CHAPTER 6

SUMMARY OF FINDINGS

In this chapter, we summarise our findings. The purpose of this preliminary report is to assist the negotiations of the parties by providing our findings on customary rights and the Crown's treatment of them, as requested by the claimants in January 2006.

6.1 Who Had Customary Rights?

In chapter 2, we outlined our view of customary right-holding in the Te Tau Ihu district, setting out the complexities of the history and relationships of the eight iwi. There is no single, universally accepted narrative of the events of the 1820s and 1830s. Nor is there a single, universally accepted interpretation of how customary law applied to the rights of the conquerors, the defeated (still-occupant) peoples, and those Ngati Toa chiefs (especially Te Rauparaha) who led the taua. In that situation, we weighed the evidence of the tangata whenua experts and their historians and reached a view on how customary law applied to the rights of the claimants at the time of the New Zealand Company and Crown transactions.

There is a danger, in summarising our view here, that the subtleties and qualifications will be overlooked. Nonetheless, we provide a brief outline of our conclusions. First, we noted that customary law was relatively settled, and the main points were shared by all iwi, at the time of the northern migrants' arrival in Te Tau Ihu. The battles, tuku, settlement, acts of ahi ka, respect for tohunga, and subsequent intermarriage all appear to have been conducted according to the tikanga of the time. Although the defeated peoples later challenged whether the take (causes of the invasions) were tika, it was our view that both sides were in fact operating according to a shared tikanga and that their rights were derived from a known system of customary law.

As at 1820, the Kurahaupo iwi – Rangitane, Ngati Apa, and Ngati Kuia – were the tangata whenua of Te Tau Ihu. Their authority over (and exclusive possession of) the district was altered in the 1820s and 1830s by the arrival of the migrant iwi from Kawhia and Taranaki. Ngati Koata settled first, in a region gifted to them by the leading Kurahaupo rangatira of

the day, Tutepourangi. This tuku formed a lasting relationship between Ngati Koata and (particularly) Ngati Kuia, with reciprocal rights and obligations. In the testimony of both iwi, the tuku and relationship have continued to the present day. Although their evidence did not agree on the exact nature of their respective rights, it was our view that both the givers and the recipients of the tuku had customary rights in the area concerned. Both had mana. Both had authority. Leadership and the balance of authority rested with Ngati Koata, as the protectors of those Kurahaupo who made the gift.

The other migrant iwi – Ngati Toa, Ngati Rarua, Ngati Tama, and Te Atiawa – arrived slightly later and established customary rights by conquest (raupatu), followed by occupation (residence or seasonal visits and resource-use). Over time, their whakapapa became embedded in the whenua through intermarriage with the defeated peoples, the burial of placenta (whenua) and the dead, residence, and the development of spiritual links.

For their part, the defeated peoples – Ngati Kuia, Rangitane, and Ngati Apa – remained in unbroken occupation of their ancestral land. In part, their rights survived at the time of the company and Crown transactions because of the survival of small, independent communities in the interior. Also, in the more coastal areas of Te Tau Ihu there were tributary communities under their own rangatira and exercising rights of occupation, thus ensuring the survival of their take tupuna and their ahi ka. Although they recognised the authority of leading migrant chiefs, especially of Ngati Toa, they still had mana and were increasingly independent after 1840. At the time of the company and Crown transactions, too little time had elapsed for their rights to have been totally extinguished in any case. The Kurahaupo people had customary rights in the 1840s and 1850s, and those rights were protected and guaranteed by the Treaty of Waitangi. In our view, the available records showed that their rights were mainly acknowledged by the northern rangatira of the time, either implicitly (by not challenging and removing people as they did in other cases) or sometimes explicitly, so long as their own authority was also recognised. It was not until the competition for too-small reserves in the 1880s and 1890s that a more exclusive line was advanced uniformly by the conquering tribes.

Among the northern iwi, we found that they were largely equal and independent in the establishment of their own customary rights. The leadership of Ngati Toa and Te Rauparaha was acknowledged by most, although Te Atiawa had come into fairly serious conflict with the latter by the 1830s, and was disputing not just Ngati Toa's leadership but Ngati Toa's rights and occupation on the ground in eastern Te Tau Ihu. In our view, the roherohetanga by which Te Rauparaha allocated the lands of eastern Te Tau Ihu was an act of mana on his part, summarising (and perhaps shaping) a consensus of where the conquering tribes should settle. It did not imply primary rights to sell land, which became the key issue of the 1840s and 1850s – such rights rested with the communities in occupation and with their leaders (wherever they lived). The overwhelming evidence from the nineteenth century (and today) is to that effect.

In the west, where Te Rauparaha and Ngati Toa were not directly involved in the taua, they did not seek to settle, either permanently or by means of frequent visits and use of resources. Nonetheless, the history of western Te Tau Ihu shows clearly that all the migrant iwi had a right to settle there after the conquest. Later arrivals could reasonably expect to receive a tuku. Te Rauparaha and Ngati Toa, as overall leaders of the whole expedition, would still have possessed that right at the time of the company and Crown transactions. Although this was not a primary authority, as claimed by that tribe, it was our view that Ngati Toa had a layer of customary rights in western Te Tau Ihu that were rightly acknowledged by the Crown.

For some years, groups maintained a migratory lifestyle, in which they had pa, kainga, cultivations, and areas of resource-use on both sides of Te Tau Ihu and Raukawa Moana (Cook Strait). Ngati Rarua, Ngati Koata, and the resident Ngati Tama, were mainly focused on their lands in eastern and western Te Tau Ihu, while Ngati Toa were mainly based in the North Island. The many hapu of Te Atiawa appear to have been intent on living and using resources on both sides of the strait. For the Kurahaupo peoples, there were tributary communities living in the more coastal areas, and small, independent communities in the interior. The principles from which the rights of these various people were derived, a system of Maori customary law, was settled and relatively well known to Spain, McLean, Grey, and other Crown officials. Also, leaders and their kainga were known and settled by the time the company (and then the Crown) agents arrived. We did not accept, therefore, the Crown's argument that customary rights were either unsettled or so much in flux as to be undefinable. The situation continued to evolve on the ground, as was customary, but was ascertainable upon due and timely inquiry.

6.2 The Crown's Failure to Carry Out its Treaty Duty: Generic Issues

In chapter 3, we analysed the Crown's duty in terms of the principles of the Treaty in the circumstances of the time. We found that in the period 1840 to 1846 there was broad agreement that the correct Maori owners must be identified for consent and payment before the Crown could confirm that a valid alienation had taken place (to the New Zealand Company or to private purchasers), or before the Crown itself could purchase land. In our reading of the evidence, the accepted standard for Crown purchasing up to 1846 was that there should be:

- a clearly delineated and relatively small block of land;
- a prior investigation of the title to that land;
- the identification of all the right-holders; and
- an agreement between them as to their relative distribution of rights or, in the event of a dispute, reference to a proposed register or Maori court.

The actions of Grey and McLean substantially departed from this standard after 1846, in serious breach of the principles of the Treaty and to the significant prejudice of those Te Tau Ihu iwi who as a result lost land and resources without having given their proper and meaningful consent.

