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**The Nature of the Relationship of the Crown in New Zealand
with Iwi Māori**

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of Doctor of Philosophy in Māori Studies, The University of Auckland,

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Abstract

This study investigates the nature of the relationship that the state in New Zealand, the Crown, has established with Māori as a tribally-based people.

Despite the efforts of recent New Zealand Governments to address the history of Crown injustice to Māori, the relationship of the Crown with Iwi Māori continues to be fraught with contradictions and tension. It is the argument of the thesis that the tension exists because the Crown has imposed a social, political, and economic order that is inherently contradictory to the social, political, and economic order of the Māori tribal world. Overriding an order where relationships are negotiated and alliances built between autonomous groups, the Crown constituted itself as a government with single, undivided sovereignty, used its unilateral power to introduce policy and legislation that facilitated the dispossession of whānau and hapū of their resources and their authority in the land, and enshrined its own authority and capitalist social relations instead.

The thesis is built round a critical reading of five Waitangi Tribunal reports, namely the *Muriwhenua Fishing Report*, *Mangonui Sewerage Report*, *The Te Roroa Report*, *Muriwhenua Land Report*, and *Te Whanau o Waipareira Report*.

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Preface

‘No question in international law and morality is as contested as fixing *limits* on the right of self-determination. Not only is the issue controversial in the extreme, but its resolution bears directly on many of the bloodiest and persistent struggles that presently beset every region of the planet, and bring serious suffering and continuous frustration to millions of peoples ...

In essence, the outcome of these struggles will shape whether our era lives up to the emancipatory potential implicit in the legal, moral, and political promise of self-determination to the “peoples” of the world. Or fails to do so, and retreats into rigidities of processing self-determination claims by reference to the territorial nationalism and status quo compulsions of most existing sovereign states’ (Richard Falk, Preface, *Proceedings of the First International Conference on the Right to Self-determination and the United Nations*, 2001).

The above statement touches on themes regarding states and peoples that will come to the fore in this investigation of the nature of the relationship of the Crown in New Zealand with Iwi Māori – where the Crown is the supreme governing and legislative authority and Iwi Māori signifies Māori as a tribally-based people, a people of peoples. The tensions that beset the relationship of the Crown with Iwi Māori, linked as they are to issues of Māori self-determination and well-being, are being played out in many areas of the world and with a particular pathos in those situations where Indigenous peoples are struggling against the oppression of a colonising state.

It is true that in New Zealand, over the past three decades, there have been moves by the state to address the injustices that have been done to Māori and their communities since 1840. That was the year that Lieutenant-Governor Hobson and a considerable number of rangatira signed the Treaty of Waitangi as a compact between the British Crown and the hapū whom the rangatira represented. More significantly in terms of the injustices, 1840 was the beginning of the establishment by the British Crown of colonial rule in New Zealand – according to patterns developed during its long imperial experience in other parts of the world.

While there is a fair measure of acceptance by politicians and the New Zealand public that there needs to be some settlement of Māori historical grievances against the Crown, there is divided opinion over what presently is the basis for the relationship of the state with Māori. The divisions are complicated by arguments over what the relationship ought or ought not to be. It was this difference of opinion that prompted me, in part, to embark on a search for an understanding of the relationship that has been established between the Crown and Māori.

Little has been done to investigate the actual nature of this relationship even though in recent years a huge amount of material has been written that relates to the subject. Study of the material gives rise to a number of questions. Is the relationship between Crown and Māori a partnership, derived from the agreements made in the Treaty of Waitangi? This has been proclaimed in a raft of writing over the past thirty years. Or, as others claim, is it more correct to say that Māori ceded their sovereignty to the Crown through the Treaty of Waitangi and agreed to have a place in this country that is substantially no different from that of other citizens? As to the present situation, is New Zealand a world leader in its willingness to address former harmful relationships with its Indigenous peoples? Or are the changes at a relatively superficial level and do not deal with the more substantial issues of the mana and self-determination of Māori communities, and the structures of state government that might stand in the way of that self-determination? In effect, such questions fuelled my desire for an understanding of the nature of the relationship between the Crown and Iwi Māori.

In 1998, when I started on the research for the thesis, many people were hopeful that New Zealand as a nation was well on its way to resolving its relationship with Māori as the indigenous people of the country. This belief was held particularly within the community of which I am a part, the Pākehā middle class. I was aware of this, not only from listening to friends and relatives, but also because I was involved in education on the Treaty of Waitangi and its implications for organisations. Many of those I worked with, in fact, felt that the point had been reached where the government was doing too

much for Māori people, to the disadvantage of the rest of us. They might be prepared to recognise that there had been injustices against Māori in the past but they thought that these were well on their way to being addressed.

My own view regarding the extent to which our country had addressed its relationship with Māori and their communities was less optimistic, and came from several sources. One was through reading and listening to Māori critiques of current situations. Those commentaries alerted me to the fact that, while progress was being made in certain areas, in others there were still considerable barriers to Māori and their input. Moreover, in a number of state and voluntary organisations where considerable gains had been made for Māori, these gains were reversed when there was a change of management or as a result of the latest round of restructuring. The advancing of Māori interests was often very dependent on the good will of non-Māori administrators, and as often as not the good will was only tenuously there.

In the case of Crown institutions a good number of government departments and other organisations had, by 1998, stated Treaty or bicultural commitments, and some significant changes had been made. However, when it came to the crunch, it was evident that a change in political climate could easily lead to a reversal of these changes. Amongst the country's decision makers there appeared to be ambivalence between recognising the interests and rights to 'self-management' of Māori communities, and insisting that there must be one rule for all. The ambivalence was not unrelated to the range of opinion in the country.

It is hardly surprising that the inconsistency of the Crown's position was less than acceptable to Māori. In an article looking at 'Māori, the State, and a New Zealand Constitution' Mason Durie, a leading Māori academic, discusses several reasons for Māori dissatisfaction with their present constitutional position and their treatment by the Crown. While recognising what had been achieved over the 1984-1994 Decade of Maori Development, he draws attention to the difficulties that arise for Māori because of the uncertainties in the Crown's approach and the lack of clear Crown objectives for

Māori advancement.

Durie's appraisal reflects the conclusions from the 1995 Hirangi Hui, a major national meeting of representatives from most tribes and many other Māori organisations. The report from that Hui says (page 9) that the submissions received show that: 'Maori are not content to depend on the goodwill of successive Governments or to be exposed to inconsistent policies developed to suit the needs of Pakeha. Progress in one decade all too frequently must be revisited a decade later'. The key issue dealt with in the report is the continuation of unilateral action by the Crown in matters that are of vital concern to Māori groups. The feedback from the Hirangi Hui indicates that from a Māori perspective the relationship of the Crown with Iwi Māori is less than satisfactory and that change is needed, and one of the main recommendations is the development of a constitution for New Zealand based on the Treaty of Waitangi.

For me, it was the disparity between official talk about the Treaty partnership and the evidence of ongoing unilateral actions by the government in areas of concern to Māori that pointed to the need for a fuller investigation of the relationship between the Crown and Māori. What is more, my questions about the nature of the Crown's relationship with Māori as a whole were inextricably linked with questions about the Crown's relationship with particular Māori communities. A starting point for my research came from what I had learned through listening to and studying the experiences of different Māori groups. Many of these experiences belied the rhetoric of partnership, and the supposition that New Zealand was well on its way to resolving its relationship to Māori communities.

Indications that there are difficulties in the Crown's relationship with Māori communities have been brought to the general public's notice through the widespread Māori rejection, since 2003, of the Crown's policy, process of consultation, and subsequent passing of its legislation regarding the foreshore and seabed. While the foreshore and seabed policy has received attention as a national issue, it has specific implications for the many hapū whose long-held proprietorial relationships to their

coasts and seas are overlooked by the legislation.

A further reason for this research stems from the contradiction between the importance of tribal communities, identities, and relationships to Māori, and the negativity towards tribal society that has been part of European colonising history and is still evident in much discussion and policy. In general, there is a considerable gulf between how tribes are described by those who have some depth of lived knowledge of the tribal world as against those who do not. From knowledgeable tribal speakers, one can get a sense of the integrity of the relationships within the tribal world, an understanding that is far removed from the common stereotypes that are to be found in much of the national and international literature. The portrayal of the tribal order as a primitive social order, one that must inevitably give way to the social organisation of the modern state, is of particular concern because of the justification it provides for the domination of tribes by the state.

This thesis sets out to investigate the relationship that the Crown in New Zealand has established with Māori as a tribally-based people, and the ideology that sustains that relationship. The subject is approached from two complementary angles. The first part of the thesis involves a search for an understanding of the social relations of the tribally-based world prior to, and as they withstand, the impositions of colonisation — in the conviction that an analysis of the Crown's relationship with Iwi Māori needs to be based in an appreciation of how that relationship is experienced by Māori communities. The second part looks into the history, from 1840 to the present day, of how the Crown has established its relationship to the tribally-based world, and explores the sources of tension and contradiction that have resulted.

Introduction

Subject

The subject of this thesis is the nature of the relationship of the Crown in New Zealand with Iwi Māori,¹ where the Crown is the supreme governing authority, executive and legislature, and Māori the indigenous people. The expression 'Iwi Māori' is used to indicate the tribal basis of Māori society and the fact that Māori are a people of peoples. While the study aims to assess the contemporary relationship, insight into this relationship is sought by seeing it in terms of its historical development. For that reason, the study takes account of events from 1840 to the present millennium, 1840 being the year of the signing of the Treaty of Waitangi and the beginning of the Crown's formal presence in New Zealand.

Since 1840, there have been changes to the constitution of the Crown in New Zealand. It was the British Crown in the person of Queen Victoria, the reigning monarch, who entered into the Treaty of Waitangi with Māori hapū. From 1840-52, the Crown was represented in New Zealand by a Governor and Council who were responsible to the Colonial Office of the British parliament.² With the passing of the New Zealand Constitution Act in 1852, the Governor had to share the powers of government and law-making with a 'settler' parliament. Over time, the powers of the elected government were increased and those of the Governor decreased. Today, the passing of legislation requires at least the majority vote of the Parliament. While the seal of approval of the Governor General is sought for legislation to become law this is, in effect, a nominal gesture of accountability to the British Crown. Decisions regarding the practical exercise of government ultimately lie with the Cabinet, the governing executive, which is made up of members of the governing party or parties. 'The Crown' embraces the terms 'the New Zealand Government' and 'the New Zealand State' where these connote

¹ Macrons are used to mark the long vowels in all MAORI words but not in personal, tribal, or place names.

² For the first months after New Zealand was annexed as a Crown colony, the country was placed by the British under the jurisdiction of the New South Wales Legislative Council. During this period, Hobson's immediate accountability was to Governor Gipps in New South Wales, who in turn was accountable to the British Colonial Office.

both legislature and executive government; at times these two terms will be used synonymously with the Crown. In terms of the subject matter of the thesis, the Crown is most accurately defined as ‘the seamless lego-constitutional controlling authority [in New Zealand] including executive government and its officials.’³

The identification of the community that the Crown represents is important because there is a common tendency when discussing Crown-Māori relationships to treat the Crown as though it were a non-representative entity. When one goes back to the Treaty of Waitangi /Te Tiriti o Waitangi documents, the English language version indicates that on the Crown side the relationship involves the Queen and ‘Her Majesty’s Subjects’. The Māori text refers to the Queen and the people of her tribe, ‘nga tangata o tona iwi’.⁴ At the time of the signing of the treaty, the Queen’s tribe would have been those people who were of British descent. Today, the community that the Crown in New Zealand represents is that of all New Zealand citizens, an ethnically diverse body, including those of Māori descent in their capacity as citizens – but not Iwi Māori in their position as partners to Te Tiriti o Waitangi.

It needs to be recognised, nevertheless, that those who held the reins of government in the years in which colonial rule was being established were British by descent, and that even today the political power base in the country rests mainly with those who are of British or European ancestry – otherwise known as Pākehā. Indeed, there is continuity, with regard to cultural heritage and identity, between the Queen’s tribe in Te Tiriti o Waitangi and the Pākehā community today. As the thesis will demonstrate, this continuity is reinforced because the legal and political systems that belong to that

³ Based on definition in R. Hill: *State Authority, Indigenous Autonomy: Crown-Maori Relations in New Zealand /Aotearoa 1900-1950*, Wellington, 2004, 7. Hill includes the words ‘in New Zealand history since 1840’ in his definition, but this is to overlook the tenuous nature of much Crown control for the first decades of its governing presence in New Zealand.

⁴ There are two officially recognised texts of the treaty of Waitangi. Until recently, New Zealand Governments paid attention only to the English language version. It was the Māori text, however, that was signed by Hobson and the rangatira on 6 February at Waitangi, and by most of the other signatories around the country. The English text speaks of an absolute cession of sovereignty to the Crown, whereas the Māori text affirms Crown recognition of ‘te tino rangatiratanga’ (the paramount authority) of the rangatira, hapū, and all Māori people. The phrase ‘nga tangata o tona iwi’ is to be found in the preamble to Te Tiriti o Waitangi, the Māori text of the treaty. For a resume of the debate round the different versions of the treaty, see R. J. Walker, *Ngā Pepa a Ranginui: the Walker Papers*, Auckland, 1996, 52-61.

heritage have been established over time as dominant, with the effect that law and government have favoured Pākehā interests. The Crown, as the New Zealand Government, is a representative body and, because of its history, is particularly representative of Pākehā people and their interests. The decisions of government are susceptible to, and shaped by, the Pākehā constituency – and especially those of the middle class.⁵

While the Crown is a unitary authority this is not the case for Iwi Māori. ‘Māori’ is used as a collective term for the Indigenous peoples of New Zealand, and Māori people generally, but this does not mean that Māori are a single people. Historically, the autonomy and identities of the different whānau, hapū, and iwi have been critically important, and take precedence over a generalised Māori identity. The word māori means normal or ordinary. With the arrival of Europeans, māori came to be used to distinguish those who were native from the new-comers. In many ways Māori carries the same level of identification as European. Each country within Europe has its own autonomy and each people its own history and identity – as do the respective whānau, hapū, and iwi. European and Māori are broadly descriptive terms. There is, nevertheless, some accuracy in referring to Māori as a people of peoples because all the Indigenous communities in New Zealand are related in some way to one another.

Iwi Māori is used in the thesis as an abbreviation for ‘te iwi Māori: ngā hapū, ngā whānau, ngā iwi, me ngā marae’: ‘the Māori *nation*: hapū, whānau, iwi, and marae’. The term ‘Māori’, when referring to Māori as a whole, generally means the same as ‘Iwi Māori’. The advantage of the latter expression is that it emphasises that Māori are a people of peoples. The description ‘tribally-based’ is often employed in the thesis to describe Māori society; this is because, historically, hapū, whānau, iwi, and marae have been basic to Māori social organisation and the tribal basis continues to be significant.⁶

⁵ See J. Kelsey, ‘Legal Imperialism and Colonization of Aotearoa’ in P. Spoonley, C. Macpherson, D. Pearson, and C. Sedgwick, eds, *Tauīwi: racism and ethnicity in New Zealand*, Palmerston North, 1984.

⁶ The words ‘tribe’ and ‘tribal’ are used in the thesis in spite of the negative connotations they carry in much writing. One reason is because they are used internationally. Another reason is that the terms are often employed by Māori when speaking in English about whānau, hapū, iwi, or marae. For some readers, the word tribe might connote some major grouping and not local communities. This cannot be assumed to be the case for Māori, and quite possibly ought not to be assumed for other tribal communities generally. For many Māori, one’s tribe might equally be one’s hapū or iwi regardless of size. And when it comes to

The expression ‘Iwi Māori’ is taken as including the pan-tribal Māori communities which are designed to provide whānau-type support.⁷ The Waitangi Tribunal explains that Te Whanau o Waipareira, a non-tribal community, was established to ‘reconstruct traditional Maori structures and patterns in an urban setting’;⁸ and it shows how Waipareira is accommodated within the network of relationships that belong to the tribally-based world.⁹ The expression ‘Maori communities’ is used to refer to tribal groups and non-tribal communities.

Another advantage of the expression ‘Iwi Māori’ is that it carries connotations of Māori’ communities in both their autonomy and connectedness. This understanding is reinforced by the use of descriptions such as ‘a people of peoples’ and ‘a tribally-based society’. One of the themes developed through this study is that the Māori tribal world is not simply a collection of distinct and separate communities; it is a world where the autonomy of groups is vitally important *and* the relationships of reciprocity among them. A particular contribution of the thesis lies in its investigation of the impacts of Crown action on the network and layering of relationships between the groups that together make up the Māori tribally-based world.¹⁰

One reason for the choice of subject for the thesis, the nature of the Crown’s relationship with Iwi Māori, was the divergence of views regarding that relationship – even amongst those who could be regarded as having some expertise in the matter. The range of opinion about the relationship between the Crown and Iwi Māori is illustrated

indicating tribal identity, then the naming of whānau, hapū, marae, and iwi can all be significant, as well as ancestors, mountains, rivers, or other characteristic features.

⁷ In discussing the various understandings of ‘iwi’ that are held by Māori, C. W. Smith points to the recognition by the Māori Congress of the Ratana church as an iwi (te iwi morehu) and she anticipates that Māori urban authorities could be acknowledged as iwi. (See C. W. Smith, ‘Kimihia te Maramatanga: colonisation and iwi development’, MA Thesis, University of Auckland, 1994, 74-6.) Her use of the terms whānau, hapū, and iwi accords with that which was stated by tribal elders several times during the High Court hearings (Auckland 1998) on the fisheries allocations. ‘Iwi’, ‘hapū’, and ‘whānau’ are used in a primary sense to refer to groups who are related by whakapapa. At the same time, there are recognised extended uses of those terms to include Māori groups where whakapapa is not the first basis for belonging.

⁸ See New Zealand Waitangi Tribunal, *Te Whanau o Waipareira Report, Wai 414*, Wellington, 1998, 10.

⁹ See Chapter 4 of the thesis.

¹⁰ The layering of relationships within the whakapapa-based world is explained by L. Carter in ‘Whakapapa and the State: some case studies in the impact of central government on traditionally organised Māori groups’, PhD Thesis, University of Auckland, 2003, 92-3; L. Waymouth, ‘The Bureaucratisation of Genealogy’, *Oceania, Debut de Siecle*, Printemps, 6, 2003, 3, available at www.alor.univ-month3.fr/cerce/r6/1.w.htm (2 July 2003).

by the statements of some of the key figures in the treaty debates of the past two decades.

As Minister for Treaty Settlements, Douglas Graham, was emphatic in his answer to a question put to him at a conference on the rights of Indigenous peoples in 1998:

But I find it offensive that Māori people go overseas and say that they're oppressed *here, today*. I don't agree with that. I don't think Māori people are *oppressed*. They *were*, but they're not today. Certainly, they're still suffering from the oppression of the past, but there is absolutely no comparison with other countries where the indigenous people are slaughtered in large numbers, or have no legal recognition at all.¹¹

Doug Graham had put a good deal of time into the Government's Treaty settlements process, and had no problem in recognising that there were historical injustices; but, as his statement shows, he did not believe that there continued to be a relationship with negative impacts for Māori. Graham's opinion is reinforced by the widely held view that the colonising era is past.¹²

This view contrasts with that of Moana Jackson (Ngati Kahungunu, Ngati Porou), a lawyer with expertise in constitutional matters, and well known as an advocate for the rights of Indigenous peoples. His position is reported in a booklet on the Government's Treaty settlements policy by the Joint Methodist Presbyterian Public Questions Committee:

Māori lawyer Moana Jackson has said the government is ignoring the underlying causes of Māori grievances in the treaty settlement process. No-one in government, he says, is talking about colonisation. Although the government offers monetary repayment and the return of land, it retains the power and control only made possible by the taking of Māori resources in the first place.¹³

Moana Jackson is then quoted as saying that until the government addresses constitutional and political issues the legacy of colonisation will remain. 'Colonisation is really about the denial of the self-determination of our people, of rangatiratanga in

¹¹ D. Graham, 'The New Zealand Government's Policy', in A. Quentin-Baxter, ed., *Recognising the Rights of Indigenous Peoples*, Wellington, 1998, 14.

¹² See, for example, J. Belich, 'Presenting a Past', Paper presented to 'Catching the Knowledge Wave Conference', 1-3 August 2001.

