

## CHAPTER 7. LAND PURCHASES AND MAORI RIGHTS TO FLORA AND FAUNA, 1800-1875

### 7.1 Introduction

Central to this report is the thesis that one of the major ways in which Maori lost access to and control over indigenous flora and fauna – if not the major way – was through their land passing out of their ownership. A comprehensive survey commissioned by the Waitangi Tribunal has shown that by 1910, virtually the end of the period with which this report is concerned, only 27.5 percent of New Zealand remained in Maori ownership.<sup>1</sup> The idea that in alienating their land (or otherwise losing title to it) Maori lost access to and ownership of the flora and fauna upon it, is consistent with English common law: the customary title over a piece of land including rights to all flora and fauna was extinguished through the Crown or another party purchasing it. But in a purchase, rights could be reserved to the vendors that meant the title acquired by the purchaser was encumbered by vestigial rights. Generally it was the case that in purchasing Maori land, the Crown assumed that it was extinguishing all incidents of title. However, an absolutely crucial consideration is the extent to which this assumption was apprehended by Maori when they contracted to ‘sell’ their land. This question largely forms the subject of this chapter.

Up until the establishment of the Native Land Court in 1865, purchase was the means by which the Crown sought to extinguish customary title. Its view was that good government and economic growth was contingent upon the extinguishment of customary title, and that any land that was held by Maori within or adjacent to Pakeha settlements should be held by virtue of a Crown-derived title. Consequently, successive governments sought to purchase large areas of land from Maori and then issue Crown grants for reserves that were to remain in their ownership.<sup>2</sup> This practice reflected the view of the Crown that there should be a complete displacement of Maori tenure and control.<sup>3</sup> Importantly in terms of rights to flora and fauna, this policy meant that the Crown sought to extinguish rights to all biota associated with the land, and that the subsequent Crown-derived title was unencumbered by any vestigial rights that enabled Maori to continue using the land in anyway.<sup>4</sup>

1. Alan Ward, *National Overview*, vol 1, GP Publications, 1997, p xxiv (figures included for each of the various land districts were averaged to give this figure)

2. In many cases though Crown grants were not issued when reserves were made. Generally the titles to such reserves were later investigated by the Native Land Court, after which a Crown grant was issued.

3. Waitangi Tribunal, *Muriwhenua Land Report*, GP Publications, Wellington, 1997, p 205

4. See chapter 6 of this report on general land policy.

Since 1985 the Waitangi Tribunal has reported on several large claims in which a major issue has been Crown purchases of Maori land. In hearing and reporting on these claims the Tribunal has devoted considerable attention to the extent to which the contracting parties to such sales understood each other's intentions and aspirations. A key aspect of this analysis is whether Maori understood that under English common law they were surrendering all rights to use, occupy and control the land that was the subject of the deed. In particular, the Tribunal's reports on the Ngai Tahu and Muriwhenua claims are drawn upon in this chapter. The latter also sheds much light on similar questions in relation to what have become known as 'old land claims'; that is pre-Treaty transactions. Another important source for this chapter is the Rangahaua Whanui series and Alan Ward's *National Overview* report – a large report based on the various district and thematic Rangahaua Whanui reports.<sup>5</sup>

As well as this survey of reports to and by the Waitangi Tribunal, a systematic analysis of all the English versions of Crown purchase deeds contained in the compendia of Turton (North Island) and Mackay (South Island) has been undertaken to establish the manner in which Maori interests in flora and fauna were dealt with in purchase deeds. The analysis of Crown purchase deeds forms the latter part of this chapter.

In seeking to answer the central question that this chapter is oriented towards – that is, what rights to flora and fauna Maori understood they were ceding in 'selling' their land – it is not the present author's intention to enter into what has become known as the 'tuku whenua' debate. This debate has its origins in the Muriwhenua inquiry and centres around the issue of whether Maori, in entering into contracts concerning their land, were effecting permanent alienations or were granting something more akin to a temporary occupation right.<sup>6</sup> But insofar as many issues germane to the idea of tuku whenua are relevant to how rights to flora and fauna were dealt with in purchases, and how these aspects of these transactions were understood by Maori, these issues are briefly considered in this chapter.

The focus of this chapter is on Crown purchases undertaken between 1840 and the mid-1870s. This is because the first decades of the colonial period were instrumental in forming Maori perceptions of sales and alienation, and because after 1865 and the advent of the Native Land Court, purchases ceased to be the primary mechanism by which the Crown ex-

5. An explanation of the Rangahaua Whanui programme can be found in Ward's *National Overview* (pp xv–xvii).

6. see Waitangi Tribunal, *Muriwhenua Land Report*, GP Publications, Wellington, 1997, pp 73–76

tinguished customary title.<sup>7</sup> Pre-Treaty land transactions, or ‘old land claims’, are also examined because they were instrumental in shaping early Maori perceptions of ‘sales’, and because the Crown adjudicated upon their validity after the signing of the Treaty.

## 7.2 Old Land Claims

Prior to the signing of the Treaty of Waitangi in 1840, there were over 1000 transactions between Pakeha and Maori involving land whereby Europeans acquired some form of title or occupation rights to land in New Zealand.<sup>8</sup> These have become known as ‘old land claims’ and have been subject to lengthy investigations – both immediately after the signing of the Treaty, and over the subsequent 160 years. The Tribunal’s Muriwhenua inquiry was the latest major investigation into the nature of these inquiries. Although the Crown was not originally party to these transactions, subsequent to acquiring sovereignty in New Zealand it constituted special commissions to investigate the alleged purchases. If the commission considered them to be legitimate purchases it recommended a Crown grant be issued to the Pakeha claimant. Where the commission found that a purchase actually occurred, the Crown generally granted a title to only a fraction of the original area claimed, and the Crown vested the surplus in itself.<sup>9</sup>

The evidence suggests that although Pakeha generally considered they were acquiring a freehold title to the land (but not always), the perception of the Maori vendors was somewhat different. According to Ward, Maori views of the transactions ‘commonly had more to do with admitting Pakeha into their communities in the expectation of ongoing benefits, without relinquishing rights in the land altogether.’<sup>10</sup> This view – that Maori, in entering into contracts for land with Pakeha prior to 1840 were simply trying to secure Pakeha to live amongst them and were not ceding title to vast tracts of their territory – recurs through out both the primary and secondary sources concerning old land claims in New Zealand. It emerges very clearly in the land claims commissioners’ investigations into the transactions subsequent to the signing of the Treaty. By 1842 it was apparent to the commissioners that Maori had no intention of completely alienating all the land within the ‘vast general boundaries’ de-

7. However, the Crown continued to purchase large amounts of Maori land after the advent of the Native Land Court in 1866. The key difference was that in this period it was generally buying the land after the customary title had been converted to a Crown-derived title by the Native Land Court. For example, between 1891 and 1911 the Liberal Government purchased 3.1 million acres of Maori land. Tom Brooking, “Busting up” the Greatest Estate of All: Liberal Maori Land Policy, 1891–1911; *New Zealand Journal of History*, 1992, vol 26, no 1, p 78

8. Ward, *National Overview*, vol 1, p 45

9. see Ward, *National Overview*, vol 2, chapter 2

10. Ward, *National Overview*, vol 1, p 45

scribed in the pre-1840 deeds. The commissioners observed that in many cases Maori had continued to live and use the natural resources within the boundaries of the deed.<sup>11</sup>

Indeed even after old land claims had been investigated and the Crown had awarded a portion of the area to the Pakeha claimant, Maori sometimes continued to use the land and its associated resources. This suggests that Maori did not apprehend the common law position that rights to use all flora and fauna passed with title to the land. Ward observes that even in cases where Maori had stated before the Land Claims Commission that they had sold land and the sale had been confirmed, Maori sometimes sought to sell the rights to the timber upon the land in question.<sup>12</sup> There is also evidence that Maori continued to occupy land that the commission had awarded to Pakeha claimants. The Muriwhenua Tribunal, for instance, described how some Maori of Te Rarawa continued to occupy the Otararau block that had been awarded to a Pakeha by the old Land Claims Commission until the 1960s – over a century after the initial transaction.<sup>13</sup> In his evidence to the British Parliamentary select committee on New Zealand, Robert FitzRoy, later to be Governor of the colony, recounted how Maori who had sold land to missionaries in the Bay of Islands had never been evicted from it, and had been allowed ‘the Right of Common’.<sup>14</sup> It would seem reasonable to conclude that Maori who entered into contracts with Pakeha for land prior to 1840 ‘expected some kind of customary rights to endure, enabling them to co-exist on the land with settlers.’<sup>15</sup>

