

## CHAPTER 2

# OLD LAND CLAIMS AND ‘SURPLUS LAND’

### 2.1 The Scope of the Problem

Dr Barry Rigby has discussed the old land claims issues at length in chapter 3 of the first Auckland District Report and, with Mr Matthew Russell and Mr Duncan Moore, in his report on ‘The Old Land Claims’ both in the Rangahaua Whanui Series. In addition many major research reports have been compiled for the Muriwhenua claim, Wai 45, and I have made use particularly of documents i2, (‘The New Zealand Land Claims Act of 1840’ by Dr Don Loveridge), i4 (‘The Land Claims Commission, Practice and Procedure, 1840–1845’ by Mr David Armstrong), and j2 (‘Surplus lands, Policy and Practice, 1840–1950’ by Messrs David Armstrong and Bruce Stirling) and i7 (‘Muriwhenua Land Claims’, an overview by Professor W H Oliver). The Waitangi Tribunal’s *Muriwhenua Land Report* was released subsequent to the drafting of this chapter.

One thousand and seventy-six claims were lodged in respect of pre-1840 purchases. By far the majority of these (722) relate to the Auckland research district, with 53 more to the Hauraki district, 68 to the Waikato and 155 to the South Island and Stewart Island. For a full list, see the appendix in Duncan Moore’s Rangahaua Whanui report, ‘The Land Claims Commission Process’, Waitangi Tribunal (pending). The area covered by these claims was 9.2 million acres. If the New Zealand Company claims are added in their wider form, amounting to some 20 million acres, the claims covered about half of New Zealand.

The claims of the New Zealand Company, and other claims in the Cook Strait region, Wanganui, and Taranaki, were dealt with under somewhat different processes from those in the rest of New Zealand. They are discussed separately in chapter 3 below. They are discussed also in the Northern South Island, Wellington, and Whanganui reports of the Rangahaua Whanui Series and briefly in the District summaries of those reports in volume iii of this report.

### 2.2 British Policy

As stated above (ch 1), the British Government’s decision in December 1837 to intervene in New Zealand and its subsequent policies towards the pre-1840 private purchases, were based on three considerations: to protect Maori from fraudulent

dealings; to promote orderly and genuine settlement and deter speculation in land; and to provide revenue to fund the colony

There was some inevitable conflict between these various purposes and it is a matter of judgement how far the Crown's actions can be seen as outcomes of reasonable efforts to steer between competing interests and how far it can be held responsible for avoidable error or negligence in discharging its Treaty responsibilities towards Maori.

Part of the purpose of Lord Normanby's and Governor Gipps' stress on the *limited* British recognition of Maori sovereign independence before 1840 was to undercut, in anticipation, the argument that the private purchasers would advance, namely that a fully sovereign Maori state or states could convey what they wished to settlers, and the British Government had no right to interfere. Hobson further sought to strengthen the Crown's position vis-à-vis the settlers by seeking, and securing, permission to declare British sovereignty over the southern islands by right of discovery, the Maori there allegedly being 'wild savages' incapable of making or enforcing contracts.

Although the term 'surplus land' was not yet being employed, a central purpose of Normanby's instructions regarding land was to curb the 'jobbery' or speculation which the Government rightly understood to have taken place, with a consequent parcelling up of the country among European purchasers but with the land itself lying idle and the revenue for promoting further immigration lost to the Government.

Thus Normanby's instruction that the land claims commissioners should ascertain the prices paid to Maori by private purchasers was not primarily for the purpose of finding out what was a fair price which ought to have been paid to Maori, but to determine the size of grant which the settlers would eventually receive from the Crown. Although Normanby's instructions had not yet spelt out the details, the implication was that a settler would get a grant, in proportion to his outlay, within any area found to be validly and equitably purchased; the balance would be available to the Crown for allocation to other settlers.

Normanby's views on appropriate price to be paid to Maori are indicated in his instructions on *Crown* purchases, that is, that the price should be an 'exceedingly small proportion' of the subsequent resale price. The Crown was to get a land revenue; the real payment to Maori was, in Normanby's theory, to be in the added value of the remaining Maori land as a result of development of the sold land by the settlers (see above chapter 1).

On 19 January 1840 Gipps issued the proclamation announcing that an investigative commission would be set up, that all claims to purchases from Maori would have to be proved before the commission, and that henceforth any purchases of land from Maori would be null and void. Hobson repeated the proclamation on arrival at the Bay of Islands on 30 January 1840. The Treaty signed at Waitangi a week later confirmed the Crown's pre-emptive (meaning sole) right of purchase. In the public discussion before the signing Busby stated that the Governor would return to Maori

all lands not ‘duly acquired’. Hobson confirmed that ‘all lands unjustly held would be returned’.<sup>1</sup>

### 2.3 The New South Wales Ordinance

The draft preamble of the Ordinance, and Gipp’s speech introducing it, placed much stress on the argument based on English and American jurisprudence, that Maori, being an ‘uncivilized people’, a tribal people, had only ‘a qualified dominion or sovereignty’ over their territory. And that, holding the land in common, they could not convey an individual interest to a purchaser. This argument was opposed by the private purchasers and eventually the preamble was amended to state, not that Maori could not *convey* a legal or permanent interest in land but that *private* British subjects could not *acquire* one from them. Instead, a purported pre-1840 conveyances of Maori to the private buyers served to create a title in the Crown, when the Crown established its sovereignty. For the British authorities this became the settled legal doctrine underlying old land claims policy.

I am not sufficiently qualified to discuss the common law and international law arguments on the legal capacity of tribal societies to convey property rights. Maori chiefs certainly believed that they had the right to convey interests in property, or perhaps more correctly to establish relationships with Europeans in respect of the use of land and other resources under their control. Had they retained sovereignty Maori would certainly have sought to order their transactions according to their own tikanga. The risk they were facing, however, was that the private purchasers, and the French, while insisting on Maori having the sovereign right to convey interests in land, would have interpreted the transactions in *their* terms and, in the less populated parts of New Zealand at least, used force to do so, or played one section of Maori right-holders off against another. In asserting its doctrine the Crown had rescued Maori from this hazard; it remained to be seen, however, how the Crown applied its theory vis-à-vis Maori.

Once the New South Wales settlers heard of Hobson’s proclamation of British sovereignty over New Zealand on 21 May 1840, they ceased contesting the legal basis of the Crown’s intervention. In Wellington the company abandoned its incipient attempt to establish an independent government in the area of their purchases, and concentrated on trying in London to negotiate for themselves better terms from the Crown. Similarly, Captain Lavaud, leading the French to Akaroa, gave up trying to establish an independent settlement when he heard that the South Island chiefs had signed the Treaty.<sup>2</sup>

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1. W Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi*, Wellington, Government Printer, 1890, pp 17–19
  2. P Tremewan, *French Akaroa: An Attempt to Colonise Southern New Zealand*, Christchurch, University of Canterbury, 1990, p 119

In 1840 Governor Gipps of New South Wales secured the passage of the New Zealand Land Claims Ordinance. Among the important machinery provisions of the Ordinance were the requirements:

- (a) that a strict inquiry be made into the purchases, gifts, conveyances or ‘other titles’ which settlers claim from Maori, and into ‘the mode by which such lands have been acquired’ and ‘all the circumstances upon which such claims may be founded’. The Queen was disposed to recognise claims which have ‘been obtained on equitable terms’, and which were not prejudicial to the interests of British residents in New Zealand.
- (b) That the value of goods paid would be ascertained and valued at three times the price paid in Sydney to determine their value when landed in New Zealand.
- (c)
  - (i) Once purchases were found to be ‘valid’ or ‘equitable’, grants would be made to settlers on a sliding scale – schedule d – which favoured the early genuine settlers and penalised those (especially absentees) who acquired land on the eve of the British assertion of sovereignty. Thus sixpence paid in 1815 to 1824 would merit one acre, whereas 4 to 8 shillings had to be paid in 1839 to merit one acre of grant under the ordinance. This scale had nothing to do with reckoning a fair price to be paid to Maori; subsequent inquiries have been mistaken on this point.
  - (ii) The maximum grant was to be 4 square miles (2560 acres). In debate it was accepted that the balance of the land acquired in equitable purchases would fall to the Government, not be returned to Maori. This was indicative of the Crown taking those lands as ‘surplus’.
  - (iii) Land required for defence or other public purchases, or within 100 feet of high water mark, would not be granted to settler claimants.
- (d) In making their inquiries, the commissioners were to ‘be guided by the real justice and good conscience of the case without regard to legal forms and solemnities, and shall direct themselves to the best evidence they can procure or that is laid before them’. This provision was intended to facilitate matters for settler claimants but it also opened the way for Maori to present evidence as to their perceptions of transactions, *provided* the commissioners were willing to receive it. But a thorough examination of Maori understandings was not positively enjoined upon the commissioners.

The New South Wales ordinance was disallowed in London because of changed circumstances; the separation of New Zealand from New South Wales in November 1840 and the agreement between the British Government and the New Zealand Company in the same month on how to treat the company claims. The ordinance was re-enacted with little significant change in New Zealand in 1841, *except that* the New Zealand Ordinance added the term ‘leases’ to the kinds of title that required investigation. This was an endeavour to stop the informal leases that were springing up in New Zealand between Maori and settlers at the time.

## 2.4 Instructions to the Commissioners

Instructions by Gipps to the first commissioners, Edward Godfrey and Matthew Richmond, on 2 October 1840, filled some important gaps about procedure. Among the important requirements were:

- (a) The Protector of Aborigines or his deputy was to be present at all inquiries to protect the interests of Maori.
- (b) ‘Competent interpreters’ were also required.
- (c) The commissioners were to set forth the ‘situation, measurement and boundaries’ of the land to be granted to settler claimants and a surveyor was to be put at their disposal for the purpose. They were also to describe the boundaries of land not awarded to the claimants – the surplus lands – ‘with such exactness as to prevent subsequent intrusion or encroachment’.

In response to some further inquiries by the commissioners, Gipps instructed that a formal deed of alienation was not required as evidence: ‘Proof of conveyance according to the custom of the country and in the manner deemed valid by the inhabitants is all that is required’.<sup>3</sup>

Gipps also instructed Hobson that he expected the commissioners’ inquiries to place at the Governor’s disposal considerable tracts of land, validly acquired from Maori, minus the maximum grant to the settler claimants:

Where, however, any of these tracts are extensive it will be proper to reserve for the Aborigines such portions of them as may be required for their use, or can advantageously be retained for their benefit.<sup>4</sup>

In response to concerns expressed by Chief Protector George Clarke that a tribe might have lost its whole patrimony for a nominal consideration in large alienations such as those claimed by the French ‘Baron’ De Thierry, Gipps advised further:

In every case in which the Chiefs admit to the sale of land to individuals, the title of such Chiefs to such lands are of course to be considered as extinct whether or not the whole or any portion of the land be conferred to the purchasers or pretended purchasers. Should it appear in any case that the land has been obtained for insufficient consideration, it will be proper and necessary for you, in concert with the official Protector of Aborigines to award some further compensation.<sup>5</sup>

This response has two troubling aspects in Treaty terms.

- (a) Although the New South Wales Ordinance, and later the New Zealand Ordinance, referred explicitly to *other* forms of conveyance besides sale, Gipps’ reply, and almost all official discussion thereafter, treats the conveyances from Maori *as sales, of absolute title*. Any suggestion that Maori might have conveyed to De Thierry, (or anyone else) a more qualified or

3. olc 5/4 and olc 8/1 cited D Armstrong, ‘The Land Claims Commission. Practice and Procedure: 1840–1845’, (Wai 45 record of documents, doc i4) p 17

4. Gipps to Hobson, 2 October 1840, Wai 45 rod, doc I4a, pp 213–214

5. Gipps to Hobson 30 November 1840, State Archives of NSW 4/1651, pp 29–30, cited in Armstrong, Wai 45 rod, doc i4, p 21

conditional title, is almost never raised. The Crown was clearly looking for extinguishment of native title. The making of additional payments was seen as ‘compensation’, not the making of a new purchase.

- (b) Although extra payments were now authorised, there was still no guideline as to what constituted sufficiency of consideration. The over-arching philosophy was still presumably that expressed in Normanby’s instructions: the Crown was to buy cheaply; unimproved land without a British title was considered to have a low monetary value.<sup>6</sup>

### 2.5 Lord John Russell’s Instructions

Lord John Russell’s instructions of December 1840 and his supplementary instructions of January 1841 directed Governor Hobson to define lands actually in the actual occupation and enjoyment’ of Maori. Russell’s view that uncultivated lands were not truly owned by Maori, strongly influenced official attitudes at this time.

To come to grips with competing Maori customary rights (upon which rival claims to have purchased the land might be erected) the January 1841 instructions directed that the Land Claims Commissioners were to be ‘invested with an effectual and summary jurisdiction for determining controversies regarding land which may arise between different tribes, or between different members of the same tribe’.<sup>7</sup>

### 2.6 The Land Claims Commission Begins Work

In December 1840 Godfrey and Richmond arrived in New Zealand and began obtaining ‘as full information and evidence as can be procured of the nature of aboriginal titles and the rights of the chiefs and others to the particular lands they may have sold or to which they claim an exclusive proprietorship against others of the same tribe’.<sup>8</sup> This was a positive start, but the hope of finding ‘exclusive proprietorship’ revealed the limitations of the officials’ understanding of Maori tenure – a eurocentrism that would seriously mislead the commissioners and distort their inquiries.

In early 1841, public notices advertised the first sitting of the commission. According to an English language version, Maori ‘land sellers’ were invited to give evidence concerning the validity or invalidity of the ‘purchase’ of their land.