¹³ Joint Methodist Presbyterian Public Questions Committee, *Politics Not Justice: the Government's Treaty settlements policy*, Wellington, 1999, 19-20. The Committee is citing an interview with Moana Jackson on Radio New Zealand, 'Mana News', 31 October 1997.

terms of sovereignty. None of the agreements so far have dealt with that.¹⁴

Elsewhere Jackson has made the point that, while some official acknowledgement of Māori rangatiratanga¹⁵ has been enunciated, the acknowledgement has been superficial. He cites the co-opting, by politicians and other ‘neo-colonists’, of Māori terminology in a way that suggests that there has been a significant recognition of the rights of Māori to self-determination, while hiding the continuing dominance of the Crown:

Thus, after 150 years during which any notion of rangatiratanga was rejected, the Labour Government of the 1980s accepted the concept. However, it acknowledged not the rangatiratanga as defined by the philosophy of Māori, but rangatiratanga as defined in relation to the overriding sovereignty of the Crown. It was not a right of government, of law-making authority, of power over life and death: it was simply a source of regional administration over certain of Pākehā government programmes ... It was rangatiratanga remade in a form compatible with the unaltered given of Crown supremacy.¹⁶

An interesting source of support for the opinion that a relationship of power and control has been established, and that it continues, appears in the work of constitutional lawyer Jock Brookfield. Brookfield observes that British rule was imposed on Māori through a seizure of power, and that that order has not changed:

In the New Zealand context I have focussed on the revolution initiated by the British Crown in 1840 when, purportedly under the Treaty of Waitangi and under proclamation of sovereignty, the Crown began the seizure of Aotearoa New Zealand upon which the present legal and constitutional order is based.¹⁷

Brookfield’s observation precedes his argument that the imposed legal and constitutional systems have gained legitimation – partly through the Treaty, partly through the passage of time and ‘certain benefits to the colonized’, and partly through the satisfaction of some of the Māori claims for the redress of specific grievances. At

¹⁴ Joint Methodist Presbyterian Public Questions Committee, *Politics Not Justice: the Government’s Treaty settlements policy*, 20, citing Moana Jackson’s words in the interview on Radio New Zealand, ‘Mana News’, 31 October 1997.

¹⁵ Margaret Mutu offers the following Glossary meanings for rangatiratanga: ‘chieftainship including sovereignty, rights of self-determination, self-government, the authority and power of iwi or hapū to make decisions and own and control resources’. See M. Mutu, *Te Whānau Moana: ngā kaupapa me ngā tikanga: customs and protocol: the teachings of McCully Matiu, kaumātua rangatira of Te Whānau Moana and Ngāti Kahu as told to Margaret Mutu*, Auckland, 2003, 235.

¹⁶ M. Jackson, ‘The Treaty and the Word: the colonisation of Māori philosophy’, in G. Oddie and R. Perrett, eds, *Justice, Ethics and New Zealand Society*, Auckland, 1992, 8.

¹⁷ F. M. Brookfield, ‘The Historic Impact of Crown Law on Maori Law: some recent issues in the Courts and the Waitangi Tribunal’, *Australia and New Zealand Legal History Conference*, University of Waikato, 7 July 2001, 1.

the same time he says that the process of legitimation is not complete:

Many claims still remain to be determined. And, especially, some constitutionally protected recognition of Maori autonomy, where this is demographically or otherwise possible, remains to be accorded.’¹⁸

Particularly interesting here is his recognition that Maori have rights of autonomy that are not yet constitutionally recognised.

A somewhat different perspective from Brookfield’s is that, through the Treaty of Waitangi, a partnership has been established between the Crown and Māori. It is a perspective that has been promulgated in recent decades and appears in much of the official literature. The partnership model tends not to dwell on the impositions of the ‘revolutionary seizure of power’ that Brookfield talks about. This is not surprising since a partnership presupposes that both parties have, and are recognised on both sides to have, sufficient autonomy for the formation of a relationship of mutuality.

The understanding that the Crown and Māori are partners received a considerable boost through the ruling of the Court of Appeal in 1987 in the *New Zealand Maori Council v Attorney-General* case that dealt with the interpretation of the State Owned Enterprises Act. In summing up the position of the Court the President, Justice Cooke, said that ‘... we have all reached two major conclusions. First, that the principles of the Treaty of Waitangi override everything else in the SOE Act. Second, that those principles require the Pakeha and Maori partners to act towards each other reasonably and with the utmost good faith.’¹⁹ And in his own judgment, Justice Cooke said: ‘In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State Owned Enterprises Act are not used inconsistently with the principles of the Treaty’.²⁰ Cooke acknowledges that the history of the Crown’s dealing with Māori has not accorded with a partnership based on the equality of the races, but he believes that such a partnership is necessarily implied in the

¹⁸ Brookfield, 1.

¹⁹ New Zealand Court of Appeal, *The New Zealand Maori Council and Latimer v Attorney-General and Others*, Court of Appeal decision (CA 54/87), 29 June 1987, 373.

²⁰ N Z Court of Appeal, *The New Zealand Maori Council and Latimer v Attorney-General and Others*, 370.

principles of the Treaty of Waitangi.²¹ It would be fair to take from Cooke's discussion that, in terms of practice, the principle of partnership is more a spelling out of what ought to be the Crown's relationship to Māori, rather than of what it has been or yet is.

The differences in the opinions cited raise a number of questions: whether the present relationship of Crown with Māori is oppressive or not; whether it is beneficial to Māori or not; whether the colonising era is passed or not; whether the relationship is based on a partnership or imposed legal and constitutional arrangements; whether any such arrangements have been justified by time, at least in part; and whether the partnership established by the Treaty of Waitangi continues to place obligations on Crown and Māori of 'utmost good faith'. It is these sorts of questions that have informed both the subject matter of this thesis, and the approach to it.

The point on which the authors of the above statements all appear to agree is that the Crown's relationship with Māori *ought not* to be oppressive. In fact, one might discern a fair level of concern amongst them that this should not be the case. This observation leads to some important points regarding the subject matter of the thesis. Firstly, it needs to be said that the focus is not on the benevolence or malevolence of particular individuals or groups of individuals. The assessment of personal attitudes and moral positions is not part of this study. At times the behaviours of certain officials and departments will be commented on, but more where these are reflective of a general Crown approach. It is the actions and constitution of the Crown as an institution that is under consideration.

The institutional focus reflects the fact that the subject of study is a social or group-to-group relationship, not one between individuals. The importance of understanding this distinction can be seen when trying to reconcile the manifest good will of those having considerable influence in Government with some of the actions of the same Government. Doug Graham, as Minister for Treaty Settlements in the National (Conservative) Government of the 1990s, provides a case in point. He put considerable

²¹ See N Z Court of Appeal, *The New Zealand Maori Council and Latimer v Attorney-General and Others*, 369-374.

effort into the settlement of a number of Treaty claims, and achieved results – albeit within strictures set by the Crown. He did this with the support of his Prime Minister, Jim Bolger. Nevertheless, when it came to policy regarding how ongoing settlements were to be made, Doug Graham, acting on behalf of the Government, presented Māori with a set of unilaterally developed directives and patently little intention of moving from them.²² The manner of the Crown’s dealing with Māori over this matter did not accord with a partnership based on ‘utmost good faith’, even though what was being dealt with was the settlement of Māori claims against the Crown in terms of the Treaty of Waitangi.²³

A similar scenario was seen in 2003-4 in the case of Crown’s proposed policy and legislation in the matter of the foreshore and seabed. Michael Cullen, deputy Prime Minister, led the Labour/Progressive Government’s consultation with Māori. In the early stages he conveyed to those present a willingness to listen to what was being said, and an understanding of the historical basis for Māori concerns. Yet, in the end, he was part of a Government who proceeded with policy that was ‘imposed after inadequate consultation’ with Māori and ‘in the face of their vociferous opposition’.²⁴ In spite of Māori proposals for alternative ways forward, there was not an attempt to negotiate an agreement on the matter, as would be expected in a relationship ‘based on the equality of the races’.

It was the disparity between the improved good will towards Māori in governments from the mid-1970s and the continuation of unilateral rule in areas of major concern to Māori that pointed to the need to enquire into the framework within which government worked. Is there something about the constitution of government in New Zealand that

²² See R. J. Walker, *Ka Whawhai Tonu Mātou: struggle without end*, Auckland, 2004, 303. See also M. Mutu, *Te Whānau Moana: ngā kaupapa me ngā tikanga: customs and protocol: the teachings of McCully Matiu, kaumātua rangatira of Te Whānau Moana and Ngāti Kahu as told to Margaret Mutu*, Auckland, 2003, 210.

²³ It was because of this manner of acting by the Crown, over what came to be known as its ‘Fiscal Envelope Policy’, that the Hirangi Hui was convened. There was widespread rejection of the policy, and the way in which it was developed, by Māori. See M.H. Durie and S. Asher, ‘A Report Concerning the Government’s Proposals for the Settlement of Treaty of Waitangi Claims and Related Constitutional Matters, based on the proceedings of a hui held at Hirangi Marae, Turangi, 29/1/95’, Hirangi Marae, Turangi, 1995, 3-9.

²⁴ New Zealand Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy*, Wellington, 2004, 125.

militates against relationships with Iwi Māori based on partnership and the negotiation of mutual benefit? This was an important question in terms of my research.

Up to this point, a good deal of the discussion has centred on Māori as a single people. This is because the examples above have been taken from situations where Crown behaviour towards Māori communities as a whole is at issue. While similar references to the Crown-Māori relationship will be made in the thesis, the particular emphasis of the study is on the nature of the Crown's relationship with Iwi Māori: Māori as a people of peoples, Māori as a tribally-based people.

One reason for the emphasis on the Crown's relationship with Māori as a tribally-based people is because there has been a long history of tension in this country between the Government and tribes. A stated purpose of the Treaty of Waitangi was to uphold tribal authority, and there is evidence that for some time after 1840 Governors governed with some measure of regard for that authority. By the early 1860's, however, barely ten years after the establishment of the New Zealand settler parliament (in 1852), it had become an overt part of Government policy and legislation to effect the breaking down of Māori tribal structures.²⁵ Most devastating was the working of the Native Land legislation that was directed at the divesting of whānau and hapū of their lands, particularly through the individualisation of title.²⁶

It is, moreover, the contention of the thesis that this is not just a nineteenth century phenomenon, but that the undermining of whānau and hapū – along with their control of resources and the network of their relationships – has been sanctioned by successive governments through to the present.²⁷ This means that on the one hand there is the

²⁵ On law and legislation, see D. V. Williams, *Te Kooti Tango Whenua: the Native Land Court 1864 – 1909*, Wellington, 1999. On educational policy, see J. Simon, ed., *Ngā Kura Māori /Native Schools System 1867-1969*, Auckland, 1998, 7ff.

²⁶ See I. H. Kawharu, *Land as Turangawaewae: Ngāti Whatua's destiny at Orakei*, Wellington, 1979.

²⁷ Besides the evidence from the hearings of the Waitangi Tribunal, there have been a number of court cases where judges have admonished the Crown for its treatment of a tribe. In 1989, for example, Judge A. G. McHugh reprimanded the Government for its unnecessary tardiness in passing legislation that would return control of the Orākei Marae to Ngāti Whātua (*New Zealand Herald*, 7 September 1989, A1). In the High Court in Wellington, in 1999, Justice Nicholson ruled against the Crown in favour of Tainui, and said that the Crown had precipitated the court action due to inadequate consultation; Tainui had been

Crown with a history of policy and action that have been directed against tribes and tribal interests. On the other hand, there are Māori communities with a history of placing whakapapa and whānau-type relationships as key to their identity and mode of operation. Although there have been official efforts over the past two decades to recognise ‘iwi’, there are many instances that show that this recognition is dependent on Crown definition and convenience.²⁸

It was the observation of the contradictions between how tribes and tribal identity are regarded by Māori, and the way tribes are treated in so much of the general literature and have been typically dealt with by governments over a long period of time, that greatly influenced my decision to investigate the nature of the relationship of the Crown in New Zealand with Iwi Māori.

Argument

It is the argument of the thesis that, in spite of efforts by recent New Zealand Governments to address the history of Crown injustice to Māori, the relationship of the Crown with Iwi Māori is fraught with difficulties because it continues to be built on the exercise of unilateral power by the state over Māori communities, against the express will and intent of those communities and their leaders.

A major difficulty in investigating the Crown’s relationship with Iwi Māori lies in the identification and analysis of the ideology that justifies the domination of tribes by states. Much international and national writing obscures the nature of the state-tribe relationship – notably by relying on ideology that places the capitalist state as naturally superior to tribes and their economies. This thesis argues that such ideology, which permeates a great deal of the discussion concerning the relationship of the Crown to the Māori tribal world, is built on stereotypes of tribal societies and unexamined assumptions about capitalism and the nation state.

asking for over a year to meet in consultation with the Crown and its requests had been ignored (*The Evening Post*, 1 April 1999, A1).

²⁸ See C. W. Smith, ‘Kimihiā te Maramatanga: colonisation and iwi development’, MA Thesis, University of Auckland, 1994, 9-10.

In order to develop an understanding of the relationship between the Crown and Iwi Māori, an analysis of the social relations established by the Crown in the process of its colonisation of New Zealand is needed. These are the social relations embedded in New Zealand's juridical and constitutional arrangements; they determine the political configuration of society as a whole, and have social, political, and economic effects. For Iwi Māori, the social order introduced by the Crown is imposed, and cuts across their social, political, and economic order.

Considerable attention is given in the thesis to the social relations of the tribally-based communities prior to, and as they withstand, the impositions of colonisation – in the conviction that an analysis of the Crown's relationship with Iwi Māori must be based in an understanding of how that relationship has been experienced by Māori and their world. It was in the pursuit of this insight that a particular underlying contention of the thesis developed, namely, that it is in the light of an alternative social order that the arguments for the natural superiority of the capitalist state can be more readily critiqued.

Another contention of the thesis is that the links between the social, political, and economic need to be conceptually held together, if the fuller implications of the relationship of the Crown with Iwi Māori are to be understood. Many works about the relationship between states and tribes offer only a partial analysis because these links are not well made, most often because they concentrate on social and political factors apart from the economic. The functioning of the Crown as a state built on capitalist social relations must be taken into account when looking at its relationship with the Māori tribally-based world.

The final argument of the thesis is that the relationship the Crown has established with Iwi Māori sets the Crown's own interests and those of capitalist development over the interests of Māori communities, and that by constituting itself as a government with single, undivided sovereignty, the Crown has been able to use its unilateral power to dispossess Māori communities of their lands and their authority in the land, and put them in their dealings with the Crown as dependent on its goodwill and pleasure.

Scope

The thesis has both a specific and a broad focus. Its specific focus is the actions, policies, and constitution of the New Zealand Crown as expressed in its relationship with Iwi Māori. While comparisons could be made with other parts of the world, and particularly the Anglo-Commonwealth jurisdictions,²⁹ this study concentrates on the New Zealand situation. Similarities with other state-tribe relationships will be noted from time to time, but these comparisons do not form a significant part of the thesis.

The broad focus of the thesis is the ideology that obscures the nature of the relationship of the Crown in New Zealand with Iwi Māori. The wider focus is needed because the ideology at issue is closely linked to ideas that permeate a great deal of the international discussion about states and tribes. This study is interested in the *use* that is made of some of the widely held theories and philosophies that carry those ideas. A complete examination of the theories is not attempted because the thesis is based on the advancing of evidence and the analysis of arguments rather than the development of a theoretical position.

A pervasive influence in discussions concerning states and tribal peoples is that of social evolutionary theory. Baldly speaking, this is the theory that humans have evolved from primitive behaviours and primitive forms of social, political, and economic organisation to those of modern, civilised society. The theory contends that the broad evolutionary path will be followed over time by all human communities and, by implication, that the leaders in this development in recent centuries have undoubtedly been the countries of Europe.³⁰

My concern in the thesis is to critique the indiscriminate use of social evolutionary theory by scholars; this is because much of the stereotyping of tribes can be traced to

²⁹ The Anglo-Commonwealth jurisdictions are Australia, Canada, and New Zealand. Much of Paul McHugh's work has been directed to comparing these three jurisdictions. See, for example, P. McHugh, 'The Legal and Constitutional Position of the Crown in Resource Management', in R. Howitt, ed., *Resources, Nations & Indigenous Peoples*, Melbourne, 1996.

³⁰ See E. R. Wolf, *Europe and the People Without History*, Berkeley, 1982, 12-18; A. Kuper, *The Invention of Primitive Society: transformations of an illusion*, London, 1988, 231 ff.; Z. Sardar, A. Nandy, M. Wyn Davies, *Barbaric Others: a manifesto on Western Racism*, London, 1993, 70-81.

the uncritical use of some form of this theory.³¹ In carrying out my research, I found it especially interesting that there were a number of works in which the concepts of social evolution were spurned as belonging to nineteenth century anthropology, and yet comparable assumptions regarding the superiority of ‘modern’ economies over tribal were uncritically held.³²

Not unrelated to social evolutionary theory are certain positions taken in the name of liberal philosophy. I say not unrelated because liberalism is another philosophical perspective that favours assumptions about inevitable paths for human progress. With its origins in the enlightenment, liberalism is inclined to the categorisation of societies as either traditional and backward-looking, or modern and forward-looking. Associated with this thinking is a presumption that there is a lack of freedom and equality in ‘traditional’ societies, to which the tribal are assigned, as against that which is to be found in ‘modern’ societies.³³ While no attempt is made to offer a thorough review of such thought, the unsubstantiated use of this sort of categorisation of societies is critiqued where necessary; and evidence is brought forward that indicates the fallacies in these ‘enlightenment’ assumptions.

As these observations might indicate, the critique of ideology is a significant aspect of the thesis. Most important is the critique of the ideology that presumes the superiority of the capitalist state over tribal society. The capitalist state, under the name of ‘liberal democracy’, is commonly portrayed as delivering equality and freedom as against other

³¹ Social evolution was developed as a theory in the nineteenth century and into the early decades of the twentieth, and continues to be regenerated in new forms. There is the more recent prediction that a stage of societal development is emerging where nation states are in the process of giving way to a fully globalised society, and another prediction is that humanity is moving into an era of ecological consciousness – as in a pristine awareness of the need to care for the ecological wellbeing of the universe. Both predictions indicate a reliance on fundamental assumptions about stages of development and inevitable paths of human advancement. Neither prediction carries analysis of the specific nature of the capitalist economy and its effects with regard to the presumed developments; see E. Meiksins Wood, *Democracy Against Capitalism: renewing historical materialism*, Cambridge, 1995, Chapter 1.

³² This is evident in some of the writing in the selected Tribunal reports. Where pertinent, comment is made on this in the body of the thesis.

³³ See Susan Healy, 'Are We Building for the Future on Misplaced Interpretations of the Past?' a paper delivered at the 2001 APRU Doctoral Students Conference, 'Nga Kete o te Matauranga, Global Pressures, Local Impacts: challenges for the Pacific rim', University of Auckland, 2001, 6-7. Comment is made on these presumptions as they appear in Robert Heilbroner's, *1992 Massey Lectures on Twenty-first Century Capitalism*; and Anthony Giddens', 'Runaway World', second lecture of the 1999 BBC Reith Lectures.

forms of political organisation³⁴ – in spite of the evidence in these states of enormous inequalities in wealth and power, and the loss of power and wealth by those Indigenous communities that have had the institutions of ‘liberal democracy’ imposed on them through colonisation.³⁵ The failure of much theorising to bridge the gap between what is claimed for and what is delivered by liberal democracies caused me to search for other explanations of how relationships of power are sustained in a democratic state like New Zealand.

It was in some of the writing based on Marx’s critique of capitalist social relations that I found more satisfactory insights into how power is exercised in democracies whose economic foundation is capitalist.³⁶ Especially useful was the writing of two scholars who had set out to demonstrate the contemporary relevance of Marx’s work. Judith Simon’s theses on education and Māori-Pākehā relations in New Zealand offer a basis for the critique of ideology, and an understanding of the power relations between Pākehā and Māori.³⁷ A more general study by Ellen Meiksins Woods, political scientist from Canada, provides an analysis of the contradictions between capitalism and the democracy that is exercised in capitalist states.³⁸

The analyses of both Simon and Meiksins Wood were helpful when it came to understanding certain aspects of the institutional basis for the Crown’s relationship with Māori, and why elements of the colonising relationship might remain in spite of the

³⁴ See Healy, 6-7.

³⁵ See D. Bedggood, ‘Origins of a Capitalist Colony’, *Rich and Poor in New Zealand: a critique of class, politics and ideology*, Auckland, 1980, Chapter 2; J. Kelsey, ‘Rogernomics and the Treaty of Waitangi’, PhD Thesis, University of Auckland, 1991, 98-122; B. Parekh, ‘Liberalism and Colonialism: a critique of Locke and Mill’ in J. N. Pieterse and B. Parekh, eds, *The Decolonization of Imagination: culture, knowledge and power*, London, New Jersey, 1995.

³⁶ There is a growing range of works, many of them based in reflection on practical situations, that are analysing the contradictions between what is claimed for and what is delivered by liberal democracy and the capitalist state. See, for instance, T. Lumumba-Kasonga, ed., *Liberal Democracy and its Critics in Africa: political dysfunction and the struggle for social progress*, Dakar, 2005; M. O’Connor, ed., *Is Capitalism Sustainable? political economy and the politics of ecology*, New York /London, 1994. While offering valuable insights, these works are not as penetrating in their analysis of these contradictions as Ellen Meiksins Wood’s, *Democracy Against Capitalism: renewing historical materialism*, which is discussed in the literature review.