Generally the Land Claims Commissioners only awarded title to land for which the claimant had a signed deed of conveyance. But although a deed is highly significant to a literate culture under its legal traditions, its status and importance to an oral culture must be queried. In relation to the old land claim deeds the Muriwhenua Tribunal has observed:

A written deed is normally the best evidence of that which was agreed on the ground, but this rule of law has little application when one party is of an oral culture, where written documents are of no consequence, and when they contain terms outside that party’s experience. In that situation, the deed evinces no more than that which the party who drafted it sought to achieve.<sup>16</sup>

Consequently that Tribunal took the view that: ‘Notwithstanding the paper conveyance in the deeds, on the ground nothing was given except

11. Ward, *National Overview*, vol 2, p 39

12. *Ibid*, pp 47, 69

13. Waitangi Tribunal, *Muriwhenua Land Report*, pp 66–67

14. Evidence of Captain R FitzRoy, 11 May 1838, ‘Report and evidence of 1838 Select Committee on New Zealand’; BPP, vol 1, pp 173–174

15. Ward, *National Overview*, vol 2, p 68

16. Waitangi Tribunal, *Muriwhenua Land Report*, p 56

a right to use and occupy; and that was subject to compliance with local laws and customs and contribution to the local community.<sup>17</sup>

In thinking about what Maori may have understood to have been transacted in pre-1840 deeds, it is instructive to consider the ways in which Maori held rights in land and its associated resources. Rather than a conception of absolute rights to everything within continuous and discrete boundaries, Maori ‘thought in terms of scattered property rights in land, birds, trees, eel weirs, fernroot patches, pipi beds, and garden lands.’<sup>18</sup> Given this, the Muriwhenua Tribunal advanced the general principle that a chief could allocate rights to use a particular resource rather than rights to all resources and land within a defined area.<sup>19</sup> From that it follows that transferring all rights to all resources within a specified area – essentially what constituted a sale – was inconsistent with traditional tenure and chiefly rights.

Expecting Maori to subscribe to the Pakeha view of the sales was all the more untenable given that the boundaries were often never surveyed until years later.<sup>20</sup> Another factor that mitigated against Maori fully apprehending the Pakeha conception of the transactions was that the person who had supposedly bought the land often did not occupy it for many years; in some cases even after the purchase had been upheld by the Land Claims Commission. According to Maori thinking, if the land was not taken up by the settler who entered into the contract, their rights would have lapsed.<sup>21</sup> This was consistent with the Muriwhenua Tribunal’s finding that what Maori bargained for with Pakeha in pre-1840 transactions were not property rights but an ongoing relationship that was personal, and therefore not transferable. Hence the contracts were social compacts rather than property conveyances. A corollary of this was that if a settler vacated the land in question, the contractual arrangements ended.<sup>22</sup> In this way people were not acquiring the land itself but were buying into the ancestral community with whom the underlying rights to the land remained.<sup>23</sup>

In relation to the old land claims Ward concludes that the ‘European sense of “exclusive possession” was probably not fully apprehended by Maori in respect of any of the pre-1840 purchases or until sometime afterwards’. Further, it was ‘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’.<sup>24</sup> Similarly the Muriwhenua Tribunal determined that although Maori were not neces-

17. *Ibid*, p 87

18. Ward, *National Overview*, vol 2, p 32

19. Waitangi Tribunal, *Muriwhenua Land Report*, p 106

20. Ward, *National Overview*, vol 2, p 32

21. *Ibid*, pp 50, 68

22. Waitangi Tribunal, *Muriwhenua Land Report*, pp 88–89, 108

23. *Ibid*, p 106

24. *Ibid*, pp 47, 72

sarily all of the same view in the far north, it was highly unlikely that they considered pre-1840 land transactions as 'sales' in the European sense. Critical to this position was that there was insufficient evidence to show that the principles of traditional Maori land tenure had been displaced – principles that were antithetical to the principles of European tenure.

In terms of rights to flora and fauna then, it seems highly unlikely that Maori considered they were ceding rights to all natural resources within the boundaries when they entered into contracts concerning land with Europeans prior to 1840. But to what extent did the European parties to such contracts think that they were acquiring exclusive rights to such lands? It would appear that while some took this exclusive view of purchases, others – notably some missionary organisations – considered that they had obtained some occupation and use rights to a particular area of land, and that the acquisition of these rights had not extinguished the prior rights of Maori. It is significant that precedents for the coexistence of such rights being held by different people over the same land were to be found in England at the time in the case of the commons (see discussion of this in chapter 5). The fact that missionaries allowed Maori to continue using land that was subject to a contract between them – in all likelihood because they were powerless to stop them, and that other supposed purchasers did not take up the land they later claimed they had acquired the freehold to immediately, contributed to a view on the part of Maori that they had not absolutely surrendered their rights to the land. Perhaps most important though was that there was no precedent for such cessions in Maori experience up until that point in time. And it is not plausible that the precepts of English land tenure had displaced those of Maori by 1840.

But it seems likely that the Maori experience of the old land claims – particularly their investigation and adjustment by the Crown – imbued Maori with a sense of the permanence of the alienations once they had been confirmed by the Crown. Ward, for example, considers that by 1843 or thereabouts 'it is scarcely credible that Maori would not have gained some understanding . . . that the land concerned was passing from them permanently.'<sup>25</sup> This would of course only have been the case for Maori in areas where there had been large numbers of pre-Treaty transactions. This chapter now turns to looking at similar issues in connection with purchases conducted between 1840 and 1865, particularly whether Maori

25. *Ibid.*, p 47

came to appreciate whether their rights to all flora and fauna upon land they alienated were extinguished.

### 7.3 Crown purchases, 1840–1865

With the exception of the years 1844 to 1846, between 1840 and 1865 the Crown maintained its right of pre-emption as enshrined in the Treaty. This meant that only it could purchase land from Maori. This period saw large areas of New Zealand pass out of Maori ownership. For example, between 1840 and 1865 the Crown purchased 99 percent of the South Island, 75 percent of the Wairarapa and 55 percent of South Auckland.<sup>26</sup>

At the outset of British Government in New Zealand, the Crown was under instructions to both recognise Maori property rights and protect Maori interests. This is clearly set out in the formal instructions of the Colonial Secretary, Lord Normanby, to Governor Hobson of 1839. Normanby stressed that contracts with Maori were to be 'fair and equal' and instructed that this was to be achieved through the appointment of an officer who would protect the interests of Maori. He informed Hobson that dealings with Maori for their land should be conducted on principles of sincerity, justice and good faith; that Maori should not be allowed to enter into contracts that would be injurious to them; and that land that was essential for their subsistence and comfort should not be purchased from them.<sup>27</sup> But despite these instructions the Crown vacillated for seven years before recognising Maori rights under the Treaty to all so called 'waste lands', as well as to their villages and cultivations.<sup>28</sup>

In its consideration of the Ngai Tahu claim, the Waitangi Tribunal was clear on the point that the duty of protection implicit in Hobson's instructions, extended to ensuring that Maori understood the implications of selling:

To satisfy themselves that Ngai Tahu understood the nature of the transactions they were being invited to enter into, the Crown purchase agents would need to explore several questions. For example, was finality really understood by the Maori? Did they understand that there was no necessary and contractual ongoing relationship entailed in the sale; that payment was not a koha; that the vendor might have no residual rights such as the right to protect (and have access to) wahi tapu; to

26. *Ibid*, p 167

27. Cited in Waitangi Tribunal, *Ngai Tahu Report 1991*, vol 3, Wellington, Brooker and Friend Ltd, 1991, p 831

28. Ward, *National Overview*, vol 1, p 52

protect the land from physical and spiritual pollution according to Maori values and the right to conserve the resources of the land for common benefit according to these same values; that the sale did not entail the right to share the land or its fruits with the buyer, or make any further claim on him, or that money was less durable an asset than land and that it should be valued as a means for saving and investment lest it ultimately prove to be of little value.<sup>29</sup>

Clearly within the ambit of these responsibilities was the need to ensure that Maori understood that by selling their land they would legally lose the right to use all the flora and fauna upon it.

But there was an obvious tension between the imperative of protection and the Crown's objective of extinguishing customary title through the purchase of Maori-owned land. This objective would appear to have been a fundamental aspect of Crown policy in the period 1840 to 1865. Officials assumed that Maori tenure, law and authority should be replaced by those of the Crown as a consequence of its sovereignty. As the Waitangi Tribunal has observed, by 'taking a cession of land, preferably by purchase, the Government deemed the native title – that is the native right to use it and the native authority over it – to have been extinguished.'<sup>30</sup> That the transactions were termed 'deeds of cession' rather than simply lands conveyances, reflects the fact that the Crown sought the total extinguishment of native title. This gave rise to the Crown's preference for purchases of huge areas with sections of freehold land then being granted back to Maori.

