premier and Native Minister, speaking as he introduced the Native Land Court bill in 1894, noted Maori concern about unauthorised surveys:

> As the law stood in the past no doubt many surveys took place when the real owners of the land had never made any application at all. A man desiring to purchase would go to the surveyor, and the surveyor worked with the intending purchaser and obtained the signatures of some who had no right to the land; but with these names, and a claim to be interested in the land, the surveys have taken place; and many Natives have complained of this. Eventually the survey has been made, and the surveyor has had a lien on the land, which has remained standing there. Sometimes he has had the power of forcing a sale, and by this machinery the land has been put into the market and sold.[1007]

It is ironic that despite Seddon's evident disapproval of a scenario in which a surveyor's lien led to the sale of the land of those who had never applied for the survey at all, the Crown had at the same time begun to buy into Tahora 2 – a purchase triggered by the costs of Baker's survey, and by officials' failure to consider a response more helpful to the owners. To buy up individual interests in Tahora with a view to securing as much land as it could within the block was not a reasonable response.

(h) ***Penalties for those who obstructed surveys:*** The development of legislative penalties for obstructing surveys, likewise, sent a message to Maori about the importance of being the initiators- or of cooperating with those who were. Such penalties, aimed at individuals, were introduced in 1886. But they were not in force in 1885 when the Tuararangaia survey was conducted by Baker. As we have seen, this did not stop Crown officials from taking a claim to the court in 1898 based on delays caused by the alleged 'detention' of surveyors by some individuals, and to seek costs against all the owners in three subdivisions of the block. The court obliged by holding 'the Uriwera tribe' responsible and exacting the costs in land from owners in two of the subdivisions. It shared the amount that would have fallen to owners in the third block among those of the other two. This was clearly unjust- as both officials and the judge must have realised, given that the legal penalties introduced since 1885 were directed at individuals, not at a community of landowners.

(i) ***The charging of survey costs to the land of those Maori owners who did not wish to sell:*** A particular grievance of the claimants was the fact that survey liens, or proportions of them, were charged on the lands of non -sellers in Te Urewera rim blocks. In Tahora 2 (excluding 2B and 2B1) the amount paid by non-sellers amounted to 5922 acres. The Whirinaki owners paid the lien they owed in land amounting to 4,439 acres.

Legislation provided a mechanism by which the court could allocate such charges. Section 65 of the Native Land Court Act 1894 gave the court wide-ranging powers. Once the Surveyor-General or Commissioner of Crown lands certified an amount owing for survey, the court could charge the amount by way of mortgage on the land or instead, with

1007. Seddon, 28 September 1894, NZPD, vol 86, p 373

Section 65 of the Native Land Court Act 1894

65. The Court may charge by way of mortgage, on such terms as may seem just, any land or parcel of land to secure the payment of an amount to be certified by the Surveyor-General or Commissioner of Crown lands for the district in which the land so surveyed is located as being the reasonable cost or portion of the cost of any survey thereof, whether heretofore made or in course of progress at the time of the passing of this Act, to such person as the Court may consider entitled to such payment, or may (subject to the approval of the Minister), in lieu of such mortgage, vest a defined portion of or interest in any such person in fee-simple in satisfaction and discharge of such cost of survey: Provided that no sale under any such mortgage shall be made until the expiration of six months after written notice, signed by or on behalf of the person claiming to exercise the power of sale, and specifying the land intended to be sold and the sum intended to be realised, shall have been lodged in the office of the Minister at Wellington.

The Minister may, out of any moneys available for the purchase of Native lands, pay the amount claimed under any such mortgage, or such other amounts which the Surveyor-General shall certify as being a fair value for the same, and take an assignment thereof in the name of the Surveyor-General.

the approval of the Minister 'vest a defined portion of or interest in any such land in any such person in fee-simple in satisfaction and discharge of such cost of survey'. The Minister might pay the amount claimed under any such mortgage, and the Surveyor-General would then become the mortgagee (creditor). As this is an important (if complex) provision, we reproduce part of it in a box.

We note two examples of Crown compromise on the matter of survey costs charged to non-owners. In one case, the court exercised its discretion under the Act, and the Government responded to court moves to secure better outcomes for Maori owners in respect of survey costs which the court regarded as unjust. When the Crown's representative Kallender sought a charging order for a survey lien of £343 17s 8d on Heruiwi 4 in May 1895, the judge asked him to check if the block had been sold to the Crown. If it had, the judge said, 'it would be manifestly unfair to burden the shares of those who have not sold with the whole of the lien.'[1008] The case, according to Tulloch was adjourned, though the court minutes record that an order was made 'against the land purchase [illegible] as it appears that they have bought most of the block the award to be pro rata as against area of

1008. Rotorua Native Land Court, minute book 42, 13 May 1895, fol 169; see also Tulloch, 'Heruiwi 1–4' (doc A1), p 83

each share'.[1009] At first officials in Wellington stood their ground. Sheridan replied to a query that 'Crown purchases do not relieve residues [that is, land retained by Maori] from any survey costs to which they are otherwise liable'.[1010]

But, before long, the Crown backed away from its original application. The £343 lien was cancelled by the Chief-Surveyor, and replaced with smaller liens for the Heruiwi subdivisions (4A, 4B2, 4C, 4F2) retained by Maori.[1011] These represented a proportion of the original boundary survey costs for Heruiwi 4 and subdivisional costs.

We note in this case, first, the judge's protest at the Crown's intention of recovering a substantial charge from the Heruiwi 4 non-sellers and, secondly, officials' initial restatement of Crown policy, and evident unwillingness to admit that it might be unfair. It is remarkable both that the judge expressed his concern and that the Government eventually responded to it.

The second case of compromise saved the Waimana 1C owners from the imminent loss of their block of over 3000 acres. As we have seen, a dispute among the owners over reimbursing Swindley in land for the original survey and court costs ended in his not receiving payment from them (as far as we know)- but meant that the cost of subdivisional surveys was not paid either by Swindley or by Tuhoe in 1885. As a result, a lien was attached to Waimana 1C block (3,179 acres), which had been assigned to Tuhoe non-sellers. By 1898, interest had accumulated on this sum. The Department of Lands and Survey, which had taken over the mortgage, prepared to put the whole block up for auction to recover its money – but the Government forestalled department officials.[1012] Tuhoe leaders, who wanted to establish a school (and had written to the Education Department about this the previous year), were able to persuade the Government to pay off the lien, stop the auction, and establish the school on 1C; the Government also agreed not to partition out the school site from the block.[1013]

Sissons, aware that such an intervention on the part of the Government was not usual, suggested that it may have been motivated 'by a desire to gain greater co-operation from Te Waimana leaders in the process of determining the boundaries and individual owners for hapu blocks being created within the Urewera District Native Reserve'. He referred particularly to disquiet on the part of Tamaikoha and Rakuraku at the Urewera Comission's procedures. We have to discount this suggestion, as the Commission did not begin sittings in Te Urewera until early 1899. The Government paid off the Waimana 1C lien between February

1009. [Maketu] Native Land Court, [minute book 14], 6 May 1895, p100, cited in Tulloch, 'Heruiwi 1–4' (doc A1), p 83

1010. Sheridan to Kensington, 7–9 October 1898, MA-MLP1, 1904107, National Archives, Wellington (Berghan, 'Block Research Narratives of the Urewera 1870–1930' (doc A86), p 585)

1011. Tulloch, 'Heruiwi 1–4' (doc A1), p 84

1012. Sissons, 'Waimana Kaaku: A History of the Waimana block' (doc A24), p 64

1013. Sissons, 'Waimana Kaaku: A History of the Waimana block' (doc A24), p 65. See also Habens to Surveyor-General, 22 July 1898, (Crown counsel, 'Document Bank Relating to the Waimana Block', 19 January 2005 (doc K4(b)), p 175)

and August 1898.[1014] And the outcome, whatever the Government's motives, appears to have been satisfactory to the owners.

On the broad issue, we are in agreement with the claimants that the charging of the land with survey costs in this way amounted to penalising those who wished to keep their land.

(j) ***Charging Maori owners who had not been able to meet survey debts interest at up to 5 per cent per annum:*** The charging of interest for unpaid liens, provided for in legislation from 1886, seems less good business practice than simply punitive. The charge in 1886 was 5 per cent; from 1894 the court was given discretion to add interest to costs charged to land; the sum was not to exceed 5 per cent. From 1895, interest was not to accrue for more than five years.[1015] The court generally charged 5 per cent. As we have seen, this meant that the amounts owners owed rapidly increased. The Tahora 2 owners contemplated sale because they feared the interest on the large sum they owed would balloon. Ngati Kahungunu leaders told the court in 1889 – when asked – that they could not meet the survey charges owing on the Waipaoa block in cash, which amounted to £687 16s 7d – including £114 13s 6d interest.[1016]

(k) ***Charging the costs of cutting out land owed to the Crown in payment of survey costs, to the Maori owners of the block in question:*** The addition to the owners' bill of the cost of surveying out the land awarded to the Crown for charges owed to it, also seems punitive rather than necessary. These charges in the Matahina C and C1 blocks, while not high in themselves, contributed –with the interest – to the appalling costs faced by Ngati Haka Patuheuheu. Together, they translated into two thirds of C and C1 blocks. Ngati Rangitihi were spared a charge for cutting out the Crown's award from Matahina D only, it seems, because 92 per cent of the block had already been swallowed in survey and interest costs. Not enough land remained to satisfy any further charge.

(l) ***Lack of provision for valuation of Maori land being taken for survey costs:*** The remaining issue is valuation of land taken for survey costs. This was an important issue for the claimants, because valuation of course affected how much land the Crown could take. It was also important where the Crown set a purchase price, and then deducted an amount from that to meet survey costs. Before 1905 the Crown named its own price per acre when purchasing, as we have seen. In Tahora 2, it insisted on its own price of two shillings an acre (when the owners had sought, first, five, then three), then deducted twopence an acre from that towards the survey lien, thus effectively buying the land at 1s 10d an acre. In Waipaoa, Huata

1014. Sissons, 'Waimana Kaaku: A History of the Waimana Block' (doc A24), p 65
1015. Native Land Court Act 1886, s 86; Native Land Court Act 1886 Amendment Act 1888, s 25; Native Land Court Act 1894, s 66; Native Land Laws Amendment Act 1895, s 67
1016. Wairoa Native Land Court, minute book 3B,p 160

and Tunupaura of Ngati Kahungunu made an agreement for survey, which specified a value for the land to be taken for costs at a rate of one acre per two shillings. Very soon afterwards, however, they asked for three shillings; it seems probable that they discovered too late how much land would be taken at the rate stipulated in the agreement. And they turned to both the court and the Crown subsequently to try to get the valuation of their land revised, without success.

After 1905, when Government valuations were required- though not specifically for survey takings- witnesses were called in the court to give evidence on the value of land. This implies some acceptance on the part of the Crown that, given the new regime on valuation of land when alienation was involved, it was of some relevance also for land awards for survey costs. But as we have seen in the cases of Tuararangaia and Matahina, this could be a somewhat haphazard process; Government valuations based on examination of the particular blocks involved was not insisted on.

(m) ***Conclusion:*** We conclude that the survey costs regime was flawed, and that there was little concern on the part of the Crown about its impact on Maori communities. This was not always true; but occasional examples of official flexibility in relation to survey charges are somewhat eclipsed by a more evident lack of interest – over a prolonged period – in how Maori owners coped with the loss of land involved. In the case of the three Matahina blocks with which we are concerned, for instance, there was no inquiry into whether the loss of the greater part of the blocks to their owners would leave them landless (as was required at the time in relation to alienations). The Lands and Survey Department was prepared to put Waimana 1C up for auction to recover the survey charges on the block- and the owners were thrown a lifeline largely because the Education Department was interested in responding to their wish for a school there.

By contrast with official indifference, the peoples of Te Urewera were deeply concerned about survey charges. The extent of Crown purchasing activities in blocks where the owners had to pay off their survey liens in land underlines the fear of 'disastrous' survey costs that would be so strongly expressed when Seddon visited Te Urewera.[1017] The remarkable thing is that while the Crown was addressing those fears in practical terms in the Urewera District Native Reserve, the attempts of its officials to secure survey charges, and interest on them, in the rim blocks, continued unabated.

We referred at the beginning of this section to the issue debated by the Crown and claimants as to whether Maori – or the public- benefitted from surveys of Te Urewera land. We have found that between 1881 and 1930 the Crown purchased nearly 60 per cent of the land in the rim blocks awarded to claimants in our inquiry; and that it achieved this by disempowering hapu through its legislation and its purchase policies. More than 82 per cent of

1017. 'Pakeha and Maori: A Narrative of the Premier's Trip through the Native Districts of the North Island', March 1894, AJHR, 1895, G-1, pp 57, 84

the land passed into Crown or settler hands. This was, as the Crown so often explained, the purpose of Crown policies. T W Lewis put it in precisely these terms to the Native Land Laws Commission in 1891: the Native Land Court system was designed to facilitate the transfer of land from Maori to settlers (see sec 10.2).[1018]

It is in this context that we have to consider the imposition of a survey regime which required Maori to bear the costs of survey of their lands. As surveyors moved into Te Urewera for the first time, taking measurements and marking boundaries on their plans so that blocks could be recorded on colonial maps, the process of 'opening up' the country to settlement and creating transferable titles got under way. This, clearly, was seen as a public good. The peoples of Te Urewera should not have borne more than a small part of these costs. (We add that they should certainly not have been charged for the erection of trig stations –yet they were. We were taken aback to find that the owners of Heruiwi 4 were charged £78 for 'triangulation for erection of 8 new trig stations; renewing 2 old stations "destroyed by the Maories"; additional costs resulting from length of time since last survey'.[1019])

For their own purposes, when Maori were ready to go to the court to have their titles confirmed (which in our view should have followed their own title determination process), sketch plans would have been adequate. The costs of surveys sufficient for land transfer title were a different matter. It was for the Crown to consider the allocation of those costs, and the extent to which it carried them or passed them on to settlers.

We find ourselves in agreement with the Hauraki tribunal that:'it is difficult to see what Maori gained, in the medium and long term, from having their land surveyed and passed through the court: most commonly it was the prelude to a succession of partitions and sales. On the other hand, the purchasers of land, including the Crown and the general community, gained from putting Maori under the obligation of having full surveys made of their land.'[1020]

(3) *What court and other fees did the peoples of Te Urewera face and what were the associated costs to them of court hearings?*

In addition to survey costs, Maori faced costs arising from the hearings themselves: both the direct fees charged by the court, or by those who assisted them to prepare their cases, and the costs arising from their attendance at hearings. The claimants argued that these costs were unreasonable, especially when they were unwilling participants, and the Crown replied that the costs were not in fact substantial.

1018. Williams, brief of evidence, 20 February 2004 (doc C3), p 26
1019. McBurney, 'Ngati Manawa and the Crown'1840–1927' (doc C12, p 340)
1020. Waitangi Tribunal, The Hauraki Report, vol 2, p 780

(*a*) *Court and other fees:* Court fees were less onerous than survey charges. The Crown, in its Closing submissions, provided a table setting out estimated land court hearing costs for Tuhoe 'hapu or individuals' for most, but not all of the rim blocks, based on that supplied by Clementine Fraser in her general evidence on Tuhoe experience of the court. Such costs averaged £1 per day, the Crown stated, and ranged in total from £3 for Waiohau to £16 for Tuararangaia.[1021]

The table supplied, though helpful, seems to us to have some limitations. Firstly, it does not provide a full picture of the court and associated fees faced by the peoples of Te Urewera. Court fees were set at £1 per party per day, payable by a party whether they were presenting their own case, or cross-examining the witnesses of others, plus two shillings for each witness called by the conductor of a case.[1022] The full amount charged claimants and those parties deemed 'counter-claimants' by the court during an initial title investigation in the district was more substantial. In Tuararangaia, for instance, it came to £37 14s, including title fees. (We note that the Tuhoe claimants were charged £1 on each of three days on which they neither gave evidence nor cross-examined.)[1023] The total fees (including title certificates) for parties in the initial Waipaoa hearing came to £44 4s.[1024] From at least 1880, the schedule of fees specified that fees might be charged 'at Judge's discretion'[1025] The 1885 Rules of the Court stated more specifically however that the fees might, at the judge's discretion, be 'remitted or abated', and for the first time specified that they might either be paid 'when they accrue or be charged against any land' involved.[1026] It is evident that occasionally judges did waive fees; but this was not common. Court fees were usually required to be paid up front, which often meant borrowing.

Secondly, Maori who appeared in the land court faced a wider raft of fees than is allowed for in the Crown's table. The case of Ruatoki is a good example – even though ultimately Tuhoe did not have to pay the fees because of the UDNRA. The Crown calculated the fees charged for eleven days' hearing, over a period of five months in 1894, as totalling £12. But Paula Berghan records that the Chief Judge, George Davy, informed the Chairman of the Native Affairs Committee that costs in that hearing, which he described as 'a lengthy one', amounted to £293 16s.[1027] The chief judge did not give a breakdown of the costs. One source of the discrepancy may be the fees charged after judgment was given in September 1894 (not included in the Crown's tables). Oliver states that after September the court continued to hear evidence for inclusion in the ownership lists, and to decide relative interests. Then

1021. Crown counsel, closing submissions (doc N20), topics 8–12, pp 31, 98–102
1022. 'Schedule of Order in Council', 5 April 1870, *New Zealand Gazette*, 1870, no 21, p 188
1023. Whakatane Native Land Court, minute book 3B, 4 December 1890,fols 260, 276
1024. Wairoa Native Land Court, minute book 3B, 26 March 1889 – 23 April 1889, fols 79–167
1025. 'Rules of the Native Land Court', 2 December 1880, *New Zealand Gazette*, 1880, no 114, p 1706
1026. 'Rules of Native Land Court', 2 June 1885, *New Zealand Gazette*, 1885, no 35, p 719
1027. Davy to Chairman, 12 August 1902, JI 190311056, Ruatoki Blocks, National Archives, Wellington (Berghan, 'Block Research Narratives of the Urewera 1870–1930' (doc A86), p 196)

Matahina Hearing at Whakatane

Natives assembled requested that they may be granted an hour to consider the question of One pound fee payable or demanded by the Court for each party per diem and two shilling for each witness.

Court adjourned for an hour.

Court resumed at 11 am.

Te Waretini . . . applied that the remainder of this day be given them to arrange for the payment of the fees . . . Penetito Hawea stated in reply . . . he could not agree to a further adjournment as he was prepared to pay his fees.

Whakatane Native Land Court, minute book 1, 7 September 1881, fol 63

in December, a partition hearing was held.[1028] But a search of the minute books, including the Judge's minute books, shows that the following costs were recorded between May and December 1894 (that is, both before and after judgment was given): May: £65 4s; August: £57 3s; September: £25 7s; October: £47 5s; November: £47 2s; December 12 shillings.[1029] (By rules of the Native Land Court dated 30 October 1888, a judge was required to keep an account of all fees accruing in respect of business before him, and to send a copy at the end of each month to the Receiver-General.[1030]) These totals amount to some £244, which is fairly close to the figure the Chief Judge gave the Native Affairs Committee.

In addition to hearing costs for Ruatoki, there were the costs of appeals in the Appellate court: the fees were £20 2s, and the forfeited deposit was £35. Despite the recommendation of the Native Affairs Committee that these appeal costs (£55 2s) should be refunded, the Chief Judge decided against it.[1031]

The Chief Judge's figure for Ruatoki is a reminder that the full picture of fees borne by parties before the court cannot be gained by looking simply at initial title investigation fees. Daily fees were charged on each occasion when parties were before the court: for rehearing, partition, subdivision, or any other purpose, such as the determination of succession claims.

1028. Oliver, 'Ruatoki Block Report' (doc A6), p 71

1029. Judge Scannell's minute book 39, 31 May 1894, p 250; Judge Scannell's minute book 43, 29 September 1894, pp 37, 178; Whakatane Native Land Court, minute book 4A,31 October 1894, fol 112; Whakatane Native Land Court, minute book 4B, 1 December 1894, fols 106, Whakatane Native Land Court minute book 4B, 5 December 1894, fols 129–130

1030. 'Rules of the Native Land Court', 30 October 1888, *New Zealand Gazette*, 1888, no 59, p 1156

1031. Berghan, 'Block Research Narratives of the Urewera 1870–1930' (doc A86), pp 196–197; see also 'Report by Chief Judge on Petition of Te Pakoura and others', 12 August 1902 (Paula Berghan, comp, supporting papers to 'Block Research Narratives', vol 11 (doc A86(k)), p 3584)

The costs of filing an application for rehearing was £5.[1032] In 1891, for example, Harehare Atarea and Toha Rahurahu each had to pay £5 when they applied for a rehearing of Heruiwi 4 block.[1033] Typically, fees in cases where succession to a deceased owner was decided were two shillings for each witness and 10 shillings for an order for registration (the latter first specified in 1885).[1034] Put another way, at the land prices paid for most rim blocks, it cost at the least several acres to succeed to an interest.

We note also that in addition to fees payable for court appearances, there were a number of other fees associated with hearings, and with securing title. We have already referred to the £1 title fees (for a certificate of title or memorial of ownership), and fees for court orders. There were also fees for inspection of papers (2s 6d from 1880) and for plans (10 shillings) and inspection of plans in the Survey Department (2s 6d) and, after 1880, for filing a document (three shillings). In April 1893, Te Marunui Rawiri wrote from Karatia to the Registrar seeking evidence regarding certain blocks (clarified in a subsequent letter as Kuhawaea 1 and 2). He was told the evidence was 'somewhat long' and it would cost 20 shillings to copy it. The following month he sent a pound note, plus stamps, totalling 22s 6d (saying he wanted it in Maori, since he didn't understand English), and the copy was made.[1035]

In addition, there were interpreters' fees. In 1890, the scale of fees for interpreters for Native Land Court work, published in the *Gazette* specified a daily fee of two guineas, with additional fees. For example, for interpreting a deed there was a fee of one guinea (£1 1s), while for translating a deed into either Maori or English the cost was 7s 6d.[1036]

Crown officials were perfectly aware of the broad trends concerning costs of the land court process. From time to time, as we have seen, they advised the Government of the situation and suggested remedies. In our view, the burden of the fees Maori had to meet should not be under-estimated.

(b) ***Associated court hearing costs:*** None of the Native Land Court hearings involving Te Urewera rim blocks were held in the rohe. Instead, they were held at Whakatane, Opotiki, Matata, Rotorua, Wairoa, or Gisborne. Costs to Te Urewera people of attending the court included travel and living costs during court sittings. In some instances, these distant hearings caused considerable expense and hardship, impacting on the health and wellbeing of claimants. Numerous requests were made by Te Urewera hapu for the location and/or timing of hearings to be moved, but they enjoyed little success.

The first hearings about which concerns of the peoples of Te Urewera are recorded were the combined hearings at Matata for Heruiwi, Waiohau, Karamuramu, and Pukahunui,

1032. 'Rules of the Native Land Court', 20 March 1890, *New Zealand Gazette*, 1890, p 317
1033. Tulloch, 'Heruiwi 1–4' (doc A1), p 68
1034. 'Rules of Native Land Court', 2 June 1885, *New Zealand Gazette*, 1885, no 35, pp 719–720
1035. Nicola Bright, comp, Supporting papers to 'The Alienation History of the Kuhawaea No 1, No 2A and No 2B blocks,' various dates (doc A62(a)), pp C35–C40
1036. 'Interpreters' Fees', 18 March 1890, *New Zealand Gazette*, no 14, p 318

together with Kaingaroa 1 and 2 hearings. Several of those blocks are outside our Inquiry district, but we are mindful that claimants have pointed out that it is important not to restrict our consideration of the experience of their tipuna to our inquiry district boundaries. The Ngati Manawa applicants for the Heruiwi block hearing had asked that it take place at Galatea (as had the Ngati Apa and Ngati Hineuru claimants for Pukahunui). To Ngati Manawa this must have seemed an unremarkable request, as in March 1878 notice was given in the *New Zealand Gazette* that the Kaingaroa 1 hearing would take place at Galatea.[1037] McBurney suggests at the time it was probably intended to hear the Heruiwi and Pukahunui blocks at the same time.[1038]

After the first day (19 June) however, the court adjourned first to Opotiki (on 28 June) and then to Matata (on 12 July).[1039] The latter was 80km away (by road) from Galatea. This prompted an immediate reaction from the Ngati Manawa claimants who, as Gilbert Mair noted in his diary, 'strongly protested against its being adjourned from Galatea . . . they would not attend Matata'.[1040] Subsequently Mair met with the Ngati Manawa claimants who explained that the move would disrupt their garden cultivation, and would also make them dependent on their Ngati Rangitihi relatives.[1041]

The Matata hearings ran from around mid July to late September 1878. The concerns of the Ngati Manawa claimants were well founded as by mid-August 1878, Te Mauparaoa told the court that Ngati Rangitihi had run out of food; as the court minutes recorded, '[s]everal other chiefs' had also 'spoke as to the want of food', at which point, having 'admitted the force of their argument', the court directed the District Officer to 'report their condition to the Government without delay'. The Government response (in terms of Ngati Manawa) was for the Crown land purchase agent, Henry Mitchell, to advance £40 and £50 against Ngati Manawa's interests in Pukahunui and Heruiwi respectively.[1042] Given that the Crown subsequently paid just over two shillings an acre for the Heruiwi 1 block, this advance for food was eventually converted in the transfer of more than 400 acres of Heruiwi 1 to the Crown.

In 1879, Ngati Manawa, Ngati Apa, Warahoe, Ngati Hineuru, Patuheuheu and Ngati Hamua all faced rehearings for Kaingaroa 1 and 2. Following a meeting in May 1879, Rawiri Tahawai wrote on their collective behalf to Chief Judge Fenton requesting that the rehearings be held at Galatea (Karatia).[1043] Henry Mitchell advised against this move though, reporting to the Native Minister that:

1037. McBurney, 'Ngati Manawa and the Crown 1840–1927' (doc C12), pp 193–194
1038. McBurney, 'Ngati Manawa and the Crown 1840–1927' (doc C12), pp 194–195
1039. Opotiki Native Land Court, minute book 1, 19 and 28 June 1878, fols 69–70
1040. Mair Diary #25. Diary entry 28 June 1878, MS-Papers-92 Folder 50, Alexander Turnbull Library (McBurney, 'Ngati Manawa and the Crown 1840–1927' (doc C12), p 195)
1041. McBurney, 'Ngati Manawa and the Crown 1840–1927' (doc C12), pp 194–195
1042. McBurney, 'Ngati Manawa and the Crown 1840–1927' (doc C12), pp 229–230
1043. McBurney, 'Ngati Manawa and the Crown 1840–1927' (doc C12), p 206

> Galatea is a very unsuitable place for holding a Court, food being always scarce amongst the Natives and Transport of European supplies very expensive. There is no suitable building for Holding a Court there and the Distance from any telegraph station is 50 miles traversable only on horseback. Matatā on the other hand is the natural support for all the Kāingaroa country & where the Natives have cultivated very extensively this season in view of the Court sitting before September. There are suitable buildings for the Court and the officers' accommodation & also for any number of Natives.[1044]

In 1884, Rawiri Parakiri asked Chief Judge Macdonald to hear title applications for Whirinaki and other blocks (including Heruiwi 4, and Tuararangaia) at Te Teko, stating that 'great has been the suffering of this people in past Courts which sat at Matata and Whakatane. Those places were very distant from our district, and we suffered from the stopping idly at distant places among strangers'.[1045]

In the view of the licensed interpreter, it 'would be a great boon' if the Ngati Manawa request was granted; as their lands were extensive they were 'entitled to receive great consideration'.[1046] But ultimately Te Teko was rejected as a hearing location after court registrar Hammond received conflicting advice over its suitability. According to Alfred Preece, the hotel was too small and there was nowhere to hold the court, whereas a Mr Fraser considered the hotel large enough for the court staff, and thought a courtroom could be created by making minor alterations to the Te Teko barracks.[1047]

Again in 1885, Harehare Atarea asked Chief Judge Macdonald to hold future hearings for Whirinaki, Tuararangaia, and Heruiwi 4 at Galatea, stating that 'many of our lands are being adjudicated upon in other district[s] and all those lands were lost in consequence of the distance from our settlement and our food'.[1048] A few months later, Harehare wrote again (on behalf of Ngati Manawa, Ngati Whare, and Ngati Haka Patuheuheu) suggesting Te Teko as a good alternative, observing that 'there will be no suffering for us in that distant, nor any loss there. We have a settlement with houses there for us Maoris'. He also reported that 'we are preparing a wooden building for the Court at Galatea and preparing food also'.[1049] And Parakiri pointed out that Te Teko was near the telegraph office at Whakatane.[1050]

1044. Mitchell to Sheehan, 9 July 1879, MA-MLP 1/1879/345 (McBurney, 'Ngati Manawa and the Crown 1840–1927' (doc C12), p 212)

1045. Rawiri Parakiri to Chief Judge J E Macdonald, 22 February 1884, Waiariki Maori Land Court Closed Correspondence Series 259 (Tulloch, 'Whirinaki' (doc A9), pp 26, 35)

1046. Covering note, licensed interpreter (name illegible), 25 February 1884, Waiariki Maori Land Court Closed Correspondence Series 259 (Tulloch, 'Whirinaki' (doc A9), p 36)

1047. Berghan, 'Block Research Narratives of the Urewera 1870–1930' (doc A86), pp 733–734

1048. Harehare Atarea to Chief Judge J E Macdonald, 11 June 1885, closed file series 14, Heruiwi correspondence closed 1910 – Rotorua MLC (Berghan, 'Block Research Narratives of the Urewera 1870–1930' (doc A86), p 569)

1049. Harehare to Chief Judge J E Macdonald, 3 October 1885, closed file 358, Whirinaki Corr -1911 Rotorua MLC (Berghan, 'Block Research Narratives of the Urewera 1870–1930' (doc A86), p 735)

1050. Rawiri Parakiri and others to Chief Judge J E Macdonald, 22 February 1884, Wairaiki MLC closed correspondence series 259 (Tulloch, 'Whirinaki' (doc A9), p 36)

10.8.3

As it happened, any possibility that the court might sit at Galatea or Te Teko in the near future was ended by the Tarawera eruption. As Doig has noted, the middle reaches of the Rangitaiki valley were covered by 15 to 30cm of rock and ash, which meant that the land at Te Teko became a temporary desert, in which no cultivation could take place.[1051] Galatea received a lighter coating of ash, but Ngati Manawa living there still took temporary refuge on their lands in the Heruiwi 4 block.[1052]

The Whirinaki hearing was finally held at Whakatane in October and November (that is, spring) 1890. If the location in Whakatane was, in the circumstances, the best that could be managed – or was a response to a small group who asked that it be held there – the timing of the hearing – especially given the court's knowledge of the difficulties the location would cause for the general Ngati Manawa community who lived in or near Whirinaki- was thoughtless to say the least. It was held during the planting season;and at a time when an influenza epidemic had broken out. Tulloch points out that the Whirinaki hearing lasted three and a half weeks, and was immediately followed by a Heruiwi 4 hearing. Together, the hearings kept Ngati Manawa claimants away from their homes and cultivations for some six weeks. And she stresses the context of these hearings for Ngati Manawa: they had already incurred 'significant costs' as a result of attending earlier hearings in Matata and Whakatane for title determination of other blocks, including Kaingaroa 1, Kuhawaea and Heruiwi.[1053] In 1912, Gilbert Mair would state that attending hearings in Whakatane was a cause of 'grievous and unnecessary hardship' to Ngati Manawa. He added that he had known Ngati Manawa 'to squander many thousands of pounds through being forced to attend the Land Court at Whakatane, to say nothing of sickness and death caused by want of food and proper accommodation.'[1054]

If Mair's comment on costs seems an overstatement, it should be set in the context of the cost of provisions at the time. The Central North Island tribunal noted that when hearings of the Maketu blocks were relocated to Tauranga in November 1879 and the Crown agreed to pay the costs, rations for 200 people for six weeks cost about £300.[1055] And Mair's observation on sickness is a reminder of the conditions that people might have to live in while attending court hearings. Camping in tents – especially but not exclusively in the winter – often meant coping with wet and mud, without clean water or sanitation.[1056] The alternative

1051. Suzanne Doig, 'Te Urewera Waterways and Freshwater Fisheries', report commissioned by the Crown Forestry Rental Trust, October 2002, (doc A75), p 11

1052. Brian Murton, 'People of Te Urewera: the Economic and Social Experience of Te Urewera Maori, 1860–2000', 2004, (doc H12), pp 215; Kathryn Rose, 'A People Dispossessed Ngati Haka Patuheuheu and the Crown 1864–1960', report commissioned by the Crown Forestry Rental Trust, February 2003, p 89

1053. Tulloch, 'Whirinaki' (doc A9), pp 26–27, 35

1054. Mair to Native Minister, 24 May 1912 MA 13/90, National Archives, Wellington (Tulloch, 'Whirinaki' (doc A9), p 35)

1055. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 516

1056. Tuhoe attending hearings at Matata in the 1880s were sometimes reduced to eating wild taro, toxic to young children (David Potter, brief of evidence, 26 March 2004 (doc C41), p 20)

was to live in expensive hostelries, on credit with the attendant temptations of readily available alcohol. There was no lack of storekeepers who set up shop at prolonged court sessions to exploit the needs of those attending the court.

The Whirinaki rehearing was held in winter 1893, and on that occasion the Inspector of Schools, James Pope, recorded the absence from Te Houhi of 'the chief and nearly all the people . . . away at the Rotorua Land Court'.[1057] Rose thought that Ngati Haka and Patuheuheu may not in general have attended hearings in a large group;[1058] but Pope's comment testifies both to the kind of community mobilisation that could and did occur during hearings; and to the chance recording of such mobilisation by a visitor.

The Crown seemed not to give much weight to evidence that the location and timing of the hearings caused difficulties for Urewera hapu. It submitted that the court was 'generally sensitive to seasonal factors such as the planting and harvesting of crops' when it came to setting hearing dates'. We note that in November 1880 the principal Ngati Awa chiefs sought an adjournment of the Matahina hearing, stating that the tangi for the chief Apanui was being held, that the various parties were very short of food and it was the planting season.[1059] On this occasion the court granted the request. But, as we have shown, the court was not always so responsive. In February 1885, when the Waimana partition hearing was held at Opotiki, an adjournment was sought by one of the parties (Jemima Shera) who had been 'taken by surprise by the hearing suddenly coming on'. Judge Mair reported to the Chief Judge on 11 February that he had already adjourned the case twice before, and that all parties were present except Mrs Shera. Under pressure from the Chief Judge, however, Mair capitulated. He sent a telegram to the Native Department the following day stating that he had adjourned for a further three days to suit Mrs Shera. But this meant that 'around 50 other claimants from the Urewera and Waimana were kept waiting in a place where they have no relations and no food'.[1060]

We welcome the Crown acknowledgement that there 'is some evidence of hardship in meeting food costs'.[1061] Counsel referred in Closings to some of the available evidence of food shortages affecting Ngati Manawa and Ngati Apa, Ngati Kahungunu, and Matahina claimants. Costs were incurred when hearings were held at a distance from community bases, and people could not supply themselves (and their visitors) from their gardens. In such circumstances, people had to feed themselves as best they could; they might gather local resources. (David Potter gave evidence that Tuhoe attending hearings at Matata in the 1880s were sometimes reduced to eating wild taro, toxic to young children).[1062] Or they had

1057. Rose, 'A People Dispossessed: Ngati Haka Patuheuheu and the Crown, 1864–1960', report commissioned by the Crown Forestry Rental Trust, February 2003, p 88

1058. Rose, 'A People Dispossessed' (doc A43), p 88

1059. Whakatane Native Land Court, minute book 1, 4 November 1880, fol 28

1060. Crown Counsel, 'Timeline Relating to the Waimana Block', 19 January 2005 (doc K4(a)), p 11

1061. Crown counsel, closing submissions (doc N20), topics 8–12, p 33

1062. David Potter, brief of evidence, 26 March 2004 (doc C41), p 20

to buy food from stores on credit.[1063] The Crown told us that there is evidence that, where the Government was buying blocks, it occasionally deducted from the purchase price the cost of food and accommodation it had paid for Maori to attend hearings for those blocks-despite the fact that this was not in accordance with Crown policy at the time.[1064] This underlines the fact that Maori had difficulty meeting such costs, and ultimately paid in land.

We accept the Crown's argument that the location of court sittings could not always satisfy all claimant groups. But we cannot but draw the contrast with later Urewera Commission hearings, held in many of the main kainga of Te Urewera, and well attended. In the case of land court sittings, there does not seem to have been any great concern on the part of officials to meet Maori requests for locations nearer their homes; or about the costs to the people of attending distant hearings. The Premier, Seddon, responded positively to Tuhoe in 1894, agreeing that a land court hearing might be held in Ruatoki so that the people would not have to travel long distances or to sell land to meet the costs of attending court in distant places.[1065] In fact, the court was later held at Whakatane. Though hearings of some Te Urewera rim blocks were not long, it is clear that the cost of provisions, even for a period of two weeks could be high. We reiterate the conclusion of the Central North Island Tribunal that the problems with venues and costs of hearings reflected the overall lack of Maori involvement in the design and running of forums to determine land titles. Had there been such involvement, the Tribunal concluded, 'it is hard to imagine that they [Maori] would have placed the pressure on people and their economic and social well-being to the extent that the court did'.[1066]

We reiterate also that the various costs Maori applicants faced were cumulative. Court costs and associated hearing costs had to be met at once, which often meant borrowing, and led ultimately to the sale of land.

(4) *Treaty analysis and findings*

Ultimately, the Crown's system for survey costs, charging Maori in their own land for its survey while at the same time it purchased large tracts intended for settlement, cannot be justified in Treaty terms. Only if we could say that the peoples of Te Urewera generally benefitted as a result of the titles they secured, that economic growth and well-being followed, could we say that the system was justified. Quite the opposite is true. The New Zealand courts and many earlier Tribunals have found that the principle of partnership inherent in the Treaty requires the Crown to act reasonably, honourably and in good faith. The Central North Island Tribunal described the obligations of partnership as including:

1063. Berghan, 'Block Research Narratives on the Urewera 1870 – 1930' (doc A86), p 570
1064. Crown counsel, closing submissions, topics 8–12 (doc N20), p 33
1065. AJHR, 1895, G-1, pp 54, 58
1066. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 518

> The duty to consult Maori on matters of importance to them, and to obtain their full, free, prior, and informed consent to anything that altered their possession of the land, resources, and taonga guaranteed to them in article 2. The Treaty partners were required to show mutual respect and to enter into dialogue to resolve issues where their respective authorities overlapped or affected each other.[1067]

We find the Crown in breach of the principle of partnership, and also the principle of good government in that it failed to consult with Maori about the basis of a system for survey costs, and failed to consult Te Urewera leaders about the implementation of its system within their rohe –despite the fact that those costs would have to be borne by Maori.

As we have seen, it did consult – and listen – in the mid 1890s, in the context of much wider discussions with Te Urewera leaders about their land and autonomy, with the result that key concerns of the peoples of Te Urewera about survey costs were met in the new UDNR legislation (see ch9). Such consultation was practical and – had it been undertaken sooner – might have produced acceptable solutions. But the rim blocks – other than Ruatoki – continued to be dealt with under the Native land legislation, and Te Urewera owners in those blocks continued to have to meet survey costs for which they were liable under that legislation.

We find further that the Crown breached the Treaty principles of good government and of active protection, in that it:

- failed to heed advice that 'undue pressure' on Maori claimants would result from their having to pay the whole cost of surveys;
- responded to evidence that such costs were heavy not by streamlining the surveying system and concentrating surveys of Maori land in the hands of district surveyors, but by providing regulations which standardised fees, and improving its policing of private surveyors, who continued to operate;
- failed to consider what the basis of a fair system of transaction costs should be; failed to monitor the operation of the regime it established, and to ensure that it worked equitably for different groups of owners;
- failed, therefore, to legislate to ensure more equitable outcomes for groups of owners in respect of the allocation of survey costs;
- failed to provide adequate or appropriate remedies for owners who, by law, had to meet the costs of boundary surveys they had neither sought nor wanted (and which, in the case of Tahora 2, had been carried out in secret at the instigation of non-owners);
- provided a survey costs regime which focused unduly on ensuring recovery of costs from Maori (usually in land), and on penalising owners who failed to meet them promptly by charging interest – which translated into more land;

1067. Ibid, vol 1, p 173

- failed to ensure that the court had an obligation to inquire, when charging survey costs on land in accordance with the established regime, into whether owners would retain sufficient land in a block once the court order took effect;
- failed, before 1905, to ensure fair valuations of land it took for survey costs; and, after 1905, when it required Government valuation of land being purchased, failed to make legislative provision for the valuation of land for survey costs;
- applied to the court in the case of Tuararangaia 1, for costs to be charged to all the owners of the block for the detention of a surveyor by a few individuals of Tuhoe, and secured an order accordingly, allowing the court to defeat the provisions of the law (section 14(12) of the Native Land Court Act 1894) as to penalties for obstructing surveyors; and
- failed to consider the impact on the peoples of Te Urewera of the inescapable and cumulative costs – survey costs, court fees, and the costs of travel, food, and accommodation involved in attending court hearings – of securing new titles to their land, and to provide appropriate assistance.

The system was very unfair. And it is in the context of rapid land alienation, and the inability of communities to control it, that the taking of additional land for survey costs has seemed such an imposition, and left such a strong sense of injustice among the peoples of Te Urewera. It seems to us that, when combined with the other many and various flaws in the native land system, in a very real sense the dispossession was being funded by the dispossessed.

10.9 What Protection Mechanisms Were there for Maori in Respect of the Alienation of Land, and How Effective Were those Mechanisms in Te Urewera?

Summary answer: *In respect of its Treaty duty of active protection, the Crown provided three mechanisms to protect Maori in their land dealings, and in the retention of sufficient land for their present and future needs. The most important, in terms of its potential for success in our inquiry district, was restrictions on alienation. This mechanism was not available to the leaders of Te Urewera as a meaningful option until 1889, after which they restricted almost three-quarters of the land that passed through the Court. In theory, this ought to have restored some collective control over alienations, and prevented any sales until the community and its leaders were truly ready and willing to sell (when a majority could apply to remove the restrictions). This majority requirement was reduced to one-third in 1894. In reality, however, the Crown purchased individual interests as if there were no restrictions on titles. Restrictions were never formally removed. The Crown's purchases were unlawful in this respect, and in breach of the*

Treaty principle of good government. The Crown also failed to provide for restrictions in legislation setting up the Validation Court and the Urewera Commission, thus preventing the renewal of restrictions on the titles of Tahora 2 and Ruatoki. By these various means, 93 percent of restricted land was no longer protected within just a few years of restrictions on alienation having been placed on block titles. Thus, restrictions provided nothing more than the illusion of protection, and the Crown itself was responsible for rendering them ineffective. This was a very disappointing outcome in Treaty terms, and an obvious violation of the Crown's duty of active protection.

The second protection mechanism was the requirement for the Crown to reserve sufficient land for the present and future needs of the peoples of Te Urewera. In our inquiry district, the earliest provision was for district officers to consult Maori and obtain agreement to setting aside reserves. The Native Land Act 1873 specified that such reserves were to provide sufficient land for present use and as endowments for the future. No such reserves were established in Te Urewera before the position of district officer was abolished in 1886. From 1889, when the majority of land in the rim blocks passed through the Court, the Government left it to the Court to impose restrictions if the people appearing before it had insufficient land. Having thus provided for 'reserves' to be made at the time of title investigation or partitioning, the Crown refused to create reserves when it was purchasing land in the rim blocks. Maori were told that it was no longer Crown policy to make reserves. Given the Crown's purchase of restricted land in the 1890s, and its unilateral cancellation of all restrictions in 1909, this meant that no true reserves were ever made. The Crown's reserve policies were a resounding failure in the Te Urewera rim blocks, in breach of its Treaty obligation of active protection.

The third protection mechanism was the requirement that all purchases of Maori land be vetted against statutory standards, by trust commissioners and the Native Land Court in the nineteenth century, and by Maori Land Boards in the first part of the twentieth century. The Crown exempted itself from such scrutiny. Counsel suggested that Maori could rely on its utmost honesty and scrupulous behaviour in its dealings with them. It cannot be shown that the Crown's purchases would not have passed the kind of examination made by trust commissioners. In terms of private purchases, the trust commissioners' inquiries in Te Urewera appear to have taken place after partitioning, so that the original transactions were not actually subject to scrutiny. Apart from Waiohau (discussed in chapter 11), this cannot be shown to have had prejudicial effects. The so-called 'majority rule', however, by which private purchasers were not supposed to be able to obtain land without community agreement, did not provide any such protection in Te Urewera. Finally, the Maori Land Board system did not provide true protection of Maori interests in its process for scrutinising and confirming sales, because of the fundamental flaw that allowed small minorities of owners to alienate land (and at a single meeting). This system permitted the forced sale of the interests of majorities of owners for

10.9.1

blocks in Te Urewera, in breach of Treaty principles. Maori were denied representation on the land boards, in breach of the principles of partnership and autonomy.

10.9.1 Introduction

The Crown's duty of active protection has been discussed by the Court of Appeal, and by the Waitangi Tribunal in many of its reports. The Central North Island Tribunal pointed out that the need to do justice to Maori, and to protect their just interests, was a common theme among the pronouncements of nineteenth-century officials and legislators. Of all the Crown's Treaty duties, this one was often in their minds – or was brought to their attention.[1068] In our inquiry, the Crown accepted that it had had a duty to protect Maori interests by providing safeguards in dealings with land, by providing means for Maori to retain their land for so long as they wished to do so, and by protecting a sufficiency of land in their possession. But the Crown stressed its view that matters had to be brought to its attention before it could be expected to act. The first native land acts, we were told, contained no protection mechanisms. It was not until experience showed that Maori wanted and needed protection in their dealings, that such mechanisms were added to the legislation. Similarly, the Crown argued that unless it was brought to its attention that Maori in the rim blocks were becoming landless, there was no expectation that it could or should have done anything to prevent it.[1069]

So what protection mechanisms did the Crown provide? Those of relevance to our inquiry were:

- Court-imposed restrictions on alienation, available at the time of title investigation or partitioning of particular blocks.
- Provisions for reserves, designed to ensure that Maori communities retained 'sufficient' land for their direct use and maintenance, and as 'endowments' for the future.
- Mechanisms for the vetting of purchases, to safeguard Maori from making transactions that were unfair to them, in violation of any aspect of the law, or that would render them landless. Nineteenth-century mechanisms included special trust commissioners and the Native Land Court itself. After the 1909 reforms, Maori Land Boards were responsible for carrying out these protective functions.

10.9.2 Essence of the difference between the parties

The Crown and claimants agreed that the Treaty guaranteed Maori the active protection of their interests by the Crown. They also agreed that positive mechanisms were established to carry out this Treaty duty in relation to land, including reserve-making, restrictions on

1068. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 181–188; vol 2, pp 429–435
1069. Crown counsel, closing submissions (doc N20), topics 8–12, pp 68, 76, 85–92

alienation, and the establishment of systems to vet transactions and protect Maori in their dealings. Vetting was done by trust commissioners and the Native Land Court in the nineteenth century, and by the Maori Land Boards in the first part of the twentieth century. The parties agreed that the Crown made honest efforts to protect Maori interests.

Conceptually, the Crown saw protection mechanisms as Government-imposed restrictions that fettered Maori freedom, and therefore had to be balanced against the right of Maori to deal with their land as they saw fit. The claimants, on the other hand, saw protection mechanisms as a fundamental necessity, to be worked out and administered in conjunction with Maori, so as to provide for their tino rangatiratanga while actively protecting their interests.

The Crown's view was that restrictions on alienation were intended to provide temporary protection. They were to provide a 'cushion' to protect land in Maori ownership and to help Maori keep sufficient land in the meantime, until they were fully ready and willing to sell land and protect their own interests in the new economy. Many Maori, we were told, resented even this much of a fetter on their freedom of action. Given a strategic choice in Court, Te Urewera leaders only sought restrictions on four of the 11 rim blocks, even though restrictions were available at all times. In order to balance the Crown's duty of protection with the right of Maori to deal with their land, restrictions were not – and could not be – a means of reserving land forever. The Crown accepted, however, that standards for the removal of restrictions were lowered in the 1890s, allowing the Crown to remove them in order to purchase land, and permitting the Court to remove them at the request of just one-third of the owners.[1070] Fundamentally, the Crown argued that restrictions did what they were designed to do in Te Urewera: provide temporary protection.

The claimants considered restrictions on alienation to be a very important protection, sought by Te Urewera leaders to protect their lands from unwanted alienations. In their view, the Crown was two-faced in its use of this protection mechanism. On the one hand, it provided restrictions as a means of preserving land that Maori wanted to retain; but, on the other hand, it purchased restricted lands extensively and almost immediately after restrictions had been imposed, without even bothering to remove them. As a result, restrictions were nothing more than another way of prohibiting private purchases and creating a Crown monopoly.[1071]

Restrictions became part and parcel of the Crown's reserve-making policies. The claimants relied on the preamble and terms of the Native Land Act 1873 to demonstrate the Crown's awareness of its duty to reserve a sufficient land base for hapu. Relying on many reports of the Waitangi Tribunal, they argued that reserving land for individuals or for a subsistence lifestyle was not enough. The Crown was required actively to protect the reten-

1070. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 89–91

1071. Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 32–36, 39; counsel for Ngati Hineuru, closing submissions (doc N18), pp 25–27

tion of sufficient land for traditional resource-use and for commercial farming, as hapu chose. The claimants contended that, as a means of carrying out this obligation, policies for reserve-making and restrictions on alienation were an abject failure in Te Urewera.[1072]

The Crown's view was that restrictions and reserves were never meant to be truly permanent, as that would have been an unreasonable fetter on Maori freedom to deal in their lands.[1073] It accepted, however, that it had a duty to prevent landlessness:

> The Crown accepts that it had some obligation to make a general assessment of the overall position of Maori landholding in areas where there was some indications of an insufficient land base. This was to be balanced with the right of Maori to deal with their lands as they saw fit. There is insufficient evidence that indications were made that Urewera hapu did not have a sufficient land base.[1074]

Further, the Crown argued that there is insufficient evidence to determine whether district officers carried out their responsibilities under the 1873 Act to make reserves, or the extent to which reserves were actually made in Te Urewera.[1075]

With respect to vetting, the Crown argued that it provided systems for checking transactions and ensuring that Maori were treated fairly and not allowed to become the victims of fraud. In particular, the Crown pointed to what it called a 'majority rule' in the native land laws before 1909, preventing private buyers from dealing with other than the whole community. The provision that transactions were legally void unless the community agreed to the sale in Court, or a majority agreed to a partition for sale, was sufficient protection of Maori interests.[1076] In addition, trust commissioners and the Court checked each private transaction against statutory standards of fairness. The Crown maintained that there is no evidence this system allowed any substantive injustices, with the exception of the Waiohau fraud.[1077] Further, the Crown submitted that it was not subject to independent vetting, but nonetheless acted in a scrupulously honourable manner in its transactions. It cannot be shown that any substantive injustice resulted from the Crown's purchases not being audited in this way.[1078]

The claimants relied on the Tribunal's report *Turanga Tangata Turanga Whenua*, and on the evidence in this inquiry, to suggest that the supposed 'majority rule' provided no protection for Maori. Individual purchasers were willing to take the risk and buy up shares until they had enough to secure a partition. Transactions were 'void' only until the Court

1072. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 4–9, 39–40, 54; counsel for Ngati Manawa, closing submissions (doc N12), p 54; counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 28
1073. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 22, 68, 76, 85–91
1074. Crown counsel, closing submissions (doc N20), topics 8–12, p 68
1075. Crown counsel, closing submissions (doc N20), topics 8–12, p 76
1076. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4–5, 13–16, 90
1077. Crown counsel, closing submissions (doc N20), topics 8–12, pp 78, 87–91
1078. Crown counsel, closing submissions (doc N20), topics 8–12, pp 6, 65, 85, 88, 91

confirmed them, which it routinely did. In the case of Waiohau, both the Court and the trust commissioner failed to vet transactions properly or enforce any kind of majority rule.[1079] In terms of the Crown's transactions, the claimants did not agree that it was safe to exempt the Crown from independent vetting. In their view, the failure to have its dealings checked by the trust commissioners was a breach of its protective obligations.[1080] In terms of private transactions, the claimants were concerned that trust commissioners checked post-partition dealings, and were unable to go behind them and so inquire into the original transactions that underlay the partition.[1081]

The Crown did not make submissions about the Maori Land Board system, or the vetting of purchases in the twentieth century. It did, however, note the end of what it called the 'majority rule' in 1909.[1082] For the claimants, the most problematic aspect of the 1909 system was the provision for meetings of owners. It allowed minorities (sometimes very small) to alienate land without the consent or even knowledge of other owners, because of the very low quorum requirements. In their view, this was a serious Treaty breach.[1083]

10.9.3 Tribunal analysis

As we mentioned above, there were three main protection mechanisms:

- Restrictions on alienation, placed on titles at the time of first hearing or partitioning;
- Reserves, to ensure that Maori retained 'sufficient' land for the present and future use of Maori; and
- Mechanisms for the vetting of purchases, including trust commissioners, the Native Land Court, and Maori Land Boards.

We deal with each of these mechanisms in turn.

(1) *Restrictions on alienation*

In our inquiry district, the most important protection mechanism was the placing of official 'restrictions' on the sale or leasing of Maori land. It was avidly sought by Te Urewera leaders, who succeeded in getting some two-thirds of the land in the rim blocks protected by restrictions on alienation. These restrictions were placed on titles by the Native Land Court at the time of hearing. Typically, they prevented any alienation of the restricted land except by way of lease. Even then, the lease was not allowed to be for longer than 21 years. Some

1079. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 30–35, 67–68

1080. Counsel for Ngati Manawa, closing submissions (doc N12), p 54; counsel for Ngati Hineuru, closing submissions (doc N 18), p 19

1081. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 29; counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 15

1082. Crown counsel, closing submissions (doc N20), topics 8–12, p 4

1083. Counsel for Ngati Manawa, closing submissions (doc N12), pp 47–48; counsel for Wai 36 Tuhoe, closing submissions, PtB (doc N8(a)), p 41; counsel for Ngati Hineuru, closing submissions (doc N18), p 29

restrictions did not permit any alienation at all, even short-term leases. If they had worked as apparently intended (and as Maori believed they would), then the rate of land alienation in the rim blocks would have been greatly reduced.

As David Williams' evidence set out for us, the legislative regime governing restrictions was complex and changed frequently.[1084] Relying on Professor Williams' evidence, the Crown suggested that its purpose was not the protection of Maori land in Maori ownership for all time. Rather, the Crown's intention was to protect land in Maori ownership, until each tribe had adapted to the colonial economy and to the practice – and consequences – of selling land.[1085] Crown counsel alluded to Article 2 of the Treaty when they submitted: 'Restrictions were intended to protect Maori in the retention of their lands (for as long as they wished to retain it) and in their dealings.'[1086]

In effect, the creation of this kind of legal protection arose from some recognition that without it, Maori could not prevent the uncontrolled and excessive alienation of their land. As T W Lewis explained to the Native Land Laws Commission in 1891, the Native Land Court system was designed to facilitate the transfer of land from Maori to settlers.[1087] An ongoing theme in the nineteenth century, however, was the Crown's duty of active protection of Maori interests. One concrete expression of that duty was the creation of a regime supposed to prevent Maori landlessness on the one hand, and on the other to protect land in Maori ownership until they were truly ready and willing to alienate.

The restrictions regime could do these two quite different things because it allowed for restrictions to be initiated by either side: Maori or the Court. From 1888 (just before most of the land in the rim blocks went through the Court), the judge was 'empowered and directed' to inquire whether Maori had sufficient inalienable land for their support, at the time that any particular block was having its title investigated. If the answer was 'no', then the judge had to place restrictions on the new titles. The same thing had to be done at subsequent partition or subdivision hearings.[1088] The intention was to prevent landlessness. Tribal leaders, however, had the opportunity to ask for restrictions on blocks themselves, regardless of whether they had what the law deemed 'sufficient' land for their support without it. As we shall see, Te Urewera leaders took up this protection with great enthusiasm, and the Court usually granted their requests as a matter of course. Thus, a large quantity of land in the rim blocks ended up protected by restrictions on alienation.

(a) ***Restrictions under the 1873 regime – everything and nothing:*** As we have seen, the rim blocks went through the Court in two distinct phases. The first five blocks had their title

1084. David Williams, brief of evidence, 20 February 2004 (doc C3), pp 9–10, 18–25; David Williams, *'Te Kooti Tango Whenua': the Native Land Court 1864–1909* (Wellington: Huia Publishers, 1999), pp 275–283
1085. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 89–90
1086. Crown counsel, closing submissions (doc N20), topics 8–12, p 89
1087. Williams, brief of evidence (doc C3), p 26
1088. Native Land Court Act 1886 Amendment Act 1888, s 13

investigated from 1878 to 1882. Waimana, Waiohau, and Heruiwi 1–3 were heard in 1878. Matahina was heard in 1881 (and reheard in 1884), and Kuhawaea had its title investigated in 1882. The main Act in force at the time of these hearings was the Native Land Act 1873. This Act's provision for restrictions on alienation has caused great confusion over the years. We view the Turanga Tribunal's interpretation as definitive.[1089] In essence, all Maori land had restrictions on the titles, but any of it could be sold with the agreement of all the owners, or a majority could partition it for sale.[1090] This was distinguished from what we might call the true restrictions on alienation, which could only be removed with the prior consent of the Governor. These restrictions were intended to protect reserves for the occupation and endowment of hapu, which were provided for in a different part of the Act.[1091]

This was changed in 1878, when Parliament reintroduced the possibility of restrictions for blocks that were not reserves. Under the 1878 Act, a judge could recommend to the Governor that restrictions be placed on the alienability of land 'forming the subject of investigation before him', if, in the judge's opinion, the land needed to be reserved for the 'use or occupation' of any of its owners.[1092] This was extended in 1880 to a positive duty on the part of the Court. It had 'in every case' to inquire as to the 'propriety of placing any restriction on the alienability of the land or any part thereof'.[1093] From then on, the Court could put these restrictions on titles itself. They could only be removed by the Governor in Council, which continued to distinguish them from the section 48 restrictions still imposed on all titles by the 1873 Act.

The Crown has suggested that all the rim blocks passed through the Court when restrictions on alienation were available at the time of title investigation, but that Maori themselves did not seek them, except in four instances: Heruiwi 4, Whirinaki, Tuararangaia, and Tahora 2.[1094] We do not accept this submission. The first three blocks to pass through the Court (Waimana, Waiohau, and Heruiwi 1–3) did so in June to July 1878. This was four months before the Native Land Act Amendment Act 1878 (no 2) came into force, in November of that year. Thus, it was not possible for the tribal leaders to request restrictions on the alienation of these blocks.

(b) ***Restrictions under the revised 1873 regime – the court's duty to inquire:*** The next two blocks passed through the Court after the 1878 and 1880 changes in the law. They were Matahina (awarded to Ngati Awa in 1881) and Kuhawaea, which was awarded to Ngati Manawa in 1882. The Court minutes do not reveal any inquiry as to whether Kuhawaea should be made

1089. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 440–444, 459–460
1090. Native Land Act 1873, ss 48, 49, 62, 65
1091. Native Land Act 1873, preamble, ss 24–31
1092. Native Land Act Amendment Act 1878 (no 2), s 3
1093. Native Land Court Act 1880, s 36
1094. Crown counsel, closing submissions (doc N20), topics 8–12, pp 90–91

inalienable.[1095] As we have seen, the majority of Ngati Manawa had resisted taking this land to Court, and had wanted to ensure its protection for future generations. But a purchase had already been initiated by the lessee, Troutbeck, and the block was awarded in two parts: Kuhawaea 1 (21,694 acres, intended for sale); and Kuhawaea 2 (586 acres, intended for the non-sellers).

In 1883, a private purchaser began trying to buy up individual shares of Kuhawaea 2. Ngati Manawa wrote to the Government, saying that they had asked the Court to make Kuhawaea 2 inalienable.[1096] Hira Potakurua wrote:

> It is not pleasing that that part should be alienated. This is an urgent request from us, that the land should be made inalienable that no person might be able to sell [their] share, lest we the tribe who live at the settlement should be in great distress.[1097]

Judge Puckey responded that no request had in fact been made in Court to put restrictions on the alienation of Kuhawaea 2. The Government's view was that there was no way to make land inalienable after title had been awarded, even if all the owners asked for it. Thus, restrictions could not be placed on Kuhawaea 2.[1098] In our view, this was a weakness in the legal regime. There was no reason why Maori owners' ability to seek restrictions on alienation should have been confined to title investigation or partition hearings. The needs, circumstances, or wishes of the owners might have changed after these initial hearings. There was an obvious imbalance in the system. The law permitted an ever-reducing number of owners to apply for the removal of restrictions at any time, yet there was no capacity for them to apply for new restrictions unless they also wanted to partition their land.[1099] No prejudice was suffered in this instance, however, as Kuhawaea 2 was not alienated at this time.

In 1884, the Court reheard the title for Matahina, awarding most of the block to Ngati Awa, with small sections for Ngati Haka Patuheuheu, Ngati Rangitihi, and Ngati Hamua. This rehearing resulted in the first restrictions on alienation in the rim blocks. Two small urupa sections were restricted, as were two of the other sections granted to Ngati Awa. But no restrictions were placed on the land awarded to the claimants in our inquiry.[1100]

The Court next dealt with partitions of Waimana and Waiohau. As with Kuhawaea, these blocks were being partitioned for private sale. In 1882, there had been a further change to the law, allowing the Court to put restrictions on the titles of blocks created by parti-

1095. Whakatane Native Land Court, minute book 2, 26–28 September 1882, fols 15–35
1096. Bright, 'Kuhawaea' (doc A62), p 53
1097. Bright, 'Kuhawaea' (doc A62), p 53
1098. Bright, 'Kuhawaea' (doc A62), pp 53–54
1099. Technically, the law did not provide for owners to seek restrictions even then, but it did compel the judge to inquire as to whether restrictions were needed.
1100. Cleaver, 'Matahina' (doc A63), pp 62–64

tion, even if there had been no restrictions on the parent block.[1101] This was carried out in Waimana in 1885. Swindley agreed to the creation of a 600-acre reserve (Waimana 1B) for the sellers in his part of the block, which was then made inalienable. This restriction protected the reserve from alienation. In 1905, when it was partitioned by the owners, the new titles were restricted from alienation.[1102] This only lasted until 1909, when the Liberal Government unilaterally annulled all restrictions on alienation without the consent of the owners, or their having the capacity to object in any particular case.[1103] Waiohau was partitioned in September 1886, but no restrictions were placed on the non-sellers' part of the block (see ch 11). As we shall see, none of them was in Court to have asked for restrictions.

(c) ***Restrictions after 1888 – Urewera leaders seek to protect their lands:*** In 1886, Donald McLean's 1873 regime was swept away. The legislation of 1873, 1878, and 1880 was all repealed. Two new Acts were passed, designed to work in tandem. The first was the Native Land Court Act 1886. This Act no longer required the Court to inquire into whether restrictions were needed, and gave it no power to put restrictions on titles.[1104] Instead, all land was supposed to be dealt with under the new system of block committees and commissioners, created by the Native Land Administration Act.[1105] Presumably, the Government thought that if Maori committees were given real power to control alienation, restrictions were no longer necessary. The Administration Act was never used, however, and it was soon repealed by the Atkinson Government in 1888, restoring 'free trade' (and purchase of individual shares). In the same year, the Court's power to put restrictions on titles was also restored. When investigating title or partitioning, the Court had to find out whether each individual owner had 'a sufficiency of inalienable land for his support'.[1106] If not, the Court 'shall, out of the land the subject of any such order, declare to be inalienable so much and such parts as shall be necessary for the support of any owner not shown to be possessed of such sufficiency'.[1107] This was the law in force when most of the remaining rim blocks passed through the Court in 1889 and 1890.