³⁷ J. Simon, ‘The Place of Schooling in Maori-Pakeha Relations’, PhD Thesis, University of Auckland, 1990; ‘Policy, Ideology and Practice: implications of the views of primary school teachers of Maori children’, MA Thesis, University of Auckland, 1982.

³⁸ E. Meiksins Wood, *Democracy Against Capitalism: renewing historical materialism*, Cambridge, 1995.

seemingly greater personal goodwill towards Māori in recent Governments. On the other hand, their contributions to the subject of the thesis were limited by the fact that neither of them considers the tribal experience. It is perhaps significant that Marx's own writing shows that he had a restricted understanding of the relationships of Indigenous peoples to their lands.³⁹ In this study, considerable attention is given to the search for an understanding of the social relations of Māori tribally-based communities prior to, and as they withstand, the impositions of colonisation. A particular reason for this search is so as to gain greater insight into tensions and contradictions between the social, political, and economic order established by the Crown and that of the tribally-based world.

In searching for an understanding of the social relations of Iwi Māori, I recognise that my own enquiry is carried out within definite limits. As will be explained later in the thesis, the main sources for information on these matters are five of the Waitangi Tribunal reports. Four of these deal with the experiences of the Far North and Te Roroa communities from long before European contact through to the time of the writing of the reports. The fifth considers Te Whanau o Waipareira, a non-tribal Māori community that developed during and after the Second World War to give support to Māori individuals and whānau in the west of the greater Auckland conurbation. In terms of counter examples to the common stereotypes of tribes, there are more than enough to be drawn from the five reports. In terms of giving a complete overview of the Māori tribal world, this is not attempted.

An attempt to provide such an overview would encounter considerable difficulty, especially because each hapū, iwi, and marae has its own history, protocols, and law. On the other hand, there is much in the different protocols and laws that is held in common, and there are well-established bases for the accommodation of the differences and the negotiation of relationships of reciprocity. In the thesis, a balance between the

³⁹ See K. Marx, *Capital: a critique of political economy, volume one*, Harmondsworth, England, 1976, 934. Marx says that the essences of a free colony 'consists in this, the bulk of the soil is still in public property'. His remark suggests that he accepts a European view common in his time, that indigenous peoples did not have an understanding of property ownership. In Chapters 1-4 of the thesis, it will be shown that hapū had very clear understandings of proprietorial rights in the land and sea. Although these were communally based, hapū property was not public property.

particular and the general is sought. This is done by basing the detailed considerations of tribal social relations on the evidence that comes from the communities who figure in the reports. These will be quite particular views of Māori tribally-based society, specific to the communities concerned. There are, nevertheless, generalisations that can be made about the social relations of the Māori tribally-based world, especially when considered relative to the social order established by the Crown. The generalisations will be derived from broader observations that are made in the reports and from supplementary evidence.

Since the thesis is centred round the actions and policies of the Crown as relayed through the five Waitangi Tribunal reports, there are aspects of the Crown's action and its effects that are not considered. One specific example is the introduction of various systems of Māori rūnanga or councils. Ostensibly these were for Māori benefit. However, those who have written in detail on the systems, Lindsay Cox, Lyn Waymouth, and Richard Hill, all concur that they were designed to bring Māori communities under Crown control.⁴⁰ While the Ngai Tahu hapū retained the rūnanga system, adapting it to their own purposes,⁴¹ the national systems of Māori councils introduced both in the 1860s and early 1900s generally did not prosper for any length of time, not least because of poor resourcing by the Government.⁴² These systems are not discussed in the five reports, or in the thesis. While the discussion in the thesis includes background on Crown actions and policies that is wider than that offered in the reports, it is beyond the scope of the thesis to cover all the many ways in which the Crown effected the establishment of its authority. The fact that particular actions taken by the Crown are not included in this study does not detract from the general conclusions that are drawn regarding the nature of the Crown's relationship with Iwi Māori. In the case of the rūnanga and council systems, Cox, Waymouth, and Hill all agree that their introduction was part of the Crown's assimilation policy, a policy that receives some attention in the thesis.

⁴⁰ Hill, *State Authority, Indigenous Autonomy*, 20-1, 50-64; Waymouth, 'The Bureaucratisation of Genealogy', 5-6; L. Cox, *Kotahitanga: the search for Māori political unity*, Auckland, 1993, 80-89.

⁴¹ Waymouth, 'The Bureaucratisation of Genealogy', 5-6.

⁴² Cox, 88-9; Hill, 62-4.

Review of the literature

There is not another study that specifically sets out to investigate the nature of the relationship of the Crown in New Zealand with Māori as a tribally-based people. There is, nonetheless, a vast and growing body of writing about tribes, states, and the state-tribe relationship.⁴³ This review considers those works that have been most useful to addressing the questions raised in the thesis. Suresh Sharma's arguments in *Tribal Identity and the Modern World* are examined because they tackle some very similar questions. Comment is then made on the contribution of the reports of the Waitangi Tribunal to an understanding of the Crown's relationship with Iwi Maori. This is followed by a consideration of the writing and kōrero of tribal experts and Māori critical thinkers, as primary sources for the understanding of the social relations of the tribally-based world and for the critique of the Crown's behaviour towards Māori communities. The studies of other New Zealand scholars, including anthropologists, historians, and legal and constitutional experts, are assessed in as much as they clarify the Crown-Maori relationship. Brief mention is made of some of the pertinent international writing on the rights of *peoples*. The overseas works that receive particular attention are James S. Anaya's treatise on Indigenous peoples and international law and James Tully's critique of modern constitutionalism, because of the insights they offer into state-tribe relations. Finally, the contributions of Judith Simon and Ellen Meiksins Wood to an understanding of the operation of the Crown as a capitalist state are considered.

Suresh Sharma's *Tribal Identity and the Modern World* is one of the relatively few works that seriously questions the priority of the 'modern' state over the tribal.⁴⁴ Sharma approaches the subject from an academic background in anthropology, geography, philosophy, and history, and his field work with tribal peoples in central India. It is his grounded knowledge of the tribal that has led him to question both the state's treatment of tribes and the way tribes have been presented in political and social sciences discourse.

⁴³ See Richard Falk's remarks quoted in the Preface. Will Kymlicka also comments on the burgeoning of literature on states and 'minorities' over the past decade. See W. Kymlicka, 'Liberal Theories of Multiculturalism', in L. H. Meyer, S. L. Paulson, and T. W. Pogge, eds, *Rights, Culture, and the Law: themes from the legal and political philosophy of Joseph Raz*, Oxford, 2003, 229.

⁴⁴ S. Sharma, *Tribal Identity and the Modern World*, New Delhi, 1994.

In his book, Sharma surveys historical and contemporary aspects of the place of the tribes in India, and particularly how they are treated under the present system of government. Sharma recognises the continuation of the colonising heritage in India's 'schedule of tribes'. He argues that the 'schedule' seeks to list and categorise tribes for the purposes of control by central government and yet fails in its attempt to define accurately who is and who is not a tribe.⁴⁵ His critique is similar to that offered by Māori scholars in their consideration of contemporary pressures on tribal communities to conform to Government-set models of organisation.⁴⁶

Sharma proposes that the treatment of tribes is an effect of 'the pursuit of modernisation' and the accompanying drive to homogenise the social fabric of India. He says that for 3000 years the history of India was that of an accommodation of multiple political styles and centres. Even if 'far from perfect' the relations maintained were of an order completely different from those that have come with the modern political arrangements. He recognises that this new order started with colonisation and is being continued today by those who, at key levels of government in India, would like to replicate the European 'homogenous social order'.⁴⁷ Sharma's observations point to a link between the 'homogenous social order' and the constitution of the modern state.

Sharma discerns that the state's treatment of tribes in the drive to modernisation is powerfully supported by the philosophy of progress, which has informed so much of social sciences discourse. He critiques the basis for this philosophy, and its application to tribes. He says:

Until quite recently, the comforting certainty in our political and social science discourse has been that the tribal formation represents an early form of human organisation in the universal though often complicated scheme of human evolution. Inevitably, therefore, the expectation has been that in the march of progress the tribal form would inevitably weaken and give way to the more advanced forms of social cohesion.⁴⁸

Sharma argues that 'the sheer persistence and resilience of tribal identities in India' puts

⁴⁵ Sharma, 9, 64-76.

⁴⁶ See Chapters 4 and 7(i) of the thesis.

⁴⁷ Sharma, 41-2.

⁴⁸ Sharma, 9-10.

a large question mark over the above reasoning.⁴⁹

There is a good deal in Sharma's treatment that is pertinent to the study of the Crown's relationship to tribes in New Zealand. The official categorisation of tribes to suit state purposes is one thing.⁵⁰ There is also his recognition of the place of colonisation in introducing a radical new order to the 'social fabric' of the region; the present treatment of tribes is seen as deriving from the colonising heritage. Finally, there is his perception of the justification that is lent to the impositions of the state on tribes by the philosophy of progress, with its assumptions that tribal formations must inevitably give way to those of the modern state.

There are limits to the usefulness of Sharma's approach for this study, quite apart from the fact that his work is based on the Indian situation. With regard to uncovering the sources of the difficulties in the relationship of the state with tribes, his analysis focuses strongly on philosophical issues and does little to identify the institutional causes of the problems. In this study, a comprehension of the relevant features of the state in political, social, and economic terms is judged to be vital to an understanding of the nature of the relationship that the Crown has established with Iwi Māori.

While Sharma's dissertation tends to concentrate on more abstract, philosophical questions, this is not the case with the bulk of the New Zealand writing about Crown-Māori relationships. There is now a wealth of information available on the Crown's policies and actions with regard to Māori people generally, from 1840 onwards. A major impetus in the generation of this material has been the research required for the investigation of the claims brought to the Waitangi Tribunal.⁵¹ The Tribunal has now produced numerous reports based on its hearings, and there are volumes of recorded

⁴⁹ Sharma, 9-11. Sharma believes, in fact, on the basis of his knowledge of tribal peoples, and the sustainability of their agricultural practices and their resilience, that their experience could help 'clarify the cultural and institutional possibilities' for human survival in the face of the major social and environmental problems that face our world and 'the suicidal edge inherent in the modern predicament'. See Sharma, 10-14.

⁵⁰ See Chapters 4 and 7(i) of the thesis.

⁵¹ The Waitangi Tribunal was established by an act of Parliament in 1975, and is a permanent commission of inquiry charged with making recommendations on claims brought by Māori relating to actions or omissions of the Crown, which breach the promises made in the Treaty of Waitangi. See <http://www.waitangi-tribunal.govt.nz/about/waitangitribunal/> (11 July 2005).

evidence that stand as a background to each of these reports.⁵²

The reports provide valuable evidence for an enquiry into the nature of the relationship that the Crown has established with Iwi Māori. They are grounded in the concrete experiences of Māori communities and the impacts on them of specific Crown policies, legislation, and actions. They bring together a wide range of information, including input from claimants, evidence from other experts, the research of the Waitangi Tribunal's staff and the claimant and Crown legal teams, and the expertise of the Tribunal itself. They have a particular value because they come out of a forum where Māori, Crown, and other tauwiwi have met and engaged with some seriousness over the resolution of historical and contemporary grievances. It is because of the abundance of information in the Tribunal reports regarding Māori communities and the Crown's treatment of them that I have chosen to centre the thesis round a critical reading of five of the reports.

While the Tribunal reports and their accompanying documents have been very useful to this research, I have found that they have needed to be read with discernment; there is some reasoning in them that needs to be questioned, and there are underlying implications regarding the Crown's relationship with Iwi Māori that need to be drawn out. The careful reading of the five selected reports reveals that some of the argument in them is not consistent, and even contradictory of their own evidence. This is notably the case where economic issues are under consideration. The actual inconsistencies are discussed in the chapters.

When it comes to identifying the nature of the Crown's relationship with Iwi Māori, a search for the deeper implications of the material in the reports is needed because there are limits to which the Waitangi Tribunal can take its investigations. As a Crown instituted body, the Tribunal carries out its work within a brief that has been set for it by the Crown. The arguments, conclusions, and recommendations of the Tribunal are

⁵² There are three main parts involved in any case brought before the Waitangi Tribunal: the *claim* brought by the aggrieved party (whanau, hapu, iwi, Māori group, or Māori individual), the *hearings* at which the Tribunal receives oral and written evidence, and the *report* of the Tribunal which sums up the evidence, and the Tribunal's conclusions and recommendations.

limited by its brief and, to some extent, by what is perceived as politically possible. Although the work of the Tribunal involves the examination of Crown policy and action, its commentary in the reports only touches on issues that concern the constitution of state power, the base from which the Crown's relationship with Māori is determined.

With regard to most aspects of this research into the Crown's relationship with Iwi Māori, I have found the sharpest insight in the kōrero and writing of tribal experts and Māori critical thinkers. As a Pākehā researcher trying to gain an understanding of the social relations of the tribally-based world, I empathise with Angela Ballara's words in the Preface to her book on *Iwi*. She says: 'I am conscious that there are thousands of people out there who are greater experts than I am on Maori iwi and hapu; they are all Maori, who have first- rather than second-hand knowledge of the things I am describing.'⁵³ Ballara's words are also applicable to the experience by Māori communities of Crown action: it is those communities and their members who have direct knowledge of that action. They are more likely, therefore, to have a sharpness of comment to offer on Crown policy and action in their regard.

This review mainly discusses the written sources of Māori comment that are called on in thesis, but I need to acknowledge the formative influence on the understandings and analysis in the thesis that have come from the spoken expression of Māori opinion. One brief example is given. At a time when I was reading about ways in which the Crown had assumed possession of land in the Far North, I attended a seminar where Himiona Peter Munro, Secretary of the Ngāti Wai Trust Board, talked about the Crown's propensity for taking 'presumptive ownership' of hapū land.⁵⁴ His apt description summed up exactly the situation I was reading about. This is but one of many, many instances of critical insight that have come from listening to Māori opinion.

When it comes to an understanding of important tribal relationships, then this is

⁵³ A. Ballara, *Iwi: the dynamics of Māori tribal organisation c.1769 to c.1945*, Wellington, 1998, 13.

⁵⁴ The seminar was entitled 'The Declaration of Independence and the Treaty of Waitangi' and was organised by Network Waitangi, Whangarei, 28 October 2000.

generally best found in discussions in the Māori language on marae and at other Māori gatherings. In recent years, however, there has been a growing body of written material that contains tribal opinion on tribal matters.⁵⁵ Particularly valuable are the records of the evidence presented to the Waitangi Tribunal by the expert witnesses from the different claimant communities. In the thesis, specific reference is made to the knowledge shared by Maori Marsden, Ross Gregory, and others on ‘tuku whenua’, the practice by which outsiders were accommodated on hapū land.⁵⁶ There is also the academic research of those who have access to the authoritative knowledge of their people. Use is made in the thesis of material from Waerete Norman’s background to the Muriwhenua claim, Merata Kawharu’s doctorate on ‘Kaitiakitanga’, Lynette Carter’s writing on ‘Whakapapa’, Hugh Kawharu’s lecture on ‘Land and Identity in Tamaki: a Ngati Whatua perspective’, and other similar works.⁵⁷ These authors convey the integrity of the relationships in the tribal world in a way that is rarely matched by those who write from outside the tribal experience.

There is also the Māori writing that is incisive in its comment on the exercise of state power in regard to Iwi Māori and the ideology that has been used to justify that exercise.⁵⁸ The publicly-available lectures and the writing of Ranginui Walker have

⁵⁵ As yet, there are very few published books and articles on these matters, but there is material in the public domain, notably as theses and the evidence presented by tribal experts to the Waitangi Tribunal. The Tribunal hearings have provided a rare public forum for tribes-people to speak about their tribes and tribal life.

⁵⁶ See ‘Evidence of Reverend Maori Marsden’, Wai 045, Doc#F25; ‘Evidence of Ross Stirling Gregory’, Wai 045, Doc#F28; ‘Statement of Evidence of Meto Hopa for Waitangi Tribunal Hearing 26 February – 2 March 2001’, Waitangi Tribunal, Northern South Island District Inquiry, Wai 566, Wai 785, Doc#B43, 2001; ‘Evidence of Priscilla Paul in the Matter of Claim Wai 566’, Doc#B17, Wai 566, Wellington: New Zealand Waitangi Tribunal, 2001.

⁵⁷ W. Norman, ‘The Muriwhenua Claim’, in I. H. Kawharu, ed., *Waitangi: Maori and Pakeha perspectives of the Treaty of Waitangi*, Auckland: Oxford University Press, 1989; M. Kawharu, ‘Dimensions of Kaitiakitanga: an investigation of a customary Maori principle of resource management’, PhD thesis, Oxford University, 1998; L. Carter, ‘Whakapapa and the State: some case studies in the impact of central government on traditionally organised Māori groups’, PhD Thesis, University of Auckland, 2003; L. Waymouth, ‘The Bureaucratisation of Genealogy’, I. H. Kawharu, ‘Land and Identity in Tamaki: a Ngati Whatua perspective’, Hillary Lecture 2001, Auckland War Memorial Museum, 14 November 2001. Another valuable source has been T. Rei, B. Young, Ngā Kairangahau and Manatū Māori staff, *Customary Māori Land and Sea Tenure: Ngā Tikanga Tiaki Taonga o Neherā*, Wellington, 1991.

⁵⁸ Only contemporary works are mentioned in the review, but the contemporary articulation of Maori critical thought comes out of a long history. There is, for instance, a good deal of critical comment in the Māori language newspapers from the nineteenth century, and especially those that are tribally-owned. See L. Waymouth, ‘Parliamentary Representation for Maori: debate and ideology in *Te Wananga* and *Te Waka Maori o Niu Tirani*, 1874-8’, in J. Curnow, N. Hopa, and J. McRae, eds, *Rere Atu, Taku Manu! discovering history, language & politics in the Maori-language newspapers*, Auckland, 2002. Copies of the newspapers are available at: <http://www.nzdl.org/niupepa>

been pioneering in this regard. They continue to provide information regarding Crown action, and analysis of institutional racism, that is not so readily found in the general body of academic writing in New Zealand.⁵⁹ Mason Durie has also written a great deal that explains how Crown institutions have been less than conducive to Māori interests, and the changes needed in order for them to be more beneficial to Māori and their communities. Like many other Maori writers he links Māori well-being with their self-determination as a people, and as self-determining communities.⁶⁰ Both Walker and Durie have opened up pathways of research that many others are now following.

There has been an escalation in Māori critical writing over the past three decades.⁶¹ Work that has been especially useful to this research into the Crown's relationship with Māori as a tribally-based people includes Lindsay Cox's book on the search for Māori political unity,⁶² Cheryl Waerea-i-te-rangi Smith's thesis on 'Colonisation and Iwi Development',⁶³ a series of readers on 'Economics, Politics & Colonisation' published by the International Research Unit for Maori and Indigenous Education,⁶⁴ the Proceedings of the 1998 Maori Research and Development Conference,⁶⁵ and papers written by Roger Maaka, former head of the Maori Studies Department at Canterbury University.⁶⁶ In terms of comprehending the constitutional and legal implications of Crown rule for Iwi Māori, and the multi-layered effects of colonisation, Moana Jackson's presentations and writing are exceptionally helpful.⁶⁷ He brings to his work a breadth of understanding about the relationships of states to tribes because of his

⁵⁹ See, for example, R. J. Walker, *Ka Whawhai Tonu Mātou: struggle without end*, Auckland, 2004.

⁶⁰ See, M.H. Durie, *Te Mana, Te Kāwanatanga: the politics of Māori self-determination*, Auckland, 1998.

⁶¹ 'Critical theory' takes its source in the Frankfurt Institute of Social Research, often referred to as the Frankfurt School. Established in the 1920s, this school produced theorists that have had enormous influence in the field of social science. The early critique from this school centred on the social relations of the capitalist economy, but the fields of 'critical writing' that have developed from there include feminism, liberation theology, and the analysis of colonial domination.

⁶² L. Cox, *Kotahitanga: the search for Māori political unity*, Auckland, 1993.

⁶³ C. W. Smith, 'Kimihiā te Maramatanga: colonisation and iwi development', MA Thesis, University of Auckland, 1994.

⁶⁴ L. Pihama and C. W., eds, 'Economics, Politics & Colonisation: a series of readers examining critical issues in contemporary Maori society, IRI/Moko Productions, University of Auckland, c. 1998.

⁶⁵ Te Pūmanawa Hauora, eds, 'Proceedings of Te Oru Rangahau: Maori Research and Development Conference 7-9 July 1998', Palmerston North: Te Pūtahi-a-Toi /School of Māori Studies, Massey University, 1998.