What was not entirely resolved by 1846, however, was whether the correct 'owners', and the nature of their rights, should be determined by Maori law or by British law and policy. The so-called 'waste lands policy' was critical to the outcome of that debate. The correct answer, in Treaty terms, was known at the time and was articulated by Lord Stanley when he told the British Parliament:

> I am not prepared to say that there may not be some districts wholly waste and uncultivated – there are such in the northern island – but they are few in number; but I know that a large portion of the district in question is distributed among various tribes, all of whom have as perfect a knowledge of the boundaries and limits of their possessions – boundaries and limits in some places natural, in others artificial – as satisfactory and well defined, as were, one hundred years ago, the bounds and marches of districts occupied, by great proprietors and their clans, in the Highlands of Scotlands [*sic*]. (hear, hear.) With respect to the greater portion of New Zealand, I assert that the limits and rights of tribes are known and decided upon by native laws. I am not prepared to say what number of acres in New Zealand are so possessed; but that portion which is not so claimed and possessed by the natives, is, by the act of sovereignty, vested in the crown. But that is a question on which native law and custom have to be consulted. That law and that custom are well understood among the natives of the islands. By them we have agreed to be bound, and by them we must abide. These laws, these customs, and the right arising from them, on the part of the Crown, we have guaranteed when we accepted the sovereignty of the islands; and be the amount at stake, smaller or larger, so far as native title is proved, – be the land waste or occupied, barren or enjoyed, – these rights and titles the Crown of England is bound in honour to maintain, and the interpretation of the treaty of Waitangi, with regard to these rights is, that except in the case of the intelligent consent of the natives, the Crown has no right to take possession of land, and having no right to take possession of land itself, it has no right – and so long as I am a minister of the Crown, I shall not advise it to exercise the power – of making over to another party [ie, by Crown grant] that which it does not possess itself. (cheers).[1]

Lord Stanley agreed with the New Zealand Company that there might be unowned waste lands in the South Island but that this could be determined only by an inquiry into Maori customary law and right-holding on the spot. The Treaty guaranteed Maori possession of

1. *New Zealander*, 13 December 1845 (quoted in Dr Donald Loveridge, '"An Object of the First Importance": Land Rights, Land Claims and Colonization in New Zealand, 1839–1852', report commissioned by the Crown Law Office, 2004 (Wai 863 ROI, doc A81), p 264 fn 645)

whatever they 'owned' according to their own law. The Secretary of State instructed the Governor to register all Maori land and to purchase land for the company's requirements if necessary. In all such purchases, he was to:

> in giving to the Company your best assistance . . . and in facilitating the negotiations with the natives, you will not fail to bear in mind the importance of endeavouring to ascertain, so far as circumstances will permit, that the natives by whom, or on whose behalf, the sales are made, are actually the parties who have the right and titles to the land, and not merely parties pretending such rights and titles. It is, of course, important both for the Government and New Zealand Company that in each case the native title should be effectively extinguished.[2]

These, then, were standards by which Grey's actions in the purchasing of Te Tau Ihu land in 1847–53 may be judged.

Maori customary law was guaranteed and protected by the Treaty. Instead of respecting that law or ascertaining Maori rights under it, Governor Grey and Donald McLean applied a virtual waste lands policy to the blanket purchasing of Maori land and to the amount of land that they permitted Maori to retain. Grey's conduct of the Wairau and Waipounamu purchases was ultimately based on his belief that Maori resource-use rights and customary claims to uncultivated 'waste land' were invalid. He did not, as instructed, investigate those claims according to Maori custom and reach a considered and informed determination of that point. The application of a virtual waste lands policy to Maori customary rights during Crown purchases and reserve-making was in serious breach of Treaty principles. Relevant aspects of the Wairau (1847) and Waipounamu (1853–56) purchases were, therefore, in serious breach of Treaty principles.

Under the Treaty of Waitangi and by the standards of the time, any purchase of Maori land or confirmation of private purchase required the Crown to ascertain:

- the correct right-holders according to Maori custom;
- the rights that they wished to convey to the Crown;
- the rights that they wished to retain; and
- the rights that they needed to retain to ensure, in Normanby's words, their own comfort and subsistence.

In addition, the Crown had to ensure that the decision of what to convey and what to retain had been made by, to paraphrase Normanby, the appropriate customary decision-makers according to their own established usages (tino rangatiratanga).

These were the standards that the Treaty guaranteed and that British policy in the 1840s was officially committed to meeting. In chapter 3, we noted that the Crown failed on all

2. Stanley to Grey, 15 August 1845, BPP, vol 5, p 253 (quoted in Michael Macky, 'Crown Purchases in Te Tau Ihu between 1847 and 1856', report commissioned by the Crown Law Office, 2003 (doc s2), pp 24–25)

these counts in Te Tau Ihu. First, it admitted that it did not properly inquire into the identity of the correct right-holders, or the nature of their customary rights, when it confirmed the New Zealand Company's transactions (1844) and made its own major purchases (1847–56). Secondly, we found that there were mechanisms available to the Crown for it to have recognised, respected, and protected the tino rangatiratanga of Te Tau Ihu Maori in transactions for their land. At the least, the Crown possessed the resources and skill sets for it to have investigated customary title by commissions of inquiry or by detailed, official, on-the-ground inquiries, but it failed to do so. Also, suggestions for a Maori court, which could have been used to resolve disputes and have Maori decide their own entitlements, were not carried out.

The best way to have dealt with matters, however, was for Te Tau Ihu Maori to have exercised their tino rangatiratanga in partnership with the Crown, deciding their own entitlements through their own customary mechanisms with officials in attendance (as happened with the Pakawau purchase in 1852). Such empowerment carried the risk, however, that Maori might say 'No', as they did at that hui to the proposed purchase of the west coast. This risk was unacceptable to Grey and McLean, who thereafter deliberately undermined or circumvented tino rangatiratanga in the Waipounamu purchase in order to obtain virtually the whole of Te Tau Ihu for the Crown.

In sum, we found that, in the circumstances of the time, the Crown considered the prior investigation of Maori customary rights, as determined by Maori customary law, to be a vital prerequisite to its acceptance of any decision to sell. Yet, it failed to carry out such investigations in an adequate manner, if it carried them out at all. The Crown's failure to abide by its own standards, more particularly during the transactions of 1844 to 1856, was in serious breach both of the Treaty principles of partnership, autonomy, reciprocity, and active protection and of its guarantee of Maori tino rangatiratanga.

In particular, the Crown failed to actively protect Maori interests (by ensuring that their entitlements were fairly identified by themselves and according to their own laws) before commencing to buy them. It failed to act in partnership with Maori or to respect their autonomy when it failed to establish official mechanisms, the decisions of which would be binding on both sides, for the negotiation of purchases and the resolution of disputes. It failed to respect and provide for tino rangatiratanga, not permitting Maori to debate and decide their own entitlements through their own institutions, before it obtained deeds and made payments. That it could have done all of these things is demonstrated above all by the Pakawau hui at Nelson and by proposals for advance title registration or dispute resolution by Maori-controlled courts. The Crown's refusal to meet the bare minimum of its obligations under the Treaty enabled it to obtain almost the entire land and resource base of Te Tau Ihu, in breach of the Treaty and to the serious prejudice of the eight Te Tau Ihu iwi.

6.2.1 Was the Crown's failure mitigated if it identified right-holders after accepting a decision to sell or even by the end of a later transaction?

It was clear from our discussion in chapter 3 that by 1847 the Crown had accepted that it was bound by the Treaty and by the Maori law governing customary rights in property. It had also, on many occasions, articulated the view that it would neither buy Maori land nor confirm the extinction of Maori title by Crown grant to others unless there was proof that the correct right-holders had been identified and paid. Further, it was the proposed practice of Governors Shortland, FitzRoy, and Grey that the correct Maori right-holders had to be identified before either purchasing land or (in the case of private purchasers) confirming a purchase. We noted the proposed purchase processes of Shortland and Clarke, the registration instructions of Russell and Stanley, the purchase instructions of Normanby and Stanley, and the proposed confirmation processes of FitzRoy and Grey. All required the identification of Maori title prior to the Crown's acceptance of a decision to sell or, in the case of confirmations, prior to its acceptance that a sale had taken place and before a Crown grant to the purchaser could ensue.

The Crown and claimants agreed that this did not happen in Te Tau Ihu. At first, the Crown denied it, but it eventually conceded the point, particularly on the evidence of Dr Ballara. The evidence of its own witnesses, Dr Gould and Mr Macky, also confirmed the point. The Crown argued, however, that its failure was mitigated by identifying and paying all right-holders by the end of the final (Waipounamu) purchase.

We did not accept this submission. The Crown, in Lord Stanley's words, had no right to grant lands that it did not itself possess. The idea that its transactions could somehow be validly or fairly completed after Maori land had been granted to settlers, or after it was judged as irrevocably sold, was incompatible with either the Treaty or British principles of justice. We accepted the submission of Ngati Tama: 'It is well settled in both Maori customary law and English law that a person cannot convey to another that which is not theirs.'[3] Anything less than the free and informed consent of Maori to the alienation of their land, given before the Crown claimed to own that land or grant it to others, was in violation of articles 2 and 3 of the Treaty, the rights of all British subjects, and the tino rangatiratanga of Maori tribes. The compensation of 'after-claimants', subsequent to their land being counted as sold and with a non-negotiable sum, was in obvious violation of the Treaty principles of reciprocity (inherent in pre-emption), partnership, and active protection.