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6. In his instructions to George Clarke, Chief Protector of Aborigines, as to the Protectorate’s role in assisting the Land Claims Commission, Hobson virtually repeated Normanby’s instructions to himself on this issue. He added that in estimating the fair purchase price of lands Clarke was to take into account any genuine comparative advantages such as water frontage. In theory then, site value, at least, should have been acknowledged, but there is no evidence to suggest that it was in any systematic way: see Hobson to Clarke, 9 April 1841, cited in Duncan Moore, *The Origins of the Crown’s Demesne at Port Nicholson* (Wai 145 rod, doc e3), pp 79–80.

7. Russell to Hobson, 28 January 1841, BPP, vol 3, pp 173–174

8. Godfrey to Colonial Secretary, NSW, 9 December 1840, cited Armstrong, Wai 45 rod, doc i4, p 40

'Hearken. This only is the time you have for speaking; this the entire acknowledgement of your land sale forever and ever'.<sup>9</sup> If some of the sense of this came through in the Maori language version, the view of the pre-1840 transactions as absolute and permanent alienations was clearly being advanced by the commissioners from the beginning.

Godfrey expected Clarke, the Chief Protector, to provide all necessary information about tribal rights and secure the attendance of necessary witnesses at the first hearing at Kororareka on 25 July 1841. In the event, neither the Protector nor an official interpreter attended. Godfrey proceeded to take evidence with a pro tem interpreter but made no final recommendations.

The next set of claims, those relating to Hokianga, were to be heard in Auckland. Clarke therefore urged upon Hobson the necessity of a prior investigation at Hokianga to get the necessary information. Notices of attendance were inadequate, he argued:

from the very inaccurate descriptions of boundary lines, an incorrect orthography in names of places describing those boundary lines . . . The importance of proceeding as proposed would also appear, when it is considered, that the greater part of those land transactions were conducted by parties very partially understanding each other; and I fear in many cases but little pains taken to ascertain to whom the land they claimed belonged.<sup>10</sup>

No Protector turned up at the Auckland hearing either, but Henry Kemp was appointed sub-protector in time to assist the next hearing at Kaipara. His prior investigations at Kaipara, and subsequent hearings in the north, turned up a number of objections by Maori against claims in the Bay of Islands, Hokianga, Waimate, and Whangaroa. Efforts were made to establish these prior investigations as a regular process, but with what thoroughness they were conducted is doubtful.

Crown researchers have rightly drawn attention to the fact that the proceedings in the commissioners' courts advanced what Mr Fergus Sinclair has termed a 'tenurial revolution'. Maori had consistently thought in terms of scattered property rights in land, bird trees, eel weirs, fernroot patches, pipi beds, and garden lands. They were now being asked to think of discrete areas of land encompassed by continuous boundaries. This approach had obviously been promoted by the land transactions and settlements of the 1830s, but until boundaries were clearly marked on the ground would have had little real meaning to Maori, and until this was publicly done the intersecting interests of various Maori right-holders would not have emerged.

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9. Cited in Armstrong, 'The Land Claims Commission. Practice and Procedure: 1840–1845', Wai 45 rod, doc i4, p 41

10. Clarke to Colonial Secretary 25 February 1841, ia 1841/250, cited in Armstrong Wai 45 rod, doc i4, pp 48–49

### 2.7 Complexities and Attempts to Hasten the Process

Meanwhile Clarke was expounding his understanding of the complexity of Maori land rights. He poured scorn on those, ignorant of Maori language and custom, who could purport to achieve an equitable purchase in a few hours from a few chiefs. The people living on the land also had to consent, Clarke explained. New Maori claimants were also coming forward, reviving claims to land from which they had been driven and which had since been sold by the conquering group. In June 1843 Clarke was arguing for the preparation of a 'Domesday Book', with the chiefs being asked to delineate tribal boundaries. The process would be expensive and lengthy but he did not know how progress could be made unless it was done.<sup>11</sup> By October 1843 Clarke reported his view that Maori land tenure was so complex, so many interests overlaid, all of which had to be required for a purchase to be complete, that only small areas of land could be purchased at the time. This process, however, would be so expensive that it would absorb all the potential value of the land to the Crown.<sup>12</sup> Similar sorts of understanding were being attained by officials like Edward Shortland, sub-protector interpreting for the commission in the South Island.

Clarke had also revealed an explicit condition in the Maori conveyances:

it never was the custom of the natives to alienate a tract of country upon which they were living unless they intended migrating or altogether abandoning it. The primary object of a New Zealander in parting with his land is not only to obtain the paltry consideration which in many cases is given to them for their land, but to secure to them the more permanent advantages of finding at all times a ready market for their produce with their white neighbours; but this important end is at once defeated upon the assumption of a total alienation as claimed by the New Zealand Company.<sup>13</sup>

Clarke was thus arguing that only slow and careful purchases of relatively small areas, should take place (or could have taken place), leaving the Maori vendors still in the vicinity and with access to the new settlements.

The question of surveys soon became critical. The commission's first surveyor accidentally drowned; the Surveyor General (Felton Mathew, then C W Ligar) and his small staff were already heavily involved with other public work. Meanwhile Godfrey had discovered that of the 1000 or so claims now before them, the boundaries were very roughly described in most deeds, the acreages grossly exaggerated, the claims overlapped and Maori had little idea of area or boundaries in English terms. Hobson instructed the commissioners not to delay their recommendations for a survey provided the claimants pointed out to them an accurately defined boundary line.<sup>14</sup> What exactly that meant is not clear, but it was no substitute for having Maori show, *on the ground itself*, the boundaries of what they intended to convey.

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11. Clarke to Shortland, 1 June 1843, cited in Armstrong Wai 45 rod, doc i4, p 72

12. BPP, 1844 (556) pp 955–959

13. New Zealand Company 12th report, Appendix e, cited Armstrong, Wai 45 rod, doc i4, p 70

14. Hobson to Russell, 30 July 1842, cited in Armstrong, Wai 45 rod, doc i4, p 87

Acting Governor Shortland then accepted a suggestion from Ligar that the claimants be allowed to employ private surveyors, with Government paying them up to £3 per lineal mile. He also followed up Hobson's plan to concentrate settlement, relocating claimants near Auckland by issuing 'land orders', later called 'scrip', at the rate of one acre for every £1 spent by the claimants. Lord Stanley approved these arrangements but the private settlers hung back from surveying their claims, still hoping that they might get the whole of their claim approved, not just the maximum allowed by the Land Claims Ordinance.

## 2.8 Adjustments of Claims in the Commission

By early 1842 it was quite apparent to the commissioners that Maori had no intention of total alienation of all the land within the vast general boundaries outlined in some of the deeds. Godfrey and Richmond had no hesitation in dismissing as utterly unintelligible, to Maori or European, some of the pretentious deeds drawn up in pseudo-legalistic English. It was also apparent that the commissioners accepted the evidence of Maori over that of the claimants, much to the chagrin of the settlers who often had their claims denied or heavily reduced by Maori evidence.

The commissioners also noted that Maori had continued to live within the boundaries of many claims and recommended that all their cultivations, fishing grounds and wahi tapu ought in every case be reserved to them, unless they had quite certainly been voluntarily relinquished.<sup>15</sup>

The reduction of boundaries and the recommendation of reserves was in fact a common practice by the commissioners, especially if a claim was disputed before them. Only rarely did the commissioners recommend an additional payment, though this did occur. It was, however, common for settlers to make additional payments to Maori before they would consent to appear before the commission and affirm a sale.

Thus the Maori who appeared before the commission rarely denied altogether the transactions they had entered into. They commonly denied them in the terms described by claimants but regularly agreed to the alienation of a lesser and more specific area. The commissioners believed that when surveyors were eventually sent to the land the Maori transactors would show them the precise areas.<sup>16</sup>

This adjustment of areas in the light of Maori evidence was a genuine attempt to come to terms with some Maori views of the transactions. The additional payments by settlers before the hearings and the adjustment of boundaries went some way towards meeting the question of adequacy of price and the variability of the quality of the land. But it is difficult to determine whether Maori were paid a 'fair' or 'adequate' price. It has been noted by Rigby that the multiplication by three of the value of goods in Sydney to get a New Zealand price was a very loose measure

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15. Report of March 1842, cited in Armstrong, Wai 45 rod, doc i4 pp 114–115

16. Godfrey report, BPP, 1844 (556), p 4

which probably favoured the settler.<sup>17</sup> On the other hand, by the time settlers paid the fees for the commission, the costs of Maori witnesses and the cost of improvements (if any) they had made on the land, they were not getting the land cheaply – especially if they ended up with the maximum of 2560 acres. The question of adequacy of consideration paid to Maori is a quite separate matter, however, and commonly related to much larger areas than were granted to the settlers (included indeed the areas taken by the Crown as surplus’, without any additional payment to Maori). The question is not a easy one to generalise about, though in relation to the on-sale value of the land, especially where there was millable timber and good water access, it can safely be said that the payments to Maori were very low indeed.

Perhaps more seriously, transactions were still couched essentially in terms of ‘sales’, that is of absolute alienation. There is virtually no indication of discussion of leasehold or other kinds of tenure, although the legislation allowed for it. The arrangements for reserves or demarcation of boundaries of the sale, if they allowed the Maori community concerned to remain close to the transacted land, would have partly met Maori desire to have Pakeha on hand for trade and employment. But, unlike leaseholds, they did not permit Maori to have these advantages *and* retain the beneficial title of the land as well. It is also clear that many, if not most, of the missionaries’ claims were efforts to take land under trusteeship for local Maori, as well as to provide for the missionaries and their families. These trusts seem not always to have been recognised by the commission or, if they were, to have first involved an absolute alienation to the missionary settler.<sup>18</sup>

## 2.9 Adequacy of Inquiries

There has been much discussion in evidence about the adequacy of the commissioners’ inquiries. Summary statements of Maori evidence typically read:

that is my signature on the deed now before the Court. I saw the rest of the chiefs sign. It was read and explained to us before we affixed our names. We fully understand it and were satisfied. We sold the land described in the deed to Mr Maning when we signed it – its was ours to sell and was never disputed by other natives. We have not sold it to any other person. We received the money and goods specified on the back of the deed from Mr Maning at the time we sold the land. The boundaries are correctly described [in the deed] and I can point them out whenever required to do so. We were aware that in selling this land we were parting with it forever to Mr Maning.

These records are summaries of evidence taken in Maori, which was not recorded in full, and little can be assumed about what did or did not go into the actual

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17. B Rigby, ‘Old Land Claims’ in Rose Daamen, Paul Hamer, and Barry Rigby, *Auckland, Waitangi Tribunal Rangahaua Whanui Series* (working paper: first release), 1996, pp 113–114

18. See Waitangi Tribunal, *Muriwhenua Land Report*, Wellington, GP Publications, 1997, for an examination of cases in that district.

dialogue. Where claims were disputed by Maori the record of evidence is much longer.

There is also evidence that the commission did not accept unquestioningly the evidence of claimants as to the value of goods they had paid. Whereas William Webster, for example, claimed to have paid nearly £1000 for Great Barrier Island, Godfrey found from Maori testimony that he had paid only £580 and the rest in promissory notes.<sup>19</sup> Dr Rigby has rightly suggested that the value of goods paid in Sydney was probably not closely checked but there was clearly some effort to ascertain whether a payment was actually made to the Maori transactors.

What is more worrying is that the commissioners required the testimony of only two witnesses before accepting that an alienation had occurred. Moreover the witnesses often had to be paid to appear, especially if the hearings were at some distance from their village; some of the payments have the character of bribes to support the sale rather than real payments to the community. Given the intricacy of Maori land tenure, and the likelihood of intersecting interests by more than one hapu, the ‘two-affirmers test’ could well have meant that not all the right-holders were represented in the commissioners’ proceedings, even if (which is uncertain) the witnesses attending had fully discussed the claim with their communities beforehand. Once again one comes back to the question of adequate and public boundary marking on the land itself, which alone was likely to bring forward all interested Maori parties.

By April 1843 the Government under Acting Governor Shortland had become so concerned that all intersecting Maori claims had not been identified and completely ‘extinguished’ that it was decided to require a double check before Crown grants would issue. A surveyor was to report that the survey of the land had not been interrupted or any (new) claim preferred by Maori in respect of the land; and a Protector was to report that he was ‘satisfied of the alienation of the lands by the former owners’.<sup>20</sup>

Protectors continued to carry out some inquiries but no surveyors’ reports appear to have been submitted before Governor FitzRoy arrived in December 1843.

## 2.10 FitzRoy’s Intervention

Crown policy on old land claims was reviewed in London before FitzRoy sailed for New Zealand. FitzRoy gave it as his view that land that was validly purchased from Maori, but in excess of what the settler was allowed by existing rules, should be returned to Maori (‘unless they or their descendants should not now prefer any claim to it’), rather than be sold to settlers or retained by the Crown. His reasons were that in selling ‘such extensive tracts of land’ Maori could not have known their value to settlers, nor foreseen the consequences to themselves. FitzRoy clearly had

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19. olc 4/25 NA Wellington, cited in M Russell, ‘The William Webster Claims’ in Russell, Rigby, and Moore, ‘The Old Land Claims’.