⁶⁶ For example, R. Maaka, 'A Relationship, Not a Problem', in K. Coates, P.G. McHugh, *Living Relationships: Kōkiri Ngātahi: the Treaty of Waitangi in the new millenium*, Wellington, 1998.

⁶⁷ See, for example, M. Jackson, *The Māori and the Criminal Justice System: a new perspective: he whaipānga hou*, Wellington: Policy and Research Division, Department of Justice, 1988, and 'The Treaty and the Word: the colonization of Māori philosophy', in G. Oddie and R. Perrett, eds, *Justice, Ethics and New Zealand Society*, Auckland: Oxford University Press, 1992.

involvement in advocacy work for Indigenous peoples at the international level.⁶⁸

The Māori critical writing generally names the capitalist economy as a significant aspect of the colonising order that has impacted on tribal life. It is less likely to use the euphemisms for the Crown-imposed economy that are employed in much commentary, including some of the Tribunal reports – where the word ‘capitalist’ is avoided and names such as ‘the modern’ economy or ‘the new’ economy are used instead.⁶⁹ There is not a great deal in the recent Māori critical writing, however, that investigates the nature of the connections between Crown rule and the capitalist economy, as they impact on Māori communities and their relationships. The most insightful article I have come across in this regard is one by Robert Webb on ‘The Sealords Deal and Treaty Rights’. He explains the implications of the Sealords deal, with the property relations it creates, for the exercise of tribal tino rangatiratanga and the spiritual and traditional relationships of Māori communities with their fisheries.⁷⁰ An important concern of the thesis is to gain an understanding of the Crown’s relationship with Iwi Māori by clarifying the connections between the political, social, and economic aspects of the social order set in place by the Crown, as it impacts on the Māori tribally-based world.

In turning to the field of other New Zealand writing, I make specific mention of the contribution of contemporary scholars whose work reflects their studious immersion in the Māori world. Notable in this regard is the research of the anthropologists, Joan Metge and Anne Salmond. Both are called on as expert witnesses for the Muriwhenua Land claim for their understanding of issues and relationships that are often misunderstood in the cross-cultural context. Another scholar is Angela Ballara who has looked into the history of tribal communities, especially through the study of the Native Land Court records and other related documents. Her major published work is entitled *Iwi* and examines the dynamics of Māori tribal organisation from 1769 to 1945. The first part of the book provides particularly helpful background on the history of how Māori tribal relations have been misinterpreted. Ballara has also done useful research

⁶⁸ See M. Jackson, ‘Self-determination: the principle and the process’, *Indigenous Affairs*, 3, 57-61, 1998.

⁶⁹ See Chapter 8 of the thesis for comment on this.

⁷⁰ R. Webb, ‘The Sealords Deal and Treaty Rights: what has been achieved?’ in L. Pihama, C. W., eds, *Fisheries and Commodifying Iwi*, Auckland, 1998, 36-42.

into customary land tenure.⁷¹

In the broad field of non-Māori writing about matters that touch on the Crown-Māori relationship there has been a considerable reassessment of opinion over the past three decades. Writing that reflects this changing view is often called 'revisionist' – which is a term of approval or otherwise, depending on the eye of the beholder! Basically, the term is applied to works that bring into question the official understandings of New Zealand's history that were conveyed through most Government-sponsored institutions through to at least the late 1960s. Some of these understandings are that in 1840 Māori unreservedly ceded their sovereignty to the British Crown, that the institutions that came with British rule offered civilisation and progress for all, that the colonisation of New Zealand has been exceptionally benign, and that as a consequence New Zealand has some of the best race relations in the world. While there are some who strongly disagree with the revisionist interpretations of history, there is today a fair measure of public acceptance of the moves in the revisionist direction; this is shown by the popularity of histories such as Michael King's *The Penguin History of New Zealand*.⁷²

Of the recent histories written by Pākehā, the closest to this thesis in terms of subject matter and analysis is Richard Hill's *State Authority, Indigenous Autonomy: Crown-Maori Relations in New Zealand /Aotearoa 1900-1950*. His work does not have the same particular interest in the Crown's relationship with Māori as a tribally-based people, nor does it look into the position of the Crown as a capitalist state.⁷³ There are, however, other areas in which his book and this thesis have a fair amount in common.⁷⁴ One of these is the institutional focus of Hill's study, which sets out to examine 'Crown-Maori relations at a macro level throughout half a century'.⁷⁵ He believes that

⁷¹ See A. Ballara, 'Customary Land Tenure in Te Tau Ihu (the Northern South Island) 1820-1860: an overview report on Te Tau Ihu (Wai 785): the evidence of Angela Ballara', Waitangi Tribunal, Wai 785, Doc #D1, February 2001, Chapter 3.

⁷² M. King, *The Penguin History of New Zealand*, Auckland: Penguin Books, 2003. King's work is a popular history rather than a strictly academic one.

⁷³ See Hill, 8. Hill says that his work 'omits significant dimensions, particularly the class relations which are so integral to the structured inequality' and that the book is 'about something else: politico-cultural relations between Maori and state leaderships, in the context of the ongoing Maori assertion of rangatiratanga and the Crown's various responses to this'.

⁷⁴ This is particularly true of his Preface which comments on the character of the Crown relationship from 1840 through to the present, and the historiography of that relationship.

⁷⁵ Hill, 7.

more scholarly attention needs to be directed to the work of the state in colonisation: ‘Scholarly attention is needed to unravel the complexity of the relationship between, on the one hand, subjugated people or peoples and, on the other, the imperial state, its devolved colonial forms and its post-colonial structure’.⁷⁶

Hill situates Crown-Maori relations within the broader context of European colonisation, which he sums up in the statement: ‘Colonisation was essentially concerned with the exploitation of territories and their human and physical resources’.⁷⁷ He is equally forthright about the actions of the Crown in establishing its rule in New Zealand. Speaking in relation to Māori he says: ‘For them [Māori], cultural homogenisation, which involved gaining control of minds (and therefore behaviours), was a complement to the violence inherent in the state’s subsuming of the Maori political economy and acquisition of the resources of Aotearoa’.⁷⁸

Hill does not agree with those who present New Zealand’s colonising history as that of a benign imperialism, and critiques the arguments of those, revisionist or otherwise, who continue to maintain that view.⁷⁹ Nor does he hold to the position that the Crown had sought some real sort of partnership with Maori in choosing to establish its presence in New Zealand. He says: ‘Some New Zealand historians have come to appreciate that the realities of imperial control applied as much to their own country as elsewhere ... But even most of these tend to miss the point that the fundamentals of colonisation and settlement precluded genuine power sharing’.⁸⁰ The British imperial order could not have tolerated ‘an autonomous indigenous political economy within a settler colony’ and the ‘potential or actual sovereign threat to the politico-capitalist order on the

⁷⁶ Hill, 18. ‘Subjugated people’ is not a term I would use, because it defines a people entirely in terms of their oppression.

⁷⁷ Hill, 11.

⁷⁸ Hill, 19.

⁷⁹ Hill, 20-6.

⁸⁰ Hill, 21. This observation is interesting because Alan Ward in *A Show of Justice*, published in 1973, describes (page 308) the colonisation of New Zealand as ‘an imperial subjugation of a native people’. However, in his much more recent history, he says (page 15) that ‘the Treaty ... was an agreement between the Crown and 500 chiefs of particular tribes to build a nation-state together’. This latter statement seems questionable. There were major tribes in the central North Island who did not sign the treaty, and it is dubious that hapū and rangatira intended to surrender their rangatiratanga for some overriding authority, which is implicit in the notion of a nation-state. Ward’s changed stance possibly reflects the discussions about ‘partnership’ in the 1980s and 1990s.

imperial periphery'.⁸¹ Hill's observations are pertinent to commentary in the *Muriwhenua Land Report*, where the Tribunal argues that the Treaty was entered into with 'goodwill' and 'mutual respect' on both sides, and then relates events that show that the Crown had little capacity for either.⁸²

A key theme in Hill's discussion are the tensions that arise because of the Crown's 'suppression of Maori autonomy, and Maori resistance to this'; he observes that this dynamic was to become 'the most fundamental and ongoing relational nexus between the state and indigenous people in New Zealand'.⁸³ In pursuing this theme, Hill indicates an appreciation of the differences between the tribal order and that of the Crown when he says that he perceives the state, meaning the Crown, to be 'a mechanism ... for imposing and preserving certain rhythms of life (behaviours, activities, internalised disciplines, thoughts, etc)'.⁸⁴ He does not, however, investigate the tribal order in order to pinpoint in what ways the 'rhythms of life' imposed by the Crown stand in contradiction to those of the tribal world. This means that, while he acknowledges tribal assertions of rangatiratanga and autonomy, his uncovering of the historical and institutional bases for those assertions is limited.

While Hill names 'capitalism' as a significant element in the order imposed by the Crown, his book concentrates on the 'politico-cultural relations between Maori and state leaderships'.⁸⁵ Because he only partially pursues the economic implications of Crown rule there are important dimensions of the Crown-Māori relationship that he does not explore. The neglect to look into the connections between the social, political, and economic aspects of Crown rule in relation to the Māori tribally-based world is common to most scholarship – whether in history, law, political studies, or the social sciences. Something of an exception is to be found in David Bedggood's, *Rich and Poor in New Zealand*; it was written over two decades ago but its analysis still has a good deal of

⁸¹ Hill, 21.

⁸² See, for instance, *Muriwhenua Land Report*, 115-121.

⁸³ Hill, 15.

⁸⁴ Hill, 23.

⁸⁵ Hill, 8.

contemporary relevance.⁸⁶

Like Hill, Bedggood questions the claims that New Zealand has been uniquely benign in its colonising history. He argues that, from at least 1870 to the present day, the class relations of international capitalism have been, and continue to be, the dominating factor in New Zealand's political, economic, and social formation. Although Bedggood tends to frame Māori society within a narrow Marxist interpretation,⁸⁷ he recognises that the life of Māori communities was shaped by the holding of land in common, that their economic enterprises were developed from the basis of a collective understanding, and that Māori resistance to the 'land-selling' pressures of the colonial Government came from 'the concern of the chiefs for the survival of their society'.⁸⁸ Bedggood argues that the planting of a settler colony 'involved a total frontal assault at all levels of society – economic, political and ideological – in order to remake Māori society in its own image'.⁸⁹ As later chapters will show, there is a good deal of accuracy in Bedggood's assessment.

When it comes to the constitution of Crown power, the work of some of the legal scholars is useful. They generally recognise the imposed nature of Crown rule, as shown in Jock Brookfield's earlier cited statement that 'purportedly under the Treaty of Waitangi and under the proclamation of sovereignty' the Crown began 'the seizure of Aotearoa New Zealand upon which the present legal and constitutional order is based'.⁹⁰ In addition, the writing and presentations of Paul McHugh and David Vernon Williams help to explain the understanding of sovereignty from which the Crown works, and reference to their arguments is made later in the thesis. None of these scholars, however,

⁸⁶ D. Bedggood, *Rich and Poor in New Zealand: a critique of class, politics and ideology*, Auckland, 1980.

⁸⁷ Bedggood uncritically holds to the evolutionary Marxism that accepts that there is a 'unilinear succession of modes of production' (phrase used by Meiksins Wood, 4). He talks in terms of the development from 'primitive communism' through to the 'capitalist mode of production', and equates these stages with degrees of relative technological development (see *Rich and Poor in New Zealand*, page 11). According to this interpretation, Māori at the time of early contact with Europeans would have belonged to the stage of 'primitive communism'. However, the point is made in the *Muriwhenua Fishing Report* that Māori fishing technology at that time was more sophisticated than that of the Europeans, who were involved in the supposedly more advanced 'capitalist mode of production'.

⁸⁸ Bedggood, 26.

⁸⁹ Bedggood, 24-5.

⁹⁰ Brookfield, 'The Historic Impact of Crown Law on Maori Law: some recent issues in the Courts and the Waitangi Tribunal', 1.

investigates the relationship between the Crown's establishment of the constitutional framework, and its enshrining of the capitalist economy over and against the tribal economies.

In one of his early articles where he discusses how colonial authorities regarded treaties made with indigenous peoples, Williams does indicate the role of 'colonial capitalism' in facilitating the dominance of Crown rule. He says:

The terms of a colonial treaty tended to be viewed seriously in the early years of colonial rule when British authority depended on the active support or, at least, the acquiescence of indigenous rulers and chiefs. However, as colonial capitalism undermined indigenous economic and social structures, and /or settler immigrants displaced the local population from their lands, so it became less difficult unilaterally to modify, abrogate or 'overlook' treaty obligations incurred at the foundation of colonial rule.⁹¹

Williams' particular contribution has been in the area of colonial law as it has operated towards Māori communities. His book on the operation of the Native Land Court shows, amongst other things, the lack of independence between the Court and the Parliament, in contravention of a basic principle of British justice.⁹²

Internationally, there is much writing by Indigenous authors and about the experience of Indigenous peoples that explores themes that are very similar to those treated in this study. One very relevant theme is that concerning the recognition of *peoples* and their rights to self-determination.⁹³ For many decades international forums such as the United Nations have concentrated on the rights of nation-states and individuals. More recently, some attention has been given to the rights of *peoples* within states, resulting in 2000 in the 'First International Conference on the Rights to Self-determination & the United

⁹¹ D. V. Williams, 'British Colonial Treaty Policies: a perspective' in H. Yensen, K. Hague, and T. McCreanor, eds, *Honouring the Treaty: an introduction for Pakeha to the Treaty of Waitangi*, Auckland, 1989, 50. Although Williams is decidedly reserved in this article about the goodwill brought to the treaties by the Crown, he does show (pages 54-5) that he sees the Treaty of Waitangi as important today – because of what has been brought to it by Māori groups and because it provides a way forward from the monoculturalism of the 'English-derived legal system'.

⁹² D. V. Williams, *Te Kooti Tango Whenua: the Native Land Court 1864-1909*, Wellington, 1999. Williams is also co-author with H. Bassett and R. Steel of a useful reference manual on the Crown's legislation with regard to Māori land: *The Māori Land Legislation Manual: Te Puka Ako Hanganga mō ngā Ture Whenua Māori*, Wellington, 1994.

⁹³ Of particular interest to this study are the papers on the collective rights of Pacific peoples in N. Tomas and Te Tai Haruru, eds, *Collective Human Rights of Pacific Peoples*, Auckland, 1998. The commonalities in the experiences of Iwi Māori and other Pacific peoples are evident from these papers.

Nations’.⁹⁴ As shown by the words of Richard Falk, cited in the Preface, this conference was about ‘the legal, moral, and political promise of self-determination to the “peoples” of the world’ in the face of resistance from ‘most existing sovereign states’.⁹⁵ It is significant that Falk puts the word “peoples” in speech marks, because the recognition of *peoples* and their rights is far from being fully accorded by many member states of the United Nations, including New Zealand.⁹⁶

In his book on *Indigenous Peoples in International Law*, S. James Anaya explains why ‘self-determination’ struggles are linked to the rights of *peoples*:

Although self-determination presumptively benefits all human beings, its linkage with the term *peoples* in international instruments indicates the collective or group character of the principle. Self-determination is concerned with human beings, not simply as individuals with autonomous will but more as social creatures engaged in the constitution and functioning of communities. In its plain meaning, the term *peoples* undoubtedly embraces the multitude of indigenous groups like the Maori, the Miskito, and the Navajo, which comprise distinct communities, each with its own social, cultural, and political attributes richly rooted in history.⁹⁷

This clarification by Anaya is usefully kept in mind when assessing the actions of colonising states in relation to tribes, many of which have had a long history of discounting the collective base of Indigenous communities in the interests of a political economy founded on individualist interests.⁹⁸

A further helpful explanation by Anaya concerns the way in which the territorial

⁹⁴ See Y.N Kly and D. Kly, eds, *In Pursuit of the Right to Self-determination: collected papers and proceedings of the First International Conference on the Rights to Self-determination & the United Nations, Geneva, 2000*, Atlanta, G.A., 2001.

⁹⁵ R. Falk, ‘Preface’ to Y.N Kly and D. Kly, eds, *In Pursuit of the Right to Self-determination: collected papers and proceedings of the First International Conference on the Rights to Self-determination & the United Nations, Geneva, 2000*, Atlanta, G. A., 2001. See also R. Maaka and A. Fleras, ‘Preface’, *The Politics of Indigeneity: challenging the state in Canada and Aotearoa New Zealand*, Dunedin, 2005.

⁹⁶ See E. A. Daes, ‘Striving for Self-determination for Indigenous Peoples’, in Y.N Kly and D. Kly, eds, *In Pursuit of the Right to Self-determination: collected papers and proceedings of the First International Conference on the Rights to Self-determination & the United Nations, Geneva, 2000*, Atlanta, G. A., 2001, 50-53; M. Jackson, ‘Self-determination: the principle and the process’, *International Affairs* (publication of the International Work Group for Indigenous Affairs (IWGIA)), 3, 1998, 57-61. Jackson records how the recognition of peoples and their rights has been the focus of years of struggle by representatives of communities.

⁹⁷ S. J. Anaya, *Indigenous Peoples in International Law*, New York, Oxford: Oxford University Press, 1996, 77.

⁹⁸ See, for instance, Chapters 5 and 8 of the thesis.

divisions of states stand in contradiction to the overlapping territories and authorities of *peoples*. The rigid border lines that divide one state from another reflect ‘the traditional Western theoretical perspective that limits humanity to two perceptual categories – the individual and the state – and which views states according to the post-Westphalian model of mutually exclusive spheres of territory, community and centralised authority’. The division of the world into mutually exclusive ‘sovereign’ territorial communities has the effect of limiting the perception of ‘peoples’, and ‘largely ignores the multiple, overlapping spheres of community, authority, and interdependency that actually exist in the human experience’.⁹⁹ The understanding of overlapping territories and authorities described by Anaya, and the effects of the imposition of rigid territorial divisions by the state, are relevant to the experience of the Māori tribally-based world.¹⁰⁰

Another scholar whose work helps to explain the sources of tension between the state and tribes is James Tully, author of *Strange Multiplicity: constitutionalism in an age of diversity*.¹⁰¹ The main theme that Tully pursues is that of modern constitutionalism, and the role it has played in replacing other constitutional forms and facilitating the European dominance of Indigenous peoples. The ‘modern constitutionalism’ referred to is that which developed out of Europe over the past four hundred years, and which is common to most nation states today. Tully links its historical formation with the spread of European imperialism.¹⁰² One of Tully’s key arguments is that modern constitutionalism imposes a uniformity, that is foreign both to earlier European constitutionalism and to the societies colonized by the Europeans.¹⁰³ His explanation accords with Sharma’s description of the homogenisation of the social fabric that has accompanied the drive to modernisation in India:

The vision of modern constitutionalism legitimates the modernising processes of discipline, rationalisation and state building that are designed to create in practice the cultural and institutional uniformity identified in modern theory.

⁹⁹ See Anaya, 78.

¹⁰⁰ See discussion of the Te Roroa communities (Chapter 2), and the Tribunal’s need to argue against an official view that only one Māori community should be recognised in West Auckland (Chapter 4).

¹⁰¹ J. Tully, *Strange Multiplicity: constitutionalism in an age of diversity*, Cambridge, 1995. The book is a compilation of the 1994 Robert Seeley lectures, delivered by Tully.

¹⁰² See Tully, Chapter 3, ‘The historical formation of modern constitutionalism: the empire of uniformity’.

¹⁰³ The degree of homogenisation demanded by modern state constitutions is the subject of growing academic concern. See W. Kymlicka, ‘Liberal Theories of Multiculturalism’, in L. H. Meyer, S. L. Paulson, and T. W. Pogge, eds, *Rights, Culture, and the Law: themes from the legal and political philosophy of Joseph Raz*, Oxford, 2003, 229-250.

These processes include the construction of centralised and uniform constitutional systems over the legal and political pluralism of early modern Europe, the implantation of similar systems by European colonisation, the extension of these by post-colonial states over Indigenous populations and customary law, the imposition of linguistic and cultural uniformity, and countless programmes of naturalisation, assimilation and eugenics to construct modern states and subjects.¹⁰⁴

This explanation certainly has application to the processes by which the present constitutional and legal framework in New Zealand was set in place by the Crown.