At the same time, the Court was given a new power: to remove restrictions. Before 1888, this had been the sole responsibility of the Governor in Council. As David Williams has shown, the power to remove restrictions was extended throughout the Liberal period.[1108] In 1888, either the Governor in Council or the Court could remove restrictions at the request

1101. Native Land Division Act 1882, s 4
1102. Sissons, 'Waimana' (doc A24), pp 54–55, 86
1103. Williams, brief of evidence (doc C3), pp 9–10, 27
1104. See the Native Land Court Act 1886
1105. See the Native Land Administration Act 1886
1106. Native Land Court Act 1886 Amendment Act 1888, s 13
1107. Ibid
1108. Williams, brief of evidence (doc C3), pp 24–25, 27–28

of a majority of owners.[1109] The Court's jurisdiction only applied to new restrictions, and it could only be exercised by means of a 'public inquiry' into whether the owners in fact agreed to the request, and had sufficient other land for their maintenance and support. All owners actually present in Court had to agree.[1110]

When the Liberals took office in 1891, they made it easier to remove restrictions. In 1892, the Native Land Purchases Act gave the Governor power to remove or declare void any restrictions, for the purposes of sale to the Crown.[1111] This was a major change. Previously, the Governor in Council had consented to (or refused) requests from owners that restrictions be removed. Now, for the purpose of Crown purchasing, the Government could simply remove any restrictions on its own initiative. There was no requirement for the owners to consent (or even to be consulted). The downgrading of restrictions was further signified in the same year, when the Native Land (Validation of Titles) Act stated that any failure to remove restrictions could not prevent validation of a 'bona fide' sale.[1112] The Liberals saw restrictions as a technicality to be evaded or set aside, rather than as a key protection of Maori land in Maori ownership for so long as they wished to keep it. In 1894, the requirement that a majority of owners apply for the removal of restrictions was reduced to one-third.[1113] Finally, in 1909, all restrictions placed on titles were cancelled by the Native Land Act of that year, regardless of the wishes or situation of the owners.[1114]

Most of the land in the rim blocks went through the Court in 1889 to 1890, with Ruatoki being investigated later in 1894. For the reasons set out in the previous section, this was the first real opportunity for Urewera leaders to seek the protection of their land at the time of title investigation, and they took full advantage of it. The whole of the Whirinaki and Ruatoki blocks were made inalienable. The great majority of Tahora 2 was also placed under restrictions. Only two relatively small sections, intended to be sold for survey costs, were not made inalienable. Most of Tuararangaia was made inalienable. One-third of Heruiwi 4 was placed under restrictions. The only block for which no restrictions were made was Waipaoa.[1115]

1109. Native Land Act 1888, s 5 (for the Governor in Council); Native Land Court Act 1886 Amendment Act 1888, s 6 (for the Native Land Court)

1110. Native Land Court Act 1886 Amendment Act 1888, s 6

1111. Native Land Purchases Act 1892, s 14

1112. Native Land (Validation of Titles) Act 1892, s 9

1113. Native Land Court Act 1894, s 52

1114. Native Land Act 1909, s 207

1115. Tulloch, 'Whirinaki' (doc A9), p 32; Oliver, 'Ruatoki' (doc A6), p 73; Boston and Oliver, 'Tahora' (doc A22), pp 79–80; Binney, 'Encircled Lands', vol 2 (doc A15), pp 99–100; Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 75–76; Tulloch, 'Heruiwi' (doc A1), p 62

Restrictions on Alienation: Key Provisions for our Inquiry

1873

Restrictions are put on titles by the Native Land Court, preventing alienation unless all owners agree to sell, or a majority agrees to partition the land for sale. A more stringent restriction is put on the titles of reserves created by district officers in consultation with the Maori owners. Such restrictions can, however, be turned into the ordinary restrictions (allowing sale) with the agreement of the Governor in Council: Native Land Act 1873.

1878

The Native Land Court can recommend to the Governor that restrictions be placed on titles, if it considers it necessary to reserve any land coming before it (these restrictions can only be removed by the Governor in Council): Native Land Act Amendment Act 1878 (No 2), s 3.

1880

The Native Land Court has to inquire at title investigation as to whether restrictions are needed, and to put them on titles if so: Native Land Court Act 1880, s 36.

1882

The Native Land Court can put restrictions on titles at the time of partitioning, regardless of whether the parent block was restricted: Native Land Division Act 1882, s 4. The Native Reserves Commissioner can ask the Court to put restrictions on any block that he thinks needs to be reserved: Native Reserves Act 1882, s 29.

1883

Sixty days' public notice is required before the Governor can remove restrictions: Native Land Laws Amendment Act 1883, s 16.

1886

Previous legislation relating to restrictions is repealed. New legislation does not provide for the Court to put restrictions on titles: Native Land Court Act 1886.

1888

The Court's power to impose restrictions is restored. When deciding title or partitioning, it must inquire as to whether the owners have sufficient inalienable land for their support. If not, the Court has to put restrictions on the titles of the land before it, so as to reserve a sufficiency. At the same time, the process for removing restrictions is specified. Any restrictions ordered from now on may be

annulled by the Court on application by a majority of the owners, but only after a public inquiry and after notice has been given. The Court must satisfy itself that the owners have sufficient other land, and all the owners appearing in Court must agree: Native Land Court Act 1886 Amendment Act 1888, ss 6, 13. Alternatively, the Governor in Council can remove any restrictions on the application of a majority of owners: Native Land Act 1888, s 5.

1889

When owners apply to the Governor to remove restrictions, the Native Land Court has to inquire as to whether the owners of the land have sufficient other land for their support, and make a report to the Governor: Native Land Court Acts Amendment Act 1889, s 17.

1890

When a majority of owners apply to the Court for the removal of restrictions, the concurrence of all owners present in Court is no longer required: Native Land Laws Amendment Act 1890, s 3.

1892

For the purposes of sale to the Crown, the Governor in Council can remove any restrictions. None of the previous requirements for removing restrictions apply in this case: Native Land Purchases Act 1892, s 14.

1894

Restrictions may be removed with the consent of one-third of the owners, so long as they have sufficient land for their support. Restrictions imposed before 1888 can only be removed by the Governor, on the recommendation of the Court: Native Land Court Act 1894, s 52.

1909

All restrictions on alienation are cancelled: Native Land Act 1909, s 207.

Section 207(1) of the Native Land Act 1909

All prohibitions or restrictions on the alienation of land by a Native, or on the alienation of Native land, which before the commencement of this Act have been imposed by any Crown grant, certificate of title, order of the Native Land Court, or other instrument of title, or by any Act, are hereby removed, and shall, with respect to any alienation made after the commencement of this Act, be of no force or effect.

As far as we can tell, the Court simply agreed to leaders' requests to make their land inalienable.[1116] Only in the case of Ruatoki does it seem clear that restrictions may have been made on the initiative of the judge and not the owners.[1117] In two of these cases – Whirinaki and Ruatoki – the titles were reheard. In both cases, restrictions were renewed for the revised titles.[1118]

Thus, the titles to 389,258 acres of land were investigated by the Court between 1889 and 1894. Of that land, 283,242 acres (73%) was made inalienable. If, however, we include the earlier blocks in that calculation, 60 percent of the original land in the rim blocks had been placed under restrictions by 1894.[1119] If restrictions on alienation had worked as intended, all this land would have been retained until its collective owners wished to deal in it.

The Crown argued that it faced a dilemma at this time. There was a risk of being too 'paternalistic', and of restrictions preventing Maori from expressing their tino rangatiratanga in terms of strategic decisions to sell or retain land.[1120] We find this argument specious. First, the Crown took away the power of Maori communities and their leaders to make such decisions when it insisted on bypassing community structures and buying from individuals. Secondly, Crown Counsel submitted:

> However, it is apparent many Maori resented any fetter on their ability to deal with their lands as they saw fit. This placed the Crown in the difficult position of trying to balance its active protection responsibilities, with the rights of Maori to partition, develop, and/or deal with their lands if they so wished.[1121]

There is no evidence that Te Urewera leaders felt themselves oppressed or unduly fettered by restrictions. Rather, they were the ones who sought to have restrictions imposed on the great majority of their land in 1889 and 1890, in the hopes of preventing just such an outcome as the rapid, uncontrolled alienation of individual shares. Did they change their minds quickly, and seek to sell restricted lands? There is evidence that Ngati Manawa leaders were willing to lift restrictions on part of Heruiwi 4, and that Turanga leaders were also willing to sell some of Tahora 2. In the case of Heruiwi, Atarea warned that the owners were facing starvation, while in Tahora 2, Wi Pere wanted collective rather than individual

1116. Whakatane Native Land Court, minute book 3, November 1890-December 1891, fols 202, 204, 213, 216, 228, 240; minute book 4, January 1891, fol 210 (Berghan, supporting documents to 'Block Research Narratives' (doc A86(l)), pp 3895, 3897, 3906, 3909, 3921, 3925, 3952); Tulloch, 'Heruiwi 1–4' (doc A1), p 62; Opotiki Native Land Court, minute book 5, 11 April 1889, fols 338–340; Whakatane Native Land Court, minute book 3, 25 November 1890, fol 202 (Berghan, supporting documents to 'Block Research Narratives' (doc A86(o)), pp 5093–5095); Whakatane Native Land Court, minute book 4, 29 January 1891, fols 199–200 (Berghan, supporting documents to 'Block Research Narratives' (doc A86(p)), pp 5414–5415); Whakatane Native Land Court, minute book 3, 24 November 1890, fols 196, 199

1117. Whakatane Native Land Court, minute book 4B, 4 December 1894, fols 126

1118. Whakatane Native Land Court, minute book 5, 8 May 1897, fol 218; Tulloch, 'Whirinaki' (doc A9), p 127

1119. This figure includes Waimana 1B, and does not include the 74,360 acres of Matahina awarded to Ngati Awa.

1120. Crown counsel, closing submissions (doc N20), topics 8–12, pp 4, 22, 85, 89–90

1121. Crown counsel, closing submissions (doc N20), topics 8–12, p 4

negotiations.[1122] But in each case, the wishes of the leaders were disregarded. No attempt was made by the owners to actually lift the restrictions. New restrictions were placed on the dwindling residue blocks each time the Crown's interests were partitioned. It was all to no avail, as we shall see in the next section. The problem was not an excess of Crown paternalism – it was a serious failure in the Crown's active protection of Maori interests.

(d) ***How effective were the restrictions in preventing alienation?*** In our view, restrictions on alienation were the most inaptly named of the Crown's protection mechanisms. They had no effect whatsoever in preventing alienation. After extensive inquiry, we are still baffled as to how land that was legally protected could simply be sold as if it were not. For all of these sales, the purchaser was the Crown. Claimant counsel submitted that the Crown treated alienation restrictions as 'having the additional gloss "except to the Crown"'.[1123] We agree. The result was that restrictions only protected land that the Crown did not want.

As we have seen, restrictions were placed on the whole of Whirinaki, almost all of Tahora 2, and one-third of Heruiwi 4. The Crown was certainly aware of these restrictions. In 1891, T W Lewis noted that the most valuable part of Heruiwi 4 was protected by them: 'If the proposed Native Land Bill passes it will place Govt in a position to purchase restricted lands – at present it would be impossible to obtain a title to any portion of the only Block the Surveyor General considers worth buying.'[1124] Legislation was enacted the following year, allowing the Governor to remove restrictions or declare them void, so that land could be sold to the Crown.[1125] The Hauraki Tribunal, however, noted that land was sometimes purchased without the restrictions having actually been removed.[1126] Indeed, this was apparently common enough for the validation legislation of 1892 to specify that this was not – in itself – sufficient cause for the Court and Parliament to invalidate a past transaction.[1127] The Native Land Court Act of 1894, however, stated that the Native Land Court could not ratify a new transaction if restrictions had not been properly removed.[1128]

In all three of these blocks, the Crown purchased individual interests as if there were no restrictions. As a result, it obtained two-thirds of Whirinaki, the majority of Tahora 2, and almost all of Heruiwi 4. All of the Crown's purchasing took place in defiance of the legal restrictions. Even though the Crown had given itself the power to remove these protections whenever it wanted, through the Native Land Purchases Act 1892, it never actually exercised that power in Te Urewera. Despite searching the *Gazette*s, the witnesses in our

1122. Tulloch, 'Heruiwi 1–4' (doc A1), pp 77–79; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 37–40
1123. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 31
1124. Lewis to Native Minister, 17 June 1891 (David Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (Wai 212 ROI, doc C4, vol 3), p K208); see also Tulloch, 'Heruiwi 1–4' (doc A1), p 72
1125. Native Land Purchases Act 1892, s 14
1126. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 706, 751
1127. Native Land (Validation of Titles) Act 1892, s 9. Under this Act, the Court's decisions had to be confirmed by Parliament (s 17).
1128. Native Land Court Act 1894, s 53(1)(d)

inquiry could find no Orders in Council removing restrictions for Whirinaki, Tahora 2, or Heruiwi 4 blocks.[1129] Nor did the Court remove the restrictions, as it was empowered to do upon application by a majority (1888) or one-third (1894) of the owners. Peter Clayworth theorised that the Court might have considered the act of selling to equate to an application to remove restrictions, but we cannot accept that argument as sound.[1130] Crown counsel offered no explanation for why restrictions on alienation were not removed in a lawful manner.[1131]

'The net effect,' said counsel for Te Whanau a Kai, 'was that the alienation restriction, supposedly a protective mechanism, did nothing more than shut out private purchasers while leaving the Crown free to carry on with its individualised share buying from the Tahora owners, a somewhat ironical outcome'.[1132] Of the 283,242 acres made inalienable by 1894, the Crown purchased 122,087 acres (43 percent) in the 1890s. Restrictions had had no effect in protecting these blocks, barely a few years after tribal leaders had sought to make them inalienable.

Was the Court unaware that the Crown had purchased restricted lands? The answer to this question is 'no'. In the case of Whirinaki, the Court renewed the restrictions for the unsold portions at the hearing where the Crown's interests were partitioned in 1895.[1133] (It did the same again in 1899 when more land was taken for new survey charges.[1134]) Some surviving parts of Heruiwi 4 also had restrictions renewed.[1135]

In our view, the answer to this puzzle may lie in the meaning and effect of section 76 of the Native Land Court Act 1894. This provision came into force before the Court was called upon to partition Crown interests out of any of the Te Urewera lands restricted from sale. It stated:

> Nothing in this Act contained shall limit or affect the power of the Crown to purchase or acquire any estate, share, right, or interest in any land or Native land, nor the power of any Native to cede, sell, or transfer any such estate, share, rights, or interest to the Crown, and when the Crown claims to be interested under any deed, contract, or other document, the same shall, on production, be admitted as evidence, and have due effect given thereto, notwithstanding any law in force to the contrary.[1136]

We did not receive submissions on the meaning and effect of this section of the Act. As we see it, this was a far-reaching provision. It may explain the apparent failure of the Court

1129. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 36; Crown counsel, closing submissions (doc N20), topics 8–12, p 91; Tulloch, 'Heruiwi 1–4' (doc A1), pp 79, 90; Tulloch, 'Whirinaki' (doc A9), p 53
1130. Clayworth, 'A History of the Tuararangaia Blocks' (doc A3), pp 80–82
1131. Crown counsel, closing submissions (doc N20), topics 8–12, pp 89–91
1132. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 35
1133. Tulloch, 'Whirinaki' (doc A9), p 53
1134. Tulloch, 'Whirinaki' (doc A9), pp 43–46
1135. Tulloch, 'Heruiwi 1–4' (doc A1), pp 85,
1136. Native Land Court Act 1894, s 76

to vet Crown transactions, and its apparent indifference to the Crown's failure to remove restrictions on alienation before purchasing so much of the restricted land in the rim blocks.

Although the Court placed new restrictions on some of the land that survived Crown purchasing, Tahora 2 was a large and important exception. As far as we can tell, no restrictions were placed on the land that was left after the Crown partitioned its interests in 1896.[1137] This appears to have been the result of a flaw in the legislation setting up the Validation Court. The status and titles of the residue blocks were decided in 1896 by that Court instead of the Native Land Court. As we read the legislation, the Validation Court could exercise some of the same powers as the Native Land Court, but it had no authority to place restrictions on titles.[1138] Similarly, the Ruatoki restrictions were removed when its titles were cancelled by legislation in 1900.[1139] Like the Validation Court, the Urewera Commission, which was given the task of re-investigating the Ruatoki titles, had no power to re-impose the restrictions on alienation.[1140]

The effect of these two actions was that restrictions were removed from another 100,000 acres of land, between 1896 and 1900. It might be argued that for Ruatoki and parts of Tahora 2, alternative protections were provided – inclusion in the Urewera District Native Reserve for Ruatoki, and in the East Coast Trust for Tahora 2. We accept that point. Nonetheless, 93 percent of restricted land had lost its restricted status within a decade.

Restrictions on alienation had proven to be totally ineffective. They were either ignored by the Crown, which purchased the land anyway, or removed when the land was made subject to legislation that did not provide for them. This was a sorry record indeed. The tribal leaders of Te Urewera had few means to combat the sale of individual interests. Restrictions on alienation, sought so comprehensively when this land passed through the Court in 1889 and 1890, had seemed to be at least one protection against unwanted sales. The reality, as we have seen, was otherwise.

Four restricted blocks, totalling almost 28,000 acres, did survive the era of Liberal purchasing unscathed: Tuararangaia 1 (3500 acres); Heruiwi 4C (2195 acres); Ruatoki (21450 acres); and Waimana 1B (600 acres). The Crown had not attempted to purchase these blocks. Nor, apart from land for survey costs, did the Crown seek to obtain any more of the restricted Urewera lands before 1899, when it called a temporary halt to Government purchasing nationwide. By 1909, the Crown was ready to resume a full purchasing programme. As part of its native land law reforms, all surviving restrictions were cancelled in that year. As we have seen in section 10.7, Tuararangaia 1 and Heruiwi 4C were alienated soon after this blanket cancellation. By this time, the Crown saw restrictions solely as a means of preventing landlessness. From its perspective, they were no longer needed because the Maori

1137. See Tairawhiti Validation Court, minute book 4, 16 April 1896
1138. See Native Land (Validation of Titles) Act 1893
1139. Urewera District Native Reserve Act Amendment Act 1900, s 2(2)
1140. See Urewera District Native Reserve Act 1896 and its amendments

The Validation Court

By the late 1880s, there was confusion and despair over the state of titles to Maori land. The frequent and often contradictory changes to the native land laws had created uncertainty on the part of both purchasers and sellers, who had entered into a series of incomplete or technically invalid transactions. This was particularly so on the East Coast. From 1889 to 1893, Governments experimented with a variety of quasi-judicial inquiries. The final result was the Validation Court, established as a separate Court of record in 1893, although staffed by Native Land Court judges and officials. The Court's task was to validate any transactions that were defeated by technical flaws, but which would have been valid if conducted between Europeans. Fraud or deliberate evasion of the law was not to be tolerated. On the one hand, this set aside a host of special protections for Maori (such as restrictions on alienation or the trust commissioner's certificate). Professor Alan Ward considered this a 'very dubious proceeding'. On the other hand, the Court was supposed to ensure that the transaction had not been unfair to the Maori owners. Parliament had the final say in validating each transaction.[1]

In Te Urewera, the Validation Court played an important role in respect of Tahora 2, as we shall explain in our chapter dealing with claims about the East Coast trust (see ch 12).

1. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 463–464; Alan Ward, *National Overview Report*, 3 vols, Rangahaua Whanui Series (Wellington: GP Publications, 1997), vol 2, p 286; see also the Native Land (Validation of Titles) Acts of 1892 and 1893

Land Boards would check each transaction from that time on, to ensure that no individuals would be rendered landless. The wider role of restrictions in protecting land in Maori ownership, at the request of the community's leaders, was forgotten. It had not worked in Te Urewera in any case.

We turn next to the question of 'landlessness', and the Crown's provision of mechanisms to prevent it in the nineteenth century.

(2) *Reserves and restrictions as a means of preventing landlessness*

In our inquiry, the Crown and claimants agreed that the Crown had a Treaty duty to protect Maori from landlessness. They did not, however, agree on whether that duty was active or passive, nor did they agree on the essential meaning of 'landlessness'.

The claimants' position was stated by counsel for Ngati Haka Patuheuheu:

> It is submitted that there is an overall duty of the Crown to ensure that the hapu retain sufficient land so as to remain a properly functioning unit. It is submitted that the Crown

10.9.3

was well aware of its duty to protect Maori from landlessness as is evidenced by certain provisions and wording of the Native Land Act 1873.[1141]

In particular, the claimants relied on the preamble of the 1873 Act:

> Whereas it is highly desirable to establish a system by which the Natives shall be enabled at a less cost to have their surplus land surveyed, their titles thereto ascertained and recorded, and the transfer and dealings relating thereto facilitated: And whereas it is of the highest importance that a roll should be prepared of the Native land throughout the Colony, showing as accurately as possible the extent and ownership thereof, with a view of assuring to the Natives without any doubt whatever a sufficiency of their land for their support and maintenance, as also for the purpose of establishing endowments for their permanent general benefit from out of such land: Be it therefore enacted . . .[1142]

In the claimants' view, the key phrases were 'sufficiency of their land for their support and maintenance', and 'establishing endowments for their permanent general benefit'.[1143]

The 1873 Act established a mechanism to carry out the intention expressed in the preamble. Under section 24, district officers were to select, with the agreement of Maori, a 'sufficient quantity of land' for their benefit, to include both land for their immediate 'support and maintenance', and for permanent endowments.[1144] The Act included a minimum measure for 'sufficiency': reserves were insufficient unless, when added together, they totalled 'not less than' 50 acres for every man, woman, and child.[1145] The fact that this was a minimum figure was stressed by the words 'not less than', and by section 32, which specified that nothing in the Act was to limit, constrain, or prevent the making of other or additional reserves.

Having selected land with the agreement of Maori communities, the district officer had to obtain the approval of the Governor in Council, get the land surveyed, and then apply for an investigation of its title in the court.[1146] Once title was decided, the Governor was to gazette the reserve with a notice that the land was 'inalienable by sale lease or mortgage, except with the consent of the Governor in Council first obtained'.[1147] The owners could apply to the Governor in Council for the reserve to be treated as if its title had been decided under section 47, which would change its status to land that could be sold.[1148] Thus, the owners could change their mind about reserving this land, so long as the Government agreed.

1141. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 4
1142. Native Land Act 1873, preamble
1143. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 4
1144. Native Land Act 1873, s 24
1145. Native Land Act 1873, s 24
1146. Native Land Act 1873, ss 24–26
1147. Native Land Act 1873, s 30
1148. Native Land Act 1873, s 31

Native Minister Donald McLean Tells Parliament the 'Chief Object' of the 1873 Act

'He (Mr McLean) considered that the chief object of the Government should be to settle upon the Natives themselves, in the first instance, a certain sufficient quantity of land which would be a permanent home for them, on which they would feel safe and secure against subsequent changes or removal; land, in fact, to be held as an ancestral patrimony, accessible for occupation to the different hapus of the tribe: to give them places which they could not dispose of, and upon which they would settle down and live peaceably side by side with the Europeans.'

Donald McLean, 25 August 1873, NZPD, 1873, vol 14, p 604
(Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 439)

In 1886, this Act (and its reserve-making provisions) was repealed. District officers were abolished. By this time, however, there was an alternative mechanism in place. The Native Reserves Act 1882 provided for a commissioner of Native Reserves, or his agent, to attend Court hearings and apply to show why 'any land being adjudicated upon . . . should be rendered subject to any restrictions, conditions, or limitations on alienation, so as to prevent the Natives from so far divesting themselves of their land as to retain insufficient for their support and maintenance.'[1149] It would then be up to the Court to decide whether to issue a title with restrictions or, with the consent of its owners, place it as a reserve under the Public Trustee. The Government's intention was that a special commissioner should maintain an 'inheritance for the race.'[1150] Alexander Mackay was appointed but the post was left vacant after his resignation in 1884.[1151]

This meant that by 1888, the only provision for reserves was the Court's duty to inquire as to whether Maori bringing land before it had sufficient inalienable (that is, reserved or restricted) land for their support. If not, the Court was to impose restrictions on the block before it, regardless of whether or not its owners wanted to reserve that particular piece of land.[1152] From 1888 onwards, as we have seen, restrictions served a dual purpose in Te Urewera: to prevent unwanted alienations (the Maori leaders' purpose) and to reserve a minimum for the prevention of landlessness (the Crown's purpose). The Government thus surrendered any active role, as had been provided for originally with the district officers and then the commissioner of native reserves, leaving everything to the Court.

1149. Native Reserves Act 1882, s 29
1150. JE Murray, *Crown Policy on Maori Reserved Lands, 1840 to 1865, and Lands Restricted from Alienation, 1865 to 1900*, Rangahaua Whanui series (Wellington: Waitangi Tribunal, 1997), p 79
1151. Murray, *Lands Restricted From Alienation*, p 79
1152. Native Land Court Act 1886 Amendment Act 1888, s 13

10.9.3

In our inquiry, the Crown accepted that district officers had had a duty to work with Maori and make reserves under the 1873 Act. Crown counsel submitted:

> There is little evidence of what reserves were promised or made in Te Urewera. It is not clear whether this is a gap in the record or an indication that reserves were not widely considered in this period of time. This prevents determination being made concerning reserves.[1153]

We do not accept this submission. If the district officer had met with Maori communities, set apart reserves in the rim blocks, and had had them surveyed and investigated by the Court, then that would have been identified by the historians in our inquiry. Similarly, if the commissioner of native reserves (or his agent) had been present in Court and requested reserves, that too would have been ascertained. In fact, no Urewera blocks were investigated during Mackay's brief tenure as commissioner, which ended in 1884.

We accept, however, that we lack evidence of whether the district officers tried to carry out their duty. Te Whitu Tekau attempted to keep all land in this district out of the Court – in that circumstance, district officers were unlikely to have much success in trying to get agreement to the surveying and Court investigation of reserves. For those who did not resist the Court – mainly Ngati Manawa – there is no evidence of reserve-making in the rim blocks. In any case, the majority of land passed through the Court after the abolition of the district officers.

During the pre-1886 period, most of the land that was sold was alienated privately. The only exception was Heruiwi 1, which was purchased by the Crown. No reserves were made, on Gill's recommendation to the Native Minister: 'I recommend the purchase[,] the price to be two thousand five hundred pounds and back rents due about two hundred pounds[, and] no reserves to be made in the block. Please wire me if you approve'.[1154]

The only reserve for sellers in this period was the Waimana 1B block, which was set aside with the agreement of Swindley. This was a pre-emption-style reserve – that is, it was land purchased by Swindley and returned to the community for that purpose.[1155]

In the second round of hearings and purchasing (1889 to 1899), the Court placed restrictions on the great majority of land, and the Crown purchased without regard to either those restrictions or the making of reserves. In Whirinaki, the purchase agent agreed to a 400-acre reserve for all the owners (sellers and non-sellers). The Government refused to increase this reserve to 1000 acres, arguing (as we have seen) that Maori could reserve land simply by not selling it. Otherwise, the surviving pieces of Whirinaki belonged to the non-sellers.[1156] Whirinaki appears to have been unique in this respect – no reserves for sellers

1153. Crown counsel, closing submissions (doc N20), topics 8–12, p 76
1154. Gill to Native Minister, 7 May 1881 (Berghan, 'Block Research Narratives' (doc A86), p 566)
1155. Sissons, 'Waimana' (doc A24), pp 54–55
1156. Tulloch, 'Whirinaki' (doc A9), pp 43–46

Reserve-making in the Crown Pre-emption Era

In the period from 1840 to 1862, the Treaty gave the Crown the right of pre-emption: the sole right to buy land that Maori wished to alienate. The Crown's practice during these years was to make reserves for the present and future needs of Maori when conducting purchases. Such reserves were intended for a variety of purposes: to secure enough land for Maori to continue their customary economy; to secure land for farming in the new economy (often cropping but sometimes for pastoral farming); to provide income from leasing; and to provide endowments for the future. The usual practice was to purchase a block of land, and then to return agreed portions of it to Maori as reserves, or to be placed under commissioners for leasing on their behalf.[1]

1. See, for example, Waitangi Tribunal, *Te Tau Ihu*, vol 2, chs 7, 9

were made in Heruiwi 4, Tahora 2, or Waipaoa. Reserves were sought by Wi Pere and Rees in 1895, when trying to put the negotiations for Tahora 2 on a tribal footing.[1157] The Crown's tactic of purchasing from individuals made it virtually impossible for sellers to negotiate reserves.

The Government's policy on reserves for sellers was explained by Sheridan in November 1895, when Ngati Manawa leaders sought the above-mentioned reserve in Whirinaki:

> I don't quite understand what these Natives want because the question of reserves is entirely in their own hands. If they want a reserve of 1000 acres they have only to accept payment for shares reduced by that amount but if they imagine we are going to pay them in full for the land and then give it back to them you [Gill] had better let them understand that that is not the way we do things nowadays. Give them every facility for making what reserves they desire on the conditions set out above [in effect, the partitioning of non-sellers' interests at the hearing] as long as they do not pick the eyes out of the block.[1158]

Sheridan was referring here to the original pre-emption era, where the Crown purchased a block of land from a community (there were no 'non-sellers'), and reserved a significant part of it for their continued use, regardless of what other land they retained. This policy had been followed in the case of the four southern blocks in the mid-1870s, as we saw in chapter 7. It was replaced in part in 1873 by the pre-purchase task of district officers, who were to work with communities to ensure the reservation of 'sufficient' land for use and for

1157. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 25–26
1158. Sheridan to Gill, November 1895 (Tracy Tulloch, comp, supporting papers to 'Whirinaki', various dates (doc A9(a), p C5)

endowments. Under that policy, none of Heruiwi 1–3 was actually reserved for the sellers. Some individuals were non-sellers and thus kept part of the land.

In our inquiry, the Crown stated its position in these terms:

> The Crown accepts that it had some obligation to make a general assessment of the overall position of Maori landholding in areas where there was some indications of an insufficient land base. This was to be balanced with the right of Maori to deal with their lands as they saw fit. There is insufficient evidence that indications were made that Urewera hapu did not have a sufficient land base.[1159]

It follows from this that the Crown saw its duty as a passive one in the 1890s. The Court would ensure that a 'sufficiency' was restricted from alienation as the blocks passed through it, and the Crown would simply purchase land wherever it could, unless something happened to convince it that the sellers were being rendered landless. No reserves were made (except one small reserve in Whirinaki). Yet, the new post-1888 policy – Court-imposed restrictions – was pointless. The Crown simply ignored restrictions on alienation as if they did not exist. Such restrictions do not appear to have qualified as an indication that Urewera hapu might not have a sufficient land base. In 1891, Lewis' only concern about the Heruiwi 4 restrictions was that they prevented the Crown from purchasing the best land. He looked forward to the day when the Crown could buy restricted land whenever it wanted – a situation given legislative authorisation in 1892.[1160] No consideration was given as to why the land was restricted, or whether uncontrolled selling of it by individuals would render communities landless.

In our view, the fact that the Court had placed restrictions on the land, and that the law required it to do so where Maori otherwise had insufficient land, was a clear signal to the Crown. Landlessness was at least a potential risk in such situations, otherwise the relevant provision in the 1888 Act was meaningless. In the Crown's view, however, the whole debate is academic. There is nothing to show that there was a real risk of landlessness in the rim blocks at this time. On the contrary, there was a perception that Tuhoe and others still owned a large area of land, which was locked up as an official reserve from 1896. Apart from Ngati Haka Patuheuheu, who were recognised as having very little land by 1907, 'landlessness does not assume the same prominence in this inquiry district as in some others.'[1161] Dr Loveridge suggested another way of looking at this question. For those Maori who still retained a substantial land base in the 1890s, this decade was the last opportunity for the Crown to have assisted them with its development, instead of assiduously purchasing it from them. In his view, the Crown could have chosen to invest in Government-guaranteed

1159. Crown counsel, closing submissions (doc N20), topics 8–12, p 68
1160. Lewis to Native Minister, 17 June 1891 (David Alexander, supporting papers to 'Native Land Court Orders and Crown Purchases' (Wai 212 doc C4, vol 3), p K208)
1161. Crown counsel, closing submissions (doc N20), topics 8–12, p 92

The Stout–Ngata Commission Recommends Reserving Land in the Twentieth Century

As part of its decision to resume purchasing on a major scale (after the moratorium at the turn of the century, described in section 10.7), the Liberal Government commissioned Sir Robert Stout and Apirana Ngata to carry out an audit of Maori land. The Government wanted an informed opinion as to how much land particular tribes needed reserved for their own use, how much was available for lease, and how much could safely be sold. Land could be reserved exclusively for its owners' use under Part 2 of the Native Land Settlement Act 1907. In our inquiry district, only a few blocks were examined. The commissioners recommended that Waimana and Waiohau 1A be reserved, except for land already (or about to be) leased. It also recommended that Matahina C be leased and Matahina C1B be sold, and that Tuararangaia 1B be incorporated.[1]

In 1909, the Government duly reserved Waimana and Waiohau 1A under the 1907 Act.[2] In the same year, its Native Land Act provided a means for Maori land boards to approve sales of such reserved land: the board could process sales in the usual manner, so long as there was a final confirmation from the Native Minister.[3] Subdivisions of Waimana were routinely sold or leased under this mechanism, at the initiative of Maori owners. Some sales were for the purpose of establishing whanau dairy farms; others because pieces were too small to be used except as part of neighbouring farms. Of the 3972 acres reserved in 1909, 52 percent had been sold or leased by 1930.[4] Small pieces of Waiohau 1A were also sold.[5] Parties made no submissions about this reserving of land, so we make no further comment about it.

1. Robert Stout and Apirana Ngata, 'Native Lands and Native-Land Tenure: Interim Report of Native Land Commission on Native Lands in the County of Whakatane', 23 March 1908, AJHR, 1908, G-1C, pp 4–5
2. 'Declaring Land to be subject to Part II of "The Native Land Settlement Act, 1907"', 14 December 1909, *New Zealand Gazette*, 1909, no 105, p 3245
3. Native Land Act 1909, s 298(b)
4. See Berghan, supporting documents to 'Block Research Narratives' (doc A86(q)), for a selection of relevant documents on this point. Examples include: under-secretary to Native Minister, 13 December 1926; R N Jones to the Registrar, Waiariki Maori Land Board, 5 May 1924 (Berghan, supporting documents to 'Block Research Narratives' (doc A86(q)), pp 5739, 5747); see also Sissons, 'Waimana' (doc A24), pp 70–96.
5. Arapere, 'Waiohau' (doc A26), pp 53–55, 63–64; Berghan, 'Block Research Narratives' (doc A86), pp 709–714

loans for Maori development, as it had for settlers, but this would have required it to 'back off and take the pressure off'.[1162] By 1900, the Crown knew that its continued purchasing was making landlessness a potential outcome for all Maori. This message was reinforced by the

1162. Donald Loveridge, cross-examination by counsel for Ngati Manawa, 13 April 2005 (transcript 4.16(a)), p 293

Stout-Ngata commission in the first decade of the twentieth-century.[1163] We return to the question of land development in a forthcoming chapter of our report.

Were Maori hapu in fact left with insufficient land for a viable cultural, social, and economic base? We will return to this question in our section below on the impacts of land alienation. Here, we address the Crown's protective mechanisms and how well they functioned. As we see it, the Crown failed to set aside reserves, failed to respect its own legislative restrictions on alienation, and failed to inquire whether its purchases from individuals were making it impossible for communities to retain a sufficient land base for their present and future needs. Claimant counsel put to us that the Crown's duty may be measured in light of the actual mechanisms provided at the time to ensure a 'sufficiency' was retained. 'The evidence before the Tribunal,' we were told, 'shows that the Crown failed to provide any inalienable reserves having absolute restrictions against sale.'[1164] We agree. The Crown, having failed to provide truly inalienable reserves, had failed in its duty to the Maori owners. The owners had asked for 60 per cent of their land in the rim blocks to be made inalienable, and the Court had agreed to their requests. The fact that the Crown itself was purchasing this supposedly inalienable land exacerbated the failure of this protection mechanism.

(3) *The vetting of purchases in the nineteenth century*

Nineteenth-century purchases of land from Maori were supposed to be checked by independent commissioners and the Native Land Court, to ensure that they met statutory standards for the protection of Maori. From 1867 to 1900, vetting was provided for under three series of Acts: the Maori Real Estate Management Acts,[1165] the Native Lands Frauds Prevention Acts,[1166] and the Native Land Acts. The first set of Acts (Maori Real Estate Management) established a regime to protect the interests of minors.[1167] The second series of Acts (Native Lands Frauds Prevention) established trust commissioners to vet all private transactions. Purchasers could not get a title registered without a commissioner's certificate, verifying that the alienation had been conducted according to the standards set out in the Acts. Finally, the Native Land Acts entrusted the Court with a second set of independent checks, usually in parallel with the other Acts. An issue debated in our inquiry was whether the Crown was also bound by this system of vetting.

1163. Donald Loveridge, cross-examination by counsel for Nga Rauru o Nga Potiki, 13 April 2005 (transcript 4.16(a)), p 310

1164. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 9

1165. Maori Real Estate Management Act 1867, Maori Real Estate Management Act Amendment Act 1877, Maori Real Estate Management Act 1888, Maori Real Estate Management Act 1888 Amendment Act 1893

1166. Native Lands Frauds Prevention Act 1870, Native Lands Frauds Prevention Act 1870 Amendment Act 1873, Native Lands Frauds Prevention Act 1881, Native Lands Frauds Prevention Act 1881 Amendment Act 1888, Native Lands Frauds Prevention Acts Amendment Act 1889

1167. Although some references were made in evidence and submissions to the treatment of minors, we lacked sufficient evidence to address the relevant claim issues. We thus make no further reference to the Maori Real Estate Management regime in this report.

In essence, the Crown presented us with five arguments about the nineteenth-century regime for vetting transactions:

- the 'majority rule' was enforced for private purchases;
- the trust commissioners' regime cannot be shown to have been ineffective;
- minor technicalities in the law may have been breached but no substantive injustice was done;
- the Waiohau fraud was atypical, and did not reveal systemic failures; and
- the regime did not apply to the Crown in any case. (Although it was not explicit, we take it that the Crown's position rested on the constitutional principle that legislation does not bind the Crown unless specifically stated to do so, or by necessary implication.)

We begin our discussion with the first of the nineteenth-century private purchases in the rim blocks, which was Swindley's purchase of Waimana 1A from 1880 to 1885.

(a) ***Nineteenth-century private purchases – Waimana:*** According to Robert Hayes, the 1873 Act created a regime in which the only safe route for private purchasers was to negotiate with the community as a whole, and get their agreement to the transaction. Even with all the owners' signatures, the transaction was still void until the Native Land Court awarded title to the purchaser. If a majority of the community had agreed to a sale, then they (not the purchaser) could apply for a partition, whereupon the Court would divide the land between the purchaser and the non-sellers.[1168] Opinions differ as to when the alienation legally occurred, and therefore as to when the trust commissioner was supposed to check its bona fides. The Turanga Tribunal noted that it was usual for trust commissioners to certify deeds before the land was partitioned and the alienation took legal effect. Justice Richmond queried this in 1885, observing that the commissioners were being asked to certify something that could not legally exist.[1169] In Te Urewera, the practice was for the Court to partition the land and award it to the sellers, not the purchaser, after which new deeds were arranged for the trust commissioner to check and certify.

In the Crown's submission, the 'majority rule' protected the right and authority of owners to control alienations as a group. The fact that pre-court dealings were legally void was the first line of protection. Then, until the community of owners convinced the Court that all of them agreed to a sale, or that a majority wanted to partition, there was no valid transaction. Thus, the risk lay with the purchaser. Nonetheless, the Crown acknowledged that pre-court dealings had a 'commercial reality', as opposed to a strictly legal reality.[1170]

In the case of Waimana, Swindley followed the same practice as the Crown in Heruiwi 1–3, even though he eventually had the support of Tamaikoha. As soon as the Native Land Court title was issued, Waimana became vulnerable to the picking off of individual interests.

1168. Hayes, 'Waiohau' (doc L15), pp 4–7
1169. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 455–456
1170. Crown counsel, closing submissions (doc N20), topics 8–12, p 16

10.9.3

Jemima Shera was an immediate and obvious threat to the Swindley-Tamaikoha alliance and lease. She bought undivided Te Upokorehe shares. Swindley had little choice but to protect his interests by converting his lease to a purchase, and Tamaikoha had little choice but to let him. Individual shares were purchased over a five-year period, in the face of opposition from Rakuraku and Te Whiu. Payments, too, were made individually – £40 to each seller. Although they led a determined resistance, Rakuraku and his supporters were powerless to stop the process when it was conducted in this way. Also, by the time the majority approved the partition in Court, this was the end of the process, not the beginning. Thus, community decision-making by consensus was subverted.[1171]

Although the 'majority rule' did not work in the way that Hayes has claimed, it did result in the partitioning of the block between the Tuhoe sellers and non-sellers in 1885, with a 600-acre reserve for the sellers. The Court did not award Waimana 1A to Swindley, although he was in Court and contributed to the selection of land and boundary lines. It was clear that his transaction was behind the partition. The sellers made a legal transfer of the block to Swindley's lawyers two days after title was awarded to them.[1172] It was this transaction which was then checked and confirmed by the trust commissioner, and not the original purchases by Swindley.[1173] As far as the minutes show, the judge did not vet the transaction before making the partition.[1174]

Similarly, John Balneavis sought a partition for his sister, Mrs Shera, of her share and the three shares that (he told the Court) she had 'purchased'. The judge (without any apparent inquiry into the bona fides of this purchase) ordered 'a piece to be cut out for Mrs Shera.'[1175] This piece (Waimana 1E) was awarded to Jemima Shera and the three sellers, who then made an official 'sale' of their shares following the Court award. The majority of owners had no say in this partition, or the sale that underpinned it. Brent Parker did not find a trust commissioner's certificate for this transaction.[1176]

Thus, the vetting mechanisms worked in such a way as to facilitate the transaction, rather than provide any real check on it. The 'majority rule' was a technicality that protected land only until a majority of shares had been purchased, rather than a meaningful protection for community decision-making, whether at the time of partition or earlier. As we have seen, Tamaikoha's people did agree to the sale (although a majority of interests was only purchased over a long period of time). Rakuraku's people opposed the sale, but had no power to enforce customary constraints or the need to reach consensus. Nor could the community

1171. Sissons, 'Waimana Kaaku' (doc A24), pp 51–59; Binney, 'Encircled Lands', vol 2 (doc A15), pp 310–323
1172. Sissons, 'Waimana Kaaku' (doc A24), pp 53–56; Opotiki Native Land Court, minute book 3, 10 February 1885, fol 83
1173. Parker, 'Timeline' (doc K4(a)), p 12
1174. Opotiki Native Land Court, minute book 3, February 1885, fols 82–85, 92–93
1175. Ibid, 16 February 1885, fol 93
1176. Ibid, 17 February 1885, fol 95; Parker, 'Timeline' (doc K4(a)), p 12

The Trust Commissioners' Regime

In 1870, the Native Lands Frauds Prevention Act created trust commissioners to check that transactions were not contrary to equity or good conscience, or to a trust, and that the price had not included alcohol or guns (ss 3–4). The commissioner was also to ensure that the price had actually been paid, that Maori had understood the transaction, and that they had sufficient other land for their 'support' (s 5). No purchaser could register a title without a trust commissioner's certificate (s 6). This regime remained in place, with amendments, until 1894. In 1888, the legislation specified that the Crown was not subject to the trust commissioners' regime (Native Lands Frauds Prevention Act 1881 Amendment Act 1888, s 8). The Liberal Government abolished the position of trust commissioner in 1894 (Native Land Court Act 1894, ss 114–116 and first schedule). Since the Liberals were reintroducing pre-emption, and the trust commissioners had no role in certifying Crown transactions, they were no longer seen as necessary.

(or the 'majority') control or prevent the sale of individual shares to Jemima Shera, and the partition of those shares to facilitate their transfer.

(b) ***Nineteenth-century private purchases – Kuhawaea:*** The purchase of Kuhawaea 1 by Hutton Troutbeck, the lessee, is difficult to untangle. As we have seen, the majority of Ngati Manawa, led by Harehare Atarea, did not want to sell this land to Troutbeck. They wanted to maintain the relationship with their lessee, but they also wanted to keep this land for future generations.[1177] Robert Pouwhare and Peter McBurney commented that it was among the best of the Rangitaiki lands.[1178] The sale was spearheaded by a young chief of senior lineage, Pani Te Hura.[1179] The rest of the tribe was unable to prevent the survey and title investigation from going ahead. From the evidence available to us, it appears that Troutbeck did not have majority support for a sale, although he did have some support when the title was heard in 1882. At that hearing, the great bulk of Kuhawaea was partitioned as Kuhawaea 1, and 'earmarked' for sale to Troutbeck. The 92 owners were (supposedly) all 'sellers'.[1180] Nonetheless,

1177. McBurney, 'Ngati Manawa and the Crown, 1840–1927' (doc C12), pp 288–289, 318–324; Binney, 'Encircled Lands', vol 2 (doc A15), pp 36–42

1178. McBurney, 'Ngati Manawa and the Crown, 1840–1927' (doc C12), p 318; Robert Pouwhare, brief of evidence (doc C15(a)), p 41; see also Gilbert Mair's assessment, cited in Binney, 'Encircled Lands', vol 2 (doc A15), p 36

1179. He was also known as Pani Harehare, Peraniko Pani, Aperaniko Te Hura, and Pani Ahuriri: Binney, 'Encircled Lands', vol 2 (doc A15), p 39

1180. McBurney, 'Ngati Manawa and the Crown, 1840–1927' (doc C12), pp 318–322; Binney, 'Encircled Lands', vol 2 (doc A15), pp 36–42; Bright, 'Kuhawaea' (doc A62), pp 53–54

this information was not supplied to the Court. According to the orders, the block was partitioned to create a separate piece for Ngati Apa (Kuhawaea 2), rather than for non-sellers.[1181] From the summary of the hearing in the minutes, the lease was mentioned several times in court, but not the sale.[1182]

After the award of title, Troutbeck collected the signatures that he needed to complete a sale. This process took almost a year (October 1882 to September 1883), with the final payment made in August 1883. It then took a further nine months to confirm the sale.[1183] According to Nicola Bright, this delay was 'because of a number of discrepancies in the information for the certificate of title'.[1184] We have no evidence about the nature of those discrepancies. It may well be that one was the purchase price. When Judge Brookfield certified the transaction in June 1884, he accepted that £7000 had been paid.[1185] Bright and McBurney queried this figure, noting the view of Henry Bird of Ngati Manawa that only £2,550 was paid.[1186] We have no evidence to determine the facts of this matter. In any case, Judge Brookfield certified that he had carried out the Native Land Court's vetting of the transaction, based on a final deed of September 1883.[1187] We have no information on whether a trust commissioner also reviewed and certified this purchase.

It seems clear that the 'majority rule' did not in fact protect the interests of Ngati Manawa. It proved impossible for Atarea and the majority to prevent this sale. We have no solid information on how the protective mechanisms functioned in terms of vetting Troutbeck's transaction.

(c) ***Nineteenth-century private purchases – Waiohau:*** Fraudulent dealings over the Waiohau block were a serious grievance to Ngati Haka Patuheuheu and Tuhoe. We address their claims about this fraud in chapter 11. Here, we note briefly some key points relevant to the vetting system.

First, the 'majority rule' did not work to protect this block either. There were two purchasers at work, neither of whom had managed to acquire a majority of shares. One of those buyers, Harry Burt, was nonetheless able to convince the Court (with the support of some Ngati Manawa grantees) that the majority of owners had agreed to a partition for sale to him.[1188] The result was a partition in the names of just two people, who then proceeded

1181. Whakatane Native Land Court, minute book 2, 20 October 1882, fol 148
1182. Ibid, September 1882, fols 15–35
1183. Bright, 'Kuhawaea' (doc A62), pp 53–54; Peter McBurney, 'Ngati Manawa and the Crown, 1840–1927' (doc C12), pp 319, 321
1184. Bright, 'Kuhawaea' (doc A62), p 54
1185. Judge Brookfield, certification of Kuhawaea 1 transfer, 16 June 1884 (Bright, supporting documents to 'Kuhawaea' (doc A62(a)), p D4)
1186. Bright, 'Kuhawaea' (doc A62), p 54; McBurney, 'Ngati Manawa and the Crown, 1840–1927' (doc C12), p 319
1187. Judge Brookfield, certification of Kuhawaea 1 transfer, 16 June 1884 (Bright, supporting documents to 'Kuhawaea' (doc A62(a)), p D4)
1188. Hayes, 'Waiohau' (doc L15), pp 7–13

to sign a deed of sale. It was this deed, and not Burt's earlier purchases, which the trust commissioner certified as meeting the requirements of the Native Lands Frauds Prevention Act.[1189] As Crown counsel noted, the commissioner could not go behind the partition and the Court title. His task was simply to certify that the owners named by the Court had understood the deed and the transaction, that the purchase price was paid (and sufficient), that the price had not included alcohol or guns, and that the transaction was not contrary to 'equity or good conscience'.[1190] The trust commissioner's inquiry was not one that could have uncovered the truth of these matters, because it did not examine the original purchases.

The Native Land Court, on the other hand, did not carry out its requisite checks. The original purchase of individual interests included improperly witnessed signatures, alienation of minors' interests, and (so it was alleged) alcohol and firearms as part of the payment.[1191] All of this was concealed from the trust commissioner by the post-partition 'sale', but ought to have been exposed in the Native Land Court. Also, as was clear, Burt did not have a majority of the pre-1886 owners' signatures. The system of vetting clearly failed in this instance.[1192]

In our inquiry, the Crown blamed the individual judge concerned (Judge Clarke), and argued that this was not a fault in the system.[1193] That may be so, but we can say with certainty that in all three of these nineteenth-century private purchases, the 'majority rule' did not work in the way that Hayes said it was supposed to. That was a significant failing of the supposed protections in the 1873 native land laws regime. Also, post-partition checks by the trust commissioner – which took place in both Waimana and Waiohau – were, by definition, ineffective, because the original transactions (or partial transactions) were not being vetted. While the purchaser got a chance to perfect or conceal earlier flaws, and also to collect more signatures, this was only after the Court had in effect validated the original transaction by granting the partition.

Nonetheless, the Crown has suggested that there was no substantive injustice to the claimants, other than in the case of Waiohau. We do not agree. Had the 'majority rule' worked in the manner it was supposed to, as posited by Hayes, then we doubt that either the Waimana or Kuhawaea sales would have taken place. It is clear from the historical evidence that – in both cases – the communities' leaders favoured leasing, and that the purchases only happened because of the lessees' ability to buy individual interests. This was a critical flaw in the native land laws. As to the system of post-partition checks, we cannot say for cer-

1189. John Battersby, 'A report on Waiohau 1 Block', report commissioned by the Crown Law Office, February 2004 (doc C1), p 10

1190. Crown counsel, closing submissions (doc N20), topics 8–12, p 79; Hayes, 'Waiohau' (doc L15), pp 5, 7

1191. Binney, 'Encircled Lands', vol 2 (doc A15), pp 50, 58–59; Hayes, 'Waiohau' (doc L15), p 8; Battersby, 'Waiohau 1 Block' (doc C1), pp 43–48

1192. Hayes, 'Waiohau' (doc L15), pp 7–8

1193. Crown counsel, closing submission (doc N20), topics 8–12, pp 4, 39, 78–80

tain whether or not injustices took place. The evidence does not allow us to make a finding on that point (except for Waiohau, as we explain in chapter 11).

(d) ***Were the Crown's purchases subject to vetting?*** According to the Crown, it exempted its transactions from vetting by trust commissioners, but this did not take away its responsibility to purchase land in an entirely scrupulous manner.[1194] From 1888, the law specified that nothing in the Native Lands Frauds Prevention Acts applied to the Crown, or to anyone working on behalf of the Crown.[1195] Before this, practice had varied: some Crown transactions had been inspected and certified, and others had not.[1196] There was only one Crown purchase in Te Urewera before 1888. In that case (Heruiwi 1–3), the Crown did not take its deed to the trust commissioner for certification. Tracy Tulloch noted that there was at least one technical flaw – the sale of a minor's interest had not been counter-signed by a Native Land Court judge, as required by law.[1197]

The rest of the Crown's purchases in the rim blocks took place after the 1888 amendment. We have no information on whether (or how) the Native Land Court checked those transactions. In some cases, such as Heruiwi 4, the technical requirements of the law had all been observed.[1198] In other cases, such as Whirinaki, the Court disregarded irregularities.[1199] As we have already noted, the Court also seems to have ignored the Crown's failure to remove restrictions on alienation for many of the blocks that came before it. It may be that section 76 of the Native Land Court Act 1894 freed the Crown from the Court's scrutiny. In any case, none of the Crown's transactions in Te Urewera was refused by the Court.

(4) *Twentieth-century vetting: the role of the Maori land boards*

From 1909, the Crown entrusted the Maori land boards with the task of protecting Maori in their land dealings. For multiply owned blocks (more than 10 owners), the boards were interposed between buyer and seller (or lessor and lessee) as the body to execute the legal arrangements and deliver secure titles to private buyers.[1200] As we have seen, the board summoned a meeting of assembled owners to determine whether they (or, at least, a quorum of five) were willing to sell or lease their land, and on what terms. For blocks with 10 or fewer owners, the parties could deal with each other directly, but the board still had to check and confirm the alienation.

1194. Crown counsel, closing submission (doc N20), topics 8–12, pp 6, 91
1195. Native Lands Frauds Prevention Act 1881 Amendment Act 1888, s 8
1196. Waitangi Tribunal, *Hauraki Report*, vol 2, p 705; Hayes, 'Evidence on the Native Land Legislation' (doc A125), pp 148–152
1197. Tulloch, 'Heruiwi' (doc A1), pp 35–36, 43
1198. Tulloch, 'Heruiwi' (doc A1), pp 76, 79
1199. Tulloch, 'Whirinaki' (doc A9), p 40. The irregularities concerned the proper witnessing of the purchase of minors' interests.
1200. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 685–686

In either case, the board had to be satisfied that the price was fair, that the alienation was not contrary to equity or good conscience, and that each individual Maori vendor would not be rendered 'landless'. In other words, much the same checks were considered necessary as the trust commissioners had once performed. The board, however, had a broader mandate than the trust commissioners: it had to confirm that the sale or lease was in the public interest (that speculators were not accumulating land), and in the best interests of the owners.[1201]

One of the more controversial of the board's roles was its task of ensuring that no individual Maori would become landless, and therefore (as it was viewed at the time) a burden on the state.[1202] According to the Central North Island Tribunal, the focus of the 1900 legislation – and of the Stout-Ngata Commission – was on reserving enough land for the community. This included ensuring sufficient customary resources as well as land for communal farming, with leased land to be available for future generations. The 1909 and 1913 legislation marked a total change of direction. The emphasis switched to preserving enough land for each individual, and for subsistence only. There was to be no provision for future generations.[1203]

The 1909 Act defined a landless individual as one whose total interests in Maori land were 'insufficient for his adequate maintenance'.[1204] Rather than overturning a sale, the board could apply for the Court to cut out the interests of individuals who would otherwise become 'landless'. This requirement could be evaded in two ways: section 373(2) provided that no purchase would be invalid if the Crown breached the requirement; and section 425 stated that the board could apply to the Governor to waive the requirement, so long as the individual concerned could earn a living some other way.[1205] In 1913, the provision was watered down by the Reform Government, which empowered the board itself to waive the clause without reference to the Governor. From that point on, the board could approve an alienation that would render individuals landless, so long as the land was useless for supporting them anyway, or they had another means of making a living.[1206]

When the board performed these functions, it did so without any Maori representation. The right of local Maori to elect members had been abolished in 1905, with the switch from councils to boards. Carroll and Ngata both asked the Government to include local Maori leaders on the boards in 1913, when Herries dropped the nominated Maori member and made the boards consist of the Land Court judge and registrar. The Government refused

1201. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 857–858
1202. Waitangi Tribunal, *Hauraki Report*, vol 2, pp 862–863
1203. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 689–692
1204. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 691
1205. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 691
1206. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 691

Carroll Versus Herries in 1913: The Right of Maori to Representation on the Boards is Debated in Parliament

The Honourable Sir J Carroll:

> First of all, the excision from the Board of any Native representation. The Board is dealing not with European land, not with Crown land, but with the land owned by the Natives; and surely it is a universal principle, recognized by all civilized races, that there should be representation on any Board dealing with the interests and property of those concerned – representation of those concerned . . . In all other cases, too innumerable to mention, there is Maori representation where their interests are concerned. But in this case why is the Maori member taken off? Because he was a check, perhaps, against any unfair dealing; because he was a discretionary unit that might examine and study transactions between Maoris and Europeans that came before the Board for confirmation . . .[1]

The Honourable Mr Herries:

> What advantage was the Maori representative? Honourable members say glibly that he represented the owners of the land. What owners did he represent, I would like to know. Very often the owners of the land would sooner see him off the Board than on. Just imagine, supposing that they had a Land Board in the ancient Highlands, if a Stewart of Appin had to go before a Board on which there was a Campbell: what trust would he have in his hereditary foe? What trust would some of the Ureweras have in an Arawa? What trust would a Ngatikahungunu have in a Ngatiporou? The matter has been brought before me in that respect, too. They say that each tribe should have a representative. The whole system of the Maori representative was a farce. It is only advanced, I know, by the honourable gentleman for party purposes . . .[2]

1. NZPD, 1913, vol 167, p 837
2. NZPD, 1913, vol 167, p 857

this request.[1207] Maori had no role whatsoever in deciding how (and how far) their own interests would be protected, other than as petitioners to the board, the Court, and the Native Minister.

(a) ***Private purchases through meetings of assembled owners:*** For this part of our inquiry, the claimants' main grievance was with the meetings of owners' system. We have already

1207. Tom Bennion, *The Maori Land Court and Land Boards, 1909 to 1952*, Rangahaua Whanui Series (Wellington: Waitangi Tribunal, 1997), p 14

discussed this system for the Crown's purchases. In Te Urewera, there were only a few meetings called for the purpose of private purchases. At issue were some of the last pieces of surviving land for Tuhoe and Ngati Manawa. Tahora 2AD2 (3,276 acres) was sold in 1911. Kuhawaea 2 (586 acres) was sold in 1913. Also, half of Whirinaki 2(3B2) (78 acres) was sold in 1921. It will be recalled that Kuhawaea 2 was particularly important to Ngati Manawa, who had strongly resisted its alienation in the nineteenth century. There were no other private sales through the meetings of owners system between 1909 and 1930.

The private purchases of Tahora 2AD2 and Kuhawaea 2 have key features in common:

- The board did its best to ensure that the owners got the highest possible price. It appears to have taken the approach that sales were in the interests of owners, so long as the best possible price was obtained.[1208]
- The board did not refuse sales on the basis of potential landlessness. We have no information as to what checks the board carried out in respect of Tahora 2AD2. We do know that some owners of 2AD2 complained of virtual landlessness to the Crown in 1911, because of sales of their Urewera District Native Reserve lands, before the sale of 2AD2 went ahead.[1209] In the case of Kuhawaea 2, the board decided that no checks were necessary, because it knew that the 'vendors have plenty of other land'.[1210]
- The board did not go behind the decision of meetings of owners, even though opposition to the sales emerged afterwards. Once a resolution was passed and confirmed, the board called no further meetings to reconsider it, no matter how low the attendance at the original assembly. It became the 'agent' of the owners to execute the transaction, and the owners had no power whatsoever to revoke that agency.[1211] Those who were absent were 'deemed to have consented', regardless of whether they protested otherwise.[1212] In both of these private purchases, the resolution to sell was made by minorities, and strong opposition was evident soon after the board had confirmed the sales.

  In Tahora 2AD2, protest was led by Te Whiu Rakuraku, Tutakangahau, and Takao Tamaikoha. There were petitions signed by many more people than the four percent of the owners (12 of 267) who had been at the meeting and voted in favour of the sale.[1213] The people of Waimana complained that 'the real owners and those who lived permanently on the land did not agree to its alienation'.[1214] Native Minister Herries refused

1208. Boston and Oliver, 'Tahora' (doc A22), pp 198–200, 212; Registrar to Urquhart, 3 April 1916; Urquhart to Registrar, 17 June 1916 (Bright, supporting documents to 'Kuhawaea' (doc A62(a)), pp A36, A38)

1209. Boston and Oliver, 'Tahora' (doc A22), p 199

1210. Judge Browne, 13 July 1914 (Bright, 'Kuhawaea' (doc A62), p 62; Bright, supporting documents to 'Kuhawaea' (doc A62(a)), p A31)

1211. Native Land Act 1909, s 356(6)

1212. Native Land Amendement Act 1913, s 100(2); see also Native Land Act 1909, ss 344–345, which required dissenting owners to sign a memorial of dissent at the meeting so that their interests could be cut out.

1213. Boston and Oliver, 'Tahora' (doc A22), pp 201–202

1214. Te Whiu Rakuraku and 36 others, Waimana, to Herries, 2 April 1913 (Boston and Oliver, 'Tahora' (doc A22), p 201)

appeals to intervene on their behalf, since the board had approved the purchase and a deposit had been paid.[1215]

In Kuhawaea 2, there was a slightly different outcome, because three owners had registered their dissent at the meeting. The legislation preserved their rights: they were allowed to partition their interests out as Kuhawaea 2A. One of the owners of 2B protested that his vote was incorrectly recorded at the meeting, and that the sale was invalid, but to no avail.[1216] (The vote had been recorded as five to three in favour of sale, with only eight of 33 owners in attendance.)

- There was a long and expensive process to deliver secure titles to private buyers. As the Central North Island Tribunal emphasised, the boards had to sort out the tangled mess that the Crown's native land title system had become.[1217] Titles had to be updated, successions had to be arranged, surveys had to be made, and (in the case of Kuhawaea 2) a partition had to take place. As a result, it took several years for each of these transactions to be completed and for the buyers to get their titles and the owners their money. Survey costs were routinely deducted from the purchase money.[1218]

The third private purchase involving the meeting of owners system took place in 1921. A local farmer, Thomas Anderson, wanted to buy the 78-acre Whirinaki 2(3B2) block.[1219] The board called a meeting of owners, at which the 12 owners present represented around half of the 7.5 shares in this block.[1220] Two owners dissented, holding one-third of a share between them, but only one of them (Patiti Paerau) signed a memorial of dissent. In his memorial, he made it clear that he was objecting on behalf of other owners too (who were not present).[1221] In a letter to the board, Patiti Paerau pointed out that his whanau was farming the land. They were, it seems, farming much more than the few acres their shares entitled them to, but they wanted to continue farming it, and to keep the land in Maori ownership in accordance with the wish of their elders.[1222]

1215. Boston and Oliver, 'Tahora' (doc A22), pp 201–202

1216. Bright, 'Kuhawaea' (doc A62), pp 62–66; Native Land Amendement Act 1913, s100(2)

1217. Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 685–686

1218. Boston and Oliver, 'Tahora' (doc A22), pp 201–205, 207–208, 209–215, 223, 322–323; Bright, 'Kuhawaea' (doc A62), pp 62–66

1219. Herbert Macdonald, 'Report of meeting of owners', 12 February 1921 (Tulloch, supporting documents to 'Whirinaki' (doc A9(a)), p Q6c)

1220. Herbert Macdonald, 'Report of meeting of owners', 12 February 1921 (Tulloch, supporting documents to 'Whirinaki' (doc A9(a)), pp Q6a–Q6c)

1221. Herbert Macdonald, 'Report of meeting of owners', 12 February 1921 (Tulloch, supporting documents to 'Whirinaki' (doc A9(a)), pp Q6a–Q6b); 'Memorial of Dissent', 12 February 1921 (Tulloch, supporting documents to 'Whirinaki' (doc A9(a)), pp Q7a–Q7b); Paerau (Albert Warbrick) to Judge Ayson, 2 May 1921 (Tulloch, supporting documents to 'Whirinaki' (doc A9(a)), pp Q8a–Q8b).

1222. Paerau (Albert Warbrick) to Judge Ayson, 2 May 1921 (Tulloch, supporting documents to 'Whirinaki' (doc A9(a)), pp Q8a–Q8b)

In this case, the board did not confirm the resolution until after the Native Land Court had cut out the interests of Paerau and of the people he told the board he represented.[1223] The Court hearing revealed that the owners were equally split – eleven owners with half of the shares were classed as non-sellers, while the other half of the shares belonged to the sellers. The majority of the block (40 acres) was partitioned for the non-sellers, with the purchaser getting a slightly smaller share (38 acres). This was because Paerau's people were keeping the 'hilly end of the block'.[1224] Judge Ayson having made this partition, he then sat the next day as president of the Maori Land Board to confirm the sale to Anderson.[1225]

What this shows is that the meeting of owners had revealed the wishes of only half of the owners. Those who wanted to keep the land had to settle for a partition – although in that sense, they were luckier than the owners of Kuhawaea 2, whose objections were not put in writing at their meeting (other than those of the three individuals who voted against the resolution.) From the limited number of cases in our inquiry, it is not clear to us how much discretion the board – or the Court – had in the matter of partitioning dissenting interests. The difference between Kuhawaea 2 and Whirinaki seems to be that Paerau specified in his memorial of dissent that it was also on behalf of others.

In sum, the low quorum requirement for the meetings of owners system is a concern for private purchases, as it is for Crown purchases. The degree of opposition to the sale of Tahora 2A D2 shows that the 4 percent of owners who voted at the meeting did not represent the will of the community of owners. While the evidence is not as strong for Kuhawaea 2, there was clearly significant opposition in both cases. For Whirinaki, the owners were evenly split, but that was not revealed at the meeting (which was dominated by the sellers). The native land laws were weighted in favour of sales, so the board did not (or could not) investigate post-meeting dissent so as to re-evaluate the decisions to sell. The most it did in Te Urewera was, as in the case of Kuhawaea 2 and Whirinaki 2(3B2), arrange for the interests of those whose dissent was recorded in writing at the meeting to be partitioned. Everyone else down through the generations lost their rights. Nor could the Native Minister intervene, as petitioned by Tuhoe in 1913. Once the board had confirmed a sale, there was no way of stopping it under the 1909 Act. For these sales to have been pushed through in the teeth of opposition, usually put as the view of those who were actually living on and using the land, shows serious flaws in the Native Land Acts of 1909 and 1913, and in the system of meetings of owners and the board that was governed by those Acts. So long as the price was good and the owners had another piece of land somewhere, sales would be approved.