20. Shortland to Clarke, 21 April 1843, cited in Armstrong, Wai 45 rod, doc i4, p 175

in mind the big purchases like those of the New Zealand Company and was possibly unaware that those claims were already being modified in New Zealand to reduce boundaries and except or reserve Maori settlements.<sup>21</sup> FitzRoy was also aware that Maori were resisting the occupancy of one Charles Terry whom Acting Governor Shortland tried to place on surplus land in Fairburn's purchase at Tamaki. The question of surpluses was apparently being 'anxiously discussed' among Maori about this time. FitzRoy thought that Maori would 'become exceedingly irritated' if Government tried to put settlers in place or take land as surplus that Maori had sold to private buyers.<sup>22</sup>

Lord Stanley decided, however, that the excess of any land *duly purchased* from Maori should be retained by the Crown, but FitzRoy should protect Maori rights in respect of land they were actually occupying before offering any surplus for sale. Stanley therefore instructed FitzRoy in respect of land that had been alienated from Maori without 'such fraud or injustice as would render it invalid', and where neither on 'the grounds of inadequacy of price [ie that was an issue after all], nor on any other ground could the former proprietors of the land [the Maori] require that it be set aside', the settler's claim should be recognised to the maximum allowed. 'The excess is vested in the sovereign as representing and protecting the interest of society at large . . . for the purposes of sale and settlement'. Where it happened, however, that Maori were found in occupation or, 'prompted by feelings entitled to respect', solicited the return of the land, it would be FitzRoy's duty to deal with them 'with the utmost possible tenderness and even to humour their wishes so far as it can be done, compatibly with the other and higher interests over which your office will require you to watch'.<sup>23</sup> That is, land not wrongfully acquired from Maori might – not would – be returned to them as a matter of policy if this was not incompatible with 'other and higher' interests.

On arrival in Auckland, FitzRoy proceeded to muddy the waters. According to a *Southern Cross* report of 30 December 1843 he announced to a welcoming assembly of very senior chiefs that he would 'Disown any and every intention on the part of the Government to appropriate . . . the surplus lands of the original settlers, they are to revert to the original owners . . . the claim to the lions' share is abandoned'. A similar statement was noted in the *Southern Cross* of 20 January 1844. FitzRoy also told a CMS representative that the surplus would be returned 'except in cases where the question of the ownership might excite feuds'.<sup>24</sup>

But by mid-1844 FitzRoy's tone was apparently changing. By then he had set up a trust to administer the 'tenth' reserves of the New Zealand Company and the tenth to be reserved from purchases under his waiver of Crown pre-emption. On 6 July the *Southern Cross* reported that 'the surplus lands of the original settlers will also be vested in these trustees for the benefit of the aborigines generally'.<sup>25</sup> Armstrong

21. FitzRoy to Stanley, 16 May 1843, cited in D Armstrong and B Stirling, 'Surplus Lands. Policy and Practice: 1840–1950', Wai 45 rod, doc j2, p 9

22. FitzRoy to Stanley, 15 October 1843, cited in Armstrong and Stirling, Wai 45 rod, doc j2, p 26

23. Stanley to FitzRoy, 26 June 1843, Wai 45 rod, doc i4a, pp 213–214

24. Cited in Armstrong and Stirling, Wai 45 rod, doc j2, pp 13–14

25. Ibid, p 15

and Stirling are very likely correct in their surmise that FitzRoy's initial statements were made in the belief that monster claims were still being made over large areas, including Maori settlements, but that by mid-1844 he had found that the monster deeds had been demolished by the land claims commissioners and/or that Maori settlements were being reserved anyway. In fact FitzRoy, like his predecessors, was discovering that there was little Crown surplus available from which to endow the Maori trust or for any other purpose.

The confusion was worsened by the widespread belief that the surplus being retained by the Crown was not land which had been *validly* acquired by the Maori but land which had been acquired *fraudulently* or *acquired for inadequate payment*. Instead of returning this to Maori, the Crown was keeping it, or so it was alleged by the Government's critics. The settlers had, from the outset, hated the intervention of the Crown in their (largely shabby) purchases, and there can be little doubt that they fomented suspicion and hostility among Maori about the Crown's actions at the same time as they were cultivating Maori support for their campaign against Crown pre-emption. It was in the settlers' interest to evoke Maori prejudice against the Crown in the hope that their own original claims would be the more strongly supported.

Yet George Clarke himself suggested to the CMS Secretary that land unfairly purchased as well as fairly purchased should not go back to Maori but to a trust for Maori 'if there is any danger of their again squandering it away'.<sup>26</sup> This kind of paternalism was perhaps affecting FitzRoy's policy.

Yet at the same time as he was talking about a Crown endowment for Maori (from an already shrunken pool of Crown surplus), FitzRoy was greatly enlarging the grants to settlers. He did this via the fresh inquiries and recommendations of a new commissioner, Robert Fitzgerald, partly to reward missionaries for long service and partly to encourage settlers whom he thought would bring investment and development to the colony. Thus William Webster, a sharp operator who had already been imprisoned for debt in Sydney, was awarded 12,674 acres of his many claims in Hauraki and Piako. Godfrey and Richmond had accepted the testimony of two witnesses only, to the purchase of 80,000 acres west of the Piako River. Webster on-sold his interests but when settlers tried to occupy the land in the 1850s they were resisted by Maori. An official inquiring on the spot found the Maori communities universally denying they had sold land right down to the river frontage because it was important for eel fishing.<sup>27</sup> The example casts doubt upon the adequacy of the Godfrey-Richmond inquiries as well as exposing FitzRoy's recklessness in making large grants, especially without survey.

For despite the warnings of Clarke and others FitzRoy decided to issue Crown grants to settlers without waiting for survey. Godfrey protested that if this were done without the 'double check' agreed by Acting Governor Shortland, confusion

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26. Clarke to Dandeson Coates, 9 July 1841, co 209/17, p 317, cited in Armstrong and Stirling, Wai 45 rod, doc j2, p 20

27. See Matthew Russell, 'The William Webster claims', in Russell, Rigby, and Moore, 'Old Land Claims', Waitangi Tribunal Rangahaua Whanui Series unreleased draft

would arise, as unsatisfied Maori claimants would resist the occupancy of the land either of the original settler or an innocent third party who had purchased a Crown grant in good faith (as the Webster case in fact later demonstrated). Edward Shortland, sub-protector, also confirmed that additional payment had been made (or promised) by claimants to interested Maori to induce them to support their claims before the commission; this might happen without the knowledge of other interested Maori and innocent settlers might later find themselves challenged when they tried to enter the land.<sup>28</sup> Major Thomas Bunbury, head of the Imperial forces in New Zealand since 1840, also warned of the need for the double check; in a minute to the Colonial Secretary about a scrip award at Kohekohe, Bunbury wrote, ‘this amount of acres must however be verified by the Certificate of a Accredited Surveyor and Protector of Aborigines. Until that is done any and every Deed for the land exchanged [for scrip] must be withheld.’<sup>29</sup>

But FitzRoy would not be deterred. The Colonial Secretary, Andrew Sinclair, was instructed to write to Godfrey that:

the many inconveniences and difficulties, such as you suggest in your letter are anticipated by His Excellency, and that he is prepared to encounter them. The Government issues Crown grants which are cautiously worded, and which do not bind the government to maintain the correctness of the boundaries or the extent of the land granted. For those who have made good valid purchases, and have fairly satisfied the native claimants, such grants will be sufficient. For those who have not done so, it is neither *intended* nor *desired* that they should be sufficient. I am further desired to say, that as the Crown cannot grant that which it cannot possess, if a valid and complete purchase has not been made, the Crown cannot give a title to the land.<sup>30</sup>

On the basis of this bland and irresponsible argument FitzRoy then began to issue Crown grants. Several were increased beyond the 2560-acre ceiling, at the recommendation of the new commissioner Fitzgerald, and under the authority of section 6 of the 1841 ordinance. Sometimes these grants exceeded what was originally claimed – all on unsurveyed land. The 1856 committee of inquiry calculated that about 400 grants were prepared and 350 issued. Many questions as to title and as to boundaries remained unresolved. Settlers were put in possession before the many exceptions, variations to boundaries and reserves recommended by the commissioner had been marked on the ground and all Maori interests identified. Disputes such as Godfrey and Shortland had envisaged indeed arose in a good many cases. What the settlers got from the Crown was, as FitzRoy frankly intended, a title which might or might not have seen the prior extinguishment of Maori proprietary rights. What is more, some of the settler occupiers were derivative purchasers, who had bought the Crown grant from the first grantee, in the belief that the title was clear of Maori claims. In some cases they inherited a dispute. And Maori inherited

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28. Armstrong and Stirling, Wai 45 rod, doc j2, pp 188–190

29. Bunbury to Colonial Secretary, 24 June 1844, ma 1991/a 520, pp 10–12, cited in Daamen et al, *Auckland*, p 108. Bunbury has been inadvertently transcribed as Banbury.

30. Sinclair to Godfrey, nd (July 1844?), ia 1, 1844/1370, Wai 45 rod, doc i4A, p 452

an intensified grievance. Commenting on the situation in 1854 the Colonial Secretary, William Gisborne, noted the highly unsatisfactory state of settlers having 'floating rights' over thousands of acres, unsurveyed, and with the exceptions in the original transactions recommended by commissioners at the request of Maori not marked out. 'Thus vast tracts are left unoccupied, native claims, which in many cases have never been wholly extinguished are revived in full force, and become a fruitful source of confusion and discord'.<sup>31</sup>

### 2.10.1 Scrip land

Claims at Oruru and Mangonui could not be investigated because of fighting between the chiefs Panakareao and Pororua. The claimants were instead given 'land orders' or 'scrip' entitling them to a certain number of acres (or of pounds sterling at the rate of one pound for each acre of claim allowed) to be selected near Auckland. The Government then took over their claims. The process was in fact used more generally under Hobson, who was anxious to concentrate settlement about Auckland, and continued under Shortland and FitzRoy. Eventually some 152,953 acres of scrip or their money equivalent were awarded to settlers. Usually this followed from an investigation by the Land Claims Commission, but not always following an inquiry involving Maori, as in the case of the Mangonui lands. The Government, however, assumed the scrip land to be Crown land in each case. Thus the scrip claims were not investigated by the subsequent commission of F D Bell (see below). Whether the Crown in fact acquired the scrip land is another matter. If the claim was followed up promptly by survey and occupation (in the steps of the settler purchaser who had taken his land elsewhere), the Crown secured occupancy. In other cases the Crown's claim lapsed or was superseded by a subsequent Crown purchase encompassing the scrip claim. The whole issue of scrip claims is a confused one but it seems to have resulted at least in the Mangonui Maori losing land without the benefit of a Land Claims Commission investigation.<sup>32</sup>

### 2.10.2 The Godfrey and Richmond commission completes its work

On 30 September 1844 Colonel Godfrey submitted his final report. As well as the claims heard by himself and Richmond the report appears to include claims heard by William Spain in the New Zealand Company areas (of which six relate to the Company itself (see chapter 3) and the remainder to various other claimants). Of the 1049 claims submitted, half concerned the Auckland district and a further quarter the adjacent Hauraki and Waikato districts (as evidenced in the subsequent returns of Commissioner Bell in 1862 and 1863). Of those 1049 claims: 490 were allowed; no grant was recommended in 165 cases; 43 were formally withdrawn; 66 were not investigated for reasons not stated; 40 at Oruru were not investigated

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31. Gisborne memo, 7 July 1854, cited in Armstrong and Stirling, Wai 45 rod, doc j2, p 47

32. See discussion in the introduction to Russell, Rigby, and Harman (appendix to 'Old Land Claims' report).

because of the conflict there over the rival claims of the chiefs Panakareao and Pororua; and in 241 cases the claimants did not appear. Six other claims concerned the New Zealand Company. Of the 165 claims where no grant was recommended the reasons were as given below.<sup>33</sup>

No Maori evidence	13 cases
Claimant refused to pay fees	23 cases
Derivative claims where the original purchaser had already received the maximum	62 cases
Derivative claims with no proof of transfer	4 cases
Maori opposition	30 cases
Purchases after the proclamation of 16 January 1840	10 cases
Incomplete purchases	3 cases
Maximum award already granted	8 cases
No reason given	12 cases

Of the 490 purchases recognised by the commissioners, Chief Protector Clarke made a very critical comment:

All that has been ascertained is that various Europeans have made purchases from certain natives, but whether those natives had a right to sell or how that right was a acquired, is still, in the majority of cases, quite a matter of doubt.<sup>34</sup>

### 2.11 Maori Attitudes to the Transactions

It is likely, following Clarke's view, that in the majority of cases doubt remained whether all Maori with interests in the land had been consulted – or at least explicitly consulted, although many would have been aware of transactions taking place on or near their land.

Commissioners' reports show that the Maori who were consulted, in all but a small minority of cases, supported the transactions. In many cases, however, they insisted upon major modifications to the location and boundaries, and usually reserved their settlements, cultivations, and important mahinga kai.

Additional payments were also commonly sought but these tended to have the character of one-off payments for agreeing to support the transaction and appearing before the commission, rather than being one of a series of regular payments as in a lease situation. If a sequence of payments was sought it was generally by

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33. New Ulster Gazette 1849, cited in Armstrong, Wai 45 rod, doc i4, p 192

34. Half yearly report, 1 July 1845, cited in Armstrong, Wai 45 rod, doc i4, p 192

interested parties who had not shared in the first payment. In this sense, in the face of the attitude being taken by the Crown officials, Maori may have moved some way towards European notions of sale.

The sense of sale or permanent alienation was certainly the mode which the commission process itself constantly inculcated – no other was seriously discussed save for some joint occupancy by Maori and missionary in respect of the missionary claims, and then usually only after conveyance of title to the missionaries had been assumed. In the face of the constant demands and insistence of the settlers and officials, and knowing as many chiefs did of the nature of European towns such as Sydney (or, closer to home, Auckland), it is scarcely credible that Maori would not have gained some understanding by 1843 or thereabouts that the land concerned was passing from them permanently. This is probably why they paid considerable attention to limiting the areas alienated, of defining important locations which they wished to retain and of distinctly delineating the areas which would go to the settlers. Most of the talk and action was about the boundaries of transactions, not about the terms on which the settlers were to occupy. The option of formal transfer less than sale was not given to Maori by the Crown.