Having considered these generic aspects of the claims in chapter 3, we then turned to the detailed processes by which the Crown purchased (or confirmed the purchase) of land.

3. Counsel for Ngati Tama, closing submissions, 2004 (doc T11), p 46

6.3 The Spain Commission

In chapter 4, we assessed the claims of Te Tau Ihu iwi that to their lasting prejudice the Spain commission incorrectly confirmed and validated the New Zealand Company's pretended purchase of land. The Crown argued that it 'consistently proceeded on the basis that there must be a valid extinguishment of Maori claims before it could legitimately acquire land or confer, or recognise the title of Europeans seeking land'.[4] It also admitted that 'the Crown did not carry out adequate inquiries into customary rights in Te Tau Ihu even though there was expert advice on these matters available'.[5] These two concessions were of great importance to our consideration of the Land Claims Commission. In the Crown's view, Commissioner Spain and other officials 'considered themselves bound by the Treaty and the British Government's instructions to protect Maori interests by a full investigation'.[6] These standards, Crown counsel conceded, were not met. Spain acted with a 'degree of ruthless pragmatism that saw the Treaty either sidelined or made secondary to the needs of the settlers and the New Zealand Company'.[7]

6.3.1 The Crown's concessions and agreements between the parties

Overall, the claimants and the Crown agreed that Spain's inquiry into customary rights and Maori's understanding of – and agreement to – the New Zealand Company's transaction was totally inadequate, and that this had prejudicial effects for Te Tau Ihu Maori. We accepted this substantive agreement on the facts. Although the Crown did not concede specific Treaty breaches, we made findings that the Treaty has been breached (summarised below).

Further, we accepted the parties' agreement on the following details:

- In terms of informal inquiries, Meurant visited only some districts in Tasman Bay and nowhere in Golden Bay, and Clarke did not have time to inquire informally.
- In terms of the formal investigation, Spain heard only one Maori witness, despite many others being present who could and should have been heard. Even the evidence of that one Maori witness was not given its due weight: Spain dismissed Te Iti's evidence on the basis of an unsubstantiated accusation that it was untruthful, an accusation made by the company agent and the protector, without them calling any evidence to corroborate their accusation. Tasman Bay tribes, therefore, did not have a proper opportunity to put their evidence on their understanding of what (if anything) had been agreed with Captain Wakefield, what (if any) rights Ngati Toa could or did alienate, whose rights were affected, and who had authority to decide such matters.

4. Crown counsel, submission concerning generic issues, 20 September 2002 (paper 2.371), p 8
5. Crown counsel, opening submissions, 14 November 2003 (paper 2.748), p 12
6. Crown counsel, submission concerning generic issues, p 18
7. Crown counsel, closing submissions, 19 February 2004 (doc T16), p 2

- Golden Bay communities had no opportunity to be heard at all, and definitely did not consent in advance to an arbitrated settlement or the amount of compensation determined for them to receive.
- The explanation for this inadequate inquiry was political; by the time it reached Nelson, the commission was determined on a quick settlement, rather than to inquire and report fully on the validity of the company's transactions.
- The Crown should have inquired into and established how Maori customary rights related to their share of the Nelson Tenths at the time. To have left it for 50 years was wrong and unfair.

The Crown made other concessions. First, it conceded that Spain and Clarke could (and should) have inquired into the rights of the Kurahaupo tribes, a point not necessarily accepted by the northern allies. Secondly, the Crown thought it 'probable' that Tasman Bay Maori were given no choice but to agree to arbitration, compensation, and even the amount of compensation, but it considered the evidence 'inconclusive'. Similarly, it was 'possible' that right-holders were left out, who neither consented nor were compensated. The claimants, on the other hand, considered the evidential foundation strong enough to take these conclusions further. They believed that the Tribunal could come to a definite view that Tasman Bay Maori did not consent to a switch from investigation to arbitration–compensation and that the 'arbitration' was in fact a coercive process in which they were given no choice but to accept deeds of release and a dictated amount of compensation. Having reviewed the evidence, we accepted the claimants' submissions to that effect.

6.3.2 The Crown's Treaty duty

In chapter 4, we found that the Crown had a Treaty duty to ensure that the New Zealand Company had made a valid purchase of land (and from the correct 'vendors') before confirming its title. The Crown thought so too, both then and now. In its submissions in our inquiry, the Crown relied on Normanby's instruction that there be an investigation, the Colonial Office's insistence to the company that it could not have title without one, and Spain's own view that to award title without first investigating and confirming its validity would have been in breach of the Treaty. We accepted this submission. These were the standards against which the Crown's actions must be judged.

The Crown conceded that it did not meet these standards, but suggested that the switch from inquiry to arbitration was not necessarily in breach of the Treaty. Much depended on whether Maori supported such a switch and participated in (rather than being objects of) the arbitration and, ultimately, consented to the final arrangements. Much depended also on the objective of the switch. Was it carried out with a view to properly balancing the Crown's obligations to its Maori and settler subjects and to its commitments in the November Agreement and the Treaty?

6.3.3 Hobson's breach of the Treaty

Prior to Commissioner Spain's investigation, Governor Hobson permitted the New Zealand Company to select land and form settlements in the northern South Island in the mistaken view that the November Agreement of 1840 prevented him from interfering. The Crown's historical evidence was that Hobson's view was incorrect. Further, Chief Protector Clarke had advised Hobson that the company's claims were dubious. Hobson could (and should) either have waived pre-emption so that the company could acquire land from resident Te Tau Ihu right-holders or have arranged to obtain that land by Crown purchase. He did neither, instead permitting Captain Wakefield's gift and settlement arrangements, later erroneously interpreted as an extinction of Maori title by Spain.

6.3.4 Spain's report and award were in breach of the Treaty

Despite carrying out what the Crown admitted was an inadequate inquiry, Spain recommended an award of 151,000 acres to the company, on the basis that:

- the 1839 Kapiti deed had transferred land and extinguished Ngati Toa's rights; and
- Captain Wakefield's 1841 gifts were in fact understood by Maori to have been an absolute purchase of exclusive title to that land.

Spain's report was demonstrably wrong as to the facts in both instances. Nonetheless, his findings (and not the 'gratuitous' deeds and payments of 1844) formed the basis for the Crown's grants of land to the company (in 1845 and 1848). This outcome was in breach of the Treaty. Neither the Kapiti deed nor the 1841 gift-giving was a valid absolute alienation of Maori customary rights. Under British law, the Kapiti deed was so faulty as to be invalid, and the Treaty's grant of pre-emption meant that only the Crown could buy land after 1840. Wakefield's 1841 gifts had no legal effect if characterised as payments for land. Under Maori law, the claimants' evidence was that they had made a customary tuku of land to the company, some of which was to be shared, other pieces of which were to be exclusive, but all of which remained under a layer of Maori rights and authority. We found from the historical evidence that these facts were discoverable at the time, had Spain inquired properly. The Crown grants, therefore, actively extinguished Maori customary title by granting it to others, without the consent or proper compensation of Te Tau Ihu rights-holders. This violated the tino rangatiratanga of Te Tau Ihu Maori, expropriated their property, and was in breach of the Treaty principles of partnership, reciprocity, equity, and active protection. This Treaty breach prejudiced all iwi with valid customary claims in the company districts.

The only thing that might have prevented or ameliorated this Treaty breach was if the Crown had treated properly with Te Tau Ihu Maori for their surviving customary rights in 1844, during Spain's 'arbitration' process, to which we now turn.

6.3.5 Tino rangatiratanga and the arbitration process

As we noted in chapter 3, the Nelson hui about the Pakawau purchase was a good example of how the Crown could act with respect for tino rangatiratanga by ensuring that all potential right-holders had been visited and knew what the Crown wanted, followed by an intertribal hui for them to discuss, agree, and arrange the matter for themselves. We therefore posed the question: Was this standard met at the Nelson 'arbitration' hui of August 1844?