1223. 'Confirmation of a Resolution passed by Assembled Owners', 19 November 1921 (Tulloch, supporting documents to 'Whirinaki' (doc A9(a)), p 99)

1224. Rotorua Native Land Court, minute book 69, 18 November 1921, fols 322, 330

1225. 'Confirmation of a Resolution passed by Assembled Owners', 19 November 1921 (Tulloch, supporting documents to 'Whirinaki' (doc A9(a)), p 99)

10.9.3

Waimana 1B1D1: Tuhoe Owners Buy Out their Co-owners

Summary: *The alienation of Waimana 1B1D1 was an exceptional case. It did not fit any of the patterns as we have described them in this section. First, Waimana lands still in Maori ownership were reserved from sale under the Native Land Settlement Act 1907, so no land could be sold without the permission of the Native Minister. Alienation was thus controlled directly by the Minister as well as the board. Secondly, the alienation of Waimana 1B1D1 was driven mainly by Tuhoe owners trying to buy out their co-owners, with one party apparently acting on behalf of a Pakeha lessee. Thirdly, the early stages of its alienation took place before there were enough owners to require a meeting of assembled owners under the 1909 Act. At that point, the Tuhoe buyers and the board squabbled over who had to pay the sellers, and the transaction fizzled out. The buyers only acquired a single interest. Later, another Tuhoe owner wanted to buy out all his co-owners' shares (except those owned by the previous buyers). By this time, successions had expanded the number of owners to the point where a meeting was required. Ultimately, as a result of that meeting in 1929, the board confirmed sale of part of the block, with the Native Land Court partitioning it in 1930. This drawn-out process lasted from 1918 to 1930.*

Waimana 1B1D1 was created in 1914. It was a block of 12 acres with 8 owners. Thus, it did not (at that point) require a meeting of owners for its alienation. This small piece of land became the subject of a three-way contest between local Tuhoe (Tiaki and Mereana Maraea, and JF Boynton) and the lessee, BW Hughes. It appears from the records that Tiaki Maraea may have been a front for Hughes, who actually paid the money for the purchase. Instead of dealing directly with the owners in 1918, Maraea and Hughes tried to get the board to pay the owners, who they claimed were scattered all over Te Urewera. The board refused to do this, but it does appear to have confirmed the alienation, subject to the Minister's consent (which was required under section 298 of the 1909 Act). While the evidence is sketchy, it appears that the board failed to apply for the Minister's consent, and Maraea failed to pay any of the owners. The purchase lapsed by 1922. Instead, the board confirmed the sale of a single interest, that of Taiha Tamarau, to Hughes in 1922. As far as we can tell from the records, this purchase of an undivided interest was then confirmed by the Minister. According to information supplied by the purchaser, Tamarau owned 90 acres at Waikaremoana and ten acres at Ruatoki, which was deemed sufficient for his support.

In 1929, J F Boynton (who was himself an owner) applied to the board for a meeting of owners to buy this land, apart from the interests acquired by Maraea. Successions had increased the number of owners from eight in 1914 to 33 in 1929, so a meeting of owners was now required. Boynton supplied the usual list of other lands held by the owners. According to that list, more than half of the owners had less than 20 acres each, although some of them had undefined interests in additional blocks.

We have no information as to how many owners were present at the meeting, but the resolution was passed. The Court partitioned the block and the board confirmed the sale of 1B1D1B to Boynton

in 1930, which (at 7 acres 3 roods 25 perches) formed two-thirds of the old block. Mereana Maraea received her share and that of Taiha Tamarau, amounting to around four acres. There may have been other, undisclosed purchases behind Maraea's share, which was agreed among the parties at the partition hearing.[1]

1. Berghan, supporting documents to 'Block Research Narratives' (doc A86(q)), pp 5763–5783; Whakatane Native Land Court, minute book 23, 30 September 1929, fols 188–189

(b) ***Precedent consent instead of a meeting of assembled owners – Tahora 2AE1(2):*** Tahora 2AE1(2) was a block of 1,082 acres. It was one of the two last pieces of Tahora 2AE left in Maori ownership. As we saw above, the Crown purchased individual interests in the other block (2AE3(2)) from 1921. In the case of Tahora 2AE1(2), which had 18 owners, there ought to have been a meeting of assembled owners when F Tiffen applied to buy or lease the land in 1911. According to Boston and Oliver, there was such a meeting in late 1911, and it voted to accept a resolution to sell to Tiffen at £1 an acre. They do not supply a reference for this statement.[1226] We have no certain information as to what happened – whether there was no quorum, or whether there was in fact no meeting. We suspect the latter, because the prospective purchaser had applied to the board for 'precedent consent', just a few months before the ability to do so was abolished in 1912.[1227] Under this provision, purchasers could get the prior consent of the board to collect the individual signatures of the owners, instead of holding a meeting.[1228]

From the evidence available to us, the board granted precedent consent, and Tiffen proceeded to get signatures to a memorandum of transfer. Although the owners appear to have signed his deed in 1912 and 1913, there was later much Maori opposition to confirming the sale.[1229] Takao Tamaikoha took a leading role in this opposition, just as he was prominent in the opposition to the sale of Tahora 2AD2.[1230]

1226. Boston and Oliver, 'Tahora' (doc A22), p 213

1227. 'Applications for precedent consent to alienations under section 209 of the Native Land Act, 1909', 1 December 1911, *New Zealand Gazette*, 1911, no 100, p 3675; Parr and Bromfield to Judge Browne, 26 January 1912 (Berghan, supporting documents to 'Block Research Narratives' (doc A86(o)), p 5218). The provision for precedent consent was abolished by section 8 of the Native Land Amendment Act 1912.

1228. Native Land Act 1909, s 209

1229. Boston and Oliver, 'Tahora' (doc A22), pp 213–215, 323; Parr and Blomfield to Judge Browne, 10 July 1913 (Berghan, supporting documents to 'Block Research Narratives' (doc A86(o)), pp 5210–5211; see also pp 5203–5221)

1230. Boston and Oliver, 'Tahora' (doc A22), pp 202, 213–215

10.9.4

The opponents of the sale alleged that they had not understood the deed, and had not wanted to sell the land.[1231] They tried to get the board not to confirm the sale. Tiffen's lawyers made a settlement of £50 to one of the objectors, who had got herself a lawyer, and paid a shilling each to all of the other owners.[1232] The board considered this a suitable compromise, and confirmed the sale in April 1913.[1233] In the lawyers' view, 'the Natives in the particular block, have no idea of the principles of morality, as applied to sales, and are continually endeavouring to blackmail our client'.[1234] As requested by Tiffen, the board 'adhered' to its confirmation after April 1913, despite opposition from Takao Tamaikoha and other owners.[1235]

In terms of its landlessness checks, the board relied on information supplied by Tiffen.[1236] From 1909, the Government entrusted this kind of investigation to the purchaser, not the board, who had to produce a list of other lands held by the sellers. The list was usually compiled from Native Land Court records.[1237] The Hauraki Tribunal was critical of this system, noting that 'the quality of these holdings, the revenue they yielded, the debts they carried, and the needs of the alienors and their families remained unchecked'.[1238]

(c) ***The protective functions of the board for private purchases from 10 or fewer owners:*** In addition to sales under the meetings of owners system, the board had the task of approving purchases where there were ten or fewer owners. Such purchases took place among the smaller subdivisions of the Waimana, Waiohau, Kuhawaea, and Whirinaki blocks. We lack sufficient evidence as to how the board performed its functions in respect of these alienations, and make no further comment on them.

10.9.4 Treaty analysis and findings

The Crown accepted in our inquiry that it had had a duty to protect Maori interests by providing safeguards in dealings with land, by providing means for Maori to retain their land for so long as they wished to do so, and by protecting a sufficiency of land in their possession. In order to carry out this duty, the Crown set up protective mechanisms, including restrictions on alienation, reserves, and processes for vetting the fairness of transactions. As

1231. Parr and Blomfield to Judge Browne, 10 July 1913 (Berghan, supporting documents to 'Block Research Narratives' (doc A86(o)), pp 5210–5211)

1232. Boston and Oliver, 'Tahora' (doc A22), pp 213–215

1233. Parr and Blomfield to Judge Browne, 10 July 1913; minute by the president, 9 April 1913 (Berghan, supporting documents to 'Block Research Narratives' (doc A86(o)), pp 5209, 5211)

1234. Parr and Blomfield to Judge Browne, 10 July 1913 (Boston and Oliver, 'Tahora' (doc A22), p 213)

1235. Boston and Oliver, 'Tahora' (doc A22), pp 213–215, 323

1236. 'Schedule of other lands held by Maori vendors or lessors', 1912; Parr and Blomfield to President, 2 February 1912; 'Tahora 2AE1 Sec 2: Other Lands', 1913 (Berghan, supporting documents to 'Block Research Narratives' (doc A86(o)), pp 5212–5216; 5219–5220)

1237. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 717

1238. Waitangi Tribunal, *Hauraki Report*, vol 2, p 862

the Turanga Tribunal found, a fair and generous approach to these protection mechanisms would have gone a long way to keeping the Crown's Treaty obligations.[1239]

(1) *Restrictions on alienation*

In Te Urewera, restrictions on alienation were not available as a protection mechanism for the Waimana, Waiohau, and Heruiwi 1–3 blocks. Legislation did not provide for them. Restrictions were available by the time Kuhawaea went through the Court, but that hearing was based on partitioning with a view to sale. Waimana was partitioned for the same reason in 1885. For the Waiohau partition in 1886, the non-sellers were not present to have sought restrictions. Thus, restrictions were only really an option for the second round of title investigations in 1889 and 1890. Te Urewera leaders took full advantage of this protection, obtaining restrictions for three-quarters of the land that passed through the Court.

As claimant counsel pointed out, the Crown treated these restrictions as 'having the additional gloss "except to the Crown"'.[1240] Of the 283,242 acres made inalienable by 1894, the Crown purchased 122,087 acres (43%) in the 1890s. Restrictions were lifted from another 100,000 acres by 1901, as a result of Tahora 2 blocks being dealt with by the Validation Court, and Ruatoki by the Urewera Commission (neither of which could put restrictions on the new titles). Although the Crown refrained from purchasing between 1899 and 1905, all restrictions were cancelled unilaterally in 1909, without investigating the circumstances of the owners or obtaining their consent. Lands formerly restricted were then alienated to the Crown and private buyers in the early twentieth century.

We accept that alternative protection mechanisms were provided for Ruatoki (inclusion in the Urewera District Native Reserve) and for parts of Tahora 2 (inclusion in the Carroll-Pere and East Coast trusts). We review the effectiveness of these protections elsewhere.

Our findings are as follows:

- The Crown breached its Treaty duty of active protection when it failed to provide proper restrictions on alienation under the 1873 Act. As a result, Waimana, Waiohau, and Heruiwi 1–3 could not be protected by restrictions. The 1878 amendment came too late for these blocks.
- Under the 1888 legislation, restrictions on alienation provided an opportunity for the Crown to exercise its duty of active protection of tino rangatiratanga. Tribal leaders sought to protect their land in the rim blocks by restricting almost three-quarters of it from alienation as it passed through the Court.
- The Crown did not respect the tino rangatiratanga of the claimants (nor their best interests) when it purchased individual interests in land that communities had specifically reserved from alienation. Worse, it did so in a manner that ignored its own protective mechanism. This was a serious failure in the Crown's duty of active protection. In our

1239. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 456–457
1240. Counsel for Te Whanau a Kai, closing submissions (doc N5), p 31

view, the Crown did not act in good faith when it provided a means for Maori to protect land in their ownership until they were truly willing to alienate it, and then treated that protection as a simple nullity. The Liberal Government's intentions were shown in the Native Land Purchase Act 1892, which empowered the Crown to remove any restrictions on alienation whenever it wanted to purchase land, regardless of whether this would render Maori landless, and regardless of the wishes or consent of the owners. Even if the Crown could be shown to have acted lawfully under this Act in Te Urewera, it would still have been a serious breach of the Treaty.

- Restrictions on alienation were the only legal mechanism for Te Urewera leaders to prevent the bleeding of individual interests to the Crown. The total failure of restrictions in that respect had a serious impact on the ability of the peoples of Te Urewera to retain their land for so long as they wished, as the Treaty had guaranteed that they should do.
- The unilateral cancellation of all restrictions in 1909 was in breach of the Treaty principle of partnership, and the Crown's duty actively to protect the interests of Maori, and in the manner Maori themselves had sought to protect them.

(2) *Reserves*

Restrictions on alienation became part of the Crown's policy to ensure that Maori retained sufficient land for their present and future use. As claimant counsel submitted, the Waitangi Tribunal has found in many of its reports that the Crown was required to ensure retention of sufficient land for hapu. Subsistence was not the standard; rather, if the Treaty was to be carried out fairly for both Maori and settlers, Maori had to retain enough land and resources for customary uses and for development in the new economy.[1241] As we have seen, this policy was carried out in a variety of ways in Te Urewera. The Crown no longer made reserves while it was purchasing, which had been standard practice earlier. When Ngati Manawa sought reserves in Whirinaki in the 1890s, the Government replied: 'if they imagine we are going to pay them in full for the land then give it back to them you [Gill] had better let them understand that that is not the way we do things nowadays'.[1242] The Government's argument was specious, maintaining that Maori could reserve land for themselves by not selling it, while fully aware that communities could not in fact control individual sales or negotiate reserves in the 1890s.

Instead of making reserves from purchases, the Crown wanted land set aside for reserves before it started purchasing. We credit the Crown with good intentions in this respect. From 1873 to 1886, district officers were supposed to identify land vital for immediate use and as future endowments, and then to get the agreement of its Maori owners for the land to be taken to the Court and reserved. Also, from 1882 the Native Reserves Commissioner had a

1241. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 4–8

1242. Sheridan to Gill, November 1895 (Tracy Tulloch, comp, supporting papers to 'Whirinaki', various dates (doc A9(a), p C5)

duty to seek the reservation of land when it passed through the Court. There was, however, no commissioner from 1884, and no district officers from 1886. When most of the land in the rim blocks had its title investigated, reserve-making responsibilities had devolved to the Court. If the people seeking title or partitions did not have an (undefined) minimum of inalienable land, then the Court was supposed to put restrictions on whatever land was before it, regardless of the wishes of the owners. In Te Urewera, tribal leaders took advantage of this (as we have seen) to restrict the bulk of land as it passed through the Court. This had no effect in protecting it from Crown purchasing.

At the turn of the century, new reserve arrangements were made between the Crown and Maori. Land that was still in customary title (plus Ruatoki) was placed in the Urewera District Native Reserve. Southern Tahora 2 was protected in the Carroll-Pere and later the East Coast trusts. We will address these arrangements later in our report.

We make no comment here on whether Maori were rendered landless in the rim blocks, or whether alienations in the rim blocks contributed to landlessness for iwi in our inquiry. We address that question below. Here, we note the failure of the Crown's reserves schemes as far as Te Urewera was concerned:

- First, the district officers and Native Reserves commissioners made no reserves.
- Secondly, except for one 400-acre reserve in Whirinaki, the Crown made no reserves when it was purchasing.
- Thirdly, the Crown set aside restrictions on alienation and purchased land reserved by the Native Land Court as if it had never been reserved.
- Fourthly, all restrictions were cancelled by legislation in 1909.
- Fifthly, the Maori Land Board's checks were focused on the present generation of individual owners, and were based on the narrow category of information supplied by purchasers.

We take it as indicative of the prevailing climate of Government opinion that, from 1913 the boards could confirm alienations that would render individuals landless, so long as they had the potential to make a living some other way.

By these actions, the Crown breached its Treaty duty of active protection. It failed to respect the wishes of the owners, it failed to make meaningful provision for reserves, and it even failed to protect the reserves that were created.

(3) *Vetting private purchases and the 'majority rule'*

According to the Crown, Maori were protected in their ability to make community decisions about their land, because it provided for a 'majority rule' in legislation until 1909. Private purchasers would be deterred from buying up individual interests, because they either had to get the agreement of all owners to a sale, or at least of a majority to partition the land for a sale. This protective mechanism was supposed to be enforced by the Native

Land Court. Trust commissioners and the Court were also to protect Maori more widely in their dealings by checking transactions for fairness and adherence to the law.

In fact, lands of significance to the claimants in our inquiry were purchased in Waimana, Waiohau, and Kuhawaea, without being protected by this supposed 'majority rule'. Purchasers bought up individual interests, usually over a number of years. In the case of Waiohau, Burt had not even acquired a majority of interests. While we accept that there was some agreement from tribal leaders to the Waimana and Kuhawaea sales, it was clear from the evidence that these lands would have remained leased if purchasers could have been truly restrained by law from picking off individual interests.

With regard to the checks carried out by the trust commissioners, we note that in at least two of the three cases, they were restricted to post-partition deeds and arrangements. The transactions underlying the partitions were not subject to their independent scrutiny. As a result, the trust commissioner's inquiry was incapable of uncovering the Waiohau fraud.

We find the Crown in breach of the Treaty for not providing an effective legal deterrent to the purchase of individual interests. While the Waimana, Kuhawaea, and Waiohau lands were not extensive in acreage, they included some of the best farmland in the rim blocks, and were highly valued as ancestral land by their Maori owners. The Crown's theoretical 'majority rule' gave no protection. The Crown breached the plain meaning of the Treaty, by subverting the tino rangatiratanga of tribal communities and their leaders, and allowing individual interests to be picked off outside the rules and constraints of either custom or British law. The fact that it was private buyers at work and not the Crown does not reduce the Crown's Treaty responsibility. In terms of the trust commissioners, we make no finding. With the exception of Waiohau, we are not able to say whether any injustice took place as a result of the manner in which the trust commissioners carried out their duties.

The Crown exempted itself from the trust commissioners' regime in Te Urewera. In the Crown's submission, this cannot be shown to have resulted in substantive injustice. We agree. The claimants demonstrated some failures on the part of the Crown to meet legal requirements in the execution of its deeds, but we lack systematic evidence on the problem or its effects.

(4) *Vetting private purchases: Maori land boards and meetings of assembled owners system*

In our inquiry, the claimants' main concern about the system set up in 1909 was its use of meetings of assembled owners to secure sales, while allowing such meetings to operate on a quorum of only five owners. In this part of our chapter, we have considered how the meetings of owners system worked in practice for private alienations.

It is clear that meetings took place at which minorities voted to sell land, whose decisions were confirmed by the board, despite the emergence soon afterwards of significant opposition. In the case of Tahora 2AD2, it is almost certain that a majority opposed the

sale. For Kuhawaea 2, there also appears to have been majority opposition. In Whirinaki 2(3B2), the owners were evenly split, but the sellers dominated the meeting and so their decision was given effect. Those who registered dissent at meetings had their interests protected by partition. Others lost their interests in their ancestral land. By law, the owners had no rights after the meeting: it was up to the board to decide whether or not to confirm the resolution; the owners could not reverse a confirmation by the board; and even the Native Minister could not lawfully intervene (despite appeals and petitions). In one case, Tahora 2AE1(2), the owners did not even have the chance of making a group decision, because the board granted 'precedent consent' for a local farmer to buy up individual interests. As with the other sales, there was a great deal of opposition that was, in effect, ignored by the board.

We find that the Crown breached its Treaty duty of active protection when it failed to provide a fair and proper system for groups of owners to make collective decisions about their land. The ability of the board to confirm resolutions made by minorities (sometimes tiny minorities) at a single meeting; the removal of the legal rights of all other owners to stop, revisit, or reverse the decision; and the restriction of the minimal protection of partition to dissent registered at the meeting: all were in breach of the Crown's duty actively to protect the interests and authority (tino rangatiratanga) of the Maori owners over their lands. In effect, the board was empowered to conduct a forced sale of the interests of a majority of owners. It was little consolation that the board almost always ensured that a fair price was paid. It is impossible to say whether local Maori representation on the boards would have made this system any fairer, but we find the Crown in breach of the principles of partnership and autonomy for refusing to allow Maori to elect representatives to the body thus empowered to confirm or refuse sales of their land.

10.10 What Were the Impacts on the Peoples of Te Urewera of the Operation of the Native Land Court, and of the Alienation of their 'Rim' Blocks?

Summary answer: *The Crown's land court and its land purchase policies and practices laid siege to the authority of Te Urewera communities over their land, as embodied in and expressed by their rangatira. That authority was undermined by processes which allowed individuals to take steps of great import for community lands, drawing blocks into the court despite the fact that there had been no community decision to do so – or on occasion in defiance of a decision not to do so. Community authority was undermined by the court itself, which was empowered to make decisions about complex rights in the Te Urewera rim lands. Grievances about a number of those decisions have remained till the present. And community authority was undermined by the individualised titles ordered by the court, which opened the way to ready*

purchase from individuals, and to land loss on a large scale. Thus at a crucial time in their history, as they faced the challenges of Pakeha settlement and colonial law, hapu communities were left without legal powers over their land. Rangatira who hoped to protect their communities confronted these systems with varying degrees of success; but none was able to secure the lasting well-being of their community.

The impact of land court processes and land loss on the cultural fabric of Te Urewera was deeply felt by the claimants. They resented the way in which their relationships with their whenua were reduced to providing particular kinds of proofs of occupation, and their whakapapa became the basis for lists of 'owners' of blocks. They resented the language of the court, and the values it seemed to enshrine. And they were profoundly conscious of the impact of land loss on their responsibilities of kaitiakitanga, and on the transmission of cultural knowledge.

In terms of economic prejudice, the Crown acquired land through means that were coercive, unfair, and in breach of the Treaty (secs 10.7–10.8). Private purchases were also in breach of Treaty principles, due to the failure of the Crown's protection mechanisms (sec 10.9). The loss of at least 82 percent of the land in the rim blocks was the prejudicial effect of these Treaty breaches. Ngati Ruapani lost all their lands, while Ngati Manawa, Ngati Hineuru, and Ngati Rangitihi were rendered virtually landless, within the rim blocks. The other tribes lost the majority of their lands.

Maori clearly suffered economic harm as a result. There was a significant contraction of their customary economy, on which their physical and cultural survival depended. This exacerbated the effects of earlier losses: from the Bay of Plenty raupatu, the Crown's acquisition of the four southern blocks, and the Native Land Court's awards of land (to the sole ownership of some at the expense of others) in the rim blocks. Some resource-use continued on forest lands after alienation, but Maori economic capability was nonetheless reduced. Further, Maori lost most of their best quality lands in the rim blocks, and also their best timber. This deprived them of development opportunities in the colonial economy. While such opportunities were more limited in Te Urewera than in some parts of New Zealand, there was still potential for European-style farming and forestry. The loss of these opportunities, as a result of alienations in breach of the Treaty, was a prejudicial effect of those Treaty breaches. Later in the report, we assess what Maori were able to do with the few lands that remained to them in the rim blocks.

10.10.1 Introduction

The operation of the Native Land Court in the rim blocks of Te Urewera, and the loss of land that followed the award of title, had a destructive impact on the peoples of the region. In earlier sections of this chapter, we have established the extent to which the native land legislation, the operations of the court and the Crown's purchase policies and practices breached the principles of the Treaty. Here, we consider the prejudice arising from those breaches we

have identified. We look first at the impact of court, and land alienation processes on the authority (tino rangatiratanga) of communities, and the ability of the rangatira to protect the customary rights of those communities. We consider ways in which they undermined and were perceived to undermine the philosophies, values and beliefs of the peoples of Te Urewera, and their relationships with their land. Finally, we examine the economic impacts that flowed from the loss of land. We ask, in particular, whether any groups were left landless in the wake of land court and purchase processes, and examine the losses of each claimant iwi in our inquiry district by 1930.

Crown counsel submitted that we lack a sufficient 'social and economic portrait' of Maori communities in the period before the introduction of the land court to enable us to assess whether it was 'a major portal of social change'. In particular, there was limited knowledge of Maori engagement with the nineteenth century economy. In the Crown's view, the question of 'what the native land laws "did to" Maori society' ought to be part of a wider inquiry into how the peoples of Te Urewera engaged with 'modernity' – though counsel did not elaborate on this proposition, or suggest how this engagement might be understood.[1243] We accept that such broad studies might provide an interesting context in which to study the operations of the land court, and land alienation; but we are concerned here with the evidence before us. We accept the reality of pervasive change in the latter part of the nineteenth century – including the development of settler towns on the Bay of Plenty coasts and at Gisborne on the east coast, in the wake of war and the Crown taking of land in both regions. But the point, as far as the Tribunal is concerned, is the kind of tools the Crown provided to Maori to assist their engagement with the new economy. We have found those tools to be wanting. Despite the Crown's understanding of Maori polities and the collective authority of communities, and despite widespread agitation for a better system of title determination, the Crown refused to replace the land court nationally – though it did finally agree to try an alternative system in Te Urewera itself in the mid 1890s. Nor did it withdraw its purchase officials in the border lands before 1900 (and then only briefly).

10.10.2 Social and cultural impacts

How did the Crown's failure to provide for Maori to determine their own title allocation, and for a legal community title, impact on the authority of Te Urewera communities over their land? Mana, as we have explained in chapter 2, was central to the philosophies, the knowledge systems, and the values of the peoples of Te Urewera. We refer readers to that discussion, based on the tribal evidence before us. We discussed the relationship between the hapu community and their rangatira in Te Urewera society: the wide-ranging responsibilities of the rangatira to protect the mana of the hapu, protect its knowledge, protect its

1243. Crown counsel, closing submissions (doc N20), topic 8–12, p 3

10.10.2

Ka noho nga mahi a te Kooti Whenua Maori me te whakataunga o nga ture hei whakamana i te tangohanga o nga whenua hei tauira marama tonu o te tikai o te Karauna ki te iwi Maori.[1]

The operation of the Native Land Court and the imposition of legislation to justify the taking of lands provide one of the most cogent examples of the lack of respect that the Crown had for our peoples.[2]

1. Tamati Kruger, brief of evidence, 18 October 2004 (doc H31(a)), p 4
2. Tamati Kruger, brief of evidence (English), 18 October 2004 (doc H31), p 4

lands and resources, and protect the well-being and future of the hapu. That relationship, we were told, was at the heart of the exercise of authority. Rangatira were mandated to make decisions on behalf of the hapu so as best to protect its interests; but it was expected that they would act with the advice and support of the people.

We explained that in Te Urewera society, as in any society, norms and rules provided a degree of certainty for everyone as to the nature of their rights, how others would recognise them, and what constituted infringement. The origins of rights lay in ancestral relationships with the land, in discovery, sometimes in conquest (often combined with ancestral rights), and always with long-established occupation. Where mana whenua (in broad terms, the exercise of authority over land) was most firmly established, it seems to have been focussed in a particular hapu or community. In parts of the border lands where settlement may have been less important than guaranteed access to resources, rangatira of Te Urewera communities (who might well also be affiliated to hapu of neighbouring iwi) negotiated rights with leaders of those hapu. Tuhoe, Ngati Ruapani and Ngati Kahungunu leaders similarly negotiated their rights with one another on the ground in the lands south east of Lake Waikaremoana, as we saw in chapter 7.

But as settlers and Crown negotiators arrived in the rim lands, and as all the rim blocks in succession went through land court hearings from the 1870s on, and were subject to court title orders, the authority of communities over tribal lands and over the exercise of customary rights, began to diminish. This was the inevitable outcome of the failure of the Crown to provide for hapu communities to exercise legal powers over their lands. Their authority was neither endorsed nor protected. The Crown has suggested that the 'strong social controls exercised by a community were not destroyed' by the operations of the land court; the court, after all, was only one forum where leadership might be exercised.[1244] We do not discount the attempts of rangatira to control aspects of court processes, or the judges' consultation with them on particular matters such as lists of names to be entered on the

1244. Crown counsel, closing submissions (doc N20), topics 8–12, pp 17, 19

titles. But we have seen how applications for court hearings could bypass rangatira; and we have seen also that ultimately it was the court – not rangatira – that made the crucial decisions about the recognition of rights, and the size of awards to each claimant group. Above all, the community and their rangatira were disempowered in respect of controlling alienation, and of managing their lands at a time when Pakeha settlement and economic change presented great challenges. As the Turanga Tribunal pointed out, the 1873 Native Land Act took the community 'out of the equation altogether . . . There was no requirement for community meetings let alone community consensus.'[1245] In all these respects, the authority of Te Urewera communities over their lands was under siege.

(1) *What kinds of prejudice resulted?*

First, Court processes were prejudicial to communities in that they empowered individuals to take decisions of enormous import for tribal land without the support of the community. The law allowed unrepresentative individuals to bring the Waimana and Tahora 2 blocks into the court. The 'secret survey' of the Tahora block drew a wide range of hapu and iwi from the eastern regions of Te Urewera into court to protect their customary rights, despite their overwhelming opposition to a court hearing. Leaders of Ngati Kahungunu, Tuhoe, Upokorehe and Ngati Patu unsuccessfully opposed the hearing. Rakuraku Rehua told the judge that: 'We . . . are at a loss to understand how in reference to application of two or three persons as against the voice of a large body of people, the Court can't take into consideration the application of the people.'[1246] The authority of all the communities with rights in the lands encompassed by Tahora 2 block had been set at nought by the court. The Kuhawaea and Tuararangaia blocks were also brought before the court by younger chiefs who did not have the support of groups on whose behalf they made applications. As we have seen, the Tuararangaia owners, ironically, all paid the price for the unauthorised survey and the active opposition of a few individuals to it when the court later decided to charge the owners for obstruction. This was an outcome that community decision-making about survey and a court application – had it been provided for – would have avoided. The case of Tahora was more prejudicial, since the survey of such a large block and the consequent court hearing resulted in huge survey costs and the arrival of Crown purchasers to take advantage of the position. And Tamaikoha, one of those pulled in at Tahora, had even had to resort to the court to protect land at Waimana (to which his people had indisputable title), because other claimants (who were found not to be owners) made an application.

Secondly, the authority of communities came under pressure because of the difficulty, in the adversarial court system, of protecting their customary rights and interests.

We have endorsed the finding of previous Tribunals, that the court was an inappropriate forum for the determination of customary title. In the rim blocks, where rights were

1245. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 444
1246. Opotiki minute book 4, 6 February 1889, fol 247 (cited in Boston and Oliver, Tahora (doc A22), p 47)

generally shared and overlapping, the court –constituted as it was – faced considerable challenges. That this was no small matter is very evident in the lasting bitterness some decisions of the court left in their wake. We have stated earlier that we are not making findings on mana whenua; nor are we able to revisit court judgments. But in our hearings well over 100 years later, it was very evident that grievances about many of those decisions had not been forgotten. Claimants in our inquiry clearly felt that they had suffered lasting prejudice as a result. The failure of the court to recognise and provide for rights about which evidence had been presented, or to provide appropriately in its awards for different kinds of rights or, in some cases, its failure to recognise well-established rights where no evidence was given but inquiry by the court would have uncovered them – has not been forgotten.

We turn now to discuss some of these grievances. We look at blocks such as Matahina, which was claimed by and largely awarded to Ngati Awa, who are not claimants before us but who also had grievances associated with this block (settled by the Ngati Awa Claims Settlement Act 2005). We are mindful of the difficulty we face because our concern here is solely with the grievances of claimants in our inquiry. We confine ourselves to those grievances, and do not intend to cause prejudice or offence to other groups.

The court's award of the Matahina block aroused strong feelings among two groups of claimants before us. Tuhoe speakers told us about the Patuheuheu claim to the area south of Waikowhewhe. They were awarded no part of the block in the 1881 title investigation, and only 2000 acres in the 1884 rehearing. Alec Ranui of Ngati Haka Patuheuheu spoke to us of the importance of the lands of Matahina to Tuhoe, whose authority, he said, had been 'paramount' there; he named pa, cultivations, a waahi tapu where the bones of their ancestors lay: 'we lived on these lands, we gathered food here, we fought here, we also died here.'[1247] But until the arrival of the land court, they had never been evicted from the land. Te Kooti's matakite (prediction), however, was that Matahina would be taken, and he had composed a waiata for the land.

Tamaroa Nikora, who gave a detailed analysis of the evidence presented to the land court, concluded that the decision of the court was contrary to the weight of evidence it received. He pointed to the failure of the court to give weight to 'detailed [Patuheuheu] evidence' of 'pa, kainga and cultivations south of Waikowhewhe', where Ngati Awa gave none; to the court's acceptance of an 'exaggerated' claim by Ngati Awa to conquest of all the Matahina land; to the court's having 'constructed a notion of Patuheuheu having been 'incorporated' into Ngati Awa when there was no such evidence'; and to the court's failure to recognise the significance of the tatau pounamu at Ohui, which he stated effected a boundary between Tuhoe and Ngati Awa. He argued that the court also failed – when it did finally recognise Patuheuheu customary interests – to do so in accordance with the extent of those interests. He pointed to a hui held after the first hearing at which Ngati Awa and Patuheuheu

1247. Alec Mahanga Ranui, brief of evidence, 14 March 2004 (doc c14(a)), p 14

Te Kooti's Waiata for Matahina

Haere ra Matahina, e huna i a koe,
Haere ra Matahina, te ora o te tangata
Haere ra Matahina, te pono o te tangata ki nga tira haere
Kauaka te mahara e rangirangia mai he mate
Ka ronaki ki te nui raorao
Kai Te Kapu o Te Ringa na na i whatoro
To te tangata hemonga, he moni – eei!

Farewell Matahina, for you are lost
Farewell Matahina, the well being of human kind
Farewell Matahina, bountiful to travelling parties.
Do not remember it; its burning-off is completed.
It slopes steadily down to the level vastness
It was Te Kapu o Te Ringa (the cup of the hand) that stretched out
Man's demise is money.

Alec Mahanga Ranui, brief of evidence, 14 March 2004 (doc C14(a)), pp 16–17

resolved the question of the Waikowhewhe boundary, after which Patuheuheu sought, unsuccessfully, to withdraw their claim for a rehearing. The rehearing thus cost Patuheuheu the benefits of their agreement with Ngati Awa rangatira. Finally, in Mr Nikora's view, the court's rulings were internally inconsistent: it denied Tuhoe claims in the Whirinaki and Heruiwi hearings on the basis that the tribe had relinquished an earlier interest in favour of another tribe, but did not apply the same principles in Matahina; had it done so, Ngati Awa would not have been found entitled 'to assume the rights of Ngati Hamua, Warahoe and Patuheuheu.'[1248]

Searching for reasons as to 'why the Native Land Court got the decision so wrong', as he put it, Mr Nikora suggested that the absence of senior Tuhoe chiefs from the court might have meant that the case was not as strongly argued as it could have been; that Judge Mair who sat on the rehearing might have favoured Ngati Awa at the expense of Tuhoe, whom he had fought against; and that the judges were 'hopelessly incompetent to deal with evidence of customary interests.'[1249] His strong criticisms of the court reflect the anger of Tuhoe at decisions which they consider cost them 20–30,000 acres south of Waikowhewhe stream,

1248. Tamaroa Raymond Nikora, brief of evidence, 18 March 2004 (doc C31), pp 8–9
1249. Ibid, p 10

and which they have never accepted.[1250] (They still maintained before us that Ngati Awa have not been able to 'answer the simple question of what is the evidence of customary associations of Ngati Awa with any areas south of Waikowhewhe'.)[1251]

Mr Ranui underlined the frustration of Ngati Haka Patuheuheu at the 'morsels' of the block the court left them with: 'Ka nui te takariri o matau tipuna ki te kooti whenua mo tenei tahae whenua na te mea ko matau te mana whenua te mana tangata i runga i a Matahina. (Our ancestors were clearly agitated with the Native Land Court for this theft of land because we asserted mana over Matahina.)'[1252]

For Ngati Rangitihi, the court's decisions about Matahina have also been a source of lasting distress. They claimed that in 1881 they were 'stripped' by the court of their customary interests in Matahina, based on conquest and occupation, and maintained by seasonal use and occupation.[1253] David Potter stated that 'all of the relevant customary evidence' was before the court in 1881, but the court failed to take it into account.[1254] The court was simply inadequate. He gave evidence that Ngati Rangitihi had sent a petition to the Native Minister, two weeks after the Court's decision in 1881, asking him to transfer decision-making about 'Pokohu' (as the land was known to them) from the Native Land Court to them.[1255] They told him that they would never move off the land, and made a strong statement of rights passed down from their ancestors and the exercise of their authority there. They asked the Minister to 'look carefully into':

- The pa sites of our ancestors
- The hopes, thoughts and aspirations of our ancestors
- The food gathering places on the land in which our ancestors lived and down to our present occupation.
- The burial sites of our ancestors down to our times
- The traditional living places on the land in which our ancestors lived and down to our present occupation.
- Our houses that stand on that land
- Our horses that have fallen upon that land
- Our present cultivations on that land.
- Our forests growing upon that land

1250. Ibid, p 13
1251. Counsel for Wai 36 Tuhoe, submissions by way of reply, 9 July 2005 (doc N31), p 62
1252. Alec Mahanga Ranui, brief of evidence (doc C14(a)), pp 6, 17
1253. Counsel for Ngati Rangitihi, closing submissions (doc N17), pp 10–12
1254. David Potter, brief of evidence, 26 March 2004 (doc C41), p 41
1255. Counsel for Ngati Rangitihi referred to Mrs P. Rondon's evidence that she had always known the Matahina block as Pokohu lands. Counsel cited Philip Cleaver's research report to the effect that the Matahina block was known as Pokohu block in the 1870s; the name then appeared to have been changed to Matahina in 1881 at the time of the first title investigation. The name Pokohu was then given to the block immediately to the west of Matahina block. Counsel for Ngati Rangitihi, closing submissions (doc N17) pp 5–6

▶ Prohibitions on seasonal food cultivations and other resources of our ancestors.

These are our concerns brought before the court that weigh heavily on our minds.[1256]

This poignant statement expresses the relationship of Ngati Rangitihi with their land over generations, their fear that it might be lost to them, and their anxieties about court processes. As we have seen, Ngati Rangitihi were awarded 1000 acres at the rehearing in 1884. But the claimants endorsed the conclusion of Philip Cleaver that these awards were so small as to actually constitute a decision against them, despite the change of the Court's award in principle.[1257] (As far as we are aware, the claimants did not try to petition Parliament about the outcome.)

The court's decisions about Matahina, as speakers from both Ngati Haka Patuheuheu and Ngati Rangitihi told us, have remained a serious grievance for them, passed down from generation to generation.[1258]

For Ngati Whare, as we discussed in section 10.5, a particular grievance was the failure of the court to make sufficient inquiry into the extent of customary rights in blocks before it – since in large measure they boycotted the court, refusing to lodge applications or defend their claims against others.[1259] The result, they said, was inadequate recognition of Ngati Whare rights in lands designated by a number of block names: Kaingaroa 1, Heruiwi, Kuhawaea, Whirinaki, Heruiwi 4, Pukahunui, and Pohokorua.[1260] Only some Ngati Whare individuals were included in blocks awarded to Ngati Manawa, we were told, and the awards thus fail to convey any sense of recognition of Ngati Whare rights. 'Rather, the inclusion appears to have been made mainly through individuals with significant Ngati Manawa connections, or as people of mana who may have been placed on blocks in an acknowledgement of the interests of their iwi.'[1261]

Anaru Te Amo spoke of Ngati Whare's opposition to the operation of the land court, consistent with their support of Te Whitu Tekau, and to any attempt to bring their custom-

1256. Petition to Native Minister, 28 October 1881 (David Potter, brief of evidence (doc C41), p 53; see also pp 39–40)

1257. Counsel for Ngati Rangitihi, closing submissions (doc N17), pp 14–15

1258. See, for example, Robert Pouwhare, brief of evidence, 14 March 2004 (doc C15); Potter, brief of evidence (doc C41); Nikora, brief of evidence (doc C31)

1259. In closing submissions, Ngati Whare modified their earlier position that they had not engaged with the court at all, based on evidence which had come to light since their pleadings. In light of that evidence, they considered that the inclusion of names in the Whirinaki block classed as 'Ngati Wharekoiwi' strongly suggested 'some kind of Ngati Whare presence' at that hearing – though no specific evidence was given as to their rights. Counsel for Ngati Whare, closing submissions (doc N16), sch 1, p 141

1260. Not all those blocks, of course, fall within our inquiry district, but Ngati Whare drew our attention to the fact that their grievances were not confined to our district.

1261. In two instances only – the inclusion in Whirinaki of a list from the hapu Ngati Wharekohiwi, and that of a group of Ngati Te Au in Kuhawaea – is there perhaps evidence of recognition of hapu of Ngati Whare; and in the latter case, Ngati Te Au were not distinguished in any way within the lists of owners: counsel for Ngati Whare, closing submissions (doc N16), p 51; see also sch 1, p 141.

ary land under the new system. 'As a result, land in which Ngati Whare had interests was brought before the Native Land Court by other iwi, and to the large part our customary interests in these lands were removed from Ngati Whare.'[1262] Ngati Whare argued – and we accept their argument – that they were prejudiced by the Crown's failure to provide a mechanism that enabled the land court to decline to award title to blocks if the majority of customary holders in those lands preferred simply to retain their lands in customary title.[1263] They should not have been forced to choose between conversion of their customary rights into a Crown-derived title – at least the kind of title on offer – and total lack of protection in the new title system for their customary rights. As it was, they lost not only their rights, but the opportunity of having their korero about those rights set down in the court's records. Had the Crown's title system operated as they suggested, that in itself would have meant protection of their rights. As it was, they took what they perceived as the only alternative to a Crown-derived title, and land loss – staying away. Because of that, their tribal community was rendered invisible in the court records. In the new title system, where recognition of customary rights by the court mattered, theirs remained unrecognised. To the extent that other kin groups were unrepresented in particular court hearings, they too were prejudiced.

For all hapu, the Court's inability to offer community title compromised its recognition of their rights (see sec 10.6). Seasonal rights to pass through or harvest became lost in the new title or were recognised in court awards on the same footing as rights of the established communities. Judge Gudgeon's explanation of one of his decisions epitomised the shortcomings of Court titles. In Heruiwi 4, he placed an urupa in which both Ngati Manawa and Ngati Hineuru had buried their dead in the Ngati Hineuru block (4A) – on the grounds that more Hineuru than Manawa people were buried there. Ngati Manawa's repeated applications for a rehearing in 1891 had no effect.[1264]

Court decisions (once any rehearing had taken place) froze rights at a point in time. Where rights were rejected, the impact was permanent. Whereas customary rights might always be renegotiated as relationships among hapu strengthened or waned, or circumstances changed, the new titles allowed for no such flexibility. Where the court found against those who claimed rights, it also, as the claimants saw it, disinherited the generations that followed. That perhaps accounts in no small part for the lasting anger about some court decisions.

Thirdly, communities struggled to retain authority over land that had passed through the court. When land emerged, newly titled, from the court, exposure to alienation and partition followed. In particular, the lack of a legal community title, and the listing of individuals on titles, each empowered to sell the share newly bestowed upon them, greatly eased the

1262. Anaru Te Amo, brief of evidence, September 2004 (doc G34), p 11
1263. Counsel for Ngati Whare, closing submissions (doc N16), p 45
1264. Tulloch, Heruiwi 1–4 (doc A1), pp 63, 65–66. Judge Gudgeon provided this explanation in a report to the Chief Judge on an application for a rehearing,

process of alienation, undermining the attempts of rangatira to preserve the land of their hapu. At a crucial time when the money economy reached Te Urewera, the safety net of the community (as the Turanga Tribunal put it) was removed.[1265] Purchasers offered cash at a time when they were one of the few sources of cash, and there was every inducement for people to sell. As storekeepers extended their business into the rim areas of Te Urewera, it was easy for people to fall into debt simply to pay for everyday items that quickly came to be seen as necessities: clothing, tea, sugar, flour, tobacco. As we have seen, court costs and the cost of travel to court venues would also have played their part. Poverty would be exacerbated, as we have seen, by widespread crop failure in the 1890s and early 1900s. Above all, empowering individuals to sell their shares meant the shrinking of the key asset that hapu might profitably have developed in the new economy –and thus reduced their chances of success.

It is clear that this was not what Te Urewera peoples had sought. Leaders throughout the region – not just those of Te Whitu Tekau – preferred leases to sale. They wanted to retain their land. Had the Crown supported rather than undermined the leasing economy, hapu might have enjoyed the kind of relationship that the Waimana people initially had with Swindley, and retained the option of later regaining possession of the land and farming it themselves. But Te Urewera leaders could not hold determined Crown or private purchasers at bay. This was compounded by the fact that restrictions on alienation were utterly ineffective in Te Urewera; they were either ignored by the Crown or removed. Nor could rangatira negotiate prices for land that the community might have decided to sell to raise finance. In the context of Crown monopoly buying this was an added barrier to securing a fair price, and thus of maximising the value of their land to ensure that it brought a good return. In blocks like Waimana 1A, Tahora 2, and Waipaoa, the returns Tuhoe, Ngati Kahungunu, Ngati Ruapani, and Ngati Hineuru owners received were modest, ranging from less than £10 each to £40 to £50 each. Such payments, as the Tribunal has noted, were often spread over a number of years (as different owners made the decision to sell), and did not form the basis of a community putea; there were no legally empowered community managers. Prices improved after 1905, as we have seen, but they were still paid to individuals. Under the meetings of assembled owners system introduced in 1909 the community, far from being re-empowered (as Carroll, the Native Minister, seemed to have hoped), remained sidelined. The alienation of smaller partitioned blocks was decided by a handful of those who had been declared owners. And the Crown was prepared to bypass decisions by such meetings to secure a transaction at its own price.

Sale often looked the most attractive proposition anyway since, as the claimants pointed out, Maori found it so difficult to borrow because the titles that had been visited on them offered no security. The Central North Island Tribunal has pointed to the 'significant

1265. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 529

barriers' Maori were facing by the 1890s, and until the 1920s, 'to accumulating or borrowing finance to develop their lands in order to enter the modern farm industry'.[1266] Yet without access to reasonable credit like other landowners of 'limited means', they had little prospect of success.

Despite all this, some rangatira made sustained efforts to protect their communities – during and after the court process. We think of Hapimana Tunupaura of Ngati Kahungunu, who fought unsuccessfully to reduce the amount of land the Waipaoa owners had to pay for survey costs. Nor, as we have seen, did he succeed in securing from the Crown the return of land that his people had wanted as a reserve for a kainga, and for their urupa there – land lost to them after the court unexpectedly awarded part of it to the Crown for survey costs. He could not protect Ngati Ruapani, who had aligned their case with his, from loss of a third of Lake Waikareiti, which was included in the Crown's award for survey costs. Though the parties agreed with the creation of a block at Waikareiti, they did not agree to its size, nor to the boundary line which was drawn contrary to their wishes. This would prove to be the precursor to the loss of the whole lake. Tunupaura did succeed, at the original hearing of the block in 1889, in securing hapu divisions when title orders were made. But the Crown contemplated extensive purchase in the block, and the Surveyor-General advised against survey of the divisions. When the Crown finished buying individual interests, all those who had not sold had their interests regrouped, in 1903, in a block called Waipaoa 5. This 'lumped together' Ngati Ruapani and Ngati Kahungunu, Richard Niania told us; and the placement of the blocks 'had little regard of traditional customary interests with every non-seller's interests placed in the same block regardless of their hapuu affiliations.'[1267] As Marr put it, this 'finally overturned the efforts made by the chiefs at the time of the original hearing to recognise and allocate lands based on traditional hapu interests and authority in the block.'[1268] Neither the Crown nor the court, in our view, showed the least regard for the customary rights of the owners, or their attempt to preserve those rights through the title processes provided.

We think also of Harehare Atarea, the Ngati Manawa leader, who sought to strategically engage in the court, in order to protect his people's customary rights, and to sell selected portions of their estate in order to raise capital for development. For a time, this worked. The case of Ngati Manawa is both poignant and telling. They did indeed raise substantial sums through their extensive sales (both inside and outside our inquiry district), but they did not achieve lasting prosperity at all. Partly this was because their economic base had been devastated by the wars, partly because – as they re-established their mana – they gave a great deal of the proceeds of sales away; or simply spent it when eager storekeepers turned

1266. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 955
1267. Niania, brief of evidence (doc 138), p 39
1268. Marr, 'Crown impacts on customary interests in land in the Waikaremoana region' (doc A52), p 270

up on their doorstep.[1269] They did however also become successful crop and sheep farmers for a period in the 1880s. But in the end Atarea was defeated first by the Tarawera eruption (which covered their grazing and cultivated land with several inches of ash and mud and killed hundreds of their animals); then by flooding, frosts and crop failure.[1270] As the people were reduced to poverty, Atarea was unable to control alienation. His offer of 6,000 acres of Heruiwi 4B and 4F, some of Ngati Manawa's best land, resulted in the Crown's move to buy from individuals, so that it secured 16,000 acres. Kuhawaea 1 was sold, despite his own objections, and those of the majority of Ngati Manawa.

Finally, we think of the Tuhoe leader Tamaikoha who, after his initial sale to Captain Swindley, determinedly protected Waimana. Tamaikoha was already anxious about Waimana, we must conclude, given that the Kennedy brothers of Te Upokorehe had taken rent money from Swindley and then applied for a court hearing in 1878. In his attempts to control the fate of the land when it was before the court, Tamaikoha gave in only twelve names for the title. Sissons suggested that he probably saw the twelve as trustees, and this is certainly borne out by the inclusion on the list of key rangatira: Te Ahikaiata, Tutakangahau, Paerau, Kereru Te Pukenui, Te Whiu, Netana Rangiihu and Hemi Kakitu. And, as Tuhoe kaumatua Te Wharau Tapuae later explained: 'It was arranged at the first hearing that only a few of the chiefs were to be admitted so [as] to hold the land. The lesser people were all kept out lest they should sell.'[1271]

Tuhoe tribal leaders thus dominated the list; and Binney points out that they were the leaders who had collectively agreed to lease Waimana to Swindley, but not to sell.[1272] Tamaikoha thus used the list of owners to protect the land, and retain the mana of Tuhoe over it.

But Tamaikoha himself sought a rehearing because he wished to widen the lists of owners; Binney says that he acted on his authority as rangatira, and recognising his obligations in this new situation 'sought to include individuals and hapu closely connected by residence and kinship with Tuhoe, and specifically those of Ngati Raka who had been excluded.'[1273] In particular Rakuraku had been omitted from the list, following 'very bitter disputes' with Tamaikoha as to the right to lease Waimana.[1274] In the wake of the 1880 rehearing, the new list had 66 names (Tuhoe, Ngai Turanga, Ngati Raka, and Te Upokorehe) – and Rakuraku headed the list of 10 Urewera/Ngai Turanga names. Tuhoe rangatira remained on the

1269. McBurney, 'Ngati Manawa and the Crown, 1840–1927' (doc C12), pp 126–128, 243, 248–250, 260, 319
1270. McBurney, 'Ngati Manawa and the Crown, 1840–1927' (doc C12), pp 129, 318, 355–356, 374–376; Armstrong, 'Ike Whenua and the Crown, 1865–1890' (doc A46), p 91
1271. Whakatane minute book 8, p 185, in Sissons, supporting papers for 'Waimana Kaaku' (doc A24(a)), p 99; *New Zealand Gazette*, supplement, 23 November 1878, p 1650 cited in Sissons, 'Waimana Kaaku' (doc A24) p 45
1272. Binney, 'Encircled Lands', vol 1 (doc A12), p 347
1273. Binney, 'Encircled Lands', vol 1 (doc A12), pp 347–348
1274. Binney, 'Encircled Lands', vol 1 (doc A12), p 347

list of 41 Tuhoe; indeed their ranks were strengthened by the addition of Te Purewa, Te Whenuanui, and Numia Kereru.[1275]

He included them because they had assisted him in defending Waimana, to 'uphold the mana of Tuhoe': 'Tuhoe was my ancestor on this land . . . (though some chiefs did not have rights by occupation), they helped me uphold the mana of my Ancestors Rongokarae and Tuhoe.'[1276] This was, Sissons and Binney agree, Tamaikoha's statement of Tuhoe rangatiratanga, 'an expression of the mana of the ancestors in which all participated'.[1277]

And he maintained his determination to protect ancestral rights later, when the matter of shares arose – as it inevitably must have – in the course of subdivision of Waimana 1C in 1905. By then there were questions of the rights of those who did not occupy the land. Tamaikoha secured an agreement with Numia Kereru that all owners should have equal shares. His authority was challenged by some within his own party, however, who took the question to the land court, arguing that those who lived permanently in the valley should have more shares than those who did not. Tamaikoha's view, he told the court, was still that ancestral rights were equally important: 'I have not changed my mind. I still have kind thoughts for all the grantees.'[1278] But the judge overruled him.[1279]

Yet Tamaikoha had kept the remaining Waimana lands out of the court till 1905. In the end he had to accept partition, which he had hoped to avoid; and the result of that process, by 1930, was fragmentation such that few owners could derive any significant economic benefit from their sections. (We will consider this process in a later chapter.)

Even a rangatira of great mana, in other words, was unable to prevent such processes from rolling to their almost inexorable conclusion in his own back yard. He held it off, but he could not stop it. Professor Binney concluded her study by reviewing the life of Tamaikoha. Although he attempted to control the engagement with the colonial economy and, after the initial sales, successfully blocked sales over a prolonged period, the operations of the native land legislation had cumulative effects. 'In touching on the life of just one senior chiefly leader', Binney wrote, 'I also note the systematic erosion of his continued capacity to act effectively as community leader. That, too, is part of this history of loss.'[1280]

(2) *Conclusion*

In the latter part of the nineteenth century, the land court and the Crown's alienation processes undermined the authority of Te Urewera rangatira over the land of their communities in a range of ways.

1275. Opotiki Native Land Court, minute book 1, 19 March 1880, fol 4 (Sissons, 'Waimana Kaaku' (doc A24), pp 48–49)
1276. Whakatane minute book 8, fol 201 (Binney, 'Encircled Lands', vol 2 (doc A15), p 315)
1277. Binney, 'Encircled Lands', vol 2 (doc A15), p 322; Sissons, 'Waimana Kaaku' (doc A24), p 50
1278. Binney, 'Encircled Lands', vol 2 (doc A15), p 315
1279. Sissons, 'Waimana Kaaku' (doc A24), p 73
1280. Binney, 'Encircled Lands', vol 1 (doc A12), p 477

We find ourselves unable to agree with the Crown that tribal social controls survived the operation of the Native land legislation and the activities of Crown purchase agents. The Crown implies that the fact that rangatira might not have been able to exercise their authority in respect of tribal land would not detract from its exercise in other spheres. We think this is to miss the point of much of what the claimants said in our hearings. It is also to miss the point of the determined efforts of Te Whitu Tekau to keep the Native Land Court and land alienation at bay – precisely because they saw this as the key to protecting mana motuhake. And it was why Te Urewera rangatira were prepared to negotiate with Seddon in the mid 1890s. It may be true that the rangatira with whom Seddon met, and who negotiated the Urewera District Native Reserve, hardly looked like leaders whose rangatiratanga was irrevocably undermined. But they were negotiating precisely because they feared the continuation of land court processes in Te Urewera, and of land alienation. They knew that they had to seize the moment, and they were under no illusions at that time that the future of their communities was assured.

We remind the Crown of the words of Colin Te Pou: 'To those who wanted to sell their shares in land, the iwi and the hapu no longer had mana to say yes or no over the lands.'[1281] 'The Maori land court' he said, 'took the authority over land away from the Maori people within Tuhoe.'[1282] Robert Pouwhare, talked of the impact of the land court on the tribal authority of Ngati Haka Patuheuheu ('nga mana whakahaere o nga rangatira o Ngati Haka-Patuheuheu')[1283] or the ability of the rangatira to lead their people. Referring to the loss of Ngati Haka Patuheuheu lands, he said: 'It undermined our tribal authority and tino rangatiratanga.'[1284] And Tama Takao stated that the whanaungatanga (relationships) of the Waimana rangatira were sourced from the same land. He illustrated this point with the following pepeha:

Kotahi te whakaaro	*Thought was as one*
Kotahi te whenua	*The land was as one*
Kotahi te tangata	*There was one person*
Kotahi te mana	*There was one authority*[1285]

He explained that 'no matter how many people there are we are still one.' All of the people 'share in the mana'. The land court, and land laws under which it operated, 'never understood or was able to follow the spirit of what was said.' It never understood the collective imperative that underpinned this society, and instead worked to undermine the ethos of

1281. Colin Te Pou, simultaneous translation of oral evidence, Waiohau hearing, 25 March 2004
1282. Colin Bruce Te Pou, brief of evidence (doc C32(a)), p 9
1283. Robert Pouwhare, brief of evidence (doc B10), pp 7–8
1284. Ibid, p 15
1285. Tama Takao, brief of evidence (doc C33(a)), pp 4, 8

'one person, one authority, and one land'. 'The main rationale was to lacerate and divide the land'.[1286]

(3) *What were the impacts on the cultural knowledge and worldviews of the peoples of Te Urewera?*

The Native Land Court, it was impressed upon us at the marae we visited, was an alien institution. The evidence we heard over many months conveyed deeply-held beliefs and an overwhelming sense that the land court was an intrusion into Te Urewera society. The Crown argued that the court may not have been a 'major portal' of social change; but was merely an aspect of the modernising society and economy that the colonists brought with them. But we are not prepared to discount the evidence of so many kaumatua and kuia which expressed a deep sense of loss in the wake of the arrival of the land court. In part this stems from a sense of alienation arising from processes which ultimately people felt they could not control. The court, of all government institutions – even if it did not sit in Te Urewera – was an ever–present reality in people's lives. It is clear that the old people saw it as central to change, because its processes seemed not to be in tune with their own tikanga – and because it was seen as fronting the Kawanatanga agenda to acquire the land.

We must not fall into the trap of thinking that because people came into the court, because they gave their whakapapa, because their leaders did their best to make its processes work for them, either taking the initiative or responding in self-defence, that people felt comfortable with what was happening in court. These were pragmatic responses which took place on one level. But kaumatua who spoke to us were talking about change, and about impacts on the cultural fabric of Te Urewera at a much deeper level.

They talked of their relationships with Papatuanuku. 'The land is my source of life', Mr Kereopa told us. 'I am threaded and woven through my ancestress Papatuanuku.'[1287] According to Mr Kereopa, the Crown's regime for dealing with land failed to take account of the significance of the ancestral origins of land.

> My question to you: what is the land? Is it what you see outside? What you see there is Papatuanuku. It is within Papatuanuku where the whenua is . . . Therefore, your Maori Land Court, yes it is correct – it is a Maori Land Court – but there is confusion in that Court as to where the whenua, the Maori land, actually is.[1288]

The law allowed the court to blunder into the realms of Te Urewera philosophies with limited cultural understanding. The korero of kaumatua who stood to speak during our hearings conveyed their relationships with the realm of the atua: the roots and significance of custom, law and knowledge were sourced in that realm.

1286. Ibid, p 8
1287. Hohepa Kereopa, brief of evidence (doc C18), para 25
1288. Hohepa Kereopa, simultaneous translation of oral evidence, 26 November 2003, Waimana

They conveyed also the layers of whakapapa through generations, and the histories of their tipuna recorded in the land in many placenames. Whakapapa, as we discussed in chapter 2, records relationships, descent from chiefly ancestors and linkages across hapu and whanau, and tribal alliances. That knowledge is carefully preserved, to maintain a record of connections, and a basis for upholding rights of land trusteeship. The peoples of Te Urewera transmitted knowledge of their histories through whakapapa, placenames, wahi tapu and tipuna whare. Waiata tawhito, Te Hue Rangi told us, are 'statements expressing links to the land and the mana of a person over the land.'[1289]

But in the court, people's relationships with their whenua were reduced to providing particular sorts of proofs of occupation, in accordance with new rules. Te Urewera kaumatua spoke to us about whakapapa being called on in an artificial forum, for purposes which ultimately served to separate people from the land, rather than reinforcing their relationship with it. Whakapapa became the basis for lists of 'owners', unheard of before because those whose relationships entitled them to exercise rights of various sorts (and thus also to meet their responsibilities to the community) were known within the community. Colin Te Pou drew attention to the superseding of community authority over allocation of rights to the land and its resources, and the transmuting of customary rights exercised in accordance with tikanga, into shares held by those named on the lists of owners: 'If the Maori land court is analysed it didn't follow Maori customary law, it instead followed the government list of names that stated who had ownership of the land . . . Because of these laws Maori customs were lost from the land.'[1290] In customary terms, there could be no finite 'list'. In successive generations, rights held in some branches of the whanau might wane, while others – because of particular relationships – might matter more. The new lists, of course, were radical in that they bestowed individual rights of alienation; they were so often the basis for processes of land loss. In that way, they contravened the nature and purpose of whakapapa. In Edward Rewi's view, the new authorities did not understand whakapapa: 'The Crown never related land to concepts like whanau, hapu, iwi or kaitiaki. It was just another asset to them.'[1291]

Tama Takao also told us about the difference between the court and Tuhoe's values. 'The spirit of the language of the Maori Land court is vastly different from the spirit of the language of Tuhoe.'[1292] The language of the court was rooted in the aspiration of acquiring the land. The language of Tuhoe had its own origins: it 'originated from Rangiatea, and descended through the genealogy and all its dimensions were connected to the land.'[1293] Humility and hospitality are fundamental values. 'When Maori, Tuhoe and all the tribes entered into court there was a completely different language that was heard. It was a lan-

1289. Te Hue Rangi, simultaneous translation of oral evidence, 21 January 2005, Tauarau Marae, Ruatoki
1290. Colin Bruce Pake Te Pou, brief of evidence (doc C32(a)), p 12
1291. Edward Rewi, brief of evidence (doc G35), p 5
1292. Tama Takao, brief of evidence (doc C33(a)), p 6
1293. Ibid, pp 6–7

10.10.2

> *Ko te raru o te Kooti Whenua Maori he kaipono kia rite ai au ki te moa ano hei matakitaki noa. He haehae i toku tipuna i a Papatuanuku. He whakawharengaro i te whenua o taku tipuna. He haehae i nga whakatipuranga o taku tipuna. E whakangangaiore ai Te Kooti Whenua Maori ki te whakahakore i au i te mahuri o Papatuanuku.*
>
> *The problem of the Maori Land court is that it believes I'm just like a moa, all I do is observe. It sought to lacerate my ancestor Papatuanuku; to make her barren. It is slashing at the generations of my ancestor. The Maori land court is attempting to leach the vitality away from the saplings of Papatuanuku.*
>
> Hohepa Kereopa, brief of evidence (doc C18), para 24

guage that goaded, it was a language that belittled, it was a language without any spirit, it was language vastly different from what Tuhoe knew. As well as the words that were used to encompass that language.'[1294] The operation of the court only served to belittle the 'authority and sovereignty of the language and spirit of Tuhoe.'[1295] 'Through the loss of the land the people also became lost.'[1296]

Mr Kereopa compared the operations of the court and land alienation to 'Te Atahapara' – 'that time at night where all is still and the spirit leaves the body and wanders through the realms and dominions of Te Ao Maori'. If the spirit does not return to the body during the time of Te Atahapara, 'the being will be incomplete and distorted upon awakening'. The court (and the loss of land that followed) represented Te Atahapara – 'the bearer of fear for the night'. 'This is my view of what the Land Court did to my female ancestress Papatuanuku and my connections to her.'[1297]

The alienation of Te Urewera lands in conjunction with the work of the court led to the dramatic shrinking of takiwa within which hapu and iwi had established and exercised their customary rights. It disrupted the transmission of cultural knowledge. When people no longer lived on the land, or hunted its resources, or made journeys across it, few new places could be named; many old names could be easily forgotten. There would be no new waiata about events that took place on the land. People would be separated from wahi tapu. No new tipuna whare would be built. Tame Takao expressed his sadness in these words:

> Ko te whakapapa a te Kooti Whenua Maori he whakawharengaro i te Tangata kia kore e heke nga rawa ki nga uri. Ko nga rawa e korero ake nei; nga maumaharatanga o nga mahi

1294. Ibid, p 7
1295. Ibid
1296. Ibid, p 9
1297. Hohepa Kereopa, brief of evidence (doc C18), para 22

whenua; nga mahi maara; nga matauranga o raro o runga i te whenua me te wai me te atea hoki.

The genealogy of the Maori land court makes the collective womb of the people infertile, in order that the assets will not be handed down to the children. The assets that I speak of are the recollections of working of the land, the cultivations, the surrounding knowledges above and below the land, the water and the space as well.[1298]

The role of caring for and protecting the land, or kaitiakitanga, was paramount to the peoples' relationship to the land. As we explained earlier, care of the land had a spiritual dimension – the mauri of any particular place, of all lifeforms, had to be cared for and conserved. As the land passed into the ownership of others, the ability of tangata whenua to fulfil their responsibilities as kaitiaki of the land, the waters and their resources diminished. This marked not just a relinquishing of relationships, but a diminishing of their spiritual world.

The impact of these changes could be seen in Mr Kereopa's dark view of the court and its legacy. 'It is clear now that the purpose of the Maori land court was to separate me from my ancestor, from my genealogies and all its functions, that makes me a Maori.'[1299] Edward Rewi of Ngati Whare spoke in the same way: 'The whakapapa must not be broken, it goes back to Papatuanuku and Ranginui, to the land and sky itself. Te Taurahere, the tying of the knot, is often referred to.' At some point in the past, he said, 'the rope had been broken'. And if the connections were completely lost, 'Ngati Whare may become extinct like the moa.'[1300]

As connections between the land and its peoples were broken, culture and identity were also damaged. And that, we were told, was a very high price to pay for progress (see box over).