Even when the land was defined and the transfer agreed, however, Maori continued sometimes to traverse the land, and to take materials from the bush, fish from the streams, and shellfish from the foreshore (possibly with permission, possibly not). There were also instances of their making commercial contracts in respect of timber on land which they acknowledged as 'sold'. It was to be some years before the question of what was transferred with the land was clarified in Crown purchase deeds and negotiations, and Maori expectations of using mahinga kai on formally alienated land continued late in the century. Indeed for much of rural New Zealand there was a kind of co-existence between Pakeha farming and Maori village life in terms of land use, employment, and social relations, although the Pakeha gradually asserted their control through fencing, swamp draining, bushfelling, and the enforcement of trespass laws over what had become, in the received law, their property. The European sense of 'exclusive possession' was probably not fully apprehended by Maori in respect of any of the pre-1840 purchases, or for some time after.

In this context there were, in the 1840s and even much later, expectations among Maori communities of what the Pakeha purchaser who had entered into relations with the community by the land transactions, should provide for them. This included buying and selling produce, employment, assistance with health care, and gifts of meat and other produce for important hui. Much of this indeed went on even into the twentieth century between Maori and Pakeha neighbours, whether on old land claims or on other kinds of direct purchase.

Although some of the big speculative purchases were done by agents, Maori generally considered themselves as having entered into a relationship with particular Pakeha in each of the purchases. On that basis they were often willing to affirm the transaction years later. Even if the claimant had disappeared from the scene in the meantime, those Maori who had made a compact with him tended to support

that compact when he reappeared, as in the case of the Banks Peninsula chiefs who had made a deal with the French whaling Captain Langlois. This, however, did not prevent other Maori with interests in the land from independently making arrangements with other Pakeha. Overlapping claims were common.

The personal nature of transactions was part of the reason for Maori objecting to the Crown diminishing the settlers' claims and taking a surplus. Another reason was that by interposing itself in the private transaction the Crown was slighting the mana of the chiefs who sought to control the relationship still. Maori did not always resent Crown intervention though. Against the New Zealand Company and other powerful claimants the chiefs were glad to have the support of the commissioner to discuss and reduce the claim. In Wellington they were glad even to have the support of the soldiers when a settler mob tried to evict Maori from contested lands at Te Aro in mid-1840. They were glad too to have the support of the Crown against the French claims in French Akaroa. But in the majority of cases, where relatively small purchases were concerned, Maori still expected at least a substantial voice in the arrangements. In this context the Crown's taking a surplus and placing other settlers on the land was commonly resented. FitzRoy complained that Maori would take up the cause of the claimants and that it was impossible to get them to comprehend the 'strictly legal' view of the Crown's right to a surplus.<sup>35</sup>

In time some of these matters were adjusted, and Maori accepted other occupants. But for this to happen smoothly and without rancour there generally needed to be a further negotiation. Where this was not done the Crown's taking of a surplus was commonly resented by Maori, probably as much from the slight to mana as from the loss of the land itself. This was particularly likely to be the case where large claims were advanced, but where the intention of the Maori was to locate the settlers on a portion only of the land within the general boundary described. In the absence of surveys to clearly define the 'external boundary' (of the area under discussion) and the 'internal boundary' (of the settler's actual area of occupation), the potential for confusion was very great, as was the likelihood of Maori resentment at the Crown taking the 'surplus'. Eventually some of these resentments were assuaged by the Crown making additional payments, undertaking purchases which subsumed the old land claims within their borders or defining reserves for the Maori transactors.

## 2.12 Grey's Governorship

Important time was lost under Grey's governorship because, instead of supporting surveys of the land or investigations by the Protectorate, Grey disbanded the Protectorate and attacked the missionaries heavily over their land claims. It is noteworthy that Maori did not generally support Grey in his effort to show that

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35. FitzRoy to Stanley, 15 October 1844, BPP, vol 4, p 409

missionaries had ‘robbed Maori blind’, pronouncing themselves satisfied with the arrangements made by Henry Williams, for example, at the Bay of Islands.

The case of *Regina v Clarke* was brought by Grey in 1847 to test the validity of FitzRoy’s extended grants. They were upheld by the Supreme Court as a valid exercise of the Governor’s discretion but in 1851 this decision was overturned by the Privy Council.

Pressed by Grey over his 6589-acre grant at Waipapa, the missionary James Kemp strongly urged that if his grant was reduced the surplus should not be returned to Maori (for it would be a source of discord among them), but ‘put in trust for the entire benefit of the social and religious welfare of the native race’ (with other CMS property).<sup>36</sup> Grey did not act on the suggestion. The endowment trust concept required by Russell’s January 1841 instructions, languished under Hobson, flourished briefly under FitzRoy, and died under Grey.

Little progress was made under Grey in implementing the promises and recommendations from the commissioners for more Maori reserves, which remained unsurveyed and ungranted, and increasingly forgotten by the officials. For example, instead of granting the one-third of the Fairburn purchase at Tamaki promised to Maori in the original purchase arrangements, Grey paid off some of the Maori complainants and took some 70,000 acres of prime South Auckland land for the Crown.

In 1849 Grey passed the Crown Titles Ordinance (sometimes called the Quieting Titles Ordinance). This confirmed the validity of unsurveyed grants and offered to increase them by one-sixth if settler claimants would have them surveyed. This attracted only about 20 responses, as most claimants still hoped to get the whole of their original purchase granted. The ordinance was effectively a dead letter.

### 2.13 Later Efforts at Resolution

In 1854 a pre-emptive land claims Bill was introduced in the New Zealand legislature to resolve questions of legality surrounding FitzRoy’s pre-emption waiver purchases (see chapter 4 below). At the initiative of William Gisborne, the Colonial Secretary, a proposal was developed to appoint a new commissioner to investigate these and the old land claims. All the same, Gisborne feared the effect of reopening claims which had received the Governor’s final decision.<sup>37</sup>

At this time efforts were being made to effect new purchases from Maori. The Government did not wish to purchase land which had already been sold before 1840 – which of course required identification of such land.

A parliamentary committee consequently reported on the situation in 1856:

The whole amount the grants declare grantees entitled to may amount to 2,000 acres; but the grantees, considering themselves entitled to the whole amount

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36. Kemp to Colonial Secretary, 11 October 1847, olc, 1/595, cited in Daamen at al, *Auckland*, p 91

37. Gisborne memo, 7 July 1854, cited in Armstrong and Stirling, Wai 45 rod, doc j2, p 47

described by the boundaries in the grants, claim at least 3,000. The grants are often bought and sold, the repurchasers still preferring their claims. Some of the grantees are in possession of the lands granted; but a great part of those claims are unoccupied by anyone. Some portions have been resumed by the natives; and some, where the native title has been extinguished, and no grants made, have been considered Crown Lands, and taken by the Government as such; although in reality it has generally had to make the natives some additional payment. Still in a great number of cases no possession has been obtained by anyone; the natives disputing the ownership of the land in the absence of the claimants, or the insecurity of the titles they hold preventing the latter from attempting to enforce those supposed rights.<sup>38</sup>

Historians acting for the Crown have commented that it was unclear whether Maori were disputing whether the land had ever been sold, or claiming it because the buyer had never occupied the land.<sup>39</sup> Such a sharp distinction is not valid; Maori conceptions of pre-1840 land transactions would certainly have been on the customary principle that if the land was not occupied, the settler's right to it would have lapsed.

The select committee recommended that a commission be appointed to investigate a range of problems and claims left over from the Godfrey–Richmond inquiries as well as the FitzRoy waiver purchases. Assistant commissioners were to take local evidence and were to accompany surveyors to the land. 'Where the lands which commissioners should adjudge a claimant entitled to are withheld by the natives, the Government should be empowered to complete the claimant's or grantee's title', and recover the cost from the grantee. The Government was clearly anticipating the possibility of Maori resistance to claims; its remedy would be to 'complete' the claims, not abandon them.

The Land Claims Settlement Act 1856 then established the commission, stating that 'the peace and well-being of the colony' requiring that old land claims should be finally settled and 'disputed grants corrected'. The Attorney-General was empowered to call in Crown Grants already made and required the grantees to meet the requirements of the new commission; positive encouragement was given in the form of an increase of up to one-sixth more for having the land surveyed. No grant was to be made unless the claim was marked out on the ground in a plan certified by an approved surveyor. The possibility of native title not being extinguished over the land claimed was dealt with by section 38, which stated:

no lands shall be included in any grant under the provisions of this Act over which it shall not be proved to the satisfaction of the Commissioners that the Native title is extinguished.

Section 39, however, provided that where it was shown that Native title had not been extinguished the Governor could extinguish the title and obtain a cession of

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38. 'Outstanding land claims select committee report', *Votes and Proceedings of the House of Representatives*, 1856, vol 2

39. Armstrong and Stirling, Wai 45 rod, doc j2, p 55

the land, grant it to the settler and receive from the settler the estimated costs of the extinguishment.

There were sharp limits to the range of the inquiry: where the Godfrey commission had found that a sale had taken place, and made a grant or an award of scrip, it was not proposed to reopen the question.<sup>40</sup> This meant that if the Godfrey–Richmond inquiries had themselves been inadequate, the new commission would not disclose that, or give Maori an opportunity to present new evidence. In view of Clarke’s serious doubts as to what the first commission’s awards really signified, this was a major limitation; clearly the Government and Parliament were seeking to finalise the claims, not to reopen them all.

### 2.14 Bell’s Commission

F D Bell, a former New Zealand Company Agent, was appointed sole commissioner in 1857. The Attorney-General was empowered to call in existing grants. New grants were made conditional on the settler claimant providing a certified survey, which required actual work by the surveyors on the land. The physical marking of boundaries on the ground (at last!) was obviously going to be a test of real significance in terms of disclosing Maori attitudes to the transactions. If the surveys were interrupted clearly this would be an indication of discontent, if not with the transaction itself then with its boundaries.

Moreover, the Government now had in mind a new and rather devious purpose in requiring a survey of the land. Incentives were built into the Act in the form of a survey allowance of up to one-sixth more of the settler’s allowable claim (plus other allowances for expenses) for surveying the outside boundary of the land claimed. As Bell reported:

it has been laid down as a general rule that claimants should survey the external boundaries of their whole claim so that after laying off the quantity that they may be found entitled to, the surplus land may revert to the Crown without disputes – the supposition being, that while the Natives will give possession to a claimant and allow surveys to be made of all the land they originally sold him, they were likely to object to the Crown taking possession of any surplus afterwards, if only the part to be granted to the claimant is surveyed by him.<sup>41</sup>

This amounted to a very deliberate taking advantage of the Maori view of the transaction (that is a personal contract with the settler) to lever up a surplus for the Crown. It is certainly from the surveys done for Bell’s commission, and the awards of that commission, that a surplus for the Crown starts seriously to be identified. The claims were enlarged beyond what the settler claimants might not (without the bonus incentive) have asserted, and they were of course treated as purchases of the freehold, not as any conditional tenure.

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40. Armstrong and Stirling, Wai 45 rod, doc j2, p 65

41. Bell memorandum, 13 January 1857, cited Armstrong and Stirling, Wai 45 rod, doc j2, p 95

Maori objectors did indeed come forward in many cases during the surveys and efforts were sometimes made by Bell or his staff to adjust the claims in the course of proceedings, but such adjustments were minimal.<sup>42</sup> Bell's work has been rightly characterised as intended to identify and secure for the Crown a pool of surplus land such as had been envisaged from the outset of the process in 1839. To this end Bell took a very hard line against any Maori challengers to the awards of the first commissioners, Godfrey and Richmond. Even where a missionary such as James Kemp, who had acquired land partly to hold it in trust for Maori, sought to return to Maori land granted to him by Godfrey and Richmond, Bell ruled:

The Commissioner, after explaining the law to the Natives, over-ruled all their objections, and he announced that it [ie, the land excluded in Kemp's survey] would be taken possession of for the Government, as it could not for a moment be allowed that a claimant should return to the natives any portion of the land originally sold.<sup>43</sup>

Because the land lay between two hapu and was not then surveyed by Kemp or anyone else, the dispute smouldered on, with Maori still occupying part of the land. But the Crown treated it as alienated.<sup>44</sup>

Bell reported from his Mangonui and Whangaroa hearings, that in a number of cases he had explained the basis of the Crown's claim to a surplus. He reported that his Maori hearers expressed themselves satisfied with the process although whether that was actually so is open to question. Occasionally Bell made small reserves for Maori from the surplus.

But, in some contrast to the first commission, persistent Maori objections tended to focus on whether the land, or portions of it, had been alienated at all, rather than on the principle of surplus land as such.<sup>45</sup> This was perhaps indicative of the greater Maori awareness of what a 'sale' meant in the European view. In such cases Bell sometimes modified a settler's claim where he was satisfied the Maori objectors were genuine owners who had somehow been prevented from presenting their evidence to Richmond and Godfrey. However, he took a hard line against young Maori claimants who tried to modify awards of the first commissioners that had been accepted by their elders. He wrote after an inquiry at Russell in 1857 that in justice he would not put Maori off land which Europeans had claimed before Godfrey but which had been returned to Maori by that commissioner:

equally they could not expect that after such a lapse of time I should listen to the claims of Natives to get portions of the land awarded to Europeans by the former Commissioners; and that although I had in accordance with my invariable practice heard all they had to say, I should certainly not give back an acre which had been validly sold by those who in those days were fully empowered to sell, nor allow the claim of anyone who had failed to bring his objection forward at the original inquiry.