The Crown's purchases immediately after its right of pre-emption was restored during Grey's first Governorship were characterised by large 'blanket purchases' over vast areas that purported to unilaterally extinguish customary title, as discussed above in chapter 6.<sup>31</sup> In 1854 the Land Purchase Department was established, headed by Donald McLean. To McLean's mind there were literally millions of acres of land going to waste under Maori tenure, and he was determined to 'obviate this evil' by executing purchases throughout the country. This, he considered, would be to the benefit of both Pakeha and Maori alike. Maori, he claimed, would profit by having their 'claims and territorial rights that are frequently creating war and bloodshed among the tribes equitably adjusted, and rendered available for their own advancement'.<sup>32</sup> By this time the Government had drafted model purchase deeds in Maori that were pro-

29. Waitangi Tribunal, *Ngai Tahu Report*, vol 3, p 832

30. Waitangi Tribunal, *Muriwhenua Land Report*, p 205

31. Ward, *National Overview*, vol 1, p 52

32. McLean to Colonial Secretary, received 19 October 1854, IA 3/1855/2618, cited in H Walter, 'Land Purchases Policy and Administration, 1846–56', Draft preliminary report, Waitangi Tribunal Rangahaua Whanui Series, 1994, p 12

vided to land purchase officers. These templates made explicit reference to timber, water and subsurface rights, and emphasised that the land was passing forever out of Maori ownership.<sup>33</sup> By the time McLean was forced from office in 1861, his department had acquired around 5 million acres in the North Island and 11 million in the South Island.<sup>34</sup>

An event that was instrumental in McLean's decline was the Waitara affair that culminated in the Taranaki wars of the 1860s and later spread throughout most of the North Island. The war in Taranaki was, according to Ward, 'truly damning evidence of Crown purchase methods before 1865' – methods that he points out were by no means peculiar to Taranaki. Government officials, in conducting purchases, took systematic advantage of the complexities of Maori land tenure, especially the competing and overlapping interests of different hapu and those resident hapu who were subject to the control of overlord chiefs. Another factor that could be preyed upon was Maori uncertainty as to their relative rights, chiefly or otherwise, in this new activity of 'selling land'. In terms of securing agreement to sell land, officials often dealt with whatever group or chief seemed most likely to acquiesce, not necessarily who had the strongest claim to the land. Advance payment to compliant chiefs further exacerbated tensions between those willing to sell and those who were opposed. This sort of activity put pressure on other chiefs who feared that the land might be sold from under them and they miss out on receiving any payment for their land.<sup>35</sup>

In the negotiation of purchases a major issue for Maori was often the reservation of mahinga kai – swamps, eel weirs, stands of forest, and so forth. In the case of some purchases of Ngai Tahu lands in the South Island for instance (see below) it seems unlikely that Maori would have agreed to sell if they had not received assurances – either verbally or in the deed – that they would continue to have access to their traditional food resources. A major issue in respect to mahinga kai and purchases is the scenario where Maori received verbal assurances of continued access to traditional resources that were not reflected in the eventual purchase deed. For example, in 1849 Donald McLean entered into negotiations for the purchase of land in the Manawatu with some chiefs of Ngati Apa, discussed above in chapter 6. The chiefs were concerned that in selling their land they might lose their rights to hunt birds upon it. McLean, however, assured them that they would be free to continue taking birds after the land was sold. Having been given this assurance, the Ngati Apa

33. Ward, *National Overview*, vol 2, p 144

34. *Ibid*, p 147

35. Ward, *National Overview*, vol 1, p 53

chiefs agreed to the sale and signed the deed – the text of which made no mention of Ngati Apa's birding rights being reserved to them.<sup>36</sup> Another major issue where mahinga kai were actually reserved to the vendors was what mahinga kai was deemed to mean: just cultivations or all food-gathering areas.<sup>37</sup>

But as well as efforts to preserve access to mahinga kai, their depletion has been recorded as a reason why Maori in fact sold their land. Angela Ballara records that one of the reasons chiefs in the Hawke's Bay were willing to sell large blocks of land in 1850 was that the birds and native rats that made them valuable had largely vanished.<sup>38</sup>

Issues concerning Crown purchases are discussed further below in relation to purchases in Muriwhenua, Wairarapa and the South Island. Although Ngai Tahu are not a party to the Wai 262 claim, because issues of mahinga kai were central to their claims to the Waitangi Tribunal concerning Crown purchase activity, and because the Waitangi Tribunal dealt with these issues substantively in its report, the Crown's purchase of their lands have been included as an illustrative example in this section.

### 7.3.1 Muriwhenua

Between 1840 and 1865 the Government acquired a further 280,177 acres of Maori land in Muriwhenua above and beyond what it had repurchased in the 'tidy-up' of the pre-1840 transactions.<sup>39</sup> In its consideration of this period of land acquisition, the Waitangi Tribunal took the view that 'Maori understandings about property and the primacy of personal relations remained as it always had been, so as to forge a distinctive Maori approach to the Government's buying programme.' Consequently whereas the Government could only see a sale, Maori saw a plan for settlement in which they would be partners with the Governor and substantial beneficiaries in a new economic regime. The Tribunal concluded that these hopes for the future were so divergent from the Government's intention of extinguishment that the arrangements the two parties entered into were 'marred by a lack of mutuality or common purpose'.<sup>40</sup>

The Muriwhenua Tribunal was of the view that the kaupapa or principle that underpinned the arrangements concerning land was one of partnership and cooperation. Consequently, Maori sought to maintain relations with the Governor so that their hapu could fully participate in the new economy.<sup>41</sup> In entering into arrangements over land in the dec-

36. McLean report, 10 April 1849, McLean papers, ATL, micro 535-002, folder 3; Copy of purchase deed, May 1849, in McLean papers, ATL, micro 535-002, folder 3

37. Ward, *National Overview*, vol 2, p 140

38. Angela Ballara, *Iwi: The Dynamics of Maori Tribal Organisation from c.1769 to c.1945*, VUP, Wellington, 1998, p 240

39. Waitangi Tribunal, *Muriwhenua Land Report*, p 181

40. *Ibid*, pp 181–182

41. *Ibid*, p 190

ades immediately after the signing of the Treaty, the evidence shows that Muriwhenua Maori were ‘not wanting to discard their culture or traditional independence in favour of some foreign authority.’<sup>42</sup> And as with the old land claims, the central motivation of Maori entering into arrangements for land after 1840 appears to have been to bring more Pakeha into their midst. The *Muriwhenua Land Report* held that the alacrity with which Maori entered into these arrangements was largely because Maori saw themselves to be in control of the situation and that it ‘was not apparent that land transactions meant a permanent loss of both land and authority.’<sup>43</sup> To the contrary, payments made in respect of land to Maori, plus additional tributes made by Governor Grey and other settlers, confirmed to the Maori mind that the land was still theirs.<sup>44</sup> The Tribunal was clear that Maori assumed their status and authority would be maintained and that their children after them would retain their ancestral associations with their land: ‘if an authority over the land was maintained, then the ancestral link with the land was continued, no matter who was in occupation.’<sup>45</sup>

Although Maori were seeking to engage with new economic opportunities, ‘Maori lifestyles were still Maori, firmly embedded in custom’. In relation to this the Tribunal observed that ‘in pursuit of the new social and economic goals, the traditional Maori views about their status and authority in the land, their relationship to the land, and the way people should relate to one another, continued to be important to Maori, just as they are important to Maori today.’<sup>46</sup> The Tribunal’s reasoning in arriving at this view of the prevalence of traditional values was fourfold. Firstly, Maori remained the predominant population in Muriwhenua. Secondly, although profound changes in material culture occurred, these were accommodated within customary group structures. Similarly, although a new religion was adopted, this was seen by the Tribunal as being in basic harmony with Maori values and beliefs. Changes were therefore held to be superficial.<sup>47</sup> Thirdly, unique Maori customs endured. And lastly, in entering into arrangements in relation to land, Maori were concerned not with conveyancing and alienation, but with settling Pakeha upon their land.<sup>48</sup> On this point the Tribunal observed:

Customary views of land tenure, contracts and human relationships . . . were part of such an entrenched social system that we do not consider its displacement can be assumed simply because of evidence of