10.10.3 Economic impacts

As we have seen (secs 10.7, 10.8), the Crown's acquisition of land in the rim blocks involved serious Treaty breaches. It was coercive and unfair. The great bulk of land loss occurred as a result of these acquisitions, which were conducted by subverting the Treaty rights and authority of communities and their leaders, and by payment of unfairly low prices. The remaining land loss occurred as a result of private purchases. In section 10.9, we concluded that the failure of the Crown's protection mechanisms meant that these purchases too were in breach of the Treaty. Any harm to Maori from the loss of all these lands was thus a prejudicial effect of Treaty breach. In this section, we assess the economic consequences of these alienations. Inevitably, land loss – if not properly compensated – results in a reduction of

1298. Tame Takao, brief of evidence (doc C33(a)), pp 4, 8
1299. Hohepa Kereopa, brief of evidence (doc C18), para 26
1300. Rewi, brief of evidence (doc G35), pp 4–5

> *I do not think that strategies of development that transgress our values can lead to progress when viewed through our eyes. Such strategies, I believe, will inevitably diminish our identity and corrode our ways of life.*
>
> *By way of example, I refer to the Native Land Court. It is clear that the Native Land Court was a development for the government, propelling our many societies toward the fulfilment of the Crown's objectives of opening our lands up for settlement. The damage that this progress did to our connections to our whenua and indeed each other is one of the reasons that our people are here before the Tribunal. To us, this cannot be seen as progress.*
>
> Peipi Richard Tumarae, brief of evidence, 14 February 2005 (doc K26), p 2

economic capability. How do we measure this? We begin by establishing how much land was left for each tribal group by 1930, after the picking off of individual interests. We then look at the impact of land loss on the customary economies of the peoples of Te Urewera. We conclude by looking at the range of economic development opportunities denied the owners by the alienation of their land, which had been carried out in breach of the Treaty.

(1) *What was the extent of land loss in the rim blocks?*

By 1930, the peoples of Te Urewera retained less than 18 percent of their lands in the rim blocks. The alienation of their land was part of an ongoing process across a much wider district. Many iwi who suffered losses in the rim blocks also lost land in neighbouring areas, outside our inquiry district – both before and after the introduction of the Land Court into Te Urewera. Some groups also had land in the Urewera District Native Reserve, which was purchased by the Crown in the 1910s and 1920s (see ch 14). We do not discuss land alienation in the rim blocks in the context of broader alienation here. But we draw readers' attention to the fact that for all of these iwi, the loss they had suffered there by 1930 is a part of a bigger story.

Table 9 illustrates the extent of land alienation in the rim blocks, and the amount that had been retained by 1930.

The conclusion that can be drawn from this table is that all iwi suffered considerable loss of the land awarded to them in the rim blocks. Ngati Ruapani lost all of the land they had been awarded. For some iwi – notably Ngati Manawa, Ngati Rangitihi, and Ngati Hineuru – the loss of land was so great as to render them virtually landless within the rim blocks. Other iwi, including Tuhoe, Ngati Kahungunu, Te Whanau a Kai and Te Aitanga a Mahaki, lost the majority of their lands. We note, however, that the amount of land actually

Iwi or hapu affiliation of majority of owners in court award	Area according to original court award	Area alienated by 1930	Area retained in 1930*	Retained area (as percentage of original)*
Tuhoe	25,082	19,387	7,035	26.6
Tuhoe and Te Upokorehe (Tahora 2A)	24,668	19,034	2,316	10.8
Te Whanau a Kai and Te Aitanga a Mahaki	96,424	72,072	27,323	27.5
Ngati Kahungunu (excluding Ngati Hika)	43,670	27,168	13,911	33.9
Ngati Ruapani and Ngati Hika	21,331	21,331	0	0
Ngati Manawa	142,752	132,993	9,307	6.5
Ngati Hineuru	5,880	4,213	1,740	29.2
Ngati Rangitihi	1,000	920	80	8.0
Ngati Haka Patuheuheu	16,464	8,605	8,052	48.3
Total acres	377,271	305,723	69,764 †	18.6 †

* These figures have been adjusted to account for survey discrepancies (which were set out in section 10.4).

† As we noted in sections 10.4 and 10.7, these figures unavoidably overstate the amount of land remaining in Maori ownership, because the Crown (as at 1930) had purchased interests in a number of blocks that had not yet been partitioned. In reality, the claimants retained less than 18.6 per cent of their lands in the rim blocks. This point should be borne in mind when we use these figures in our analysis.

Table 9: The amount of land alienated per tribal group by 1930

Absent from this table altogether is Ngati Whare, who, because they did not attend the court, received no awards.

retained in Maori hands was lower than appears from these statistics. For Te Whanau a Kai, all of their land was locked up in the East Coast trust. The situation was similar for Ngati Kahungunu; almost all of their land in the rim blocks was in the trust, and so effectively out of their hands. In fact, the majority of retained land was located in southern Tahora 2 and effectively alienated from Maori until the trust was wound up in the 1950s (see ch 12). Of the remainder, the Crown was part-owner of some blocks, where it had not yet partitioned out its interests (see secs 10.4, 10.7). Thus, the figure of 18.6 percent was inflated; the real figure was lower.

(2) *How did the loss of land affect the customary economy?*

The lands within the rim blocks contained a range of resources that were crucial to the economies of peoples of the region. These resources were drawn from the low-lying areas,

where crops were cultivated, and from the more mountainous regions – from the forests, rivers, lakes and wetlands. Over generations, the people developed specialised techniques for taking birds and eels, and for harvesting forest foods and plants. By the early nineteenth-century, they had developed a series of sophisticated economies, taking advantage of the different resources, environments, and microclimates of the various rohe. As we discussed in chapter 2, tribes were known for particular prized foods and resources. Their economies had both internal and external dimensions – they provided the basis for communities to feed themselves and develop their home infrastructure, and also to look outside the region, by trading with other tribal groups and making the customary exchanges that sustained relationships and upheld mana (see ch 2).

Changing relationships (which meant change in access to resources) and new resources or technologies were rapidly accommodated in the customary economy. Stokes, Milroy, and Melbourne pointed out the problem with using the word 'traditional' in this context: 'To suggest [that] traditional means only pre European contact is an academic and largely irrelevant distinction.'[1301] Potatoes and pigs, they said, were two recent imports that have become an 'integral part of the forest economy since the 1840s'.[1302] This was because they were used for 'traditional' purposes according to customary rules: for food (often instead of fernroot or kumara), for upholding mana in the hosting of manuhiri (guests), and for exchange with other tribes. There was, of course, some overlap with the new colonial economy, in which both pre- and post-contact resources were used for trade with European settlers (and attempts to obtain money). We will consider the opportunities for European-style economic development in the next section. Here, we note that the customary economy continued to function in Te Urewera (as, in important ways, it still does today), incorporating new resources and technology where seen as necessary or desirable. Many of the older practices of crop cultivation, herb and plant gathering, hunting, and fishing remained of importance and continued to supplement the new additions. In this section we investigate how land loss affected the customary economies of Te Urewera.

The outlying areas of Te Urewera helped support a wide-ranging population, and constituted the resource base for quite different economies. Tuhoe relied on the lands that bordered their central communities (Ruatahuna, Maungapohatu) as a crucial part of their economy. Resources could be found or grown in the border lands that were not available or could not be cultivated in the harsher climate of the interior. The western lands were the primary resource base for Ngati Manawa and Ngati Whare; as the Waikaremoana lands were the primary resource base for Ngati Ruapani. The western lands were also important for iwi such as Ngati Rangitihi whose rohe stretched further to the west (well beyond our inquiry district). The same applied to the iwi of the east and south – Te Aitanga a Mahaki, Te Whanau a Kai, and some hapu of Ngati Kahungunu – for whom the Tahora and Waipaoa

1301. Stokes, Milroy, and Melbourne, 'Te Urewera: Nga Iwi Te Whenua Te Ngahere' (doc A111), p 27
1302. Stokes, Milroy, and Melbourne, 'Te Urewera: Nga Iwi Te Whenua Te Ngahere' (doc A111), p 28

lands supplemented resources obtained in other lands. Murton has observed that the early European visitors to the rim blocks saw the land as being inhospitable and the people materially poor compared with Maori who lived in the more benign environment of the coast.[1303] However, despite the challenges of the environment in the central lands, the peoples of Te Urewera utilised all its resources to sustain their economies.

Hapu established many permanent settlements in some areas of the rim block lands. The Waimana valley was one such place, where numerous kainga were located.[1304] Some kainga and pa were located along the Rangitaiki river, which constituted the western boundary of the Waiohau, Kuhawaea, and Whirinaki blocks. For Ngati Haka Patuheuheu, for example, the land that became Matahina C was said to have been a place of seasonal resource use; the permanent settlement, Te Houhi, was on the opposite side of the Rangitaiki.[1305] Settlements were also located on the eastern bank of the Wheao River, in the Heruiwi 4 block.[1306] Others were located further up into the mountain ranges. Kawharu and Wiri provided us with detailed evidence of the numerous Ngati Manawa settlements and camps in the Heruiwi, Whirinaki, and Kuhawaea blocks – the places that were occupied and those that were visited seasonally for their resources.[1307] The eastern lands contained fewer kainga and pa.[1308] But there were exceptions – particularly in the northern parts of the Tahora 2 block.[1309] And even in the harsh climate of the Waipaoa block, around Lake Waikareiti, communities had maintained a presence for seasonal use.[1310]

From their home bases (sometimes in lands outside the rim blocks), people moved seasonally in order to harvest particular resources; they were highly mobile.[1311] Jack Ohlson called this 'te takina nekeneke': 'the term takina nekeneke refers to a migration of whanau and hapu groups to certain parts of the forest in order to hunt and gather food resources'.[1312]

A number of resources could be found across most of the lands of the rim blocks. These resources did not merely provide food; they also provided the basis of community infrastructure, including shelter, clothing, medicines, transport, and all their other material necessities.

Essential food resources were gathered from some of the more forested areas. Fern root, or aruhe, provided an important source of carbohydrate and was harvested in almost all

1303. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 101–102
1304. Sissons, 'Waimana Kaaku' (doc A24), pp 15–19
1305. Cleaver, 'Matahina Block'(doc A63), p 15
1306. Tulloch, 'Heruiwi 1–4' (doc A1), p 14–15
1307. Kawharu and Wiri, 'Te Mana Whenua o Ngati Manawa' (doc C11), pp 39–42
1308. Boston and Oliver, 'Tahora' (doc A22), p 104
1309. Boston and Oliver, 'Tahora' (doc A22), p 166
1310. Marr, 'Crown Impacts on Customary Interests in Land in the Waikaremoana Region' (doc A52), p 16
1311. See, for example, Kawharu and Wiri's description of a 'typical economic cycle of resource use' in the Heruiwi block: Kawharu and Wiri, 'Te Mana Whenua o Ngati Manawa' (doc C11), p 40.
1312. Jack Tapui Ohlson, brief of evidence, September 2004 (doc G30), p 7

areas.[1313] In the Waimana block, communities managed extensive fernlands on the low hills and the poorer soils on the flats.[1314] Pikopiko, or fern fronds, was another important resource.[1315] Hinau and miro berries were another source of food.[1316]

Birding was a crucial economic activity across the blocks. The range of birds caught with snares and traps included kiwi, weka, kakapo, kereru, kaka, and tui – and specific sites were known to communities who monitored and utilised the resource.[1317] Alec Ranui named three places in the Matahina block that Ngati Haka Patuheuheu used for birding.[1318] Sissons pointed out that Te Urewera hapu and iwi often traded birds with other iwi.[1319] As such, they were an important component of both the internal and external economies of Te Urewera peoples. David Potter of Ngati Rangitihi told us that the alienation of their section of the Matahina block closed off their main source of kereru, 'the greatest delicacy of all'.[1320]

A variety of fish was obtained from the rivers and lakes of the region. Speaking of the Kuhawaea block, Bright noted that eels and certain species of fresh water fish 'provided one of the few reliable food sources for the hapu who resided nearby'.[1321] Alec Ranui told us that Pokairoa was Ngati Haka Patuheuheu's place for eeling in the Matahina block.[1322] Similar eeling and fishing places were located elsewhere in the rim blocks, in various rivers and lakes.[1323] Where access was retained, they remained a critical part of the customary economy in the twentieth century.[1324] Joe Runga drew our attention to the economic effect of this aspect of the Crown's purchases in the Waipaoa block: the blocks awarded to the Crown left 'only a short narrow access way for all the Iwi concerned to access the Waikareiti Lake'. This created an 'inadvertent grid ironing of Lake Waikareiti', which 'nullified the mahinga kai of Ngati Kahungunu and Ruapani peoples' – and the loss of their 'gem', the lake. With its loss, and the inadequate access to such an important resource, it became less important to peo-

1313. Clayworth, 'Tuararangaia' (doc A3), p 20; Kawharu and Wiri, 'Te Mana Whenua o Ngati Manawa' (doc C11), p 40; Merata Kawharu, brief of evidence, 30 July 2004 (doc F10), p 8; Murton, 'The Crown and the Peoples of the Urewera' (doc H12), p 132; Tulloch, 'Heruiwi 1–4' (doc A1), p 14–15

1314. Murton, 'The Crown and the Peoples of the Urewera' (doc H12), pp 121–123

1315. Tulloch, 'Heruiwi 1–4' (doc A1), p 14–15

1316. Kawharu and Wiri, 'Te Mana Whenua o Ngati Manawa' (doc C11), p 40; Tulloch, 'Heruiwi 1–4' (doc A1), p 15; Ranui, brief of evidence, 14 March 2004 (doc C14 (a)), p 19

1317. Kawharu and Wiri, 'Te Mana Whenua o Ngati Manawa' (doc C11), pp 40, 42, 92–93, 109; Clayworth, 'Tuararangaia' (doc A3), p 20; Sissons, 'Waimana Kaaku' (doc A24), p 7; Cleaver, 'Matahina Block' (doc A63), p 15; Boston and Oliver, 'Tahora' (doc A22), pp 63, 104, 326; Stevens, 'Waipaoa' (doc A51), p 18

1318. Ranui, brief of evidence (doc C14(a)), p 20

1319. Sissons, 'Waimana Kaaku' (doc A24), p 7

1320. Potter, brief of evidence, 26 March 2004 (doc C41), p 41

1321. Bright, 'Kuhawaea' (doc A62), p 7

1322. Ranui, brief of evidence (doc C14(a)), p 20

1323. Kawharu and Wiri, 'Te Mana Whenua o Ngati Manawa' (doc C11), pp 93, 109; Stevens, 'Waipaoa' (doc A51), p 18; Sissons, 'Waimana Kaaku' (doc A24), p 8

1324. See, for example, Ohlson, brief of evidence (doc G30), p 11; Kaa Kathleen Williams, brief of evidence, 14 March 2004 (doc C16), p 35

ple to retain the Waipaoa interests at a time when they were indebted and facing substantial Crown pressure to sell.[1325]

Other resources were gathered or cultivated to use for clothes, housing, and to make tradable items. Tikouka (or cabbage trees) were planted in the Heruiwi lands for fibre to make snares.[1326] Timber was a key resource that could be obtained from all the blocks. For example, communities felled totara in the Tuararangaia block to build canoes.[1327] Totara was by no means common throughout the blocks but this example gives an indication of the types of activities in which timber was put to use (we explore below the range of timber types in the blocks). David Potter told us that the alienation of Ngati Rangitihi's portion of the Matahina block put an end to the pit-sawing of tanekaha, and therefore Matata's ship building industry.[1328]

While there were many resources that were commonly accessible in many of the rim block lands, there were others that could only be found – or grown – in specific places. The Waimana block was exceptional in terms of its quality of land, and many traditional crops were cultivated successfully there. In chapter 4 we explained the importance of the northern Waimana lands to the Tuhoe internal economy, because of the range of crops that could be grown there and rarely elsewhere. The same applied to the southern Waimana lands (those that became the Waimana block). But other places, particularly in the western lands, also allowed traditional crops to be grown – for instance in portions of the Kuhawaea and Whirinaki blocks. Sissons noted that flax grew in the Waimana valley, but not further inland.[1329] Flax was also collected in the Kuhawaea block (along with raupo) – and flax that was gathered was put to use building huts and weaving clothes.[1330] The Waimana lands were also used for cultivating a number of traditional crops that would not grow in the colder climate of the interior lands. These included kumara, hue (gourd) and taro.[1331] But kumara could also be cultivated in some areas of the western lands.[1332]

The introduction of new crops and tools brought changes to the customary economy. Potatoes were a critical introduction, one that greatly increased the food supplies of the peoples in Te Urewera. They could be grown in the harshest of environments – as was seen when the Crown's military forces found and destroyed large quantities of potato crops around Lake Waikaremoana in 1870 and 1871 (see ch 5). Murton argues that the harvesting and processing of fernroot was largely abandoned after the introduction of potatoes, except

1325. Joe Runga, brief of evidence, 30 November 2004 (doc I19), pp 8–10
1326. Kawharu and Wiri, 'Te Mana Whenua o Ngati Manawa' (doc C11), p 39; Tulloch, 'Heruiwi 1–4' (doc A1), p 15
1327. Clayworth, 'Tuararangaia' (doc A3), p 20
1328. Potter, brief of evidence (doc C41), p 41
1329. Sissons, 'Waimana Kaaku' (doc A24), p 7
1330. Bright, 'Kuhawaea' (doc A62), p 7
1331. Sissons, 'Waimana Kaaku' (doc A24), pp 7–8; Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 121
1332. Arapere, 'Waiohau' (doc A26), p 45; Cleaver, 'Matahina Block' (doc A63), p 56

in seasons when the potato crop failed.[1333] But Bright notes that even after the introduction of potatoes, people still had to supplement their diet 'with seasonal food supplies'.[1334]

Wild pigs were soon widespread and had become an important food source in the Tuararangaia block by the early nineteenth century, and were also hunted in the Matahina and Kuhawaea blocks.[1335]

Wheat and corn were other important introductions, but they could only be cultivated in areas with better quality lands. These crops were particularly successful in the Waimana lands. As we noted in chapter 4, these developments were seriously affected by the 1866 confiscation, which took much of the best Waimana land, and forced Tuhoe to focus on their internal economy. But good quality land remained south of the confiscation line, though wheat and maize cultivation did not resume on those lands until the 1870s (mainly at a subsistence level). Although Waimana was the main place in Te Urewera where wheat was grown (alongside Ruatoki, which we do not discuss in this chapter), it was also cultivated in some areas in the Kuhawaea block.[1336] We will explore these developments further below. Here we note that the new introductions did not displace customary practices and uses, though the general economic pattern did change.[1337] Communities were better equipped to feed themselves, so long as they still had sufficient access to other food supplies if the potato crop failed.

Despite many changes in social, cultural and economic circumstances, the customary economy remained crucial to physical and cultural survival in the first half of the twentieth century. Colin (Pake) Te Pou described how the Waimana people carried out community fundraising during his childhood by holding large hapu dances. Kaumatua placed rahui on hunting and gathering for the period leading up to these events, 'only until it got close to the day, when we would hunt pigs, gather pikopiko, catch eels, and those types of food in the bush'.[1338] Such activities were still a necessary part of daily survival as well. We note that the Crown was aware of the ongoing importance of traditional economic uses of the land. Seddon and Carroll had both highlighted this for the lands that became the Urewera District Native Reserve in the 1890s (see ch 9). They knew that every part of the wide interior was needed and used for food production.[1339]

This knowledge was not limited to the lands and peoples of the Urewera District Native Reserve; it was known that all Maori still needed access to such resources. In 1908, for example, surveyor Henry Tai Mitchell was sent to Waiohau to consult with Ngati Haka

1333. Murton, 'The Crown and the Peoples of the Urewera' (doc H12), p 263
1334. Bright, 'Kuhawaea' (doc A62), p 8
1335. Clayworth, 'Tuararangaia' (doc A3), p 20; Cleaver, 'Matahina Block'(doc A63), p 15; Bright, 'Kuhawaea' (doc A62), p 8
1336. Bright, 'Kuhawaea' (doc A62), pp 27, 46
1337. Jeffrey Sissons, 'Waimana Kaaku' (doc A24), pp 8, 61–62
1338. Colin Bruce (Pake) Te Pou, brief of evidence, 26 March 2004 (doc C32(a)), p 10
1339. Brad Coombes, '"Making Scenes of Nature and Sport": resource and wildlife management in Te Urewera, 1895–1954', report commissioned for the Crown Forestry Rental Trust, May 2003 (doc A121), pp 61–62

Patuheuheu about relocating to Te Teko (see ch 11). Mitchell noted to his superiors that the land he had selected was 'most suitable' for 'Native occupation in every respect': not only could it carry sheep, but kumara could also be cultivated there, and eels trapped in the lake. Mitchell's description of what was needed is important. It shows how people still depended on customary resources to survive at that time – and that as much was acknowledged by officials.[1340]

The presence of such men as Carroll and later Ngata in the Government ensured that this knowledge continued to exist at the highest level. In the 1930s, Ngata – aware that customary food sources were vital to Maori survival – supported a petition from Ngati Manawa, objecting that the Crown had closed their access across Kuhawaea to traditional pig hunting grounds.[1341] The Minister of Lands, in reply, recognised that '[t]he necessity for the Natives to have access to what to them is evidently a very important food source is fully appreciated'.[1342] Such knowledge, however, had done little or nothing to stop the Crown's ongoing drive to acquire every piece of Maori land that it could (see 10.7), whether it was really suitable for settlement or not, leaving the peoples of Te Urewera with a greatly contracted land base for their wide-ranging economic activities.

The first contraction in the customary economy of Te Urewera occurred in the 1860s. The Crown's confiscation of land in the Bay of Plenty included half of all of Tuhoe's good farm land, and severely restricted access to the coast and its resources (see ch 4). The economy was further circumscribed by the loss of land to the south of Lake Waikaremoana in the 1870s (see ch 7). A third contraction took place through the activities of the Native Land Court, as we saw in the previous section. While in one sense this was a redistribution, because certain groups became the sole owners of land (and all its resources) at the expense of others, there was certainly a significant loss of access to resources for those groups who did less well in the Court.

The subsequent loss of 82 per cent of the land in the rim blocks, we conclude, could only have had further drastic effects on the customary economies of Te Urewera. Those economies depended on use of (sometimes scarce) resources scattered over a very large area, as well as access to particular sites. Without ready access to the wide range of resources these lands offered, the internal economies would have contracted, as well as the ability to trade with other iwi and engage in further community development. Without the ability to use these resources, the economic capability of all the iwi who lost land in breach of the Treaty was diminished. From 1878 to 1930, therefore, there was a gradual reduction of available resources, many of them crucial to the coherence of the customary economies and the ability of communities to feed themselves. Generally, this reduction in economic capability was not compensated in gains elsewhere.

1340. Battersby, 'Waiohau' (doc C1), p 78; Arapere, 'Waiohau' (doc A26), p 45
1341. Bright, 'Kuhawaea' (doc A62), p 67
1342. Ransom to Ngata, [1933] (Bright, 'Kuhawaea' (doc A62), p 67)

10.10.3

Immediate impacts included loss of the ability to live on or grow crops on land which had passed from its owners. As a 1902 petition from Tamaikoha showed, this kind of loss could force Maori to leave an area, even where they still had access to 'precipitous broken bush unfit for cultivation'.[1343] Here, too, mobility was important. A large pool of land was required beyond that in immediate use for cultivation. Customary practices required new crop lands to be broken in every couple of years.[1344] The people needed to be able to move, to build new kainga and break in new land as necessary. According to the evidence available to us, Maori lost most of their land suitable (or potentially suitable) for growing crops, except in the Waimana block.[1345] As we have seen, existence was sometimes precarious in Te Urewera; this was a loss that they could ill afford.

Nonetheless, some access for hunting or gathering survived the official alienation of the land for a time. In Kuhawaea, for example, the Troutbecks permitted Ngati Manawa to cross their land for hunting purposes.[1346] In Waimana, too, Swindley appears to have allowed some use of his land by Tamaikoha's people.[1347] In both cases, these arrangements were overturned after the land passed out of the ownership of Swindley and the Troutbecks, although the Government agreed to issue permits for travel across Kuhawaea to traditional hunting grounds.[1348] The spread of settlement, or the cutting up of the land by the Crown in anticipation of settlement, brought with it new owners and users, fences, and deforestation, gradually restricting access (and the availability of some resources). Large parts of the rim blocks, however, remained Crown land, eventually destined for forestry or reserves (such as the Whirinaki Forest Park). There, too, access and activities were restricted, but not necessarily ended altogether, as we shall see later in this report.[1349]

We conclude that the alienation of 82 per cent of the land in the rim blocks by 1930 had a serious effect on the role that those lands could play in the customary economy. In particular, there had been a significant reduction in the land available for kainga and cropping, and in the mobile use of scattered resources. Not only were particular resource sites lost, but access across the region became much more difficult. In some cases, access was stopped altogether. For the forest lands retained by the Crown, however, some access and resource-use was permitted or tolerated. We will return to that point in later chapters. Here, we note a significant reduction in the economic capability of all the peoples of Te Urewera, as a

1343. Boston and Oliver, 'Tahora' (doc A22), p166. In this case, the loss of the flat, arable land was caused by a partition rather than a sale, although the Crown was soon purchasing interests in this land after the Court repartitioned it (see section 10.7).

1344. Stokes, Milroy and Melbourne, 'Te Urewera: Nga Iwi Te Whenua Te Ngahere' (doc A111), p180

1345. Crown Forestry Rental Trust, 'Wai 894 – Te Urewera: Inquiry District Overview Map Book, Part 3' (doc A132), Map 25, 'Landuse Capability within Te Urewera District Inquiry'

1346. Bright, 'Kuhawaea' (doc A62), p67

1347. Sissons, 'Waimana' (doc A24), p59

1348. Sissons, 'Waimana' (doc A24), p59; Bright, 'Kuhawaea' (doc A62), pp67, 72

1349. See, for example, Brad Coombes, 'Preserving 'a great national playing area': conservation conflicts and contradictions in Te Urewera, 1954–2003', report commissioned for the Crown Forestry Rental Trust, September 2003 (doc A133), pp457–458

result of the purchase of their land in breach of the Treaty, but that the reduction was not as great as it would have been had all the lands become closely settled. The peoples of Te Urewera also lost their ability to develop these lands in the colonial economy. We now turn to look at this aspect of land loss.

(3) *What development opportunities were denied the peoples of Te Urewera as a result of land lost in breach of the Treaty?*

As a result of the loss of 82 per cent of their lands in the rim blocks, in breach of the Treaty, the peoples of Te Urewera were denied a number of development opportunities. In this section we assess those opportunities in light of the development that actually occurred (to the benefit of others) in the lands that were alienated.

(a) *The preconditions for successful economic development:* Successful economic development of agricultural or pastoral land – at any time, from the nineteenth century to now – is dependent on a range of factors. Foremost among these factors was (and is) the quality of the land: the type of terrain, altitude, aspect (whether it faces the sun or not), fertility, depth and type of soil, existing vegetation cover, rainfall, and access. These are some of the variables that made land development possible or profitable. Apart from a few select areas, most of the lands in the rim block were (and remain) marginal for agricultural development.[1350] According to the 1962 Land Use Capability Survey, the majority of the rim block lands are 'non-arable' lands.[1351] Rugged terrain, high rainfall, high altitude, low fertility soils, soils with low water holding capacity, and heavy bush cover; all that limited the development potential of the region.

Secondly, successful economic development is dependent on technological innovation, the development of infrastructure, and access to capital. These were all factors in economic development in the wider New Zealand economy from 1890 to 1930.[1352] Roads were crucial for getting services and goods in and produce out, but Te Urewera suffered a relatively slow and limited development of infrastructure, particularly of its roads. Isolation from processing plants and ports in the Bay of Plenty and Hawke's Bay continued to be a problem into the twentieth century. Infrastructure aside, successful farming enterprises require capital for the purchase of stock, machinery, buildings, fencing, tools, grass seed, fertiliser, and numerous other essentials. Murton points out that pastoral farming became more capital intensive in the 1880s and 1890s, with substantial outlays necessary for fencing and building.[1353]

1350. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 176
1351. Crown Forestry Rental Trust, 'Map Book, Part 3' (doc A132), Map 25, 'Landuse Capability within Te Urewera District Inquiry'
1352. G R Hawke, *The Making of New Zealand: An Economic History* (Cambridge: Cambridge University Press, 1985), pp 85–90
1353. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 250–251

10.10.3

Finally, any enterprise has to be able to function within regional and national economies. If local markets are not thriving, then there is little chance for any kind of development to succeed. The Native Land Court's investigation of title in the rim blocks coincided with the greatest transformation in the colonial economy, including the success of refrigeration and government initiatives to encourage agriculture.[1354] But this was by no means a steady improvement: the long depression in the 1880s and the depression in the 1930s seriously affected regional economies as well as New Zealand as a whole. Although growth was slow in the wider Bay of Plenty district into the twentieth century, the eastern Bay of Plenty began to enjoy some success from around 1910 with the increase of dairy farming, and the opening of cheese factories and of a freezing works at Whakatane.[1355] But it is true that the wider economy in the Bay of Plenty developed more slowly than in Hawke's Bay or Manawatu.[1356] Other opportunities opened up in the twentieth century, the most important of which was forestry.

(b) ***Farm development:*** Despite the limitations, it is clear to us that successful economic enterprises did occur in the rim blocks after the land was alienated. The 1962 Land Use Capability Survey shows that there are areas with fertile lands. By far the biggest is in the Waimana block (we remind readers that we do not discuss the Ruatoki block in this chapter). But the Kuhawaea block, along with the southern quarter of Waiohau 1 and the northern end of the Whirinaki block, also contain lands described as having only 'moderate limitations' for intensive arable farming.[1357] According to our calculations, by 1930, the peoples of Te Urewera retained 41 per cent, or 4100 acres, of their high-quality land (all of which was located in the Waimana block) and only 17 per cent, or 5000 acres, of the slightly lesser quality land (located in the Galatea plain). A number of successful developments occurred on the land that was alienated – with the assistance of necessary capital investment and growth of infrastructure. These enterprises suggest what the former Maori owners of this land could have done, given a level playing field with settlers (equality of access to finance, usable titles, and expertise).[1358]

Of the rim blocks, Waimana was best suited for development in the colonial economy. In chapter 4, we described the quality of the land that was confiscated by the Crown in the north Waimana valley in 1866. The Waimana block itself (to the south) was of much the same quality. The terrain and vegetation cover of the Waimana plain made it an ideal area for development, and the natural fertility of the block's soils meant that crop and pasture

1354. Ibid, pp 440–446
1355. Ibid, pp 455–456
1356. Hutton and Neumann, 'Ngati Whare and the Crown' (doc A28), p 178
1357. Crown Forestry Rental Trust, 'Map Book, Part 3' (doc A132), map 25
1358. For the Crown's responsibility to ensure a level playing field, and equality of opportunity with settlers, see Waitangi Tribunal, *He Maunga Rongo*, volume 3, chapter 13 (for overall analysis), chapter 14 (for farm development opportunities), and chapters 15 and 16 (for development opportunities in indigenous and exotic forestry).

production did not decline as rapidly on the bush-cleared hills. On the land use capability map, Waimana stands out as being eminently suited for horticulture, cropping, pastoral production or forestry.[1359] Being on the edge of the coastal plain, Waimana also had the advantage of easy access to services and processing plants.

The moderate success of settler farming enterprises in the Waimana block demonstrates what was possible on these lands. As we have seen, Swindley began leasing land in 1874, and eventually built his Waimana holding into a 21,000 acre estate with the purchase of Waimana 1A and blocks from the confiscated lands.[1360] He set out to establish a mixed-farming estate and grazed cattle and sheep, and grew wheat. In 1888, after several years of poor wool and stock prices, Swindley was unable to meet his mortgage repayments to the Bank of New Zealand, which took over the estate. In the 1890s, anywhere from 3800 to 6000 sheep were run on the Bank of New Zealand's Estate (which we assume was primarily made up of the Swindley estate).[1361] In 1905 the bank decided to subdivide the estate and develop it into a number of dairy farms, and built a cheese making plant to process the milk.[1362]

When the Government purchased the estate from the bank in 1906 it increased the pace of the subdivision, and settlers drew the first ballots for the farm sections in August 1907. The settler community thereafter grew at pace. In the decade from 1906, the Pakeha population of Waimana township increased five-fold, and had settled at 216 by 1926.[1363] According to Sissons, many Pakeha farmers pressured Maori to lease and sell land adjoining their farms from 1907, often successfully.[1364] His evidence suggests that the settler farms tended to be on the better quality Waimana land.[1365] They were predominantly dairy farms, supplying milk and cream to nearby cheese factories at Waimana (established 1905) and Nukuhou North, just north of the confiscation line (established in 1908).[1366] About half a dozen settler farmers also ran some sheep (from 50 to 2000 sheep each) on their farms in the period from 1908 to 1930.[1367] With the right conditions and support, successful farming enterprises could occur on the better lands of the rim blocks – so much so that a flourishing community had emerged in the Pakeha settlement of Waimana by the 1920s.

1359. Crown Forestry Rental Trust, 'Map Book, Part 3' (doc A132), map 25

1360. Miles, 'Te Urewera' (doc A11), pp 232–233

1361. AJHR 1891, H-15(a), p 23; AJHR 1898, H-23, p 27

1362. Sissons, 'Waimana Kaaku' (doc A24) p 67

1363. *Population Census, 1906* (Wellington: Government Printer, 1907), p 46; *Population Census, 1911* (Wellington: Government Printer, 1911), p 54; *Population Census, 1916* (Wellington: Government Printer, 1920), pp 28, 54–55. The Maori population of Waimana was not recorded in the census until 1926: *Population Census, 1926*, vol 1, p 56, vol 17, p 32.

1364. Sissons, 'Waimana Kaaku' (doc A24), pp 67, 83–96; Sissons, *Te Waimana: the Spring of Mana, Tuhoe History and the Colonial Encounter* (Dunedin: University of Otago Press, 1991) (doc B23), p 241

1365. Sissons, *Te Waimana* (doc B23), p 95

1366. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), pp 455–456; Sissons, *Te Waimana* (doc B23), pp 232, 245

1367. AJHR, 1908, H-23, pp 29–30; AJHR, 1909, H-23, p 32; AJHR, 1910, H-23, p 30; AJHR, 1911, H-23, p 18; AJHR, 1912, H-23, pp 18–19; AJHR, 1914, H-23, p 19; AJHR, 1917, H-23, p 22; AJHR, 1920, H-23A, p 24; AJHR, 1923, H-23B, pp 23–24; AJHR, 1925, H-23B, p 23; AJHR, 1926, H-23B, pp 24–25; AJHR, 1928, H-23B, p 26; AJHR, 1930, H-23B, p 35

10.10.3

Waimana was not the only part of the rim blocks to sustain farm development. The Kuhawaea block had the most potential for agricultural development outside of Waimana. In addition, there were other significant areas of land suitable for cropping or pastoral farming in the western blocks. By our calculations, large areas of this land had been alienated by 1930: 83 per cent, or 25,000 acres, of land with moderate limitations (but arable), 82 per cent, or 22,900 acres, of land suitable for pasture (with some arable), and 57 per cent, or 29,600 acres, of land suitable for pasture (but non-arable). The land use capability map shows Kuhawaea as suitable for cultivated crops, pasture or forestry.[1368] Its biggest advantage is the easy terrain which made land clearance and land management straight forward. As with all the western rim blocks, the pumice soils were a major limitation on agricultural production. But once the land was ploughed and seeded, it appears that grass could flourish on the Kuhawaea plain. The land did have a cobalt deficiency but this was uneven. There were pockets of land that could support cattle or sheep farming.[1369] And cobalt deficiency, we note, affected livestock rather than crop cultivation. By the 1890s settler pastoralists were growing oats and turnips for stock feed on Kuhawaea 1, and Ngati Manawa grew wheat, potatoes, maize and oats on the comparatively small piece of land that they retained until 1923 (we discuss this further below).[1370]

The largest and most successful farm on the Kuhawaea lands was that of Hutton Troutbeck. As we saw in section 10.7, Troutbeck purchased the 21,694-acre Kuhawaea 1 block in 1884.[1371] The Troutbeck family added Kuhawaea 2A and most of 2B and built their holding into a 33,000-acre station, which was run as an extensive sheep and cattle property. They managed the natural pasturage largely through burning and grazing, and also by erecting fencing. The Galatea Station ran about 7000 to 10,000 sheep in the 1890s and early 1900s.[1372] In 1920, it stocked 15,000 sheep and 1500 cattle.[1373] Sheep numbers peaked at around 30,000, and when the Government purchased the station in 1932, it grazed 17,500 sheep and 3,500 cattle.[1374] At this time, the Government also invested in infrastructure, including the construction of the road to Whakatane. The capital investment included the establishment of an experimental and demonstration farm in 1933 to explore how to develop and manage this difficult country. Research staff found that high fertiliser use, cultivation, and sowing

1368. Crown Forestry Rental Trust, 'Map Book, Part 3' (doc A132), map 25
1369. A A Coates, *The Galatea Story* (Whakatane: Whakatane and District Historical Society Inc, 1980), p 27
1370. McBurney, 'Ngati Manawa' (doc C12), p 318; Coates, *The Galatea Story*, p 33
1371. Miles, 'Te Urewera' (doc A11), p 226
1372. AJHR, 1891, H-15A, p 23; AJHR, 1898, H-23, p 27; AJHR, 1900, H-23, p 27; AJHR, 1905, H-23, p 27; AJHR, 1910, H-23, p 30
1373. Commissioner of Crown Lands, Auckland, to land purchase controller, 'Galatea Estate (Report)', 13 September 1920 (Coates, *The Galatea Story*, p 35)
1374. James W Fox and R G Lister, *The Galatea Basin: A Geographic Reconnaissance*, reprinted *New Zealand Geographer*, vol 5, no 1, April 1949, p 24

Land type	Open land originally held by Maori (acres)	Open land retained (acres)	Percentage retained
Slight to moderate limitations (arable)	10,000	4,100	41
Moderate limitations (arable)	30,000	5,000	17
Suitable for pasture, some arable	28,000	5,100	18
Suitable for some pasture, non-arable	47,000	22,400	48

This table assesses land that was open at the time of alienation. We note, however, that forested lands could also be cleared and developed successfully for pastoral farming. Thus, potential farmland was not limited to these open lands.

Table 10: Retention by land type in Te Urewera rim blocks

lucerne increased the productivity of the Galatea plain. The Government converted the station from sheep to dairying and subdivided the property into small units for settlement.[1375]

Smaller yet similar areas existed elsewhere in the western rim blocks, also requiring Government assistance to convert from sheep to dairy farming.[1376] As with the Galatea scheme, heavy capital investment was needed for fertiliser, fencing, cultivation, lucerne planting and buildings. It was these Rangitaiki lands that Colenso had called uninhabited, desolate and sterile.[1377] And though potential for agricultural development was limited in the central part of the Waiohau block because of the broken terrain, the plains near the Rangitiaki River in the north and south of the block had considerable potential for livestock farming.[1378]

From these brief studies, we can reach some conclusions about the development opportunities denied the peoples of Te Urewera on their better lands that were acquired from them in breach of the Treaty. As a general principle, we would say that Maori land owners in the rim blocks should have had the opportunity to engage in the new economy where they desired to do so, on a level playing field with settlers. The developments that occurred on the Waimana and Galatea lands demonstrate how, with considerable capital investment and expertise, some of the lands in the rim blocks could be made profitable through farming. The denial of this opportunity to Maori, who had to watch their former lands being developed by others, was one aspect of the prejudice they suffered from the loss of these

1375. Murton, 'The Crown and the Peoples of Te Urewera' (doc H12), p 459
1376. Fox and Lister, *The Galatea Basin*, pp 24–25
1377. Murton, 'The Crown and the Peoples of the Urewera' (doc H12), p 99
1378. Crown Forestry Rental Trust, 'Map Book, Part 3' (doc A132), map 25, 'Landuse Capability within Te Urewera District Inquiry'

10.10.3

Forest type	Forested at time of alienation	Forest retained*	Percentage retained
Softwood podocarp	10,000	0	0
Softwood/hardwood	35,000	1500	4
Rimu/tawa, tawa	40,000	3500	9
Beech/beech podocarp	180,000	28,000	16

* The retained areas consisted of the following: softwood/hardwood – Heruiwi 4F2, parts of Whirinaki 1(4B1B) and 1(4B2); rimu/tawa, tawa – Tahora 2A3B, pt 2AD2, 2AE3(2), and 2B2B1; beech/podocarp – Waipaoa 5A2, Waipaoa 5C, Tahora 2G2, and parts of Tahora 2C1(3), 2C2(2), 2C3(2), and 2F2.

Table 11: Retention by forest type in Te Urewera rim blocks

lands. We address what the Maori owners did with the money they received for land sales, and what they were able to do with the few lands that were left to them, later in this report.

(c) ***Forestry development:*** A considerable portion of the land in the rim blocks was not suitable for agricultural or pastoral farming. The steep terrain, combined with the harsh environment and soil qualities, meant that this kind of development was impossible in many places. But had the owners retained those lands, they ought to have reaped the benefits of timber extraction – an industry that developed in the region as the twentieth century progressed. By our estimate, around 265,000 acres (70%) of the land at issue in the rim blocks was under forest cover in the period in question. We have made this assessment based on a map of forest types prepared by the Crown Forestry Rental Trust, relying on a 1973 map, and evidence in various research reports about the range of bush cover in the nineteenth century.[1379]

Not all of this forested land was of equal commercial value. The most prized areas in monetary terms were those with softwood podocarp trees such as totara, rimu and matai. Forests with mixed softwood and hardwood podocarps were less valuable, with beech valued least. As an indication of their relative values, royalties paid in the 1950s for Maungapohatu totara fetched 20 shillings per acre – twice as much as matai, rimu, miro and kahikatea, and over seven times as much as for beech.[1380]

Within the rim blocks there were only small pockets of purely softwood podocarp forest. This amounted to about 10,000 acres in the southeast of Whirinaki, running along

1379. Crown Forestry Rental Trust, 'Map Book, Part 3' (doc A132), Map 27, 'Forest Type Map within Te Urewera Inquiry District'; see also Tulloch, 'Heruiwi 1–4' (doc A1), pp 25–26; Boston and Oliver, 'Tahora' (doc A22), pp 143, 198; Stevens, 'Waipaoa' (doc A51), pp 27, 60, map 13 (follows p 57)

1380. Klaus Neumann, 'That No Timber Whatsoever be Removed: The Crown and the Reservation of Maori-owned Indigenous Forests in the Urewera, 1889–2000', report commissioned by the Waitangi Tribunal, 2001 (doc A10), p 156

the southern boundary of Heruiwi 1 and Heruiwi 4, and in the Matahina D block. By 1907 the Crown had acquired practically all of this land. Another 35,000 acres contained rimu-matai-hardwoods podocarp forest, which was located in the Heruiwi 4 and Whirinaki blocks. Of this, the Crown acquired all but 1500 acres in Heruiwi 4F2 and Whirinaki 1(4B2). Of the remaining 220,000 acres which would have been under forest, the most valuable land was probably in the Tuararangaia 1, and Tahora 2A1, 2A2, and 2AD blocks, which were covered by a mixture of rimu and tawa. There was also tawa bush across Tahora 2A3 and 2AE. Altogether, there was some 40,000 acres of forest in this category, of which Maori lost 91 percent. The rest of the forests in the rim blocks were mainly mixed beech and podocarp forests, or predominantly beech. These covered 180,000 acres, of which Maori lost 84 percent.[1381]

The total amount of forest alienated from the claimants' ownership was 232,000 acres (87.5 percent of their forests, and 61.5 percent of their land in the rim blocks). The Crown had acquired almost all of the valuable forest, sometimes with a deliberate eye to its future timber producing potential.[1382] Had the owners retained these lands, then they would have been in a position to use selected portions of them for development in timber extraction. We do not have comprehensive information on the extent of exotic forestry on the land alienated from our claimants in the rim blocks, but we calculate that some 60,000 acres has been used for that purpose.[1383] Exotic forestry was a further development opportunity denied the claimants.

Later in this report we address the operation of the Crown's policies in relation to timber extraction from land that Maori did manage to retain. Here, we note that the claimants are very aware of what they have missed out on, as Gladys Campbell explained in her evidence for Ngati Hineuru:

> All of that land of Heruiwi had native timber on it, and that timber was cut and sold by the Crown. Was the value of the timber included in the price of that land? That is an issue for all Heruiwi Blocks that were sold.
>
> The Hineuru lands [Heruiwi 4A] were a heaven of its own, it was out in the no man's land, and still had to be developed and created to the benefit of all the people that were living there. That was their country, their home, and although they had occupational rights, the laws did not allow them to utilise their land.[1384]

1381. Crown Forestry Rental Trust, 'Map Book, Part 3' (doc A132), map 27; see also secs 10.4, 10.7 for land alienation details

1382. See, for example, Tulloch, 'Heruiwi 1–4' (doc A1), p 32

1383. Tulloch, 'Heruiwi 1–4' (doc A1), p 137; Cleaver, 'Matahina' (doc A63), p 138; Tulloch, 'Whirinaki' (doc A9), p 63; Crown Forestry Rental Trust, 'Map Book, Part 3' (doc A132), maps 12, 15, 16, 22; 'Ngati Whare Map Book for Treaty of Waitangi Claim Wai 66', a map book commissioned by the Crown Forestry Rental Trust, September 2004 (doc G33), map 6

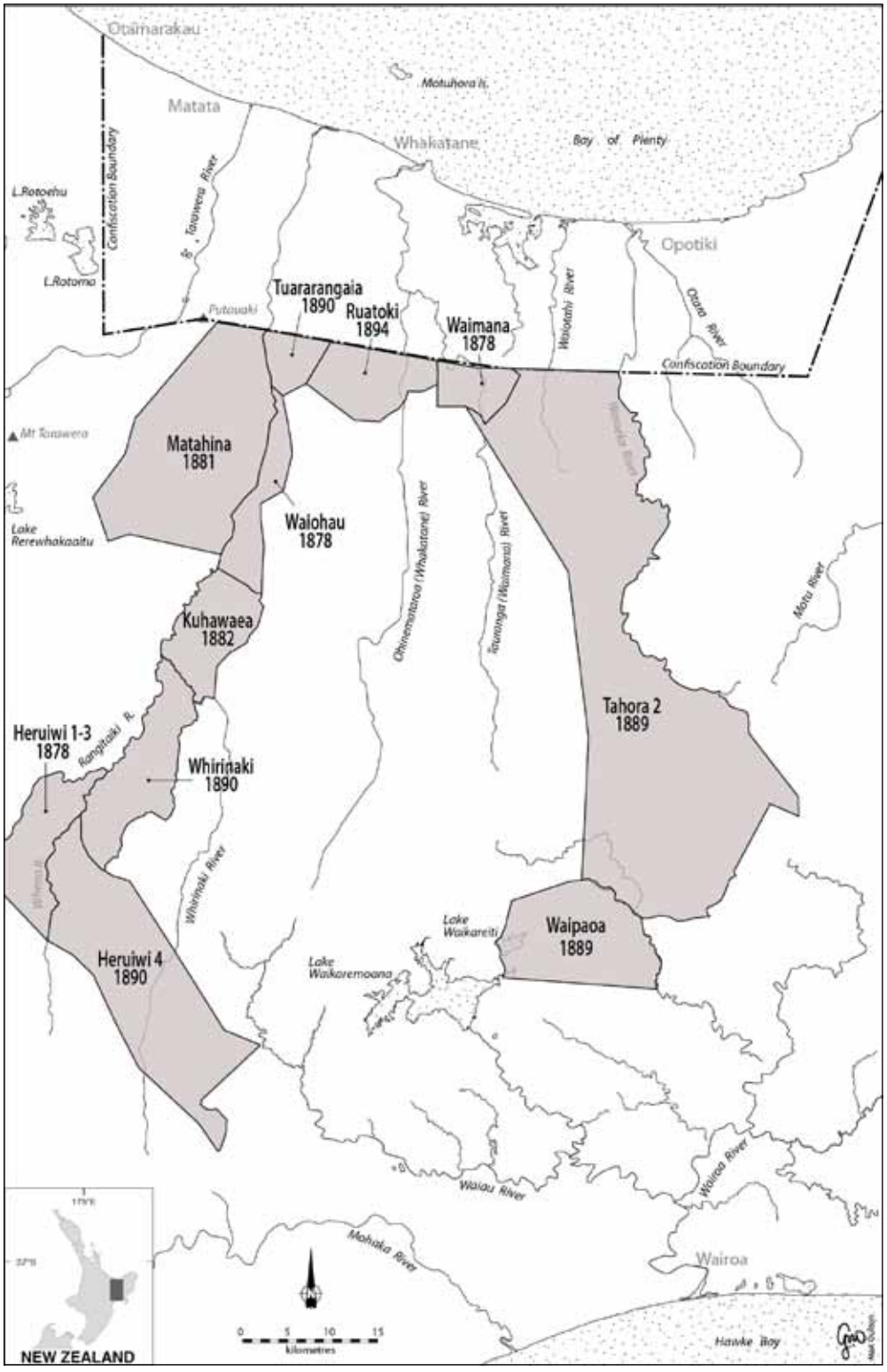
1384. Gladys Campbell, brief of evidence, 8 September 2004 (doc G25), p 5

10.10.3

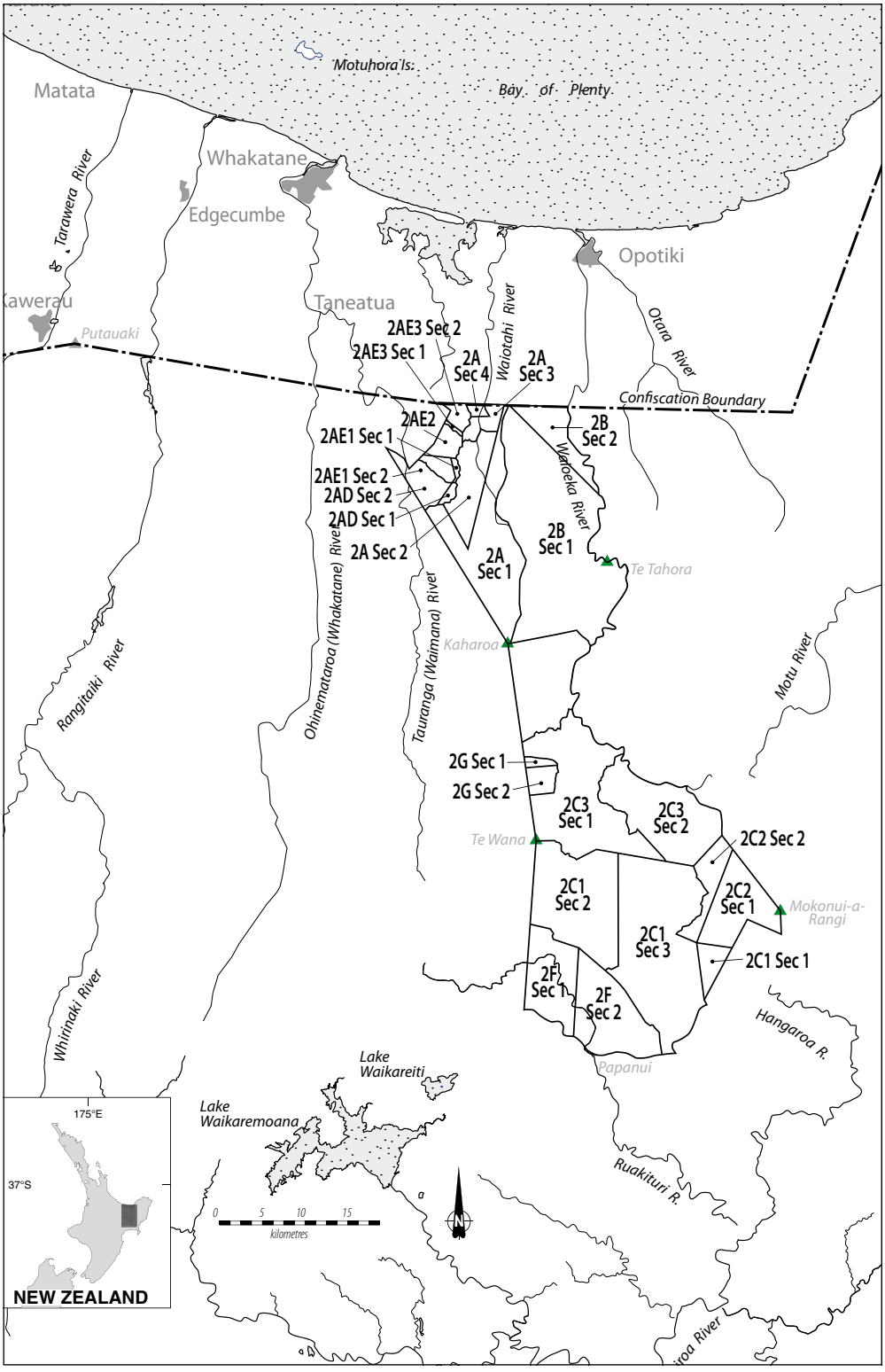
(d) ***Economic impacts – conclusions:*** Between 1878 and 1930, a total of 82 percent of the land awarded to the peoples of Te Urewera in the rim blocks was acquired in breach of the Treaty. This loss of land had notable economic effects. In both the short and long term, the peoples of Te Urewera were denied many of their customary uses of these lands (and their waters). These lands were important for the range of resources they provided – including a variety of birds and plants – and for the relatively rare places suitable for habitation and cropping. The Waimana block and some areas of the western lands provided a much greater range of traditional economic uses for those who exercised rights to that land.

The loss of this land had other long term effects. The owners were restricted to less than 18 percent of their former holdings, and denied the ability to develop the great majority in the colonial economy. The development potential of the lost lands was limited, compared to some parts of New Zealand. With the exception of the Waimana block and some of the western lands, the range of possible economic activities was circumscribed by the quality of the land, the terrain, and issues of access. Most of the land in the rim blocks, therefore, has not proven suitable for agricultural or pastoral farming development. Exceptions included the Waimana, Kuhawaea and Waiohau blocks, usually with investment or assistance from the Crown. (Also, as we shall see in chapter 12, the East Coast trust was able to use the capital and infrastructure of a big business to develop farms in southern Tahora 2.) But farming was not the only potential economic activity. Had the owners been able to retain the land acquired from them in breach of the Treaty, they clearly would have been able to take advantage of forestry operations, which had some success in the second half of the twentieth century.

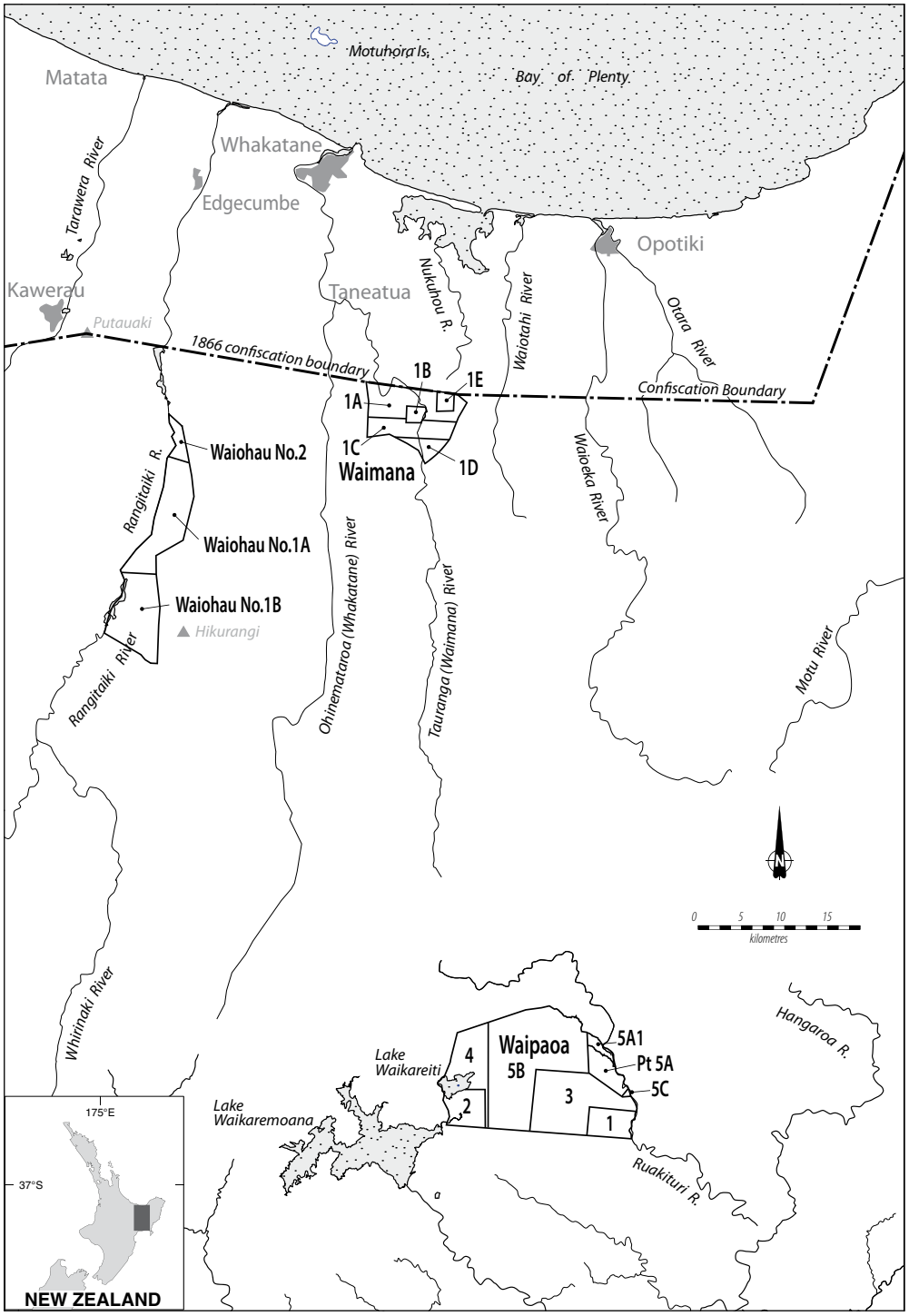
The rim blocks were important to the economies of the peoples of Te Urewera. The loss of more than 82 per cent of this land had significant effects on their customary economy, and on their ability to participate in the developing colonial economy. At the same time, the Crown was purchasing their other lands in the Urewera District Native Reserve (see chs 14–15). Later in our report, having considered alienations in the reserve, we will be in a position to assess the overall impact of land loss on the claimants in our inquiry district. At that point, we will be able to answer the broader question: did they retain sufficient land to sustain themselves, and for development purposes?



Map 5: Te Urewera 'rim' blocks (including Ruatoki) with dates dealt with by the Native Land Court



Map 6: The Tahora 2 block, including partitions



Map 7: The Waipaoa, Waiohau, and Waimana blocks, including partitions

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CHAPTER 11

TE MAHI TINIHANGA MO NGA WHENUA O WAIOHAU: THE WAIOHAU FRAUD

> *That they [Ngati Haka Patuheuheu] have suffered a grievous wrong is, in my opinion, plain. It is doubly hard that this wrong should have resulted from a miscarriage, which certainly ought to have been avoided, in the very Court which was especially charged with the duty of protecting them in such matters.*
>
> Justice Edwards, 1905

11.1 Introduction

The Waiohau block was the ancestral home of Ngati Haka Patuheuheu.[1] In 1907, they were evicted from that home by its new legal owner, James Grant, after a long period of peaceful resistance to earlier eviction attempts. The people retreated into the mountains for a while, grieving, before finally resettling on their less valuable lands in the northern half of the block. In some ways, the claimants have never recovered from that blow. They feel the effects of it still. In 1905, when their lands were already under threat, they petitioned Parliament that they were 'dispirited and helpless'.[2] We heard the echoes of that sentiment at our Waiohau hearing in 2004. The people still remember and they still grieve.

How did James Grant come to get a title recognised by the law to the ancestral land of Ngati Haka Patuheuheu, while they continued to live there? As Parliament and the courts have long recognised, the tribe lost ownership of their land through fraud. In 1886, local interpreter Harry Burt, who had purchased a minority of individual interests, bribed a handful of Ngati Manawa owners to come with him to the Native Land Court and lie about a voluntary arrangement among the owners. As a result, Judge Clarke partitioned the block, awarding just under half of it to two owners, who immediately sold it to Burt's financial backer (who then sold it to Mrs Burt). Burt's fraudulently obtained title was sold to parties

1. Throughout our report, we use the tribal name in common use by the people today. As to the historical distinction between Patuheuheu and Ngati Haka, see chapter 2.

2. Mehaka Tokopounamu and others for 'Patuheuheu Ngatimanawa and Te Urewera', petition, August 1905 (Battersby, comp, documents in support of 'Waiohau 1', (doc C1(b)), section 5, p 95)

who were bona fide (good faith) purchasers without notice of that fraud, and therefore protected under the land transfer system, ending with James Grant in 1907. The Land Transfer Act protected their titles, despite the 'grievous wrong' that the Supreme Court found that Ngati Haka Patuheuheu had suffered in 1886. Thus, of all the many players, Ngati Haka Patuheuheu were the losers, and the loss was their ancestral land.

In our inquiry, Crown counsel submitted: 'The Crown accepts the Waiohau fraud is a "very, very, sorry saga in the history of Ngati Haka Patuheuheu, and is a most painful grievance".'[3] On this point, the parties were agreed. Nonetheless, the Crown disclaimed the lion's share of responsibility, admitting only to some minor failures which, we were told, were not Treaty breaches. The claimants, on the other hand, maintained that the fraud should have been prevented by better protections in the law. Also, they argued that the Crown could and should have provided an effective remedy, as soon as the fraud was discovered. Its failure to do so was a serious breach of its Treaty duty of active protection. The Crown did not deny the harm that Ngati Haka Patuheuheu have suffered as a result; it simply disclaimed responsibility.

11.2 Issues for Tribunal Determination

The Crown and the claimants agreed that a fraud had been committed, but they differed sharply as to the Crown's liability under the Treaty. While the Crown conceded that it had failed in some minor respects, it argued that the main fault lay with the judges of the Native Land Court, and with what it saw as the claimants' decision not to take timely action in the Supreme Court. For that, the Crown blamed the claimants' lawyer, Henry Howorth. In the Crown's view, its Treaty obligation was met by inquiring into the fraud, and then advising the claimants that they must take legal action themselves. A legal remedy was available; no special action was therefore required on the part of the Crown. The claimants did not accept this argument. In their view, the fraud was only possible because of systemic flaws in the Native Land Court, and in the fraud prevention laws. As soon as it was exposed, the Crown's Treaty obligation was to provide a remedy. This, it failed to do. As they saw it, a serious breach of the Crown's Treaty duty of active protection had taken place. The eventual compensation – 300 acres for the loss of 7000 – was inadequate. The Crown accepted that it could never fully compensate Ngati Haka Patuheuheu for what they had lost, but argued that its compensation was adequate.

Given the failure of the parties to agree on the interpretation of key events, and the Crown's refusal to acknowledge any Treaty breaches, our analysis will focus on the following issues:

3. Crown counsel, closing submissions (doc N20), topics 8–12, p 78

- How was the Waiohau fraud able to be carried out, and did the Crown provide adequate protection to Ngati Haka Patuheuheu?
- How and when was the fraud exposed?
- Did the Crown do enough to provide a remedy while it still could?
- Did the Crown provide a fair and effective remedy after Ngati Haka Patuheuheu lost in the Supreme Court?

We address these issues before we make our findings.

11.3 Key Facts

Many of the key facts are not in dispute between the parties. The Waiohau 1 block, consisting of 14,464 acres, was awarded to Ngati Haka Patuheuheu in 1878. Some rangatira from the wider Tuhoe iwi, and also some prominent Ngati Manawa individuals, were included in the list of owners. In the early 1880s, Ngati Haka Patuheuheu formed a relationship with local interpreter Harry Burt, who was a land purchase agent for private parties. Burt lived with a daughter of the rangatira Wi Patene when he stayed at Te Houhi. The community appear to have been unaware that he also had a Pakeha wife. Burt helped the community interact with officialdom, and he supplied liquor and other goods. It was later a matter of dispute as to how far these supplies were part of the payment for individual interests in land.

The Native Land Act 1873 made the purchase of individual interests void but not illegal. In Court, a majority of owners could agree to partition for the purposes of sale, once a majority of interests had been purchased outside the Court. From 1882 to 1884, Burt bought up individual shares in Waiohau 1. He did not acquire close to a majority of shares. In 1889, Judge Wilson's inquiry exposed that Burt had acted as interpreter in his own transactions, had bought the interests of minors improperly, had failed to get many of the transactions witnessed properly, and may have paid partly in guns and alcohol. Nonetheless, these transactions were not subject to the scrutiny of a trust commissioner, under the Native Lands Frauds Prevention Act, which (as Wilson found) they should have been. A trust commissioner could not have certified some (perhaps any) of Burt's arrangements.

In the mid-1880s, tribal leaders tried to stop the sale of individual interests, and to repudiate the agreements that had already been made. They sought the help of Te Kooti to negotiate with Burt. Mediation was arranged, but Burt refused to accept the 1200 acres offered to him, and the tribe could not raise the money to repay both the purchase money and his claimed expenses.