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42. W H Oliver, 'The Crown and Muriwhenua Lands: an Overview', Wai 45 rod, doc 17

43. Bell memo, 26 March 1858, ma 91/20, p 10

44. Daamen at al, *Auckland*, pp 94–98

45. See example the case of Heremaia, in Shepherd's purchase at Whangaroa, olc 5/34, NA Wellington.

But Bell’s distinction between these two categories of Maori objections is a tenuous one, resting upon the concept of certain Maori being ‘fully empowered to sell’ in the pre-1840 situation. Such a concept is of very doubtful validity; as Clarke and other officials had been pointing out, it was very difficult to say exactly who, if anyone, was ‘empowered to sell’.

In a report to the Government in 1858, Bell referred to the positive and cooperative responses of the chiefs to his commission:

There have been a number of very complicated cases which afforded ample opportunities for the display of a bad disposition if any had existed; there have even been many spurious claims advanced by the younger men because they know it was their last chance; it is an honour to the Natives that (with two or three unimportant exceptions) they have in every instance peaceably and patiently stated their claims before me, and cheerfully submitted to any adverse decision. They have done more than yield a passive acquiescence in the law; many of the Chiefs and Assessors have given me active and intelligent help, taking pains to make themselves acquainted with the principles and even details of the Act, and corresponding with me from different places as to the settlement of boundaries and other matters.

He claimed that Maori, far from objecting to the Crown policy of taking a surplus, accepted that when any right of theirs to land was extinguished by the initial transactions, they had nothing to do with the apportionment of it between the Crown and its subject.<sup>46</sup>

Professor W H Oliver, in commenting at length on the Muriwhenua claims, notes that no independent evidence has been cited in support of Bell’s assertions as to Maori understanding and acceptance of his proceedings.<sup>47</sup> The plain reading of Bell’s 1858 report is that it reflects the sort of optimism that officials tend to display when wanting to show ministers that they are succeeding. His own words show him trying to gloss over a difficulty: his suggestions for the extension of time and authority (which emanated in the Land Claims Settlement Act 1858) include a provision for settlers having difficulty getting quiet possession to have their grants exchanged for Crown land elsewhere. Bell explained:

The commissioners make a favourable award, the title being really extinguished as far as the principal chiefs are concerned, but other Natives refuse to give possession, and Government for political reasons will not interfere; clearly the claimant ought to get land somewhere for his award.<sup>48</sup>

Once again Bell was erecting a distinction between ‘the principal chiefs’ and ‘other Natives’. And once again it is a tenuous distinction, given that ‘principal chiefs’ had no right under custom to dispose of the interests of their kin without their active consent or at least their tacit consent over time.

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46. Bell to Colonial Secretary, 15 May 1858, AJHR, 1858, c-1

47. Oliver, pp 15–21

48. NZPD, 1858, 19–22, p 479, (cited in Armstrong and Stirling, Wai 45 rod, doc j2, p 90)

As noted earlier the scrip claims in Muriwhenua were not investigated by Bell at all. In other respects his awards were dubious. He was hurried out of Poverty Bay, for example, in 1859, by the local runanga who had reasserted the Maori view of their transactions with traders and denied altogether 'selling land'. Bell nevertheless made some favourable recommendations based on his incomplete inquiries and these were probably influential when the Poverty Bay commission allocated the land after it had been 'ceded' following the Pai Marire disturbances of the mid-1860s.

In 1862 Bell presented a final report. This showed that 1049 old land claims had been examined (by the earlier commissions and in many cases by himself also), together with 54 claims that had not come before the earlier commissions. Altogether the claims affected a total area of some 10.3 million acres. (This appears to include one million for New Zealand Company claims since the Tribunal researchers checking all claims other than the New Zealand Company claims arrive at a total of 9.3 million acres; at their grandest scope the company claims embraced some 20 million acres but they focused mainly on about 1 million acres within that.) From the claims in Bell's list 267,000 acres had been granted to claimants, and 204,000 acres retained by the Crown. About 152,000 acres of scrip had been awarded to claimants also.<sup>49</sup> Subsequently to Bell's reporting, about 5000 acres was awarded to Johnny Jones of Waikouaiti and nearly 10,000 acres to James Busby. Thus some 9,700,000 acres alleged to have been purchased remained in Maori hands. Tribunal researchers, checking Bell's return against figures compiled for the Myers commission of 1948, note that, of the land claimed, over seven million acres were embraced by a mere 14 claims ranging from 100,000 to one million acres each. These 'monster' claims mostly lapsed from non-appearance of the claimants, who knew they could not satisfy the tests of the Land Claims Commission process.<sup>50</sup>

Some £88,000 had been paid to Maori (estimated by giving goods used in payment three times their Sydney value) plus other payments made about the time of the first Land Claims Commission. Sometimes later Crown purchases overlaid the old land claim. But some important claims in Muriwhenua had not been investigated either by the Godfrey commission or by the Bell commission.

### 2.15 Later Adjustments

Bells' 1862 recommendations were not fully ratified until the Land Claims Arbitration Act 1867. Much of the reason for the delay was the persistence of settler claimants like Busby and John Jones, who had never accepted the limitation on their grants or other requirements of the land claims legislation.

As many submissions to the Waitangi Tribunal have noted, numbers of Maori claims in respect of old land claims continued to be brought forward, particularly to

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49. AJHR, 1862, d-10

50. Russell, Rigby, and Moore, 'Introduction'

the Native Land Court after 1865. These refer in many cases to portions of the 'surplus lands'. The Government in most cases declined to allow Maori claims to be erected over these lands, and declared the Maori rights extinguished. Their efforts were at times clumsy and heavy-handed. For example a theoretical Crown entitlement to surplus land was asserted in respect of Richard Taylor's 57,000-acre block in Muriwhenua, which the CMS had not brought before Bell because it was one of blocks which the mission had purchased to keep in trust for Maori and the land had remained in Maori hands. The claim was not pressed by the Crown either in 1871 when the block came before the Native Land Court. In 1877, however, the Government needed an island, Motu-o-Pao, off Cape Maria van Dieman for a lighthouse, and asserted their claim to it as Crown surplus: this touched off persistent Maori protests.<sup>51</sup>

In 1880 a claim was brought by Maori to Taipaku, a block which lay within Richard Davis's claim, which had been investigated by Bell. This caused S Percy Smith, the Surveyor General, to remark that 'This was an attempt to raise again the question of the validity of the Crown's title to "Surplus Lands", a question which is constantly cropping up and giving rise to endless trouble'.<sup>52</sup> Armstrong and Stirling note that this was in fact the first case to arise in Muriwhenua in respect of land which had passed before Bell's commission. The claim was dismissed by the Native Land Court because the vendors had not objected to Davis's purchase, and one had even accompanied the Government's surveyor around the boundaries of the entire claim in 1859.

Smith later forwarded to John Curnin, a solicitor for the Crown Lands Department, a list of five Maori claims affecting surplus land in the Bay of Islands and further north. The claim of Wi Marena Tuoro to Te Huia block at Hokianga was one of them. Wi Marena claimed that the land had been sold before 1840, but not by the proper owners. However, such information had not been brought forward before, either to the Richmond or Bell inquiries and the land had been surveyed, with Maori cooperation, in 1858 to 1859. Wi Marena's claim was therefore dismissed. Curnin took the view that the Maori claims were opportunistic and partly prompted by unscrupulous Pakeha. The basis of his assertion is not clear.<sup>53</sup> No further details of claims to surplus land in the Native Land Court have been cited by historians but dissatisfied Maori began to petition Parliament.

In 1907, Robert Houston was appointed to inquire into six Maori claims to surplus land named in seven petitions from Maori of Tai Tokerau. The investigation concerned, in part, land at Tangonge which the CMS had apparently attempted to bring under its trusteeship plans and on which they had allowed continued Maori occupation. The Crown persisted in claiming it as surplus, asserting that Matthews (of the CMS) had no right to 'give back' land the Maori title to which had been extinguished.<sup>54</sup> In 1925 Judge McCormick upheld the legal argument of the Crown:

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51. Armstrong and Stirling, Wai 45 rod, doc j2, p 382

52. Ibid, p 386

53. Curnin to Native Minister, 16 March 1885, ma 91/5, cited in Armstrong and Stirling, Wai 45 rod, doc j2, pp 389-390

that the land had been alienated and that Matthews had no right to return it to Maori. Armstrong and Stirling conclude in relation to this decision that while the Crown held legal right to all land found not to be Maori land, McCormick did not consider closely how the Crown determined that Maori title had been extinguished by the pre-Treaty transaction.<sup>55</sup> The root of the issue (as always) is whether either Godfrey and Richmond's inquiries, or Bell's, had adequately determined the intentions of the Maori parties to the transactions, or that Maori considered their interests in the land to have been extinguished.

Maori claims in respect of Tangonge and other grievances in the north were considered by the Sim commission of 1927 but without any clear outcome and the protests persisted. Inquiries by Judges Acheson and Jones revealed a great deal of confusion as to the legal basis of the Crown's claim to surplus.<sup>56</sup>

The Myers commission of 1948 was the most substantial of the twentieth century inquiries into old land claims and surplus lands. Armstrong and Stirling have pointed out that the list of 53 blocks which the five major iwi of Tai Tokerau put to the commission as 'surplus land' were not, in fact, concerned with surplus land, but land which had been granted to old land claimants.<sup>57</sup> This suggests that the pre-1840 purchases as a whole, not just the Crown's taking of a surplus, was of ongoing concern to many Maori in the north. In fact the majority of claims before the Myers commission were from Muriwhenua, the Bay of Islands and Hokianga.

The Myers commission divided in its findings and has since been criticised from various perspectives.<sup>58</sup> Certainly its proceedings and reasoning seem flawed and inadequate in the light of current knowledge. Messrs Samuels and Reedy misunderstood the nature and purpose of Gipps' scale for determining settlers' entitlements (believing it to indicate what was the due price payable to Maori) and recommended compensation of £61,307. Myers, the chairman, understood the purpose of the scale correctly and recommended compensation of £15,000 based upon the discrepancy between the area estimated to have been sold (in negotiations with Maori) and the area as actually surveyed. This seems illogical since Maori were not thinking in price-per-acre terms anyway. The commission certainly did not get to grips with the question of Maori understandings of the transactions in the first place and assumed that (however, adequate or inadequate they were) it was not possible to reappraise the findings of Godfrey, Richmond, and Bell, as late as 1948.

In any case dissatisfaction persisted in Muriwhenua, if only because of the extreme shortage of land in relation to the population and because the pre-1840 transactions form a very considerable percentage of the land alienated there. The issue is a most serious one for north Auckland claimants before the Waitangi Tribunal, spilling over into the nature of land transactions after 1840 as well as before.

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54. Armstrong and Stirling, Wai 45 rod, doc j2, p 396

55. Ibid, pp 428–429

56. Ibid, pp 409–410

57. Ibid, p 429

58. See for example, Armstrong and Stirling Wai 45 rod, doc j2; M Nepia, 'Muriwhenua Surplus Lands. Commissions of Inquiry in the Twentieth Century', Wai 45 rod, doc g1

### 2.15.1 Some case studies

Before proceeding to some general conclusions it is pertinent to reflect upon some case studies.<sup>59</sup>

#### (1) *The Fairburn purchase*

The Fairburn purchase is one of the more evident failures of the Crown to implement its own undertakings. It affects an area southward of the Tamaki Estuary from Otahuhu south to the Wairoa river and from Papakura in the west eastward to the east coast. The area was estimated by the Surveyor-General in 1851 to contain 75,000 acres and by planimeter in 1948 to contain 82,947 acres. During the Ngapuhi raids the area had been deserted by resident hapu. They returned in 1835 under the aegis of Potatau Te Wherowhero but there was renewed disputing between sections of Ngati Paoa, Ngati Tamatera and Te Akitai. To remove the bone of contention, Te Wherowhero accepted a suggestion from Henry Williams to sell the land to the CMS in the name of its agent at Maraetai, William Fairburn. In January 1836, the first of several deeds was signed and payments made. Four more deeds followed by 1839, with various sections of the right holders. By a deed on 12 July 1837 the CMS (or Fairburn) promised to return one-third of the land, when it was surveyed, to Ngati Paoa, Ngati Tamatera, Ngati Terau, Te Akitai, and Ngai Whanaunga 'for their personal use forever, in proportion to the number of persons of whom their tribes may consist in any part of the Thames and Manukau'.<sup>60</sup> Some Maori were living on the land at the time and Fairburn later testified that he understood that their cultivations were not to be disturbed.

After examining 11 witnesses, the Land Claims Commission recommended in 1842 that Maori be left in 'undisturbed possession' of one-third of the block as promised, that Fairburn receive a grant of 2560 acres and that the balance form Crown surplus (with the canoe portage at Otahuhu to be preserved as public land). Two of the witnesses in 1842 disputed that their portions were sold and these were excepted from the purchase. Later, in 1851, Katikati, one of the signatories in 1836, said he had not heard of the 1842 hearings and objected to the inclusion of a portion called Tewharau. Another witness said the evidence as recorded was not what he had said.

In 1851, Wi Tuke said that 'Governor Shortland gave us back Onepuhia (Umu-puhia?) under the arrangement of one third being returned by Mr Fairburn'.<sup>61</sup> But this was only a few hundred acres. The promised one-third of the block was not actually granted.