In our view, there was nothing wrong in principle with a settlement 'out of court', provided both parties agreed to follow that procedure and fully participated in the negotiation or were represented by advisers of their choosing. In the case of Spain's 1844 arbitration, the Crown conceded:

> it cannot be said with confidence that there is evidence of a reasonable degree of Maori engagement with and consent over the shift from inquiry to arbitration. There may have been, but it is also probable that Maori believed they had little or no choice in the matter. The evidence one way or the other is inconclusive. For the same reason it is therefore possible that some groups of Maori were unwilling to alienate their land, and there is a possibility that the Crown did not consult, negotiate and compensate all Maori with rights in the land affected.[8]

We considered the evidence to be firmer than was admitted by the Crown. Similar to the circumstances in Wellington, we found that the Crown acted in breach of Treaty principles in that:

- it failed adequately to consult with Maori having customary interests in Tasman Bay and Golden Bay before deciding to switch from an inquiry into the validity of the New Zealand Company's transactions to a form of arbitration;
- it proceeded to implement the arbitration process without the informed consent of Maori with interests;
- it failed to ensure that a fair process, acceptable to Maori, would be followed by the arbitrator, because he reserved the right to impose conditions and settle compensation without the willing consent of Maori, which was required by article 2 of the Treaty;
- it failed to respect, protect, and provide for tino rangatiratanga when it imposed an amount of compensation, and it restricted the decision-making of the intertribal hui to a single point, the proportionate distribution of that set compensation;
- it failed to permit even that exercise of tino rangatiratanga to Golden Bay hapu and leaders, whose refusal to accept or divide up the compensation was followed by its being awarded anyway and their land being awarded to the company; and

8. Crown counsel, closing submissions, pp 49–50

- it accepted Spain's award as a legitimate basis for a Crown grant to the company, even though that award was based on an inadequate inquiry and its decision was wrong on the facts.

As a consequence, all such Maori were prejudicially affected by the arbitration proceedings and award, with the expropriation of their title to 151,000 acres of land, without their meaningful consent and to their social, cultural, and economic harm.

6.3.6 Were customary rights nonetheless extinguished by the 1844 deeds of release?

Having reviewed the circumstances of the 1844 negotiations, we were not satisfied that the deeds of release – explained as a gratuitous payment rather than an extinguishment of rights – can be shown to have changed the customary aspects of the tuku, to the certain knowledge of the Maori signatories. As in 1841, there was an avoidable failure to secure a meeting of minds. This time, the failure was mainly due to Commissioner Spain and it was soon evident to the Government in the 1850s. In the Maori view, there remained unalienated customary rights in the lands adjudicated by Spain and awarded to the New Zealand Company. In the Crown's view, all rights had been extinguished by purchase (as found by Spain), and the land was then legitimately granted to settlers (minus reserves). As a result of Spain's failure to inquire properly and find the truth, and his subsequent explanation of the 1844 payments, Maori and the Crown were still 'talking past each other' by the 1850s. By then, however, all unalienated customary rights had, at law, been expropriated and granted to others by Crown grant in 1845 and 1848. The issuing of these Crown grants, based on the faulty Spain inquiry and award, compounded the Treaty breaches enumerated above.

6.3.7 Who was affected by the Treaty breaches?

All iwi with customary rights in Tasman Bay and Golden Bay were prejudiced by these Treaty breaches. Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata were clearly among that number and (at the time) had the leading authority in those districts.

Ngati Toa were also affected. They had customary rights in western Te Tau Ihu. The Kapiti deed marked an intention on the part of Te Rauparaha and other Ngati Toa leaders to make a tuku of western Te Tau Ihu land to the New Zealand Company, but there was no valid alienation of all of Ngati Toa's rights, nor even agreement on which parts of Te Tau Ihu were intended for settlement. There was no justification whatsoever for equating 'Taitapu' with any part of the Golden Bay land awarded to the company and justification only for equating 'Wakatu' with that part of Tasman Bay accepted under that appellation by the resident iwi. Spain wrongly found otherwise, as we noted in chapter 4.

The Kurahaupo tribes also had surviving customary rights in Tasman and Golden Bays, and were wrongly overlooked by Spain, Clarke, Meurant, and the Wakefields, as the Crown

conceded. These iwi were therefore also affected by the Treaty breaches. Further, the Crown's historian pointed to the fact that Spain's award was recommendatory, that Governor FitzRoy was aware of the Kurahaupo claim and could have intervened in Te Tau Ihu on behalf of the defeated peoples, as he did in Taranaki. We agreed, and found the Crown in breach of the Treaty for this act of omission, compounding the earlier breaches with regard to the Kurahaupo iwi.

6.3.8 Customary entitlements and the Nelson Tenths

As noted above, the Crown and claimants agreed that the beneficiaries of the tenths should have been identified at the time and that the failure to do so was a serious one. We considered that in 1844, Ngati Rarua, Ngati Tama, Te Atiawa, and Ngati Koata had the strongest customary authority in the lands awarded to the company. The rights of the first three tribes were based on take raupatu, followed by itinerant resource-use, residence, and cultivation, and by the beginnings of intermarriage with the defeated peoples and the burial of placenta and the dead in the land. The rights of Ngati Koata, however, were derived from take tuku, and from itinerant resource-use, occasional residence in the company lands, intermarriage, and the burial of the placenta and the dead in the land.

The Kurahaupo tribes had surviving rights despite their defeat, and the potential for them to recover and strengthen with every year. Their leader, Tutepourangi, had made a tuku to Ngati Koata that was still live at the time, and a basis of relationship and rights for both. It was not clear how far they were still in occupation, especially in Golden Bay. According to Meihana Kereopa's evidence, Kurahaupo peoples were still in occupation of part of Tasman Bay until after the Spain award (as a result of which, it appeared, they had to leave the district). There were Ngati Apa families scattered around, some still in 'slavery', despite the Treaty promise that they had the rights of British subjects. Their right to continue peacefully recovering from the conquest was, as with the Ngati Toa right to take up ahi ka, foreclosed by the Spain decision of 1844 and the Crown grants of 1845 and 1848.

As described in chapter 2, in 1844 Ngati Toa still had a latent right to visit for resource-use or to take up residence and cultivation (which together or severally make up ahi ka). The evidence was that, had they chosen to take up this latent right in the 1840s, their former allies in western Te Tau Ihu, especially their close relatives among Ngati Rarua and Ngati Koata, would likely have accommodated them with a tuku. There would have been little choice, given the leading role of Te Rauparaha in the raupatu (even if not personally involved in the west) and the way those tribes considered it tika to accommodate other conquest chiefs who came to settle after the first wave. But, without taking up this latent right, Ngati Toa of the 1840s were too far away from western Te Tau Ihu to maintain any kind of authority over their relations or allies, nor could they claim primary or leading rights in the land.

It was not possible for this Tribunal, at this distance in time from the events of the 1840s, to comment on the proportionate share to which the uninvestigated rights of Ngati Toa and the Kurahaupo iwi would have entitled them. Suffice to say that we thought the leading share in the tenths was indeed correctly decided in 1892, although we made no comment on the proportion as between the four northern allies. But, because the tenths were considered part-payment for the New Zealand Company lands and an endowment for the 'vendors', we considered that Ngati Toa and the Kurahaupo iwi should also have had a share. We found in chapter 4, therefore, that Ngati Toa and the Kurahaupo iwi were wrongly denied a share in the tenths, in breach of the Treaty principles of partnership, equal treatment, and active protection, and to the obvious prejudice of those iwi. In our view, it would be neither possible nor appropriate to satisfy those claims from the assets of the Wakatu Incorporation. Other issues with regard to the tenths will be dealt with in our final report.

6.4 The Wairau Purchase

One of the most enduring of the claimants' grievances was Governor Grey's blanket purchase of the enormous Wairau block, followed by his grant of millions of acres to the New Zealand Company. There was broad agreement between the claimants and the Crown on many of the historical facts. The Crown made some important concessions, accepting criticism from various witnesses (including its own historian), but it made only two concessions of Treaty breach: first, that Grey's detention of Te Rauparaha without trial was in breach of the Treaty and, secondly, that Grey's purchases were carried out with a ruthless pragmatism that sidelined Treaty promises and, in doing so, subordinated the interests of Maori to those of the settlers. Although the Crown did not specify the Treaty principles concerned, this was clearly a breach of the principles of equity, partnership, and active protection.