Tully's discussion of the philosophies that have informed 'modern constitutionalism' is especially useful in the identification of ideology that supports the exercise of state power over Indigenous peoples.¹⁰⁵ He explains that '[James Harrington, John Locke, and Adam Smith] gave the implantation of European institutions and traditions of interpretation the impression of historical inevitability, for all three conceptions of modern constitutionalism are defined in contrast to, and in supercession of, the Aboriginal peoples they displaced in practice – the propertyless and wasteful hunter gatherer, the vicious savage and the rude native respectively'.¹⁰⁶ The endurance of these ideas, which were generated in the seventeenth and eighteenth centuries, is demonstrated in the thesis.¹⁰⁷ Of particular relevance are the associated notions that the sole title to property is 'individual labour', that Aboriginal people are better off as a result of European settlement, and that European commerce is superior to that of the Aboriginal peoples and therefore must of necessity bring benefit to them.¹⁰⁸

Tully believes that Locke's arguments with regard to the superiority of the European economy have remained very influential:

It is difficult to overestimate the influence of this economic argument in the justification of planting European constitutional systems of private property and commerce around the world and in justifying the coercive assimilation of Aboriginal and other peoples. Even theorists who believe that Aboriginal peoples have some rights in their territories, contrary to Locke, often argue that

¹⁰⁴ Tully, 82-3.

¹⁰⁵ See Tully, Chapter 3.

¹⁰⁶ Tully, 79-80.

¹⁰⁷ See Chapters 1 and 8 of the thesis.

¹⁰⁸ See Tully, Chapter 3. A similar analysis is offered by Bhiku Parekh in 'Liberalism and Colonialism: a critique of Locke and Mill' in J. N. Pieterse and B. Parekh, eds, *The Decolonization of Imagination: culture, knowledge and power*, London, New Jersey: Zed Books, 1995, 81-98.

they are nevertheless more than compensated for the loss of their land by the material abundance and greater productivity of the commercial societies that have displaced theirs.¹⁰⁹

Of additional interest in this statement is Tully's recognition that the constitutions imposed by European powers on their 'colonies', incorporate systems of private property and European modes of commerce. He thus makes the connection between 'modern constitutionalism' and the promotion of a particular form of economy.

The investigation of this connection is more thoroughly pursued by Ellen Meiksins Wood, political scientist from Canada, in her book *Democracy Against Capitalism*. In this work she goes to the heart of Marx's analysis of capitalist social relations in order to uncover the nature of the domination exercised in the capitalist state. Her elucidations on this subject have considerable relevance to this thesis in its examination of the Crown in New Zealand as a capitalist state displaying dominance towards its Indigenous peoples, namely Iwi Māori. Since Meiksins Wood's work is addressed to an audience with a reasonably specialist knowledge of Marxist concepts and language, this review examines some of her key arguments – communicated in relatively lay terms – as they pertain to issues addressed in the thesis.

A major theme of Meiksins Wood's book is the historical specificity of capitalism as a system of social relations and political power. Her explanations are helpful to an understanding of aspects of the state/tribe relationship, and the critique of much that is written about that relationship. In my own reading for this thesis, I have found that many writers take the capitalist system for granted, and even as the epitome of human progress. Their underlying assumptions are that tribal economic systems are of little account, and that the displacement of tribal economies by the capitalist is inevitable. This provides, in turn, a strong justification for the domination of the capitalist state over tribes. Ellen Meiksins Wood argues that the uncritical acceptance of capitalism as a superior economic system stems from the failure to understand the specific nature of

¹⁰⁹ Tully, 75. See pages 72 ff. for Tully's presentation and analysis of Locke's economic arguments. For Locke's arguments see J. Locke, *Two Treatises of Government*, P. Laslett, ed., Cambridge, 1988 [1690], ss 32-46, 290-300; and J. Locke, *Two Treatises of Government*, Second Treatise, ss 32-46, available at www.johnlocke.org (18 January 2006).

capitalist social relations.¹¹⁰

This specificity is not identified by the classical economics, which is built on the presumption that there are ‘universal, transhistoric economic laws’. Meiksins Wood sums up the classical theory of economic progress thus:

In this classical conception of progress, the historical evolution of ‘modes of subsistence’ had culminated in the current, highest stage of ‘commercial society’; but this does not mean that commercial society was, like earlier stages, merely another historical phenomenon, specific and transitory like its predecessors. It had a universal, transhistorical status not only in the sense that it represented the final destination of progress but also in a more fundamental sense that the movement of history had from the beginning been governed by what amounted to the natural laws of commercial society, the laws of competition, the division of labour and the increasing productivity rooted in the natural inclination of human beings to ‘truck, barter and exchange’.¹¹¹

Meiksins Wood acknowledges that some of Marx’s own writing includes ideas of a ‘unilinear succession of modes of production’.¹¹² She sees this, however, as counter to his major thesis: that the origin of capitalism is not to be found in some transhistorical natural law but ‘in historically specific social relations, contradictions and struggles’.¹¹³ This understanding not only allows the limits of capitalism to be prescribed but also the recognition that every mode of production has ‘a specific systemic logic of its own’.¹¹⁴ It is an understanding that is critical if the tribal economies are to be viewed in their own right, and not simply as precursors to the capitalist economy.¹¹⁵ The latter projection is to be found in some of the commentary in the Tribunal reports and a good deal of other writing; Meiksins Wood’s analysis is helpful to the critique of this sort of projection.

Another important and related theme in Meiksins Wood’s work concerns the need for scholarship to hold together the considerations of the political and economic. She argues that the conceptual separation of the political and economic is a crucial factor in helping

¹¹⁰ These social relations include the class divisions that exist in capitalist society, the maintenance of absolute private property for the capitalist, and the capitalist’s control over production and appropriation. See Meiksins Wood, 20.

¹¹¹ Meiksins Wood, 4-5.

¹¹² Meiksins Wood, 4.

¹¹³ Meiksins Wood, 6.

¹¹⁴ Meiksins Wood, 4.

¹¹⁵ The latter projection is to be found in some of the commentary in the Tribunal reports and a good deal of other writing; Meiksins Wood’s analysis is helpful to the critique of this sort of projection.

to hide the specificity of capitalist social relations and the domination inherent in them. Her observations on this point are relevant to this thesis in the critique of writing that works from the presumption that liberal democracy is *the* political system which uniquely delivers freedom and equality, as against systems like the tribal which are supposedly dominated by unelected leaders and held back by hide-bound tradition.¹¹⁶ Typically such writing disregards the fact that, as capitalist societies, these same democracies sanction enormous inequalities in wealth, give disproportionate political influence to the owners of capital, and allow corporations to exercise a great deal of control over the lives of their workers. By contrast, as the evidence from the hapū studied in the thesis shows, such inequalities were not customarily experienced in the tribal communities. Land belonged to the hapū as a whole,¹¹⁷ which meant that the accumulation of wealth by individuals was not a feature of their societies, and that those who held positions of leadership were constrained in the sort of power they could exercise.¹¹⁸ The fallacy in the suggestion, which appears in some writing, that freedom and equality were brought to tribal communities through the introduction of a Western system of ‘democratic’ government, is exposed when political and economic considerations are held together. The misinterpretations of the tribal and capitalist worlds that result from the failure to trace the connections between the economic and political are a matter for some comment in the thesis.¹¹⁹

Meiksins Wood contends that the exercise of political and economic power in the capitalist state can be understood only by recognising the social, economic, and political forms that are peculiar to capitalism.¹²⁰ Capitalist society is characterised by two distinct sources of control over people’s lives. On the one hand there is control by the state, maintained through the state’s ‘coercive apparatus’ and the legislative framework.¹²¹ While the state is seen as the site of public political control, it is generally unrecognised

¹¹⁶ See Healy, 6-7.

¹¹⁷ Individuals and individual whānau did have use-rights to particular resources, including plots of land. See Chapter 1 of the thesis.

¹¹⁸ See discussion in Chapter 3 of the thesis.

¹¹⁹ The themes touched on this paragraph are exemplified in Part 2 of the thesis.

¹²⁰ See Meiksins Wood, 29 ff.

¹²¹ The ‘coercive apparatus’ is all of the policing functions of the state. The legislative framework includes the many laws which support capitalist social relations, as in those laws that ensure that most land is held as private and alienable property. In New Zealand in the nineteenth century, legislation was introduced by the Crown to enforce the individualisation of land title, so that the communal and inalienable property relations of the tribes would be brought to an end. See Chapter 5 of the thesis.

that a whole vital area of control concerning workers and the conditions of their labour that has been privatised and put into the hands of the capitalist. This control involves a domination and expropriation of the worker by the capitalist that remains concealed.¹²²

The right of the capitalist to exercise that control over his or her workers is sustained by the legislative framework of the state and ‘the political configuration of society as a whole’.¹²³ This means that although the electorate can have a say in who exercises political control, the economic control held by the capitalist is systemically-embedded and non-accountable in its exercise. The important point that emerges for this study from Meiksins Wood’s discussion is that, although everyone in a capitalist democracy is given the right to vote, it is a right that carries a strictly limited political power.¹²⁴ The juridical framework within which any political party governs permits ‘the expropriation of the direct producer, the maintenance of absolute private property for the capitalist, and his control over production and appropriation.’¹²⁵ Particular governments may act to temper, or otherwise, the effects of the capitalist social order but the order remains the same.

Meiksins Wood’s explanations of how power is exercised in the capitalist state, like the Crown in New Zealand, have considerable relevance to understanding the tensions that arise for whānau, hapū, iwi, and marae through the imposition on them of the colonising order, in its social, political, and economic dimensions. As Meiksins Wood points out, the domination that belongs to the capitalist state will not be overcome simply by the winning of purely ‘political’ battles over the power to govern and rule.¹²⁶ It would be possible to have a Māori-controlled state, or a state where Māori have considerable political influence, in which tribal communities could find that there is a continuing diminishment of their traditional authority over their lives and resources. There are already indications that there has been some disempowerment of whānau and hapū by Māori corporations, following Treaty settlements, even though the whānau and hapū

¹²² See Meiksins Wood, Chapter 1. In its simplest terms, her argument is that the expropriation of the workers derives from the fact that the profit accumulated by the capitalist is generated from the work put in by his or her employees.

¹²³ Meiksins Wood, 20.

¹²⁴ See Meiksins Wood, 40.

¹²⁵ Meiksins Wood, 20.

¹²⁶ Meiksins Wood, 47-8.

might have had access to monetary benefits.¹²⁷ The disempowerment reflects the fact that Treaty settlements are made within the whole social, political, and economic framework of the capitalist state.¹²⁸ Indeed, the settlements are often dependent on the adoption of state-approved, governing structures.¹²⁹ That is why it is important to identify the specificity of the social relations of the capitalist order introduced by the Crown – and especially as these stand in contradiction to the social relations of the tribal world. It is by this means that a more complete understanding of the sources of the tensions in the Crown’s relationship with Iwi Māori can be gained – and more widely of how the social order imposed by the Crown stands at odds with the customary social order of the tribal world.

Meiksins Wood’s explanations of how power is exercised in the capitalist state offer valuable insights into what is involved in the relationship that the Crown has established with Iwi Māori. It is unfortunate that, even though she is teaching and writing in Canada, Meiksins Wood does not investigate the social relations of any of the Indigenous peoples in Canada, to see how their social order contrasts with that of the capitalist state. Such an investigation would have broadened the horizons of her work beyond the European /Western historical experience, which is the main focus of her analysis.

Judith Simon is a New Zealand scholar whose work has been directed towards understanding the effects of educational policies and practice on the schooling of Māori children. Like Meiksins Wood, she believes that it is important to have an understanding of the power relations that are exercised in the capitalist state. Her concern is to take account of these relations as they affect the Pākehā and Māori relationship in New Zealand society and schools.

¹²⁷ See L. Waymouth, ‘Waitaha, Kātimamoe, Kāitahu: ko wai? Waitaha, Kātimamoe, Kāitahu: identity boundaries’, MA Thesis, University of Auckland, 1998, 228 ff. See also Robert Webb’s analysis of the implications of the Sealord Deal for hapū, referred to in Chapter 8 of the thesis.

¹²⁸ And, indeed, of the global capitalist economy. See Bedgood, 13 ff.

¹²⁹ See Waymouth, 228 ff. See also Chapters 4 and 7(i) of the thesis. One of the difficulties is that, as a result of the settlement process, one centralised centre of the ‘iwi’ is often established in a position of economic and political dominance, thus diminishing the autonomy that has characteristically rested with each of the many marae across the iwi’s rohe.

Simon's research shows that, although educational policy had been introduced in 1980 to provide curricula better tailored to the needs of Māori students, the implementation of the policy in classrooms often did not lead to the desired outcome. She found that the aims of the policy were frequently subverted by Pākehā administrators and teachers, who implemented the policy in a way that reinforced the Pākehā dominance over Māori that prevails in the wider New Zealand society. She concluded that the policy was open to this subversion because Maori did not have a determining say in the policy's implementation.¹³⁰

Simon is of the opinion that account must be taken of the asymmetry of power relations that exist between Pākehā and Māori in New Zealand society.¹³¹ She notes that “calls by educators and others for ‘tolerance of cultural differences’ and the ‘valuing of cultural diversity’” are rendered meaningless ‘when unaccompanied by any recognition of the need to change the relations of dominance’.¹³² Her point is that people may use the ‘right’ phrases about welcoming social change, but unless the actual power relations change the situation will remain oppressive for the disadvantaged group. In this case, because Pākehā administrators and teachers remained in charge of the implementation of the new Māori policy, and there was not established an effective measure of Māori control over the process of implementation, the policy did not achieve its objectives.¹³³ At the least what was needed was a power-sharing arrangement between Māori and Pākehā in the oversight of the new policy.

The situation Simon describes is exemplified in several recent cases described in the thesis.¹³⁴ In the 1980s a number of Government departments adopted a Treaty commitment, and some made considerable efforts to ensure greater input from Māori in the direction of their ministry, especially as it affected Māori and their communities.

¹³⁰ See J. Simon, *Ideology in the Schooling of Maori Children*, Delta Research Monograph, 7, Palmerston North, 1986, Chapter 4 ‘Conclusion’.

¹³¹ See Simon, *Ideology in the Schooling of Maori Children*, 5-6. Simon points to a range of factors that show that ‘in terms of economic and political power in New Zealand society, the Pakeha can be seen to be dominant and the Maori subordinate’.

¹³² Simon, *Ideology in the Schooling of Maori Children*, 8. Comment is made in the thesis on the use of the argument of cultural difference in a way that takes away from the particular rights of Indigenous communities. See Chapter 3.

¹³³ It would be rather the equivalent if a ‘women’s policy’ were being introduced into an institution that had been controlled by men, and women were treated as marginal to the policy’s implementation.

¹³⁴ See Chapter 9 of the thesis.

The changes were mainly effected as a result of the drive and hard work of Māori, although the contribution of supportive non-Māori in key positions was significant in terms of helping to make way for the changes. However, because in most cases no guaranteed means of power-sharing between the department and Māori was introduced, the changes have tended to be according to what a Pākehā-dominated administration would allow and vulnerable to set-back with a change of departmental administration or Minister in charge.¹³⁵

Simon's observations on the importance of recognising what are the actual power relations in operation in any given situation have application to the assessment of the relationship of the Crown to Iwi Māori as a whole. Have the changes of the past three decades led to an actual change in the power relations between the Crown and Iwi Māori – or is it a case of change up to the limit that a tenuously Māori-friendly administration and public will allow? This is an important question to be addressed as the thesis proceeds.

In carrying out her research, Simon found that was it necessary not only to take into account the power relations that were at work, but also the ideology that sustains those power relations.¹³⁶ For that reason, she looks to Marxist theory for the help it provides in the critique of ideology. A great deal of her discussion on this subject is by-passed here because of its technical nature. There are, nonetheless, some key points extracted because of their usefulness to this thesis. The first is that ideology, used in this sort of context, has a particular meaning: it does not refer to all the ideas in society but to a system of ideas that works to justify relations of domination. Ideology is seen as 'a condition for the functioning and reproduction of power relations'.¹³⁷

Simon explains that ideology is not generally generated through a conscious intention to deceive but it is 'a solution in the mind to contradictions which cannot be solved in

¹³⁵ See, for instance, Chapter 9 of the thesis where the evidence from the Te Roroa and the Te Whanau o Waipareira reports is discussed.

¹³⁶ Simon, *Ideology in the Schooling of Maori Children*, 6.

¹³⁷ Simon, *Ideology in the Schooling of Maori Children*, 6.

practice'.¹³⁸ Faced with a social fact such as the uneven distribution of wealth, people will develop a set of explanations as to why this is the situation. In capitalist society, the poor are typically labelled as 'lazy', 'lacking in entrepreneurial drive', and so on. Converse virtues are attributed to the rich. The examination of the actual social relations that leads to the gaining of wealth for some and its diminishment for others is by-passed. In Simon words: 'Ideology fulfils its role in society by hiding the true relations and explaining away the relations of domination and subordination. Thus it legitimates a social structure while necessarily serving the interest of the dominant class'.¹³⁹ A major task in the thesis is the critique of the ideology that serves to justify the Crown's domination of Iwi Māori by concealing the actual power relations that are being exercised.

Simon also brings out that ideology will vary according to the historical situation and the social practices that hold sway.¹⁴⁰ To give an example that is relevant to the discussion in the thesis: although liberal notions of freedom and equality were being promoted amongst nineteenth century, middle class European communities this was not the ideology that was taken over by the Europeans into their relations with native peoples in the colonies. Rather philosophies of the hierarchical ordering of humanity were reverted to; the civilised and Christian continued to be superior to the barbarian and heathen and, later, the more advanced and evolved were placed as higher than the primitive.¹⁴¹ Such ideologies were needed to justify the establishing of imperial domination over native peoples.

There is an important inference to be taken from these explanations of ideology, namely, that ideology needs to be assessed in relation to the social relations that hold sway. Too often, the assumption is made that a change in ideology means an equivalent change in the social relationship. The fact, for instance, that terms like 'primitive' and 'heathen' are less used in the literature does not signal the end of European dominance

¹³⁸ Simon, *Ideology in the Schooling of Maori Children*, 7, citing J. Larrain, *The Concept of Ideology*, London, 1979, 46.

¹³⁹ Simon, *Ideology in the Schooling of Maori Children*, 7.

¹⁴⁰ See Simon, *Ideology in the Schooling of Maori Children*, 8.

¹⁴¹ See Kuper, *The Invention of Primitive Society: transformations of an illusion*; and Sardar, Nandy, and Wyn Davies, *Barbaric Others: a manifesto on Western Racism*.

over Indigenous peoples. If the relationship of dominance does not change, it is likely that there will be a new ideological justification for the relationship, often more covert than the first.¹⁴² Simon emphasises that the only way to overcome ideology 'is to transform the conditions that produce it – the social relations of dominance'.¹⁴³

Simon's explanations of the role of ideology in the functioning and reproduction of power relations have been of considerable value to the critical reading of material on the state /tribe relationship. Simon deals, however, with Māori as though they were a single people and does not investigate the tribally-based nature of the Māori world. Her analysis tends to limit the issues in the state /Māori relationship to those of domination and subordination; it does not open up the broader vista that can be gained from the investigation of the social relations of the tribal world and the vision of a social order that is truly alternative to that brought by the Crown in the establishing of New Zealand as a capitalist state. This thesis seeks an understanding of the social relations of the Māori tribally-based world in order to appreciate more fully the sources of tension for Iwi Māori in the Crown's relationship with them, bearing in mind the Crown's character as a capitalist state.

Structure, Methodology, and Sources

In order to develop an understanding of the nature of the Crown's relationship with Iwi Māori this investigation has had to accommodate several lines of enquiry. One concerns the historical basis for the relationship, and involves an examination of the evidence on the actions and policies of the Crown with regard to Māori communities from 1840 to the present and how state power in New Zealand has been constituted. At the same time it has been important to penetrate the suppositions surrounding the evidence, because much of the information on these matters is interpreted in ways that help to justify the domination of tribes by states. Notably, there is the ideology that casts the capitalist state as naturally superior to tribes and their economies. It has also been important to

¹⁴² See Simon, *Ideology in the Schooling of Maori Children*, 8, citing J. Larrain, *The Concept of Ideology*, London, 1979, 49. An illustrative example is given in the *Te Whanau o Waipareira Report* where it is noted that the Department of Social Welfare had taken on board a stated 'bicultural' policy, while introducing changes that gave Māori social service providers less say in the direction of welfare policy. See Chapter 9 of the thesis.

¹⁴³ See Simon, *Ideology in the Schooling of Maori Children*, 9. She makes it clear that she is following Marxist theory in taking this position.

develop a well-based appreciation of the social relations of the tribally-based world, both to counter common stereotypes and to gain insight into the contradictions between the social, political, and economic order established by the Crown and that which belongs to Iwi Māori.

To help in the teasing out of these different strands and to clarify the impacts of Crown rule on Māori communities, the thesis is structured in two parts. Part 1 seeks an understanding of the integrity of the social relations of the Māori tribally-based world as they have existed prior to, and as they withstand, the impositions of colonisation. Part 2 then examines how the Crown has established and exercised its rule in relation to that world, and the character of the political economy it has introduced. The contradictions between the two orders, and the nature of the impositions the Crown has made on tribes, are highlighted in the process of these considerations. Throughout the thesis, there is critique of the ideology that misrepresents the tribes, the state, and the state-tribe relationship, and particular attention is given to the misrepresentations that arise because of the failure to trace the continuities between the social, political, and economic spheres of each society.