Fairburn's grant was increased under FitzRoy to 5500 acres and the missionary selected this in various parts of block. But the land was still unsurveyed at this point. Shortland had meanwhile tried to place on the land a saw-miller, Charles Terry, with 20,600 acres of cutting rights. He was resisted by Maori who burnt his

59. The first three are summaries of Matthew Russell's case studies in Russell, Rigby, and Moore.

60. Deed of purchase in olc 1/590, NA Wellington

61. Testimony of Wi Tuke, 14 June 1851, enclosed in Gisborne (Colonial Secretary) report, 1 July 1851 olc 1/590, NA Wellington

buildings. William Brown, in *New Zealand and its Aborigines*, published in London in 1845, stated that the Maori view was that 'If the land did not go to Mr Fairburn it must still belong to them'.<sup>62</sup> In other words Maori understood their transaction to be with Fairburn alone, not an extinguishment of their rights in favour of the Crown or anyone else.

Governor Grey subsequently sought to reduce Fairburn's grant but in fact paid him for 400 acres at Otahuhu for the military pensioners' settlement, at £2 an acre (recouping to Fairburn about what he paid in goods for the whole 80,000 acres). He later sold other land at Otahuhu for up to £30 an acre.

Still the one-third was not marked and granted to Maori, and in 1851 Katikati of Ngati Tamatera halted the activities of William McGee who held a timber licence on the block. Katikati claimed that a large area of the land had never been sold.

The Colonial Secretary (William Gisborne) preferred the view of Wi Tuke, that the whole block had been sold in 1836 to 1837, but he acknowledged that the one-third was yet to be returned. He recommended a settlement of the claim by a mixture of land and money payment. In the event the Government paid £200 to Katikati for the relinquishment of Ngati Tamatera claims, £100 to Akitai, and £500 to Ngati Tai (Ngai Tai). There is no mention of Ngati Paoa and Ngati Whanaunga being paid. Because the Government took deeds of purchase for these payments, the large area of valuable surplus in the land never came before subsequent inquiries (such as the Myers commission into surplus land). Whatever one thinks of payments made before 1840, the £800 paid after 1851 was derisory in relation to the value of Tamaki land at the time. Apart from the fact that not all groups mentioned in the 1837 deed received payment the paying off of some Maori in 1851 denied the tribes the benefit of the added value of the promised one-third of the block. Nor was the recommendation of the Land Claims Commission itself implemented. This would appear to fall considerably short of the Crown's obligations under the Treaty of Waitangi.

## (2) *Hokianga scrip claims*

In pursuit of its policy of concentrating settlement, the Government from 1842 offered settlers scrip (land orders equal to their claim, or to the maximum allowed), to be taken up near Auckland rather than in the area of the original purchase, the Crown acquiring in exchange the settler claimant's purchase. Due to the absence of surveys the scrip was issued for the acreage estimated by the claimants (provided the purchase was accepted by Godfrey and Richmond as bona fide). Often the claimants over-estimated the acreage of their original claim and left the Government with the shortfall when they tried to take up the land. An insight into Maori attitudes towards scrip arrangements comes from Hokianga where the interpreter John White was overseeing surveys in 1859:

These claims were not disputed when I was in Hokianga. On a former occasion Mr Clarke was not allowed to survey these claims by the Natives, as they had heard that

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62. Cited in Armstrong and Stirling Wai 45 rod, doc j2, p 23

part of them had been exchanged for Scrip, hence they would not allow the whole to be surveyed least the Government should require them to make up the deficiency in case the land did not contain the number of acres equal to the amount of scrip given in exchange.<sup>63</sup>

The comment suggest an extremely precise understanding of the whole process by the Maori witnesses. It also indicates a willingness to allow occupation by the Crown of the original area the Maori themselves had identified as alienated, but not more. Government did not in fact try to take the shortfall from the Hokianga Maori.

White came to the area with the surveyor William Clarke and met the assembled Hokianga chiefs at Mangunu on 9 November 1858. He read out the boundaries of some 35 old land claims reported on by Godfrey and Richmond. He sought nominees from among the chiefs to accompany him round these boundaries. In eight cases the chiefs challenged the boundaries, but White said he must insist on them: they had had the opportunity to object at the Lands Claims Commissioners’ hearings, at which time the commissioners would have adjusted the boundaries. He himself had no authority to do so. He reported that three weeks after the meeting ‘this dispute was given up’.<sup>64</sup> Matthew Russell comments that White did not in fact hesitate to modify the commissioners’ recommendations if it favoured the Crown to do so.<sup>65</sup> Moreover, when White produced six claims in the Hokianga group which had never been before the commissioners, the assembled chiefs acknowledged the alienation. White took their depositions and included the land in the surveys – an action for which he had no authority.

Matthew Russell identified several reasons why boundaries were not disputed until after the long interval between the original alienation and the survey. One was simply an attempt to push up the price, Maori having realised much more about the rising value of land. White usually referred to the chiefs’ evidence given before Godfrey and denied claims based on 1850s prices. A second reason was a desire to protect cultivations which had developed since the sale. White recommended 15 additional small reserves to accommodate these. A third important reason was the existence of valuable kauri timber on the land. Bell had held a short hearing at Hokianga to discuss the Orira Valley claims, and secured agreement to the original boundaries. But when White went to survey these he encountered some resistance from two chiefs desiring to retain a stand of kauri. Bell secured their compliance by sending a letter which White read to the assembled chiefs threatening to stop the trade in the area altogether. The chiefs had been given cutting rights on the land claimed by the Crown and these rights were apparently seen as more important to the community generally than the interest of the two who tried to retain a specific stand of timber.

The dispute, and related correspondence over timber, shows that Maori considered that land could be alienated but not timber on it – that this could be the subject

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63. White, ‘Report of Proceedings in Hokianga’, 8 August 1859, olc/4, NA Wellington, pp 9–10, cited in Matthew Russell, case study ‘The Hokianga Scrip Claims’, in Rigby, Russell, and Moore, p 4.

64. White, report of proceedings, 8 August 1859, Russell in Rigby, Russell, and Moore, p 7

65. Russell in Rigby, Russell, and Moore, ‘The Hokianga Scrip Claims’, p 8

of separate transactions. This would have conformed with customary law, where rights to specific trees or resources were often seen as lying with individuals or groups separately from the hapu who primarily controlled the land.

The Hokianga claims show that it was possible to adjust claims broadly to the satisfaction of Crown and Maori, at least in the short term. Maori options were reduced, however, by the officials' normal insistence on the findings of the first commission. Maori were pressed hard to accept these, notwithstanding the doubts expressed in 1843 to 1845 by several officials about the adequacy of the inquiry. In 1857 to 1859 it took very determined Maori to move officials to make any fresh concessions.

### (3) *The McCaskills at Hikutaia*

The essence of the McCaskill dispute was that Commissioner Richmond found on the evidence of three Maori witnesses, that McCaskill and Martin had made a bona fide purchase of 8000 acres south of Hikutaia Creek, and (on the testimony of two witnesses) of another 4000 acres. FitzRoy eventually recommended grants of 7000 and 3000 acres respectively. McCaskill took possession and began saw-milling, but the land was not surveyed until 1851. At that point, local Maori temporarily resisted the survey of any land east of the Paiaka Ridge and denied selling some two-thirds of the southern block. (At the initial purchase the boundaries had not been traversed but pointed out from a hilltop on a foggy day.) The matter apparently rested until 1858 when the land was resurveyed for Bell's inquiry, again with resistance. Even more resistance occurred when McCaskill began milling on the disputed land.

Bell came to Hikutaia in February 1859. Maori objected to several of McCaskill's purchases in the Thames area. Bell later reported that he stated distinctly to them:

that it was not possible for me to entertain the claims of those who were mere children at the time of the sale . . . or [who] failed to bring forward their objections in a valid manner before the investigating commissioners in 1843.<sup>66</sup>

At McCaskill's request Bell granted an adjournment. But Bell did not return to hear the adjourned claim. In 1862 at Auckland, at McCaskill's request, he recommended that grants be issued to the McCaskill brothers for all four blocks claimed. Bell noted that Herewini, son of Rangitua, had been a protester, but his mother (a rangatira), had affirmed the sale in 1843 and 'I cannot admit that Herewini shall now be entitled to dispute his mother's sale'.<sup>67</sup>

Maori were angered by Bell's failure to resume the adjourned hearing and began to challenge McCaskill's occupancy by petition in 1868, and by occupying the ground themselves. The dispute smouldered on well into the twentieth century.

The key issue in this case is, once again, whether the Maori witnesses heard in 1842 to 1843 were sufficient to represent the community of owners, and make a

66. Bell report 23 June 1862, o/c 1/287, NA Wellington, vol 1, cited by Russell in Rigby, Russell, and Moore, 'McCaskill's claim', p 12

67. Bell, 23 June 1863, cited by Russell in Rigby, Russell, and Moore, p 14

binding decision to alienate the land. The younger generation challenging the sale in the 1850s and 1860s may have been opportunistic, or they may have represented a genuine hapu interest with a genuine discontent about what their elders had allegedly done. In not taking evidence fully and in relying on the 1843 testimony, Bell circumscribed the investigation and the possibility of the satisfactory renegotiation and adjustment of the claim. (See also volume iii, chapter 2.)

**(4) *The Manukau Company purchase***

On 11 January 1836, soon after Ngati Whatua had returned to the pa called Karangahape near Puponga Point on the north shore of the Manukau, one Thomas Mitchell, assisted by the Methodist missionary, William White, secured the marks of Apihai Te Kawau, Kauwae, and Tinana Te Tamaki to a deed purporting to sell forever the whole of the Tamaki Isthmus between the Manukau and Tamaki 'rivers' on the south and the Waitemata 'river' on the north, and from the Tasman sea to the Hauraki Gulf. The price was 1000 pounds of tobacco, 100 dozen pipes, and six muskets. On 3 November 1838, following Mitchell's death by drowning, the title was purchased from his widow for £500 by a group of largely Scottish entrepreneurs under the name of the New Zealand Manukau and Waitemata Land Company.

Following the establishment of British sovereignty the company's claims were presented to the Land Claims Commission by Captain W C Symonds, its New Zealand agent. But no Maori witnesses appeared before the land claims commission in 1841 to certify the deed. Meanwhile the company had sold subdivision sections to settlers in the United Kingdom, as if it did have title, and immigrants were actually on their way out in the ship *Brilliant*. At the request of the Secretary of State in London, Lord John Russell, the executive council in New Zealand decided, on 18 October 1841, that the Manukau company would be granted four acres for every £1 it had spent on colonisation, *in the area where it had any proven valid claim*. The formula of the Pennington awards to the New Zealand Company was thus applied to the Manukau Company. On the figures of expenditure presented this would have entitled to them to 19,924 acres. However, soon after this decision, W C Symonds was drowned and, lacking an effective local agent, the company's claims before the land claims commission languished. On 3 July 1843 the commission reported that no Maori witnesses having presented themselves during three advertised hearings, the company's claims were not proven.

Meanwhile the settlers of the *Brilliant* had arrived, distressed and bitter at having no titles. The New Zealand administration gave them permission to squat on a defined area at Karangahape, pending the hearing of their claim (which at the time, was expected to be at least in part in their favour). Many dispersed but about 30 settlers huddled in bush material huts on the land, presumably with Ngati Whatua agreement.

On 12 August 1844, Lord Stanley, the Secretary of State for the Colonies, ordered a special investigation into the claims, which was conducted by Governor FitzRoy's Executive Council. The deed was not in Maori, Mitchell was dead, and the company's witnesses failed to support the 1836 deed adequately (White knew

no Maori at the time it was signed). Theophilus Heale, the company's new agent in New Zealand, acknowledged that the boundaries of the claim were vague and abandoned them. However, he had apparently discerned that the Ngati Whatua chiefs would support a modified claim. They did appear at the special investigation. Though no exact transcript of proceedings have survived, Heale put on record his summary of what they said: Te Kawau had first denied ever having seen the deed, however, hearing Tinana, admits its genuineness, but within limited boundaries, he allegedly said, 'If the paper means only that portion of the land, I will acknowledge that I signed it, if for more then I know nothing about it'. Whatever the accuracy of Heale's summary the special investigation sought to implement the Maori understanding or agreement, and awarded the company an area at Karangahape which when surveyed amounted to 1927 acres at Puponga Point. This became the township (now suburb) of Cornwallis. The company was also awarded scrip for £4844 for purchase of Crown land elsewhere. Despite several attempts by the company to enlarge this award the Crown held to it. There is no record of any further Ngati Whatua objection.<sup>68</sup>

## 2.16 Assessment

In the light of the above overview and case studies and the evidence behind them, it is possible to make an appraisal of the Crown's handling of the pre-1840 purchases. This chapter has concentrated on the process for hearing claims other than the New Zealand Company purchases. For an appraisal of these see chapter 3.

### 2.16.1 The Crown's rights and obligations

In 1840 the chiefs such as Tamati Waka Nene, aware of incipient threats to their rangtiratanga from colonisation, welcomed the Crown's support in safeguarding it, and in the task of developing new governmental structures appropriate to new needs and conditions. The Treaty negotiations and Treaty terms suggest that the Crown acquired an obligation to help the chiefs appraise the pre-1840 land transactions in terms which, by and large, Maori would have wished. Notwithstanding the responsibilities of kawatanga the chiefs had not invited the Crown to impose unilaterally a different set of terms upon the transactions than they themselves had intended.

It is not a simple to say what those terms were. A variety of kinds of transaction had occurred in the previous decade and some of them were beginning to have the appearance of straight commodity sales by chiefs against the wishes of their lineage. But rarely did Maori include their cultivating lands in the transactions and usually there was an assumption that the settlers acquiring land rights would enter into some kind of relationship with local hapu – favouring them in trade or in

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68. See also olc 629, NA Wellington

employment, or giving gifts to the chiefs at major hui, for example. Where the land was disputed, chiefs might in some cases have sold their rights to Pakeha to score off rivals and be rid of the problem. Even there the Pakeha were probably seen as potential allies in future disputes.