In 1886, Burt circumvented this tribal opposition by bribing Ngati Manawa chiefs to appear with him in the Native Land Court. There, they told Judge Clarke that the owners had made a voluntary arrangement to transfer 7000 acres to Burt, in recognition of his

purchases. The judge called for objections – there were only seven people in Court, including Burt – and (unsurprisingly) there were none. Judge Clarke ordered the partition of Waiohau 1, with the 1B block of 7000 acres to be vested in Pani Te Hura (Peraniko Ahuriri) and Hira Te Mumuhu of Ngati Manawa. This block contained the main Ngati Haka Patuheuheu kainga, Te Houhi, as well as their cultivations, church, and urupa, and the best farmland. This Court order gave the new owners a land transfer title. They immediately sold Waiohau 1B to Burt's financial backer, John Soutter, with Judge Clarke as a witness. This deed of sale was certified by the trust commissioner in 1887. Ngati Haka Patuheuheu applied for a rehearing, but their applications were turned down by Chief Judge Macdonald on the advice of Judge Clarke.

In 1888, Soutter sold Waiohau 1B to Margaret Burt, Harry's wife. She immediately mortgaged half of the block, selling the other half to Henry Piper. The Burts tried to take possession of their part in 1889, sparking a petition from Ngati Haka Patuheuheu to Parliament. The Native Affairs Committee (of which James Carroll was a member) found that the petitioners had been the victims of a 'great injustice'. It recommended a fuller inquiry, with a view to restoring their rights. The Government charged Judge Wilson of the Native Land Court with that inquiry, and he examined papers and witnesses in 1889. In his findings, Wilson could not be sure that Burt had paid for land in guns or liquor, but he found that Burt's interest could never have amounted to more than 4128 acres, and that he was not legally entitled to anything. Ngati Haka Patuheuheu were not present in court, and they had not agreed to any voluntary arrangement, hence the court had no power to make the partition.

The Government referred Wilson's report to its solicitor, H D Bell, who thought that Burt's title could be overturned in the Supreme Court. On Bell's recommendation, the Crown wrote to Ngati Haka Patuheuheu in January 1890, promising all the assistance in its power to obtain their rights, and offering Bell's services if they wanted to take the case to the Supreme Court. It also asked the district land registrar to lodge a caveat, which was done for Burt's half of Waiohau 1B (but not Piper's). Ngati Haka Patuheuheu signalled their intention to go to court, but at first preferred to use parliamentarian Hirini Taiwhanga's lawyer, Henry Howorth, instead of Bell. In April 1890, they met with G F Richardson, the Minister of Lands, and asked the Government to take the case for them, which they could not afford. At first, the Government was still willing to help but demurred because the tribe had engaged Howorth. Later in the year, however, it made two policy changes: it would act entirely neutrally between the two sides; and, upon learning that Ngati Haka Patuheuheu did not intend to go to court on their own, it told the district land registrar that the caveat could now be withdrawn. The registrar removed the caveat the same day, although the tribe was never informed.

Caveats under the Land Transfer Act 1885

The Land Transfer Act 1885 empowered the district land registrar to enter a caveat to prohibit any dealings in land, for the 'prevention of any fraud or improper dealing'.[1] Once a caveat was lodged, the registered owner (in this case, Mrs Burt) could not get any sale, lease, mortgage, or any other kind of transfer legally registered under the Land Transfer Act.[2] Also, the caveat served as notice to any prospective purchasers that Ngati Haka Patuheuheu had an equitable interest in the land.[3]

1. Land Transfer Act 1885, s 175(4)
2. Ibid, s 142; see also second schedule, form L
3. Crown counsel, closing submissions (doc N20), topics 8–12, p 81

In 1891, Ngati Haka Patuheuheu approached the new Liberal Government for assistance, but were told that the previous Government's policy could not be changed. Despite further approaches to Seddon and Carroll from 1894 to 1896, the Government neither took the case to court, nor provided assistance to do so. The result was a stalemate: Ngati Haka Patuheuheu could not afford to challenge Burt and Piper in court, but nor were Burt and Piper willing to risk a Supreme Court action themselves. This situation changed in 1903, when the Methodist mission foreclosed on Burt's mortgage. The mission sold Burt's part of Waiohau 1B (which included Te Houhi) in 1904 to Margaret Beale, a speculator who sold it to James Grant for a large profit. The arrangement with Grant was conditional on the removal of the Maori occupants, so the Beales took action in the Supreme Court. The tribe's new lawyer, Frederick Earl, asked for special legislation to prevent a court battle, but the Government turned him down.

Ngati Haka Patuheuheu lost in court in 1905, although the judge was sympathetic and stated that a 'grievous wrong' had been done them. Justice Edwards found that Burt's title had been obtained by fraud, but that the Land Transfer Act 1885 protected Mrs Beale. He 'found on the evidence before him that Beale had not acted fraudulently (and how the Torrens system could be used with the result that a bona fide purchaser for valuable consideration obtained an indefeasible title at the expense of the persons defrauded)'.[4] While Beale was aware that her vendors had never been in possession, she could not be shown to have known that they had acquired their title by fraud, and was therefore a bona fide purchaser.

In the wake of the Supreme Court decision in 1905, Ngati Haka Patuheuheu again petitioned Parliament for help. Carroll decided to buy the land back from Mrs Beale, but his negotiations were fruitless. Neither Beale nor Grant was willing to sell to the Crown, even

4. Crown counsel, closing submissions (doc N20), topics 8–12, p 83

though it matched Grant's price. In the meantime, Mrs Beale sent in the sheriff and bailiffs, took further court action, and tried to evict the Waiohau community – without success, although at a considerable cost to the people. Carroll switched to compulsion, informing Mrs Beale in February 1906 that her land would be acquired under the Land for Settlements legislation, and lodging a caveat against the title for that purpose. No further action was taken, however, and Mrs Beale completed the sale to Grant a year later, when the caveat expired. In 1907, Grant moved to evict the Waiohau community. This time, he took direct action and destroyed their crops. Final appeals to the Crown met with no response, so Ngati Haka Patuheuheu had to leave their ancestral home. The eviction of Ngati Haka Patuheuheu was a national scandal. Grant refused to let them remove their wharenui, using it as a hay barn until the Government purchased it from him in 1908. Ngati Haka Patuheuheu moved the whare to their new home on Waiohau 1A.

Also in 1908, the Government arranged compensation in the form of a 300-acre block of land at Te Teko. This land was vested in the Waiariki District Maori Land Board, and its beneficial owners were not identified until 1920.

11.4 Essence of the Difference between the Parties

As we noted above, the Crown accepted that 'the Waiohau fraud is a "very, very, sorry saga in the history of Ngati Haka Patuheuheu, and is a most painful grievance"'.[5] While agreeing with the claimants on that point, the Crown argued that it had met all of its Treaty and legal obligations to the Waiohau community. In its view, the fraud was brought about by a series of one-off failures in protection mechanisms and the application of the law, as a result of 'human error', not faults in the system. The individuals most responsible for the tragic loss of Waiohau lands were Judge Clarke and Chief Judge Macdonald of the Native Land Court. Failures on their part were not actions of the Crown. Once their failures came to light, there was a legal remedy available: placing a caveat on the title, in conjunction with challenging the titles in the Supreme Court. The individual only 'marginally' less responsible than the Native Land Court judges was Henry Howorth, the lawyer engaged by Ngati Haka Patuheuheu. On his advice, the claimants rejected the legal remedy available to them. The tragic consequence was their unavoidable eviction in 1907. While the Crown did invite the district land registrar to remove the caveat, it could not direct him to do so; he presumably exercised his independent discretion in doing so.[6]

The Crown conceded that some of its actions made a minor contribution to the loss of Te Houhi. These included its failure to:

5. Crown counsel, closing submissions (doc N20), topics 8–12, p 78
6. Crown counsel, closing submissions (doc N20), topics 8–12, pp 78–84

- inform the Waiohau community that a caveat had not been lodged against the title of the part sold to Piper;
- find out for itself whether the Waiohau community intended to take legal proceedings before 'inviting' the district land registrar to withdraw the caveat;
- inform the community that the caveat had been withdrawn because of their reported decision not to take their case to the Supreme Court; and
- meet with the community 'face to face and discuss with them both the necessary limits on what assistance the Crown could provide and reiterate the soundness of [Crown solicitor] Bell's advice and set out the potential consequences in failing to take action as recommended by Bell'.[7]

Nonetheless, the Crown's position was that its Treaty and legal obligations were fulfilled by inquiring into petitions (the Wilson inquiry), seeking its solicitor's advice on Wilson's report, and providing that advice to the claimants. The claimants then chose not to take the recommended action. When the eviction could not be avoided, the Crown provided adequate compensation in the form of land at Te Teko, even if such compensation could never remove the prejudice.[8]

The claimants did not accept that the Crown's concessions of failure were adequate. In their view, the law and its protection mechanisms failed, regardless of which individual was responsible. The fault lay with processes, not human error. In particular, the failure of the trust commissioner's inquiry was attributable to serious flaws in the system. Nor did they accept that the district land registrar acted on his own discretion. He was clearly instructed by the Crown.[9]

The claimants conceded that a large share of responsibility belonged with the Native Land Court judges, and that those judges were not agents of the Crown.[10] But, in their view, the Crown was obliged to provide a fair and proper remedy as soon as the Court's failures were exposed. The 'key grievance' of Ngati Haka Patuheuheu is that the Crown failed to provide an adequate remedy when its 'systems failed so spectacularly'.[11] The Crown's actions were 'unconscionable' because it 'essentially allowed the matter to unfold over a period of around seventeen years with the final consequence that an entire community of people were evicted from their village'.[12] At some point during that long period, it must have been obvious that special legislation was the only remedy. In the 'extraordinary circumstances such special legislation was warranted and, given that the land included the eviction of an entire community, there must have been grounds for disrupting the indefeasibility of the land transfer

7. Crown counsel, closing submissions (doc N20), topics 8–12, p 79
8. Crown counsel, closing submissions (doc N20), topics 8–12, pp 83–84
9. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), pp 27–46; counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), pp 29–32
10. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 36
11. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 30
12. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 30

title."[13] Counsel for Wai 36 Tuhoe commented: 'The travesty of justice was that the Crown, which had enacted statute after statute to take Maori land, could not pass the simple legislation required to return the land and remedy the fraud."[14]

The grant of a mere 310 acres in compensation, without sufficient consultation and situated outside the tribal rohe, was entirely inadequate.[15]

11.5 Tribunal Analysis

11.5.1 How was the Waiohau fraud able to be carried out, and did the Crown provide adequate protection to Ngati Haka Patuheuheu?

Summary answer: *In 1886, Harry Burt bribed a handful of Ngati Manawa chiefs to attend a partition hearing for Waiohau 1, and to lie to Judge Clarke about a voluntary agreement among the owners. This alleged voluntary agreement was for 7000 acres to be cut out of Waiohau 1, in satisfaction of Burt's purchase of individual interests. No such voluntary agreement existed. Only seven people attended the Court, of whom three were not owners, yet Judge Clarke accepted the supposed voluntary agreement and partitioned Waiohau 1 accordingly. Ngati Haka Patuheuheu were neither present nor represented. Waiohau 1B, containing their principal kainga (Te Houhi) and best farmland, was awarded to two Ngati Manawa chiefs, who then sold it to Burt's financial backer, Soutter. A year or so later, Soutter sold it to Burt's Pakeha wife, Margaret.*

The parties in our inquiry agreed that a fraud was perpetrated in the Native Land Court. They did not agree on who was responsible for allowing for such a thing to happen under the native land laws. According to the Crown, the Waiohau fraud was able to be carried out because of human error on the part of Judge Clarke. The native land laws provided sufficient protections for the prevention of fraud, but his 'unfathomable performance' defeated those protections. In particular, voluntary agreements could not defeat the requirement that a private purchaser acquire a majority of interests before partition (which Burt had not done). Secondly, the fraud should have been uncovered at a rehearing, but the chief judge did not deal properly with the rehearing applications. Again, this was a failure on the part of the chief judge. Neither Judge Clarke nor Chief Judge Macdonald was an agent of the Crown.

The claimants agreed that these judges were not Crown agents, but pointed to systemic failings underpinning their poor performance. We agree:

- *The native land laws did not require mandated tribal leaders or bodies to participate in the Court's proceedings, or to decide titles independently of the Court. Such a provision*

13. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 31
14. Counsel for Wai 36 Tuhoe, closing submissions, Part A, 31 May 2005 (doc N8), p 42
15. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 44

would have prevented the fraud. As the Native Affairs Committee found, there was a 'want of security' for the 'proper representation' of Maori owners in the Court.

- *The law allowed the trust commissioners to check post-partition transactions, instead of the dealings that resulted in the partition. This was a systemic flaw. Not only had Burt failed to acquire a majority of interests, but, as Judge Wilson later found, the circumstances of his individual purchases would have resulted in some (perhaps all) being rejected under the criteria applied by the trust commissioners.*
- *Had the legislation required, as it should, that applicants for rehearing were entitled to be heard, then the rehearing applications in this case would have disclosed facts which would have inevitably meant the grant of a rehearing. At the subsequent rehearing, Burt would have had no prospect of success.*
- *The legislation provided no right of appeal from either the original decision or from the Chief Judge's refusal to grant a rehearing to Ngati Haka Patuheuheu. An appeal would likely have resulted in the overturn of the fraud.*

The Crown's native land laws did not protect the tino rangatiratanga of Ngati Haka Patuheuheu in respect of their Waiohau lands. Systemic failings allowed the Waiohau fraud to be perpetrated in the first place, and then prevented its timely exposure on appeal.

(1) *Introduction*

The parties agreed that the Native Land Court played a key role in allowing the Waiohau fraud to take place. The Crown blamed 'human error' on the part of Judge Clarke and Chief Judge Macdonald; the claimants blamed poorly designed systems with ineffective protection mechanisms. In any case, the Native Lands Frauds Prevention Acts were a backstop that should have protected the Maori owners from fraudulent dealings. The parties agreed that this legislation failed, but again could not agree on the cause. According to the Crown, it was the judge's fault for making a partition order without checking the underlying transactions, so that the trust commissioner had no choice but to vet the post-partition sale. The claimants identified this as a broader weakness in the law, not limited to a single mistake by a judge. There were two levels of improper dealings: first, the many alleged flaws in Burt's original purchase of individual interests; and, secondly, the fraudulent partition obtained from the Native Land Court, which allowed a new deed to be signed and then certified by the trust commissioner.

(2) *The purchase of individual interests in Waiohau 1*

As we have seen, Waiohau 1 was a block of 14,464 acres, awarded to 158 individuals in 1878. The majority of the owners were Ngati Haka Patuheuheu, although the list also included some chiefs of the wider Tuhoe iwi, and a few of their Ngati Manawa relations. The Ngati Haka Patuheuheu community continued to use the Waiohau lands and resources as before,

11.5

Ngati Haka Patuheuheu's Account of the Waiohau Fraud

At our hearing at Waiohau on 22 March 2004, Robert Pouwhare delivered Ngati Haka Patuheuheu's account of the Waiohau fraud:

> One day there appeared a thieving ghost called Harry Burt. But who is this person? One of his names was Hare Paati. Another of his names was Hare Rauparaha. His main interest in activity here was going in amongst our people to buy shares in land.
>
> In those early days, according to our people, Harry Burt was extremely friendly with the land surveyors, Preece and Henry Mitchell, and our old people concluded that Harry Burt was engaged in theft (fraud, of our lands) right from the start.
>
> Even though he was a Pakeha, his common name amongst us was Hare Paati. Many mistook him for Maori. He spoke fluent Maori, he was an interpreter for the Native Land Court. We heard he was a Maori from Ngati Raukawa, but one of his names was Hare Rauparaha and he also said he was from Ngati Toa.
>
> He also took to wife the daughter of the Chief Wi Patene Tarahanga, but the old women knew it was calculated so he could inveigle himself into her heart and into her thighs, (that is the old people's words).
>
> However, Ngati Haka-Patuheuheu and other Maoris of this region did not know he was still married to his Pakeha wife, Margaret Burt.
>
> When he finally acquired Ngati Haka-Patuheuheu land (7,000 acres) he continued to commit theft by transferring through law, this land to his Pakeha wife Margaret Burt – unbeknownst to the Maori.
>
> So therefore for us, we suffered great pain, huge fury with this ghost – this despicable fraudster Harry Burt.
>
> He was a liar, deceitful, a thief, a thief of land – a fraudster. He fed our people alcohol in order to take land. He seduced Peraniko and Te Mumuhu with alcohol and money to steal our land.
>
> We have in our possession the legacy of Te Umutaoroa. The histories were left with our rangatira Hieke Tupu. Out of the discourse on Te Umutaoroa emerges a clear picture of Harry Burt's fraud. Te Umutaoroa grew out of the betrayal by Harry Burt of Te Kooti and the betrayal of Ngati Haka-Patuheuheu.
>
> Te Kooti left Te Umutaoroa at Te Houhi and it is said that that is the payment of the sins of Harry Burt – that which is contained in Te Umutaoroa – it is said Te Kooti's chosen child will one day come to uncover the hangi of Te Umutaoroa, the earth oven of long cooking.
>
> When the lands of Waiohau and Te Houhi were taken by Harry Burt, Te Kooti heard of this. He said:
>
> *There will come a time when Harry Burt's money will be like a pit of rotting potatoes.*

Ngati Haka-Patuheuheu began to follow Te Kooti in earnest – this was the end of the relationship between Harry Burt and Te Kooti.

Later the Law Courts confirmed Harry Burt's fraudulent activities.

Burt then proceeded to bribe Maori for their shares – when he acquired these he went to the Court and requested partitions under his pseudonym Hare Rauparaha. The Court agreed to put this land under Te Mumuhu and Peraniko, and from them the land was transferred to Harry Burt's banker Souter. Land was then transferred to Harry Burt's wife, Margaret Burt, who onsold it later to Piper. All of this activity of selling and transfer took place on one day, the day of the Court sitting.

Now to come back to Te Umutaoroa. According to Hieke Tupe, Te Kooti came to Te Houhi. There was a hui there, a meeting about land. When Te Kooti slept, he dreamt that the Rangitaiki was totally covered with mist. That place where he slept, he named it Te Umutaoroa. He placed eight powerful gifts in this umu, in this hangi – and then he said:

> *. . . tao ake nei tao ake nei*
>
> *kei te haramai taku tamaiti hai huki i Te Umutaoroa . . .*
>
> *[This oven will cook for a long time but one day my chosen one will come to uncover Te Umutaoroa and the gifts and the powers which lie therein]*

- te mauri atua: — (the essence of spirituality, belief in God)
- te mauri whenua: — (the life force of the land)
- te mauri tangata: — (the life force of the people)
- te mauri whakapono: — (the power of belief or faith)
- te mauri whakaora nga iwi: — (the power to heal the people)
- te mauri hohonu: — (the mauri of hidden wealth – minerals, gold, diamonds and oil perhaps underground)
- te mauri arai atu i nga pakanga: — (the power to return war from this land to other countries)
- te mauri whakahoki i nga iwi: — (the power to return people to their land)

For us Te Umutaoroa is a symbol for all land lost. We wait now for the fulfilment of Te Kooti's dream – that our land may one day be returned.

These stories we teach to our future generations so that these prophecies of Te Kooti will never die. We try to instill in our grandchildren the truth, to seek the right path, so that our lands are returned and all the resources stolen from us by tauiwi and the Native Land Court and the fraudsters be returned to us.

It was well after, a Court sitting examined Waiohau lands and the activities of Harry Burt. At that Court Harry Burt conceded that the two Maori he placed on the title of Waiohau 1B (that is, Peraniko and Te Mumuhu) had no authority to be on the title – they had no authority to represent or speak on behalf of the people.

Later word reached our people from Wellington. One of the parliamentary committees and the Supreme Court said *'a great injustice'* was inflicted upon Ngati Haka-Patuheuheu.

Now do you remember Piper and Margaret Burt – Ngati Haka-Patuheuheu continued to occupy Te Houhi even though Harry Burt had purchased it.

Piper then turned to the law to evict Ngati Haka-Patuheuheu from Te Houhi.

We still continued to occupy our lands. Our school had been established; our homes as well as our ancestral house, Tama ki Hikurangi.

I ki etahi kaare nga Harry Burt me nga Pakeha i mahi tinihanga

Some people maintain that Harry Burt and the Pakehas did not commit fraud.

Our ancestors did not agree: they believed all Pakeha concerned were fully aware. Harry Burt, his wife, the farmers of Galatea, Piper, Margaret Beale, and even Preece and Mitchell, the surveyors.

To our ancestors the theft was well calculated – the theft of our lands was carefully crafted – they had seen the lands of Kuhawaea and Te Houhi were excellent lands – flat, access to water and food, and animals grew well.

In the contemporary context these same lands have farms worth in excess of One Million Dollars – Pakeha farms in Galatea and Te Houhi.

So we were evicted. According to the old people, they had to call for the police from Rotorua, soldiers from Auckland. They had guns to sack our ancestors, adults and children alike. It was a time of great fear for Ngati Haka-Patuheuheu.

The old people related that many people cried, old women wailed and lamented. The children were frightened – and even men cried as well as the elders, because they knew already they had lost the lands at Kuhawaea, at Matahina, at Tuararangaia, at Kaingaroa, and now Waiohau Te Houhi. It wasn't till much later that we lost Hikurangi/Horomanga.

Some of our chiefs and people were imprisoned in Auckland. James Grant (Karati) became the new owner of Te Houhi. He destroyed all our food crops, our gardens. He destroyed our homes, then sacked both animals and people. The Pakeha Grant did not agree to release our ancestral house Tama-ki-hikurangi.

He filled it instead with hay and horses until the Maori paid him, before he would allow us to come and fetch our house.

Tama-ki-hikurangi was broken down into bits and brought down to Waiohau on carts and floated some pieces down the Rangitaiki River. It was then reconstructed and re-established in Waiohau; that is how we came to stay in this valley.

It was some time later that our old people went up to exhume the bones of our ancestors buried at Te Houhi. It was the parents of some of these people sitting here who were involved in that exhumation.

> The Government had little sympathy for us. They considered buying land for us as compensation for the 7,000 acres lost to the Pakeha. The Government bought 310 acres at Te Teko. Later, the Government conceded that land at Waiohau was taken wrongfully, and the quote there is *"wrongfully dispossessed"*.
>
> Our ancestors didn't really want that land. They didn't want to stay on that land in the territory of Ngati Awa; it was not our land.[1]

1. Robert Pouwhare, brief of evidence, 14 March 2004 (doc C15(a)), pp 38–43

with their principal kainga and cultivations in the southern part of the block, at Te Houhi. As part of their engagement with the settler world, an alliance was arranged with Harry Burt, a private land purchase agent. He stayed often at Te Houhi, lived with a daughter of Wi Patene when he was there, advanced cash and goods, and helped the tribe to deal with officialdom. Capitalising on this arrangement, Burt began buying up individual interests in Waiohau from 1882. At the same time, another private purchase agent, Alfred Preece, who was also married to a local woman, began to negotiate with individuals to purchase their Waiohau shares. For a while, Burt and Preece competed with one another, protected by their respective relationships with the tribes. Some individuals sold to both, but neither of them obtained close to a majority of interests.[16]

According to later claims, Burt did not always pay for shares in cash. He advanced goods, including alcohol and firearms. The significance of those claims, of course, was that a trust commissioner could not certify for registration any purchase involving liquor or guns. Burt did not deny providing alcohol to Tuhoe communities. He claimed, however, that it was never used as payment for land, and that the guns were stolen from his whare at Te Houhi. A later inquiry (1889) did not accept Burt's story about the theft. Nonetheless, it could not be proven to Judge Wilson's satisfaction that alcohol and firearms had been part of the purchase price. Ngati Haka Patuheuheu, on the other hand, never departed from their conviction that both had been used in the payment for individual interests.[17]

In any case, purchasing of interests stalled in 1884, in the face of tribal opposition. As Burt later testified, no one wanted to own up to having sold their share when faced with a tribal hui.[18] Robert Pouwhare commented:

16. Binney, 'Encircled Lands', vol 2 (doc A15), pp 46–50; Battersby, 'A report on Waiohau 1 Block', a report commissioned by the Crown Law Office, February 2004 (doc C1), pp 8–16
17. Binney, 'Encircled Lands', vol 2 (doc A15), pp 57–58, 328; Battersby, 'Waiohau 1' (doc C1), pp 14, 21, 24–44
18. Battersby, 'Waiohau 1' (doc C1), p 33

11.5.1

> In the dealings of the Native Land Court, some of our people sold leases, even land. Some didn't. Those who didn't sell staunchly believed in Te Kooti Arikirangi. Therefore, for those families who sold, they still feel great shame.[19]

Tuhoe and Ngati Haka Patuheuheu leaders struggled to prevent any more picking off of individual interests. Wi Patene was still supporting Burt at that stage, and he applied to the Native Land Court for a partition of the shares that had been sold. Other leaders opposed this move. A hui was held in April 1885, at which Mehaka Tokopounamu and other sellers repudiated their arrangements with Burt. The majority of the owners, who had not sold their shares, insisted on this course of action.[20]

Under the Native Land Act 1873, Burt's purchases were void. He had no legal recourse, not having been able to secure a majority of signatures. But the tribe did not want to go back on the word of various individuals (including chiefs such as Wi Patene and Tokopounamu). A mediation was arranged, with a committee consisting of Te Arawa leaders Retireti Tapsell and Aporo Te Tipitipi (independent of both sides), Henry Mitchell representing Burt's interests, and a group of Tuhoe chiefs. The result was an offer of 1200 acres to Burt, representing what the committee considered his purchases to be worth.[21]

Burt refused to accept this compromise, arguing that his shares amounted to 3000 acres.[22] A second hui was held at Te Houhi in January 1886, involving almost all the leaders of Tuhoe. The committee sat for a second time, and on this occasion the decision was that Burt's money should be refunded. Shortly afterwards, the people placed Waiohau under the protection of Te Kooti, seeking his help in dealing with Burt. The prospect of a refund of the actual cash he had paid was not attractive to Burt, and he insisted that he be compensated for a variety of expenses as well. The sum of £1200 was finally agreed but Tuhoe were unable to raise the money, so the committee's decision lapsed. Te Kooti did try to negotiate with Burt. According to Professor Binney, there was hostility between these two men who had once had a friendly relationship. Te Kooti's involvement only made Burt more determined.[23]

In the face of tribal opposition, Burt filed applications for partition – occasionally under the pseudonym of Hare Rauparaha, but also listing the names of other owners. He forged a new alliance with the leaders of Ngati Manawa, who had been included in the ownership list for Waiohau 1. With their support, he was successful in getting a hearing and partition in September 1886.[24]

19. Pouwhare, brief of evidence, 14 March 2004 (doc C15(a)), p 29
20. Binney, 'Encircled Lands', vol 2 (doc A15), p 51
21. Binney, 'Encircled Lands', vol 2 (doc A15), pp 51–52; Battersby, 'Waiohau 1' (doc C1), pp 41–42
22. Battersby, 'Waiohau 1' (doc C1), p 42
23. Binney, 'Encircled Lands', vol 2 (doc A15), pp 52–53, 59–60; Battersby, 'Waiohau 1' (doc C1), p 34
24. Binney, 'Encircled Lands', vol 2 (doc A15), pp 51–54; Battersby, 'Waiohau 1' (doc C1), pp 8–10

(3) *The 1886 hearing: fraud is committed*

In 1886, the Native Land Court partitioned Waiohau 1. A block of 7000 acres (1B) was awarded to two Ngati Manawa chiefs, who sold it the next day to Burt's financial backer, John Soutter. Mr Soutter then sold Waiohau 1B to Burt's Pakeha wife, Margaret, in 1888. This part of the block included the Ngati Haka Patuheuheu kainga, Te Houhi, as well as their cultivations, their urupa, and the best farmland. A slightly larger block (7,464 acres) was awarded to all the former owners of Waiohau 1, seller and non-seller alike, although the sellers were to have less than a full share each. According to later inquiries by Judge Wilson of the Native Land Court, by a parliamentary select committee, and finally by the Supreme Court, this partition was obtained by fraudulent means. The parties in our inquiry agree that fraud was committed.

First, it is clear that Ngati Haka Patuheuheu were neither present nor represented at this hearing. Earlier attempts to hold a partition hearing had been adjourned in their absence. This time, however, Ngati Manawa chiefs claimed to speak for all the owners, and assured the Court that a voluntary arrangement had been reached, giving Burt 7000 acres as a result of his purchases. Judge Clarke accepted that these leaders represented the owners (both sellers and non-sellers). These chiefs and their tribal affiliations were known to him, and he had (so Burt later testified) a history of relying on their word. There were seven people in Court, including Burt, and only four of the seven were actual owners. There were no members of Ngati Haka Patuheuheu present.[25]

The fraud is encapsulated in Burt's later description of the hearing:

> The principal chiefs and owners of the land did come to the Court and a voluntary arrangement was come to by them which resulted in 7,000 acres being cut off. Judge Clarke having known these natives for 20 years (as he told me) was satisfied with the voluntary arrangement come to.
>
> Harehare the principal chief was there (he being a non-seller) and protected the interests of the non-sellers, and agreed that this portion [Waiohau 1B, including Te Houhi] should be cut off by the Court, to represent the interests of those who sold to me.[26]

Secondly, it was later proven from their own testimony that the Ngati Manawa chiefs were bribed to attend Court and lie to the judge. Harehare Atarea and Te Mumuhu told Judge Wilson that Burt offered them 1000 acres each, as well as a sum of money. Atarea was at first unwilling to support a claim for 7000 acres, but the bribe overcame his reluctance. In his own view, he was the leading chief of the district, with authority to make the partition. But – and this is the crucial point – the Court was told that a voluntary agreement had been reached among all the owners. Burt contested the evidence of Atarea and Te Mumuhu that he had promised them land and money, although conceded that he had paid their expenses,

25. Battersby, 'Waiohau 1' (doc C1), pp 9–10, 16–17, 45–48; Hayes, 'Waiohau' (doc L15), pp 9–12
26. HR Burt, statement for Judge Brabant, 10 December 1887 (Battersby, 'Waiohau 1' (doc C1), p 16)

and that Atarea had at first opposed his claim for a full 7000 acres.[27] Thirdly, giving notice to Ngati Haka Patuheuheu was entrusted to Burt. Apart from the *Kahiti*, which they claimed never to have received, Judge Clarke gave notices to Burt and his Ngati Manawa associates to deliver. Later, Burt and Te Mumuhu claimed to have handed over the Haka Patuheuheu notice to a neutral man named Te Wiremu. This man refused to appear at Judge Wilson's inquiry and give evidence as to whether he had – as Burt claimed – delivered the notice to Te Houhi.[28] Binney suspected that Ngati Haka Patuheuheu may have boycotted the hearing, but their own testimony was that they never received notice.[29]

According to the Crown's witnesses in our inquiry, Dr Battersby and Mr Hayes, this fraudulent partition should have been prevented by protection mechanisms in the native land laws. It was clear to the Court that Burt had not (and did not claim to have) purchased a majority of interests. Under the 1873 Act, partition for the purpose of sale required such a majority. The provision for voluntary arrangements was not supposed to allow evasion of this rule. Even if that were not the case, there was in fact no voluntary arrangement among the owners. It was the invention of Burt and his Ngati Manawa allies, and easily proven to have no substance (as Judge Wilson later found).[30] Also, Judge Clarke did not vet the actual purchase itself, although the law required him to do so, since it was clearly understood to be the cause of the partition.[31] Judge Wilson's later inquiry in 1889 uncovered problems with Burt's supposed purchases and receipts. At the most generous estimate, Burt would have been entitled only to 4128 acres, not 7000.[32] Under the law, of course, he was strictly entitled to nothing at all, having not obtained a majority of signatures. Finally, the location of Burt's share was decided in the absence of Ngati Haka Patuheuheu. A full inquiry ought to have uncovered that their principal kainga and cultivations were located in the part sold to Mrs Burt (via Soutter).[33]

(4) *The immediate aftermath of the fraud: Ngati Haka Patuheuheu apply for a rehearing and a trust commissioner certifies the sale of Waiohau 1B*

The purchase of Waiohau 1B was certified by a trust commissioner in 1887. As with the fraudulent partition, this ought not to have been possible. According to Crown counsel, it was an unavoidable failure. The Court had awarded the land to two Ngati Manawa chiefs, who immediately sold it to Soutter. This sale was properly witnessed by Judge Clarke and his registrar. The commissioner had to accept that these were the legal owners, and therefore that this was the transaction he had to check. 'For this reason,' suggested Crown counsel,

27. Battersby, 'Waiohau 1' (doc C1), pp 16, 35–36
28. Battersby, 'Waiohau 1' (doc C1), pp 9–12, 20–21, 22–23, 28, 31–32, 34–35, 45
29. Binney, 'Encircled Lands', vol 2 (doc A15), p 53
30. Hayes, 'Waiohau' (doc L15), pp 4–13
31. Hayes, 'Waiohau' (doc L15), pp 7–8
32. Hayes, 'Waiohau' (doc L15), p 11
33. Battersby, 'Waiohau 1' (doc C1), pp 11, 23–25, 34, 36–37

'the protection mechanism located in the functions of the Trust Commissioners cannot be said to have failed.'[34]

Claimant counsel took a broader view. Accepting the premise that the Native Lands Frauds Prevention Acts were supposed to protect Maori from fraud, then they clearly failed to do so. The commissioner did not inquire into the transactions between Burt and the individuals whose interests he claimed to have purchased. Neither did Judge Clarke. Yet these alienations were the basis for the partition that actually took place in 1886. Thus, there was no proper inquiry into the real transactions, some of which were (as Wilson later found) in breach of the Acts. Since none of the criteria provided for in the Acts (see ch 10) were used to measure Burt's actual transactions, the protection mechanism failed.[35]

In Te Urewera, we do not have a large number of private transactions by which to measure this failure. As we noted above, the usual process was for purchasers to obtain a trust commissioner's certificate before a partition hearing. The Supreme Court had queried this in 1885, suggesting that the commissioners could not certify something that did not legally exist.[36] In the case of Waimana in 1885, the same practice had been used as in Waiohau: the Court partitioned the land and awarded part of it to the sellers, who then signed a new conveyance to the purchaser, which was the transaction checked by the trust commissioner. As we found above, it is difficult to see how the intent of the Native Lands Frauds Prevention Acts could be carried out in those circumstances.

The official sale of Waiohau 1B took place in Court the day after the hearing. Some 12 days later, Ngati Haka Patuheuheu found out about what had happened.[37] Hira Te Mumuhu travelled to Te Houhi and showed them a map, explaining that they would have to move out of their homes.[38] They at once applied to the Chief Judge for a rehearing:

> We were not aware of the adjudication by Harepati [Hare Pati: Harry Burt] and his people. No intimation of it reached us, nor any notice to inform us that we might know that there was to be an adjudication . . .
>
> Let there be a Rehearing upon that investigation: because our dead, our houses, and our cultivations, are all gone into this division of the block to Harepati.[39]

In addition to this application from Ngahoro Wahawaha (younger brother of Wi Patene), there was another application from Ngati Haka Patuheuheu, led by Hetaraka Te Wakaunua, Wi Patene, and Mehaka Tokopounamu.[40] There was also an application from Harete

34. Crown counsel, closing submissions (doc N20), topics 8–12, p 79
35. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 33; counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 29
36. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 455–456
37. Battersby, 'Waiohau 1' (doc C1), p 11
38. Binney, 'Encircled Lands', vol 2 (doc A15), p 56
39. Ngahoro Wahawaha to Chief Judge Macdonald, 23 September 1886 (Battersby, 'Waiohau 1' (doc C1), p 11)
40. Battersby, 'Waiohau 1' (doc C1), p 11; Binney, 'Encircled Lands', vol 2 (doc A15), p 54

Peraniko, which Burt protested against because she was one of the owners who had actually been in Court.[41] Harehare Atarea, still working with Burt at this point, sent an objection to any rehearing, claiming that notice had been given to Ngati Haka Patuheuheu, and also that his was the mana to make decisions about the land 'and all the tribes in my district', as Judge Clarke well knew.[42] Burt also wrote to object to the applications, denying that there was anything improper in his purchases (as had been alleged). He claimed that the chiefs and 'twenty other of the principal people of the Ngatimanawa and patuheuheu [*sic*] were at the Court all the time the subdivision was going on'. According to him, the rehearing application was a form of blackmail, to get more money out of him.[43]

Chief Judge Macdonald consulted Judge Clarke, who advised:

> The notification for the subdivision of the Waiohau Block was in the 'Panui' for a long time. Before the case was called on I took particular care that the parties interested should not be taken by surprise. I sent a special notification to the people that the application would be heard on a particular day. I was satisfied that a representative number of the tribe were present, sellers and non-sellers. The assessor and myself were satisfied that we had not the least difficulty arriving at the decision we did. I cannot recommend the application for a rehearing applied for.[44]

Acting under the Native Land Court Act 1880, the Chief Judge did not give Tuhoe and Ngati Haka Patuheuheu an opportunity to be heard on their applications. Instead, he adopted Judge Clarke's recommendation and refused a rehearing.[45] It is startling that the Chief Judge failed to hear those who sought a rehearing, relying simply on a report from the judge whose decision was impugned. We note that the legislation was later amended in 1888, to require the Chief Judge to hear applicants for rehearing in open Court.[46] This amendment came too late for Ngati Haka Patuheuheu.

The Supreme Court found that the fraudulent partition would have been overturned at this point in events, if the rehearing had been granted.[47] It also found that the Chief Judge had not dealt with these applications in a proper manner. He ought not to have dismissed them without hearing the applicants – and one application he did not seem to have processed at all.[48] This failing was not limited to Waiohau. As we have seen in chapter 10, the same thing happened in Kuhawaea, where Chief Judge Davy commented that his prede-

41. Battersby, 'Waiohau 1' (doc C1), pp 11–13
42. Battersby, 'Waiohau 1' (doc C1), pp 11–12
43. Burt to Hammond, 15 December 1886 (Battersby, 'Waiohau 1' (doc C1), p 13)
44. Judge Clarke, minute, 15 November 1886 (Battersby, 'Waiohau 1' (doc C1), p 12)
45. Battersby, 'Waiohau 1' (doc C1), pp 12–14; Hayes, 'Waiohau' (doc L15), pp 13–14; see also the Native Land Court Act 1880, s 47
46. Native Land Court Act 1886 Amendment Act 1888, s 24
47. Binney, 'Encircled Lands', vol 2 (doc A15), p 336
48. Hayes, 'Waiohau' (doc L15), pp 13–14

> *It is much to be regretted that the Chief Judge of the Native Land Court did not deal regularly with the applications for a rehearing of the proceedings upon partition. If he had done so, and had made a patient investigation of the matter, the wrong which the Native defendants have undoubtedly suffered must have been established and rectified, as it should have been, by the Native Land Court at the time.*
>
> *Beale v Tihema Te Hau* (1905) 24 NZLR 883, 888

cessor had acted illegally in not hearing applicants before dismissing their applications for rehearing.[49]

(5) *Fixing systemic problems: legislative remedies in 1890 and 1894*

As we shall see, the Native Affairs Committee inquired into Ngati Haka Patuheuheu's grievance in 1889. In its report, the committee identified 'the want of security there is in Native Land Courts for the proper representation of the Native owners'.[50] In the wake of this report, and of the Wilson inquiry, the Atkinson Government took action to fix the problem. In 1890, it tightened up the rules for voluntary arrangements. Such arrangements now had to be reduced to writing, and signed by everyone concerned. The Court could not just accept the document as proof, but had to check the authenticity of the signatures and satisfy itself as to the 'bona fides of the arrangement'.[51] Had this clause been in the law in 1886, the Waiohau fraud could never have happened. While we accept the Crown's submission (outlined above) that the judge did not do his job properly, we consider that the committee rightly identified a major problem in the law. The Atkinson Government tried to fix it.

Was the 1890 amendment the correct solution? On that issue, we offer no opinion, as we have not been presented with examples of its working.

In 1894, a second systemic problem was addressed. In previous reports, the Tribunal has noted with approval the provision for voluntary arrangements, which allowed Maori a significant degree of control over the Court's decisions.[52] As we saw above, it enabled iwi to reach a negotiated agreement over the division and award of Tahora 2. Nonetheless, there were obvious risks involved. The Court's titles were final, and people who were absent might get left out, inadvertently or even by design. The content of applications for rehearing had

49. Bright, 'Kuhawaea' (doc A62), p 59
50. 'Petition of Mehaka Tokopounamu and 86 others', report of the Native Affairs Committee, 21 August 1889 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 R01, doc H4(b)), p 89)
51. Hayes, 'Waiohau' (doc L15), p 12
52. See, for example, Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 451–452; Waitangi Tribunal, *Hauraki Report*, vol 2, p 777

made the Government aware of this problem for years prior to the Waiohau fraud in 1886.[53] The Turanga Tribunal concluded:

> Thus, while it was reasonable for the court to rely on lists provided by Maori themselves in awarding of title, the dangers of mistake or abuse meant that there had to be a guaranteed right of appeal or rehearing for all who claimed to have been left off by their relatives. The provisions in the Act for rehearing contained no such guarantee. Indeed, it was not until 1894 (30 years after the court was created) that a full right of appeal was introduced.[54]

The Native Land Court Act 1894 created the Native Appellate Court, with a guaranteed right of appeal. The need for such an appeal was obvious earlier, yet it came too late to prevent the Chief Judge from dismissing applications for the rehearing of the Waiohau 1 partition, and thus the earliest and best chance of overturning the Waiohau fraud.

According to Crown counsel, Parliament was entitled to believe that land could not be brought under the Land Transfer Act by means of a court order obtained by fraud. If the Court made a mistake, as Judge Clarke did in 1886, then 'one [meaning legislators] would reasonably expect the mistake to be rectified in the appeal process'.[55] But there was no proper appeal process at the time, which was one reason why there was a systemic fault in the Native Land Court process.

(6) *Who was at fault so far?*

As we have noted, the Crown accepts that the Waiohau fraud was a sorry saga of great grievance and prejudice to Ngati Haka Patuheuheu. Nonetheless, Crown counsel stressed that this Tribunal must focus on the degree to which responsibility lies with the Crown. In their view, the Waiohau fraud was a one-off event that was mainly the result of 'human error', not flaws in the legislation or the systems established by it.[56] In particular, counsel highlighted:

- the failure of the Native Land Court to 'properly apply the law' relating to partitions;
- the failure of the Native Land Court to 'properly vet the Burt transaction that clearly underpinned the application for partition'; and
- the failure of the Chief Judge to 'properly process the applications for rehearing'.[57]

Had any one of these protection mechanisms 'been as effective as they ought to have been and ordinarily were, a different outcome was probable'.[58] According to the Crown, the

53. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 450–451
54. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 451–452
55. Crown counsel, closing submissions (doc N20), topics 8–12, p 83
56. Crown counsel, closing submissions (doc N20), topics 8–12, p 78
57. Crown counsel, closing submissions (doc N20), topics 8–12, p 78
58. Crown counsel, closing submissions (doc N20), topics 8–12, p 80

fault for this lay with Judge Clarke and Chief Judge Macdonald. The 'failures of the Native Land Court . . . are not the actions of the Crown', a point accepted by claimant counsel.[59]

The claimants made two arguments in response. The first was that the laws and protection mechanisms failed to prevent the fraud. No matter which individual was responsible at any one point, the law had not provided effective protection. As we have just seen, two systemic flaws were identified at the time, requiring legislative amendment. These were the failure to provide a means of ensuring proper representation of owners in the Court, and the failure to provide a guaranteed right of appeal. Also, in our view, the failure of the trust commissioner's inquiry was a systemic matter. It resulted from awarding land to sellers who then executed 'new' transactions, concealing the nature and effects of the original (real) transactions.

Secondly, the claimants argued that the key issue in Treaty terms was not the failings of the Court or the personal failings of judges, but the Crown's duty to provide a fair and effective remedy, as soon as the failures were exposed. Counsel for Ngati Haka Patuheuheu suggested that the Crown's actions were 'unconscionable' because it did not remedy the failures of the Native Land Court system, but 'essentially allowed the matter to unfold over a period of around seventeen years with the final consequence that an entire community of people were evicted from their village'.[60] In other words, the key issue for the Tribunal's inquiry is what happened after the fraud was exposed. We turn to that question next.

11.5.2 How and when was the fraud exposed?

Summary answer: *The Crown's first departmental inquiry, by Judge Herbert Brabant in 1887, was inadequate. Brabant limited his inquiry to certain papers, and failed to uncover the facts. In particular, he did not check the original minutes for the award of title of Waiohau 1, and thus accepted the mistaken evidence of the court interpreter that Ngati Manawa were the owners of the land. In the meantime, Soutter sold Waiohau 1B back to Mrs Burt, who then sold half to Henry Piper, and took out a mortgage on the other half. In 1889, the Native Affairs Committee investigated a petition from Ngati Haka Patuheuheu. The committee found that a 'great injustice' had been inflicted upon the tribe, and recommended that the Government inquire further with a view to restoring the petitioners' rights. A second departmental inquiry, conducted by Judge Wilson, then exposed the full extent of Burt's problematic original transactions, and of the fraud perpetrated in the Native Land Court in 1886. Thus, a key opportunity for exposing the fraud was lost in 1887, permitting further dealings in the land, but the fraud was finally uncovered in 1889. We agree with the claimants that the key question then became: what remedy would the Crown provide?*

59. Crown counsel, closing submissions (doc N20), topics 8–12, p 80; see also counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 36
60. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), p 30

11.5.2

(1) *Introduction*

Given the claimants' argument that, as soon as the Crown became aware of the 'failures in the processes under Native land legislation, it ought to have ensured a remedy was available to the community',[61] the question arises: when did the Crown find out? As we noted above, the Chief Judge's improper handling of the rehearing applications was identified much later, by the Supreme Court in 1905. We did not receive evidence as to the extent of this problem in the processing of applications under the 1880 Act. We were told of a similar situation in Kuhawaea, revealed to the Crown in 1897. We are not in a position to say whether the Crown knew enough to have inquired about this problem sooner.

The fraud itself, however, and the 'great injustice' that Ngati Haka Patuheuheu had endured, was revealed much earlier.[62] That is the critical point.

(2) *The Brabant inquiry, 1887: the fraud remains concealed*

After the Chief Judge dismissed the applications for rehearing, the first petition was sent to Parliament in 1887. This did not come, as might have been expected, from the community living at Te Houhi. Akinihi Te Tuhi, the wife of Burt's competitor, Alfred Preece, sent a petition instead. She claimed that Burt had purchased interests using alcohol and 'other illegal considerations', that he had not bought a majority of interests, that he had knowingly repurchased some shares sold to Preece, and that she had not received notice of the hearing. Land belonging to non-sellers had been wrongly included in 1B, and the non-sellers had not been properly represented in Court.[63]

The Government asked a Native Land Court judge, Herbert Brabant, to investigate and report on the petition. This was a very limited inquiry. Brabant obtained a response from Burt, checked the panui and Court minutes, and got an account of the hearing from the Court interpreter.[64] Burt denied all the allegations. The key evidence came from the interpreter, who advised that printed notices had been circulated, and that 'the principal people of Ngati Manawa, the owners of the block were present in Court, and they asked for a subdivision'.[65] Brabant did not check the minutes of the 1878 hearing, and so did not uncover the fact that Ngati Manawa were not the owners of Waiohau 1. Nor did he query the mistaken statement of the interpreter, to the effect that Judge Clarke had 'as Trust Commissioner made the usual inquiries' when he witnessed the sale to Soutter in the foyer of his Court.[66]

61. Crown counsel, closing submissions (doc N20), topics 8–12, p 80, paraphrasing counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 36

62. The Native Affairs Committee came to the conclusion in 1889 that a 'great injustice' had been committed: 'Petition of Mehaka Tokopounamu and 86 others', report of the Native Affairs Committee, 21 August 1889 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 R01, doc H4(b)), p 89)

63. Battersby, 'Waiohau 1' (doc C1), p 14

64. Battersby, 'Waiohau 1' (doc C1), pp 14–17

65. B Edwards, statement, 10 December 1887 (Battersby, 'Waiohau 1' (doc C1), p 17)

66. Battersby, 'Waiohau 1' (doc C1), pp 17–18

Judge Brabant found that notice had been duly given, and that the Court had done nothing wrong; it had 'only sanctioned a voluntary arrangement come to by the owners'.[67] It was possible that not all owners were present, but the judge said that he had no way of verifying this – unsurprisingly, on the basis of such a limited inquiry.[68] As to the allegations about Burt's purchases, Brabant simply found that counter-allegations had been made against Preece, and that it was one man's word against the other's. The judge did not seek additional evidence.[69]

(3) *The Native Affairs Committee's inquiry, 1889: the fraud is exposed*

The Government relied on the findings of Judge Brabant until Ngati Haka Patuheuheu sent a petition to Parliament in 1889.[70] The petition was precipitated by the Burts. In 1888, Soutter sold Waiohau 1B back to Margaret Burt, who then tried to take possession of the land in 1889. Ngati Haka Patuheuheu were charged with trespass, but no information has been found about this case in the Resident Magistrate's Court.[71] The petition was brought personally to Wellington by Mehaka Tokopounamu. It had been signed by 87 people, including Wi Patene and his brother Ngahoro, and Tuhoe leaders Kereru Te Pukenui, Te Makarini Tamarau, and Te Wharekotua.[72] It alleged that Burt had only purchased a minority of shares, and that he had wrongly obtained 7000 acres (including land belonging to the non-sellers, and with their permanent homes, cultivations, and wahi tapu). Ngati Haka Patuheuheu had not been present or represented when this happened, having received no notice. The tribe also claimed that the purchase money was inadequate, that it sometimes included liquor and guns, and that in some cases it was not paid at all. Signatures had not been properly witnessed. Perhaps most damningly of all, the petitioners alleged that a few Ngati Manawa individuals colluded with Burt to mislead the Court, where they 'falsely stated . . . that a voluntary arrangement had been arrived at, and that a division shown on the plan produced should be given effect to'.[73]

Burt sent a written defence of his actions, and also submitted his deeds and receipts for inspection. He accused Te Kooti of being behind the trouble: the tribe had refused to attend the Court because Te Kooti 'had been over there and named Waiohau block, "Umu Taoroa" and that it would never be opened by me'.[74]

67. Battersby, 'Waiohau 1' (doc C1), p 17
68. Battersby, 'Waiohau 1' (doc C1), pp 17–18
69. Battersby, 'Waiohau 1' (doc C1), p 17
70. Battersby, 'Waiohau 1' (doc C1), p 18
71. Battersby, 'Waiohau 1' (doc C1), pp 24–25. Dr Battersby could not discover the details of the Resident Magistrate's hearing.
72. Binney, 'Encirled Lands', vol 2 (doc A15), p 56
73. 'Petition of Mehaka Tokopounamu and 86 others', report of the Native Affairs Committee, 21 August 1889 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 R01, doc H4(b)), p 89)
74. Battersby, 'Waiohau 1' (doc C1), p 20

11.5.2

As well as considering Burt's papers and the material gathered by Brabant, the committee examined Mehaka Tokopounamu and Te Korowhiti Te Maramarama. Tokopounamu gave evidence that Burt had paid partly in alcohol and guns, had failed to get his deeds properly witnessed, had purchased the shares of minors, and had bribed Ngati Manawa chiefs with promises of land and money.[75] The committee recommended that the Government institute a 'strict and searching inquiry', with a view to restoring the petitioners' rights. It concluded that 'in the main, the allegations made by [the] petitioners are correct, and a great injustice has been inflicted upon them'.[76] The committee added that 'they do not altogether hold the petitioners blameless in the matter'.[77] The heaviest censure was reserved for the Native Land Court system, which allowed 'reckless, illegal, and loose' purchases to be validated. The Court minutes revealed to the committee that there was nothing to ensure the proper representation of owners, a matter which it urged the Government to correct. Also, the minutes showed how the Court 'is frequently, though unwittingly, made the channel through which nefarious transactions are legalised'.[78]

(4) *Judge Wilson's inquiry, 1889: the fraud is confirmed*

In response to the Native Affairs Committee's report, the Government referred the issue of Waiohau 1 to another Native Land Court judge for a further inquiry. As with Brabant's investigation, this was not an official Native Land Court hearing, but rather a departmental inquiry. Unlike Brabant, however, Wilson conducted a full inquiry and heard evidence from many witnesses. We do not propose to recite that evidence here. It has been summarised in detail in Dr Battersby's report.[79] We note simply that Wilson examined Burt, the Ngati Haka Patuheuheu petitioners, Harehare Atarea (who admitted that his actions had been secured by promises of land and money) and the Ngati Manawa chiefs, and one of the neutral 1885 mediators, Aporo Te Tipitipi. One witness who did not appear was Te Wiremu, the man supposedly tasked by Burt and Te Mumuhu with taking the notices to Te Houhi.[80]

After extensive examination of witnesses and documentation, Wilson made the following findings:

- While Burt had definitely distributed alcohol, it could not be proven that he had used it as part of the price for purchasing land.
- Burt's allegation that his guns had been stolen was proven untrue. Nonetheless, it was not possible to say from the conflicting evidence whether he had given the guns to individuals, or had used them as part of his purchase of their interests.

75. Battersby, 'Waiohau 1' (doc C1), pp 19–25
76. 'Petition of Mehaka Tokopounamu and 86 others', report of the Native Affairs Committee, 21 August 1889 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 ROI, doc H4(b)), p 89)
77. Ibid
78. Ibid
79. Battersby, 'Waiohau 1' (doc C1), pp 25–43
80. Ibid, p 45

- Burt had acted as interpreter in his own transactions, which was not permitted under the law.
- Burt may have purchased interests without payment.
- Signatures for 17 individual interests were invalid, because they did not comply with legal requirements.
- Burt had purchased minors' interests, and in two cases had not obtained the approval of a Native Land Court judge, as required by law. There was nothing to prove that he had purchased the interests of deceased owners.
- Ngati Haka Patuheuheu had not boycotted the Court as a result of Te Kooti's influence, since their applications for rehearing (only 11 days after the sitting) showed that they were prepared to use the Court. Nonetheless, it could not be established definitely whether or not they had received notice.
- Ngati Haka Patuheuheu were not present or represented in Court.
- Seven people were present in 1886 (including Burt), of whom only four were owners. Of those four, two had sold to Burt, and two had sold to Preece. These people were Ngati Manawa, when the Court at its original hearing had awarded the block to Ngati Haka Patuheuheu. By their own evidence, the people in Court had received inducements from Burt, and were under his influence. There was no voluntary arrangement between the owners, and so the Court had no legal power to make the partition.
- Even if the Court had had such a power, Burt's transactions were not certified by a trust commissioner, which they should have been. Then, even if a trust commissioner had certified them, there were still only 43 properly attested signatures, which entitled Burt to no more than 4,128 acres at most.
- Finally, the sellers were included improperly in the title for Waiohau 1A, which had the effect of reducing the non-sellers' share even further.[81]

11.5.3 Did the Crown do enough to provide a remedy while it still could?

Summary answer: *The Crown argued that, while it might have communicated better with the Waiohau community, it nonetheless met all its Treaty and legal obligations to them. There were legal remedies available in 1890. Mrs Burt's land transfer title could have been overturned in the Supreme Court. Acting on the advice of its solicitor, the Government informed the Waiohau community that a caveat would be placed on the title, but that they should take action as soon as possible in the Supreme Court. The Native Minister promised every assistance to recover their rights, and offered the services of the Crown solicitor (Bell) in taking the case.*

81. Battersby, 'Waiohau 1' (doc C1), pp 43–48; Hayes, 'Waiohau' (doc L15), pp 8–12

11.5.3

The parties in our inquiry agreed that timely action in the Supreme Court would have solved the problem, at least for Mrs Burt's half of the block. The Crown blamed the claimants' lawyer, Henry Howorth, for bad advice to his clients. According to Crown counsel, Howorth's advice was the reason that Ngati Haka Patuheuheu never took their case to court; and thus they gave up their best opportunity for overturning the fraud. In our view, the historical evidence does not support this interpretation. Rather, it is clear that Ngati Haka Patuheuheu simply could not afford the cost of litigation. They repeatedly asked the Crown to either take the case for them, or to help them pay for it, in 1890, 1891, 1894, 1895, and 1896. In a manner that the Crown's historian (Robert Hayes) found baffling, the Government abandoned its earlier conviction that the claimants had been defrauded and were deserving of help, and assumed a stance of strict neutrality between the tribe and the possessors of land transfer titles to their land. Even so, at times Mitchelson, Seddon, and Carroll all seemed to hold out hope of Crown assistance, only to take no real action.

Also, when it became clear that Ngati Haka Patuheuheu could not afford to take the case without help, the Government advised the district land registrar to withdraw the caveat, which permitted further dealings in Mrs Burt's half of Waiohau 1B. While the registrar had discretion, he clearly acted immediately on the Crown's advice that the caveat 'can now be withdrawn', giving it effect the same day that he received it. When the Methodist mission later foreclosed on Mrs Burt's mortgage, there was nothing to stop the sale of this land to Margaret Beale in 1904. Authorities agree that Supreme Court action became hopeless at that point, since Mrs Beale was a bona fide purchaser for valuable consideration, and thus protected by the Land Transfer Act. We accept Professor Brookfield's evidence that the Land Transfer Act would have protected Ngati Haka Patuheuheu if the land had come under it by registration, instead of by an order of the Native Land Court. Crown counsel submitted that Parliament, when enacting the Land Transfer Act 1885, was entitled to expect that a fraudulent Court order could not be obtained, because it would be exposed on appeal. As we have seen, however, Maori did not have a guaranteed right of appeal, which parliamentarians well knew when passing the land transfer legislation.

Ngati Haka Patuheuheu's request for a special legislative remedy was rejected by the Crown in 1904. As a result, the case went to Court and the tribe lost. In our view, the Crown was primarily responsible for this situation:

- *it knew that Ngati Haka Patuheuheu could not afford to go to the Supreme Court unaided;*
- *it refused their repeated requests for assistance over a number of years, despite Mitchelson, Seddon, and Carroll all holding out hope that it would in fact assist;*
- *it failed to provide appropriate protection for Maori land in the Land Transfer Act; and*
- *it failed to intervene with special legislation in 1904.*

(1) *Introduction*

From 1889 to 1904, changes took place in the titles for Waiohau 1B, gradually transferring the land along a chain to those whom the law would later consider bona fide (good faith) purchasers with indefeasible titles. In 1889, after receiving the Wilson report, the Crown solicitor thought that Burt's title could be overturned in the Supreme Court. He suggested that a caveat be lodged against it at once. Mrs Burt, however, had already mortgaged the block, and had sold half of it to Henry Piper. The Burts did not cease to be the owners of their half of Waiohau 1B, however, until 1903, when their mortgagee foreclosed. In 1904, the mortgagee sold the land to Margaret Beale. When the case finally came into the Supreme Court in 1905, it was her title (and not Burt's) that the claimants had to overturn. Their lawyer, Frederick Earl, asked the Crown for special legislation, realising that it was already too late for his clients. In 1905, the Supreme Court found in favour of Mrs Beale against Ngati Haka Patuheuheu. From 1889 to 1903, therefore, a critical window of opportunity existed, in which court action would likely have quashed Burt's title. The question for the Tribunal is: did the Crown do enough to provide a remedy while it still could?

(2) *The search for a remedy: courts and caveats*

On receipt of the Wilson report, the Government's first impulse was to help. Mr Hayes stressed the reaction of the Native Minister:

> I feel that the Natives have been defrauded, and although the parties have been clever enough to have several transactions [registered?] so as to make Land Transfer titles tolerably safe, I think it is a case that in the interests of justice the Government should take into the Supreme Court.[82]

He sought a legal opinion from the Crown solicitor, H D Bell, on whether there was a case to take to the Supreme Court, and whether a caveat should be lodged so as to prevent further dealings.[83]

Bell's opinion was that the title 'can be successfully contested'. Even though title had been awarded to two Maori, who had then sold to Soutter, this was still 'fraudulent and illegal'. Also, his opinion was that the transfer to Soutter was void under the Native Land Administration Act 1886, which was in force at the time of the sale.[84] The fundamental fraud was the partition itself, which had been 'obtained through fraud and can be upset'. He recommended that the 'Natives who have been defrauded should be advised to apply to the

82. Mitchelson to Hislop, 17 December 1889 (Hayes, 'Waiohau' (doc L15), p 14)
83. Hayes, 'Waiohau' (doc L15), p 14
84. Hayes, 'Waiohau' (doc L15), pp 14–16. Battersby and Hayes disagreed as to whether Bell was correct about the effect of the Native Land Administration Act. It was never argued in the Supreme Court, so we have not considered the matter further: see Hayes, 'Waiohau' (doc L15), p 16.

Registrar under section 69 of the Land Transfer Act 1885 for rectification of the register'.[85] If that failed, then they should take their case to the Supreme Court to get the partition order and subsequent grants cancelled. If the Court found that no actual fraud had taken place, it might be possible to get the European owners made 'trustees for the injured persons'.[86] In the meantime, a caveat should be lodged.[87]

Bell's advice to the Government was a crucial piece of evidence in our inquiry. Much hinged on it. A key part of it was the view that Maori, not the Crown, should take the case to Court. As noted by Hayes, the Native Minister had 'contemplated that the Government would take up the case of challenging the validity of the title in the court', but the Native Department gave strong support to Bell's contrary view.[88] The Minister accepted their advice, and directed the department to 'take the necessary action'.[89]

This action took two forms: first, the department forwarded the relevant papers to the Registrar General of Lands, asking that a caveat be placed on the block; and secondly, the department wrote to the Ngati Haka Patuheuheu petitioners, outlining Bell's opinion and advising them as to what they needed to do next. Both actions were crucial to the parties' view of the Crown's responsibilities.

Dr Battersby located three drafts of the letter sent to Mehaka Tokopounamu, and he was not sure which was the final version. In one version, the Native Minister promised 'all the assistance in his power to obtain their rights'.[90] From the wording of Tokopounamu's petition in 1905, this was the version that was sent.[91] In another draft, the Native Minister would 'endeavour to render the Natives . . . every assistance in order that they may obtain relief'. A third version stated that the Minister was 'anxious to assist the Maoris . . . and to afford them relief'.[92] In all three versions, Bell's opinion was set out, and an offer was made for them to employ Bell to take the case to the Supreme Court. The Government was careful to note that it could not advise on their choice of solicitor, which was a decision they alone could make.[93]

Ngati Haka Patuheuheu responded to this letter in February 1890. After careful consideration, they decided to go to the Supreme Court at once.[94] They did not, however, accept the offer of Bell's services. According to Dr Battersby, the wording of the Government's letter

85. Hayes, 'Waiohau' (doc L15), p 15. According to Professor Brookfield, the registrar would not have had the power to cancel a title in this manner: F M Brookfield, cross-examination by Crown counsel, 22 March 2004 (transcript 4.4, p 20).
86. HD Bell to under-secretary, Native Department, 28 December 1889 (Hayes, 'Waiohau' (doc L15), p 15)
87. Battersby, 'Waiohau 1' (doc C1), p 49
88. Hayes, 'Waiohau' (doc L15), p 16
89. Hayes, 'Waiohau' (doc L15), p 14
90. Battersby, 'Waiohau 1' (doc C1), p 50
91. Mehaka Tokopounamu and others, petition, undated (August 1905) (Battersby, comp, documents in support of 'Waiohau 1', (doc C1(b)), section 5, p 93)
92. Battersby, 'Waiohau 1' (doc C1), pp 50–51
93. Battersby, 'Waiohau 1' (doc C1), pp 50–51
94. Battersby, 'Waiohau 1' (doc C1), p 51; Binney, 'Encircled Lands', vol 2 (doc A15), pp 62–63

Hirini Taiwhanga and Henry Howorth

Hirini Taiwhanga was a Ngapuhi leader, fluent in English and experienced in Pakeha business, who was unpopular with various Governments right through from the 1870s to 1890. He led a Ngapuhi mission to England in the early 1880s to appeal to Queen Victoria against the New Zealand Government's treatment of Maori. He also promoted a Treaty-based union between tribes, including a covenant between Ngapuhi and the Kingitanga. He was elected a member of Parliament in 1887, and steadfastly promoted Maori management of their own affairs, introducing Bills and stonewalling Government legislation in an effort to empower Maori. His inveterate opposition to the Government gained him the reputation of a 'troublemaker'. Taiwhanga was re-elected to Parliament in 1890 but was already ill, and died in September of that year.[1]

Henry Howorth was a Wellington solicitor who worked closely with Taiwhanga for several years, drafted his parliamentary Bills, participated in consultation hui with tribes across the North Island, and promoted his schemes for Maori self-management of their lands.[2]

Clearly, as Professor Binney noted, consultation with Taiwhanga and Howorth, and the hiring of Howorth as their lawyer, did Ngati Haka Patuheuheu a disservice with the Government, hence Carroll's private warning to them in July 1890.[3]

1. Binney, 'Encircled Lands' (doc A15), pp 63–64, 142; Claudia Oranga, 'Taiwhanga, Hirini Rawiri 1832–33? – 1890', *Dictionary of New Zealand Biography*, updated 22 June 2007, http://www.dnzb.govt.nz
2. Commission Appointed to Inquire into the Subject of the Native Land Laws, 'Minutes of Evidence', Wellington, 14 May 1891, AJHR, 1891, sess 2, G-1, p 173
3. Binney, 'Encircled Lands' (doc A15), pp 63–64

made it clear that they would have to employ Bell in his private capacity.[95] The Te Houhi community approached Maori member of Parliament Hirini Taiwhanga instead, seeking to use his lawyer, Howorth.[96] In Professor Binney's view, this caused a significant change of heart on the part of the Government, which did not like either Taiwhanga or his lawyer. In July 1890, Carroll wrote to Ngati Haka Patuheuheu, warning them privately that the Government would not help them if they stuck with Howorth as their lawyer.[97]

In the meantime, there had been further developments. In January 1890, the Government redirected its request for a caveat to the District Land Registrar. He replied that Mrs Burt had sold the northern half of Waiohau 1B to Henry Piper in October 1889. Thus, he had lodged a caveat against Burt's remaining land, but not Piper's, and asked: 'Do you approve

95. Battersby, 'Waiohau 1' (doc C1), p 51
96. Hayes, 'Waiohau' (doc L15), pp 18–19
97. Binney, 'Encircled Lands', vol 2 (doc A15), pp 63–64

The Caveat

Take notice that I, Theophilus Kissling as District Land Registrar for the Provincial District of Auckland claiming estate or interest on behalf of Mehaka Tokopounamu and other members of the Patuheuheu Tribe Rotorua who allege that by reason of the improper action of H R Burt in obtaining from the Native Land Court a partition of a block of land of which Waiohau No 1B containing 7000 acres more or less forms a part they have been deprived of their interests in the said block of land forbid the registration of any Memorandum of Transfer or other instrument affecting the said land in Volume 55 folios [ ] and 70 of the Register Books at Auckland until this Caveat be by me withdrawn.