42. *Ibid*, p 189

43. *Ibid*, p 191

44. *Ibid*, p 191

45. *Ibid*, p 190

46. *Ibid*, p 194

47. *Ibid*, p 194

48. *Ibid*, p 200

superficial changes, no matter how extensive those changes might have seemed. Old views on ancestral land continue to be applied today, despite the alternative provisions in statutory Maori land law.<sup>49</sup>

The Tribunal therefore concluded that it was likely new understandings would have developed only very slowly and over several generations. After a consideration of evidence presented by the Crown that Maori did understand the concept of land sales, it took the view that the transactions were not seen by Maori 'to carry all the consequences that a person familiar with English land sales would have taken for granted, or that they were seen to omit those expectations that a Maori would assume when contracting.'<sup>50</sup> Important in arriving at this view was the primacy Maori would have afforded to the oral contract over the written deed – the decision to sign a deed would have had more to do with confirming what was agreed in the preceding negotiations and discussion than the actual terms of the deed.<sup>51</sup>

But what does all this tell us about the Maori understandings of the transactions as they related to rights to flora and fauna? In its report on the Muriwhenua claims, the Tribunal does not consider this specific question (and the present author has not had the opportunity to study the evidence presented to it in the course of its inquiry). However, from its findings and reasoning set out in the report, it is possible to pose some tentative answers to this question. The fact that Muriwhenua Maori did not apprehend the transactions as being a permanent extinguishment of their rights to the lands in question suggests that they considered at least some of their rights to the flora and fauna upon it endured.

The idea that from a Maori point of view the transactions were about admitting Pakeha into their communities and did not extinguish their rights to flora and fauna is consistent with how rights were held and exercised over land traditionally in Muriwhenua. Importantly, this system of tenure, which clearly had not been displaced at this time, allowed intersecting and overlapping rights to be held and exercised by different groups over the same areas of land. Hence it seems tenable that Maori could have 'sold' land to the Crown in the expectation that Pakeha would live amongst them, sharing the area's resources such as fish, birds and firewood. In such a scenario, though, Maori would have been clearly in control, and the status of the land as their ancestral property would have been unmitigated.

49. *Ibid*, p 198

50. *Ibid*, p 201

51. *Ibid*, p 200

Another factor that must be considered in relation to these matters is the oral negotiations that transpired prior to the signing of the deed. Without having researched this history, it is hard to say much other than raise the possibility (as is evident in other land negotiations elsewhere in New Zealand) that in negotiations, the aspirations and understandings of Muriwhenua Maori were expressed and even assented to by the contracting Pakeha party. These negotiations may have dealt with rights to natural resources and resulted in agreements about continued use that were not reflected in the deeds. Another possibility is that the issue was never addressed: Maori assumed they would enjoy continued access to the resources, whereas the Crown's agents assumed the tenets of common law would prevail.

### 7.3.2 Wairarapa

The history of Pakeha settlement and land acquisition in the Wairarapa is particularly interesting in terms of Maori authority and rights over flora and fauna. As is recounted in other chapters of this report, the region was settled very early by European pastoralists who grazed sheep upon the indigenous grasslands of the Wairarapa plains. Initially the pastoralists secured the right to do so through entering into lease agreements with local chiefs. Although very profitable for Wairarapa hapu, the leases were technically illegal under the Land Claims Ordinance 1846 which gave effect to the Crown's Treaty right of pre-emption, forbidding anyone other than the Crown from treating with Maori in relation to the alienation of their land.

Paul Goldsmith, in an overview report for the Waitangi Tribunal, contends that the system of leases that evolved in the Wairarapa was relatively easily accommodated into Maori conceptions of tenure, being in practice a recognisable process for Maori. Maori were in control and were able to change the terms of the leases as it suited them. He describes how Maori raised the rental, demanded additional payments for timber, and cultivated lands after they had leased them.<sup>52</sup> Vincent O'Malley has pointed out how such transactions, typically establishing an ongoing and flexible relationship in which the tangata whenua remained firmly in control, were consistent with what has become known as the concept of *tuku whenua*.<sup>53</sup> Goldsmith concluded that in the system of leases 'there was a

52. Paul Goldsmith, *Wairarapa*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1996, p 5

53. Vincent O'Malley, 'The Ahuriri Purchase: An Overview Report Commissioned by the Crown Forestry Rental Trust', 1995, p 16, cited in Goldsmith, p 5

pattern of profitable development for both Maori and settler that appeared to have potential.<sup>54</sup>

The Crown, however, found nothing to celebrate in the leases and began an intensive campaign to purchase Wairarapa lands from their Maori owners in order to extinguish their native title. But throughout the 1840s it enjoyed little success as Wairarapa Maori, happy with the lease arrangements, refused to sell. Finally in 1853 it succeeded in breaking the deadlock, and between June of that year and January 1854, Wairarapa Maori agreed to sell around 1,500,000 acres of land.<sup>55</sup> Goldsmith's analysis of these early purchases shows that as well as Maori being granted reserves from the purchases, some deeds guaranteed Maori would continue to enjoy use rights over the land sold. For instance, the deeds for the Western Lake, Eastern lake, and Morrison Blocks all made provision for Maori to be able to continue eel fishing within the purchase boundaries. As well as eel fishing rights, the deed for the Whareama 2 block reserved to the vendors their cultivations at Mangapiu, and stated that the firewood there was to be used by them and future European settlers. However, as Goldsmith notes, these reservations were vague. Did a right to take eels give Maori the right to go onto the land once it had been on-sold to Pakeha? And who actually owned the forests that were the source of the firewood? But however vague these provisions were, they are significant in that they could have encouraged the view amongst Maori that the deeds were not simply one-off payments that forever closed the deal and that extinguished all rights to flora and fauna.<sup>56</sup> The 'five percents', whereby Maori were to receive five percent of revenue the Crown generated from the on-sale of their land, would also not have reinforced the impression that once the initial payment had been received, the deal was concluded forever.<sup>57</sup>

In his report Goldsmith addresses the 'difficult question' of how Wairarapa Maori understood these early transactions. He takes the line that given they would have observed the earlier 'sales' in Wellington and the Hawke's Bay, had adroitly managed the lease arrangements, and that the Wairarapa deeds contained lengthy tangi clauses that mourned the passing of the land 'forever', it is unlikely that they would not have understood the full implications of their decision to sell the land. In contrast to this position though is the view of William Searnacke, expressed before the 1856 board of enquiry on Maori Land. He told the enquiry that in the case of sales in the Wairarapa and Horowhenua, Maori 'did not suppose that they were selling the fee simple of the land.'<sup>58</sup> Goldsmith suggests that

54. Goldsmith, p 8

55. *Ibid*, p 19

56. *Ibid*, p 38

57. For details of the Wairarapa 'five percents', see Goldsmith, pp 23, 97–99

58. Walter, p 31

Searnacke's motives for making such a statement need to be further researched, apparently discounting the possibility that he was actually correct in his statement, instead implying that Searnacke was politically motivated in making the statement. But Goldsmith does allow that the use rights that were preserved in some of the deeds could have given rise to some confusion, and that 'the murky area emerges about understandings of the exclusive and complete nature' of the sales.<sup>59</sup>

Instances of Maori who had supposedly 'sold' their land later demanding further payment for resources upon it add further weight to the thesis that at least some Wairarapa Maori did not apprehend the transactions as being total extinguishments of their rights. For example, in 1854, Maori in the vicinity of present day Masterton demanded that settlers pay five shillings for every tree they cut down upon land that they had already sold.<sup>60</sup> Such scenarios, however, do not necessarily mean that Maori did not consider themselves to have parted with the actual land. Rather, they could have seen themselves as retaining the ownership of the forests even though they had parted with the underlying soil. Importantly there is common law precedent for this sort of reservation being made. What is critical though is that the Crown appears to have always assumed that in purchasing Maori land it was acquiring it unencumbered by any vestigial rights, unless exceptions were agreed to in negotiations and noted in the deed.