These then are some of the terms which, at least implicitly, Maori expected from the land transactions. Sometimes the price paid was itself important – guns, steel tools, gold sovereigns were no light consideration and they featured in a number of transactions. But the piles of trade goods on the beach, soon gone, were not what the chiefs really sought from the deal; the price was the presence of the Pakeha themselves and their continued support.

The British Crown, however, did not assume authority in New Zealand solely to support Maori and protect their interests. Perhaps they should have. That is a moral, not an historical issue. By December 1837 the British Government had concluded, quite genuinely, though on incomplete information, that settlement was going to overrun New Zealand in any case. The Crown therefore saw itself as having a dual obligation – to protect Maori and to regulate colonisation in the interest of genuine settlers who would invest capital and labour and develop the country. Maori and Pakeha were alike expected to benefit. So far, at least in theory, there was no complete contradiction between Maori goals and those of the Crown.

But the colony also had to be paid for. The Crown needed a revenue and the obvious source of revenue was profit on resale of land. This (rather than protection for Maori) was the main purpose of the Crown’s pre-emptive right of purchase. It was also one of the reasons for taking a surplus from land sold by Maori to private settlers. The other reason, also deemed to be in the public interest, involved not giving the old land claimants grants in the more remote areas but trying to locate them in certain areas where public services could reach them and their concentrated efforts would better assist development. Both these aspects impinged on the Maori view of the land transactions. The Crown was interposing itself between the private parties, preventing them from arranging the terms of land settlement exactly as either party would have wished.

It may be asked, however, whether the price demanded by the Crown for its intervention in the pre-1840 transactions, that is largely taking them out of the hands of Maori and taking surplus lands, was a reasonable offset to Maori for defence against unregulated, potentially brutal and rapacious settlement, and for the Government’s efforts to develop the colony in a more orderly fashion. For the Crown also assumed obligations under article 2 to protect Maori property rights and rangatiratanga, which implied that Maori understanding of the pre-1840 transactions, and their limits, would in each case need to be determined and upheld, unless there were very good reason not to uphold them.

Sufficient legal authority appears to have been provided, in statutes of the New South Wales legislature in 1840 and of the New Zealand in 1841 and subsequently, for the Crown to award only part of the land equitably purchased from Maori, to the settler purchaser, and to retain the balance as a Crown surplus. By Normanby’s instructions and subsequent legislation, however, the Crown set itself the task of

checking whether the pre-1840 purchases were bona fide or equitable. It has to be considered whether the Crown's tests of equity were adequate and whether Maori title had indeed been lawfully extinguished (or extinguished in accordance with Treaty principles) before Crown made grants to settlers or took a surplus in the land.

### 2.16.2 A statistical evaluation

The totality of European's deeds of purchase and/or claims before 1840 have been estimated by Mr Jack Lee of the Bay of Islands to exceed 66 million acres – greater than the total land area of New Zealand.<sup>69</sup> This is in fact typical of nineteenth century colonisation in the Pacific: Fiji, Samoa, Vanuatu, the New Hebrides, and other groups were all subject to a flow of settlement, reams of 'purchase deeds' each carrying the marks of a few local men, and escalating warfare between factions of the local people armed and incited by factions of European in support of their claims. Lee is right in saying that the very establishment of a Land Claims Commission, requiring the affirmation of local people to support the transactions, did an enormous service: most of the specious or shoddy 'purchases', with vast areas and inadequate boundaries, simply disappeared. The holders of worthless paper knew they would never pass the scrutiny of the Crown officials and they were right. Godfrey and Richmond rejected such shoddy deeds with scorn.

Of the claims actually lodged, Bell reported in 1862 that they amounted to 10,322,453 acres (including 97,427 acres of claims under FitzRoy's waiver of Crown pre-emption) Of the pre-1840 purchases, 471,410 acres were found to be bona fide purchases, 267,176 acres of which were awarded to settler claimants and 204,243 acres retained by the Crown as surplus land. In addition £109,282 worth of scrip was issued (the Crown taking over the settlers' former claim). In other words, over nine million acres of the claimed land reverted to Maori ownership.

The Surplus Lands Commission of 1948 (the Myers commission) has rather different figures and Rigby, Harman, and Russell, Tribunal researchers, have produced totals from a careful survey of available information, as follows:

- Total claimed, 1119 claims (including the 'monster' claims of over 100,000 acres) 9,304,906 acres.
- Total claimed, *less* the 'monster' claims (that is less five New Zealand Company claims and nine other vast claims not seriously pursued to their full extent, 2,236,906 acres.
- Total confirmed alienations from Maori, 468,145 acres (326,356 acres granted to settlers plus 141, 826 acres Crown surplus).

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69. J Lee, *Old Land Claims in New Zealand*, Northland Historical Publications and Society Inc., Kerikeri, 1993, in ix–x. A speaker in the House of Commons in 1845 estimated that nine claimants alone had submitted claims totalling 56,654,000 acres, Armstrong and Stirling, Wai 45 rod, doc j2, p 435. This would include the New Zealand Company claim of over 20 million acres, on the basis of their 1839 purchase deeds.

In addition some 153,000 acres of scrip was awarded to settlers; in some cases the Crown took up the land in the settlers’ original claims, sometimes not.<sup>70</sup>

Of the New Zealand Company’s initial claims, amounting to more than 20 million acres, about 1.3 million acres were eventually awarded, of which 828,000 acres were actually surveyed and selected. The Crown was involved in the repurchase of much of this land (for example at Porirua and Wairau) to fulfil the company’s award, plus huge new purchases such as Otago and Canterbury. On the demise of the company in 1850 all the company land, except 199,000 acres on-sold to settlers, became Crown land.<sup>71</sup>

This demolition of most of the so-called purchases, mainly on the basis that Maori denied that they had actually sold all that land, is a remarkable result. Even on Lee’s estimate of 2.5 million acres of awards to settler claimants (including the awards to the New Zealand Company), only 4.6 percent of New Zealand’s area was regarded as alienated by pre-1840 transactions. This compares very well with the 8.2 percent for Fiji regarded as alienated by the Land Claims Commission there and the 20 percent for Samoa. In fact, Lee’s 2.5 million acres is an over estimate, unless one adds in some of the land awarded to the New Zealand Company after additional Crown or company payments under Grey in places like Porirua and Wairau.<sup>72</sup> In the New Hebrides Anglo–French Condominium (now Vanuatu) the Land Claims Commission was emasculated by the French and about 40 percent of the country was deemed to have been alienated. New Caledonia had no Land Claims Commission at all, and some 85 percent of the group was deemed alienated either by private purchase or as state demesne. Any assessment of Treaty grievances in New Zealand must keep these perspectives in mind. The Land Claims Commission had gone a long way to fulfilling Hobson’s undertaking at Waitangi to return to Maori land not validly acquired in pre-1840 transactions.

### 2.16.3 Were the checks adequate?

Of itself, however, none of the above proves that the 471,000 acres deemed by Bell to have been alienated (or the 468,145 acres in the calculation of Rigby, Harman, and Russell) were in fact all equitably alienated. The further question must be posed as to whether the checks imposed were sufficiently thorough to meet the Crown’s own stated objectives. Should even more of the claimed land have remained in Maori hands? Should more payments have been made, or should the alienations have been considered as something other than absolute alienations? In other words, should some sort of Maori right or interest remained extant, as was certainly

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70. Russell, Rigby, and Moore, ‘Introduction’.

71. D Moore, ‘The Crown’s surplus in the New Zealand Company Purchases’ in Russell, Rigby, and Moore, p 101.

72. Daamen, Hamer, and Rigby, p 68. Adding together the 468,145 acres awarded by the Land Claims Commission, 150,000 acres of scrip claims, and 1,300,000 acres of awards to the New Zealand Company, at most 1.9 million acres was alienated in pre-1840 purchases after the Land Claims Commission awards, and at least half a million acres of that were not taken up. Thus, of the 66.4 million acres available in total, 2.9 percent was awarded and 2.1 percent taken up through pre-1840 purchases (see also ch 3).

intended by the chiefs in many of the pre-1840 transactions? Also, despite the relatively small percentage of alienations approved nationally, did the incidence of alienation fall heavily upon particular districts? How did Maori view the outcomes? These are not easy questions to answer, in respect of all parts of New Zealand. In the last resort they hinge upon a judgement of what could reasonably have been accomplished at the time, having regard to all circumstances.

The following points may be made in the light of the evidence:

- (a) Firstly it is clear that the Crown officials under-estimated the task before them, both as to the number of the claims preferred, the vagueness of many of the transactions, and the complexity of Maori land tenure. Had there been more time to gather prior knowledge about these matters (and much was known about them by missionaries and Busby) better preparations might have been made. But once the New Zealand Company despatched its ships to New Zealand in May 1839, preparations for Crown intervention began to be made in considerable haste. As has been argued in the first part of this chapter the urgent necessity appeared to be to secure sovereign authority and take control of the land trade, including power to scrutinise pre-1840 purchases. The detail of how this was to be done had to be largely worked out by officials on the spot. In that sense Normanby's instructions to Gipps and to Hobson were not inappropriate.
- (b) It is not reasonable to expect Gipps to have mastered the detail of the New Zealand situation by February 1840; the problem of New Zealand was rather sprung upon him and, rightly, he had to leave most of the detail to the men appointed to New Zealand. His 1840 ordinance covered in broad terms most of the essential points necessary to safeguard Maori interests. Gipp's instruction to Hobson of 30 November 1840, however, that where chiefs 'admit to sale' of land their title was to be deemed extinct, intruded heavily into the process and prevented a more comprehensive investigation of what the chiefs might have intended in the transactions.
- (c) Godfrey and Richmond's investigations were conscientious and principled as far as they went. Greatly to the advantage of Maori was that their evidence was preferred over that of the settlers where contradictions were exposed. This resulted in the lapse or annulment of many shoddy claims and possibly some bona fide ones as well.
- (d) One result of the collapse or diminution of the shoddy claims is that the Crown's own access to a surplus was also diminished. Judgment of the Crown's performance in respect of the half million acres of alienations (other than those of the New Zealand Company) recognised by the process, should perhaps be tempered by this consideration.
- (e) On the other hand the Crown's investigations *were* inadequate in many respects. The taking of evidence from only two Maori witnesses, not always close to the land, was a serious weakness. Especially in view of the objections which emerged when the land came to be occupied, and of the highly sceptical statements of George Clarke and other officials, there is serious

doubt as the adequacy of Godfrey and Richmond's inquiries. Indeed Godfrey and Richmond themselves acknowledged the possibility of the testimony brought before them being inadequate and urged upon Shortland, then FitzRoy, the additional double checks of Protectors' reports plus an uninterrupted survey of the land itself. The responsibility lies with FitzRoy that grants were issued to settlers without this double-check; and with Governor Browne, the settler General Assembly and Commissioner Bell that Bell declined, in most cases, to admit new evidence in respect of Godfrey and Richmond's awards (although they did require surveys).

- (f) The absence of survey staff was a key weakness in the early phase of the process. It was unfortunate that the surveyor sent to assist to Godfrey and Richmond was accidentally drowned soon after he arrived. The authorities did not replace him and underestimated the load on the Surveyor-General and his staff. In contrast, surveyors were provided to assist the New Zealand Company define its claims. A possible alternative to full survey was a formal cutting of lines and boundary marking on the land itself – a chain-and-compass survey and accompanying sketch plan sufficient to locate the land. This was feasible in most of the purchases, though expensive in heavy bush. It would have had the inestimable advantage of publicly involving the Maori transactors and making them aware early of precisely what land was involved. In 1856 to 1858 the Government was sufficiently concerned with security of title for private investment, and for precise definition of the land it could claim as surplus, finally to require survey. It must also be observed that one major reason for the frustration of Crown's objectives in regard to surveys, up to that point, was lack of cooperation from the settler claimants, who fought the reduction of their claims at every stage and would not survey the land if it tended towards identifying a Crown surplus within their claim, until they were rewarded with a percentage increase in their grants in the 1856 to 1858 arrangements.

#### **2.16.4 The Crown's vested interest in the freehold**

At this stage it might be asked whether the Crown would have done better to have abandoned the idea of gaining a surplus, allowing the settlers the whole of their claims (if they could substantiate them), or letting them return to Maori and purchasing them afresh. In hindsight, given the cost and confusion involved, the answer is probably yes, but it was hard to see this in advance, given the belief (apparently supported by the pre-1840 evidence reaching London) that very large areas had been alienated by Maori.

In its determination to require a surplus, however, the Crown became involved not merely in identifying what Maori had done, or intended, in their pre-1840 transactions, but in promoting the transactions as absolute alienations. Had the Crown thought more about recognising leases or licences from Maori – a form of alienation which suited both Maori and the settler in many cases, and which was

provided for in the 1840 and 1841 ordinances – a much more flexible set of possibilities would have emerged. Maori would almost certainly have been willing to alienate by lease much larger areas than they were willing to sell. They would have felt more in control of the land and of the whole situation; their rangatiratanga would have been substantially preserved. The Crown's role would have been to oversee the development of leasehold terms fair to both parties, perhaps with priority to the Maori owners in employment or in the buying and selling of produce.<sup>73</sup> Such an option was not for a moment considered by the Crown. From late 1840 at least, the Land Claims Commission essentially posed only two alternatives to the Maori; they had either sold the land to the settlers absolutely or they had not. The imperatives for this were partly an unquestioning assumption that settlers would want the freehold (true in most cases), and more importantly that the Crown needed to extinguish Maori title and obtain a surplus.

A serious point of difference between Maori and Crown views concerned timber. The Crown usually regarded a purchase of land as including the timber on the land; Maori, on the other hand, did not necessarily see the timber as necessarily passing with the land, and sought on a number of occasions to deal separately with it. Sometimes the Crown did license the timber rights back to Maori on land they had purchased.