6.4.1 The Crown's concessions

The Crown conceded that:

- its indefinite detention of Te Rauparaha without trial was a Treaty breach, and that it used his detention to apply 'moral pressure on Ngati Toa chiefs to agree to a cession of land'[9];
- Surveyor-General Ligar's investigation identified 13 principal 'owners' of the Wairau, along with many other claimants, but Grey ignored Ligar's report and purchased the Wairau from only three of the principal 'owners'; and

9. Crown counsel, closing submissions, p 101

- payment may not have been distributed widely enough and Rangitane certainly were not paid.

The Crown also criticised Ligar's inquiry as inadequate (even if the Governor had taken any notice of it) because it failed to:

- explain the overlapping interests or the relative interests of Ngati Toa, Ngati Rarua, and Rangitane;
- explain what authority the Kurahaupo rangatira Ihaia Kaikoura had over the land as an accepted leader of the Port Underwood community;
- explain why Pukekohatu was identified as Ngati Toa;
- explain whether the Rangitane 'fugitives' living independently in the interior had rights; and
- identify the 'many who have claims'.[10]

The Crown concluded that the Wairau purchase was 'not without its controversies such as to whether all right-holders were identified, whether consideration was distributed widely, delays in surveying and the coercive context associated with the Ngati Toa chiefs'.[11] Counsel suggested, however, that the 'fair' purchase price of £3000, the Wairau residents' desire for settlers, and the setting aside of a large and sufficient reserve for all the residents were factors in mitigation of the Government's actions. The Crown did not, therefore, draw a conclusion that the admitted 'controversies' were in breach of the Treaty.

6.4.2 Did the Crown carry out an adequate inquiry into customary rights before or during Grey's negotiations to purchase the Wairau?

In chapters 2, 3, and 5, we accepted the claimants' evidence that customary right-holding was decided according to a system of law common to all districts, though with regional variations, and that sufficient Maori and settler expertise was available for the Government to have inquired adequately as to customary law and those who held rights under it. Such rights continued to change and evolve according to custom during the 1840s. This did not mean that things were in 'flux' or were impossible to settle upon due inquiry or by the exercise of tino rangatiratanga through intertribal hui and other customary decision-making mechanisms. Nor did infrastructural limits prevent the Government from carrying out inquiries, given the fact that both the Spain and the Ligar inquiries actually happened.

Of the two, Grey chose to rely on Spain's report, even though the commissioner had not actually investigated the Wairau, other than his questioning of Ngati Toa chiefs in 1843. That questioning was confined to whether or not a 'sale' had taken place. There was no investigation of customary rights, yet Spain concluded that the Wairau was in the 'bona fide

10. Ibid, pp 103–104
11. Ibid, p 104

possession' of Ngati Toa alone. Rangitane did not meet his criteria for customary rights, as he believed them all to be fugitives and not in occupation (which was demonstrably untrue). He made no mention of Ngati Rarua, also in occupation at the time. Ligar, on the other hand, visited parts of the district (on the Government's instructions) and identified the presence of Rangitane in occupation with Ngati Toa, the rangatiratanga of Ihaia Kaikoura, the ascription of primary authority over a sale to 13 chiefs, and the existence of 'many' other unspecified claimants.

The claimants and the Crown agreed on two fundamental criticisms of Ligar's report. First, they argued that it was incomplete and faulty – the 'many' unidentified right-holders remained that way and tribal identities were not properly ascertained and explored. Secondly, the Government took no notice of the report in any case. Both criticisms were justified in our view. The former problem might have been overcome if the Government had respected tino rangatiratanga and ensured that right-holders were properly informed of the planned purchase and had an opportunity to assemble, debate the purchase, and reach a consensus on whether it should go ahead. Instead, in a manner for which Crown counsel used the words 'pressure' and 'coercive', Grey forced through a purchase in the North Island from just three of the 13 principal right-holders, all three of whom were Ngati Toa.

6.4.3 Treaty breaches in the Wairau purchase: Ngati Toa Rangatira

The inquiries that took place were clearly inadequate in the circumstances, but that was only the beginning of the problem. As we noted, Grey ignored Ligar's findings, such as they were, in favour of purchasing from Rawiri Puaha, Tamihana Te Rauparaha, and Matene Te Whiwhi. He did so in order to secure certain military, strategic, and political objectives, as we outlined in chapter 5. The Governor had already decided to buy from those three chiefs even before the Ligar inquiry took place.

Grey's actions knowingly violated the rights of other senior leaders of Ngati Toa and of the tribe as a whole. The Wairau purchase, as conducted by Grey, was an absolute and deliberate breach of article 2 of the Treaty, and of the Treaty principles of reciprocity, partnership, active protection, and equal treatment. Had the Crown had regard to its partnership with Maori, and its obligations under article 2, it would have given effect to their tino rangatiratanga by convening a public hui at or near the district under negotiation (as it did for Pakawau). It would have ensured that the tribe had a chance to consider the Crown's offer and come to a deliberate and informed decision by means of its own customary decision-making mechanisms. It would have ensured that the 13 principal leaders, as identified by its own inquiry, were present and/or consented to the transaction. Above all, it would have given all legitimate right-holders the opportunity for a genuine and informed choice. The Crown's purchase of the Wairau from Ngati Toa failed to meet a single one of its Treaty obligations to that tribe and was in very serious breach of Treaty principles.

6.4.4 Treaty breaches in the Wairau purchase: Ngati Rarua

In chapter 5, we accepted the submission of counsel for Ngati Rarua that the Ligar report put Grey on notice that the consent of 13 leading chiefs was required (including Pukekohatu of Ngati Rarua) and that there were 'many' other right-holders yet to be identified. As with the wider community of Ngati Toa right-holders and leaders, the Ngati Rarua people were entitled to participate in the decision-making and to give a free and informed consent (or refusal) to the purchase. We found that the Crown knowingly and deliberately purchased the Wairau without the consent of its resident right-holders, including Ngati Rarua, in serious breach of article 2 of the Treaty. This was a deliberate suppression of their tino rangatiratanga and was in violation of the principles of reciprocity, partnership, active protection, and equal treatment.

6.4.5 Treaty breaches in the Wairau purchase – Rangitane

Rangitane clearly had customary rights in the district at the time of the Wairau purchase. Following the signing of the 1847 deed and the beginning of settler intrusion on the ground, Rangitane (and other residents) asserted their right to have been consulted and paid, and their protest at being excluded. The Crown had already granted their land to others, and it ignored or actively sought to suppress their protests. The tribes residing in the Wairau appear to have worked together in the late 1840s and early 1850s to protest the sale of their land without their consent (or payment).

We found that a layer of legitimate Rangitane rights had survived their defeat, although those rights were no longer exclusive. The fact that Rangitane, in common with others at the Wairau, looked to Ngati Toa chiefs for leadership at this time, especially Te Kanae and Puaha, did not change the existence of their rights, which were guaranteed and protected by the Treaty. The Governor's predetermined decision to buy the Wairau from three select Ngati Toa chiefs meant that Ligar's failure to properly examine and identify Rangitane's claim was immaterial. The Crown's purchase of their land, without their participation or consent, was in serious breach of article 2 of the Treaty, and of its principles. This breach was compounded by the Crown's failure to investigate Rangitane's post-sale protest fairly or to uncover and satisfy their undoubted rights at that point. Rather, the Crown tried to enforce the sale by requesting Ngati Toa to remove the protestors.

6.4.6 Treaty breaches in the Wairau purchase – the failure to ensure that all customary right-holders shared in the payment

Ngati Rarua, Rangitane, and the majority of Ngati Toa leaders and right-holders were deprived of their tino rangatiratanga when they were not allowed any say in whether the Wairau would be sold. The Crown purchased the district from just three chiefs and then

enforced that purchase on resident protesters. Was this action of the Crown in any way mitigated by ensuring that all right-holders were at least paid, even if they were not consulted and had not consented?