### 7.3.3 The Ngai Tahu purchases

Between 1844 and 1863 the Crown purchased all of the lands that are today considered to have made up the traditional rohe of Ngai Tahu. These lands amounted to over 80 percent of the South Island.<sup>61</sup> Of the lands purchased, a small area was vested in Ngai Tahu as reserves. The purchases were the focus of the Waitangi Tribunal's inquiry into the Ngai Tahu claims, reported on in 1991.<sup>62</sup>

In its overview of the Crown purchases, the Tribunal concluded that although Ngai Tahu were willing to sell, it was 'highly likely they expected many of their traditional usages to continue in the foreseeable future over much of their land, in particular their access to mahinga kai.' Indeed evidence shows how throughout the 1850s Ngai Tahu that had sold their land cultivated and grazed stock beyond their reserves, and continued to hunt and forage as much as they had previously. The Tribunal took the

59. Goldsmith, p 38

60. Ibid, p 55

61. Harry C Evison, *Ngai Tahu Land rights and the Crown Pastoral Lease Lands in the South Island of New Zealand*, Ngai Tahu Maori Trust Board, Christchurch, 1986, p 8

62. Waitangi Tribunal, *Ngai Tahu Report*, 3 vols, Brooker and Friend Ltd, Wellington, 1991

view that in selling their lands, Ngai Tahu contemplated an ongoing relationship with both the Crown and the Pakeha who subsequently settled upon it. It held that initially Ngai Tahu 'would have had little real understanding of the finality and irrevocability of the sale of their land or of their consequential permanent alienation from it and its resources.' It was only after some time when settlers began to take up the land and exclude Ngai Tahu from it that they came to realise the full significance of the transactions. 'Increasingly Ngai Tahu became confined to their minimal reserves and the prospect of poverty and isolation.'<sup>63</sup>

To provide an illustration of the process by which the Crown secured the agreement of Ngai Tahu to surrender their lands, and how rights to flora and fauna were dealt with, a brief account of the Otakou, Murihiku and Kemp purchases follows.

The Otakou purchase, transacted in 1844, saw the Otago peninsula and much of south Otago pass out of Maori ownership. The negotiations for the purchase were the only ones at which an independent protector of Maori interests was present. The deed that was signed stated that Ngai Tahu 'give up, sell and abandon altogether' the lands described. The chiefs that signed the deed also traversed the boundaries of the purchase with representatives of the Crown and the New Zealand Company, and identified the areas that were to be excepted from the sale and reserved to Ngai Tahu. Evidence shows that during the negotiations the protector, George Clarke, explained to Ngai Tahu the boundaries of the purchase, that they forever surrendered their interests in the land, and that their consent was binding upon their descendants. Clark later reported that Ngai Tahu fully understood the contents of the deed. The Ngai Tahu Tribunal concluded 'that in this instance the Crown made reasonable efforts to ensure that Ngai Tahu understood the full implications of the deed.'<sup>64</sup> The deed, however, made no mention of rights to flora and fauna passing, just that vendors agreed to 'give up, sell, and abandon altogether' their 'claims and title to the lands comprised within the undermentioned boundaries'.<sup>65</sup>

In 1848 the Crown secured the agreement of Ngai Tahu to part with 20 million acres in the middle of the South Island – basically what is modern day Canterbury and Westland.<sup>66</sup> The Crown agent who negotiated the purchase, Henry Tacy Kemp, was instructed to first survey the land and then exclude from the purchase all the land that Ngai Tahu wished to retain. He did not do this however. Instead he insisted that the whole area be

63. Waitangi Tribunal, *Ngai Tahu Report*, vol 3, p 823

64. *Ibid*, pp 833–834

65. Deed reproduced in Waitangi Tribunal, *Ngai Tahu Report*, vol 3, pp 1075–1076

66. The west coast was later repurchased as the Arahura Block in 1860.

purchased, promising Ngai Tahu that lands they wished to retain would later be returned to them as reserves.<sup>67</sup> However, in the event only minimal reserves were awarded to Ngai Tahu – insufficient for them to continue traditional or engage in new economic practices.<sup>68</sup>

As with the Otakou purchase deed, the Kemp deed was explicit that the purchase was a full and final cession of all the lands within the boundaries of the deed, with the exception of the lands that were to be reserved to Ngai Tahu. These lands were described in the Maori version of the deed as their 'kainga nohoanga' and 'mahinga kai'. In the English version of the deed these terms were constructed very narrowly as 'places of residence' and 'plantations'. As the Tribunal pointed out:

The Maori understanding of the agreement, as recorded in the original Maori deed, goes beyond Kemp's translation. From this and other evidence of the time, it is clear that Ngai Tahu agreed to sell much of their land to the Crown on their understanding that their villages and homes, their gardens and their natural food resources would be retained by them, as well as substantial additional lands.<sup>69</sup>

So whereas Ngai Tahu assumed that they would be able to continue taking resources such as birds and fish, and presumably freely traverse the land in order to do so, the English deed which encapsulated the Crown's understanding and intent, held that only Ngai Tahu's cultivations and places of residence would be reserved to them. Claimants told the Tribunal during the course of its inquiry that Ngai Tahu would not have sold Canterbury if they thought that their mahinga kai would not be reserved to them.<sup>70</sup>

The Murihiku purchase, signed in 1853, was for 7 million acres comprising what is today Southland (including Fiordland) and South Otago. Reserves were agreed to during the negotiations. Once these had been excluded – in total 4,875 acres – the Crown acquired over 7 million acres. As well as the reserves, Ruapuke, Rakiura (Stewart) and several of the Titi Islands in Foveaux Strait were excluded from the sale. The 4,875 acres amounted to a mere 17.89 acres per individual Ngai Tahu recorded as living in Murihiku in the 1850s.<sup>71</sup> The deed was explicit that within the specified boundaries, Ngai Tahu gave up all of their: 'Turanga me nga awa me nga roto, me nga ngahere, me nga aha noa katoa ki aua wahi me aua mea katoa e takoto ana'. This was later translated by Alexander Mackay as saying the vendors gave up their 'anchorage and landing-

67. Waitangi Tribunal, *Ngai Tahu Report*, vol 1, p 52

68. Waitangi Tribunal, *Ngai Tahu Report*, vol 2, p 484

69. Waitangi Tribunal, *Ngai Tahu Report*, vol 3, p 834

70. See for example Waitangi Tribunal, *Ngai Tahu Report*, vol 3, pp 844–847

71. Waitangi Tribunal, *Ngai Tahu Report*, vol 1, pp 99, 106–107

places, with the rivers, the lakes, the woods, and the bush, with all things whatsoever within those places and in all things lying thereupon.<sup>72</sup>

The Ngai Tahu Tribunal concluded that the deed implies that with one stroke Ngai Tahu alienated all of their mahinga kai with the exception of the resources upon the lands that they had succeeded in having excepted from the sale. Given the paltry extent of these reserves – both in terms of potential for new and traditional economic practices – the Tribunal ‘was unable to accept that Ngai Tahu could have contemplated that they were surrendering all future access to their traditional food resources’.<sup>73</sup> In relation to this finding it notes that it is possible that Mantell, in negotiating the Murihiku purchase, promised Ngai Tahu they would still have access to their mahinga kai, but in common with Pakeha.<sup>74</sup>

As well as examining the eight Crown purchases, in its report the Tribunal devoted much attention to general issues related to mahinga kai – what Ngai Tahu called the ninth ‘tall tree’ of their claim. The Kemp purchase deed was the only one of the eight Crown purchases that explicitly reserved to Ngai Tahu their mahinga kai. But what were the expectations of Ngai Tahu and the Crown in the other sales? In the course of the hearings, counsel for the Crown submitted to the Tribunal ‘that the Crown would expect to take the land unencumbered and without attached aboriginal rights.’<sup>75</sup> This position was of course generally consistent with English common law, though under that law, rights to certain resources could be explicitly excluded from a sale. Further, securing the extinguishment of aboriginal title was a major reason why the Crown was so eager to purchase the lands of Ngai Tahu.

The Tribunal did ‘not accept that in entering into the various purchase deeds Ngai Tahu were doing so on the understanding they were thereby surrendering all future access to traditional food resources which they needed for subsistence and trade.’ Evidence was presented that showed ‘the tribe continued to exercise its mahinga kai rights after the respective sales and in most case relied on those resources to live.’<sup>76</sup> And in the decades immediately after the sales, before the land was on-sold to Pakeha settlers, Maori were by-and-large free to continue using their mahinga kai as before. Gradually, however, pastoralists took up the land and began running livestock upon it, erecting gates and fences and issuing warnings to Maori about trespassing. It was then that the Tribunal considered that Ngai Tahu came to better understand the European concept of ownership

72. Waitangi Tribunal, *Ngai Tahu Report*, vol 2, p 610

73. *Ibid*, p 107

74. *Ibid*, p 638

75. Waitangi Tribunal, *Ngai Tahu Report*, vol 3, p 903

76. *Ibid*, p 904

as many of the new settlers, though not all, began denying Ngai Tahu access to their traditional food resources.<sup>77</sup>

Although the Ngai Tahu Tribunal admitted that it was difficult to say with any certainty exactly what the expectations of the two parties to the Ngai Tahu purchases in fact were, it was very clear on the point that the Crown had an obligation to ensure that Maori understood the consequences of them selling their land. And in terms of the Crown's knowledge of Ngai Tahu's reliance upon their mahinga kai, the Tribunal considered it had a particular obligation to make adequate provisions for their future needs – an obligation that it failed to fulfill.<sup>78</sup>

#### 7.4 Analysis of Crown purchase deeds, 1840–1875

As part of the consideration of the extent and manner in which the Maori ownership of flora and fauna was recognised and dealt with when the Crown purchased Maori land, a systematic analysis of the English version of Crown purchase deeds from 1840 to around 1870 has been undertaken.<sup>79</sup> The key issue that is addressed in this analysis is the fashion in which the deeds sought to convey what appears, on the basis of the discussion of Crown purchase activity above, to have been the Crown's intention in purchasing Maori land – the total extinguishment of customary title. The means by which this was achieved was the complete alienation of the lands specified in a deed along with all associated resources, including all flora and fauna.