Because there was so much material and argument related to the different aspects of the study, I decided to focus on documents that encapsulate the evidence for and arguments around the Crown's relationship with Māori as a tribally-based people. The documents would be scrutinised both for the information they could release and the critique of ideology that could be drawn from them. Where necessary, the understandings drawn from the study of documents would be expanded through reference to supplementary sources, national and international.

The documents chosen for this close scrutiny are five of the Waitangi Tribunal reports: the *Muriwhenua Fishing Report*, *Mangonui Sewerage Report*, *Muriwhenua Land Report*, *The Te Roroa Report*, and *Te Whanau o Waipareira Report*. The first three examine various aspects of the Crown's treatment with the whānau and hapū of the Far North, the most northerly region of the country. The fourth report looks at the concerns of the Te Roroa hapū whose rohe extends along the west coast, between the Hokianga

and Kaipara harbours, and who have close links with the hapū of the Far North. The fifth report stems from a claim brought by Te Whanau o Waipareira, a non-tribal community in West Auckland.

The *Te Whānau o Waipareira Report* is included because it brings out relevant points about the Crown's relationship with Iwi Māori that are both complementary to, and reinforcing of, those in the other four reports. The Te Whānau o Waipareira claim was brought to the Tribunal because the Crown would not deal with the Waipareira community as a Treaty partner. For that reason, the Tribunal decided it needed to investigate as to whether Waipareira counted as an authentic Māori community. In the process of this investigation, the Tribunal brings to the fore some important aspects of the tribal world, and insight into how a community like Waipareira fits within the network of relationships that derive from that world. When it comes to looking at how the Crown has dealt with the Waipareira community there is the opportunity to compare the experience of the non-tribal and tribal communities, especially with regard to assessing the nature of the Crown's relationship with Iwi Māori as a whole. A distinction is made in the thesis. The expression 'tribally-based' is used when discussing the collectivity of all Māori communities, whereas 'tribal' is used when the reference is specifically to tribes.

Between them the five reports cover events from the pre-1840s through to the mid-1990s, and thus contribute valuable information regarding the historical development of the Crown's relationship with Iwi Māori. The *Muriwhenua Land Report* considers the earliest recognised agreements between Māori and European over land, the earliest dealings of Crown agents in these matters, and some of the earliest Crown legislation. Important insights can be drawn from it as to the origins of Māori grievance against the Crown. The *Muriwhenua Fishing* and the *Te Roroa* reports deal with history from the 1870s through to the present, and the *Mangonui Sewerage* and the *Te Whanau o Waipareira* reports look at the implications of contemporary Crown action. Through the examination of the five reports in the thesis, an understanding is built up of how the Crown's relationship with Iwi Māori has been established, and how it continues.

The five reports also carry a good deal of information regarding the social relations of the tribally-based world. Much of the information offers a correction to common misunderstandings of the tribal world. There are places, however, where the commentary in the report does less than justice to the tribal order; and noticeably where the Tribunal describes the tribal economies in terms of their development according to 'the Western' model. These and any other inconsistencies in the Tribunal's discussion are critiqued. By drawing on the information in the reports, and critiquing it, a picture is built up of the integrity of the tribal relationships, and hence it can be seen more clearly in what ways the social, political, and economic order brought by the Crown cuts across these relationships.

The reason that only five reports are selected as key source documents for the thesis is practical. My original intention was to scrutinise all the Tribunal reports that dealt with claims from the Waikato north, thus covering a sizeable section of the country. I found, however, that the number had to be restricted if they were to be subjected to close study. Most Tribunal reports are lengthy and complex documents; they have been put together after the presentation of volumes of evidence and conflicting opinion about the evidence. They have also been put together under some duress because of the time constraints under which the Tribunal works. As a result their internal logic is not always easy to follow. To get an understanding of what is presented in the reports a careful reading and re-reading is needed, even before information is taken from them and critique applied to them.¹⁴⁴ That is why I decided that a better quality of evidence and analysis would be obtained by the careful study of the five reports rather than a more cursory reading of a greater number.

Although the chosen reports focus on specific grievances there is much in them that has reference to national Crown policy and action. This is very useful to the identification of

¹⁴⁴ It must have been a quicker reading of the *Muriwhenua Land Report* that led the historian Bill Oliver, when critiquing the Tribunal's work, to misunderstand the Tribunal's position on a key matter; he says that the Tribunal states that in the 1860s the Muriwhenua Maori were reinforced in their determination never to sell land. The Tribunal argues, rather, that the Muriwhenua communities were still very much in the majority and had no reason to change their customary understandings of land transactions, which were more like leases than sales. The Tribunal makes no mention of a reinforced determination never to sell land. See Bill Oliver, 'Is Bias One-sided?', Wellington, June 1997, 19; *Muriwhenua Land Report*, Section 6.3.4.

the patterns of the Crown's dealings with hapū, whānau, iwi, and marae throughout the country. There is also a level of generalisation about the social relations of the Māori tribally-based world that can be drawn from the reports, especially inasmuch as these contrast with the social relations of the political and economic order put in place by the Crown. Because the Tribunal brings with it knowledge from hearings in other parts of the country and on other issues there are normally references in a report to information or conclusions from earlier reports, about the tribally-based world and patterns of Crown behaviour. This means that each report also contains information that belongs to the wider picture.

The thesis is based around the critical reading of the five reports. The first four chapters make up Part 1 of the thesis, and are directed towards building up a picture of the social relations of the Māori tribally-based world before the harmful impacts of Crown rule and as they have continued in spite of colonisation. These 'social relations' refer to the whole social ordering, and embrace such factors as how property is held, relationships to land and resources, the structures that are in place for the exercise of political and economic control, and how production is managed. The aim is to gain an understanding of the interconnected social, political, economic, and environmental relationships of Māori tribally-based society. It is from the basis of the outline of the social relations of the Maori tribally-based world developed in Part 1 of the thesis, that assessment will be made of the actions of the Crown towards Iwi Māori, as recorded in Part 2.

Chapter 1 examines the relationships of hapū in the Far North to their fisheries and lands. Working mainly from information in the *Muriwhenua Fishing Report*, the first part of the chapter covers property rights in the land and sea, the tribal fishing industry (especially through to the 1870s), inter-tribal trade, and the conservation of the sea environment by the hapū. The chapter also offers some critique of the Tribunal's analysis of the tribal economies. The second part of the chapter uses material from the *Mangonui Sewerage Report* and supplementary sources to look at the Ngati Kahu hapū in relation to their lands. The importance for the hapū of their ancestral relationships into the land and with one another is noted, along with the fact that each hapū stands in its own autonomy. It is explained how the dense settlement of the Ngati Kahu land was

made possible by the hapū's skill as gardeners and their sustainable harvesting of a range of resources.

In Chapter 2, the Te Roroa hapū are considered in terms of their social, political, economic, and environmental relationships. The themes of group autonomy and connectedness are again explored, and background on the establishment of rights to land and the relationship of leaders to their communities is given. There is a particular emphasis on the relationship of the hapū to their taonga as this is a central issue in the Te Roroa claim. Some critical comment is offered on the Tribunal's explanations of how land 'sales' were understood.

Chapter 3 uses material from the *Muriwhenua Land Report* as a basis for developing an understanding of how hapū incorporated outsiders on their lands, which is especially relevant to the issue of what hapū intended in their dealings with the Crown and others over land. The custom of 'tuku whenua', which involves the allocation of a place on hapū land to an outside group, is discussed – as well as the hapū's intentions in granting a place on their lands to Europeans. There is also discussion of the tribal trading, both before and after 1840. The Tribunal's tendency to describe the trading as if it must naturally follow a path of adaptation to Western forms is questioned. In this chapter, a recurring theme is the capacity of the hapū to incorporate outside elements within the compass of their customary social, political, and economic relationships.

Chapter 4 considers the information in the *Te Whanau o Waipareira Report* for what it conveys about the tribally-based world. Te Whanau o Waipareira is a non-tribal community, but it is part of the network of relationships that derive from the tribal world. Topics covered in this chapter include the flexibility of the tribal order, the misrepresentation of the tribal world as hierarchically structured, the importance of locally-held authority for all Maori communities, rangatiratanga and its meanings, and the network of relationships that bind Maori communities, tribal and non-tribal. In this chapter, as in the others, allusion is made to the effects of Crown action on the understandings and relationships described.

Part 2 of the thesis investigates how the Crown has established and exercised its authority in relation to Iwi Māori from 1840 through to the present, and the sources of tension between the social, political, and economic order set in place by the Crown and that of the tribally-based world. While this part of the thesis generally follows a chronological sequence of events, the broad topic of the Crown's relationship with Iwi Māori is approached from various angles, each chapter bringing its own emphasis.

Chapter 5 examines some of the steps taken by the Crown in the initial establishment of its authority over tribes and their lands. The chapter brings to the fore the presumptions from which the Crown worked, and the deliberate assault on the tribal base that was brought into effect from the 1860s onwards.

Chapter 6 considers the expectations of hapū regarding the Crown's relationship with them, and the institutional structures carried by the Crown that militated against its meeting those expectations. The evidence educed brings into question the view that in 1840 Māori tribes ceded their sovereignty to the British Crown, and offers insight into the limits of the authority that the rangatira, in acting of behalf of their hapū, intended to allow to the Governor as the Queen's personal representative and the leader of her 'tribe' in New Zealand.

Chapter 7 seeks further understanding of the nature of Crown rule by identifying some of its significant characteristics and how these have impacted on hapū. The emphasis is mainly on the Crown's nineteenth century rule and its more immediate consequences.

Chapter 8 looks at the Crown's instalment and promotion of capitalist interests in opposition to the social, political, and economic order of the tribally-based world, as this has occurred in both the nineteenth and twentieth centuries. Consideration is given to the connection between the Crown's assertion of its sovereignty and its promotion of capitalist interests, the contradictions between the tribal and capitalist economies, the undermining effects of the capitalist order for the tribal economies and communities, and the ideology that is used to justify the state's imposition of capitalist social

relations.

Chapter 9, the final chapter of the thesis, focuses on the exercise of Crown rule as it impacted on Māori communities in the twentieth century. The sources of tension in the Crown's relationship with the communities are identified, and the common patterns in the Crown's behaviour towards the tribally-based world are noted. The Crown's relationship with Iwi Māori through to the twentieth-first century is a matter for comment at the end of the chapter.

The main sources documents for Chapters 5-9 are the same five Tribunal reports that were used in the first four chapters. In Part 2 of the thesis, more extensive use is made of the material in the *Muriwhenua Land Report*. This is for a number of reasons. One is that the Muriwhenua Land report uses *The Te Roroa Report*, the *Muriwhenua Fishing Report* and the *Mangonui Sewerage Report* as source documents; its generalisations thus embrace much that is contained in those three reports. Moreover, as the last written of the four reports its analysis shows a development on that contained in the other three. This is noticeable in its understanding of the intentions of the hapū in entering into land agreements, and hence of the way in which the Crown paid regard to those intentions. The other reason for concentrating on the *Muriwhenua Land Report* is because it deals with issues that arise from the earliest recognised agreements between hapū and Europeans over land, some of the earliest Crown policy and legislation that affected hapū and their lands, and some of the earliest dealings of Crown agents in these matters. The *Muriwhenua Land Report* is, therefore, a valuable document in terms of revealing the foundations of Crown rule in this country, and the historical origins of issues of grievance between tribes and the Crown. The information in the other four reports and supplementary sources is used to build on the understandings gained through the examination of the *Muriwhenua Land Report*, to show how Crown rule has been exercised towards the tribally-based world from its first years through to the present, and to comprehend the nature of the relationship that the Crown has established with Iwi Māori.

Part 1

The Social Relations of the Tribally-based World

Chapter 1

Hapū in Relation to their Fisheries and Lands

This chapter focuses on hapū in the Far North in relation to their fisheries and lands. Much of what is described has application to tribal groups across the country, and some of the wider application is indicated in the chapter. The chapter is divided into two parts. The first part draws on information in the *Muriwhenua Fishing Report* to develop an understanding of the Far North hapū and their fishing economies.¹ The second part is the beginning of an investigation into tribal relationships to their lands. Material from the *Mangonui Sewerage Report* and supplementary sources is used to look at the Ngati Kahu hapū in relation to their lands.

The Far North hapū and their fisheries

The Muriwhenua Fishing claim to the Waitangi Tribunal concerned the fishing rights of the hapū of the Far North: Ngati Kuri, Te Aupouri, Te Rarawa, Ngai Takoto and Ngati Kahu. Theirs is a rohe with a relatively small land base and a very long coastline, and hence their fisheries and fishing economies have always been vitally important to them. With the loss of land and reduced opportunities for employment following colonisation in the nineteenth and twentieth centuries, many of their households became even more dependent on fishing as a source of income and food. In the mid-1980s the tribes brought their claim to the Tribunal because the Crown had been developing policy that threatened their fisheries and livelihoods from fishing.²

The Waitangi Tribunal, in the early part of its report on the Muriwhenua Fishing claim, sets out to identify the nature of the fishing economy of the Far North hapū in the time

¹ In the Muriwhenua Fishing and Muriwhenua Land reports, the Tribunal quite frequently makes reference to the Muriwhenua hapū, Muriwhenua Māori, and the Muriwhenua land (meaning the whole area of the claim). Margaret Mutu, who is of Ngati Kahu, and who had a great deal to do with the presentation of the land claim, told me that the whole area of the claim is more correctly described as Te Hiku o te Ika (the Far North). For that reason I use the terms, the Far North hapū and the Far North land, to indicate the tribes and the region involved in the Muriwhenua claims.

² The claim relates to the inland waters and surrounding seas of the Far North.

before and after the signing of the Treaty of Waitangi. The wide-ranging discussion offers insight into the peoples' fishing industry, trade, property rights in the sea, inter-community relationships, distribution of wealth, environmental practices, and the importance of the fisheries to the whole of their culture. In this section, information on these themes is drawn from the report with a view to developing an understanding of the social relations of the Far North communities, and to some extent of the Māori tribal world generally. Some of the Tribunal's passing remarks on the life of the communities are expanded on, and its analysis of the tribal economies will be developed into a more precise critique.

The *Muriwhenua Fishing Report* is geared to giving an extensive picture of tribal life, in relation to fishing economies, because it calls on evidence from the Far North and other areas as well. The Tribunal explains:

... that Maori fishing practices, customs and beliefs were substantially the same for all tribes, there being a common Polynesian heritage and a continuing communication and exchange of ideas amongst them. Local variations are due mainly to the distinctive geography of some places. The evidence specific to Muriwhenua confirms that their fishing practices, customs and beliefs were not broadly different from elsewhere.³

The Tribunal is talking particularly of practices through to the decades of early European exploration and settlement, and appropriately treats 'Maori' as equivalent to 'tribes'. The equivalence holds true for the use of 'Maori' by some of the early European observers, and this needs to be kept in mind when reading their cited comments. It would be a mistake to think that they used the word 'Maori' to refer to a world that was somehow different from the tribal one. What they observed was a whānau and hapū based world. In fact, the early writers tended to use 'Maori' and 'tribe' interchangeably – although those who got to know the people of an area really well almost always identify them by their tribal name.

Some further aspects of the Tribunal's approach and analysis in the opening chapters of the report are as follows. The Tribunal identifies the period from the time of settlement (at least 1000 years ago) through to 1870 as one of continuing prosperity in fishing for

³ *Muriwhenua Fishing Report*, 31.

the Far North communities. As long as the hapū retained their authority in the land their industry accommodated the European presence, which opened up fresh avenues for trade. The Tribunal judged it important to investigate the extent of the original fishing industry because, from the mid-1860s, there had been a history of official denial that Māori communities had commercial interests in the sea.⁴ The evidence cited in the report shows quite otherwise. The Tribunal's sources include eyewitness accounts from early European observers, direct evidence from the claimants, archaeological evidence, and a range of other documentation.⁵ While the opening chapters of the report concentrate on the period up to 1870, they contain information that shows how the fishing practices of the Far North tribes have continued since then.

At the beginning of its report the Tribunal describes the claimant hapū thus:

As is usual amongst adjoining tribes, the five tribes of Muriwhenua are at once fiercely independent and inextricably interrelated.⁶

The autonomy of communities and their interconnectedness is a remarkable feature of the social relations of the tribal world. The evidence cited in the ensuing chapters of the thesis indicates that the independence comes from the political arrangements recognised by the tribal communities and the control each group has of its resource base; and that the interconnectedness stems from shared whakapapa and histories, the negotiation of alliances, and the sharing of access to certain major resources.

The report gives concrete examples to show the levels at which individual, whānau, and hapū rights might be expected to operate:

Individual rights obtained to personal property, tools, weapons, clothing and ornaments. Occasionally, private use rights attached to an agricultural plot, fishing ground, or birding tree but more commonly, rights to resources were owned by a number of people in common, such as a whanau group.

⁴ *Muriwhenua Fishing Report*, See Sections S1.5 - S1.8.

⁵ This documentation includes petitions regarding fishing rights made to Government by tribal groups from the nineteenth century on, evidence from Court cases regarding tribal fishing rights, and scholarly writing in the form of papers, books, and theses.

⁶ *Muriwhenua Fishing Report*, 4. This pattern of independence and interconnectedness, as it continues today, is illustrated in Section 1.6 where the Tribunal describes the different tribes who came to the Muriwhenua Fishing hearings to lend their support. The description details the relatedness of the tribes to the Far North peoples, and indicates their independent interests.

To the whanau group usually ‘belonged’ the dwelling house, stored food, the small eel weirs on branch streams, small fishing canoes, and some gardens, fishing grounds and shellfish beds in the immediate vicinity. Though they did not formally ‘own’ the fishing grounds and beds, at least their prior rights of use were respected.

The hapu exercised control over larger units, meeting houses, food storage pits and pataka, the large eel weirs on main rivers, the central gardens, war canoes, larger fishing or seafaring vessels, and some specific fishing grounds.⁷

This account, taken from a synopsis of written information on ‘traditional’ custom,⁸ shows that personal and whānau rights to property are recognised and respected. At the same time, in regard to lands and seas the personal and whānau rights are closer in nature to use rights rather than absolute private ownership. This matter is mentioned because the question of how rights to land are established is an important one and is returned to in later chapters.

It is notable that the above account suggests that hapū had only very limited and specific rights in the sea, and by implication in the land. This dubious suggestion reflects the Tribunal’s acceptance, at this point, of a hierarchical ordering of whānau, hapū, and iwi – with iwi as dominant and having the ultimate authority over resources. Under this ordering, it is iwi that count as tribes. The report says: ‘The tribal [iwi] property was made up of the lands of the various hapu, the lakes, rivers, swamps and streams within them and the adjacent mudflats, rocks, reefs and open sea. The tribe [iwi], as the greater social group, incorporated the rights of the lesser groups.’⁹ Unfortunately, the Tribunal did not have available to it some of the more recent writing, which judges that the top-down model of tribal authority is one that has been imposed by colonial scholars and officials, and shows that the extensive rights in land and sea rest with hapū.¹⁰

That the relationships between groups in the tribal world are far more complex than the ‘top-down’ model suggests, is evident from the research of Lynette Carter whose

⁷ *Muriwhenua Fishing Report*, 35-6.

⁸ At the beginning of Chapter 3, the Tribunal explains that it had asked Dr G Habib, Fishing Consultant, to prepare an overview of written sources that dealt with traditional fishing and fish resources, and that its information in Chapter 3 is largely based on Habib’s synopsis. The Tribunal stresses that ‘traditional’ does not mean something past and unchanging.

⁹ *Muriwhenua Fishing Report*, Section 3.1.3 (page 36). In this section the Tribunal explicitly states that iwi is *the* term for tribe – which is the definition found in writing that works from the top-down model – even though earlier the Tribunal names the Far North hapū as tribes.

¹⁰ See Ballara, *Iwi*, 17-19.

doctoral thesis on whakapapa is the first major academic work on the subject.¹¹ Carter explains how one group does not inherently take priority over the other but each has its place according to the task to be done or the particular relationships being forged. She describes a pattern of interacting layers of relationship and authority between the different groups:

The social groupings in Maori society – whanau, hapu and iwi – were connections to different layers of whakapapa and were managed through alliances and kinship relationships. Different levels of authority and power interacted to govern each layer of kinship and relationship ...¹²

It is significant that in the same discussion Carter says that ‘hapu were to practice “kaitiakitanga” (guardianship over their whenua-land)’ and “rangatiratanga” (self-governance)’.¹³ Her use of ‘hapu’ rather than ‘iwi’ in this context is consistent with the position she takes in her other work,¹⁴ and accords with the opinions of other experts, regarding the traditional importance of localised political and economic authority in Māori society.¹⁵

The historical evidence, cited in the *Muriwhenua Fishing Report*, points to the tribal fishing industry as one involving the enterprise and self-sufficiency of local households as well as large scale endeavours. The industry of the households is highlighted in words quoted from Joseph Banks, botanist on the Endeavour, in his journal entry for 4 December 1769, written during a stay in the Bay of Islands:

Fishing seems to be the cheif business of this part of the countrey; about all their towns are abundance of netts laid upon small heaps like hay cocks and thatched over and almost every house you go into has netts in its making.¹⁶

Other observers provide more detail about the seasonal, large scale fishing expeditions,

¹¹ L. Carter, ‘Whakapapa and the State: some case studies in the impact of central government on traditionally organised Māori groups’, PhD thesis, University of Auckland, 2003.