From what evidence was available to us, the Crown was aware that the three signatories were not distributing the money to other right-holders or had at least been accused of not doing so. Servantes investigated the complaints and recommended that further instalment payments be supervised so that the Government could satisfy itself that the money was being properly distributed. But this recommendation does not appear to have been implemented. We found that the Crown had a responsibility to try to ensure that land purchase money handed over to a select few chiefs was equitably distributed to right-holders and, where possible, invested in the productive development of land reserved to them. After all, this was what Grey promised would result from the instalment payment system that he initiated with the Wairau purchase. He seems to have done nothing about it once he had got the block. Instead, the Crown failed to ensure that the instalment payments were properly distributed to right-holders, Ngati Toa or others. This failure was in breach of the principles of active protection and equal treatment.

As a result, the great majority of Maori right-holders were deprived of their tino rangatiratanga and were not consulted about the purchase, did not consent to it, and were never paid as part of it. Taken together, these Crown actions were in very serious breach of the Treaty of Waitangi and its principles.

6.4.7 Were these Treaty breaches mitigated by the inclusion of Wairau right-holders in the Waipounamu purchase?

In 1848, Governor Grey issued the New Zealand Company a Crown grant that included the entirety of the Te Tau Ihu land that he claimed to have purchased from Puaha, Te Whiwhi, and Tamihana Te Rauparaha. From that point on, the settlers had all legal rights to the land and Maori had none (save their reserve). In 1851, when the company's affairs were wound up, any unallocated land reverted to the Crown. In the Waipounamu purchase of 1853–56, the three iwi with rights at the Wairau – Ngati Toa, Ngati Rarua, and Rangitane – signed deeds purporting to sell all their rights wherever they happened to be. Whatever the circumstances of the Waipounamu purchase, it was certainly not a free and willing sale of rights in Wairau land already granted by the Crown to others. It was simply and clearly inconsistent with the Treaty guarantees for the Crown to grant land with unextinguished customary rights to settlers. Whatever the Wairau purchase deed may have purported to do, it did not extinguish the customary rights of those Maori who were not a party to it. As we have found, that included the majority of Ngati Toa, and also the resident Ngati Rarua and Rangitane. Their rights were extinguished at British law by the Crown's 1848 grant of their land to others in fee simple. In theory, there was no going back from that point. In practice,

when the Crown resumed ownership of a very large territory in 1851, it could have returned land to Maori who had not sold their rights and did not wish to do so, without any injustice to settlers. Instead, it maintained and defended its title.

Thus, although the Crown may have paid some excluded right-holders years later during the Waipounamu purchase, this did not mitigate the absolute suppression of their tino rangatiratanga in 1847 and 1848. We found that the Waipounamu purchase could not and did not make willing sellers of those whose rights had already been granted to others, in violation of the plain meaning of article 2 of the Treaty, and of the principles of reciprocity, partnership, and active protection. Further, in favouring the company and settlers by granting the Wairau to them, despite knowing of the right-holders identified by Ligar, and in maintaining that grant despite protest from Te Kanae and Rangitane, the Crown breached the Treaty principle of equity. As it conceded more generally, it subordinated the interests of Maori to those of the New Zealand Company and settlers.

6.5 The Waitohi and Pakawau Purchases

In 1848–50, the Crown negotiated the purchase of Waitohi in Queen Charlotte Sound with the leaders and people of Te Atiawa. Ngati Toa and Rangitane did not pursue claims before this Tribunal that they should have been included in the Waitohi purchase. Nor did Te Atiawa claim that there were any issues with how their right-holders were identified and represented in that purchase. We did not, therefore, discuss the Waitohi purchase in this preliminary report. Other claims about the Waitohi purchase (and its Waikawa reserve) will be considered in our final report.

In 1852, the Crown purchased the Pakawau block in western Te Tau Ihu for the sum of £550. The decision to sell was well canvassed among resident right-holders and eventually made by a large and representative hui, which also refused to sell the West Coast for the offered price. The Pakawau purchase was not the subject of claims that customary right-holders were left out or unrepresented in the decision-making, but there are other claims about that purchase, which will be dealt with in our final report.

6.6 The Waipounamu Purchase

In 1853, Governor Grey left New Zealand. As part of the ceremonial surrounding his departure, he met with Ngati Toa in August and requested that they surrender all their remaining customary rights in Te Tau Ihu to the Crown. Although the tribe was reluctant, their leaders eventually decided to agree to the proposed sale after two days of public debate at the well-attended farewell hui. The 1853 purchase deed acknowledged that resident tribes

– including the defeated peoples – claimed the land 'conjointly' with Ngati Toa and that reserves would be made for them (to be decided by the Crown). Two-fifths of the purchase price of £5000 was paid to Ngati Toa, with the remainder to be allocated to resident right-holders at a proposed general hui in Nelson.

From that point on, the Government counted the entirety of Te Tau Ihu as 'sold'. Although there were many overlapping customary rights known to officials, McLean's view was that Ngati Toa had an unquestionable suzerainty and an undeniable primary right to sell the land. Other tribes and resident Ngati Toa would be compensated for their interests, and have reserves made for cultivation and subsistence, but their land was sold and they could not repudiate that sale. Without their concurrence, on the other hand, McLean admitted that the sale would not be complete or valid.

The proposed Nelson hui of Ngati Toa and Te Tau Ihu residents did not eventuate. Instead, during 1854 McLean paid the remainder of the purchase money both to non-resident Te Atiawa who had returned to Taranaki, and at a second North Island hui of Ngati Toa in December of that year. Finally, at the end of 1855 and the beginning of 1856, over 24 months after the land was counted as sold, McLean met with Te Tau Ihu residents and signed deeds with them. He refused to vary the small amount of money they were allowed, which had been allocated to him after having paid the entire purchase price to non-residents. After much resistance, he agreed to except Taitapu on the west coast and Wakapuaka in Tasman Bay from having been 'sold'. Rangitoto was not included in 1853, and Ngati Koata (who therefore had a choice) refused to include it now, and stuck to that resolution despite pressure from McLean. By early 1856, the Government had signed 13 deeds (or receipts) with Ngati Toa, Te Atiawa, Ngati Rarua, Ngati Tama, Ngati Koata, Rangitane, and Ngati Kuia. No deed was ever signed, or reserves allocated, for Ngati Apa. The entire region of Te Tau Ihu was then considered Crown land, apart from Taitapu, Wakapuaka, Rangitoto, and small occupation reserves.

6.6.1 The Crown's concessions

The Crown accepted that it did not inquire properly as to customary rights during its major purchases, including this, the biggest one of them all. Grey and McLean were possessed of a good general knowledge of custom but exploited it to obtain land from Maori at the latter's expense. The Crown also admitted that Grey and McLean set aside Treaty promises when purchasing land, and subordinated the interests of Maori to settlers. Further, the Crown conceded that occupation was discoverable on the ground, upon proper inquiry, and that, while some rights were contested, an inquiry had been feasible. Given the complexity of the situation, however, the Crown qualified its concession with the argument that McLean eventually resolved undealt with or residual rights by purchasing all of them. This was, in the Crown's view, a proper and satisfactory resolution.

Based on the evidence of its own historian, the Crown accepted that McLean improperly tried to use his transactions with non-residents to try to pressure resident right-holders to agree to sales. In the Waipounamu purchase, he dealt with non-residents first and then sent in surveyors to lay off reserves, treating the alienation of the land as a fait accompli. He also brought senior chiefs with him to support him when he finally had to deal with the resident right-holders in person. The main difference between the Crown and the claimants was not that McLean tried to do this but how *successful* he was. In the Crown's view, the strategy was not always successful, and some Te Tau Ihu resident iwi were willing sellers.

6.6.2 Was there an adequate inquiry into customary rights before or during the Waipounamu purchase?

The parties in our inquiry agreed that the answer to the question of whether there was an adequate inquiry into customary rights before or during the Waipounamu purchase was 'No'. The follow-up questions were:

- Did the Crown know that Ngati Toa's claim was contested?
- Did the Crown fail to investigate a situation known to be controversial?

The clear answer to those questions was 'Yes'. During the late 1840s and early 1850s, Ngati Toa's claim to primary rights was disputed by Te Atiawa in eastern Te Tau Ihu and by a number of tribes in the west. Most notably, the Government ignored Ngati Toa's claim in the Waitohi purchase and sent them to Nelson to debate and resolve matters with their allies and relations on the spot for the Pakawau purchase. In the case of Waipounamu, however, it accepted a claim at face value that it knew to be contested in order to force through a purchase of almost the entirety of the northern South Island. This was a deliberate and calculated Treaty breach of enormous prejudice to the iwi of Te Tau Ihu.