##### 7.4.1 Methodology

The analysis took as its subject matter the English versions of Crown purchase deeds, deed receipts and gifts as they were transcribed and reprinted in Turton (North Island) and Mackay's (South Island) compendia of deeds and other official documents.<sup>80</sup> These volumes contain most of the deeds executed up until the early 1870s for the South Island, and the mid-1870s for the North Island. All the deeds were searched for qualifications that may have referred either implicitly or explicitly to flora and fauna in the act of cession. Such qualifications took two main forms: explicit references to flora and fauna (such as 'timber' and 'rivers')<sup>81</sup> and

77. Ibid, p 888

78. Ibid, pp 903, 835

79. This work has been undertaken by Waitangi Tribunal researcher Richard Moorsom, with research assistance from Vanessa Brown. Mr Moorsom analysed the data compiled by Ms Brown (see description of methodology below) and wrote up a set of preliminary findings. These notes formed the basis of this section. The present author is indebted to both Ms Brown and Mr Moorsom for their work. However, although informed by the work of Mr Moorsom, the arguments developed and opinions expressed in this section are solely the responsibility of the present author.

80. Alexander Mackay, *A Compendium of Official Documents Relative to Native Affairs in the South Island*, 2 vols, Wellington, 1871; H H Turton, *Maori Deeds of Land Purchases in the North Island of New Zealand*, 2 vols, Wellington, 1878

81. For the purposes of this analysis, flora and fauna qualifiers include such inanimate things as subsurface rights and waterways, as well as phenomena such as plants and birds.

'catch all' common law phrases (such as 'all the rights and appurtenances thereto belonging'). As well as such qualifications on the act of cession specifying that rights to flora and fauna were being transferred along with the land, instances where rights to biota were excluded (such as when fishing rights were reserved to the vendor) were also recorded. All such clauses and qualifications were highlighted on a paper copy of the deeds. These clauses were then entered into a spreadsheet matrix for analysis. This enabled particular clauses to be grouped together and quantified.

In many ways this methodology and analysis is somewhat rudimentary. For instance, all deeds are treated equally, irrespective of whether they apply to a quarter-acre town section or a block of several million acres. It also makes no distinctions between deeds signed at different times. But more serious is the fact that the analysis has been undertaken working solely from the English translations of the deeds, with no regard to the Maori versions. Of particular significance in relation to this is the degree of consonance between the qualifying terms and references to flora and fauna in the Maori and English versions of the deeds. For example, how is a common law phrase such as 'all the rights and appurtenances thereto belonging' – which is perfectly clear to the common law mind – meaningfully translated into Maori? Unfortunately, undertaking an analysis across both Maori and English versions of the deeds is beyond the expertise of the present author. The limitations noted here could, however, be overcome through further work being done in the future.

Another limitation is the actual significance the deeds had to Maori, relative to the oral contract. As noted above, to an oral culture, the act of signing a written deed can be seen as simply a confirmation of what was agreed to verbally; not an assent to the actual content of the deed. An example of this is the 1849 purchase negotiated by McLean in the Manawatu, recounted above. In this purchase he promised Ngati Apa they would be free to continue taking birds after the land was sold, but failed to record this in the actual deed.

But these limitations notwithstanding, the analysis of deeds undertaken for this section does reveal some interesting patterns as to how rights to flora and fauna were dealt with in Crown purchases.

### 7.4.2 The overall pattern

In total 923 deeds were analysed for their contents in relation to flora and fauna. These included all deed receipts and gifts that had qualifiers (though most did not). The total clearly includes some duplication. A few deeds are reproduced twice in Mackay and Turton, and many deed receipts (though not all) refer to land alienated by a separate deed. The major findings are as follows:

- ▶ Of the 923 deeds, 189 had no qualifier whatsoever, be they common law phrases or specific references to flora and fauna. Fully 80 percent of the deeds contained some sort of qualification.
- ▶ Of the 734 deeds that had qualifiers, all except eight contained a common law phrase of some kind. Therefore, a mere eight deeds included only flora and fauna qualifiers.
- ▶ Forty-four percent of all deeds with qualifiers (320) had only common law phrases and made no explicit mention of flora and fauna. Conversely, 414 deeds, or 56 percent of those with qualifiers (45 percent of all deeds), included at least one explicit flora and fauna qualifier.
- ▶ Of the 414 deeds that included flora and fauna qualifiers, 70 of them (17 percent) included a tangi clause that expressed a farewelling of the land and its resources. In nearly all of these cases, the flora and fauna qualifiers were embodied in the tangi clause.

### 7.4.3 Types of flora and fauna qualifier

Of the deeds that contain flora and fauna qualifiers, a strong overall pattern is evident. In this analysis, flora and fauna qualifiers were grouped into eight categories: timber, cultivations, vegetation, general land or surface, water, fishing and coastal, birding, and subsurface. References to timber, water and subsurface rights occur much more frequently in deeds with qualifications than the other five. References to timber appear in 393 deeds, water in 376 deeds, and subsurface rights in 362 deeds (95, 91 and 87 percent of deeds with flora and fauna qualifiers respectively). These three categories often occurred concurrently in deeds. Such a deed where all three appear is that for the Castle Point Block in the Wairarapa, signed in 1853. It stated that the vendors ceded the lands along with 'its trees its waters [and] its minerals whether underneath or on the earth'.<sup>82</sup> None of

<sup>82</sup> Turton, Castle Point deed, deed No. 85, 22 June 1853 (Province of Wellington), p 265

the other five categories occur in more than 20 percent of the 414 deeds containing flora and fauna qualifications.

There are very few references to cultivations, fishing (including general rights to the foreshore and coast) and birding in the deeds analysed – 7.2 percent, 4.8 percent and 2.4 percent respectively of all deeds containing flora and fauna qualifiers. This is notable given the central importance of these things to traditional Maori economies. Instead, the flora and fauna qualifiers that predominate are reflective of what Pakeha settlers valued: minerals, timber and access to water. This raises the possibility that the non-reference to resources of traditional importance to Maori, gave rise to the understanding that rights to those resources were not passing with the land.

The prevalence of Pakeha settlers' values are also apparent when the timber category is examined in more detail. References to timber in deeds with flora and fauna qualifiers break down into two main subcategories: timber or trees, and woods or forests. The former, expressing a utilitarian view of forests, appears in 373 deeds; whereas the latter, which can be seen to reflect a more generic view that embraces the idea of forests as habitat, appears in only 56 deeds. Similarly a breakdown of the natural vegetation category reveals that vegetation types valued by settlers – namely grasses and pasture – appear much more frequently than do vegetation-types traditionally of value to Maori such as flax and raupo. Whereas references to grasses, herbage and pasture appear in 15 percent of all deeds with flora and fauna qualifiers, those containing references to raupo and flax account for only 0.5 percent.