Caveat 698, 13 January 1890, south Auckland registry
(Hayes, 'Waiohau' (doc L15), pp 17–18)

of my action[?]'[98] The department sought Bell's advice. Bell responded that the registrar was right not to put a caveat against Piper's title, and that the 'Natives should be advised if they have any claim against Piper to lodge a caveat themselves'.[99] The department told the Minister that a caveat should not be put on Piper's title, and he agreed. According to Mr Hayes, the Government did not carry out Bell's recommendation to advise Ngati Haka Patuheuheu to seek a caveat themselves. As far as the documentary record shows, the Government also did not inform Ngati Haka Patuheuheu that the existing caveat only covered Burt's half of the block.[100]

In February 1890, Piper tried to take possession of Waiohau 1B and was turned away by the claimants. On Piper's information, Mehaka Tokopounamu and Te Whaiti Paora were charged with trespass under the Police Offences Act. They did not contest the charges, and were fined a shilling each plus costs (amounting all together to £5).[101] Resident Magistrate Bush warned them that they were liable to further trespass charges, and that they should take their case to the Supreme Court at once. They replied that they were about to do so, on Howorth's advice, and that they would always remain in occupation.[102]

98. District land registrar to Native Department, 10 January 1890 (Hayes, 'Waiohau' (doc L15), p 17)
99. Bell to Sheridan, 15 January 1890 (Hayes, 'Waiohau' (doc L15), p 18)
100. Hayes, 'Waiohau' (doc L15), p 18. This was Mr Hayes' conclusion, after reviewing the documentary evidence. Ngati Haka Patuheuheu were informed that the Government had asked for a caveat 'against any further dealings with the land'. (Lewis to Tokopounamu, 8 January 1890 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 R01, doc H4(c)), p 96)) There is, however, no record that they were ever informed that the caveat was not entered against Piper's half of the block. See, in particular, the account in Ngati Haka Patuheuheu's 1905 petition (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 R01, doc H4(d)), pp 93–94)
101. Bush to under-secretary, Native Department, 27 February 1890 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 R01, doc H4(c)), pp 128–129)
102. Hayes, 'Waiohau' (doc L15), p 19

Ngati Haka Patuheuheu then faced a serious dilemma. It is clear from the historical evidence that they could not afford the cost of litigation. Their situation was precarious in the 1890s and the first decade of the twentieth century. There was nothing spare to cope with the effects of a series of natural disasters in these decades. The constable who delivered Supreme Court summonses in 1905 had to deliver emergency donations of seed potatoes at the same time.[103] When they were finally forced into the Court at that time, they later had to sell their cattle – to sell 'everything' – to pay their lawyer.[104] For this community, the cost of litigation in the superior courts was something that they simply could not afford. As Bush (and others) pointed out, however, nor could they afford not to.

As a result, Ngati Haka Patuheuheu made an important decision in April 1890. If the case was to go to Court, then they must get the Government's help. After all, they had an assurance that the Native Minister would do everything in his power to help them get a remedy. They approached G F Richardson, the Minister of Lands, asking the Government to 'take the case for them.'[105] They told him that they could not afford to do so themselves. Richardson's response was confused. He misunderstood Bell's opinion, and advised them to apply to the chief judge of the Native Land Court first.[106] In the meantime, he suggested to the Native Minister that their request was 'worth careful consideration': 'could not the Govt see its way to pay the costs of a Supreme Court action on behalf of the Natives, being recouped say by land'.[107] Richardson was anxious to avoid trouble if it came to a confrontation between the residents of Te Houhi and the new owners.[108]

This suggestion was killed by the Native Department. Lewis advised that the approach to Taiwhanga and Howorth 'seems to shut out the Govt from assisting them as proposed to bring their case into the Supreme Court as the matter is now between them & the Solicitor whom they have selected'. If Howorth 'declines the case or takes no action', then Lewis or Bush could meet with Maori and 'explain the position to them.'[109]

Unaware of this, Ngati Haka Patuheuheu applied to the chief judge of the Native Land Court, as they had been advised to do by the Minister of Lands, believing that they were supposed to seek a rehearing of Waiohau 1. The chief judge was confused, since no rehearing was possible for Waiohau.[110] Having completed this step, Tokopounamu approached the Government a second time, asking if it had taken any action (as requested) over Waiohau.[111]

103. Binney, 'Encircled Lands', vol 2 (doc A15), pp 349–350
104. Arapere, 'Waiohau' (doc A26), p 51
105. Hayes, 'Waiohau' (doc L15), p 20
106. Hayes, 'Waiohau' (doc L15), p 20
107. Richardson to Mitchelson, 24 April 1890 (Hayes, 'Waiohau' (doc L15), p 20)
108. Hayes, 'Waiohau' (doc L15), p 20
109. Lewis to Mitchelson, 2 May 1890 (Battersby, comp, documents in support of 'Waiohau 1', (doc C1(b)), section 4, pp 134–135)
110. Binney, 'Encircled Lands', vol 2 (doc A15), p 63; see also Te Korowhiti Te Maramarama, Wi Patene and others to the Chief Judge, 26 May 1890 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 ROI, doc H4(f)), pp 106–107)
111. Hayes, 'Waiohau' (doc L15), p 21

11.5.3

The Recommended First Step: Applying to the Registrar under Section 69

Section 69 of the Land Transfer Act 1885 provided for the registrar to cancel or correct any 'certificate of title or other instrument' that 'has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained'.[1] The Crown solicitor, H D Bell, thought that Ngati Haka Patuheuheu could apply to the registrar to cancel Burt's title under this section of the Act. He was not aware that half of the block had been sold to Piper.[2] As far as we are aware, no action was taken on this recommendation. We have no information as to why it was not pursued. We note Professor Brookfield's doubt that the registrar's power applied in the circumstances of Waiohau.[3]

1. Land Transfer Act 1885, s 69
2. Hayes, 'Waiohau' (doc L15), pp 15–18
3. F M Brookfield, cross-examination by Crown counsel, 22 March 2004 (transcript 4.4, p 20)

This was a crucial point in events. T W Lewis wrote to the Minister: 'Recommended that the writer be informed that the Govt find it can take no action in the matter.'[112] Mitchelson agreed, and a brief response to that effect was sent to Ngati Haka Patuheuheu.[113] Approaches from Piper and Burt, asking the Government to intervene on their behalf, got the same reply.[114]

Thus, the Government had moved from an initial conviction that Ngati Haka Patuheuheu had been defrauded, and offering 'every assistance', to a position of neutrality between private citizens. We also accept that while the Government could not interfere between lawyer and client, this was never explained to the tribe. Nor, in our view, does it suffice to explain the change from a willingness to help, and to consider the possibility of taking the case or at least paying for it, to a stance of determined neutrality. Mr Hayes was puzzled by the Government's change of heart, commenting: 'It is difficult to make sense of Lewis' recommendation, let alone Mitchelson's approval for that course of action.'[115] The Government's change of policy was summarised by Lewis in October 1890:

> It was the intention originally of the Government to assist the Natives in Supreme Court action but they did not act upon the advice then given to them and after careful enquiries

112. Lewis to Mitchelson, 19 July 1890 (Hayes, 'Waiohau' (doc L15), p 21)
113. Hayes, 'Waiohau' (doc L15), p 21
114. Battersby, 'Waiohau 1' (doc C1), pp 52–53
115. Hayes, 'Waiohau' (doc L15), p 21

subsequently made it was decided by the Native Minister that the Government could not interfere on either side.[116]

The result was inevitable. Unable to afford Supreme Court litigation, Ngati Haka Patuheuheu faced further trespass charges in September 1890.[117] This time, Bush reported that the tribe no longer intended to take a case to the Supreme Court, but to remain in occupation and leave it for Burt or Piper to take action. This was apparently the advice they had received from Howorth.[118] As Professor Brookfield noted in cross-examination, this was not good advice.[119] Bush's report implied that the Government must take action if it wanted to avoid a serious confrontation between the parties.[120]

The Government's response to Bush's report was not what he might have expected. Despite its supposed new stance of neutrality, the Government decided that if the tribe would not go to court (knowing that they could not afford to), then there was no point in keeping the caveat on Burt's title. The land should be freed up for use in the market. If fraud was proven later, the Government would simply compensate whichever party lost with money from funds set aside under the Land Transfer Act.[121] This might have been in keeping with a neutral stance, but it points to a remarkable lack of concern with the fate of Ngati Haka Patuheuheu, should they lose in Court. Mitchelson approved Lewis' recommendation to remove the caveat. Lewis then wrote to the registrar, informing him that the 'Government sees no reason to continue the caveat which you were requested to enter against any dealings with Waiohau 1B Block which can now be withdrawn'.[122] Dr Battersby interpreted this as an instruction.[123] The registrar withdrew the caveat the same day that he received the letter.[124] Ngati Haka Patuheuheu never found out that it had been lifted.[125]

At this point, in November 1890, Ngati Haka Patuheuheu now approached the Crown solicitor in Auckland. Despite the earlier rebuff from the Government, they wrote: 'We give you this case to conduct in the Supreme Court according to its rules'. A quick response was requested.[126] Their letter was referred to the Native Department, and the Government's

116. Lewis to Morpeth, 27 October 1890 (Battersby, comp, documents in support of 'Waiohau 1', (doc C1(b)), section 4, p 162)
117. The charges were the result of 'further informations . . . laid against natives for trespassing on Waiohau' (Bush to under-secretary, Native Department, 17 September 1890 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 R01, doc H4(c)), p 148))
118. Hayes, 'Waiohau' (doc L15), pp 22–23
119. FM Brookfield, cross-examination by Crown counsel, 22 March 2004 (transcript 4.4, p 20)
120. Battersby, 'Waiohau 1' (doc C1), p 54
121. Hayes, 'Waiohau' (doc L15), p 23; Battersby, 'Waiohau 1' (doc C1), p 54
122. Lewis to district land registrar, 4 November 1890 (Hayes, 'Waiohau' (doc L15), p 23)
123. Battersby, 'Waiohau 1' (doc C1), p 54
124. Hayes, 'Waiohau' (doc L15), p 23
125. Binney, 'Encircled Lands', vol 2 (doc A15), p 340
126. Mehaka Tokopounamu and others to Crown solicitor, 21 October 1890 (Hayes, 'Waiohau' (doc L15), pp 23–24)

response was that it was now too late.[127] In keeping with its new policy of neutrality, Lewis advised that 'their letter has arrived too late for the Government to give them any assistance'.[128] Privately, to the Native Minister, Lewis reiterated that the Government should not assist, and would 'only be throwing their money away by taking action in the Supreme Court'.[129] Howorth, it seems, was no longer the issue.

Ngati Haka Patuheuheu did not give up on seeking Government help. With the change of Government in 1891, the tribe tried again. The Liberals took office in January of that year. In August, Mehaka Tokopounamu and Wi Patene wrote to the new Native Minister, Alfred Cadman, outlining the history so far and asking the Government to 'suppress all difficulties' regarding Waiohau.[130] Lewis' advice appears to have been the key determining factor. He replied to Ngati Haka Patuheuheu: 'Mr Mitchelson's decision was that the Government would not take any action in the matter and that decision of his cannot be altered.'[131] This was the Government's 'unwavering position' from 1891 to 1905.[132] Dr Battersby commented: 'Ngati Haka Patuheuheu were undoubtedly frustrated over government inaction and at the uncertainty continuing in the wake of the non-settlement of the issue.'[133] At the same time, the Government also refused to help Piper or Burt, who were seeking its assistance.[134]

Ngati Haka Patuheuheu did not give up. As we have seen in Chapter 8, the Government's attention in the early 1890s was focused on the Ruatoki survey crisis, and opening Te Urewera for mining. The Waiohau community were not big players in these affairs, although Mehaka Tokopounamu did try to arrange the Governor's visit in 1890. Then, in 1894, Seddon and Carroll visited Te Urewera, followed by negotiations in Wellington in 1895 that resulted in setting up the Urewera District Native Reserve the following year (see ch 9).

Mehaka Tokopounamu tried to use these opportunities to get the Government's help for Te Houhi. He raised the issue during the premier's visit to Galatea in 1894. James Carroll, who had been a member of the 1889 select committee, advised Seddon that 'an injustice has been done'. Seddon promised to look into it:

> and if, after going carefully through the papers, I find that an injustice has been done, then I say the wrong shall be removed. I believe the wrong done in the first place was not done by Mr Piper, but that you are suffering from the wrong done by others. But all the same, if the land has been wrongfully taken from the proper owners, that wrong should be redressed. I believe the late Government did offer, if you took it to the Supreme Court, to assist you

127. Hayes, 'Waiohau' (doc L15), p 24; Battersby, 'Waiohau 1' (doc C1), pp 54–55
128. Lewis to Kelly, 4 November 1890 (Battersby, comp, documents in support of 'Waiohau 1', (doc C1(b)), section 4, p 169)
129. Lewis to Mitchelson, 4 November 1890 (Battersby, 'Waiohau 1' (doc C1), pp 55)
130. Battersby, 'Waiohau 1' (doc C1), pp 55
131. Lewis to Tokopounamu, 14 September 1891 (Battersby, comp, documents in support of 'Waiohau 1', (doc C1(b)), section 4, p 191)
132. Battersby, 'Waiohau 1' (doc C1), p 55
133. Ibid
134. Ibid, pp 52–53

> with money to get it through the Court, but you were led to take a course advocated by one of your own race [presumably a reference to Hirini Taiwhanga]. However, I will look into it, and if I can adjust the matter for you, as between the parties, I shall be only too glad to put it right.[135]

Seddon's assurances were not followed by any action. In 1895, Tokopounamu visited Wellington and tried to get 'the question of title to Te Houhi lands settled by the Premier's directions', again without success.[136] As part of the Urewera delegation of that year, sent to negotiate a wide-ranging settlement with the Government, he did get what appears to have been a promise of help from Seddon. Tokopounamu told the premier of the 1890 letter, promising Mitchelson's assistance. Piper soon found out that the Government was once again considering funding a case to the Supreme Court. Carroll replied to his query about it, that everything waited on a final decision from Seddon.[137]

Ngati Haka Patuheuheu tried once more in March 1896, when the Governor visited Te Urewera. This time, they met with Carroll (who was effectively Seddon's deputy as Native Minister). A newspaper report of the meeting recorded: 'It was agreed to take the matter into the Supreme Court, if the Government were paid part of the expenses.'[138] No action followed this agreement, although the Government's school inspector noted soon after that the tribe had 'great hopes, through a recent development' that the problem would finally be settled.[139] Professor Binney suggested that Ngati Haka Patuheuheu might not have been able to raise their share of the costs, or Carroll might not have been able to get his ministry's approval.[140] We note, however, that the tribe was now resigned to paying the Government back in land.

Mehaka Tokopounamu wrote to Seddon in December 1896:

> We are still waiting on you now with reference to Waiohau. What is your decision with regard to our conversation at Wellington [in 1895]. When I asked you if the Government would assist the Maoris and provide a lawyer, and that the Government should undertake to assist me and my hapu, – In replying you said, "Yes." I will look into Mr Seddon's (Sheridan's) [letter] and see what was said. On my return here I looked up that letter of Mr Seddon (Sheridan) dated the 8th of January, 1890, and find that it is as I stated to you at Wellington. I feel that if you had sent me your consent (to that proposition) I would have

135. 'Pakeha and Maori: A Narrative of the Premier's Trip through the Native Districts of the North Island', March 1894, AJHR, 1895, G-1, p 64 (Battersby, 'Waiohau 1' (doc C1), p 60)
136. Rose, 'A People Dispossessed' (doc A119), p 108
137. Binney, 'Encircled Lands', vol 2 (doc A15), p 328
138. *New Zealand Herald*, 9 March 1896 (Battersby, 'Waiohau 1' (doc C1), p 60)
139. Battersby, 'Waiohau 1' (doc C1), p 61
140. Binney, 'Encircled Lands', vol 2 (doc A15), p 330

> informed you of the acres that I would give you for your regard to us. Friend, please let me know your word on this matter.[141]

No response to this letter has been found. The Government took no action and, it appears, Ngati Haka Patuheuheu finally gave up on trying to get its help. Without that help, the status quo remained: they could not afford to take a case to the Supreme Court, and neither Burt nor Piper were willing force the issue in litigation.

From 1897 to 1903, nothing changed at Te Houhi. Ngati Haka Patuheuheu remained in possession, Piper and the Burts were unable to go onto the land, and neither side appealed to the Courts. There was, however, a significant development as far as the Government was concerned. In 1902, it passed the Land Titles Protection Act. By the terms of this Act, the Turanga Tribunal stated:

> no Crown grant, court order or other instrument relating to Maori land, could be called into question in proceedings in any court if the grant, order, or instrument was more than 10 years old, without the express consent of the Governor in Council. Effectively, that meant Cabinet could veto any litigation by Maori in respect of native land legislation from the 1870s and 1880s – the period during which the law was most confused and least principled.[142]

Ngati Haka Patuheuheu could no longer take their case to Court, even if they could afford to, without first getting an Order in Council.

The stalemate over Te Houhi was finally broken in 1904. Burt's land had been mortgaged ever since 1889. In 1903, the mortgagee (the Methodist mission) foreclosed. In 1904, Margaret Beale purchased this half of Waiohau 1B, planning to resell at a profit to a local farmer soon after.[143] Now that the perpetrators of the fraud were no longer owners of the land, the prospect of Ngati Haka Patuheuheu winning in Court was greatly reduced, because of the protection that the Land Transfer Act gave to non-fraudulent title holders. Mrs Beale served a notice on the Waiohau community to vacate by the end of June. One of their leaders, Mika Te Tawha, who was also a member of the Mataatua Maori Council, appealed to the Government for help in May 1904. They also engaged a lawyer, Frederick Earl, finally convinced that they would have to divest their community of assets in order to fight it out in Court.[144] Te Tawha pointed out that Te Houhi was their principal kainga, that they were a progressive people trying to do what the Government wanted, and had

141. Tokopounamu to Seddon, 11 December 1896 (Battersby, comp, documents in support of 'Waiohau 1', (doc C1(b)), section 4, p 216). The references to Seddon and Sheridan appear to be errors. Tokopounamu referred to 'Seddon'. The Native Department translator corrected this to 'Sheridan'. The file drafts of the 8 January 1890 letter were written by TW Lewis, under-secretary of the Native Department, on behalf of Edwin Mitchelson, the Native Minister at the time. As Dr Battersby noted (see above), we do not have a copy of the final version of this letter. It is possible that it was sent by Sheridan on behalf of Lewis, or the translator may have mistaken Sheridan's position in 1890.

142. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 467

143. Battersby, 'Waiohau 1' (doc C1), p 62

144. Binney, 'Encircled Lands', vol 2 (doc A15), pp 333–334

just rebuilt wooden houses to bring them up to Maori Council standards. This was a community, in other words, willing to help itself and deserving, as they claimed, of the Liberal Government's help.[145] Earl followed this appeal with a request that the Government settle the question by remedial legislation instead of a Court battle.[146]

No help was forthcoming, with one exception. The Government did agree to issue an order in council under the 1902 Act, allowing Ngati Haka Patuheuheu to contest the original titles in Court. In response, Beale's lawyers objected that 'persons in their position with titles assured by a Land Transfer Title should be put in a position of having to defend those titles against the attacks of impecunious natives'.[147] They asked for the order in council to require Ngati Haka Patuheuheu to provide security for the payment of costs. The Government refused, noting that that would simply put justice beyond their reach.[148]

The famous case in the Supreme Court of *Beale v Tihema Te Hau* came too late in the chain of titles for Ngati Haka Patuheuheu to win. Had they succeeded in getting Government assistance to challenge the titles while Burt was still an owner, it seems clear that they would have won their case. But Mrs Beale was an innocent party, who knew of the Maori occupation of Waiohau but had not, the Court found, known of the fraud behind Burt's title. Thus, the Land Transfer Act protected her in possession of her title. According to Professor Binney, the broader historical evidence suggests that Margaret Beale bought the land knowingly, but there is nothing definite to support this suggestion.[149] Justice Edwards was sympathetic to Ngati Haka Patuheuheu, whom he felt had suffered a 'grievous wrong'. He noted that the original partition and title had been obtained by fraud, and that the applications for rehearing had been improperly dismissed.[150] But the law, as it stood, could not protect them. The Land Transfer Acts allowed a bona fide purchaser to obtain an 'indefeasible title at the expense of the persons defrauded'.[151] Ngati Haka Patuheuheu, they were told, had lost everything and would have to get off the land, unless the Government intervened to help them at this very final stage.

(3) *Who was at fault? The Crown's concessions*

It is helpful at this point to reiterate the Crown's concessions, which all related to the period from 1890 to 1905. The Crown's position was that it had failed to:

- 'adequately implement the advice of Bell', when it failed to inform the Waiohau community that a caveat had not been lodged against the title of the part sold to Piper;

145. Mika Te Tawha to Carroll, 19 May 1904 (Battersby, comp, documents in support of 'Waiohau 1', (doc C1(b)), section 4, p 239)
146. Battersby, 'Waiohau 1' (doc C1), p 63
147. Stafford, Treadwell, and Field to under-secretary for Justice, 2 February 1905 (Battersby, 'Waiohau 1' (doc C1), p 65)
148. Battersby, 'Waiohau 1' (doc C1), p 65
149. Binney, 'Encircled Lands', vol 2 (doc A15), pp 332–339
150. *Beale v Tihema Te Hau* (1905) 24 NZLR 883, 887–891
151. Crown counsel, closing submissions (doc N20), topics 8–12, p 83

- find out whether the Waiohau community intended to take legal proceedings to test the validity of the Burt and Piper titles before 'inviting' the district land registrar to withdraw the caveat;
- tell the community that it had invited the registrar to withdraw the caveat 'because of their reported decision not to institute proceedings', and that the registrar had done so; and
- meet with the community 'face to face and discuss with them both the necessary limits on what assistance the Crown could provide and reiterate the soundness of Bell's advice and set out the potential consequences in failing to take action as recommended by Bell'.[152]

In addition, the Crown conceded that it 'took upon itself a role in relation to the community when acting upon Bell's advice. The Crown accepts that it failed to communicate all that it should have to the community.'[153] But the role undertaken by the Crown at the time 'falls short of a fiduciary duty to the community'.[154] Offering 'every assistance', as it did in January 1890, created a relationship that required it to keep the community 'fully informed on its actions and intentions and the reasons for the same'. It did not extend to 'providing advice on what action should be taken, or which solicitor to retain, or necessarily providing financial assistance. The limits of its assistance were clearly stated.'[155]

The Crown argued that it had done enough to carry out its Treaty and legal obligations: the main failures were not its responsibility.[156] In particular, it singled out Howorth's advice to Ngati Haka Patuheuheu as the overwhelming reason why no Court action was taken. It also denied any responsibility for the district registrar's decision to remove the caveat. According to Crown counsel, the registrar should have carried out his own independent checks as to whether the caveat should be removed.[157]

These arguments are central to our evaluation of the claims. We turn next, therefore, to consider who was at fault in the long period between Mitchelson's offer of assistance in 1890, and the decision in *Beale v Tihema Te Hau and Others* in 1905.

(4) *Who was at fault? The caveat*

The issue of the caveat may be disposed of briefly. We accept that the district land registrar could not be directed by the Crown, and that he should have carried out his own, independent, checks before removing the caveat.[158] The evidence is clear that he did not do so, since he removed it on the same day that he received the Crown's letter. We cannot say for certain,

152. Crown counsel, closing submissions (doc N20), topics 8–12, p 79
153. Crown counsel, closing submissions (doc N20), topics 8–12, p 80
154. Crown counsel, closing submissions (doc N20), topics 8–12, p 80
155. Crown counsel, closing submissions (doc N20), topics 8–12, p 80
156. Crown counsel, closing submissions (doc N20), topics 8–12, pp 83–84
157. Crown counsel, closing submissions (doc N20), topics 8–12, pp 79–84
158. Crown counsel, closing submissions (doc N20), topics 8–12, pp 80–81

Extract from the 1905 Petition of Ngati Haka Patuheuheu

Following the said [Wilson] report the Under-secretary for Native Affairs wrote to your petitioners under date 8th January 1890 stating (inter alia) that the Crown Solicitor had advised the partition had been obtained by fraud and could be upset and that the Registrar-General of Land had been instructed to enter a caveat against further dealings[;] also that the Native Minister desired to give the Natives who he considered had been wronged all the assistance in his power to obtain their rights.

A caveat was accordingly entered against the title of the said land but unknown to your petitioners in November of the same year it was withdrawn for what reasons your petitioners know not.

Following the withdrawal of the caveat it now appears although your petitioners were unaware of the fact until lately that several dealings with the title took place and according to the Register the title of the said land is now vested in Mrs Margaret Hilton Beale as to three thousand five hundred acres and one Henry Piper as to the other three thousand five hundred acres . . .

'Petition of the Undersigned Members of the Patuheuheu Ngatimanawa and Te Urewera Tribes Resident in Galatea in the Bay of Plenty District', August 1905 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 R01, doc H4(d)), pp 93–94)

however, what facts the registrar took into account, other than the Crown's advice that the 'caveat can now be withdrawn'[159] because Ngati Haka Patuheuheu were not going to contest the title in Court. It is not possible to say how far he exercised any discretion in the matter. We also accept, as Crown counsel pointed out, that Ngati Haka Patuheuheu's decision not to take the case to Court (if they had, in fact, made such a decision) was not a sound reason for removing the caveat.[160]

Nonetheless, the material facts are these:

- The caveat was put on Burt's title at the request of the Crown;
- At the same time, the district land registrar specifically sought the Crown's approval for not putting a caveat on Piper's title;
- After consulting Bell, the Crown agreed that no caveat should be put on Piper's title; and
- The caveat on Burt's title was removed immediately upon the Crown's request.

To say that the Crown was not responsible because it did not actually remove the caveat itself, and to blame the district registrar for carrying out the Crown's request, does not

159. Lewis to district land registrar, 4 November 1890 (Hayes, 'Waiohau' (doc L15), p 23)
160. Crown counsel, closing submissions (doc N20), topics 8–12, pp 80–81

excuse the Crown from having requested its removal in the first place. It was clearly the Crown that prompted this sequence of events. The removal of the caveat had serious consequences. It allowed Margaret Beale to buy Burt's land and disclaim any knowledge of problems with the title. While we accept that the registrar had discretion, he was prompted by the Crown and acted as it had signalled. Meanwhile, Ngati Haka Patuheuheu continued to live at Te Houhi, unaware that they no longer had the protection afforded by the caveat.

(5) *Who was at fault? The failure to take the case to the Supreme Court in time*

According to the Crown, the main responsibility (in this period) for the 'tragic loss' of Ngati Haka Patuheuheu's land lay with Howorth. His actions were only 'marginally' second to the 'unfathomable performance of the Native Land Court'.[161] Bell's advice showed that the partition order and resultant title were obtained by fraud, and he was 'properly' confident of upsetting that title by litigation. 'All conveyancing solicitors,' we were told, 'would or should have been aware of a growing body of case law that gave every prospect of upsetting Burt's title.'[162] The Crown relied on Professor Brookfield's criticism of Howorth's advice, and considered it the key reason why litigation came too late to save Te Houhi.[163] The caveat was not a long term solution: it had to be combined with speedy action in the Courts. 'To do nothing – as Howorth advised – was not merely poor but arguably negligent advice.'[164] Counsel for Ngati Haka Patuheuheu claimed that, as soon as the Crown became aware of the Native Land Court's failures, it was obliged to provide a remedy.[165] The Crown responded that it did not need to do so, because there was already a remedy available – a remedy not taken because of Howorth's advice.[166]

While we welcome the Crown's concessions, outlined earlier, they do not go far enough. The historical evidence shows Ngati Haka Patuheuheu's repeated attempts to get the Crown's help in 1890, 1891, 1894, 1895, and 1896. We have just discussed these in some detail. Despite having engaged Howorth, and despite his reported advice that they should not take the case to Court, the key factor for the Waiohau community was that they simply could not pay for litigation without divesting themselves of almost everything they owned. It is also clear from the evidence of Professor Binney, Dr Battersby, and Mr Hayes, that they did want to get the titles overturned in Court. They made repeated approaches to the Government, from 1890 to 1896, asking it to take the case on their behalf, or to pay for it, or to at least help them to pay for it. They were even, by 1896, ready to sacrifice more land to pay a share of the costs. It is simply not credible to argue that the case was not taken to Court because of Howorth's negligent advice. It was not taken because the Crown refused to help.

161. Crown counsel, closing submissions (doc N20), topics 8–12, pp 81–82
162. Ibid, p 82
163. Ibid, pp 81–82
164. Ibid, p 81
165. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p 36
166. Crown counsel, closing submissions (doc N20), topics 8–12, p 80

At first, the issue of Howorth (and Hirini Taiwhanga) was a stumbling block for the Government. Even so, it was ready to help as soon as it was clear that Howorth was not going to act. It is not as if the Government was going to Ngati Haka Patuheuheu and telling them to go against the advice of their lawyer. Rather, the tribe was coming to the Government and asking it to take the case to Court, or to help them do so. At some point in 1890, however, there was a crucial change of policy. Mr Hayes was puzzled by this change, and could not account for the Government's shift to a stance of absolute neutrality.

Just as puzzling were the actions of the Liberal Government. Carroll clearly knew that an injustice had taken place, and advised Seddon accordingly. Approaches from Ngati Haka Patuheuheu leaders seemed to result in promises of help and redress in the period 1894 to 1896. Yet still nothing happened. We are not surprised that the tribe gave up on the Liberals after 1896, until desperation drove them to ask for help again in 1904. At this point, only a special legislative remedy could have helped, because the removal of the caveat had allowed an 'innocent' party to buy Burt's title. The Government refused such a remedy, and the case was lost in Court. All of this was avoidable, had the Crown acted earlier on Ngati Haka Patuheuheu's repeated appeals for help. Since they literally asked for nothing more than the Government had offered in early 1890, this outcome is all the more tragic.

(6) *Who was at fault? Parliament and the Land Transfer Acts*

According to Professor Brookfield, the main culprit in depriving Ngati Haka Patuheuheu of their land was the Land Transfer Act itself. In his view, the tribe would still have been protected in 1905 if the Act had been adequate. Howorth assumed (wrongly) that the protections in section 67 of the Act would cover their situation.[167] Crown counsel explored this possibility in cross-examination, querying whether the purpose of section 67 was broader than its actual terms, and so should have been interpreted as protecting Maori freehold land. Professor Brookfield did not accept that proposition.[168] Section 67 protected no land other than that brought under the Act by an 'applicant proprietor'.[169] This did not include titles such as that for Waiohau 1B, brought under the Land Transfer Act by an order of the Native Land Court, which is what the Supreme Court decided in 1905.[170]

In the claimants' view, this was a serious flaw in the Act. Maori freehold land should have been entitled to the same protection as other forms of land when it was brought under the Land Transfer Act 1870 in 1874. This protection was finally granted in 1913 – too late to help the Waiohau community. It ought to have been part of the Act from 1874 onwards.[171] Professor Brookfield commented: 'In short, had *Beale's* case occurred after the amendment

167. FM Brookfield, brief of evidence, 20 February 2004 (doc C2)
168. FM Brookfield, cross-examination by Crown counsel, 22 March 2004 (Transcript 4.4, pp17–18)
169. *Beale v Tihema Te Hau* (1905) 24 NZLR 883, 889–891
170. Ibid
171. Counsel for Ngati Haka Patuheuheu, closing submissions (doc N7), p37

Section 67 of the Land Transfer Act 1885

Any certificate of title issued upon the first bringing of land under this Act, and every certificate of title issued in respect of the same land, or any part thereof, to any person claiming or deriving title under or through the applicant proprietor, shall be void as against the title of any person adversely in actual occupation of and rightfully entitled to such land, or any part thereof, at the time when such land was so brought under this Act, and continuing in such occupation at the time of any subsequent certificate of title being issued in respect of the said land; but every such certificate of title shall be as valid and effectual against the title of any other person as if such adverse occupation did not exist.

made in 1913, the defendants would have won it.'[172] The need for it should have been obvious in 1874.[173]

The Crown had 'some sympathy for the line of argument', but submitted that 'perfection is not an attainable standard in legislation establishing a novel and untried regime, as the Torrens [land transfer] system was at 1870'.[174] Section 67 excluded at least two categories of land from its protections: land brought under the law by a court order; and land sold to title-holders by the Crown. In both cases, we were told, fraud ought not to have been possible:

> no one would have thought that the Crown would issue a Crown grant of its land to A when B was in possession and had a lawful right to be in possession. Likewise, no one would have thought that the Native Land Court, in making a freehold order, would vest that land in A when B was in possession and had a lawful right to be in possession.[175]

If, by chance, someone did manage to obtain a fraudulent Court order, then 'one [meaning legislators] would reasonably expect the mistake to be rectified in the appeal process'.[176] Also, from the evidence submitted in this inquiry, no problems were identified in these categories of land, in such a way that the need for protection was obvious when the law was amended and consolidated in 1885. Indeed, there were no successful cases taken after the amendment, between 1913 and 1951.[177] Further, in the Crown's view, such a protection was not in fact necessary. There were 'ample other mechanisms available that ought to have protected the community in the possession and retention of their land (even when that

172. Brookfield, brief of evidence (doc C2), p 10
173. Ibid, p 12
174. Crown counsel, closing submissions (doc N20), topics 8–12, p 82
175. Ibid
176. Ibid, p 83
177. Ibid, pp 82–83

land was brought under the Torrens system), and it is extraordinary that all failed.'[178] Clearly, Waiohau was a unique case.

As we see it, the claimant and Crown views are not entirely incompatible. The claimants are correct that the Land Transfer Act did not protect the Waiohau community. The Crown is correct that other protections should have made it unnecessary for it to have done so. If we accept the Crown's proposition that this fraud was the result of a unique sequence of events, in which all possible protections failed in turn, then that simply increases the onus on the Crown to have provided a unique remedy. We will return to that point below.

Here, we note Professor Brookfield's evidence that the parliamentary debates do not reveal what was in the minds of the legislators. The question of protecting – or not needing to protect – land brought under the Act by a court order was not debated.[179] Yet the 1874 amendment was enacted at a pivotal time. The Native Land Act 1873 was intended to facilitate Maori dealing in their land. Maori land issues were debated extensively in the early 1870s. The provisions that Maori individuals should be able to get a freehold title, and that that title should be brought under the Torrens system, were deliberate actions on the part of the Crown. We find it difficult to accept that the protections of section 67 were deliberately denied such land. It may have been an oversight, reflecting carelessness with Maori interests. In any case, we cannot disagree with Professor Brookfield's conclusion: 'When they needed the protection it was not available to them.'[180]

Finally, we note that the Crown's argument rests on a faulty foundation. According to Crown counsel, Parliament was entitled to believe that fraudulent orders could not be obtained from a Court, because they would be exposed and overturned on appeal. As we have seen, Maori did not have a guaranteed right of appeal from Native Land Court decisions until 1894. In 1874, when Court orders could first bring Maori freehold land under the land transfer system, Maori had a right to apply to the Governor in Council for a rehearing. In 1885, when the Land Transfer Act was amended and consolidated, Maori had a right to apply to the Chief Judge for a rehearing. In neither case, were they guaranteed any hearing at a second-tier level. Thus, Parliament was not in fact entitled to any confidence that fraudulent Court orders would necessarily be exposed on appeal. Having passed the relevant Native Land Acts in 1873 and 1880, Parliament was well aware that Maori did not have any guaranteed right of appeal. Thus, we cannot accept the Crown's argument that Parliament was justified, in the circumstances of the time, in thinking that section 67 protections did not need to cover Maori land.

178. Ibid, p 82
179. Brookfield, brief of evidence (doc C2), pp 6–7
180. Ibid, p 12

11.5.4 Did the Crown provide a fair and effective remedy after Ngati Haka Patuheuheu lost in the Supreme Court?

Summary answer: *The Crown intervened to assist Ngati Haka Patuheuheu after they lost in court in 1905. Justice Edwards recommended that the Crown buy the land back for its Maori owners, and that Beale be reasonable in her demands. The Native Minister, James Carroll, tried to buy Beale's half of Waiohau 1B. Negotiations proved fruitless, however, because Beale had entered into a conditional sale to a settler farmer, James Grant. Neither Beale nor Grant was willing to deal. The Government had the option of compulsorily purchasing the land, and compensating Grant if he in fact lost anything by this action. Carroll set a compulsory purchase in train under the Land for Settlements legislation, and lodged a 12-month caveat preventing any other transfer of the land. But this Act did not apply to the circumstances of Waiohau, and the Government failed to pass special legislation before the caveat expired in 1907. In our view, given that Beale was already selling the land, the fairest course of action would have been for the Crown to have conducted a compulsory purchase (as Carroll initially intended), authorised under special legislation. This did not happen. Ngati Haka Patuheuheu's further pleas for help fell on deaf ears, and the Government allowed the tribe to be evicted in 1907.*

The Crown then offered some 300 acres of land in compensation, as well as buying back the tribe's wharenui (which was being used as a barn) and paying some of Beale's legal expenses (which had been awarded against Ngati Haka Patuheuheu as costs). This compensation was inadequate. Consultation with the tribe was minimal. They may not have agreed to the location of the land (at Te Teko). In any case, the land provided in compensation was much smaller, and worth considerably less, than the land they had lost, and outside their rohe. Subsequent protest also fell on deaf ears.

(1) *Introduction*

The window of opportunity to impugn the Burts' title was foreclosed with their mortgage in 1903. After that, special action was required for the Native Minister to provide Ngati Haka Patuheuheu with 'all the assistance in his power to obtain their rights,'[181] as had been promised in 1890. As it was seen at the time, there were two options: to buy the land back from Mrs Beale and restore it to the tribe, if she were willing to deal; and to take the land compulsorily (with compensation) if she were not. Repurchase of the land was urged on the Government by Justice Edwards in 1906, as Ngati Haka Patuheuheu faced the sheriff, bailiffs, and suits for 'forcible detention' of the land. In this section, we consider how the Government dealt with these options, and its eventual switch to compensating Ngati Haka Patuheuheu after they were finally evicted in 1907.

181. Battersby, 'Waiohau 1' (doc C1), p 50

> *Your petitioners have exhausted their scanty means in defending the action recently decided against them [Beale v Tihema Te Hau] and are dispirited and helpless. Your petitioners humbly submit that the sympathy and assistance promised them by the Government should now be made manifest and the mistakes and incompetence of the Native Land Court should not be permitted to result in their utter undoing.*
>
> Mehaka Tokopounamu and 63 others for 'Patuheuheu Ngatimanawa and Te Urewera', petition, August 1905 (Battersby, comp, documents in support of 'Waiohau 1', (doc C1(b)), sec 5, p 95; see also Binney, 'Encircled Lands', vol 2 (doc A15), pp 339–340)

(2) *The Crown's first attempt at a remedy: to buy or take the land*

In 1905, Ngati Haka Patuheuheu lost their case in *Beale v Tihema Te Hau*. They had four months to file an appeal, but – again – the costs deterred them. As they informed the Government, their 'scanty means' had been exhausted in the first case.[182] Instead, the tribe asked the Government for help. Earl sent an urgent letter, 'warning that the people of Te Houhi would now lose everything: their homes, their school, their meeting-house, their plantations, their church, and their burial ground'.[183] The Justice Department recommended immediate action. The Government should buy Beale's land and 'let the natives have it'.[184]

For the next seven months, the Native Minister (Carroll) made determined and praiseworthy attempts to buy this land. Cabinet voted £2000 for the purpose, well above the official value of £1600. Mrs Beale had paid £1,025 for it in 1904.[185] It emerged later, however, that there was 'someone in the background who must be reached before anything can be done'.[186] It turned out that the Beales were speculators, who had sold their part of Waiohau 1B to local farmer James Grant a year after buying it (and just before they took action in the Supreme Court). Although they sold for almost twice what they had paid, the buyer insisted that they guarantee him possession before the sale could take effect. Thus, the sale was not complete and could still be overturned, although Earl considered the agreement legally binding on the Beales.[187]

It is not clear, therefore, whether the Beales could have sold to the Government when it matched Grant's price. What is certain is that neither the Beales nor Grant were willing to sell to Carroll. The Supreme Court had awarded costs to the Beales in 1905, but they now

182. Binney, 'Encircled Lands', vol 2 (doc A15), pp 339–340
183. Ibid, p 337
184. Ibid, p 337
185. Battersby, 'Waiohau 1' (doc C1), pp 70, 75
186. Carroll to Waldegrave, 10 January 1906 (Battersby, 'Waiohau 1' (doc C1), p 74)
187. Binney, 'Encircled Lands', vol 2 (doc A15), pp 337–339; Battersby, 'Waiohau 1' (doc C1), p 75

faced expensive legal action to try to evict Ngati Haka Patuheuheu. Despite their loss in Court, the tribe refused to leave. Carroll was not unhappy with this situation, hoping it would give him the leverage to get the Beales to agree to sell.[188]

The consequences for the Waiohau community were unfortunate. They were put through drawn-out Court action, which they had to pay for, and were harassed by the sheriff and bailiffs.[189] In February 1906, the Supreme Court told Ngati Haka Patuheuheu that they would have to leave, even though the Beales lost their case for 'forcible detainment' of the land, and resistance to the sheriff.[190] The Beales lost because, as Professor Binney noted, all of the Waiohau people's resistance was peaceful. They simply refused to leave their homes.[191]

Even though the Beales' case was dismissed, Justice Edwards again commented that Ngati Haka Patuheuheu had suffered 'grievous wrong at the hands of the Native Land Court, which it was the duty of the colony to rectify'.[192] He advised them to seek Government help and urged the Government to buy the land for them, even though 'perhaps he had no right to say so'.[193] Mrs Beale ought to be 'moderate in her demands, seeing that she bought the land, knowing the natives were living on it, and that it was their ancestral home, and that she should be very well satisfied to get her money back with interest'.[194] Nonetheless, Ngati Haka Patuheuheu had done all that they could within the law to draw attention to their case, and now (he told them) they had to leave.[195]

Wharepapa Peita and Wi Patene telegraphed Carroll: 'The words of Judge Edwards today are that you should relieve us but if you fail we must leave the land. We are looking anxiously to you. Act quickly or we may go to prison.'[196]

The Government responded that it was still trying to buy the land from the Beales. Earl urged it to negotiate with Grant to 'take his position [and] pay Beale two thousand [pounds, the] amount agreed to by Grant'.[197] The Justice Department found, however, that the 'attitude of Beale does not facilitate settlement'.[198] Professor Binney posited that the Beales were waging a vendetta against the Waiohau community, and the evidence is suggestive of that.[199] In February 1906, having lost their case in Court, they began new eviction proceedings. Carroll gave up on negotiations, noting that 'the principals refuse to deal'.[200] His response

188. Battersby, 'Waiohau 1' (doc C1), pp 73–74
189. Binney, 'Encircled Lands', vol 2 (doc A15), pp 337–348
190. Ibid, pp 343–344
191. Ibid, pp 343, 348
192. *New Zealand Herald*, 7 February 1906 (Binney, 'Encircled Lands', vol 2 (doc A15), p 344)
193. *New Zealand Herald*, 7 February 1906 (Battersby, 'Waiohau 1' (doc C1), p 75)
194. Ibid
195. Binney, 'Encircled Lands', vol 2 (doc A15), p 344
196. Wharepapa Peita, Mika Te Tawhao and Wi Patene to Native Minister, 6 February 1906 (Binney, 'Encircled Lands', vol 2 (doc A15), p 344)
197. Earl to Waldegrave, 8 February 1906 (Battersby, 'Waiohau 1' (doc C1), p 75)
198. Waldegrave to Earl, 14 February 1906 (Battersby, 'Waiohau 1' (doc C1), p 75)
199. Binney, 'Encircled Lands', vol 2 (doc A15), p 339
200. Carroll to Waldegrave, 17 February 1906 (Battersby, 'Waiohau 1' (doc C1), p 76)

was to seek a means of acquiring the land compulsorily. In 1905, Earl had urged special legislation, and this option was still open to the Government. Claimant counsel suggested that it was the only fair remedy, given the circumstances.[201]

Carroll, however, tried to use existing provisions: the Lands for Settlement legislation. On 17 February, he abandoned negotiations, and on 21 February the Government notified Mrs Beale of its intention to acquire the land under the Land for Settlements Amendment Act 1901. On 22 February, a caveat was placed on the title, preventing the completion of its on-sale to Grant, and showing that 'the government seriously contemplated the compulsory acquisition of the land'.[202] The problem was that the Act allowed the Government to take land (with compensation) only for the purposes of settlement. As the Justice Department later pointed out, Waiohau did not come under the scope of the Act.[203] It may well be that Carroll intended this as a stopgap, enabling a caveat to be lodged, because he had to work within the existing law until Parliament sat later in the year. If so, Carroll did not introduce a special Bill once the session began in June.[204] In the meantime, the Beales proceeded with their efforts to evict the tribe, who clung desperately to their land and refused to leave.

As Professor Binney observed, the Lands for Settlement Act only allowed land to be caveated for a year, after which (if the Government had not acquired it) the Government's claim had to be abandoned.[205] It was duly removed in February 1907. Immediately, the Beales completed the sale to Grant, and he moved to evict the Waiohau community himself.[206] This time, there was no other help. Numia Kereru, Hetaraka Te Wakaunua, and Nikora Te Ao-o-Te Rangi telegraphed Carroll, asking him to '"hasten" the "reserving" ("te rahui") of Te Houhi lest "Patuheuheu" be driven off. But the government failed to find any legal device or further solution.'[207]

Grant moved onto the land and destroyed their cultivations, leaving the people with no food and no options. They retreated into the mountains to grieve for a time, before moving on to their less fertile land in Waiohau 1A and starting to rebuild.[208] The Government had had from February 1906 to February 1907 to pass special legislation, empowering it to acquire this land compulsorily, to rectify a wrong done by the colony's courts. Instead, it took no action and a whole community lost their homes, their ancestral land, and their wahi tapu.

201. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), pp 30–31
202. Battersby, 'Waiohau 1' (doc C1), p 76
203. Justice Department, memorandum, undated (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 R01, doc H4(d)), p 191); see also Battersby, 'Waiohau 1' (doc C1), p 76; Binney, 'Encircled Lands', vol 2 (doc A15), p 345
204. See *Bills Thrown Out*, 1907
205. Binney, 'Encircled Lands', vol 2 (doc A15), p 345; see also Land for Settlements Amendment Act 1901, s 6
206. Battersby, 'Waiohau 1' (doc C1), p 78; Binney, 'Encircled Lands', vol 2 (doc A15), pp 345–346
207. Binney, 'Encircled Lands', vol 2 (doc A15), p 346
208. Binney, 'Encircled Lands', vol 2 (doc A15), p 346

11.5.4

The Crown put to us that the enactment of special legislation was unthinkable: 'To have taken this step would have undermined one of the fundamental tenets of the Land Transfer system – indefeasibility. Today, the position would be the same.'[209] The Crown cited a 1995 decision *Registrar General v Marshall*, to the effect that the security of title to real property is the one area of the law where absolute security is required, and that this is a matter of high principle.[210] Claimant counsel disputed whether a single individual's title should have been weighted higher than that of an entire Maori community, living on their ancestral land, and about to be evicted because of failures in the Crown's Maori land titles system. Surely, he argued, the Treaty did not contemplate such an outcome.[211]

We agree with claimant counsel, and note another legal principle that was clearly considered at the time. Justice Edwards found that the colony's courts had been at fault, and the colony must rectify the matter. The judge urged the Government to buy the land back and restore it to the claimants. When that course failed, compulsion was the next logical step. It is a longstanding principle of British law that private land can be taken, with compensation, for public purposes. In New Zealand law, the definition of public purposes was very broad and enabled land to be taken for a wide range of purposes. At the time, it included the taking of land in large estates so that it could be broken up and redistributed for 'close settlement'. Surely, the colony's duty to rectify a wrong done by its courts (as Justice Edwards put it) was a public purpose, akin to compensation for wrongful imprisonment. It strains credulity that the taking of Mrs Beale's land would have been seen as unreasonable in the circumstances of the time. Indeed, the Native Minister did plan to take it under the Land for Settlements Act, discovering later that the terms of the Act made it the wrong vehicle. Special legislation was required.

While in one sense, it could be perceived as Parliament overturning the decision of a Court, in fact the judge had urged the Crown to buy out Mrs Beale, and had encouraged her to be reasonable in the matter. Mrs Beale had never been upon the land, had never even seen it, and had already contracted to sell it. Indefeasibility was not in fact the issue: rather, it was a question of who should or could buy the land that Mrs Beale was in the process of selling, the Government or Mr Grant. Grant had only a conditional agreement, and the question of whether any injustice or loss was suffered by him could be resolved with money. Ngati Haka Patuheuheu, however, were losing exactly what was guaranteed to them in the Treaty: their ancestral lands. Money was not the answer for them, in either Treaty or legal terms. In all the circumstances, and in the context of the Treaty, we believe that special legislation was justified.

209. Crown counsel, closing submissions (doc N20), topics 8–12, p 84
210. Crown counsel, closing submissions (doc N20), topics 8–12, p 84
211. Counsel for Ngati Haka Patuheuheu, submissions by way of reply (doc N25), pp 31–32

Eviction from Te Houhi

Kaa Williams recalled her mother's experience of the eviction from Te Houhi:

> My mother started her schooling at Te Houhi. She was about nine at the time. It was also at the time when problems, arguments, disagreements, squabbling and infighting broke out. She rarely spoke about these times probably because the hurt was down deep inside her, but when she did she spoke about the belittling of her foster parents and elders. She suffered their anguish and their hurt as their homeland was wrested from under their feet and they were physically forced to leave everything behind.
>
> She and her foster parents were in the group which moved not to Waiohau [1A] but to Painoaiho in Murupara. 'Panoaiho' is a name which means 'it's okay' so I'm not sure if they used this name to console themselves after being forcibly pushed out of Te Houhi. She finished her schooling at the age of thirteen in Murupara. She began looking for work to support her foster parents who were living in poverty with barely enough to eat. All the food they had planted in their gardens, all their eeling places and all their crops were left behind in Te Houhi.[1]

1. Kaa Kathleen Williams, brief of evidence, 14 March 2004 (doc C16), p 35

(3) *The Crown's second attempt at a remedy: compensation*

After the eviction, the Government began to consider the possibility of providing land to Ngati Haka Patuheuheu as compensation for their loss. James Grant allowed them to remove some of their wooden homes, but he refused to allow the removal of the school building or the wharenui, using the former to house his shearers and the latter as a hay barn.[212] Ngati Haka Patuheuheu were, of course, distressed at the use of their wharenui as a barn.[213] Buying back the wharenui became part of the compensation package. In addition, the tribe looked to the Government to help them with legal expenses, since they had to pay Beale's costs as well as their own.

The story of the Government's compensation efforts is a further unhappy episode in Ngati Haka Patuheuheu history. Tai Mitchell was sent to scope possible sites. He recommended that the Government buy the land back from Grant. The commissioner of Crown lands supported this recommendation, but the prospect seems to have been hopeless. Grant was adamant that he would not sell.[214] The first alternative site considered was Te Teko (300 acres,

212. Binney, 'Encircled Lands', vol 2 (doc A15), pp 346–347
213. Pouwhare, brief of evidence, 14 March 2004 (doc C15(a)), pp 42–43
214. Arapere, 'Waiohau' (doc A26), pp 44–45; Battersby, 'Waiohau 1' (doc C1), p 78; Rose, 'A People Dispossessed' (doc A119), pp 117–118

worth about £1300, for which the Government paid £1230).[215] Mitchell thought it suitable 'if the question at issue was devoid of all sentiment and was purely a question of selection, but as I have already pointed out this is not the case, and in the following report it would be as well that that aspect – consulting the Natives – is not entirely lost sight of'.[216]

When Ngati Haka Patuheuheu were consulted, they preferred a piece of land at nearby Galatea. Mitchell was in the middle of negotiations for this land in August, when he received a letter from Wharepapa Peita, on behalf of Kereru and other owners. Mitchell informed the Government that they now preferred Te Teko to the Galatea site, and wanted the Government to buy it for them. Negotiations with Rupert Wylie, who had an option to buy the land at Galatea, were suspended. Thomas Wylie (Rupert's father), who had been the school teacher at Te Houhi and was close to the people, wrote claiming that Wharepapa had acted without consulting others, who wanted land at Galatea.[217] Mr McGarvey, on the other hand, who owned the property at Te Teko, assured Carroll that 'Kereru, Wakaunua and party' had inspected his land and found it very good.[218]

Neither Dr Battersby nor Ms Arapere found evidence of further consultation with the community.[219] Robert Pouwhare told us that Ngati Haka Patuheuheu did not want land at Te Teko: 'Our ancestors didn't really want that land, they didn't want to stay on that land in the territory of Ngati Awa: it was not our land.'[220] In November 1908, Carroll instructed his officials that the land at Te Teko should be purchased and vested in the Waiariki Maori Land Board, so that it could be kept inalienable.[221]

In the meantime, Tai Mitchell had also negotiated with Grant for the removal of the wharenui from Waiohau 1B. Grant agreed to allow this in return for the sum of £140. It seems clear from these negotiations that the community did not intend to move to Te Teko.[222] They wanted the house moved to their new home on Waiohau 1A, and they wanted to move it themselves: 'It is a work they would not like anyone but themselves to do on account of the maori carvings which they would not like a stranger to handle.'[223]

215. Arapere, 'Waiohau' (doc A26), pp 44–47
216. Mitchell to chief surveyor, 11 April 1908 (Arapere, 'Waiohau' (doc A26), pp 44–45)
217. Battersby, 'Waiohau 1' (doc C1), pp 78–80; Arapere, 'Waiohau' (doc A26), pp 45–46; for the relationship between the Wylies and the Waiohau community, see Binney, 'Encircled Lands', vol 2 (doc A15), pp 145, 256–292, 327–350
218. McGarvey to Carroll, 14 August 1908 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 R01, doc H4(e)), p 18)
219. Battersby, 'Waiohau 1' (doc C1), pp 79–80; Arapere, 'Waiohau' (doc A26), p 46
220. Pouwhare, brief of evidence (doc C15(a)), p 43
221. Memorandum for Under-secretary, Lands, 17 November 1908 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 R01, doc H4(e)), p 31)
222. Arapere, 'Waiohau' (doc A26), pp 46–48; Binney, 'Encircled Lands', vol 2 (doc A15), pp 347–348
223. Grant to commissioner of Crown lands, 6 January 1909 (Battersby, comp, documents in support of 'Waiohau 1', (doc C1(b)), section 8, p 31)

In our inquiry, the Crown did not accept the claimants' view that the land at Te Teko was inadequate compensation for their loss. We agree with the claimants that the compensation was clearly inadequate. We note the following points:

- It was a much smaller piece of land than what had been lost, and was worth considerably less money: 300 acres for 7,000 acres, and worth a lot less than the value of just Mrs Beale's half of the 7,000 acres. No compensation was ever received for Piper's half.
- It was not in the tribal area of Tuhoe or Ngati Haka Patuheuheu, and the claimants say that they were reluctant to accept it or go there for that reason.
- The land was vested in the local Maori Land Board and not the owners, who thus had no control over it. There are suggestions that they might have been amenable to farming it, had it been handed over to them in time.[224] The beneficial owners were not actually decided until 1920, after which it became part of the Ruatoki consolidation scheme.[225] Many other people got into the title as a result, which may well have further contributed to the sense of grievance by the 1940s.[226]
- The Waiohau community did not move to Te Teko, remaining on their (poorer quality) ancestral land at Waiohau 1A. No assistance was given to help them develop this land for farming.
- The Waiohau community were not satisfied with the outcome. In the mid-1940s, Rikiriki Mehaka Tokopounamu sent petitions to Parliament, objecting that the compensation had been insufficient. These petitions were rejected without inquiry. By the 1940s, the Government considered that it had made a free donation to the tribe, without any obligation to have helped them. It was also wrongly thought that no earlier complaints had been received, ignoring the 1909 request for the balance of the £2000, and the various complaints in the 1910s about the failure to award title to Te Teko.[227]

Local settlers recommended that the compensation money be spent on helping the Waiohau community develop their land. Their advice was not disinterested, as the settler community were anxious about where the tribe might be relocated ('thus bringing hordes of Maori dogs contiguous to the best sheep lands').[228] Nonetheless, we think that they had a valuable point to make, when they suggested that 'the money be devoted to the payment for permanent & reproductive improvements on the land already owned by these natives, thus affording them employment & permanent means of livelihood by the possession of

224. Arapere, 'Waiohau' (doc A26), pp 47–51; Binney, 'Encircled Lands', vol 2 (doc A15), p 348
225. Arapere, 'Waiohau' (doc A26), pp 52–53
226. Under-secretary to Native Minister, 10 September 1945 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 ROI, doc H4(e)), p 132). This memorandum was a response to the 1945 Ngati Haka Patuheuheu petition.
227. Arapere, 'Waiohau' (doc A26), p 53; Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 ROI, doc H4(e)), pp 126–140
228. R H Abbott to Carroll, 3 June 1908 (Paul, comp, supporting documents to 'Te Houhi and Waiohau 1B' (Wai 46 ROI, doc H4(e)), p 17)

improved lands'.[229] If the settler community could see the wisdom of helping Ngati Haka Patuheuheu to develop their lands, then it ought to have been obvious to Carroll and the Government.

In 1909, the Waiohau community petitioned Parliament to pay them £480, which was the amount they believed was left over from the £2000, after the purchase of Te Teko, the payment to Grant for the wharenui, and the payment for the cost of moving the meeting house. They were still being hounded to pay legal fees, including those of Margaret Beale. The Government refused, observing that the money was voted to buy land, not as compensation in its own right. In 1911, Ngata arranged for Mrs Beale to be paid £200, which he felt was all she deserved (although she had presented the tribe with a bill for £579).[230]

In sum, Cabinet voted £2000 to buy back Beale's 3500 acres of Waiohau 1B, which was only half of the land lost by Ngati Haka Patuheuheu. When Carroll's assiduous efforts failed, £1230 was spent to buy some 300 acres in compensation, 18 kilometres distant from Waiohau and outside their tribal territory. There was some consultation with the owners, but it is not certain that they agreed to take the land at Te Teko. As Ms Arapere noted, there was no consultation with them about the level or adequacy of the compensation.[231] In addition to the £1230, sums of money were spent to buy back Ngati Haka Patuheuheu's meeting house, to move it, and to pay off Beale's demands for legal costs. No money was spent to help Ngati Haka Patuheuheu develop their lands for farming, and they did not receive ownership of their compensation land until 1920. Their petition objecting to the inadequacy of the compensation was rejected without much inquiry in 1945 and 1946.

11.6 Treaty Analysis and Findings

The Crown argued that the primary responsibility for the tragic loss of Waiohau 1B lay with the Native Land Court, and the claimants' decision to follow their lawyer's advice not to challenge the titles in the Supreme Court. The Native Land Court judges were not agents of the Crown, and nor was Howorth. The Crown accepted that it had a relationship with the Waiohau community, that it should have consulted them more, and that some minor failures on its part were contributing factors. Nonetheless, the Crown's view was that it met all of its Treaty and legal obligations. The claimants, on the other hand, maintained that the Crown breached the Treaty principle of active protection for a period of 17 years, to their great cultural, social, and economic harm.

We find that the Crown acted consistently with the Treaty when it:

- investigated and upheld Ngati Haka Patuheuheu's petition in 1889;

229. Ibid; see also a similar letter from Grant to Carroll, 29 April 1908 (Battersby, 'Waiohau 1' (doc C1), p 79)
230. Battersby, 'Waiohau 1' (doc C1), pp 81–84. Beale was not actually paid until 1915.
231. Arapere, 'Waiohau' (doc A26), pp 59–60

I am directed to report as follows: That the Committee, after hearing the evidence of Mehaka Tokopounamu and Korowiti, carefully perusing the papers submitted to the Committee by HR Burt, and after looking over the minutes of the proceedings of the Native Land Court, have come to the conclusion that, in the main, the allegations made by the petitioners are correct, and a great injustice has been inflicted upon them, although they do not altogether hold the petitioners blameless in the matter.

Native Affairs Committee of the House of Representatives, 1889

It is further stated that the partition of the land made to Burt 7000 acres is unjust . . . If the information tendered to me is correct the whole of this charge is strictly true. The information so tendered is chiefly from Burt's side, as the Patuheuheu were not present at Judge Clarke's Court. [Emphasis in original.]

Judge Wilson, 1889

The Native Minister desires to give the Natives who he considers have been wronged all the assistance in his power to obtain their rights.

T W Lewis, under-secretary, to Mehaka Tokopounamu, 1890

Mr Carroll tells me that an injustice has been done.

Premier Richard Seddon, speaking at Galatea, 1894

That they have suffered a grievous wrong is, in my opinion, plain. It is doubly hard that this wrong should have resulted from a miscarriage, which certainly ought to have been avoided, in the very Court which was especially charged with the duty of protecting them in such matters.

Justice Edwards, 1905

And whereas the Native owners of the land known as Waiohau No 1B Block were wrongfully dispossessed of their said land . . .

Lord Liverpool, Governor General, Order in Council, 1920

- conducted the Wilson inquiry and referred the report to its solicitor for a plan of action;
- promised 'all the assistance in [the Native Minister's] power to obtain their rights' in 1890;[232]

232. Battersby, 'Waiohau 1' (doc C1), p 50

- arranged for a caveat to be lodged against Burt's title in 1890;
- made determined efforts to buy Waiohau 1B from the Beales to restore it to the claimants in late 1905 and early 1906; and
- put a caveat on Beale's title with the intention of acquiring it compulsorily in 1906.

We have already found the following Treaty breaches:

- The Crown imposed the Native Land Court system without consent, so that the Court decided questions of title and partition instead of Maori themselves. Had Te Whitu Tekau been entrusted with such business, as Tuhoe and Ngati Haka Patuheuheu requested, this fraud could never have happened.
- The Crown made the purchase of individual interests void instead of illegal. It also failed to provide a mechanism (recognised by the law) for groups of owners to make pre-Court decisions about their land, instead of the supposed 'majority rule' of deciding to partition in Court. If the Crown had made the private purchase of individual interests illegal, or if it had provided for a legal negotiating face for the tribe, this fraud could not have happened.

We find further that the Crown breached the principles of the Treaty by the following actions or failures to act:

- Having set up the Native Land Court, the Crown failed (as the Native Affairs Committee found) to provide a proper means for ensuring that the people appearing in Court represented the owners – again, a legal negotiating face for the tribe was required. Had such a mechanism existed, this fraud could not have happened.
- The Native Lands Frauds Prevention Acts failed to operate effectively when the commissioner checked post-partition transactions, instead of the real transactions on which the partition rested. This failure in the system allowed fraud to go unchecked.
- The Crown failed to provide Maori with a guaranteed right of appeal or rehearing. Had such a right existed, this fraud should have been overturned on appeal.
- After the fraud was exposed in 1889, the Crown failed to provide the promised 'assistance . . . to obtain their rights.'[233] It refused repeated requests from Ngati Haka Patuheuheu to either take the case to the Supreme Court for them, or to assist them to do so, despite its knowledge that this was their only legal remedy, and that they could not afford to do it on their own. The Crown refused the tribe's requests in 1890, 1891, 1894, 1895 and 1896.
- The Crown had the caveat on Burt's title withdrawn without consulting or informing Ngati Haka Patuheuheu, thus allowing the transfer of that title to a new owner, who gained an indefeasible title under the Land Transfer Act.
- The Crown refused Ngati Haka Patuheuheu's request for special, remedial legislation in 1904, leaving them to fight a Court battle that they could not win.

233. Battersby, 'Waiohau 1' (doc C1), p 50

- The Crown failed to protect Maori freehold land from fraud under the Land Transfer Act 1885, in the manner that other land was protected.
- After negotiations broke down with the Beales (and Grant), the Crown failed to recover Waiohau 1B for its Maori owners by special legislation.
- The Crown failed to consult Ngati Haka Patuheuheu about an appropriate level and form of compensation, and failed to provide land of equivalent value, or located inside their tribal rohe.