6.6.3 How representative were the 1853 and 1854 hui?

McLean, aware of the dubiousness of his actions, tried to legitimise the foundational 1853 and 1854 deeds by claiming that they had been agreed and signed at hui representing all the tribes. This was a pure fiction. After assessing the evidence in chapter 5, we found that the 1853 and 1854 hui were adequately representative of the Ngati Toa tribe. They were not, however, representative of other iwi or communities resident in Te Tau Ihu. To proceed on the basis that the entire northern South Island was irrevocably sold as a result of these arrangements was a very serious breach of article 2 of the Treaty. McLean misrepresented the outcome to the Government. He pretended that the defeated peoples were represented when they were not. The chief whom he characterised as their leader was actually a southern Ngai Tahu chief, who did not sign the 1854 deed in any case. Nor did the signatures of three chiefs – Tana Pukekohatu, Tipene Paremata Te Wahapiro, and Rawiri Te Ouenuku – suffice for the

consent of the resident northern iwi. At best, the arrangement was still what it had been in 1853 – an arrangement with Ngati Toa.

Proceeding as if his misrepresentations were fact, McLean cast a veil of legitimacy over what was an invalid transaction in both Maori and British law of the time. In doing so, the Crown committed a breach of the Treaty, with serious consequences for Ngati Apa, Ngati Kuia, Rangitane, Ngati Rarua, Te Atiawa, Ngati Tama, and Ngati Koata.

6.6.4 'Hobson's choice': Did the Crown act correctly in paying resident right-holders after the event?

It follows from our findings (summarised above) that the correct process for the Crown in the circumstances of the time was to send officials:

- to investigate desired blocks and ascertain local kainga and chiefs; then
- to convene a tribal or intertribal hui at or near the places it wished to purchase; then
- to permit the tribes to decide their own entitlements and reach a consensus on the purchase at that (or at more than one) hui; and then
- to abide by the result; or alternatively
- to provide a Maori-controlled legal process to determine disputes if they could not be resolved by customary means.

We accepted both expert evidence that this method of proceeding was known at the time and Ngati Rarua's submission that it was correctly followed in the case of Pakawau and the West Coast in 1852. The Crown's failure to respect tino rangatiratanga in this way during the Waipounamu purchase in 1853–56, and to purchase instead from non-resident chiefs and then enforce that purchase on residents, was a deliberate tactic employed by the Government to obtain the most land possible for as little money as possible.

The historical evidence was clear that Te Tau Ihu Maori wanted settlers, economic development, and a relationship with the Crown, and were prepared to sell some of their land to obtain these things. The tragedy of the Waipounamu purchase was that, through McLean's tactic of enforcing the 1853 transaction with Ngati Toa, they were denied their right to decide which pieces and how much land they would sell, and for what price. McLean was willing to resort to anything short of physical force to obtain all their land. We relied on the evidence of the Crown's historian to that effect and noted that there was some agreement between Crown, claimant, and Tribunal historians on McLean's tactics and their effects.

Crown counsel conceded the tactic but not its outcome. In our view, the situation might have been mitigated to some extent if McLean had abandoned the tactic after concluding the first deed in 1853. The majority of the purchase money remained to be allocated at a proposed intertribal hui at Nelson. Although the resident iwi would have been at a disadvantage because of Ngati Toa's deed, at that point they may still have been able to repudiate

or renegotiate the sale. As the leading Ngati Tama rangatira put it in October of that year: 'when these men meet here then we will dispute the matter with each other – for their act and deed is an intrusion.'[12] Major Richmond reported the locals' view that they ought to have been consulted before any sale. He feared that, if McLean did not hold the promised hui, the resident iwi might refuse the sale altogether.

Instead, the Government's leading purchase officer left the residents to wait for years while he paid the entirety of the remaining purchase money to non-residents (other than a small payment to Ngati Hinetuhi of Port Gore). At the same time, he sent officials to lay off reserves in Te Tau Ihu, explaining to local Maori that their land was sold and that all that remained was for the Government to make reserves. Resident right-holders resisted this tactic but put all their faith in McLean. By the time he actually arrived to get the residents to sign deeds individually (more aptly called receipts), over two years had gone by since Ngati Toa 'sold' the land in 1853, and the purchase money was all gone. The Government agreed – reluctantly – to an extra £2000 for McLean to compensate those whom he characterised as outstanding claimants.

In sum, the Government virtually forced Ngati Toa's 'sale' of everything everywhere on the resident iwi of Te Tau Ihu, who might otherwise have made willing and informed choices in accordance with their Treaty rights. In taking this action, we found the Crown in serious breach of the plain meaning of article 2 of the Treaty, and of the Treaty principles of partnership, reciprocity, active protection, equity, and equal treatment. The prejudice for Te Tau Ihu Maori was the loss of their land and resources without their free and informed consent (and for grossly inadequate compensation, which we will explain in our final report).

6.6.5 Did officials exploit custom to the disadvantage of Ngati Toa as well as the resident right-holders?

With the initiation of the Waipounamu purchase, we found that Grey exploited important Maori customs to obtain the initial vast cession from Ngati Toa. This was described as 'an ohaaki within the context of a poroporoaki.'[13] Although Ngati Toa had been pressing the Government to recognise their claims, the evidence was clear that they did not wish to relinquish Te Hoiere and other valued districts in eastern Te Tau Ihu. Grey and McLean exploited Ngati Toa's need to reassert their leadership and rights in the wake of their disastrous loss of mana to the Crown in 1846–47 and accepted Ngati Toa's claims to primary rights and authority without investigation, despite their certain knowledge that those claims were contested. In the circumstances, it was difficult for Ngati Toa to resist Grey's request

12. Wiremu Te Puoho to Richmond and Stafford, 19 October 1853 (quoted in Macky, p 152)
13. Tony Walzl, 'Ngati Rarua Land Issues, 1839–1860', report commissioned by the Ngati Rarua Iwi Trust in association with the Crown Forestry Rental Trust, 2000 (doc A50, vol 1), p 302

that they sell Waipounamu. Eventually, they gave in. Valedictory statements at farewell ceremonies in both Maori and Pakeha cultures are naturally given to excesses of emotions. But they should be left at that, and not used as the basis for pressuring Maori leaders into a massive land transfer.

This disadvantaged Ngati Toa's erstwhile northern allies as well as the defeated Kurahaupo peoples, who were in occupation and increasingly assertive of their rights. The Crown clearly exploited and built upon its recognition of a Ngati Toa paramountcy. It initiated the purchase with them and forced the resident iwi to accept compensatory payments, just as Spain had done to 'complete' the New Zealand Company purchase from Ngati Toa. The cumulative effect of this exploitation of Ngati Toa claims to paramountcy in the 1840s and 1850s was to deliver nearly all of Te Tau Ihu to the Crown. This rewarded absentees at the expense of occupants, the very antithesis of Maori custom as Spain, Grey, and McLean understood it. A ruthless expediency had replaced the Crown's Treaty-based obligation to respect Maori customary rights to land and their rangatiratanga over it.

Fundamentally, neither Ngati Toa nor the resident iwi were in a position to freely sell land to the Crown as they wished, as envisaged by article 2 of the Treaty. The Crown's purchase procedures were in breach of the principles of partnership – since both parties did not negotiate freely as equals – active protection, and equal treatment, since Ngati Toa and the resident iwi were not treated with equal fairness in terms of their respective customary rights.

6.6.6 How representative were the 1855–56 arrangements with resident right-holders?

The claimants did not argue that there were deficiencies in the negotiations with the resident right-holders, in terms of the proper involvement of their respective leaders and the negotiation of wide and representative consent to the deeds. We accepted this position, on the evidence, and concluded that the 1855–56 arrangements were not deficient in that respect.

6.7 The Unique Claim of Ngati Apa

Ngati Apa claimed that they were uniquely prejudiced by the Crown's admitted failure to investigate customary rights properly before confirming or conducting purchases. We found that the Kurahaupo tribes were treated alike in the failure of the Spain commission to carry out a proper investigation. In the Waipounamu purchase, however, the evidence was clear that Ngati Apa were indeed prejudiced in a unique way by the actions of Grey and McLean. The Government signed deeds with Ngati Kuia and Rangitane, paid them a small sum for their interests, and made reserves for them. It did none of those things for Ngati Apa.