A discernible difference exists between deeds containing flora and fauna qualifiers that also include a tangi clause, and those that do not. It is apparent that the flora and fauna qualifiers in deeds that do not have tangi clauses are largely restricted to the categories of water, trees and subsurface rights. However, deeds that do have a tangi clause (just under 8 percent of all deeds) often also make reference to natural vegetation and the surface of the land – 70 and 77 percent respectively. Such deeds also have a high incidence of other flora and fauna qualifiers. The 1853 deed for the sale of a block in the Wairarapa known as Manihera's Reserve, for example, stated that:

Now we have forever given up and wept over and bidden farewell to and transferred this land which has descended to us from our ancestors

with its streams its rivers its lakes its waters its timbers its pasture its minerals its cliffs its fertile spots its barren places with all above and with all below the said land with all appertaining to the said land . . .<sup>83</sup>

Indirect references to flora and fauna are also common in deeds containing tangi clauses. These references usually appear in clauses that describe major features of the landscape and appear to have been included to make the farewelling of the land more tangible and comprehensive. Three terms appear either separately or together in most of the deeds that contain tangi clauses: fertile and barren places, good and bad places, and plains and hills. Several other topographical descriptors appear, but much less frequently. An example of such a tangi clause is that included in the deed for the Tautane Block in the Hawke's Bay; one of many deeds executed by Donald McLean on the east coast of the North Island. It stated that the vendors had 'entirely given up and bid farewell to this land . . . with its rivers its streams its lakes its springs its timber grass and stones with its plains and fertile spots its sterile parts and everything above the surface or under the surface and everything thereunto belonging'.<sup>84</sup> Similarly, McLean's deed for the Tauherenikau No. 4 block referred to the Maori signatories having 'forever bade farewell to and transferred these lands . . . with its good and bad places'.<sup>85</sup>

#### 7.4.4 Common law terms

Most of the 923 deeds that were analysed contained a common law qualifier intended to convey the idea that in selling their land, Maori were giving up all incidents of their title such as rights to timber, water and minerals. In total, 726 of the deeds had such a common law qualifier. Of these 726 deeds, 406 of them also contained specific references (however vague) to flora and fauna (only eight deeds contained references to flora and fauna and did not include a common law qualifier). There are some 130 different common law phrases in the deeds analysed, but the vast majority are minor variations on a few generic formulations.

The commonest phrase by far is the simple 'all appertaining to', appearing in 248 deeds or 34 percent of all deeds with common law qualifiers. Many minor variants upon this construction convey much the same meaning. A second main group of formulations are variations on the phrase 'all appurtenances thereto belonging'. Many of the variations on

83. Turton, Manihera's reserve deed, deed No. 116, 23 December 1857 (Province of Wellington), p 297

84. Turton, Tautane Block deed, deed No.4, 6 January 1854 (Province of Hawke's Bay), p 499

85. Turton, Tauherenikau No. 4 deed, deed No.91, 19 September 1853 (Province of Wellington), p 271

this construction function to reinforce the effect of the clause. Most of the common law phrases included universalising terms to reinforce the comprehensiveness of the transaction such as 'whatsoever', 'all' and 'everything'.<sup>86</sup>

As well as these references to real property – that is the incidents of land ownership under English common law – the deeds frequently included more general qualifiers that state the vendors are giving up their 'rights' in the land. Typically such clauses appear in deeds that contain common law qualifiers; either conjoined with the first or attached to the general statement of cession earlier in the deed. The purpose of these clauses appears to be to further reinforce that the vendors are committing themselves to giving up all their interests in the land. By far the most common formulation of such qualifiers is 'all our title right claim and interest whatsoever thereon'.<sup>87</sup>

Somewhat anomalous amongst the deeds analysed are the 10 that make reference to 'rights of common' passing with the land. Of these 10 deeds, eight of them relate to transactions where the then Superintendent of Wellington, William Fitzherbert, had earlier entered into an agreement with Maori in respect of their land. The agreements held that money would be advanced to the owners and then repaid either when the land was sold, or the sum advanced would form part of the purchase price if the Crown purchased the land. The eight deeds stated that money and gifts had been advanced and that therefore the land was passing to the Crown (in some cases with additional payments being made). These deeds, all signed in 1873, follow the same form.<sup>88</sup> They state that the said land shall become the property of the Crown:

Together with all and singular commons and rights of common mines minerals furzes [gorse] trees woods underwoods and the ground and soil thereof mounds fences hedges ditches ways waters water-courses streams fishings fisheries fowlings, surface rights, of shore and foreshore (if any) And all and singular other the appurtenances whatsoever thereunto belonging and appertaining to . . .

The other two deeds that refer to commons appear to be normal purchases, also in the Province of Wellington, and as with the other eight, were both signed in 1873.<sup>89</sup> It is notable that all 10 deeds that have references to commons, also contain numerous flora and fauna qualifiers, including the only specific references to fowling in all of the 923 deeds

86. See for example Turton, Ruarangi deed, Deed No. 104, 8 February 1875 (Whangarei district, Province of Auckland), pp 142–143; Turton, Maungakarama No 1 deed, Deed No.106, 8 February 1875 (Whangarei district, Province of Auckland), pp 144–145

87. See for example Turton, Papakowhai, deed No. 24, 27 September 1875 (Province of Wellington), pp 131–132

88. The deeds are Turton Manawatu-Kukutaikai No. 3 deed, Deed No. 59, 15 April 1873 (Province of Wellington), pp 189–191; Turton, Manawatu-Kukutaikai No. 3 deed, Deed No. 61, 3 May 1873, (Province of Wellington) pp 192–193; Manawatu-Kukutaikai No. 3 deed, Deed No. 62, 3 May 1873 (Province of Wellington), p 195; Turton, Wairarapa-Waimana block, Deed No. 74, 29 August 1873 (Province of Wellington), p 234; Turton, Mangatainoka No. 1 deed, Deed No.188, 28 March 1873 (Province of Wellington), pp 394–395; Turton, Mangatainoka No. 2 deed, Deed No. 189, 29 March 1873 (Province of Wellington), p 396

89. The deeds are Turton, Upper Aorangi deed, Deed No. 60, 14 April 1873 (Province of Wellington), p 191; Turton, Kauhanga Nos. 1 and 2, Deed No.190, 16 April 1873 (Province of Wellington), p 397

analysed. As noted above, references to fishing rights were also rare, and references to furze (gorse, perhaps bracken fern in these cases) appear in no others. It is also interesting that unlike almost all deeds in Turton and Mackay's compendia, there is not a Maori version of the 10 that make reference to commons.

Why the references to commons were included is a question that is hard to answer on the limited evidence studied. It seems likely though that the fact that the deeds are all from the Province of Wellington and were all transacted in the year 1873, is significant. There seems to be nothing unique about these transactions that may have led Maori to believe that, had rights of common not been explicitly extinguished, they may have continued to enjoy them. Indeed, there had been no official recognition of such rights in New Zealand (although FitzRoy had opined that the rights Maori continued to enjoy in lands they had 'sold' to missionaries in the Bay of Islands were akin to rights of common). And even if Maori had assumed that they would have had a right to continue to take such things as birds, fish and firewood once they had sold their land, it seems unlikely that they would have conceived of such as a common law 'right of common'. One reason that presents itself to the present author is that all the deeds were drafted by the same official who favoured the use of the term, perhaps being a recent arrival from England where common rights were central to many land dealings and who considered there was a similarity between this class of right and the rights the negotiators were wanting Maori to cede.

#### 7.4.5 Discussion

As noted above, the analysis of purchase deeds undertaken for this project is somewhat limited. It has had no regard to the Maori versions of the deeds, when deeds were signed, where in the country the affected land is situated, the size of the block, or the negotiations and oral contract that would have been precursors to the actual deed. But these limitations notwithstanding, some definite patterns and trends are apparent that enable some tentative conclusions to be drawn.

The fact that almost 50 percent of all deeds include one or more flora and fauna qualifiers suggests that in these cases the Crown was trying to convey that the organic attributes of the land were passing out of Maori ownership, and that its agents considered that this was not adequately

conveyed simply by the term 'land'. Significantly though, other than timber, these references were very rarely to flora and fauna of traditional value to Maori, possibly giving rise to the perception that rights to such things as birds and fish were not passing with the land.

The sense that all incidents of land ownership were being ceded was also expressed – at least to the common law mind – through the inclusion of common law terms in almost 80 percent of all deeds analysed. It seems unlikely that irrespective of how proficient Maori had become in English, and how familiar they had become with matters of English law, that many would have apprehended such legal technicalities. It would seem probable that specific references to flora and fauna in deeds would better convey to the Maori mind the Crown's view that with the land was passing their rights to all biota associated with it. Importantly though, 55 percent of deeds analysed contained no such specific references to flora and fauna. This definitely raises the possibility that Maori did not fully apprehend that they were ceding all rights to the land, as opposed to thinking that they were simply granting the purchaser the right of occupation. Of the deeds that contained no references to flora and fauna, more than 60 percent of these did contain a common law qualifier. This suggests that Crown agents may have considered that through imposing English legal forms on the transactions, an adequate sense of complete alienation was being conveyed. A more cynical view is that by relying upon common law qualifiers, the Crown was deliberately fostering ambiguity in the minds of the vendors, who may have been opposed to the sale if they fully appreciated they were losing, among other things, rights to use all flora and fauna upon the land subject to the deed. However, the evidence adduced in this analysis is insufficient to say whether this was in the fact the case.