These actions or inactions of the Crown breached its obligation to respect and give effect to the tino rangatiratanga of Ngati Haka Patuheuheu, more particularly in the mechanisms it established for ascertaining title and administering land. Had it not breached the Treaty in this manner, the subsequent breaches could not have happened. There was also a serious and sustained failure actively to protect Ngati Haka Patuheuheu and their lands, especially from 1886 to 1907. Further, the Crown failed to provide a proper remedy for the wrongs suffered as a result of its own laws and actions, in breach of the principle of redress. Finally, we note the Treaty principle of equity, which requires the Crown to act fairly as between settlers and Maori.[234] As the Central North Island Tribunal observed, this principle:

> derives from Article 3 of the Treaty guaranteeing Maori the rights of British citizens. In relation to property rights, it is axiomatic that Maori rights should be afforded no less protection than the rights of other citizens.[235]

The inequitable treatment of Maori and general land in the Land Transfer Acts, and the protection of a single settler's land transfer title rather than the ancestral rights of the Waiohau community, were in breach of this principle. Compensation, if required, should have gone to the settler; the land to Ngati Haka Patuheuheu.

These were not minor breaches. Ngati Haka Patuheuheu suffered a 'grievous wrong' that was preventable in the first place, and easily remedied (if the Crown had acted soon enough) in the second place. They suffered serious prejudice in the loss of 7000 acres of their ancestral land through fraud, and their eviction from Te Houhi and from their sacred sites and places of spiritual connection. It was also their best farm land. As they told the Crown in their 1905 petition, they were reduced to a state of despair and helplessness. We heard the long-term effects of that despair, and of the cultural and economic losses suffered by the tribe, in the claimants' evidence at our Waiohau hearing. Robert Pouwhare told us:

> We, who live here, live in abject poverty. We are a landless people and we live under continuing shame and embarrassment. We are ashamed because of the actions of the Crown, and the hideous actions of the Native Land Court of centuries past imposed upon us. Since

234. For a discussion of the principle of equity, see, for example, Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 427–428
235. Waitangi Tribunal, *He Maunga Rongo*, vol 2, p 428

11.6

> the eviction of Ngati Haka-Patuheuheu from our homelands at Te Houhi, we lived in depression on these lands. We could not get work, we could not get through school, there was no land to sustain us and we had no resources. In the dealings of the Native Land Court, some of our people sold leases, even land. Some didn't. Those who didn't sell staunchly believed in Te Kooti Arikirangi. Therefore, for those families who sold, they still feel great shame. We are embarrassed because we are unable, through poverty, to properly look after and accommodate our visitors. Look at our marae – the toilets are broken, our dining room is near collapse and our youth are unemployed. Having said that, out of adversity, out of poverty a steady resolve has grown, we have grown closer and we love one another and to hark back to our ancestors at the battle of Orakau who went in support of Maniapoto, who said *'Struggle without end Ka whawhai tonu matau mo ake, ake, ake – Struggle without end. We will fight forever and ever.'*[236]

We agree with both parties that 'the Waiohau fraud is a "very, very, sorry saga in the history of Ngati Haka Patuheuheu, and is a most painful grievance"'.[237]

236. Pouwhare, brief of evidence (doc C15(a)), pp 28–29
237. Crown counsel, closing submissions (doc N20), topics 8–12, p 78

CHAPTER 12

TE RUNANGA KAITIAKI WHENUA O TE TAIRAWHITI: THE EAST COAST TRUST

12.1 Introduction

This chapter deals with the claims of Te Whanau a Kai, Te Aitanga a Mahaki, Tuhoe, and Ngati Kahungunu, about the lands of southern Tahora 2. At issue is 60,000 acres of land, which was vested in the Carroll–Pere trust in 1896, and then transferred to a board of Pakeha businessmen in 1902. The East Coast Native Trust Lands Board sold 9,590 acres (one-sixth) of the Tahora 2 lands to help pay off the trust's debts. This sale was agreed in advance with the former trustees, and Te Whanau a Kai make no claim about it today. In 1906, the board was replaced with a single commissioner. From 1911 to 1949, the commissioner sold, leased and managed the trust estate, while the Maori owners had no decision-making powers about their own land. During this period, a further one-sixth of Tahora 2 was sold. The Turanga claimants do object to the alienations in this period, alleging that their land was sold in an improper manner, without their consent, and even actively against their wishes.

Tuhoe and Ngati Kahungunu land was not sold by the trust.

The Tuhoe claim relates to the vesting of their land in the trust without their consent, the long neglect of their land from 1906 to 1958, and the manner in which the Crown then acquired it from them after its return.

Ngati Kahungunu do not quarrel with the administration of their land by the trust, which returned it intact and developed for farming. Their complaint is a very specific one against the Crown, which refused to return land to them after it was discovered that the Crown had obtained more than its fair share of Tahora 2F due to a survey error. We address these various claims in this chapter. The Crown made no concessions of Treaty breach in respect of these claims.

12.2 Issues for Tribunal Determination

In this chapter, the claims revolve around issues of authority. The key matter was who had the power to decide what should happen to the Tahora 2 lands. This was so for the vesting

of lands in the East Coast Native Trust Lands Board, the sale of lands by that board, the sale of lands by the East Coast commissioner, and the choice of lands worthy of investment for development. Also, once Tahora 2G2 was returned to the owners in 1959, the question was again one of authority: who would decide whether or not that block could be milled and developed, the owners or the Government? The only claim that does not come under this rubric is that of Ngati Kahungunu, who (unsuccessfully) sought redress from the Crown when it was found to have acquired more than its fair share of Tahora 2F.

The questions that we have posed for further analysis are:

- How did Tahora 2 lands end up vested in a board of non-Maori businessmen in 1902?
- How and why was land alienated while vested in the East Coast Trust?
- Was Tahora 2G2 'forgotten' during the trust's administration, and was there a fair opportunity for it to be retained and developed after the trust was wound up?
- Did the Crown keep more than its fair share of Tahora 2F, after an error in its size was discovered, and were Ngati Kahungunu prejudiced as a result?

We begin by setting out a narrative of the key facts that underpin our analysis of the claims.

12.3 Key Facts

In 1889, the Native Land Court determined title to Tahora 2, a large area of land in which the interests of Urewera, Wairoa, Opotiki, and Turanga tribes overlapped (see ch 10). The decision was mainly reached by tribal negotiations out of court. For the blocks which eventually became part of the East Coast trust, the Court awarded title to individuals of the following kin groups:

- Tahora 2C: Te Whanau a Kai, Ngati Maru, Ngati Hine, and Ngati Rua.
- Tahora 2F: Ngati Kahungunu.
- Tahora 2G: Tuhoe.

Because Tahora 2 then became caught up in events centred outside our inquiry district, we need to provide a brief background to them. The origins of the East Coast Trust lie in the efforts of Maori leaders to restore corporate title and control over land that had been individualised by the Native Land Court. These efforts were led by Wi Pere, a tribal leader of Te Whanau a Kai, Te Aitanga a Mahaki, and Rongowhakaata, who also had links with Ngati Kahungunu. Pere forged an alliance with colonial lawyer and politician W L Rees. In the 1870s, they encouraged East Coast tribes to put land into a series of trusts (called the Rees–Pere trusts), but they could not get the Government to pass empowering legislation, and the courts ruled that Maori land could not be placed in trust under the current native land laws. In 1881, Pere and Rees tried an alternative: a joint-stock company. Land was transferred from the Rees–Pere trusts to the New Zealand Native Land Settlement Company. Like the

trusts, its goal was to restore Maori community control of land alienation (this time in partnership with Auckland businessmen), enabling strategic sales for the benefit of both settlers and Maori. The company started life with heavy debts, however, because of the need to buy back some of the better Turanga lands from settlers.

The Turanga Tribunal, which considered the history of the company in some detail, found that it failed because of its high debts, some poor business decisions, an international economic downturn in the 1880s, and lack of Government support. In 1888, the Bank of New Zealand forced the company into liquidation. It was at this point that its history first intersected with that of Tahora 2. Pere later claimed (with support from his people) that the owners of Tahora 2 conveyed their subdivisions to the defunct company soon after title to the block was decided in 1889. A deed was never produced in support of that claim. In 1893, ignoring any claims from the company (or tribal leaders), the Crown began to purchase individual interests in the Tahora 2 blocks (see ch 10).

In the meantime, in 1891, the Bank of New Zealand had held a mortgagee sale of some of the company's lands. The remainder were transferred to a new trust, with trustees Wi Pere and James Carroll (at this time, an East Coast member of Parliament). The lands were still mortgaged to the bank, and held by its Estates Company. In the early 1890s, Pere promised the bank that something would be done to add Tahora 2 (and other lands for which the company lacked a completed title) to the securities for the trust's debts. No action was taken, however, until 1895, when Pere tried to use the 1889 agreement to stop the Crown's purchase of individual interests. He did so by means of an application to the Validation Court, for it to validate the company's title to Tahora 2.

The origins of the Validation Court have been traversed in detail by the Turanga Tribunal. In essence, the complexity of the native land laws, and the frequent amendments (some of them u-turns) in the requirements for the legal transfer of land from Maori to settlers, had resulted in many incomplete transactions. In 1893, the Liberal Government set up a special court to validate such transctions, where it could be shown that the transaction would have been valid if conducted between Europeans, and if there had been no fraud or deliberate intent to evade the law. This meant that protections such as the trust commissioners' certification of sales (see ch 10) were treated as technicalities, and purchases could be validated without them. The 1893 Court was the third attempt: the first attempt (1889) consisted of a royal commission; the second attempt (1892) gave the task to the Native Land Court; and this third attempt created a special court with its own jurisdiction, but with Native Land Court judges and staff. The Validation Court sat almost solely on the East Coast. It was this Court which heard Wi Pere's Tahora 2 application in 1896.

After the Native Land Court defined the Crown's share of the various Tahora 2 blocks, the Validation Court sat to deal with the residue. At the request of Wi Pere, acting on behalf of the owners, the southern Tahora 2 lands were vested in the Carroll–Pere trust:

- Tahora 2C1 section 3 (28,305 acres).

- Tahora 2C2 section 2 (3843 acres).
- Tahora 2C3 section 2 (15,330 acres).
- Tahora 2F2 (11,870 acres).
- Tahora 2G2 (1346 acres).

From 1896 to 1902, the trustees tried to raise money for the development of these lands, and also so that they could be cut up for leasing. Most attempts to secure finance failed, but there was a relatively small loan secured on Tahora 2 by the end of this period. In 1901, the bank began the process of a mortgagee sale of the Carroll–Pere trust lands. In 1902, the Government intervened and passed special legislation to prevent this from happening. The East Coast Native Trust Lands Act provided for the Government to appoint a board of 'three fit persons', who could not be members of Parliament, for the purpose of managing the strategic sale of enough land to pay off the trust's substantial debts. At this point, the trust held more than a quarter of a million acres, throughout the whole East Coast region. All of that land, whether it was secured against the bank's mortgages or not, was transferred to the new board. This included the Tahora 2 blocks. Section 12 of the Act specified that the former trustees had to agree terms and conditions with the board before it was allowed to sell any land.

In 1903, the East Coast Native Trust Lands Board and the former trustees signed an agreement permitting the board to sell up to 5000 acres each of Tahora 2C1 and 2C3. In all, the board sold 9,590 acres of these two blocks for £10,009, although it sold more of 2C1 than had been agreed. No other Tahora 2 lands were sold by the board. By 1905, the board had sold enough land to pay off the trust's debts. At this point, the Government chose to dispense with the board and transfer the trust to a single commissioner, called the East Coast commissioner. The commissioner was given all the powers of the board by section 22 of the Maori Land Claims Adjustment and Laws Amendment Act 1906. Section 11 of the Maori Land Claims Adjustment and Laws Amendment Act the following year gave the commissioner the power to develop the trust lands. In 1911, his powers were extended further. He was no longer bound by the 1903 agreements, and had the sole power to sell land as he chose (section 14 of the Native Land Claims Adjustment Act 1911).

The Maori owners, on the other hand, had no say in the decision-making of the trust until 1935. In response to a 1934 petition from Turi Carroll and other owners, section 18 of the Native Purposes Act 1935 provided an advisory role for block committees. It was not until 1949, however, that the owners were given more than advisory powers. Commissioner Jessep set up a central consultative committee in 1948, which was given a formal role by the Maori Purposes Act 1949. The Act provided for an East Coast Trust Maori Council, consisting of an elected member from each of the block committees. The council was given the power to veto any sales or mortgages, any purchases by the trust, and any increase of the trust's overdraft.

Section 28(3) of the Native Land Amendment and Native Land Claims Adjustment Act 1922

Section 28(3) of the Native Land Amendment and Native Land Claims Adjustment Act 1922 reads:

> The power of the Commissioner appointed under section twenty-two of the Maori Land Claims Adjustment and Laws Amendment Act, 1906, to sell lands vested in him as such Commissioner shall be exercised subject to the approval in writing of the Native Minister of any such sale or of the proposal to sell.

In the meantime, further sales had taken place in Tahora 2C3 section 2. In 1920, a new commissioner, Thomas Coleman Junior, offered 6,711 acres to Chapple and Field, clients of his private law firm. Despite protests from the trust's solicitor, James Nolan, and from the owners, this sale went ahead and was completed in October 1920. Coleman then began a sale of a further 3,396 acres (almost the whole of the rest of the block) to the same private buyers. With that sale in train, Coleman resigned in 1921 and was replaced by Judge W Rawson, who was also the Maori Trustee. Commissioner Rawson completed the second sale to Chapple, and also sold 183 acres of 2C3 to the Crown in 1922. In that year, the Government – in the light of Coleman's actions – changed the law to take away the commissioner's sole power to sell. Section 28 of the Native Land Amendment and Native Land Claims Adjustment Act 1922 required the written approval of the Native Minister for any sale. After this law change, no more land was sold from the Tahora 2 blocks.

The commissioner's principal task was to pay off the trust's internal debts. The board had sold various blocks, no matter what their particular share of the debts owed to the Bank of New Zealand. As a result, the owners of the surviving blocks owed money to the owners of the blocks that had been sold. In order to pay off these internal debts, the commissioner sought an income by leasing land to settler or Maori farmers, or by developing farms himself. As money came in from leasing (or selling) land, and from farm produce, it was spent on developing more land and settling internal debts. A long balancing exercise resulted, with blocks moving in and out of debt to each other for a number of decades, until the wool boom of the early 1950s enabled the trust to be wound up. On 1 July 1953, the three Tahora 2C blocks were transferred from the East Coast commissioner to incorporations of the owners. In 1955, the owners had a joint meeting and agreed that the last 1509 acres of 2C3 should be sold to 2C2, so that the land could continue being farmed as part of the Tapere station. This sale took place in 1956.

12.4

Tahora 2 block	Into trust in 1903 (acres)	Sold or taken for public works	Returned to owners
2C1 section 3	28,305	6,178	22,127
2C2 section 2	3,843	56	3,687
2C3 section 2	15,330	13,821	1,509
2F2	11,870	311	11,559
2G2	1,346	0	1,770*
Total	60,694	20,042	40,652

* The difference between the estimated area of Tahora 2G2 in 1903 (1346 acres) and the area returned to the owners in 1959 (1770 acres) was the result of a survey.

Tahora 2 lands and the East Coast trust

Source: Michael Macky, 'Report of Michael Macky in Respect of Tahora and the East Coast Trust' (commissioned research report, Wellington: Crown Law Office, 2005) (doc L8), p 29, tbl 2

Tahora 2F2 (Papuni Station) was returned to an incorporation of owners on 1 July 1953. Tahora 2G2, however, remained vested in the East Coast commissioner until 1959. This was partly because the list of owners was decades out of date. In 1957, the Government called a meeting of assembled owners to vote on a resolution to sell the block to the Crown. The meeting rejected the resolution, and in 1958 a second meeting was held to establish an incorporation to receive the land back from the commissioner. The land was duly vested in the new incorporation in 1959. Then, in 1961, Tahora 2G2 was proclaimed under the Soil Conservation and Rivers Control Amendment Act 1959, which allowed the prohibition of milling on land required for catchment protection. In 1973, the owners agreed to exchange Tahora 2G2 for Crown land. Two sections of State Forest 101 were transferred to the incorporation in 1973, along with a payment of $8,320. The additional payment was necessary because the Crown land being exchanged was worth less than 2G2.

12.4 Essence of the Difference between the Parties

12.4.1 How did Tahora 2 lands end up vested in a board of non-Maori businessmen in 1902?

The Crown and claimants agreed on many of the facts about the East Coast Trust and the sale of land from Tahora 2C in 1905 and the 1920s, although they had different interpretations of some key points. They did not agree about the antecedents of the trust, nor the degree of Crown responsibility for the failure of the Carroll–Pere trust. These matters, as

we were told, have been been the subject of detailed analysis and findings by the Turanga Tribunal. The Crown challenged some of those findings, and the claimants defended them.[1]

In essence, the Tribunal found that the Crown's native land laws failed to provide an adequate (or any) provision for community management of tribal land. As a result, the peoples of Turanga sold their land to trusts or a corporate body at token prices, to sell it in turn on their behalf, in order to restore the community's ability to alienate selected land to fund farm development. Neither the trust (the Rees–Pere trust) nor the company (the New Zealand Native Land Settlements Company) worked. According to the Turanga Tribunal, the reasons were mixed: the trustees and company made some poor business decisions and the 1880s depression damaged their interests, but the Crown's title system also contributed to their failure. The 1890s rescue vehicle – the Carroll–Pere trust – also failed, because it had too much debt and too little Crown assistance, too late. In particular, the Tribunal blamed the constant, expensive litigation in the Validation Court as a key reason for the trust's failure, again brought about in part by the flaws in the Crown's title system.[2]

As noted, the Crown challenged these findings and the claimants defended them. We do not intend to take these matters further. We did not receive detailed evidence on the antecedents of the Carroll–Pere and East Coast trusts. To the extent that the trusts' origins are relevant to Tahora 2, we see no need to revisit the Turanga Tribunal's findings. The history of Tahora 2 was different in some ways from the situation described in Turanga. Tahora 2 was never part of the Rees–Pere trusts or the Settlement Company, and it was only ever on the periphery of the Carroll–Pere trust. Some of the issues relevant to that trust are not particularly relevant to Tahora 2, except in the broadest sense. Tahora 2 did not come before the Validation Court because it was an incomplete purchase. Rather, the Court was asked to validate a voluntary arrangement to put parts of Tahora 2 in trust. Also, the reasons for the failure of the Carroll–Pere trust are not central to our inquiry. Tahora 2 came into the trust relatively late, and it was never an integral part of it, nor at risk of mortgagee sale by the Bank of New Zealand, to which the Carroll–Pere trust lands had been mortgaged.

On the main matters of relevance to our inquiry, the parties agreed that Tahora 2 was vested in the Carroll–Pere trust in order to put a stop to Crown purchasing, to secure a corporate control of any future alienations, and to fund development. The Crown argued, however, that the owners could have chosen the 1894 incorporation option instead of putting their land in such a risky business as this particular trust. The claimants stressed that they had to do something to escape the Crown's purchase of individual interests, and this was their only viable option. The parties agreed that the Carroll–Pere trust failed because of its debts, although the Crown did not accept the claimants' argument that it should have done

1. Crown counsel, closing submissions (doc N20), Topic 13, pp 2–4; Counsel for Te Whanau a Kai, closing submissions (doc N5), pp 36–42; Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), 11–17. We note that counsel for Te Aitanga a Mahaki supported and agreed with submissions made by counsel for Te Whanau a Kai on these issues.

2. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 539–585

something positive to assist the trust, and that it should have intervened much earlier than 1902.[3]

In terms of the 1902 intervention, the parties agreed that it was necessary. The claimants did not agree with each other on one issue: Tuhoe challenged the placing of their land in the East Coast Trust without their consent, when it could have been returned to the owners; whereas Te Whanau a Kai considered the replacement of Carroll and Pere with the 1902 board was necessary.[4] The Crown suggested that there had been a degree of consultation by the trustees with the owners, but accepted that the owners were expecting their land to be transferred to the Maori Land Council, not a Government-appointed board of Pakeha businessmen on which they had no representation. The Crown noted, however, the Turanga Tribunal's finding that the form of intervention in 1902 had been a 'necessary and painful measure'.[5]

12.4.2 How and why was land alienated while vested in the East Coast Trust?

Some Tahora 2C land was sold by the board in 1905. Te Whanau a Kai accepted that they had agreed to the sale, and that it was not for the purpose of settling the Bank of New Zealand mortgages.[6] Counsel concluded: 'there are no issues for Te Whanau a Kai relating to that matter'.[7]

The claimants did, however, take issue with the creation of the East Coast commissioner in 1906, their exclusion from any role or decision-making about their lands until 1949, and the sale of more of Tahora 2C in the 1920s. Relying on Michael Macky's evidence for the Crown, the claimants were critical of the commissioners' unnecessary sale of almost all of 2C3(2) from 1920 to 1923, which took place without their consent.[8] The Crown also relied on Macky, and accepted that Commissioner Coleman's actions were questionable when he sold parts of 2C3(2). In the view of Crown counsel, however, the Crown's response was adequate: the Government pointed out to the commissioner that he was acting inappropriately; and it later removed the commissioner's sole power to sell. Also, the Crown suggested that the second round of sales under Commissioner Rawson were carried out with the owners' consent, which was a departure from Macky's evidence.[9]

3. Crown counsel, closing submissions (doc N20), Topic 13, pp 3–6; counsel for Te Whanau a Kai, closing submissions (doc N5), pp 36–42; counsel for Te Whanau a Kai, submissions by way of reply (doc N27), pp 11–17
4. Counsel for Wai 36 Tuhoe, closing submissions, Part B, (doc N8(a)), pp 79, 81; counsel for Te Whanau a Kai, closing submissions (doc N5), pp 40–42; counsel for Te Whanau a Kai, submissions by way of reply (doc N27), pp 13–14, 17
5. Crown counsel, closing submissions (doc N20), Topic 13, pp 6–7
6. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), pp 13–14, 17
7. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), p 17
8. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), pp 14, 16–17
9. Crown counsel, closing submissions (doc N20), Topic 13, pp 9–10

On the question of consultation with – and decision-making powers for – the owners, the Crown accepted that:

> the beneficial owners' capacity to control their lands was severely limited between 1902 and 1949. It is also likely that Maori were anticipating a greater role in the Trust than they were given.[10]

In the Crown's view, this was acceptable during the emergency period of 1902 to 1906, but as soon as it became clear that the trust regime was going to have a long existence, it became 'problematic'.[11] Nonetheless, the Crown stressed the degree of informal consultation that probably took place on the ground, the creation of advisory owner committees in 1935, and the grant of real powers to the East Coast Trust Maori Council in 1949. Also, the owners' lack of control was compensated by the development of their lands, and the return of those lands in the 1950s.[12] The claimants accepted that this outcome 'offset' some of their grievances, but not all of them.[13]

12.4.3 Was Tahora 2G2 'forgotten' during the trust's administration, and was there a fair opportunity for it to be retained and developed after the trust was wound up?

Tuhoe and Ngati Kahungunu land was vested in the East Coast Trust in 1902, but none of it was sold. For these iwi, the grievances are different. Tuhoe claimed that their piece (2G2) was vested in the Carroll–Pere trust without their consent. This error was compounded, they argued, when the land was revested in the East Coast Trust in 1902, again without their consent. From 1902 to 1958, Tuhoe had no say in the decisions about their land. It was left neglected to accumulate debts, while the commissioner at first tried to sell or exchange it in 1926, and then ignored it for the next thirty years as too isolated for development.[14] The Crown argued that it was in fact too isolated for development, and that it would have been unfair to other blocks if more money was spent on this one than it could repay.[15] The claimants responded that the land should have been returned to Tuhoe instead of being left to accumulate debts, as soon as the commissioner decided that he would not develop it. They could then have made their own decision about it. Also, they suggest that the Crown's main argument – that Maori grievances were remedied when their land was saved and returned in a developed form – does not apply to them.[16]

10. Crown counsel, closing submissions (doc N20), Topic 13, p 7
11. Crown counsel, closing submissions (doc N20), Topic 13, p 7
12. Crown counsel, closing submissions (doc N20), Topic 13, pp 7–8, 10
13. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), p 14
14. Counsel for Wai 36 Tuhoe, closing submissions, Part B, (doc N8(a)), pp 79–82
15. Crown counsel, closing submissions (doc N20), Topic 13, pp 12–13
16. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 17–18

12.4.4

Further, Tuhoe argued that the Crown's actions were 'coercive' when the land was actually returned in 1959. Unable to persuade the owners to sell the land to it, the Crown used legislation to prevent them from using it or getting any benefit from it, until they were finally compelled to agree to an exchange.[17] The Crown argued that it had a valid need for this land to protect a river catchment and prevent erosion, and that it made a fair exchange in which the owners got an economic asset in return, about which no complaints were made.[18]

12.4.4 Did the Crown keep more than its fair share of Tahora 2F, after an error in its size was discovered, and were Ngati Kahungunu prejudiced as a result?

Ngati Kahungunu do not take issue with the fact that Tahora 2F2 was returned to them intact in the 1950s, with a developed and working farm. They do, however, protest against their loss of land as a result of survey errors. When 2F was partitioned between Ngati Kahungunu and the Crown in 1896, the block was believed to be larger than it turned out on survey, so that the Crown was awarded 803 acres more than its fair share. This error was discovered during the trust's administration, when the claimants had no say in managing the land. Numerous petitions failed to secure redress.[19] The Crown responded that it received less than its due in Tahora 2C. At the time of the claimants' petitions, the Crown's response was that any compensation should therefore come from the Maori sections of 2C, and not the Crown's part of 2F. Crown counsel accepted that there were few owners in common between the 2C and 2F lands.[20]

12.5 Tribunal Analysis

12.5.1 How did Tahora 2 lands end up vested in a board of non-Maori businessmen in 1902?

Summary answer: *Tahora 2 was drawn into the Carroll–Pere trust in 1896. By 1889, when the New Zealand Land Settlement Company had already failed, Turanga leader Wi Pere was still trying to get Maori land vested in it. His purpose was to restore Maori community control of land alienation, and to raise capital for development by means of leasing and strategic sales. In 1893, the Crown began buying individual interests in Tahora 2, refusing to negotiate with tribal leaders. In an attempt to stop the bleeding of individual shares, Pere and Rees applied to the Validation Court to confirm an alleged transfer of Tahora 2 to the Settlement Company back in 1889. No deed was produced, but in 1896 the Court gave effect to a voluntary agreement among the southern Tahora 2 leaders, that their lands should be vested in the Carroll–Pere*

17. Counsel for Wai 36 Tuhoe, closing submissions, Part B, (doc N8(a)), pp 81–82
18. Crown counsel, closing submissions (doc N20), Topic 13, p 13
19. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 8, 68–70, 74; see also Boston and Oliver, 'Tahora' (doc A22), pp 271–282
20. Crown counsel, closing submissions (doc N20), Topics 8–12, p 64

trust, which had replaced the Settlement Company. One Tuhoe block, Tahora 2G2, was vested in the trust, although its owners were not present in Court and did not consent.

From 1896 to 1902, Tahora 2 was on the periphery of events relating to the Carroll–Pere trust. At first, the trustees were inclined to agree with the Bank of New Zealand that the block should be counted among the securities for the trust's debts, and thus available for mortgagee sale, but the Validation Court (and ultimately the trustees) did not allow this. It was kept separate from the main trust estate. At the same time, it was nearly impossible to raise finance for development, so there was only a minor debt outstanding against Tahora 2 when the bank forced a mortgagee sale in 1901. Legal action forestalled the sale, and the Government was finally persuaded to intervene in 1902, partly to save as much of the Carroll–Pere trust lands as possible, and partly to save the bank itself from a sale that might not even cover the debts.

Carroll consulted leading owners and tried to get the lands transferred to the new Maori Land Council, with its Maori majority and elected Maori representatives. The Government turned down this proposal, as it had turned down earlier proposals for Government financial assistance and for continued Maori governance of the trust. Instead, all the lands vested in Carroll and Pere (including Tahora 2, which was not at risk of mortgagee sale) were transferred to a board of three Pakeha businessmen. The Turanga Tribunal considered this arrangement for professional management to have been a painful but necessary step. We note, however, that Carroll also intended the Council to appoint professionals to manage these lands. Some Maori input was provided in the 1902 scheme: the board could not sell lands to clear the trust's debts without the prior agreement of the former trustees.

(1) *Legal powers for Maori to protect their own lands: Tahora 2 and the Carroll–Pere trust*

As we have seen, the Crown conceded that it failed to provide a mechanism for Maori to manage their lands as communities. The importance of this concession cannot be overstated. From 1878 to 1894, Urewera lands passed through the Court and became the property of collections of individuals. The law empowered those individuals to alienate their paper shares at the expense of the customary authority of rangatira and community control. In 1886, the law was changed to allow groups of owners to elect block committees. Significantly, restrictions on alienation were no longer thought necessary for the short period when this law was in force. Restrictions were restored alongside individual dealings in 1888. Finally, in 1894, the Liberals provided for block owners to form incorporations, with elected management committees.

This reform came too late for Te Urewera. Most of the land left in the rim blocks was already tied up in Crown dealings (or was soon after), which meant that Maori could not form incorporations. In that circumstance, Maori leaders on the eastern side of our inquiry district tried another model with which they were more familiar: a formal, legal trust. The courts had ruled in 1881 that Maori land could not be placed in trust unless it had a freehold

(later Land Transfer) title. Memorials of ownership did not qualify.[21] Nonetheless, Wi Pere and his lawyer, William Rees, had established trusts (and later a joint stock company) on the East Coast. Their aim was to ensure community management and protection of Maori land; judicious sales would fund its development, allow for control of the extent of Pakeha settlement, and for infrastructure. The joint-stock company, called the New Zealand Native Land Settlement Company, was a more ambitious operation with the same objects, designed to attract settler capital, while Maori would invest their land. The company had failed in 1888, a victim of the debts it inherited from the trusts (which had had to buy good land back from settlers), unwise business decisions, a lack of Government support, and the international economic downturn, which saw its sales dry up. The company had substantial debts to the Bank of New Zealand. A new trust (called the Carroll–Pere trust) was established in its stead in 1892.[22]

In 1893, Rees and Pere proposed a scheme for the development of East Coast Maori lands, including Tahora 2. They sought a large loan from the Government to pay off the Settlement Company's old debts, the survey liens on Tahora 2 (and other blocks), and to fund farming development. They also wanted to fund improvements to enable some of the land to be leased. Farming was to be on a large scale and managed by tribal committees. In return, the 3000 or so Maori owners would sell significant amounts of land to the Crown for settlement, including parts of Tahora 2. The Government, however, rejected this scheme. It was suspicious of Maori abilities to farm on any significant scale, and preferred to buy individual shares in Tahora 2, which it did over the next two and a half years (see ch 10). In order to put a stop to the bleeding of individual interests, Rees and Pere warned the Crown that they would take a pre-Crown purchase agreement covering the whole of Tahora 2 to the Validation Court for its endorsement. The Government was not deterred so the application to the Court went ahead.[23]

There was a brief tussle for jurisdiction. Judge Gudgeon was both Native Land Court and Validation Court judge in this case. The Crown had applied to the Native Land Court for a partition of its interests. But Rees had filed a prior application to the Validation Court regarding an 1889 agreement to vest the whole of Tahora 2 in the Settlement Company. Rees argued that the Validation Court had to decide his application first. For reasons that are unclear, the Native Land Court dealt with the Crown's application first, and awarded it some 130,000 acres of Tahora 2.[24] On the same day, Judge Gudgeon sat as the Validation Court to decide whether the 1889 agreement should be validated, which would have resulted in the vesting of the Tahora 2 residue blocks in the Carroll–Pere trust.

21. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 486–489, 490–491, 523–524, 535–536, 552
22. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 3–4
23. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 41–42; Macky, 'Tahora and the East Coast Trust' (doc L8), pp 6–8
24. Macky, 'Tahora and the East Coast Trust' (doc L8), p 8; Boston and Oliver, 'Tahora' (doc A22), p 131

The detailed history of the Carroll–Pere trust has already been covered by the Turanga Tribunal.[25] Here, we note two points of significance to our inquiry. The first point is that the trust mechanism, which the Turanga Tribunal called recollectivising, was a way of empowering Maori committees and ensuring the management of their lands by community leaders. But, as we have seen, the Rees–Pere trusts and the New Zealand Native Land Settlement Company both failed, and the debts of the company led to a mortgagee sale of a number of its land blocks by the Bank of New Zealand Estates Company. The Carroll–Pere trust was a rather desperate attempt to save the rest of the Settlement Company lands for their Maori owners. Clearly the new, unique, and experimental trust started life with considerable disadvantages. The Crown agreed with Macky that it was established with 'too much debt and too little land'.[26] It lacked access to sufficient cheap finance, and rapidly racked up costs and debts as it funded Maori farming development. The trustees tried to solve its problems with land to which the company had acquired partial title, and which could now be secured through the Validation Court, to bolster the trust's asset base and spread the debt across more land. Tahora 2 was one such block.[27]

The second point is that the Court did not in fact validate the 1889 'agreement', which supposedly vested the whole of Tahora 2 in the Settlement Company. Macky pointed out that an actual deed was never produced in Court, and may never have existed.[28] The Court had no choice but to recognise that the Crown had purchased parts of all of the blocks (as decided in the Native Land Court), and it only vested southern Tahora 2 in the trust, while awarding ownership of the residue of the lands in the north of the block directly to their owners.[29] Section 19 of the Native Land (Validation of Titles) Act 1893 gave the Court power to approve voluntary arrangements.[30] This in effect was what happened with Tahora 2. Wi Pere, and the peoples that he represented, claimed their shares of Tahora 2 for the trust, but did not (for the most part) try to obtain the Tuhoe or Whakatohea sections. With the apparent consent of the owners – and no objections in Court – the judge gave effect to the voluntary arrangements presented to him in 1896 in satisfaction of the 1889 'agreement'.[31]

(a) ***Tuhoe's claim about Tahora 2G2:*** We pause here to consider Tuhoe's claim about the vesting of Tahora 2G2 in the trust.[32] Unlike the rest of the Tuhoe lands, Pere did claim this block for the trust. Why did he do so? From the evidence available to us, it appears that the

25. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 539–585
26. Crown counsel, closing submissions (doc N20), Topic 13, p 3; Macky, 'Tahora and the East Coast Trust' (doc L8), p 4
27. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 4–5
28. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 5–7
29. Boston and Oliver, 'Tahora' (doc A22), pp 131–140
30. Native Land (Validation of Titles) Act, s 19
31. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 5–9; Boston and Oliver, 'Tahora' (doc A22), pp 129, 139–140
32. Counsel for Wai 36 Tuhoe, closing submissions, Part B, (doc N8(a)), pp 79–82

answer lies in the original title determination for 2G in 1889. Originally, the 2G lands were part of the Turanga claim (2C). The 2G block was a 1856-acre piece of land at the 'eastern edge' of Tuhoe's claim in Tahora.[33] Netana Te Rangiihu had claimed land in 2C on behalf of Nga Maihi and Ngai Tamaroki. This claim breached the arrangements made between tribal leaders for the subdivision of Tahora 2 into iwi blocks. Tamaikoha negotiated a new agreement with Pere in March 1889. In return for cutting the 2G block out of 2C for Nga Maihi and Ngai Tamaroki, Netana and Hetaraka Te Wakaunua gave up their wider claims in 2C. Thus, the creation of 2G and its award to Tuhoe had been a compromise between Turanga and Urewera leaders.[34] Wi Pere, it seems, was claiming this land back when he sought it for the Carroll–Pere trust in 1896.

The Native Land Court awarded 510 acres (2G1) to the Crown. The residue (2G2), estimated at 1,345 acres, was vested in the Carroll–Pere trust. Tuhoe claim that there is no record of the owners being present at the hearing, nor that they consented to this vesting, other than a statement in court to that effect by Wi Pere.[35] He told the Court: 'Most of the owners belong to Uriwera [*sic*] but some of them are here. They have agreed to appt of Trustees – Carroll, myself and Kaho Anumia [*sic*].'[36] Significantly, Pere did not apply for the appointment of a committee to represent the owners, as he did for some of the other blocks.[37]

It emerged from a later petition in 1903 that Tuhoe had definitely not been present at the 1896 hearing. Tamaikoha sent a petition to Parliament on behalf of Tuhoe and Te Upokorehe, explaining that the 1896 hearing had been too distant (and, presumably, expensive) for the hapu to attend. They sent John Balneavis to look after their interests, and he oversaw matters on their behalf. Instead of acting in their interests, however, Balneavis was believed to have betrayed the hapu. He tried to secure the best land for a small minority by partitioning the residue of 2A.[38] Tamaikoha told Parliament:

> Balneavis, acting for himself and 25 others, had prevailed upon the Court to cut out of the residue of the Block 2148 acres, to be named Tahora No. 2A Section 3, being all the flat, or ground fit to cultivate, leaving us the great majority of the owners 135 only precipitous broken bush unfit for cultivation, also taking all our ancestral burial places and cultivations. Many of us are almost landless, and now living upon and cultivating land belonging to our friends.[39]

33. Binney, 'Encircled Lands' (doc A15), pp 10, 104
34. Boston and Oliver, 'Tahora' (doc A22), pp 62–64
35. Counsel for Wai 36 Tuhoe, closing submissions, Part B, (doc N8(a)), p 79
36. Tairawhiti Validation Court, minute book 4, 17 April 1896, fol 188 (Boston and Oliver, 'Tahora' (doc A22), pp 139–140). The name of the third trustee is difficult to read in the minutes, but appears to be Kaho Numia.
37. Boston and Oliver, 'Tahora' (doc A22), pp 138–140
38. Boston and Oliver, 'Tahora' (doc A22), p 166
39. Petition No 10, Erueti Tamaikoha and eleven others, 1902 (Boston and Oliver, 'Tahora' (doc A22), p 166)

The select committee referred the petition to the Justice Department for comment.[40] The Chief Judge inquired into it and discovered that Balneavis had indeed secured this partition without the knowledge of the other owners. He advised that there was some justification for the petitioners' complaint.[41]

We take this as clear evidence that Tuhoe did not attend the 1896 hearing, and that their chosen representative could not be relied upon to protect their interests. Balneavis, it seems, was the only person who might have objected on their behalf to the vesting of 2G2 in the trust, and he did not do so. We accept the Tuhoe claim that they were not present and did not consent to the vesting of 2G2 in the trust.

(2) *The Carroll–Pere trust: Tahora 2 gets into debt*

As we have seen, the southern parts of Tahora 2 (some 60,000 acres) were vested in the Carroll–Pere trust in 1896. Of these lands, the Ngati Kahungunu share (2F2) remained intact and was successfully developed for farming. The Tuhoe block (2G2) was also kept intact, although it was not developed. Neither iwi, therefore, has a claim about the trust's alienation of land. Sales were confined to the three Tahora 2C blocks belonging to Te Whanau a Kai and three other hapu.

Overall, the question of land sales became tied up with the need to pay off the trust's debts, more than the need to raise finance for development. The 1892 agreement between Rees, Pere, Carroll and the Bank of New Zealand's Estates Company required the new trust to trade its way out of debt within five years. The Crown's historian, Michael Macky, argued that this was an impossible task. The debts were too high, and the trust's land base was too low, for it to succeed. Its only chance was to pull in as much extra land as possible, at the risk of this too being sold to pay off the ever-growing interest on (and the principal of) the old debts. The validation legislation of 1892 and 1893 offered the trust a chance to obtain more land at no extra cost, other than high legal fees, if it could convince the new court to validate some of its old, incomplete titles. As early as 1892, Rees and Pere promised the Estates Company that they would complete titles to Tahora 2, to provide more security for the mortgage. They repeated this promise in 1893 but did not carry it out until 1896.[42] This indicates a hesitancy on the part of both owners and trustees – they did not make good on their promise until virtually forced to do so, as a way of stopping the Crown's purchase of undefined individual interests.

40. The Native Department had been abolished at this time, with its responsibilities divided between Justice and Lands and Surveys.

41. Boston and Oliver, 'Tahora' (doc A22), pp 166–167

42. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 3–8

12.5.1

The Tahora 2 lands became vested in a series of trusts, with trustees additional to Carroll and Pere for each of the blocks. Their exact relationship with the rest of the Carroll–Pere trust was undefined, left deliberately by the Validation Court for a future decision.[43]

Macky suggested that the owners agreed to this arrangement because:

- they wanted to stop the Crown purchasing of individual shares;
- they wanted a corporate title and management structure;
- they wanted to control any future alienations so as to get real profits and capital for development, and they wanted a choice between selling or leasing.[44]

As the 1890s wore on, Carroll spoke for the many Maori who preferred leasing to sales, farming development, and Maori partnership with the Crown in achieving both. This was influential in shaping the direction of the trust, and also the alternatives proposed as to the manner of the Crown's intervention in 1902. We will return to that below. Here, we note that the trustees tried to raise money on Tahora 2 for a variety of purposes, although they neither leased nor sold any of it.

As early as November 1896, Rees applied to the Validation Court for the removal of restrictions to permit the land to be leased, and to enable the trustees to borrow money for the payment of costs, charges, and expenses, including past and future survey costs. The trust wanted to survey (and provide road access to) distinct parcels for leasing. The Court granted the application, authorising the trust to apply to the Government. These 'restrictions' were not restrictions on alienation, recorded on the title, but restrictions imposed by the Crown's right of pre-emption under the 1894 Act. Special permission was required for Maori land to be leased or mortgaged to anyone other than the Crown, and this included the Tahora 2 lands held by the trustees.[45] Further applications to the Court followed, because it proved almost impossible to get loans. The Government and its lending institutions were, in Rees' words, 'absolutely afraid to touch Maori lands'.[46] They were seen as risky partly because incomplete private purchases had left titles shaky. This was an outcome of the Crown's title system and purchase policies for Maori land.

In the late 1890s, the Carroll–Pere trust was in serious financial strife, as legal fees and interest on debts ballooned. The Tahora 2 lands were in lesser financial difficulties, but finding it hard to raise money for development. The trustees tried fruitlessly to secure loans on Tahora 2. In 1897, the trust did get a more general loan of £8500 from the Bank of New Zealand, of which £568 was used to pay Rees' legal fees in connection with Tahora 2. This sum would have to be repaid whenever the block generated any income. In 1900, the trust applied to the Court to approve a £3,500 loan on Tahora 2. The 2C and 2F owners met with

43. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 9–10, 14–15; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 45–48

44. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 10–12

45. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 44; Tairawhiti Validation Court, minute book 5, 19 November 1896, ff 378–379; Native Land Court Act 1894, s 117; Native Land Laws Amendment Act 1895, s 4

46. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 43

the trustees and asked for the loan to be increased by £2000, to provide development capital for their reserves at Te Papuni (2F2) and Te Houpapa (2C2). The judge approved the application but the trustees returned to Court in 1901, seeking fresh approval of a reduced loan at the less ambitious sum of £2500. This was supposed to fund surveys so that some of the land could be cut up for leasing or sales. But the loan fell through and the trust had to take the money from a private individual at an exorbitant interest rate, to the alarm of the Validation Court.[47]

Despite some misgivings on the part of Judge Batham, the Validation Court had assumed a monitoring and supervisory role over the trust's administration of land vested in it through that Court. In overseeing these various applications, the judge stressed that Tahora 2 was not to be made responsible for the Bank of New Zealand mortgages. The bank (which was also in trouble) was looking hopefully at Tahora 2. In the past, the trustees had sometimes treated the land as though it was part and parcel of the Carroll–Pere trust and its obligations, but the Court reminded the trustees (and the bank) that this was not so. By 1901, as the crisis intensified and the deadline approached for another mortgagee sale, the bank was trying to ensure that Tahora 2 would be considered part of the assets available to it. The trustees and the Court both opposed the bank, and insisted that Tahora 2 consisted of separate trusts.[48] Rees proposed that Tahora should 'not be treated as an integral part of the Trust estate'. Judge Batham agreed:

> I am not aware that I have ever looked upon Tahora as forming part of the general Trust Estate[;] until the question as to whether Tahora is part of the general Trust Estate is decided, it should be treated as a separate estate. That question has never been brought before the Court in a proper manner.[49]

In 1905, when the Tahora 2 debt was paid off, it amounted to £2,742 8s 4d.[50] The Carroll–Pere trust's debts, on the other hand, had risen from £58,000 in 1892 to £156,383 by 1902. This increase was almost entirely the result of legal fees and interest.[51] From time to time, the trustees and the Maori communities of the East Coast sought the aid of the Government. The Liberals rejected all appeals for Government finance to assist the trust. This was despite a recommendation from the Validation Court, which had suggested that a political solution was necessary to the trust's problem: the Government needed to advance money in return for a 'certain measure of control'.[52] Petitions to the Native Affairs Committee resulted

47. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 43–54
48. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 45–48; Macky, 'Tahora and the East Coast Trust' (doc L8), pp 9–10, 14–17
49. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 46
50. East Coast Native Trust Lands Board, 'Schedules of Lands vested in the Board, and a Statement of the Board's Transactions in regard to the said Blocks to the 31st July, 1905', AJHR, 1905, G-9, p 5
51. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 561
52. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 43

in several reports to the Government in favour of helping to resolve the growing crisis. Its failure to do so would have considerable ramifications for Tahora 2. In 1895, the Bank had extended the Carroll–Pere trust's deadline for a mortgagee sale to 1901. From 1896 onwards, bills were introduced to Parliament to rescue the land (and the bank) before it came to that. All of them lapsed. There was, as the Turanga Tribunal put it, no 'political will' to negotiate and push through a solution.[53]

Part of the problem lay in the distance between Maori and Government views of the remedy. The trust's platform for rescue packages usually involved continued Maori control, a prominent role for leasing, and a Government loan to pay off the bank and help development. The Government, on the other hand, tended to prefer a board of Pakeha businessmen, the strategic sale of enough land to pay off the debt, and an ongoing management regime independent of the owners. Increasingly, it fell to Carroll to mediate these two quite different approaches, due to his role as trustee and (from 1899) as Native Minister.[54]

(3) *Crown intervention in 1902*

The political will for successful intervention in 1902 came from the precarious situation of the Bank of New Zealand. It had been in trouble for some time by 1902, despite a large Government bail out in 1894. Court action on the part of the owners had failed to do more than delay the proposed mortgagee sale, but there was a very real concern, on the part of the bank as well as the owners, that a forced sale would result in low prices and might not even cover the mortgages. Also, there was the threat of further litigation from the trustees, and – as the bank's chairman explained to Sir Joseph Ward, the acting premier – it did not want to be seen to force the sale of Maori land. The bank appealed to the Government for a solution in 1902, and the Government obliged.[55] According to the Turanga Tribunal, the Government could and should have intervened earlier. Had it done so, then it would have prevented the escalation of debt and the greater land loss necessary to pay for it.[56] We agree.

Carroll's first effort at a solution in 1902 was a compromise between the Government and Maori proposals. In our view, his scheme was a critical opportunity for the Government to have ensured that Maori retained decision-making powers in the vehicle chosen to replace their trustees. Carroll wanted to vest control of the land in the new Tairawhiti Maori Land Council, which had just been set up under his 1900 legislation (discussed in chapter 10). This would have allowed Maori a say in what happened, through their elected

53. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 560–563; Macky, 'Tahora and the East Coast Trust' (doc I8), pp 13–19; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 43–54

54. The 1902 bill was drafted by the bank's and the trust's lawyers (Bell and Rees), and was influenced by Carroll. He did not, however, introduce the Bill in Parliament, as that would have been a conflict of interest. The bill was introduced by Sir Joseph Ward instead. Due to the extreme haste (the Bill had its first reading on 22 August, one week before the date for the mortgagee sale), the details of the bill were settled by a special parliamentary committee.

55. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 563; Katherine Orr-Nimmo, 'Report for the Crown Forestry Rental Trust on the East Coast Maori Trust', February 1997 (doc A54), p 149

56. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 568

representatives on the Council, and might well have resulted in an emphasis on leasing, which was the Council's main business. Carroll claimed that he and Pere had consulted the 'principal owners', who supported this solution. (He had not, he conceded, consulted the majority of owners.)[57] Carroll's compromise was rejected by the Government, which insisted on a board of three Pakeha businessmen, with the skills to sell the land in such a manner as to pay off the debt but rescue most of it for the owners.[58] Hone Heke, the member for Northern Maori who was a strong advocate for Maori rights, pressed for the retention of control by the owners, and a rescue in the form of a Government loan.[59]

The option finally chosen by Parliament was enacted in the form of the East Coast Native Trust Lands Act 1902. Both the Maori Land Council and a Government loan were firmly rejected. According to Rees, Carroll had to accept this defeat because the mortgagee sale was only days away, but he was determined to revisit it and transfer control to the council in the next parliamentary session, after his main political ally (Premier Seddon) returned.[60] If this is correct, Carroll was not able to effect such a change in 1903.

Instead of the council, the Act provided for the Government to appoint a board of three businessmen to sell land and settle the debts. The current trustees – Carroll and Pere – were ruled out by a clause that specified that members of Parliament could not sit on the board.[61] But they were given a significant degree of control in the form of mandating what the board could – and could not – sell. Section 12 provided that the 'terms and conditions of management, and of selling, leasing, mortgaging, improving, or otherwise dealing with the said lands' had to be agreed in advance between the 'trustees or beneficiaries and the Board by deed'.[62] There was a further stipulation for land such as Tahora 2, which had been vested in the trust by the Validation Court: the Chief Judge had to approve the terms of the deed.[63]

In our view, this gave a significant degree of control to the trustees and (if they consulted properly) the Maori owners. It will be recalled that the Validation Court had agreed to Pere's proposals, wherever he had sought the appointment of an owners' committee to represent the owners in their dealings with the trustees. These committees may have met with Carroll and Pere to agree the terms to be put to the board, although we have no evidence of that. The eventual deed was signed by a handful of owners, in addition to the trustees. Nevertheless, Macky noted that the 1890s' bills had all provided for Maori representation on the decision-making trust body. It was likely, he concluded, that 'Maori were anticipating

57. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), pp 138–140
58. In response to criticism on this point, Carroll responded that the Council could appoint a professional manager to carry out the business side of things, but that the decisions should be made by the Council and not the manager.
59. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), pp 151–152; Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), pp 52–53
60. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), p 152
61. East Coast Native Trust Lands Act, s 3
62. East Coast Native Trust Lands Act, s 12
63. East Coast Native Trust Lands Act, s 12

Section 12 of the East Coast Native Trust Lands Act 1902

Section 12 of the East Coast Native Trust Lands Act 1902 reads:

> The terms and conditions of management, and of selling, leasing, mortgaging, improving, or otherwise dealing with the said lands, and of all properties by this Act vested in the Board, shall be agreed upon between the trustees or beneficiaries and the Board by deed; but, so far as relates to securities and lands vested in the trustees, either alone or with others, by decrees of the Validation Court, they shall have no force or effect until approved by the Chief Judge of the Native Land Court: Provided that the bank shall retain the control and management of any lands, stock, and properties heretofore controlled and managed by the bank.

a greater role in the Trust than they were given'.[64] We agree, and we note further that this option was deliberately rejected by Parliament.

In the next section, we will consider what the inclusion of the owners' trustees was ultimately worth in terms of the agreements negotiated between them and the board. We will also review the board's sale of Tahora 2 lands, the continuation of a non-Maori trust after the board resolved the immediate crisis, and the further sale of Tahora 2 lands by the new East Coast commissioner.

12.5.2 How and why was land alienated while vested in the East Coast trust?

Summary answer: *In 1903, the former trustees of the Tahora 2 blocks negotiated an agreement with the East Coast Native Trust Lands Board. Some 'representative owners' also signed this agreement. The board was mandated to sell up to 5000 acres of two of the Tahora 2C blocks. While it did not exceed the overall cap of 10,000 acres, the board sold more of Tahora 2C1(3) than was provided for in the agreement. The claimants do not take issue with this sale.*

Having cleared the external debts (but exacerbated the internal debts), the board's task was finished. In 1906, control of the trust was vested in a Pakeha commissioner. While the expedient of removing the owners from control of their lands had not been envisaged as a long-term measure, it now proved to be so. Worse, in 1911 Parliament freed the commissioner from the constraints imposed by the 1903 agreements, giving him unfettered powers to sell trust lands. In the early 1920s, Commissioner Coleman initiated two sales of Tahora 2C lands to a client of his private law firm. James Carroll, for the owners, and James Nolan, the trust's solicitor, protested to the Government. The sale of this land did not fit the usual pattern of alienations from

64. Macky, 'Tahora and the East Coast Trust' (doc L8), p 21

the trust, which appear to have been for the offloading of unprofitable land burdened with accumulating debts. Nolan alleged that the commissioner was 'in the hands of' the private buyer, and Carroll advised that the owners opposed the sale.

The Government intervened too little and too late: first, it did not suspend Coleman or investigate further, taking no action other than to advise Coleman that his actions were inappropriate; and, secondly, it removed the unfettered powers of the commissioner to sell in 1922, after the event. Even then, approval for sales was vested in the Native Minister alone, with no requirement for the owners to be consulted or to consent. Coleman's successor, W Rawson, had to complete the second sale, regardless of the wishes of the owners. Also, he sold a small piece of land to the Crown, described by historians Boston and Oliver as a 'mindless' purchase by the Crown because it did not really need this land. By these means, 9894 acres was sold, representing almost the whole of 2C3(2) block (and around 20 per cent of the Tahora 2 land remaining in the estate).

The owners remained excluded from the trust's decision-making until the eve of its dissolution in the 1950s. Nonetheless, the claimants and Crown agree that where Tahora 2 lands were returned intact, with developed farms, this offset the grievance in that respect. Not so for the alienation of Tahora 2C lands in the 1920s, which were unnecessary in the trust's terms, and carried out not merely without the owners' consent, but in the face of their known opposition. While the owners were paid for their land, many years later, that did not compensate for the loss.

(1) *The East Coast Native Trust Lands Board sells parts of Tahora 2C*

In 1903, a series of agreements were concluded between the East Coast Native Trust Lands Board and the former trustees. The position of Tahora 2, before it entered the new arrangements, was as follows:

- the Tahora 2 lands had not been burdened with the debts to the Bank of New Zealand by 1902, so were not in danger of being sold as part of the mortgagee sale;
- the Tahora 2 lands were nonetheless vested in the board under the 1902 Act, along with all other lands held in trust by Carroll and Pere (whether in common with other trustees or not); and
- the Tahora 2 lands were not included among the principal or specific security blocks, so they could not be sold by the new board to pay off the general estate's mortgages to the bank, but they were considered part of the wider trust and available for settlement of other debts.[65]

65. Macky, 'Tahora and the East Coast Trust' (doc I8), pp 19–20, 22–23. The principal and specific security blocks were both liable to be sold at a mortgagee sale. The difference was that the principal security blocks, which had perfect titles, were transferred directly from the Settlement Company to the Carroll–Pere trust, while the specific security blocks had to have their titles completed in the Validation Court before being vested in the trust. Tahora 2 was not held to be a specific security block for the mortgages to the BNZ.

12.5.2

Summary of the Board's Sales for Tahora 2

The trustees (and some representative owners) mandated the board to sell:

- From Tahora 2C1(3): up to 5000 acres (the board sold 6244 acres).
- From Tahora 2C3(2): up to 5000 acres (the board sold 3326 acres).

In theory, therefore, it was possible that none (or very little) of Tahora 2 would be sold by the board. At first, Carroll opposed the sale of any part of it, along with any other land that had not been mortgaged to the bank. But there was a private mortgage over Tahora 2, and the land still needed to be developed to the point where it could be farmed or cut up for leasing (or both). It was producing no income. As a result, the Tahora 2 trustees agreed that up to 5000 acres of the 15,330-acre 2C3(2) block, and up to 5000 acres of the 28,305-acre 2C1(3) block, could be sold by the board. They also mandated the board to begin leasing and developing the land.[66] The chief judge approved the deed of agreement between the owners, trustees, and board in December 1903.[67]

In addition to Carroll and Pere, who were trustees for all of the blocks, the deed was signed by Peka Kerekere (trustee for the three 2C sections), Hukanui (trustee for 2C1(3)), and Hawea Tipuna (trustee for 2F2). In addition, although none of the 1896 committee members signed the deed, there were several owners who did so: Te Haenga, Winiata Te Rito, Hori Niania, Tamati Hake, Hohepa Napihi, and Maike Taruke.[68] Kathryn Rose called this a group of 'representative owners'.[69] We note, however, that the trustee for 2G2, and the beneficial owners of 2G2, were not included in this agreement. We have no information on how widely the owners were consulted in making these arrangements.

Thus mandated, the board sold 9,590 acres of Tahora 2 for £10,009. It reported to Parliament that this sale was 'to pay old liabilities contracted by the Trustees, and to assist in redeeming mortgages in the Mangapoike and Tahora Blocks: the latter (£2,742 8s 4d) has been paid off.'[70] There are two issues to note about this sale. According to Macky, the 'old liabilities' amounted to £20,600, as distinct from the mortgages to the Bank of New Zealand. Most of these debts came from legal expenses, but they also included the general expenses

66. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 20–22
67. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 53
68. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 9, 20
69. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 53
70. East Coast Native Trust Lands Board, 'Report by the East Coast Native Trust Lands Boards', 24 August 1905 (Macky, 'Tahora and the East Coast Trust' (doc L8), p 22)

of running the trust. Thus, a large sum of money from this sale was 'applied to expenses that were not specific to Tahora'.[71]

The second point is that the Board did not carry out the exact terms of the 1903 agreement. It had sold 6,244 acres of 2C1(3), and 3,326 acres of 2C3(2). It had thus exceeded the 5000-acre cap in one block, but had balanced that by selling less of the other block. In its report, the Board noted that it had permission to sell 10,000 acres of Tahora 2.[72] It is unclear whether this represents a creative (and incorrect) interpretation of the 1903 agreement, or whether the board had approached the trustees and owners to vary the agreement.

Nonetheless, the claimants accept that their land was not sold to pay off the Bank of New Zealand mortgage. As a result, and presumably in light of the agreement between the trustees and the board, the claimants say that they take no issue with this sale.[73] We therefore turn to the sequel of this first sale and the setting up of the board: the exclusion of the owners from any more say in the management of their land; and the sale of additional lands from the 2C blocks without their permission.

(2) *The board is replaced by an East Coast commissioner with unrestricted powers to sell land*

By March 1905, the East Coast Native Trust Lands Board had repaid the mortgage to the Bank of New Zealand through 'judicious sales'.[74] As we have noted, one-sixth of the trust's Tahora 2 lands were sold to pay off the mortgage on that block, and to assist with the trust's other expenses. Although the board did not undertake any farming development during its short tenure, it did succeed in finally leasing parts of Tahora 2 and securing the beginnings of a rental income. Under earlier arrangements with the Validation Court, 22,045 acres had been reserved for Maori use. The board set up leases for another 18,259 acres, for an annual rent of £432 in 1905. That left 10,800 acres of land still available for leasing.[75]

The question was: who would succeed the board? In one sense, the board had done its job quickly and well. It had made strategic alienations, after a hard year of negotiations with the trustees and owners, and it had completely paid off the debts that had so bedevilled the former trust. But though the board had cleared the external debts, it had not been able to clear the internal debts of the Carroll–Pere trust blocks. Its actions had in fact created a new, intractable set of internal debts. In selling land, the board had no regard to how much of the debt was secured against the particular pieces that it sold. As a result, the owners of the land that remained now owed a lot of money to the owners of the land that had been sold. The

71. Macky, 'Tahora and the East Coast Trust' (doc L8), p 22
72. Macky, 'Tahora and the East Coast Trust' (doc L8), p 22; see also East Coast Native Trust Lands Board, 'Report by the East Coast Native Trust Lands Boards', 24 August 1905, AJHR, 1905, G-9, p 2
73. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), p 17
74. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 22–23
75. East Coast Native Trust Lands Board, 'Schedules of Lands vested in the Board, and a Statement of the Board's Transactions in regard to the said Blocks to the 31st July, 1905', AJHR, 1905, G-9, p 5

nightmare prospect existed of a further round of sales, to pay off those who had borne more than their share of the old debts.[76]

The Government decided not to take either of those paths, but to set up a further trust arrangement, until income from rents and farming could be used gradually to settle the internal debts. What was not anticipated, perhaps, was that this would create a cycle of further debts. As money was raised to develop some lands (but not others), this became part of the juggling of credit and debt, so that blocks moved in and out of debt to each other for decades.[77]

Since the new arrangement would prove to be a lengthy one, a lot was riding on its exact shape. The political climate was not as favourable to Maori authority in 1906 as it had been in 1902 (which, in turn, was not as positive as it had been in 1900). Carroll had won real gains for Maori as a result of the Government's need to come to terms with the Kotahitanga movement in the late 1890s. But almost all of his gains were in the process of being dismantled in 1905 and 1906. Originally, Carroll had wanted to bring the trust lands under his Maori Land Councils, with their elected component and provision for Maori input to decisions. The 1902 compromise had involved a Pakeha board, but the degree of Maori say in its decisions had been critical. The former trustees – and, to the extent that the trustees involved them, the owners – specified which and how much land could be sold. They also asked the board to help develop the remaining land, but that had not been its priority at that point. By the time the board had completed its task in 1905, the tide was running strongly against Maori inclusion in decision-making. The Maori Land Councils were replaced by appointed, Pakeha-dominated boards in that year. The policy of leasing-only was set aside, and the moratorium on Crown purchases was lifted in most districts. It was in this, less favourable environment that the Liberal Government moved to replace the East Coast trust board.

There were two critical components to the new regime, as far as the claimants in our inquiry are concerned. First, the board was replaced by a single, Government-appointed commissioner. Maori were given no role in the commissioner's decision-making, not even in an advisory capacity. (Maori membership of the Land Boards was also dropped soon after.) The Turanga Tribunal found that the exclusion of Maori owners from the 1902 board, to allow business experts to do their work, had been a painful but necessary step. Putting the exclusion of the owners on a more comprehensive and longer-term footing from 1906, however, was neither necessary nor appropriate.[78] Secondly, the restrictions placed on the

76. Macky, 'Tahora and the East Coast Trust' (doc I8), p 23; Michael Macky, 'Trust Company Management by Wi Pere and William Rees (Issues 20 and 21)', report commissioned by the Crown Law Office for the Turanga inquiry, March 2002 (doc A72), pp 273–274; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 548–549, 565–566, 570, 584–585

77. Macky, 'Tahora and the East Coast Trust' (doc I8), p 23; Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 548–549, 565–566, 570, 584–585

78. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, pp 567–568

commissioner's powers to sell land by the 1903 agreements were cancelled in 1911. In that year, Parliament gave the commissioner the authority to sell, lease, or mortgage any lands, backdated to the time of his appointment.[79] Macky commented: 'It is not clear what, if any, consultation took place with Maori over this step.'[80] As far as the evidence shows, there was none.

By these two actions, the Crown removed any and all say on the part of the owners in the decision-making about their land. These were the preconditions for the sale of another 9,894 acres of the 2C blocks in the 1920s. This represented almost 20 percent of the Tahora 2 land remaining in the estate, after the sale of 1905.

At first, Maori responded with some enthusiasm to the appointment of the commissioner. As Macky has noted, they wanted his assistance to develop their lands for farming.[81] The Tahora 2C and 2F owners were felling bush by 1908, and sought financial help for fencing, farm buildings, and the purchase of stock.[82] Arani Kunaiti of Ngati Kahungunu led representations by these owners to the first commissioner, John Harding. The commissioner felt that he needed specific legislative authority to use (and raise) money for farming, despite the 1903 agreements between the former trustees and the board. In response, Parliament gave the commissioner specific powers for this purpose in 1907. Development work was soon underway in the 1910s and 1920s, focused on creating four farms in the 2C and 2F blocks.[83]

With a large land base and access to cheap finance, the East Coast commissioner succeeded where the earlier trusts had failed. Using economies of scale, the ability to apply finance strategically to the best lands, and the financial clout of such a large enterprise, the commissioner shows what iwi corporations or the Maori Land Councils could have achieved, given the same advantages and the opportunity to operate on a similar scale. The claimants do not contest the fact that significant farm development took place, and that they benefited ultimately from the commissioners' absolute control of their lands. They do, however, take issue with their exclusion from all decision-making – and, in particular, the decision to sell parts of their land.

We have not carried out a detailed inquiry into how and why the commissioners sold land from the trust's estate, as that is a matter for other Tribunals. From the evidence of Katherine Orr-Nimmo and Michael Macky, it appears that land was mostly sold by the commissioners because it was unlikely to ever produce revenue, yet was taxable and accumulating rates arrears. Such land was considered a 'drag' on the trust and its more accessible, developable lands, while its sale produced money for farming (and, at some point, for

79. Macky, 'Tahora and the East Coast Trust' (doc L8), p 26
80. Macky, 'Tahora and the East Coast Trust' (doc L8), p 26
81. Macky, 'Tahora and the East Coast Trust' (doc L8), p 24
82. Boston and Oliver, 'Tahora' (doc A22), p 253
83. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 20, 24, 32; Boston and Oliver, 'Tahora' (doc A22), pp 253–254

distribution to individual owners). In general, however, the trust aimed to preserve the land for the Maori owners. Mortgages and other kinds of debts were not likely to lead to the sale of productive land; the trust preferred the slower route of rents and the sale of farm produce to repay debt, so as to keep the land for the Maori owners.[84] The sales of Tahora 2 land in the 1920s, which we discuss below, were not made for the usual reasons.