The Crown conceded as a general proposition that it did not identify and deal adequately with the rights of defeated peoples. Also, counsel admitted that, by failing to investigate the hinterland, where free survivors of Ngati Apa were recorded as living, it may well have deprived Ngati Apa of customary entitlements. The Crown did not, however, make a submission on whether it should have signed a deed with Ngati Apa for their rights in Te Tau Ihu or made reserves for them.

In our view, too little time had gone by since the conquest for Ngati Apa's rights to have been entirely foreclosed as at the 1840s and 1850s. Ngati Apa survived as a people and have maintained a consistent (if under-investigated) claim to customary rights in Te Tau Ihu. A tributary community of Ngati Apa lived at Port Gore, and another community survived under its own chief (Puaha Te Rangi) on the West Coast of the South Island, with claims extending into western Te Tau Ihu. Undefeated (though fugitive) Ngati Apa continued to reside and use resources in the interior of western Te Tau Ihu in the 1840s and eventually joined their settled relatives on the coast. Ngati Apa people were living at Taitapu and elsewhere in coastal western Te Tau Ihu, but their numbers must have been small. Critically, their rights and status were not investigated in the 1840s and 1850s, and they were overlooked by officials. By the time Ngati Apa made claims to the Native Land Court in the 1880s for a share of western Te Tau Ihu lands, Dr Ballara's view was that the evidence had become too slight for us to evaluate those claims fully today.

This Tribunal, therefore, faced a difficult task in evaluating Ngati Apa's claim against the Crown. On the one hand, it was no longer possible to say exactly what rights Ngati Apa retained in western Te Tau Ihu, since these were not investigated or recognised at the time. On the other hand, Ngati Apa found themselves written out of history as a result. Apart from Port Gore, which will be considered in our final report, Ngati Apa individuals had to come in under other lines to establish any kind of claim to land in Te Tau Ihu after 1856. Theirs was indeed a unique claim in this respect, and their survival all the more remarkable for it.

We were not in a position to evaluate the relativity of Ngati Apa's claims and rights in western Te Tau Ihu vis-à-vis the tribes that were recognised by the Crown. On the basis of the available evidence, we found that they did have surviving rights (of some degree), that McLean was on notice of their claims in both western Te Tau Ihu and Port Gore, and that the Crown failed to investigate their claims or ascertain their rights. This failure on the part of the Crown resulted in the extinguishment of Ngati Apa's customary rights during the Waipounamu purchase, without their consent and without paying them or providing them with even the minimal reserves made for other tribes. This was a very serious breach of their article 2 rights, and of the Treaty principles of reciprocity, partnership, active protection, and equal treatment.

6.8 The Impact of Blanket Purchasing on Customary Resource-Use Rights

The claimants argued that they had customary rights of migratory resource-use extending throughout Te Tau Ihu that they did not wish to alienate in the transactions of 1847–56. The Crown, in their view, failed to investigate or ascertain those rights and failed to make provision for them by reserving sufficient land (or access to land) for them to maintain their customary economy. As a result, much of economic, cultural, and spiritual value was lost.

The Crown largely conceded these points. It accepted that the reserves were insufficient for either the customary economy or European-style farming and that this arose from 'a failure to adopt a more generous approach to reserves in the Crown purchase era'.[14] In particular, the Crown adopted completely Dr Ballara's criticism:

> The most serious fault of all revealed in the Crown's process of land acquisition was the failure to think far enough into the future; the failure to create an estate of reserves to replace what Maori had lost through Crown action in pressuring sales. The estates of land lost by Maori should have been replaced with an alternative source of wealth and prosperity for their people that was capable of expansion according to need.[15]

This criticism was not a new one. The Crown accepted Ballara's point that Alexander Mackay had thought the solution obvious in 1874 and that it had been equally obvious to Normanby in his instructions of 1839. South Island Maori were impoverished because their reserves were too small and colonisation was cutting them off from their customary resources. The Crown, argued Mackay, could have foreseen this 'probable effect of colonization on their former habits' of migratory resource-use. 'All this might have been obviated', he told the Government, 'had the precaution been taken to set apart land to provide for the wants of the Natives', in anticipation of that probable outcome:

> It would have been an easy matter for the Government to have imposed this tax on the landed estate, on [ie, at the time of] the acquisition of Native territory. Such reserves would have afforded easy relief to the people who [had] ceded their lands for a trifle, and formed the only possible way of paying them with justice.[16]

In addition, the Crown conceded that it had breached the Treaty principle of options by taking away the ability of Te Tau Ihu Maori to exercise their tino rangatiratanga and choose their path of development, whether it be by maintaining their traditional culture and economy, assimilating to the new economy, or walking in both worlds.

As well as this broad agreement between the claimants and the Crown on some key issues, we had historical evidence that Governor Grey and other officials were aware of the need for Maori to retain a large land base. Without it, they could not continue their customary

14. Crown counsel, closing submissions, p 4
15. Ibid
16. Alexander Mackay, 1874 (quoted in Crown counsel, closing submissions, p 4)

lifestyle. Both the Governor and the Colonial Office had accepted that to deprive them of it, without a full and fair alternative, would be unjust. Nonetheless, the Government applied a virtual 'waste lands' policy to its purchases and reserve-making. Perforce, its officials accepted Te Tau Ihu Maori continuing to exercise their customary rights on 'sold' land after 1856, until the spread of settlers and environmental modification restricted Maori to their inadequate reserves. The resultant poverty was soon obvious and, in the evidence of Alexander Mackay (as accepted by the Crown), entirely avoidable.

We found, on the basis of broad agreement between the parties and our own review of the historical evidence, that the Crown acted in serious breach of Treaty principles. It did not allow Maori to retain sufficient land and access to land for the maintenance of their customary economy and resource-use rights, or indeed for their engagement in modern farming practices, thereby reducing their options to bare subsistence. This failure was avoidable in the circumstances of the time, as the Crown accepted. It was a breach of Treaty principles in its own right, and a prejudicial effect of the officials' 'waste lands' approach to Maori land and of the Crown's blanket purchase process (especially in the Waipounamu purchase). It was also a prejudicial effect of the Crown's failure to properly inquire into Maori customary rights and to therefore identify those lands and resources which they wished or needed to retain for (in Normanby's words) their own comfort and subsistence. The result was serious and avoidable poverty, as reported to governments of the day by their own officials.

In sum, we found that the Crown breached the Treaty principles of partnership, reciprocity, options, and active protection, to the serious prejudice of all Te Tau Ihu Maori. This was, in effect, conceded by the Crown. There was also, as explained in the claimants' evidence, social and cultural prejudice in Maori being prevented from exercising their tikanga – indeed, their way of life as they preferred to live it. Again, this point was broadly conceded by the Crown, as a breach of the Treaty principle of options. These Treaty breaches, and the prejudice to Te Tau Ihu Maori, were serious and require large and culturally appropriate redress.

6.9 Conclusion

As at 1840, Maori customary rights in Te Tau Ihu were regulated by their own law and were protected and guaranteed by the Treaty of Waitangi. The Crown had sufficient resources and expertise to have investigated those rights, which were discoverable upon due inquiry. Above all, the Crown needed to respect and provide for tino rangatiratanga, by working in partnership with Maori leaders and institutions, so that Te Tau Ihu Maori could decide both their own customary entitlements and whether they wished to alienate them to the Crown. Instead, the Crown failed to investigate customary rights properly, failed to provide for partnership or tino rangatiratanga, and exploited custom where possible to obtain

almost the whole of Te Tau Ihu. In doing so, the Crown committed serious breaches of the plain terms of the Treaty, and of the principles of partnership, autonomy, reciprocity, active protection, options, equity, and equal treatment.

These Treaty breaches were serious, resulting in significant economic, social, cultural, and spiritual harm to the iwi of Te Tau Ihu. We will consider the full range of issues and Treaty breaches, and the full extent of prejudice, in our final report.

Dated at Wellington this 19th day of March 2007

W W Isaac, presiding officer

J Clarke, member

P E Ringwood, member

M P K Sorrenson, member

R Tahuparae, member