Generally the language of the deeds is characterised by its formal and legalistic qualities. The main text of most deeds follows English legal conventions and is written in unadulterated legalese. Variations such as tangi clauses or exclusions such as reserves are either inserted into the midst of legal formulations, or are tacked on as additional paragraphs. A big issue is the manner in which this legal language was translated into Maori. Was an attempt made to render it in a colloquial manner, or was a literal translation attempted whereby Maori concepts were appropriated and inferred with new or altered meanings? Importantly only a handful of deeds would have been directly authored by Maori. Most would have been transacted using standard texts based on English legal forms, which

would have been copied by hand or printed for general use. Such forms left spaces for details such as purchase area and price to be inserted. Although some deeds pertaining to some early large Crown purchases have a distinctive and unique form, having more the appearance of an agreement or treaty between the parties, these are few in number.<sup>90</sup> Generally the deeds follow very similar forms.

Only in deeds that include tangi clauses is there a conscious switch to a more colloquial and vernacular mode of language. Such clauses always place the vendors as subjects and use active forms of verbs to convey emotion and leave taking. For example the 1858 deed for the Te Mata block in Hawke's Bay states: 'We have greeted we have bidden farewell to and fully ceded this place which we inherited from our ancestors'.<sup>91</sup> Such tangi clauses generally appear towards the end of the deeds and seem to be an attempt to render the ceding of the land more concrete and tangible. The extent to which these clauses contributed to a sense amongst Maori vendors that they were losing all rights to flora and fauna associated with the land is unclear. It would seem likely though that they did contribute to a sense of the permanence of the alienation. Given this, it is interesting to note that tangi clauses only appear in about eight percent of the deeds analysed, and that these deeds tended to have been transacted in the early period of Crown purchase activity.

### 7.5 Crown purchases 1840–1865: an overview

The colonisation of New Zealand proceeded on the basis of the Crown having recognised that Maori held title to all of New Zealand. Consequently the viability of the colony was contingent upon the Crown acquiring vast amounts of land from Maori so that Pakeha settlers could bring it into agricultural production. But there were obvious tensions between this need for land, the recognition of Maori tenure, and the obligation of Crown officials to protect Maori interests. This obligation was expressed both in Hobson's formal instructions and the Treaty itself – article two of which explicitly identifies lands, estates, forests and fisheries as being in Maori ownership so long as they wanted to retain them. These tensions form the context in which the Crown's purchase of land must be viewed. Matters were further complicated by the Crown's policy of extinguishment whereby it sought to fully extinguish Maori customary

90. See Vincent O'Malley, 'Treaty Making in Early Colonial New Zealand', *New Zealand Journal of History*, vol 33, no 2, 1999, pp 137–154

91. Turon, Te Mata deed, Deed no. 25, 29 September 1858 (Province of Hawke's Bay), pp 526–527

title in purchases so that the title it acquired was not encumbered in any way by any servitudes or vestigial rights to things such as flora and fauna. The key issue that this chapter is oriented towards is whether this intention of the Crown was apprehended by Maori when they entered into agreements in respect of their lands, or whether they expected to enjoy ongoing use rights and other associations with it.

As noted throughout this chapter, a major problem in addressing questions such as these when one party is of a literate culture and the other of an oral culture, is the discrepancies that are likely to exist between written deeds and oral contracts in relation to the same transaction. In the case of nineteenth century land transactions we have relatively easy access to written deeds, whereas establishing what may have been agreed to orally is much harder. Unfortunately for the purposes of this chapter it has not been possible to undertake primary research on the negotiations that led to the signing of purchase deeds. This is significant in view of the idea, articulated by the Waitangi Tribunal in its *Muriwhenua Land Report*, that in contractual exchanges between literate and non-literate cultures, the deed ultimately reflects the objectives of the literate party. The aspirations and intent of the non-literate party, on the other hand, are embedded in the oral negotiations and agreement that preceded the signing of the deed. Certainly in Muriwhenua, and it would seem likely in other parts of the country, many transactions concerning land were marred by a lack of mutuality and common purpose.<sup>92</sup>

In this regard, a recurring theme throughout this chapter is whether Maori expected to enjoy the ongoing use of the land once it had been sold and settled by Pakeha. In Muriwhenua in the period 1840 to 1865, evidence shows that the lifestyles of Maori remained firmly 'Maori', embedded in tradition and custom.<sup>93</sup> It would seem that this was also the case elsewhere in the country. Notwithstanding that Maori also sought to engage with new economic opportunities, that their lifestyles remained largely traditional in this period makes it hard to credit that they would sell their land knowing that they would later be denied access to their traditional food resources associated with it. This was certainly the view the Waitangi Tribunal took of the Crown's Murihiku purchase in its 1991 report on the Ngai Tahu claim. More generally, that Tribunal held that Ngai Tahu had little appreciation of the permanence of the alienations that were effected through the Crown's purchases of their land, and that they would as a consequence lose access to their cherished mahinga kai.<sup>94</sup>

92. Waitangi Tribunal, *Muriwhenua Land Report*, pp 181–182

93. *Ibid*, p 194

That Maori did not think they had ceded all rights to the land they had 'sold' is further evidenced in the many recorded instances of vendors continuing to use resources upon land subsequent to its sale. This was especially common where there was a sizeable period between initial sale and settlement.

In some purchase deeds, however, particular resource rights were reserved to Maori. In the Wairarapa for instance there are examples of rights to eels and firewood being reserved to the vendors of land.<sup>95</sup> Perhaps most famous in this regard is the Crown's 1848 purchase of the middle of the South Island from Ngai Tahu, generally known as Kemp's purchase. In the Maori version of that deed it is stated that Ngai Tahu were to retain all of their mahinga kai. But in the English version of the deed, the term mahinga kai was constructed very narrowly so as to include only Ngai Tahu's cultivations and villages, not the areas they gathered wild foods from. That the Crown did make some exceptions from its general policy of seeking the complete extinguishment of all incidents of title can be seen as having encouraged the view, at least amongst some Maori, that by selling their land, they were not necessarily losing all rights to use it.

But as well as cases where certain use rights were reserved to Maori vendors in deeds, there were instances where such exceptions were agreed to verbally, but were not included in the deeds. McLean's 1849 purchase of land in the Manawatu from Ngati Apa, for example, saw exactly this occur. It seems reasonable to assume that this was not just an isolated incident. One can imagine over zealous Crown officials promised such things verbally in order to get Maori to agree to sales they may have otherwise rejected, but that the exclusions were never included in the deed. And Maori, satisfied that they had a binding oral agreement, signed the deed unperturbed by the fact that it made no mention of the exception.

It is deeds though that historically have been taken by the Crown as being ultimate proof of what was ceded by Maori in land sales, not oral agreements. And as illustrated in this chapter, most English versions of purchase deeds made it clear, at least to the common law mind, that all incidents of land ownership were passing with the land. This was achieved through the inclusion of qualifier clauses derived from common law – such as 'all rights and appurtenances thereto belonging' to the land – that appear in just under 80 percent of the 923 deeds examined for

94. Waitangi Tribunal, *Ngai Tahu Report*, vol 2, p 107

95. Goldsmith, p 55

this report. More tangible to Maori though, were references in deeds to specific types of flora and fauna. It seems probable that references to trees and fish would be more easily translated into Maori and comprehended by the nineteenth-century Maori mind than would technical common law terms such as 'appurtenances'. But while deeds analysed for this project frequently made reference to timber, minerals and water, very few referred to the fact that in the Crown's view Maori were also ceding rights to traditionally important resources such as fish, birds and flax. The very low incidence of such qualifiers – with the exception of forests, appearing in well under 5 percent of the deeds analysed – gives rise to the possibility that the Maori signatories to such deeds did not consider that they were losing rights to these resources.

In the period 1840 to 1865, the major period of Crown purchase activity in New Zealand, it would seem that at least some Maori, in selling their land, expected to enjoy continuing use rights over certain resources on their land. Importantly though, that is not to say that Maori considered they were not ceding other rights to the land such as the right to occupy and cultivate it. Rather than it being the case that the transactions were not sales, the evidence reviewed in this chapter suggests that there was a degree of dissonance between the perceptions of the sales on the part of the Crown and Maori in relation to rights over flora and fauna. It would also appear that the Crown often did not do all that was within its powers to ensure that Maori understood, that legally, they were ceding all rights associated with the land they were selling. But by the 1870s, the historical experience of sales and their aftermath, especially the phenomenon of Maori being prevented from ranging over their former estates and using their resources, must have engendered a more complete understanding of what the effect of the sales actually were.