¹² L. Waymouth, ‘The Bureaucratisation of Genealogy’, 3.

¹³ L. Waymouth, ‘The Bureaucratisation of Genealogy’, 3.

¹⁴ L. Waymouth, ‘Waitaha, Katimamoe, Kaitahu: ko wai? Waitaha, Katimamoe, Kaitahu: identity boundaries’, MA Thesis, University of Auckland, 1998.

¹⁵ See E. T. Durie, ‘F W Guest Memorial Lecture 1996: Will the Settlers Settle? Cultural Conciliation and Law’, University of Otago, 1996, 2; R. Maaka, ‘A Relationship, Not a Problem’, in K. Coates and P.G. McHugh, *Living Relationships: Kōkiri Ngātahi: the Treaty of Waitangi in the new millenium*, Wellington, 1998, 203.

¹⁶ *Muriwhenua Fishing Report*, 42, with Beaglehole, 1955, 1, 444, given as reference. The Bay of Islands is an area close to the Far North.

in different parts of the country.¹⁷ Of particular interest to this claim were the accounts of the shark fishing excursions in the Far North.¹⁸ R H Matthews describes in detail one of these expeditions in which about 7000 shark were taken.¹⁹ There were around a thousand people from several villages involved in the actual fishing and many more in carrying out tasks on the shore. The fleet was made up of fifty canoes and two boats. The Tribunal quotes Matthew's account at length because it provides 'a graphic description of the extent, nature and competence of Maori fishing, about which, it seemed to us, most New Zealanders are almost totally unaware'.

There are a number of insights into the Māori tribal world that can be taken from Matthews' and other similar accounts of these major fishing expeditions. One is the capacity for such large scale operations.²⁰ It is apparent that the systems of management were well understood. While the accounts often point to one experienced rangatira with overall command of the enterprise there were layers of responsibility and command depending on the tasks to be done and the skills needed.²¹ The picture given in these accounts is of many groups and individuals working purposefully alongside one another, each knowing their contribution and place in the overall enterprise.²²

Besides the actual fishing there was a huge range of work involved, including the feeding of the workers and the preparation of lines, hooks and fishing vessels. This description from Matthews' address is illustrative:

After a hearty snack I took a stroll through the village, which was humming like a swarm of bees, everybody being busily engaged in preparations for the maunga [taking of the catch]. Some of the old dames were scraping muka (flax-

¹⁷ See *Muriwhenua Fishing Report*, Sections S1.3, 3.1.5, 3.4.2, 4.4.

¹⁸ See *Muriwhenua Fishing Report*, Section 4.4. Rev. Petera described what had been passed down to him by his forebears at Rangaunu Bay.

¹⁹ In Section 4.4 of the *Muriwhenua Fishing Report*, the Tribunal quotes a long passage from R. H., Matthews, 'Reminiscences of Maori Life Fifty Years Ago', address given to the Auckland Institute, 1910, 43 Transactions and Proceedings of the New Zealand Institute 598 (held as Doc#B37, Wai 022, Wellington: New Zealand Waitangi Tribunal).

²⁰ See Cox, 23-24, for further comment on the capacity of whānau to work independently and yet come together as hapū for large scale operations, according to the specific purpose of the enterprise being undertaken.

²¹ See, for example, *Muriwhenua Fishing Report*, 39: 'The fisheries expertise was distributed among the crews of the fishing fleet in the form of what Firth called 'minor executive heads' (Firth 1972:230).'

²² See *Muriwhenua Fishing Report*, Sections 3.1.5 and 4.4. Also, in Section 2.5, there is recorded a delightful account by Niki Conrad of the tasks assumed by those who just had no luck when it came to the actual fishing; everyone had a contribution to make.

fibre), others were making it into twine by rolling the fibre on the calf of the leg with the palm of the hand. Some of the twine would be used for seizing the hooks; some for pakaikai, in lengths of about 3 ft, for tying on the bait. Altogether the kainga presented a busy and animated scene, full of life and good-humoured fun.²³

While Matthews depicts the scene as relaxed, there were for all such operations certain strict regulations that applied. The fishing of a species at a particular location was often limited to a very few days each year; and no one was allowed to go out to fish until the signal was given. This latter rule not only safeguarded the resource but made for fairness to the whole group by preventing some gaining advantage over others. The consequences of breaking the rules were well understood.²⁴

One of the most notable features of these large scale enterprises is their co-operative nature. This is clear not only from the way people worked together, but also from how the gains were distributed. In the situation described by Matthews, the sharks were landed and laid out in separate heaps and notched to identify the ‘individual owners’. His earlier description shows that the ‘individual owner’ is not simply one person but a whānau. The implication is that each whānau would get the benefit of their effort within the overall endeavour. Other accounts talk of the rangatira, either one or several, apportioning the catch to the whānau that had participated.²⁵ Either way, the resource being harvested is understood to belong to the assembly of whānau, and the returns from the harvest come back to them.

Much of the catch from these expeditions was preserved and used in trade with other tribal groups, especially those of the more inland areas. In considering the value of this trade to the whānau and hapū, the Tribunal notes its continuance through the nineteenth century and beyond.

Maori traded widely in pre-European times, coastal tribes taking the produce of their fisheries to distant tribes inland and receiving in due course those goods not so readily accessible to them. This form of trade continued, and its continued existence was commented upon in the Supreme Court as late as 1914.²⁶

²³ Cited in *Muriwhenua Fishing Report*, Section 4.4.

²⁴ *Muriwhenua Fishing Report*, Section 4.4.

²⁵ See *Muriwhenua Fishing Report*, 39.

²⁶ *Muriwhenua Fishing Report*, xiv. Detailed descriptions of extensive inter-tribal trade are presented in Sections 3.4.3 and 3.4.4 of the report.

The Tribunal also notes the communities' participation in and enjoyment of commerce.

The desire for trade was endemic, being built into the Maori way. In 1838 Polack observed "Few nations delight more in trading and bargaining than this people, a native fair or festival best illustrates this fact."²⁷

This information on the importance of trade in the tribal world is significant because it helps to dispel persisting notions of the tribal economies as 'merely subsistent' or 'hunter-gatherer'.²⁸ What is more, the evidence does not suggest, as has often been postulated, that whānau and hapū were overwhelmed through their contact with the supposedly, more advanced commercial nations. From the time of Captain Cook's first visit, trade between the indigenes and newcomers was welcomed on both sides; and from the 1820s there were Māori communities involved in substantial trade with Europeans. As the report says:

There are many similar accounts of a Maori trading bent. It is sufficient to say here that by the 1820's Maori were substantially involved in the provisioning of ships and the supply of whaling settlements. By 1830 ships were carrying large quantities of their produce to Sydney. Thus were Maori involved in export, even before the Treaty, and their enterprise continued well after it.²⁹

Just as Māori communities embraced and accommodated trade with Europeans, so they took hold of imported materials and technologies that suited them. Again it was not a case of being overwhelmed by a technologically superior culture. In fact, as far as fishing was concerned – apart from whaling and sealing – the Māori tribal technology was if anything superior to that of the European. This is not surprising considering the vital importance of their fishing economies to the whānau and hapū.

Many of the early explorers speak with amazement about the scale of the communities' fishing nets, and make comparisons with their own. Joseph Banks wrote in his 4 December 1769 entry that the Māori had 'a little laught' at the Endeavour's seine, and produced one of theirs. 'It was 5 fathom deep' he said, 'and its length we could only guess, as it was not stretched out, but it could not from its bulk be less than 4 or 500

²⁷ *Muriwhenua Fishing Report*, xv, citing J. S. Polack, J. S., *New Zealand: being a narrative of travels and adventures*, London, 1838. This avid interest in trade is also evident from the accounts of the very early European explorers, given in Section 3.4.5 of the report.

²⁸ See Tully, 72 ff.

²⁹ *Muriwhenua Fishing Report*, xv.

fathoms.³⁰ In 1814, J L Nicholas made a similar remark: ‘their nets are much larger than any that are made use of in Europe ... One of them very often gives employment to a whole village’.³¹ The written evidence lends support to that given by the claimant witnesses who identified places ‘where stakes were said to have been driven into the ground, covering long distances from the land to the shore, for the making, mending or checking of nets, and of how some nets were said to have spanned the distance several times over’.³² Other sources cited in the report comment in detail on the quality and extraordinary degree of specialised design in a whole range of fishing equipment.³³

Further evidence of the sophistication of the tribes’ fishing industry lies in their extensive and intimate understanding of the sea environment. The Tribunal remarks on the knowledge imparted by the witnesses from the Far North:

Several hundred fishing grounds were named and identified in detail, up to 25 miles at sea, with descriptions given of their locations as fixed by cross bearings from the land, the fish species associated with each, and the times to fish there. It was soon obvious to us, from the spread of such grounds, that Muriwhenua fishermen had worked the whole of the inshore seas and that all workable depths were known.³⁴

And, in summing up the evidence from the claimants and other sources, the Tribunal says: ‘On the evidence the fishing activities of the Muriwhenua people involved the whole of the adjacent continental shelf.’³⁵

As well as detailing the location and nature of their many fishing grounds, the tribal witnesses were able to establish to whom the different grounds belonged. It became apparent to the Tribunal that amongst the tribes exclusive rights of ownership were recognised in the sea just as they were in the land: ‘As with land, fishing grounds were clearly included as part of the Maori asset base and within the concept of traditional ownership rights’.³⁶ And in its summary, the Tribunal states:

³⁰ *Muriwhenua Fishing Report*, 42.

³¹ *Muriwhenua Fishing Report*, 42-3.

³² *Muriwhenua Fishing Report*, 23.

³³ *Muriwhenua Fishing Report*, Section 3.1.2.

³⁴ *Muriwhenua Fishing Report*, xiv.

³⁵ *Muriwhenua Fishing Report*, xix.

³⁶ *Muriwhenua Fishing Report*, 37.

Though the five tribes had merged to bring their claims the separate accounting of fishing grounds, methods, expeditions and traditional knowledge lent credence to the oft-repeated assertion, that although some fishing grounds were shared with one or more neighbouring groups, the far greater number were accepted by all as the exclusive territory of one tribe.³⁷

It does need to be noted that these exclusive rights that whānau and hapū had in the sea and land are not identical with ‘property rights’ as understood in British common law. ‘Property rights’ generally refers to property that the owner is free to sell. Later chapters will show that, before the impositions of Crown rule and the capitalist system, the selling of land or sea was not sanctioned in the Māori tribal world; while whānau and hapū traded in goods and services they did not trade in land.³⁸ To convey more accurately the nature of the rights of ownership that whānau and hapū had in the sea and land, I will refer to them here as ‘proprietary rights’. By ‘proprietary right’ I mean a right of exclusive ownership, but not a right of alienation.

Like communities around the world, whānau and hapū expected and continue to expect that newcomers would respect their proprietary rights. Talking of the period from the 1820s, the Tribunal says that the practice of groups claiming levies on overseas boats entering their harbours had become widespread ‘from the bottom of the South Island to the top of the North’ and that there were groups still claiming the right to harbour dues at the Orakei Conference in 1879,³⁹ against the Crown’s assumption that it alone should control and lay claim to any such dues.⁴⁰ With regard to the present day, the Tribunal records that there was a complaint made by the claimants about outside crayfishermen depleting grounds ‘belonging’ to particular hapū.⁴¹ This is another sign of the continuing tribal understanding of specific rights in the sea.⁴² It is significant that for some years European travellers and traders did respect these proprietary rights, as shown by their willingness to pay the levies claimed by tribes for entry into their harbours.

It was also the case that rights in the land were associated with contiguous rights in the

³⁷ *Muriwhenua Fishing Report*, 17.

³⁸ Outside groups could be granted the use of a specific area of tribal land, but there was not the buying and selling of land as practised under the capitalist economy. See discussion in Chapter 3 of the thesis.

³⁹ *Muriwhenua Fishing Report*, 59-60.

⁴⁰ See discussion in Chapter 6 of the thesis.

⁴¹ *Muriwhenua Fishing Report*, 26.

⁴² See *Muriwhenua Fishing Report*, 21, and Section 3.1.4 on ‘Traditional Fishing Areas’.

sea and inland waters. This is shown by the fact that quite frequently whānau established their rights ‘to the foreshore fisheries adjoining their habitations’ by running lines of stakes from their land into the sea.⁴³ Further evidence comes from the Maori Land Court judgment of 1957 concerning the Ninety Mile Beach; the Court found that the northern and southern parts of the Ninety Mile Beach were ‘exclusively occupied’ by the Te Aupouri and Te Rarawa tribes respectively according to ‘their customs and usages’, and assessed that ‘these two tribes respectively had complete dominion over the dry land within their territories, over the foreshore, and over such part of the sea as they could effectively control’.⁴⁴ In a similar way, all tribes recognised that rights to land included the associated inland waterways. It was only with the imposition of the Crown’s system of property rights that the continuity of right between land and adjacent waters was broken.

An important corollary of the above was that issues of authority and guardianship were determined by the tribes on the basis that each tribe had control of ‘the whole of the inland waters and seas adjacent to its tribal lands’.⁴⁵ In this matter as in others, the Tribunal noted that the claimants came with a clear framework of understanding for where their respective rights and properties lay. The Tribunal was impressed with the respect shown by the claimant hapū for one another’s autonomy and rights; it specifically observed that, in giving evidence regarding the various fishing grounds, ‘witnesses spoke for their own hapū or tribes and did not presume to describe areas to which they did not belong’.⁴⁶ What one can detect is a social and political order directed towards the autonomy of communities but on the basis of shared intercommunity understandings.

The intense interest of the whānau and hapū in their fishing resources might lead one to expect that, after centuries of use, fish stocks would be dangerously low. The Tribunal notes that the archaeological evidence suggests that the ‘seal fisheries were brought near

⁴³ See *Muriwhenua Fishing Report*, 37, 43, 198.

⁴⁴ *Muriwhenua Fishing Report*, 182, citing the Maori Land Court, *Judgment In Re Ninety Mile Beach*, 85 Northern MB 126, 1957.

⁴⁵ *Muriwhenua Fishing Report*, 37. The Tribunal does note that: ‘An exception to that general rule relates to specifically arranged inter-tribal rights.’

⁴⁶ *Muriwhenua Fishing Report*, 17.

to extinction by Muriwhenua Maori centuries ago', in the period after the people first came from the Pacific to settle in the Far North.⁴⁷ Apart from that, however, many of the early European visitors marvelled at the plentiful supplies and great variety of fish around all of the New Zealand shores. Rather similar descriptions were given by the claimant witnesses, some of whom were talking from the personal experience of their younger days. Because much of the Far North had remained remote from the cities and larger towns it was only in very recent decades that the hapū had experienced a severe decline in their fish stocks, due to the intrusions of large scale commercial fishing.

An intimation as to why the tribal fisheries had previously retained their bounty is contained in Colenso's words about the fishing in the 1840 period.

They (the Maori) were very great consumers of fish ... The seas around their coasts swarmed with excellent fish and crayfish; the rocky and sandy shores abounded with good shellfish ... The rivers and lakes contained ... plenty of small fish and fine mussels and small crayfish; the marshes and swamps were full of large rich eels ... In seeking all of these, they knew the proper seasons when, as well as the best manner how, to take them ...⁴⁸

It was undoubtedly because of their exact environmental knowledge and careful fishing methods that the tribes managed to ensure their fisheries stayed replete. The Tribunal realised that they had only heard a small part of the tribal information on these matters but what they heard impressed them, as can be seen from this extract from the report:

We learnt a little of the association of particular fish movements with the growth stages of various plants on shore, and with phases of the moon at different times of the year; the prediction of weather changes from the behaviour of certain finfish, shellfish and birds; the preferred lures and bait for different species at different times; the main species peculiar to particular fishing grounds; the months of the year for catching various species and the preferred days within those months; optimum fishing times according to the phases of the moon; the line and netting techniques to be employed during the spring tides of full and dying moon; the fish to be caught at various tides; the fish caught, best locations and techniques needed according to wind directions; the migratory, breeding and feeding habits of various fish, and also of certain birds; and the lures appropriate to some species ...⁴⁹

This contemporary tribal knowledge is exactly in line with that recorded by observers

⁴⁷ See *Muriwhenua Fishing Report*, 33.

⁴⁸ *Muriwhenua Fishing Report*, Section 3.3, citing W. M. Colenso, 'On the Maori Races of New Zealand', 1 Transactions and Proceedings of the New Zealand Institute, 1868, 9.

⁴⁹ *Muriwhenua Fishing Report*, 23. See Sections 3.1.2 and 4.3 for summaries of the great deal of documented evidence on tribal fishing methods and practices.

like Polack and Sherrin, and anthropologists like Te Rangi Hiroa and Raymond Firth, in their descriptions of earlier tribal fishing practices and methods.⁵⁰

Not only does the Tribunal express astonishment at the depth of the claimant peoples' knowledge of the ecological systems but also at the scrupulousness of their environmental practices. The report includes comment on the rules that are observed:

Some rules, we thought, were basically directed to the maintenance of clear waters and balanced fish habitats. It is forbidden to gut fish in the open seas, or to dispose of small fish, excess bait, food or rubbish ... It was thought by some that the disposal of waste advantaged mainly certain predators and upset the natural balance of species at particular grounds.

There are particularly strict rules for the maintenance of habitats, feeding and breeding areas. Nets and lines must not drag on the sea-bed. 'The dragnet', it was alleged, 'kills the toka' (fishing ground). The underwater contours and characteristics of some grounds are well known and must be maintained and the waters should not be muddied ... On shore, sacks and baskets must be lifted, never dragged over shellfish beds ...⁵¹

The Tribunal thought the rules of hygiene and conservation held to by the claimant communities would be judged 'extreme' by Western standards, and could only be explained by 'the degree of care taken for essential renewable resources, and the extent of the Muriwhenua people's reliance upon the bounty of the sea'.⁵²

The *Muriwhenua Fishing Report* shows that the intimate and practical care of the whānau and hapū for their sea environments is sustained by their philosophy and spirituality, arts, and the preservation of their histories. The Reverend Harold Petera made the following statement in proof his Ngai Takoto people's love for their harbour: 'This harbour (Rangaunu) has sustained our people for centuries, it has been admired, envied, sung about and fought over ...'.⁵³ Others explained how 'the laws of Tangaroa (God of the fish) are still observed by many', and that 'incantations must be offered to Tangaroa before going out to fish'.⁵⁴ There was, moreover, evidence of a strong philosophical foundation for respect of the sea environment in its many aspects –

⁵⁰ See *Muriwhenua Fishing Report*, Sections 3.1.2 and 4.3 for summaries of the great deal of documented evidence on tribal fishing methods and practices, mainly with reference to the nineteenth century and earlier.

⁵¹ *Muriwhenua Fishing Report*, 24.

⁵² *Muriwhenua Fishing Report*, 24.

⁵³ *Muriwhenua Fishing Report*, 17.

⁵⁴ *Muriwhenua Fishing Report*, 24.

although in latter years the maintaining of the practical side of this respect had been made difficult. The Tribunal says:

In the past, we were told, these grounds and sea areas were treated with great respect and some grounds are still tapu to Muriwhenua people. In the manner of past generations, elders still monitor the amounts of seafood taken, so that the sea will always be plentiful in its bounty, but, they complained, they can no longer count or control the losses from "outsider raiding".⁵⁵

The report makes it clear that the tribes of the Far North objected to the 'raiding' of the large commercial operators, but were quite willing to accommodate the interests of people who did not belong to their whānau and hapū as long as they were considerate of the local people and their environment. The Tribunal states that there were no problems voiced regarding the non-Māori people who had settled in their area and fished locally. Nor were there complaints against recreational fishermen, 'save some regrets that Pakeha did not seem to understand the necessary laws of nature.' Any criticism against small-time commercial fishers was directed towards non-local fishermen who 'did not all respect important breeding grounds away from their homes and had no care to ensure the continuity of supply for local people.' In fact, some of the claimants thought that 'the establishment of local commercial fishing families brought about a respect for conservation once they sought to maintain a fishing tradition'.⁵⁶ The Tribunal also records that there were non-Māori who presented their support for the conservation aspects of the claim, and upheld the view 'that local Maori should have guardianship or trusteeship rights, with some form of local regulation or control to conserve coastal and harbour fishing grounds for all'.⁵⁷ What concerned those with local vested interest, whether of the tribes or not, was the protection of the sea environment from its degradation by those who showed little or no interest in its long-term sustainability, and these mainly were the large commercial operators from outside the area.