### **2.16.5 Maori attitudes to the Crown's procedures**

Maori responses varied. Powerful chiefs like Panakareao in Muriwhenua asserted plainly that they wished to control the nature of the transactions, who occupied and on what terms. Panakareao would not accept the idea of a Crown surplus. Other chiefs responded by defining more sharply what they were prepared to alienate, that is, sell, once they had realised the nature of the alienation that the process enjoined. So boundaries were drastically modified in many cases, more payments extracted, and some (usually small) additional reserves made. The outcome was that less land was alienated than might otherwise have been the case, but it was alienated without expectations of it returning to the former Maori owners, at least within a foreseeable future. There was probably another implied proviso, however, namely that the land was actually occupied. Abstract notions of legal title would have meant little to Maori; they made agreements with an individual or individuals, and unless those people took up the land the rights would not really have been seen to have transferred. Even when they did, there are indications in some cases at least, that Maori expected some kind of customary rights to endure, enabling them to co-exist on the land with the settlers. Or they expected ongoing reciprocal exchanges with the settlers or with the Crown officials.

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73. Such a system was introduced in the Republic of Vanuatu with considerable success after 1980, the independence constitution having cancelled the former colonial freeholds. But leaseholds from indigenous owners were almost never officially introduced in Pacific colonies in the nineteenth century, even though informal leases were common before formal annexation.

While the Land Claims Commission did not give Maori an opportunity to press for leasehold arrangements, these were developing informally between Maori and settlers (though deterred by the Land Claims Ordinance 1841 and the Native Land Purchase Ordinance 1846). Maori also tried to have timber dealt with separately and sometimes persisted with timber claims even after agreeing before Godfrey and Richmond to an alienation of the land. Otherwise there seemed to be loose expectations, which missionaries and officials fostered, of ongoing benefits from the proximity of settlers. In many cases the benefits were realised, in the sense that markets for Maori produce grew throughout most of the 1840s and 1850s in districts such as Auckland and Hauraki, and Maori availed themselves of these markets. Employment continued on the farms and timber camps in parts of north Auckland. In such cases, many Maori with interests in old land claims, in a sense, did get much of the real payment for which they had alienated the land in the first place. In areas bypassed by settlement, such as Muriwhenua, Maori would not have had such opportunities.

In summary then, Maori satisfaction or dissatisfaction depended upon whether the expected benefits of association with settlement actually followed and/or whether there had been a genuine opportunity to renegotiate and reaffirm the original transaction in the commission or in related proceedings (as in the Manukau Company claim, for example). Where such renegotiations took place, to Maori satisfaction, no subsequent protests appear to have been raised. There were many adjustments made in Godfrey and Richmond's court which, if implemented, appear to have resulted in no further protests about the transaction.

### 2.16.6 Official neglect

There were numerous occasions, however, when officials actions or inactions created dissatisfaction, particularly those of FitzRoy. According to the *Southern Cross* reports, FitzRoy promised to return to Maori land not granted to settlers, including even land in bona fide purchases. Even allowing the possibility that the *Southern Cross*, a rather venomous settler journal, had got it wrong, or that FitzRoy was meaning to put the land into his endowment trust rather than return it to its former owners, the Governor certainly confused the issue and made no subsequent clarification; nor did he return purchased land to Maori. More seriously, and despite the advice of senior officials, FitzRoy decided to issue Crown grants without first surveying or marking the boundaries of the land. Some of the grants were on-sold. This led to continued confusion on the land between intersecting Maori right-holders and between Maori and settlers.

Further confusion and injustice to Maori developed under Grey, who, for the seven years of his first governorship, neither advanced the surveying and definition of the land, nor pursued closer investigations as to Maori right-holding in the affected land. Moreover he neglected to implement recommendations of the commissioners to make reserves or return land to Maori. The Fairburn purchase is an example of this.

Bell's commission, based on surveys, went a long way towards resolving many issues of area and boundary. The increased grant to settlers for surveying the outer boundary of their claims (not just the limit of the award to themselves) tended to enlarge the areas claimed and contribute to the Crown's surplus. Again absolute alienation was the only kind of transaction seriously entertained and the finer points of transactions between missionaries and Maori (for example) tended to be overlooked. Bell was clearly determined not to allow sales approved by Godfrey and Richmond to be overturned by others beside the chiefs who had been acknowledged as owners and vendors about 20 or so years before. Evidence and challenges brought by a younger generation of Maori was heard but not heeded. This almost certainly shut out some interested parties. This approach rested on a view of senior chiefs having the right to sell quite large areas, whereas, as Clarke had demonstrated, a much wider hapu (or interhapu) involvement would have been necessary to secure full agreement to alienations of that kind. Some of those who objected to the alienations in Bell's commissions were very likely to have been speaking for the wider hapu interest, not simply as members of the younger generation trying to repudiate their elders' transaction (although that cannot be entirely ruled out in all cases). McCaskill's case is an example of the consequences of Bell and other officials relying upon quieting objections merely by making additional payments.

The result is that a doubt continued to lie over some of the old land claims. Some Maori grievances certainly continued to be expressed in particular cases, such as Webster's and McCaskill's claims in Hauraki and a number of cases in Tai Tokerau. There are also indications that, in parts of the north, the explanation by Bell and others as to how the Crown took a surplus, was not fully accepted. Over the years, these were the subject of a number of petitions, some relating to the surplus, some relating to the initial pre-1840 alienations. Several of these were considered by the Myers commission in 1948.

### **2.16.7 The balance of argument?**

It is difficult to generalise about the Crown's handling of the pre-1840 purchases.

On the other hand, many of the claims were talked through during the commissions, marked on the ground, and adjusted with the chiefs in either Godfrey's or Bell's commission. Others were overlaid by subsequent Crown purchases and matters may have been adjusted in that context. In most of the 500 or so claims granted and taken up settlers did indeed have quiet possession. If a grievance was felt by Maori in such cases it seems to have related to a the general sense of alienation and marginalisation that Maori felt as a result on the far more sweeping losses of their land under processes much less equitable than those underlying the old land claims commission. Provided that necessary adjustments were actually made in the hearings and on the ground (which was by no means always the case) Maori may have come away from the process having felt they had made a genuine negotiation based on common understanding, even if it were a different kind of transaction from the one they had initially intended.

For this reason, despite the doubts that exist over the adequacy of the commissioners' investigations, and despite the Crown having propelled Maori towards one form of alienation only – absolute sale – it is difficult to conclude that each and every old land claim remained inequitable at about 1860, in the sense that it lacked Maori understanding and consent.

Lack of adequate discussion and consent certainly seems to have been common in Muriwhenua largely because there was no early investigation and readjustment of most of the claims – indeed no Land Claims Commission investigation at all in respect of many of the scrip lands. Where there was delay Maori tended to reassert their control of the land and their view of transactions. Poverty Bay is an area which Godfrey and Richmond did not reach; when Bell tried to investigate the transactions in 1859 he was virtually ordered out by the runanga.

Even more difficult to discern are the situations where settlers and officials thought they genuinely had a genuine understanding with Maori but in fact did not. Moreover, if this included an expectation by Maori of ongoing relationship and exchanges, the failure of these to materialise might not evoke immediate Maori protest, but could make the alienations a focus of grievance much later. This seems to have been the case in north Auckland, whence came most of the petitions and protests about the pre-1840 transactions.

In this context the Crown's taking of a surplus becomes a subsidiary consideration, although a far from unimportant one. If the whole transaction was adequately discussed and appropriate adjustments agreed and made, the Crown's taking of a surplus may have been understood and accepted as well, as Bell claimed it was. If the nature of a sale, as extinguishing pre-1840 Maori rights in the land, was not genuinely understood and accepted, then the Crown's taking of a surplus simply would not have been understood and accepted either.

Then there are the cases like the Fairburn purchase where the Godfrey–Richmond recommendations were ignored or forgotten by the Government and later Maori protesters paid off. The fact that no further Maori protest occurred was probably because so many tribes had interests in the land and were confused about their rights there – perhaps ignorant even of what the deed of sale entitled them to. In such cases unfulfilled Maori entitlements simply became forgotten.

Another sense in which Maori Treaty rights may have been overridden, is that in some areas too little land was left for Maori for their future needs, if not by the old land claims process alone then by that process plus subsequent Crown purchases. Tribunal researchers have calculated that about 11 percent of Muriwhenua was alienated through old land claims and 25 percent of the Bay of Islands.<sup>74</sup> Much of this was land of the best quality, on the rivers and harbours. Taken with the Crown purchases occurring about the same time as Bell's commission, the diminution of Maori interests was serious. Nor was there the off-setting prosperity which Maori had expected. Once the settler assembly took control in the 1860s, the northern Maori sense of alliance with the Crown weakened and a sense of something like

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74. Rigby, Daamen, and Hamer, pp 213–215

betrayal developed. In that context the old land claims and the Crown's handling of them loomed as grievances – as giving up a lot and receiving little back. This alone goes far to explaining why there is a persistent sense of grievance about the old land claims in the Bay of Islands and northwards. Te Hemara, a Bay of Islands and Mahurangi elder speaking at Paora Tuhaere's 'parliament' at Orakei in 1879, referred to the iron pots, fish-hooks, blankets, and shirts given for land by the missionaries. He said 'The whole of the Bay of Islands was purchased with these worthless articles'. When Government was established Maori had lost all their land: 'the Ngapuhi trembled under the feet of the stipulations they had made with the Queen.' The missionaries had 'meddled with the land; and, as they were sent by the Queen, she is responsible.'<sup>75</sup> The people of the far north, Muriwhenua, did not even get the growth of townships in their vicinity which was part of their purpose in the transactions.

By contrast, Hauraki Maori benefited considerably for some years by being able to sell timber and other produce to Pakeha sawmillers and traders settling on their coast, or to trade with Auckland. In this sense their purpose in the pre-1840 transactions was largely fulfilled, and since they had transacted relatively little land at that stage (albeit strategic and important land) their objections tended to focus on particular issues, such as McCaskill's, rather than on the pre-1840 alienations or the Crown surplus per se. Even the Fairburn purchase, by far the biggest of all the Crown surplus areas, did not become a serious point of contention after the 1851 payments. Later alienations, the gold rushes and the spate of Crown purchasing seem to have overtaken the old land claims in Hauraki's perspective of loss.

### 2.16.8 An approach to redress?

Although the evidence of what Maori intended in pre-1840 transactions is contradictory in some respects, it is very unlikely that in more than a minority of cases – perhaps a very small minority – that Maori intended to convey absolute title and relinquish all connection with the land. Moreover, prices initially paid for the land were usually very low and in some cases derisory. On the other hand, many of the old land claims were adjusted in various proceedings. Boundaries were adjusted and additional payments made. In the process the notion of permanent alienation of the land probably was apprehended by Maori in many instances. It would appear that not each alienation has smouldered as a specific grievance among the former owners and their descendants. It therefore scarcely seem appropriate to open *each one individually* to review now. Moreover, the evidence surviving in relation to many of the claims is thin and would not disclose with any precision the contemporary understandings and feelings of the parties affected.

Yet doubts have persisted, particularly in north Auckland, as to the adequacy of the Crown's proceedings in regard to the pre-1840 transactions. Research shows that, on the admission of the Crown's officers themselves, about the time of the

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75. Te Hemara Tauhia, AJHR, 1879, sess 2, g-8, p 19, cited in Bill Dacker, Michael Reilly, and Lee Watson, 'Te Mamae me to Taumaha,' Rangahaua Whanui Series unreleased draft, 1996, p 77

completion of the Godfrey–Richmond commission's work, doubts were entertained as to the whether the consent of Maori owners to an absolute alienation had been ascertained. The complexity of Maori right-holding and the newness of the concept of exclusive possession would have made such a conveyance inherently difficult. Maori objections to the Crown's taking a surplus, rather than grant the whole claim to the settler, suggests that Maori had not then seen themselves to have relinquished all interest in the land by the pre-1840 transaction. Research also suggests that subsequent proceedings (for example the Bell commission), while clarifying the nature of the transactions for some Maori, may have cloaked or glossed over other outstanding disagreements.

These persistent doubts, and persistent Maori complaints in north Auckland, caused the Myers commission in 1948 to attempt some general compensation rather than to approach the issue on a case by case basis. Their approach is understandable. Whether their calculation of the recompense was appropriate, is another matter. Myers himself came closer than his fellow commissioners to understanding the facts, in the present writer's opinion. But, as mentioned earlier, trying to calculate recompense on the basis of a discrepancy between the area estimated by the purchaser and the area eventually surveyed seems a somewhat illogical proceeding, given that Maori were not thinking in per acre prices in the first place. The 'under-payment' to Maori in not providing the settlements and the services they expected would be far higher than Myers' calculation allowed. So too would recompense for inadequate reserves or reserves promised and not made, or the exclusion of Maori from the future ownership and management of the land by the Crown's insistence on the sale of the freehold (although, as has been argued, Maori, in many some cases at least, accepted that situation and renegotiated accordingly).

In the light of the above analysis it would seem appropriate to apply the Tribunal's approach to remedy as discussed in the Orakei report, looking to the future and seeking to remove the prejudicial effect of land loss by restoring a tribal economic base. Old land claims and Crown surpluses might therefore be included as an element to be considered in Treaty settlements according to the proportion they constituted of a tribe or district's total land alienations – a very significant proportion in Taitokerau. There would appear be a need to pursue more specific inquiries only in respect of the cases where persistent Maori protest, dating from the time of the Godfrey–Richmond or Bell inquiries appears to have been overlooked or overridden.