(3) *The East Coast commissioners sell Tahora 2C lands: private sales in the 1920s*

In the 1910s, Commissioner Thomas Coleman began development work on the 2C and 2F farms, and tried to lease the remaining unreserved land (some 10,000 acres).[85] There was no talk of selling Tahora land until 1920, when his son (also called Thomas Coleman) took over the trust after Coleman senior's death. The new commissioner was a member of the private law practice responsible for some of the commissioner's affairs, and for which he continued to work while discharging his new responsibilities. What followed in mid-1920 was a sale of leased Tahora 2C land to one of the law firm's other clients, Chapple and Field (who were business partners).[86]

Macky commented: 'The reasons for Coleman commencing these negotiations are unclear.'[87] But, in the view of the trust's solicitor, James Nolan, the reason was very clear: 'At present Commissioner appears to be in hands of Chapple,' he telegraphed the Native Minister in May 1920.[88] Nolan called for Coleman's immediate suspension: 'suggest suspension to prevent unlimited sale of lands under sec 14 of 1911 [Act;] sole power should be yours [the Native Minister's]'.[89] James Carroll, who was actually leasing part or all of this land, also appealed to the Minister to intervene. Carroll complained that the commissioner 'has full power to sell under Section 14 Native Land Adjustment Act, 1911, and defy everybody'.[90] He joined Nolan in requesting the suspension of the commissioner. Macky concluded that Coleman had not sought the approval of the owners, who clearly did not agree to the sale.[91]

Serious allegations had been made against the commissioner. At the very least, we would have expected the Government to inquire into the matter to determine whether the allegations were well founded. Was the commissioner selling land improperly? Was the proposed sale in the best interests of the trust and of the block's owners? Did it have the consent of

84. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), pp 203–207; Macky, 'Trust Company Management by Wi Pere and William Rees' (doc A72), pp 317–325

85. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 20, 24, 26, 32 (noting on p 26 a correction to his earlier report, in which he thought this land had been offered for sale instead of lease)

86. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), pp 189–190; Macky, 'Tahora and the East Coast Trust' (doc L8), pp 26–27

87. Macky, 'Tahora and the East Coast Trust' (doc L8), p 26

88. Nolan to Native Minister, 28 May 1920 (Macky, 'Trust Company Management by Wi Pere and William Rees' (doc A72), p 322)

89. Nolan to Native Minister, 28 May 1920 (Macky, 'Trust Company Management by Wi Pere and William Rees' (doc A72), p 322)

90. Carroll to Native Minister, 28 May 1920 (Macky, 'Tahora and the East Coast Trust' (doc L8), p 27)

91. Macky, 'Tahora and the East Coast Trust' (doc L8), p 27

Section 14(1) of the Native Land Claims Adjustment Act 1911

Section 14(1) of the Native Land Claims Adjustment Act 1911 reads:

> The Commissioner shall have and be deemed to have always had, in addition to the powers conferred by the Act of 1907, full power and discretion to sell, lease, or mortgage any lands vested in him as such Commissioner, including lands so vested pursuant to section eleven of the Act of 1902, or otherwise; and the provisions of this paragraph shall be deemed to be incorporated in any deed or agreement executed pursuant to section twelve of the Act of 1902.

Under section 11 of the 1902 Act, the Tahora 2 lands were vested in the board (and then the commissioner). Under section 12 of the 1902 Act, the deed signed with the Tahora 2 trustees and 'representative owners' only allowed the board to sell up to 5000 acres each of 2C1 and 2C3. The commissioner was not permitted to sell any other parts of the Tahora 2 blocks until this Act in 1911 deemed such a power to have been incorporated in the section 12 deeds, and to have been vested in the commissioner all along.

the owners? These questions ought to have been asked, in light of the representations made to the Government by Carroll and Nolan. The Native Department did intervene, but only to the extent of warning Coleman that it was inappropriate for him to act as the purchaser's solicitor.[92] The department did not inquire further, or act on the recommendation to suspend Coleman so as to prevent the sale.

Macky noted that the law was changed in 1922 in response to Coleman's Tahora 2 sales, along the lines suggested by Nolan. The commissioner was no longer allowed to sell land without the direct approval of the Native Minister.[93] In our view, it was appropriate for the Minister to carry out a protective supervision of alienations, but it should have been for the owners to have the final say in whether their land would be sold. Instead, the 1911 and now the 1922 legislation gave them no say whatsoever. (A council of owners was not given a veto over sales until 1949.[94])

In any case, the 1922 law change was too late to prevent Coleman's sales of land in Tahora 2. Nolan and Carroll had appealed for Government intervention in May 1920. When that was not forthcoming, Coleman completed the sale of 6711 acres of Tahora 2C3(2) in October 1920, for the sum of £27,730. Macky noted that Field also purchased Carroll's lease, so the latter may have ended his opposition. There was, however, no evidence that Carroll

92. Macky, 'Tahora and the East Coast Trust' (doc L8), p 27
93. Macky, 'Tahora and the East Coast Trust' (doc L8), p 27
94. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 567

or any of the owners were involved in the negotiations or consented to the sale. Coleman was allowed, as Carroll had put it, to 'defy everybody'.[95]

Nor was the commissioner deterred by the Native Department's rebuke about his conflict of interest. Instead, he gave Chapple a mortgage for the land that he and his partner had just bought, and also offered them another 3,396 acres of land (the rest of the 2C3(2) block). This new negotiation was incomplete when Coleman resigned his position in 1921.[96] He told the Native Department that he did not have time to do the job properly, and suggested that it be taken over by the new office of the Native Trustee.[97] The Government agreed: the trust was brought under the Native Trustee, which meant the direct control of the Native Department.[98] Also, the law was changed in 1922 to prevent further sales without the consent of the Minister.[99]

The question of the 2C3 mortgage was resolved when Chapple paid the money back and got a new mortgage from the Public Trust.[100] But the new commissioner, Judge W Rawson (the Native Trustee), still had to deal with the incomplete sale of the remainder of 2C3(2). Although the law had not yet been changed, Rawson acted in anticipation of it, writing to the Minister: 'I suggest that as the price offered seems a fair one that I be authorised to discuss the matter with the beneficial owners and, if they, or a large majority of them, consent that the sale be approved by you.'[101]

The danger, as Rawson saw it, was that Chapple and Field had threatened legal action if the trust did not complete the sale. Win or lose, the trust could not afford to fight this in court. A delay of some months followed, but the sale of 3000 acres for £12,851 was finalised at some point before the end of March 1923.[102] There is virtually no evidence about how this negotiation was concluded. Macky commented: 'It is not clear from the evidence that I have seen whether this sale was forced on the Trust by Court action, or if the Trust and Maori ultimately consented to it.'[103] In his view, the delay might have been explained by Maori opposition.[104] There is no evidence that the owners ever consented, and – perhaps most importantly – their consent was not required in any case.

95. Macky, 'Tahora and the East Coast Trust' (doc L8), p 27
96. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 27–28
97. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), p 194
98. Crown counsel, closing submissions (doc N20), Topic 13, p 9; see also Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 566
99. Native Land Amendment and Native Land Claims Adjustment Act 1922, s 28
100. Boston and Oliver, 'Tahora' (doc A22), p 255
101. Rawson to Native Minister, 8 November 1921 (Macky, 'Tahora and the East Coast Trust' (doc L8), p 28)
102. Macky, 'Tahora and the East Coast Trust' (doc L8), p 28
103. Macky, 'Tahora and the East Coast Trust' (doc L8), p 28
104. Macky, 'Tahora and the East Coast Trust' (doc L8), p 28

(4) *The Crown tries to buy Tahora 2C lands in the 1920s*

At the same time that Chapple and Field were trying to buy land in Tahora 2C3, the Crown was also seeking to buy part of it. In 1919, the Crown surveyed its 1890s purchases in 2C, preparing to cut the blocks up for settlement. The surveyor recommended that the Government buy 600 acres of 2C3(2) to 'greatly improve at least two of the roughest sections of the Crown Block'.[105] The Government approached the commissioner (Coleman senior), who said that he preferred not to sell because the land was reserved for farming by its owners, but was in fact willing to do so. At that point, the land was not leased but the trust had borrowed £6000 against it.[106]

In 1920, the Government changed its mind, deciding that it only needed 200 acres to get better fencing lines for its blocks. The Crown offered £1 15s an acre, which was well below the unimproved value (£4 an acre). The matter lapsed, possibly because of Coleman senior's death, and the Crown raised it again with the new commissioner in 1921. The Crown's new offer of £1 10s reflected what it considered to be the value of the particular piece it wanted. Coleman refused to sell, noting that Chapple had offered £4 an acre for the whole block. The Government compromised at £3, but the commissioner refused to budge. As we have seen, he had offered the whole of this land to Chapple. The Crown refused to increase its price, arguing that Maori as well as the Crown would benefit from a better fencing line.[107]

This was where matters stood when Rawson took over. He immediately accepted the Crown's price, although the purchase was delayed by the absence of the Native Minister, Herries.[108] Finally, in January 1922, the commissioner sold 183 acres to the Crown. Boston and Oliver were critical of this purchase. They noted that the Crown already knew the cost of roading was prohibitive for opening up small sections in its 2C blocks, which ended up as state forest:

> The alienation was a particularly mindless act. The Maori owners lost a portion of land, which had the Crown shown more foresight in its planning and selection procedures, would have remained under the East Coast Native Trust, land that would have later found its way back into the hands of the beneficial owners.[109]

This may be so, but this land would probably have been sold to Chapple and Field if it had not been sold to the Crown, although at a higher price.

In 1924, now planning to develop forestry on its Tahora lands, the Crown tried to buy 2,298 acres of 2C3(2) and 2C2(2) for the adjoining State Forest 22. Commissioner Rawson was slightly less obliging this time. He replied that the land was valuable for pastoral farm-

105. Cagney to Chief Surveyor, no date (1919) (Boston and Oliver, 'Tahora' (doc A22), p 256)
106. Boston and Oliver, 'Tahora' (doc A22), pp 256–257
107. Boston and Oliver, 'Tahora' (doc A22), pp 257–259
108. Boston and Oliver, 'Tahora' (doc A22), p 259
109. Boston and Oliver, 'Tahora' (doc A22), p 260; see also p 258

ing, and could be 'easily leased for a good figure'.[110] Nonetheless, he agreed to sell it for £3 10s per acre, so long as the Government also paid £8000 for the timber, and so long as the owners agreed.[111] The sale did not go ahead. The Forest Service thought the price too high, and suggested that the trust use Part VI of the Forests Act 1921–22, which allowed timber to be milled by the Commissioner of State Forests, with the owners getting the benefit.[112] As far as we are aware, this arrangement did not happen either.

(5) *Were the owners paid?*

By 1924, Commissioners Coleman and Rawson had sold 9894 acres of 2C3(2), the great majority of it to Chapple and Field as a result of questionable arrangements on the part of Commissioner Coleman. It is not easy, however, to determine exactly how the purchase money was spent. The commissioner had netted £41,130 for these three sales. None of this money was paid to the owners until 1927, when they received a payment of £7880. In 1929, they got a further £15,760.[113] We have no information on when the remaining purchase money was paid out, although we presume it was part of distributions to the owners between 1937 and 1950 (see below). According to Michael Macky, the owners of Tahora 2C3(2) received a total of £53,223. We conclude that they received the full purchase price for their land.

(6) *The owners petition the Crown in 1924 and 1929*

The owners of the 2C blocks were very much in the dark about what was happening to their land. In 1924, Hune Hukanui (the former trustee for 2C1(3)) and 87 other owners sent a petition to Parliament, seeking the return of 2C1 and 2F to their control. The Native Affairs Committee made no recommendation on this petition.[114] In 1929, they sent a second petition, this time complaining about 2C1, 2C2, and 2F.[115] They protested against the 1905 sale, because it had mainly been used to pay off debts on other land. They also objected to the fact that they had not been able to get the accounts for their land from 1907 to 1924, and that 'we the owners of this land have not received any benefit from the lands thereof'.[116] Nonetheless, they believed that income from these blocks had been used to assist returned servicemen and to pay for Wairoa memorials to James Carroll: 'We, the home folk, object

110. Boston and Oliver, 'Tahora' (doc A22), p 261
111. Boston and Oliver, 'Tahora' (doc A22), p 261
112. Boston and Oliver, 'Tahora' (doc A22), p 261
113. Macky, 'Tahora and the East Coast Trust' (doc I8), p 34
114. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), p 209
115. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), pp 209–211
116. Petition no 297/1929 (Orr-Nimmo, supporting documents to 'Report on the East Coast Maori Trust' (Wai 814, doc A4(a), section D), p 422)

to this being done because we have not yet received any benefit from this land."[117] The petition did not mention the 1920s sales of land in 2C3, of which they may not have been aware.

Chief Judge Jones, as under-secretary of the Native Department, advised the Native Affairs Committee that this land could not be returned to the owners yet. Although there was provision for revesting, it could not happen until all of the debtor and creditor blocks in the trust were reconciled. This, in turn, could not happen straight away unless more land was sold.[118] The committee made no recommendation on this petition, and the Government took no action.[119]

(7) *The developed Tahora 2 lands are handed back: enough to offset the losses?*

It is not clear how far the owners were actually employed on the farms that were being developed on their best land. Steven Oliver noted that some owners were employed on Te Papuni farm (on 2F2), and that others 'probably' worked on the 2C farms.[120] In 1934, however, following on from the petitions of 1924 and 1929, Turi Carroll and 102 others petitioned Parliament about their alienation from their lands (including Tahora 2F2 and 2C1(3)):

> We . . . consider that the Development of the lands concerned in a commercial sense is not more important than the development of the people interested in the land. It is our wish and prayer that the owners of the land and their descendants should be assisted and developed side by side with their land by giving them work to be carried out thereon and by ultimately settling suitable owners thereon . . . A very large part of the income from the land is expended in labour costs and supervision. Up to now the Native owners have had only a very small part of the work. They are losing their identity with their land which can be retained only if they are permitted to have a share in the work and farming carried on thereon . . .[121]

We do not have detailed evidence on the administration of the Tahora 2 blocks. There were no further sales after 1923, and four farms were successfully developed in the 1920s and 1930s. According to Michael Macky, the commissioners spent £131,736 on improvements for the four blocks, as well as £79,305 to buy stock and machinery; a total of £211,041. Also, between 1926 and 1950, the owners received occasional distributions from the trust, amounting to £93,178. The majority of this amount (£53,223) was paid to the owners of 2C3(2). This was mostly the 1920s' purchase money, and partly for the settlement of inter-

117. Petition no 297/1929 (Orr-Nimmo, supporting documents to 'Report on the East Coast Maori Trust' (Wai 814, doc A4(a), section D), p 423)
118. RN Jones to Chairman, Native Affairs Committee, 12 October 1929 (Orr-Nimmo, supporting documents to 'Report on the East Coast Maori Trust' (Wai 814, doc A4(a), section D), p 412)
119. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), p 211
120. Steven Oliver, 'Presentation summary and response to issues for the Tahora No 2 block report', November 2004 (doc I8), p 12
121. Petition 149/1934 (Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), p 214)

nal debts, but we lack specific details. Finally, in 1953, the farms were returned to owner incorporations in good working order. The wool boom of the early 1950s had helped settle accounts between the creditor and debtor blocks, enabling the winding up of the trust.[122]

This successful outcome was not only at the expense of some land loss, as we have seen. The owners were totally excluded from the decisions that were made about their land. Crown counsel emphasised the steps that were taken to rectify this omission. In 1935, the Native Purposes Act formalised block committees for the trust lands, in response to Turi Carroll's petition the previous year (discussed above).[123] The committees were accorded an advisory role only; 'the advice did not have to be followed'.[124] As Macky noted, this 'did not satisfy Maori'.[125] In 1944, the Ngati Kahungunu owners of 2F2 petitioned Parliament, seeking the establishment of a three-person board to run the trust, with one Government appointee and two representatives of the owners. They also wanted to replace the commissioner. An inquiry dismissed their dissatisfaction with Commissioner Jessep. It was not until 1948, in the context of the Maori war effort organisations and the growing recognition of tribal committees, that the East Coast Maori Trust Council was set up. The block committees elected one representative each to the council. In 1949, legislation was passed requiring the commissioner to consult the council, and giving it a power of veto over sales, purchases, mortgages, and any increase to the trust's overdraft.[126] Macky noted that 'Maori not did acquire any capacity to control important aspects of the Trust's administration of their land until 1949'.[127] This was, of course, on the eve of its dissolution.

The Crown argued:

> The loss of control of the Tahora owners between 1902 and 1949 needs to be set against the economic gains the Trust provided for Maori in the long term . . . The overall benefit or prejudice caused to Maori by the Crown actions concerning Tahora 2 will need to be carefully weighed by the Tribunal.[128]

David Hawea, in his evidence for Te Whanau a Kai, told us:

> In 1953 the Te Whanau a Kai portion of No 2 was incorporated as Tapere Station. The new incorporation included a small part of 2C1, sec 3, and 2C3, sec 2 as well as 2C2 sec 2. Today Tapere Station is a very profitably run Incorporation.[129]

122. Macky, 'Tahora and the East Coast Trust' (doc L8), pp 30–34
123. Crown counsel, closing submissions (doc N20), Topic 13, pp 8, 10
124. Macky, 'Tahora and the East Coast Trust' (doc L8), p 25
125. Macky, 'Tahora and the East Coast Trust' (doc L8), p 25
126. Macky, 'Tahora and the East Coast Trust' (doc L8), p 25
127. Macky, 'Tahora and the East Coast Trust' (doc L8), p 35
128. Crown counsel, closing submissions (doc N20), Topic 13, p 11
129. David Hawea, brief of evidence, 24 November 2004 (doc I37), p 24

The claimants accept that their exclusion from control of the trust, and the alienation of parts of their land, were 'offset . . . by the undoubted improvements made to the lands before their return to owners'.[130] Overall, some two-thirds of the Tahora 2 lands were returned to Maori. As a result of the 1920s sales, however, the burden of loss fell much more heavily on the owners of 2C3(2), Te Whanau a Kai and Ngati Hine, who lost 90 percent of this land. In 1955, they agreed to transfer the last 1,509 acres to their neighbours (and relations), the owners of 2C2, so that it could continue to be farmed rationally as part of Tapere station.[131]

We note the claimants' position that, as the 1905 sale was agreed between the trustees and the board, and did not involve payment of the old debts to the Bank of New Zealand, they do not take issue with that sale. They do, however, endorse Macky's 'fair' analysis and criticisms of the 1920s sales.[132] In our view, the sale of 9,711 acres of Tahora 2C3(2) to Chapple and Field was highly questionable. Serious allegations were made, but no inquiry or action followed, other than the delayed law change in 1922, removing the commissioner's sole power to sell. We accept the Crown's argument that the return of two-thirds of the land, developed as farm stations, largely offset the exclusion of the owners from control of their lands. In part, this was because the claimants' evidence and submissions do not quarrel with how the lands were developed, or, in effect, with the decisions that were made. We note the owners' concern in 1934, that their alienation from their land went further than its control – that they were excluded from the actual farming of (and a meaningful relationship with) their ancestral land. This, too, could be remedied by the return of that land to them as working farms in the 1950s.

In many ways, therefore, the return of the Tahora stations in 1953 was a remedy for the grievances experienced by the owners from 1902 to 1949. There is one exception. The 1920s' sales were not for the purposes of benefitting the trust. They do not fit what we believe to be the usual pattern, which was alienation for the purpose of offloading unproductive land. Such land was incapable of (or prohibitively expensive for) farm development, yet was costing the trust money in terms of taxes and rates. The Tahora 2C alienations were not for that purpose, nor for paying off debt or raising development capital. Macky argued that the reason for the sales is unknown, although the allegation at the time was that the commissioner was 'in [the] hands' of his law firm's client, the purchaser. While the owners were eventually paid, this could not compensate them for the loss of their ancestral land, sold without their consent (or any involvement in what parts would be sold, for what price, and on what conditions).

From the evidence available to us, the sales to Chapple and Field showed questionable judgement on the part of the commissioner. James Carroll and the trust's solicitor both appealed to the Government to suspend the commissioner and put a halt to the sale. Instead,

130. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), p 14
131. Boston and Oliver, 'Tahora' (doc A22), pp 263–266
132. Counsel for Te Whanau a Kai, submissions by way of reply (doc N27), pp 13–17

the Government did nothing more than warn Coleman that his actions were improper. It did remove the commissioners' unchecked power to sell in 1922, as a direct result of these events, but too late to be of any use for Tahora 2C. Further, Coleman then entered into a second questionable sale, which his successor carried through rather than risk litigation. Much of the proceeds of the 1905 sale had gone to pay the trust's legal costs. It seems unfair that the owners of 2C3(2) should have suffered from the trust's later unwillingness to defend them in court.

Both of the 1920s' sales were unnecessary as far as the trust's purposes were concerned, and the evidence seems clear that the owners did not consent to them. Indeed, Carroll reported that the sales were taking place in defiance of the owners' wishes. Yet the owners had no legal power to prevent sales until some 28 years later.

Finally, Commissioner Rawson agreed to sell a small amount of this same block to the Crown at its own price, which was less than what Chapple and Field were willing to pay. Although the quantity of land was small, it indicates the Crown's carelessness with the owners' interests. The sale was 'mindless', in Boston and Oliver's view, because the Crown did not really need the land.

We conclude that the return of two-thirds of Tahora 2 as working farms in 1953 offset some of the claimants' grievances, but not the unnecessary, improper sale of land from 2C3(2). If the Crown had carried out its duty of active protection, it would have acted to prevent the 1920s' sale, and the Tahora 2 owners would have received a larger, more valuable estate in 1954. The hapu with interests in Tahora 2C3(2) would not have lost 90 percent of that land.

12.5.3 Was Tahora 2G2 'forgotten' during the trust's administration, and was there a fair opportunity for it to be retained and developed after the trust was wound up?

Summary answer: *The owners of Tahora 2G2 had no voice in the vesting of their land in the Carroll–Pere trust in 1896, and nor did they consent to its transfer to the East Coast trust in 1902. In 1926, the commissioner tried to sell this land to the Crown, because it was accumulating debts and he saw little hope of developing it. The Crown refused to buy it (or exchange other land for it), but did prevent any further rates charges. We agree with the claimants that it was convenient for the Crown to see this land sit undeveloped in the trust, because it was useful for catchment protection. The commissioners took no further action; to all intents and purposes, it was 'forgotten' until the trust was wound up in the 1950s. At that point, the Crown tried to buy Tahora 2G2, calling a meeting of assembled owners for the purpose, even though the ownership list had not been updated and many of the owners were deceased. The Tuhoe owners rejected the Crown's offer, preferring to incorporate with the intention of milling and developing 2G2 for farming. The Government then had the land proclaimed under the water*

and soil conservation legislation, so that it could not be milled. Even so, the Forest Service thought that the Government might yet fell the timber itself, once it had been acquired for the Crown. With the land thus locked up, the owners finally agreed to exchange it with the Crown for other forest land in 1973. The claimants have not raised any issues about the land that they received in this exchange.

As we have seen, Tuhoe did not consent to their piece of land in southern Tahora (2G2) being placed in the trust in 1896. This was the beginning of their long alienation from that land. In 1902, it was vested in the East Coast trust board by legislation. Owners were not consulted directly about that action, although Carroll advised that the 'principal' Tahora 2 owners supported the transfer of their lands from the Carroll–Pere trust to the Maori Land Council.[133] The Validation Court had not been asked to appoint a committee of owners in 1896, but Pere had nominated a third trustee to serve alongside him and Carroll. This person's name appears (from the rather illegible minutes) to be 'Kaho Numia'.[134] The claimants have not identified this person for us. When agreements were negotiated in 1903 between the trustees and the board, as required by the 1902 Act, no agreement was made for Tahora 2G2.[135] This was symptomatic of the neglect that followed for the next forty years of trust administration.

Tahora 2G2 consisted of isolated, rugged, forested land. It was surrounded on three sides by undeveloped, unroaded Crown land. On the western side, it bounded the Urewera District Native Reserve.[136] In 1926, Commissioner Rawson described it as completely isolated. Although it had millable timber, the lack of access was such that any kind of development would cost more than it would realise in returns. Macky noted the commissioner's view that the expense of developing 2G2 would have been an 'unreasonable burden on the other blocks in the Trust'.[137] While some remote land was leased as part of large-scale pastoral farming, 2G2 (surrounded by unused Crown land) could not be leased either. In the meantime, it had a survey lien that had gathered interest for a set period, and ever-growing rates arrears. For some other lands in the trust, this was a formula for their sale.[138]

In 1926, Commissioner Rawson proposed to sell 2G2 to the Crown. In his view, it was valuable only to the Crown for wider forestry or conservation purposes. The Government did not want to buy this land, so Rawson suggested an exchange instead. Rawson, it will be recalled, had come into the trust with the view that owners should be consulted before any alienation. With that perhaps in mind, he asked the Native Land Court to determine the beneficial owners of 2G2. There had been no update to the list since 1896. There is no

133. Orr-Nimmo, 'Report on the East Coast Maori Trust' (doc A54), pp 138–140
134. Tairawhiti Validation Court, minute book 4, 17 April 1896, fol 188
135. Macky, 'Tahora and the East Coast Trust' (doc L8), p 33
136. Boston and Oliver, 'Tahora' (doc A22), p 302
137. Macky, 'Tahora and the East Coast Trust' (doc L8), p 33
138. Macky, 'Tahora and the East Coast Trust' (doc L8), p 33; Boston and Oliver, 'Tahora' (doc A22), p 303

evidence, however, that the owners were in fact consulted about either of these proposals. Rawson wanted to swap 2G2 for Crown land in 2C1(2), so as to allow a better fencing line for the Maori owners of 2C1(3). This was some distance from 2G2, and – while useful for the trust – involved benefitting a different set of tribal owners altogether. The commissioner of Crown lands agreed to the exchange, conditional on the Crown surveying its own land – but, it seems, this was the end of the matter. The proposal lapsed, and 2G2 continued to accumulate interest on its debts. From 1926, however, the Government gave 2G2 a special exemption from any new rates charges, which kept the debts much lower than they would otherwise have been.[139]

According to Boston and Oliver, the Crown did not bother to acquire this land (or carry out an exchange beneficial to the owners) because it knew that the commissioner could not develop it. The Government wanted this land preserved to prevent erosion, and was satisfied that leaving it in the trust would secure that end without costing it a penny.[140] This comfortable situation changed in the 1950s, when the trust was wound up. With the reintroduction of the Tuhoe owners into the picture, fresh attempts might be made to mill the timber and farm the land. For that reason, the Government now took the initiative and tried to buy or exchange 2G2. This caused a delay in the transfer of the land from the commissioner to the owners, which was exacerbated by the fact that successions had not taken place, and the title had not been updated since 1926.[141]

Before the ownership lists were updated or an incorporation formed, the Crown exercised its power to summon a meeting of assembled owners. Under the Maori Affairs Act 1953, the Crown could instruct the registrar to summon such a meeting, and the quorum requirements were now set at just three owners.[142] At first, the commissioner had proposed another exchange (forest for forest) but the Lands Department preferred to buy the land outright for water and soil conservation. The Maori Land Court made an effort to locate owners in 1956, based on the out-of-date ownership list (more than half of the owners were known to be dead), and a meeting was called at Waimana in March 1957. Nine of the 111 owners attended the meeting, holding less than 4 of the 85 shares in 2G2. In addition to the official owners, there were 51 more people, some of them likely successors to the 63 deceased owners.[143]

The meeting was faced with a choice. It had been called to vote on the Crown's offer to buy the land for £8200. There was a debt of around £1167 on the land, because it had never produced any income to pay it off. The debt was mostly rates arrears and old survey charges, as well as administrative costs and a fee for appraising the block's timber. It would have to be paid before the land could be sold to the Crown. The commissioner of Crown lands

139. Boston and Oliver, 'Tahora' (doc A22), pp 303–305
140. Boston and Oliver, 'Tahora' (doc A22), p 314
141. Boston and Oliver, 'Tahora' (doc A22), pp 305–310, 314
142. Maori Affairs Act 1953, ss 307, 309
143. Boston and Oliver, 'Tahora' (doc A22), pp 305–310

advised that the block was too isolated for the timber to be milled, yet it was needed in its undeveloped state to protect the Waioeka River and prevent erosion. The handful of legal owners present simply did not believe that the Crown would not mill the timber later for its own profit. They voted unanimously against the Crown's offer, and decided instead to pay off the debt and develop the land themselves. The Maori Affairs Department advised the Lands Department not to try to overturn this unanimous decision. The owners, it was clear, wanted to keep their land.[144]

Following this meeting, the Tuhoe owners set in train the business of appointing successors and getting an updated list, so that an incorporation could be formed to resume ownership of 2G2. This happened in 1958, when a meeting of owners appointed a management committee and borrowed money from their neighbours (the owners of the successful farm on 2C1(3)) to pay their debts. The land was transferred to them in 1959. The Government acted to prevent this new incorporation from developing the land. In 1961, it proclaimed the block under the Soil Conservation and Rivers Control Amendment Act 1959, which allowed the local catchment board to prohibit milling. With the land tied up again, the Government once more considered acquiring it permanently. By 1970, the owners saw no alternative but to agree. They proposed the addition of the land to the Urewera National Park or a state forest, in return for Crown land that they could use. This seemed to fit well with Te Manawa o Tuhoe Trust's proposals to lease land to forestry companies – the Forest Service believed that land could be exchanged to enable the 2G2 owners to be part of that enterprise. Two sections of State Forest 101 were transferred to the incorporation in 1973, along with a payment of $8,320. The additional payment was necessary because the Crown land being exchanged was worth less than 2G2.[145]

The Maori Land Court was responsible for ensuring that the exchange was properly carried out, including that the Crown met its obligation to provide access to the new forest land. It took almost ten years for all the conditions to be met. The owners wanted to turn their incorporation into a section 438 trust, but this did not happen until 1982. The Tuhoe-Waikaremoana Maori Trust Board became the responsible trustee, and undertook to manage the land for its owners.[146]

In our inquiry, Tuhoe were very concerned at the length of time that 2G2 land was tied up in the East Coast Trust but left undeveloped, all without their consent. In their view, the Crown's argument that there was gradual inclusion of owners' representatives in the trust's decision-making, and that at least the owners got developed land back, did not apply to

144. Boston and Oliver, 'Tahora' (doc A22), pp 306–309
145. Boston and Oliver, 'Tahora' (doc A22), pp 309–312
146. Boston and Oliver, 'Tahora' (doc A22), pp 312–313. With the official introduction of Maori owners as 'advisory trustees' in 1974, the term 'responsible trustee' was used for the trustee in whom the property was legally vested, and who was responsible to the beneficial owners for carrying out the trust. See Waitangi Tribunal, *He Maunga Rongo*, vol 2, pp 784–785.

2G2.[147] In the claimants' view: 'The Crown's submission contains no explanation or evidence to justify the clear breach of the Article II rights of those Tuhoe individuals who lost control of Tahora 2G2 in the period 1902–1959.'[148] Further, the decision not to develop 2G2 was taken as early as 1926, so why did the trust keep the land for another 33 years, while it accumulated unpaid debts? The claimants argued that, despite the access problems, they would have found a way to mill this land and use it for farming. Also, the claimants argued that the 2G2 incorporation was virtually forced to exchange their land with the Crown in the 1970s. They still had to pay off the mortgage (taken out to cover the debts accumulated when the land was in the trust), yet the Crown had put a proclamation over their land that prevented them from using it.[149]

The Crown argued that 2G2 was 'forgotten' because it was too remote and expensive to develop, rather than deliberately kept undeveloped. Counsel also suggested that there were no objections at the time to the exchange, while accepting that its proclamation did prevent the owners from making any use of the land.[150]

In our view, most of the claimants' concerns are justified. They did not consent to the inclusion of their land in either the Carroll–Pere trust or the East Coast trust. They had no say in the fact that their land was considered impossible to develop from at least 1926 until its return in the late 1950s. Macky considered that the management of this block had been, as the claimants noted, 'thoroughly bad'.[151] It was returned burdened with debts, although we note that those debts would have been much higher if the Crown had not exempted 2G2 from further rates charges in 1926. Then, the block could not actually be returned for some years, because the trust had not maintained an up-to-date ownership list, and because the Crown wanted to buy it.

Finally, we agree that the 1973 exchange was carried out in an unfortunate set of circumstances: the mortgage (resulting from the old debts) still had to be paid, but the Crown had used the law to prevent the owners from making any use of their land. While we accept that the Crown's powers to protect catchments and prevent erosion were sometimes necessary, it is by no means certain that their use was in good faith in this instance. In 1971, ten years after the proclamation, the Forest Service considered it 'likely' that the land was needed for a conservation forest, but also thought it possible that the Crown could mill the timber if it acquired the land, if it was economically viable to do so.[152] In those circumstances, it is difficult to see the Crown's actions as defensible, let alone the exchange as a truly willing one.

147. Counsel for Wai 36 Tuhoe, closing submissions, Part B, (doc N8(a)), pp 79–82; counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), pp 17–18
148. Counsel for Wai 36 Tuhoe, submissions by way of reply (doc N31), p 18
149. Counsel for Wai 36 Tuhoe, closing submissions, Part B, (doc N8(a)), pp 79–82
150. Crown counsel, closing submissions (doc N20), Topic 13, pp 12–13
151. Counsel for Wai 36 Tuhoe, closing submissions, Part B, (doc N8(a)), p 81
152. Boston and Oliver, 'Tahora' (doc A22), p 311

We note, however, that the claimants have not criticised the practical outcome. They do not think the exchange unfair, in terms of what they got in return for one of their last links to Tahora 2. From a practical standpoint, they were willing to exchange land with the Crown in the 1970s in order to develop forestry on lands that they could actually use.[153]

12.5.4 Did the Crown keep more than its fair share of Tahora 2F, after an error in its size was discovered, and were Ngati Kahungunu prejudiced as a result?

Summary answer: *Upon survey, Ngati Kahungunu's share of Tahora 2F was found to be 2,591 acres smaller than had been estimated when the block was divided with the Crown in 1896. Baker's secret survey, which had never been properly finished, was partly to blame. A proportionate reduction of the Crown's share of Tahora 2F would have seen the return of 803 acres to the Maori owners of 2F2, who sent frequent complaints and petitions between 1919 and 1943. The Government refused to return any land, despite some support for the petitioners from the Native Department and the Native Affairs Committee.*

Ngati Kahungunu's share of Tahora 2, which was awarded to Ngati Hinaanga and Ngati Wahanga, was divided between the Crown (2F1) and the Maori owners (2F2) in 1896, with the owners' share being vested in the Carroll–Pere trust. After its transfer to the East Coast Trust in 1902, a successful farm (called Te Papuni) was developed on 2F2 from the 1910s onwards. None of this land was sold, and it was returned to an incorporation of the owners in 1953. Ngati Kahungunu do not quarrel with the administration of the trust, or the fact that their land was returned to them with a working farm. Their main concern is the discovery during the trust regime that 2F2 was 2,591 acres smaller than it should have been. Richard Niania told us: 'The survey discrepancy in 2F2 has meant in the eyes of Kahungunu owners then that the Crown has acquired 803 acres more than its entitlement.'[154] A series of petitions and complaints were made to the Crown from 1919 to the 1940s, trying to find out how this had happened, and seeking the return of 803 acres of Tahora 2F1 – the amount of excess land taken by the Crown for its share of 2F.[155]

Despite some support for these appeals from the Native Department and the Native Affairs Committee, the Government persisted in the view that it too had been shortchanged but in the 2C blocks, which had turned out to be bigger than thought (and so Maori had been awarded more than their share of those blocks in 1896). The Native Department insisted that the owners of the 2F and 2C blocks were different tribes, and that there were few owners in common (a point accepted in our inquiry by Crown counsel).[156] The owners

153. Tama Nikora, brief of evidence for 7th hearing week, 3 September 2004 (doc G8), pp 3–8
154. Richard Niania, brief of evidence (doc 138), p 52
155. Counsel for Wai 621 Ngati Kahungunu, closing submissions (doc N1), pp 8, 68–70, 74; Boston and Oliver, 'Tahora' (doc A22), pp 271–282
156. Crown counsel, closing submissions (doc N20), Topics 8–12, p 64

of 2F thus could not be compensated by taking land from 2C. The Government did not accept this advice and insisted that any compensation must come from the Maori-owned 2C sections. In theory, it wanted to keep 2F1 intact to prevent erosion, although it was in fact willing to lease parts of it for farming. In 1943, the Government made its final decision not to compensate or return land to Ngati Kahungunu.[157]

There appear to be two reasons for these discrepancies in the estimated area of Tahora blocks. First, and most significantly, Baker's survey was not very reliable, and the whole block was smaller than his survey showed it to be. Secondly, the Native Land Court and the Validation Court had estimated the area of the partitioned blocks without the benefit of subdivisional surveys, and so there were errors as between the estimated and surveyed area of each block.[158]

The question of whether the Crown or Maori benefited overall from the discrepancies is not relevant to Ngati Kahungunu. We accept that they have a strongly demonstrated historical grievance about the disappearance of a significant part of their land in 2F2.

12.6 Treaty Analysis and Findings

As we have said, the antecedents of the Carroll–Pere and East Coast trusts were the subject of detailed analysis and findings by the Turanga Tribunal. We see no need to depart from those findings, on the basis of our more limited inquiry into the trusts' origins. For our purposes, the first key matter was the inclusion of parts of Tahora 2 in the Carroll–Pere trust in 1896. We accept that the 2C and 2F blocks were included in the trust by the wish of their owners, in order to stop the bleeding of interests to the Crown through its purchase of individual interests. Te Whanau a Kai and Ngati Kahungunu had no other option. As we noted in chapter 10, under the provisions of the Native Land Court Act 1894 they could not form an incorporation while the Crown was picking off individual interests in their land. While the Carroll–Pere trust was a risky venture, the price seemed worth paying to stop the bleeding, and regain some corporate control over whether land would be alienated, and, if so, on what terms. The parties agreed, however, that the trust was doomed from the start. It had too little land, too many debts, and no Government assistance. In those circumstances, the owners of Tahora 2 were fortunate that the Validation Court – and, eventually, the trustees – successfully resisted the Bank of New Zealand's efforts to make their land liable for a share of its mortgages over other Carroll–Pere trust lands.

This very success meant that Tahora 2 was not in danger of mortgagee sale in 1902, when the Government took emergency action to help save the land and the bank. Nonetheless, it was swept up with all the other lands held by Carroll and Pere (with others) in trust, and

157. Boston and Oliver, 'Tahora' (doc A22), pp 274–282
158. Boston and Oliver, 'Tahora' (doc A22), pp 271–282

vested in a new board of three Pakeha businessmen appointed solely by the Government. The Crown accepted in our inquiry that if there was any consultation with owners, it was on the basis that their land would be transferred to the local Maori Land Council, with its elected Maori leaders. When this initative was defeated, there was no fresh consultation. Indeed, there was no time for it – the mortgagee sale was only days away. We agree with the Turanga Tribunal that the placing of the land in the hands of professional managers was a 'necessary and painful measure'.[159] We note, however, Carroll's plan that the council too would appoint a professional manager. It was not necessary to remove Maori from decision-making to achieve the object of strategic sales to pay off the mortgages. We note, too, the Government's rejection of a proposed loan to save all of the land, not just some, and give time for leasing and farm development to pay the debts.

The claimants do not take issue with the board's sale of 9,590 acres of Tahora 2C in 1905, since it was mandated to do so by the trustees (and what Rose called 'representative owners'[160]), and because the sale was not to pay off the mortgages to the Bank of New Zealand. There were some irregularities in this sale. The board did not carry out the agreed terms exactly (it sold more of one of the 2C blocks than had been authorised), and the money was mostly used to pay off debts associated with litigation rather than the relatively small private mortgage on Tahora 2. Nonetheless, the claimants have no issue with them.

The 1902 rescue package transferred land held by trustees chosen by the owners, and advised by owners' committees, to a Government-appointed board. This was done without the consent of the owners. Nonetheless, it was expected to be a temporary measure, to get rid of the mortgages. The board was tightly controlled in respect of what the former trustees had agreed it could do with the land. This situation was changed for the worse in 1906 and 1911. First, the Crown appointed a sole commissioner to replace the board in 1906. Again, the owners were not consulted and did not consent, although there was now no time constraint. Secondly, the Crown set aside the deeds of agreement in 1911 and authorised the commissioner to sell or lease land as he saw fit. This removed the last check on the commissioner from the owners and their former trustees. From 1911 to 1949, the owners had no control over what happened to their lands. They had no say at all until 1935, and then it was limited to advice on particular blocks. The commissioner did not have to take their advice. The Crown has accepted that this situation was 'problematic'. We agree.

The transfer of Tahora 2 from the owners' trustees to a Government-appointed board, without their consent, and in the face of their known preference for the Maori Land Council, was in breach of their Treaty right to retain their land for so long as they wished to do so. We accept that the imminence of the mortgagee sale made it impossible to consult the owners directly. Nonetheless, the owners' wishes were made known to the Government by their trustees. Those wishes were ignored. This was in breach of the plain meaning of

159. Waitangi Tribunal, *Turanga Tangata Turanga Whenua*, vol 2, p 567
160. Rose, 'Te Aitanga-a-Mahaki and Tahora 2' (doc A77), p 53

Article 2 of the Treaty. Any prejudice to the claimants could have been prevented if the Government body had carried out its mandated tasks, as set forth in the deeds of agreement, followed by consultation with the owners as to what should happen next. Instead, the Government decided to make the East Coast trust a longer term solution, until the internal debts were settled. The initial change was to replace the board with a single commissioner. While the trust model was clearly one which these groups of owners had supported in the past, we note that they had previously chosen the trustees themselves. To have their lands more permanently tied up in this new trust without their consent was in breach of the Treaty, compounding the initial breach in 1902.

The total exclusion of the owners from any meaningful say in the trust's decisions about their land, from 1911 to 1949, was an obvious Treaty breach. It was inconsistent with the principle of partnership, and with the tino rangatiratanga (absolute authority) of the owners with respect to their ancestral land. To be 'beneficial owners', with no say in how the land was managed, whether it was developed, whether it was leased or even sold, and how the proceeds from the land should be spent, was not consistent with Treaty principles. Maori complaint on this head was ignored until 1935, when, as we have seen, the inadequate device of advisory committees, with no powers, was set up. Macky noted Maori dissatisfaction, and the Crown has agreed that the owners' 'capacity to control their lands was severely limited'.[161]

The parties seem to have reached a tentative agreement, however, that the effects of this Treaty breach were offset by the fact that the trust saved the land for its owners, and returned developed farms to them in the 1950s. There was an important exception to this. A significant part of Tahora 2C was sold in the 1920s. In our view, these sales were entirely inappropriate. They did not fit the usual mould of sales to offload unproductive land that was costing the trust money but could not be developed. Nor were the sales for the purpose of paying debts or raising capital. Allegations were made that the real reason for these sales was that the new commissioner was 'in [the] hands' of the purchaser, one of his law firm's clients. The Crown did not deal appropriately with these allegations. It did not hold an inquiry, yet it ignored calls for the suspension of the commissioner, and the removal of his sole power to sell land. It also ignored Carroll's appeal that the proposed sales were in defiance of the owners' wishes. The Government took two actions: it warned the commissioner that he should not sell land to his clients; and it passed legislation (some two years later) giving the Native Minister power to approve all sales.

The Crown's actions were inadequate to meet its Treaty obligations. First, its warning to Coleman was simply ignored. He proceeded to complete the first sale a few months later, to accept a mortgage on that land, and to offer the remainder of 2C3(2) to the same buyers. His replacement, Commissioner Rawson, felt bound to complete this second sale, because

161. Crown counsel, closing submissions (doc N20), Topic 13, p 7

he was unwilling to risk expensive litigation. While Rawson acted from the time of his appointment as if the Minister had the power to approve sales, it was not in fact the case until 1922. The owners had no legal power to say 'yes' or 'no' to these sales, either before or after 1922. We accept that the Minister's new power was potentially for the protection of Maori interests, but the owners ought also to have had a say in whether their land could be sold. We find the Crown in breach of the Treaty principle of active protection, for failing to investigate the allegations against Coleman properly, and for failing to prevent the sales until their propriety was clear and the wishes of the owners were known. We also find that the Crown breached the Maori owners' Treaty-guaranteed tino rangatiratanga, by setting up a trust in which their land could be alienated permanently without their consent. As we have seen, this was an innovation in 1911 – even the 1902 Act did not go so far.

These findings also apply to the Crown's purchase of part of 2C3(2). This sale was at the initiative of the Crown and for its purposes, not those of the trust. While we cannot agree entirely with Boston and Oliver that the sale was 'mindless,'[162] it was unnecessary. The Crown did not really need this land, but it was sold by the new commissioner anyway and at the Crown's price, which was lower than Chapple and Field paid for the rest of the block. Had this 183 acres been sold from a different block, we might assess it as being relatively minor – but here, it increased the loss of land for Tahora 2C3(2) owners, again without their consent.

The Crown suggested that the owners did consent to Rawson's sales (183 acres to the Crown, and the completion of the second sale to Chapple). This was on the presumption that Rawson carried out his stated intention to consult the owners and seek their agreement. We applaud Commissioner Rawson's view that the owners ought to have the right to veto or consent to sales, even if the law did not accord them that right. Macky, however, notes that there is no evidence that they consented to these sales. He also suggested that the long delay in finalising the second sale to Chapple may have been due to their opposition. We note too the evidence of Carroll that the owners were all opposed to the sale of 2C land to Chapple. Finally, the owners had no legal rights in the matter. Putting this evidence together, we conclude that the owners cannot be shown to have consented to Rawson's two sales, and probably did not do so. They definitely did not consent to Coleman's sale.

We find the Crown in breach of the plain meaning of Article 2 of the Treaty, for allowing the permanent alienation of this land without the consent of its owners. We also find the Crown in breach of its obligation actively to protect the interests of the Maori owners, given that it had vested their land in this trust without their consent, had cancelled their 1903 restrictions on what could be done with the land, and now allowed its permanent alienation against their known wishes. The sad fact is that Commissioner Rawson would have agreed with Carroll that this land should not be sold against its owners' wishes, yet the

162. Boston and Oliver, 'Tahora' (doc A22), p 260

system permitted it nonetheless. We also find that the return of other Tahora 2C land to its owners as developed farms did not remove the prejudicial effects of these Treaty breaches, which were confined to the owners of Tahora 2C2(3). The success of the trust in developing and returning land might have offset legimitate sales for the trust's purposes, but not these sales (which, as we have seen, were not for the trust's purposes at all.) The fact that the owners were paid was no true compensation for the loss of their ancestral land without their consent.

12.6.1 Tuhoe's claim about Tahora 2G2

We accept the claimants' evidence that 2G2 was included in the Carroll–Pere trust without their knowledge or consent. The opportunity to rectify this mistake came in 1902, when the trust was wound up. Instead, the land was vested unnecessarily in the East Coast trust, again without its owners' consent. What followed was a long history of neglect, in which (as the Crown put it) the block was 'forgotten' because it was of no use to the trust. We accept the claimants' view that the trust ought to have returned the land to them if it had no intention of developing it, or paying off its growing debts. They might have had some success in developing it themselves, or – if they chose – pursuing an exchange of land with the Crown, in a more vigorous manner than the East Coast trust. We also note, however, that the commissioner did act to stop fresh rate demands from 1926.

The 'forgotten' block had a completely out-of-date ownership in the 1950s, with more than half of the owners being deceased. It was unlikely, therefore, that Tuhoe had profited from a block committee or membership on the East Coast Trust Maori Council. They had had absolutely no say, even in an advisory capacity, on what happened to their land while it was held in trust against their will. They tested the thesis that 2G2 was incapable of development as soon as it was returned to their control in the late 1950s. Despite the low quorum requirements and the out-of-date ownership list, the Crown could not get agreement to its proposal to buy this 'useless' land in 1958. The surviving owners insisted on forming an incorporation, paying off the debt, and trying to mill (and then farm) the land.

The Crown, on the other hand, wanted 2G2 for river protection and to prevent erosion. The owners were suspicious of this, as we have seen, guessing that the Crown just wanted to mill the timber itself. There was some justification for their suspicion, since the Forest Service would not rule out the possibility as late as 1971. In the meantime, however, the Crown proclaimed 2G2 under the water and soil conservation legislation, so as to prevent the owners from milling it. Stymied in their ability to do anything other than transfer the land to the Crown, the Tuhoe owners finally agreed to an exchange in 1973.

We are not confident that the Crown was acting in good faith in its dealing with the Maori owners of 2G2. We agree with Boston and Oliver that it was convenient for the Crown

to see the land sit undeveloped in the trust. It did not complete Rawson's 1926 proposal for an exchange. But as soon as the land looked set to return to its owners, the Crown moved to acquire it. The Maori Affairs Department prevented repeated approaches to the owners after the Crown lost at the 1958 meeting, but the Lands Department nonetheless used the law to stop the owners from getting any benefit from their land. While we accept that the Crown sometimes needs to prevent deforestation and erosion in the best interests of all, we are not convinced that this was the Crown's only motive in the 1960s. The Forest Service thought it 'likely' that the Crown would use the land for that purpose, but also contemplated milling it when it became economic to do so.

We find that the Crown breached the owners' Treaty rights when it vested Tahora 2G2 in the East Coast trust without their consent in 1902. We also find that it breached its obligations of active protection, when it provided no means for owners of blocks such as 2G2 to retrieve their land from a trust that clearly did not want it. Unable to sell or exchange it in 1926, the commissioners simply left it for thirty years to accumulate debt. The Crown breached the Treaty by not allowing these owners any say in the decisions about their land until 1958. That breach was not offset, as it was for some claimants, by the return of developed land in the 1950s. In our view, the Maori Affairs Department acted consistently with the Treaty when it prevented further pressure on the owners after 1958, giving them scope to form an incorporation and try to develop their land. But, by the same token, the Government's proclamation of the land under the water and soil conservation legislation in 1961, when there was not agreement within the Crown that the land was truly needed for this purpose, was in breach of the Crown's Treaty obligation to act scrupulously and with the utmost good faith towards the Maori owners. The proclamation limited their choices to either selling or exchanging with the Crown. We find that the 1973 exchange was carried out in circumstances that were thus inconsistent with the Treaty.

We are unable to say whether the claimants have been prejudiced by these Treaty breaches. Clearly, there was a long period (from 1902 to 1973) when they were effectively alienated from their land, and prevented from making any use of it, or obtaining any benefit from it. As the Crown has pointed out, however, the claimants have not expressed dissatisfaction with the land they received in exchange for 2G2 in 1973.

12.6.2 Ngati Kahungunu's claim about Tahora 2F2

Ngati Kahungunu owners lost 2,591 acres of their share of Tahora 2F, when the block proved to be smaller than the Court's estimate. This loss was borne by them alone, as the Crown's share of the block was not adjusted downwards to compensate them. This was a strong grievance for Ngati Kahungunu in the first half of the twentieth century, resulting in several petitions. The Government refused to hand over the requested 803 acres of 2F1, arguing that it too had been shortchanged in the 2C blocks. This does not appear to us to have been a fair

or justifiable approach to have taken to Ngati Kahungunu's protests. We note that the East Coast Trust did save 2F2 for its owners, and returned it to them with developed land and a successful farm in 1953. Nonetheless, the Crown was not entitled to profit from a mistake or sidewind at the expense of its Treaty partner. Its failure to return the 803 acres was in breach of the Treaty. The claimants were prejudiced by the loss of the opportunity to have profited from this extra land, to which they were fully entitled.

12.6.3 Prejudice

The whole sequence of events from 1902 to 1973 is redolent with continuing and compounding Treaty breaches. We have identified the following specific prejudice above:

- The loss of 9894 acres of land from Tahora 2C, which fell unfairly on the owners of Tahora 2C3(2). The land was sold without the owners' consent – indeed, against their wishes – but they were paid out over an extended period. It is not suggested that the price was inadequate, but it could never have compensated for this loss of taonga tuku iho.
- The long period (from 1896 to 1973) in which Tuhoe could obtain no access to or benefit from Tahora 2G2. The commission's stewardship was misguided and produced no benefit whatsoever to the owners.
- Ngati Kahungunu's loss of 803 acres, for which they were never compensated, from the farmland of Tahora 2F2.

Dated at Wellington this 31st day of July 2010

Judge Patrick J Savage, presiding officer

Joanne R Morris, member

Joseph Tuahine Northover MNZM, member

Dr Ann R Parsonson, member

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APPENDIX

THE UREWERA DISTRICT NATIVE RESERVE ACT 1896

ANALYSIS

1896, No 27.

AN ACT to make Provision as to the Ownership and Local Government of the Native Lands in the Urewera District. Title.

[*12th October, 1896*

WHEREAS it is desirable in the interests of the Native race that the Native ownership of the Native lands constituting the Urewera District should be ascertained in such manner, not inconsistent with Native customs and usages, as will meet the views of the Native owners generally and the equities of each particular case, and also that provision should be made for the local government of the said district: Preamble.

BE IT THEREFORE ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

Short Title.

1. The Short Title of this Act is 'The Urewera District Native Reserve Act, 1896.'

Urewera District declared a Native reserve.

2. The Native lands constituting the Urewera District, the area and boundaries whereof are approximately set forth in the First Schedule hereto, are hereby declared to be a Native reserve, subject to the provisions of this Act.

Acts suspended.

3. Neither 'The Native Reserves Act, 1882,' nor 'The Native Land Court Act, 1894,' shall have any operation within the said district except in so far as is expressly provided by this Act or by regulations made hereunder.

Governor in Council may appoint Commissioners.

4. For the purposes of this Act the Governor may by Order in Council appoint seven persons to be Commissioners, of whom two shall be Europeans, and the remainder Natives of the Tuhoe Tribe.

Powers and Functions thereof.

5. Subject to the provisions of this Act, the Commissioners shall have such powers and functions as the Governor in Council prescribes.

Procedure of Commissioners.

6. The Commissioners shall divide the said district into blocks, and shall, with due regard to Native customs and usages, investigate the ownership of each block, adopting as far as possible hapu boundaries, in such manner as in their opinion will enable them to arrive at a just and equitable decision in each case.

Ownership to be investigated on sketch-plan.

7. The ownership of any particular block may be investigated and determined on a sketch-plan prepared and approved by the Surveyor-General as approximately correct. The cost of any such sketch-plan shall be borne by the Government.

Particulars to be stated in orders made.

8. The Commissioners shall make an order in the prescribed form in respect of each block, declaring with respect to such block—

(1.) The names of the owners of the block, grouping families together, but specifying the name of each member of each family;

(2.) The relative share of the block to which each family is entitled;

(3.) The relative share to which each member of the family is entitled in such family's share of the block;

(4.) Such other particulars as are prescribed.

Orders to be published.

9. Every order made by the Commissioners shall be published in the *Kahiti* in Maori and English, and, if no appeal as hereinafter provided is lodged against the same within the period

of twelve months from the date of such publication, the same shall thereupon be confirmed by the Governor.

Person aggrieved may appeal to Minister of Native Affairs.

10. Any person feeling aggrieved by any order made by the Commissioners may, in the prescribed manner, appeal to the Minister of Native Affairs, who may direct such expert inquiry and report as he thinks fit, and, after considering such report, may confirm the original order unaltered or with such modification or variance as he deems equitable. His decision shall be final.

Registration orders when confirmed.

11. Every order confirmed by the Governor or the Minister of Native Affairs shall be registered in the prescribed manner, and shall thereupon operate as a certificate of ownership under this Act.

Order may be sent to Native Land Court to deal with.

12. In lieu of himself confirming any such order the Minister may refer it to the Governor in Council, who may confer jurisdiction on the Native Land Court to deal therewith under the provisions in that behalf hereinafter contained.

Particulars to be recorded on certificates of ownership.

13. There shall be recorded on each certificate of ownership, in the prescribed manner,—

(1.) The names of the Local Committee for the block comprised in the certificate, and of the General Committee, and particulars of every change in the membership thereof respectively:

(2.) Every dealing with the block or any portion thereof:

(3.) Every change of ownership in the block:

(4.) Such other particulars as are prescribed.

Governor may confer jurisdiction on Native Land Court.

14. The Governor, by Order in Council, may from time to time confer jurisdiction on the Native Land Court to determine succession claims, or for any other specific purpose relating to the said district.

Orders of Native Land Court to be registered.

15. Any order made by the Native Land Court under the provisions of the last-preceding section hereof may, if the Minister of Native Affairs so directs, be registered as a certificate of ownership under this Act, or be recorded on a certificate of ownership and entitled to registration, as provided in regulations under this Act.

Local Committees to be appointed.

16. (1.) From the owners of each block a provisional Local Committee of not less than five nor more than seven members shall in the first instance be appointed by the Commissioners in the prescribed manner.

(2.) Members of the provisional Local Committee may be removed from office by the Governor, and vacancies may be filled up in the prescribed manner.

Duration of office of provisional Committees.

17. Subject as last aforesaid, the provisional Local Committee shall hold office until the election of a permanent Local Committee by the owners of the block.

Such election shall be held at such time and in such manner as the Governor prescribes.

Election of General Committee.

18. Each Local Committee shall, in the prescribed manner, elect one of its members to be a member of a General Committee to deal with all questions affecting the reserve as a whole, or affecting any portion thereof in relation to other persons than the owners thereof.

Decisions thereof binding on owners.

19. Subject to prescribed regulations, all decision or undertakings by the General Committee shall be binding on all the owners.

Powers of Local and General Committees.

20. The Local Committee and the General Committee shall have such powers and functions as are prescribed by the Governor in Council: Provided that the powers and functions of the Local Committee of each block shall be confined to the internal affairs of the block.

Power of General Committee to alienate.

21. The General Committee shall have power to alienate any portion of the district to Her Majesty, either absolutely or for any lesser estate, or by way of cession for mining purposes.

Governor may lay out roads and landing-places.

22. (1.) The Governor may from time to time lay out roads and landing-places in the said district according to plans to be prepared by the Surveyor-General.

(2.) All such roads and landing-places shall be deemed to be public roads and public landing-places, and shall vest in Her Majesty the Queen.

May take land for accommodation-houses.

23. The Governor may also from time to time take land for accommodation-houses and camping-grounds for stock and other purposes of public utility under the provisions of 'The Public Works Act, 1894,' relating to the taking of land for a public work:

Provided that, except with the consent of the General Committee, the total area of the land to be so taken shall not exceed four hundred acres.

Governor in Council may make regulations.

24. The Governor in Council may from time to time make such regulations as he thinks necessary for the following purposes:—

(1.) The mode of election of members of the Local Committees and the General Committee, and fixing their term of office:

(2.) Giving effect to anything which by this Act is expressed to be prescribed:

(3.) Any other purpose for which regulations are contemplated by this Act, or which he deems necessary in order to give full effect to this Act: and also

(4.) For giving effect to a certain memorandum from the Honourable Richard John Seddon, Premier of the Colony, addressed to the representatives of the Tuhoe people, bearing

date the twenty-fifth day of September, one thousand eight hundred and ninety-five, a copy whereof is set forth in the Second Schedule hereto.

25. All expenses incurred by the Government under this Act shall be paid out of moneys to be appropriated by Parliament. Payment of expenses.

SCHEDULES

Schedules.

FIRST SCHEDULE

All that area in the Auckland and Hawke's Bay Land Districts, containing by admeasurement 656,000 acres, more or less. Bounded towards the north by the Confiscation Boundary-line; towards the east generally by the Waimana and Tahora, No 2 Blocks; towards the south-east by the Waipaoa Block, the Waikaremoana Lake, by Forest Reserve, Educational Reserve, Block v, Waiau Survey District, and Section No 1, Block viii, Mangahopai Survey District; towards the south-west by the Waiau River to the northernmost corner of Maungataniwha Block; thence by a right line to the Trig Station on Maungataniwha, and thence by Heruiwi No 4 Block; and towards the west generally by Whirinaki, Kuhawaea No 1, Waiohau Nos 1b, 1a, and 2, and Tuararangaia Blocks to the Confiscation Boundary-line at Tapapa-kiekie.

SECOND SCHEDULE

Premier's Office, Wellington, 25th September, 1895.

To the persons who came hither to represent Tuhoe, and who have addressed me with reference to certain matters affecting the tribe.

Friends,—

Salutations! In response to your application that I should give you an answer to the matters brought before me, and acquaint you with the decision of the Government thereon, in fulfillment of my promise I now address this communication to you. In the first place, you ask that the *rohe-potae* of the Tuhoe land-that is to say, the country known as that of the Urewera-be permanently determined; and, in order to do this, that a Commissioner be appointed to define the boundary known as the *rohe-potae*. I do not see why this cannot be done. I have no objection to that. The boundaries of these lands can be determined by the trig stations that have been erected. You ask also that a Commissioner be appointed to inquire into the title of the persons owning land within the said *rohe-potae*, and to determine the boundaries of land belonging to hapus and persons who consider that the land is theirs, his decision to be set down in writing; the Commissioner also to make a sketch-plan of the country, to be approved by the Surveyor-General, the boundaries of the land belonging to the hapus being determined by landmarks where possible to do so; if not, then to be surveyed with the concurrence of the owners of the

land. In coming to such a decision the Commissioner must pay due consideration to Native manners and customs, and, where it is possible to do so, he must follow the boundaries of the several hapus, each block to be dealt with in a clear and proper manner.

In dealing with the title of a person and his family they must be deemed to be joint tenants. When the Commissioner has concluded his investigation into the title of the several blocks, then the Maoris who are in a block of land belonging to a hapu may elect a Local Committee, the members of which must not exceed seven in number. This Committee to be an administrative one, to act for the owners of the land for the period for which they were elected. The number of these Local Committees should be determined by the number of the hapus and the owners of the blocks of land.

You ask further that a General Committee be appointed to deal with the tribal lands generally, and that the decisions and proceedings of the said Committee be binding on the Local Committees and hapus; its proceedings to be conducted in accordance with Maori manners and customs. I think that such a Committee should be appointed, and, in order to give effect to this, I agree that each Local Committee or hapu should elect one of their number to be a member of the General Committee, all the decisions of the General Committee to be communicated to the Local Committees for their guidance.

The regulations for the appointment of a Commissioner, and for the election of members of Local Committees and of the General Committee, will be communicated later on, after an Act has been passed giving effect to what is here set forth, which will be explained by the Hon Mr Carroll and Wi Pere, member for the Eastern Maori Electoral District, to Tuhoe.

You also remind me of the promise that I made when I visited you a short time back with reference to the establishment of schools at some of your principal kaingas. As I feel that the education of your children will give you pleasure, and that the children will benefit thereby in the time to come, the erection of school-buildings will be proceeded with forthwith. I regret very much that this has not been proceeded with sooner, but I will give instructions to have it done forthwith.

You refer to the road works in your district, and ask that certain sections be given for the Maoris to do, and that when the roads are finished that certain portions be given to the Maoris to maintain. These requests are reasonable, and will be given effect to.

As you feel that it would be desirable to provide an additional attraction to European tourists, and at the same time provide you with additional sources of food, you have asked that arrangements may be made for the introduction of English birds, and by stocking the rivers with English fish. By such means you Maoris will be benefited, and the rest of the colony as well. I will place myself in communication with the Curator of the fish-ponds at Masterton, and ascertain whether there are any English trout that can be supplied to you this year; and I will also ask to be furnished with full directions to be furnished to you, so that you may know which are the most

suitable places in which to place the fish in the rivers and lakes of your country, and how to look after them.

With regard to your request that your forests and birds should be suitably protected, it gives me much pleasure to assent to this request of yours. I am also very much pleased to learn from you that you have opened your land to tourists, who will now have an opportunity of seeing the wonders of your country, and the extent of your forests, with its lakes and its rivers. It is a cause of gratification to the Governor, and to me also, to hear that you acknowledge that the Queen's mana is over all, and that you will honour and obey her laws.

With regard to prospecting for gold, I told you that the Government gave a reward to anyone discovering gold in new country, and that much money had been paid away in that manner, the amount paid being in proportion to the number of people employed in digging gold in such localities, and the quantity of gold procured. The Government have received many applications to grant licenses for prospecting for gold, but I have not granted them. I consider that any rewards for the discovery of gold should be paid to the Maori owners of the land who prospect for and find gold. If you wish to prospect for and find gold, and it is proved to be of value, the Government will authorise a mining expert to go with the Maoris and teach them how to look for gold and other minerals, and the Government will pay a portion of the expenses of such a prospector according to the scale laid down in the regulations for gold-prospecting on Crown lands. I think, too, that should gold be found in your land the benefit accruing therefrom should be participated in by the hapus owning the land where the gold is discovered; and before the goldfield is opened arrangements should be made between the Government and the Maoris upon which the field is to be worked, either by payment of a royalty per pound or per ounce of the amount received from the working to the owners of the land, or that the balance, after paying the expenses of administration of the goldfield, and the balance on the issue of licenses and miners' rights to miners, be paid to the owners of the land. The question of general administration can be arranged with the chiefs or the persons selected to represent each hapu, or with the hapu owning the land in which gold is found. I also think that you can settle the arrangements for prospecting for gold. This is an important matter, and one that I think might be left for one person to decide; should there be no difference of opinion amongst you on this point it will not cause surprise, and there will be no trouble or heartburning.

From your loving friend,

R J Seddon,

Premier, and Minister of Native Affairs.

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