The concerns of the hapū were, of course, more than ecological, and demonstrate the many levels on which their survival was dependent on being able to sustain themselves in the lands and seas that had been their home for centuries. This is illustrated in the Tribunal's summary of what is needed for the future.

⁵⁵ *Muriwhenua Fishing Report*, 18.

⁵⁶ *Muriwhenua Fishing Report*, 26.

⁵⁷ *Muriwhenua Fishing Report*, 28.

It is the restoration of the tribal base that predominates amongst the Muriwhenua concerns. Any programme would be misdirected if it did not seek to re-establish their ancestral association with the seas, providing for their employment, the development of an industrial capability, the restoration of their communities and the protection of their resource. Their own current programmes directed to those ends are grossly under-funded and much assistance is required.⁵⁸

It is significant that the Tribunal states that the restoration of the tribal base is the main underlying concern of the Far North hapū in bringing this claim. Advancement for the tribes of the Far North will come through the strengthening of their whānau and hapū, brought about through the sort of practical measures outlined by the Tribunal. In terms of the Crown's relationship with the Far North hapū the Tribunal is saying that, because of the Treaty of Waitangi, the Crown has a duty to offer active protection to the interests and well-being of the whānau and hapū of the Far North, particularly through supporting their economic initiatives in fishing.⁵⁹

Finally in this section, I will offer some critique of the Tribunal's varying interpretations of the tribal fishing economies. The Tribunal does record consistent evidence showing that the Far North hapū had a very long history of industry and trade in fish, and counteracting the long held official position that Māori communities had no commercial interest in the sea. Nevertheless, depending on the sources it is using at the time, the Tribunal offers somewhat conflicting views of the tribal economies. On the one hand, there are parts of the report where the fishing economies through to some decades after 1840 are portrayed as standing in their own right, enterprises where European involvement was accommodated on tribal terms. On the other hand, there are places where the tribal economy is given some respect but is judged in terms of its development according to 'Western norms', the latter being treated as the necessary path of development.

In the chapters that are based on evidence from early European visitors and the Far North claimants, the picture conveyed is that of a very well developed tribal fishing industry, providing an important source of food and employment for whānau, and the basis for trade with other hapū – at least until early in the twentieth century. Also, in

⁵⁸ *Muriwhenua Fishing Report*, xxi.

⁵⁹ See *Muriwhenua Fishing Report*, Conclusions 12.1.2.

Chapter 4 of the report, which examines ‘fishing industry in the period 1840-70’, several points are made to show that Māori were the main initiators of new developments in their industry,⁶⁰ that they remained very much in control of their fisheries, and that they continued to work from their tribal base.⁶¹

When the relationship of Māori communities to the whaling industry is being discussed,⁶² the issue of tribal control of their fisheries is brought out in an especially interesting way. Whaling was the one type of fishing where European technology was superior to that of Māori. The argument had been put to the Tribunal that because tribes had allowed Europeans to pursue whaling on a large scale this was evidence that they had surrendered their rights to their fisheries. The Tribunal judged, however, that, while hapū granted exclusive whaling rights to certain European individuals, their doing so was directed towards drawing the whaling enterprises under their control and to the benefit of their communities.

We consider it unsafe to assume that because of whaling, Muriwhenua Maori could be taken to have abandoned exclusive tribal rights before the Treaty. We consider rather that the record is indicative of a Maori desire to secure trade, and later to establish their own whaling businesses. It is the sovereign right of all people to seek progress in that way, and the record does not seem to us to indicate any waiver from that sovereignty.⁶³

This observation is significant. It shows that the tribal communities, rather than giving way before a European superiority and hence the alienation of their resource, worked to bring the foreign business under their own local direction. The tribes and their leaders welcomed the expansion of their fishing economies but not the alienation of their properties or the surrendering of the oversight of the economic activities within their waters. As evidence given in the report shows, the later losses of control of their fisheries stem not from their own actions but are a result of legislation introduced by the Government – land legislation that was directed against the tribal base, and fisheries legislation which denied tribal commercial interests in fishing.⁶⁴ The tribes sought to

⁶⁰ See *Muriwhenua Fishing Report*, 64: ‘Though the missionaries and later Governor Grey did much to encourage agriculture and trade, the initiatives came mainly from Māori who were keen to capitalise on the new settler markets, and take advantage of the new economy’.

⁶¹ See *Muriwhenua Fishing Report*, 64-74 and 77-80.

⁶² *Muriwhenua Fishing Report*, Section 3.5.

⁶³ *Muriwhenua Fishing Report*, 61.

⁶⁴ See *Muriwhenua Fishing Report*, 77-80.

develop their economies through the new trading possibilities and in this they were successful, until they were undermined by legislation not of their making.

The picture of hapū control of their resource and industry, and the accommodation of trade with Europeans on tribal terms, is less clear in Chapter 3 of the report. In this chapter the Tribunal states that it is largely relying on a summary of information put together by Dr. Habib, a fisheries consultant. There is no question that the summary provides a great deal of valuable and detailed evidence on many aspects of tribal fishing. In the sections on the ‘Maori’ economy, however, the information given is punctuated with somewhat convoluted discussions on theoretical issues.⁶⁵

It is beyond the scope of the thesis to critique in detail the discussion on the Māori tribal economy in Chapter 3 of the report. What I will examine are those parts where direct comparisons are made with the ‘Western’ economy. Here the Tribunal is particularly influenced by the work of Dr Raymond Firth whose ‘book, *Primitive Economics of the New Zealand Maori*, first published in 1929, was the earliest comprehensive attempt to expound the customary form of Maori trade.’⁶⁶ There is no doubt that Firth is still a valuable source of information on the Māori tribal economy before it was severely impacted by colonisation, where ‘economy’ is being used in its broad social sense. On the other hand, although Firth’s work shows that he recognised that the Māori economy had ‘its own internal logic’,⁶⁷ he took the social evolutionary position of his time: that all economies would naturally develop from a ‘primitive’ to a Western form.

While the Tribunal does not embrace all of Firth’s opinions, there are parts of their discussion on trade where they adopt his method of placing ‘Western norms’ as the measure by which Māori development is to be assessed:

Though trade in a modern sense was lacking amongst the ancient Maori, the rapid adaptation to barter was indicative of some experience in that field. That experience lay in the practice of gift exchange ...

⁶⁵ Quite a bit of this discussion calls on ‘gift exchange’ theory to describe the tribal system of trade. In Chapter 3 of the thesis some critique of the Tribunal’s use of this theory is offered.

⁶⁶ *Muriwhenua Fishing Report*, 49.

⁶⁷ See Meiksins Wood, 4, cited in Introduction to the thesis, ‘Review of the literature’.

The Maori gift-exchange required an understanding of equivalents, relative worth and reciprocity. These were also essential elements of barter. Other Western norms took longer to grasp – the emphasis on possessions, contracts without continuing obligations and the equation of personal wealth with status and social power – were not essential to any effective early trade ... Adaptation to western norms passed through two stages. During the phase of initial contact, the Maori traded food and native products for goods of a utilitarian nature such as iron and cloth ...⁶⁸

The tone and premises of this discussion immediately cast the ‘Maori’ system as ancient and primitive. It presumes that Māori communities would have inevitably followed the Western model with its ‘emphasis on possessions, contracts without continuing obligations and the equation of personal wealth with status and social power’. Particularly telling is the use of the term ‘adaptation’ for the process by which Māori were supposed to have taken on these norms. It suggests that Māori were willing participants in moving into a social order where, for instance, ‘contracts [regarding land and sea] without continuing obligations’ were embraced.

That this was not the case will be shown by the evidence given in later chapters of this thesis. It was through legislation alien to tribal interests that the Crown imposed ‘contracts without continuing obligations’ on Māori communities. While the Tribunal overlooks this point, it does recognise that the tribal economic order was undermined by factors that were not entirely of Māori choice. It disagrees with Firth’s hypothesis that the ‘Maori’ economy carried the seeds of ‘primitive capitalism’ and that therefore Maori adapted readily to the norms of the Western economic order. The Tribunal judges, rather, that ‘time was to show that once numbers [of Pākehā to Māori] changed, land was lost and the old tribal power was defeated, Maori were disadvantaged in economic competition, and their early economic initiatives have never since been so successfully repeated’.⁶⁹ Although the facts that the Tribunal are describing carry a basic accuracy, its use of terms like ‘the *old* tribal power’ tends to reinforce the idea of the tribal order as ancient and past, and as one that had inevitably to give way to the Western order. By doing this, it contradicts its earlier picture of the Far North and other tribal communities as standing in their own autonomy, and from that base setting their own directions and drawing in the elements they chose from outside groups.

⁶⁸ *Muriwhenua Fishing Report*, 53-4, citing R. W. Firth, *Economics of the New Zealand Maori*, Wellington, 1959 [1929], 431-432.

⁶⁹ *Muriwhenua Fishing Report*, 56.

The differing assessments of the tribal fishing economies are illustrative of how ideology develops to justify the dominance of one group's interests over another's. The European explorers and settlers through to the early decades of the nineteenth century did not have a commercial interest in the sea.⁷⁰ Their accounts are generally enthusiastic about the tribal fishing industry and trade. It is from the mid-1860s that officials and others start casting the interests of Māori communities in the sea as merely subsistent, and not commercial. This is the point at which the European settlers started to look to fisheries as a source of revenue for themselves.

Through their careful study, some of the twentieth century scholars like Firth came to recognise the extent of the tribal fishing industry and that Māori communities had profited from their trade in fish. But because these scholars worked within a social milieu in which colonial domination was still being established and an academic climate where social evolutionary notions were uncritically held, they portrayed the tribal economies as primitive, and assumed that development would have to be according to Western norms if there were to be 'advancement'. As the Tribunal's use of Firth shows, this ideology still exerts considerable influence. No doubt because he judged that the Māori economy would inevitably give way to the Western, Firth does not explore the contradiction between the way property in the sea and land was held by tribes (with the sort of social relations that entailed) and the alienable property rights of the capitalist system (meaning that contracts could be made without continuing obligations). It is a contradiction that will be investigated in some depth in the course of this study. Suffice it to say at this stage, that the social evolutionary assumptions used by Firth, and in part by the Tribunal, tend to foster the notion that it was natural that the tribal economic order would give way to the 'Western', thus providing justification for the Crown's recent option to promote the large scale capitalist exploitation of the fish resource rather than to protect the fishing industries of the hapū.⁷¹

⁷⁰ This is apart from the whalers and sealers, whose interest on the whole did not have a conflict with those of the tribes.

⁷¹ See discussion in Chapter 8 of the thesis.

Ngati Kahu and their lands

The Ngati Kahu iwi are one of the five Far North hapū who brought the Muriwhenua Fishing and Muriwhenua Land claims to the Waitangi Tribunal.⁷² Ngati Kahu made its own claim to the Tribunal, with regard to the building of a sewerage works on an area of their land which is a site of great historical and social significance. The *Mangonui Sewerage Report* records the Tribunal's findings, and includes background on Ngati Kahu and their lands.

The area under contention was the Otengi headland, which had been given to Ngati Kahu in 1974. The donors were Mr. and Mrs. G. P. Adamson, who were descendants of an early European family in the district. The gift meant a great deal to Ngati Kahu, as the report explains:

In June 1974, Mr and Mrs G P Adamson gifted part of their farm to the Ngati Kahu Trust Board for the Ngati Kahu people as a whole. It was 20 acres, which may seem small, but it was the most significant 20 acres of the ancestral demesne. It was the Otengi headland where the tribe was born. The gift was symbolic of the re-emergence of the tribe.⁷³

There are two reasons for the significance of this gift. One is that the land is held by Ngati Kahu as an iwi. The report shows that colonisation, as facilitated by Crown policy and practice, has led to the huge dispossession of Ngati Kahu, meaning that there is now little tribally owned land.⁷⁴ While some whānau do own land in the area, most of it is under freehold title.⁷⁵ The other reason is that the Otengi headland and the adjacent Taipa Bay are the place of settlement for the first ancestors of Ngati Kahu. Throughout Ngati Kahu history this land has held utmost primacy in terms of their identity as a people.

The report refers to the detailed knowledge the people carry of the founding of their tribe, seven hundred years ago. Indeed, Ngati Kahu's history reaches back to Kupe, famous Polynesian explorer. He had visualised a settlement at Taipa. It was after some

⁷² In the *Mangonui Sewerage Report* Ngati Kahu are called an 'iwi', and in the Muriwhenua Fishing Report they are included as one of the five claimant hapū. This is a demonstration of how 'iwi' and 'hapū' can be used interchangeably.

⁷³ *Mangonui Sewerage Report*, 25.

⁷⁴ See *Mangonui Sewerage Report*, Section 1.4.

⁷⁵ Freehold land can be more easily sold and thus moved out of Ngati Kahu hands.

generations, and accompanied by significant portents, that Kahutianui and Parata, descendants of Kupe's people, came to settle in the area. It is from Kahutianui that Ngati Kahu take their name. She 'was a woman of great lineage, courage and leadership'.⁷⁶ Important in the history is the waka that brought first Kahutianui and family to the Hokianga, and then Parata and family to Taipa. The waka was initially the Tinana but later, re-adzed and enlarged, it was given a new name, the Mamaru. Important, too, are the landing points of Mamaru and the site of the first pā to be built. These details imparted to the Tribunal point to the wealth of history carried by Ngati Kahu, and to the traditions which have helped shape and maintain their identity as a people.

Just as the founding community was an offshoot of particular whānau in Hawaiki, so new communities arose from the original. These communities established themselves along the coast and up the rich Oruru valley, and grew and multiplied.⁷⁷ The histories of the whānau and hapū of Ngati Kahu are intimately linked with the histories of the places in which they live. Each headland, each bay, each valley can be identified with one or more hapū. The names of localities are associated with the peoples who have lived in them, and thus the history of the people and the history of the land are intertwined.⁷⁸

A clarification of how the different whānau and hapū of Ngati Kahu are related to one another is given in the report:

Originally there were three hapu or clans on the Mamaru canoe, Te Rorohuri, Patu Koraha and Te Whanau Moana. Those names have always been maintained but in later years numerous sub-tribal groups adopted additional tribal names that came to apply to different localities. For convenience, we refer to the sub-tribes collectively as Ngati Kahu, although the name was not revived until the 1920's, and although for the greater period of the time described, different groups of the same people preferred their separate hapu names.⁷⁹

The explanation that for the greater part of a very long history 'different groups

⁷⁶ *Mangonui Sewerage Report*, 14.

⁷⁷ The report says (page 14) that by the eighteenth century there were broadly three main areas of settlements, although villages were to be found everywhere.

⁷⁸ See Chapter 2 of the thesis, for further background on the significance of the naming of the land to whānau and hapū. See also W. Norman, 'The Muriwhenua Claim', in I. H. Kawharu, ed., *Waitangi: Maori and Pakeha perspectives of the Treaty of Waitangi*, Auckland, 1989, 200.

⁷⁹ *Mangonui Sewerage Report*, 14.

preferred their separate hapū names’ is significant. It indicates that, while the whānau and hapū knew and treasured their shared ancestral links to Kahutianui and Parata, and to the Otengi headland, each had its own history and identity. This aligns with the evidence from the *Muriwhenua Fishing Report* that in the Far North the autonomy of local communities is highly valued. The Tribunal’s use of ‘sub-tribal’ to describe the whānau and hapū of Ngati Kahu is not strictly accurate because it suggests there is some sort of major tribal body with rights over the ‘sub’ groups below it. In fact, the evidence given in the report indicates that each group has its own identity and autonomy, while at the same time acknowledging the relationships that come from a wider shared ancestry. In recent times the peoples of Ngati Kahu have shown the capacity to unite in pursuing matters of common interest, and not least in bringing this and other claims to the Waitangi Tribunal. But their uniting has been a federation of hapū and whānau, each standing in their own authority; it has not been a case of sub-tribes coming together at the direction of an overriding major tribal authority.

The archaeological evidence brought to the Tribunal showed that in the eighteenth century much of the Ngati Kahu rohe was densely populated. In summing up this evidence the Tribunal says:

It is likely that for every coastal headland there was a pa, and many were built inland, on well drained hills, at strategic spots on communication lines, and at places with ready access to the resources of the dense forests and the open seas. On carefully chosen sites, extensive gardens were established.⁸⁰

It is thought probable that the Oruru valley, in particular, supported one of the densest concentrations of population in the country. There was a string of villages for 22 kilometres along the valley, and it is estimated that in the eighteenth century this valley alone had a population of 8000 people. The Tribunal was advised ‘that the area was so densely settled that news and messages could be shouted from Taipa to Kauhanga, from one pa to the next’.⁸¹

Some important implications regarding Ngati Kahu society can be drawn from the fact that the area was so densely populated. These implications are only touched on in the

⁸⁰ *Mangonui Sewerage Report*, 15.

⁸¹ *Mangonui Sewerage Report*, 15.

report, which is relatively brief because it is focussed on a single issue. The Tribunal makes it clear that a fuller understanding of the Mangonui sewerage case requires the background provided by the Muriwhenua Fishing and Muriwhenua Land hearings. In order to make more explicit what is implicit in the *Mangonui Sewerage Report*, I will call on supplementary sources and especially ones that deal with the Far North.

The first point is that Ngati Kahu's large population could be sustained not only because the area was rich in resources of land and sea,⁸² but also because of the people's skill and knowledge in cultivating and harvesting those resources. The sustainability of their fishing practices has been outlined in the previous discussion on the *Muriwhenua Fishing Report*. The indications are that comparable levels of skilled and sustainable practice were applied by the people to their gardening and harvesting of forest resources.⁸³

The expertise of the gardening practices of Ngati Kahu, and Māori communities throughout the country, are explained by Dr Susan Bulmer, in an overview of Māori gardening from an archaeological perspective.⁸⁴ In reading her observations about Māori gardening it needs again to be remembered that, while she uses the generic term 'Māori', the world she is referring to is a world where whānau and hapū autonomy and identity predominate. Bulmer describes the Oruru Valley as 'one of the most spectacular examples of Māori valley garden landscapes', with its system of large ditched gardens.⁸⁵ She also discusses gardening in other parts of the Far North. There is evidence of an area of ditched swamp gardens that covered about 15 square kilometres in the area between Kaitaia and Awanui, and another garden system north of Kaitaia that covered about 50 hectares.⁸⁶ This latter is referred to in the *Muriwhenua Land Report*, which notes that part of the system incorporated a complicated grid network of ditches to bring

⁸² In terms of the range of natural resources available to it, Ngati Kahu was better off than those other parts of the Far North where the land suitable for cultivation was not so extensive.

⁸³ See E. Best, *Forest Lore of the Māori*, Wellington, 2005, for background on forest resources and their harvesting.

⁸⁴ S. Bulmer, 'Nga Mara – traditional Maori gardens', in M. Bradbury, ed., *A History of the Garden in New Zealand*, Auckland, 1995.

⁸⁵ Bulmer, 30.

⁸⁶ Bulmer, 29-30.

irrigation water down-slope from natural springs.⁸⁷ What is clear from the comments in the *Muriwhenua Land Report* and Bulmer's broader discussion is that whānau and hapū were 'master gardeners',⁸⁸ and that up and down the country they adapted their systems of gardening to the soils, climate, and topography of the area they were in.

Bulmer also pursues an argument that challenges the 'hunter-gatherer' image of the tribal world.⁸⁹ While acknowledging that there is much more research that needs to be done on Māori gardening, she disagrees with those who suggest that the earliest Māori settlers went first to the southern South Island where 'they could have easily lived on hunting and collecting' and not have had to bother about gardening. One can see in this suggestion the influence of the theory that puts 'hunter-gatherer' societies as low on the evolutionary ladder, and thus supports the portrayal of the Māori tribal world as primitive. Bulmer thinks it much more likely that the first Polynesian settlers established themselves in the North so they could establish gardens as was their custom, and that this would not have been unduly difficult for them because adapting to different circumstances was part of their heritage.

The pre-European Māori gardeners were inheritors of a rich agricultural tradition from East Polynesia and, like their ancestors and relatives in the islands, were master gardeners ...

[They] came from a region where they had to be skilled in the kind of crops, techniques and gardening knowledge that made it possible to establish gardens in the new variety of climates and soils of Aotearoa. Polynesian conditions of gardening were challenging, and required a great deal of adaptability, as these people eventually colonised all available islands in the eastern Pacific [adapting as they went] ...⁹⁰

She then discusses the species that were cultivated by Māori communities, both those brought with them and the indigenous plants. It is here that she offers another correction:

Thus, far from being impoverished, as some writers allege, Māori gardeners were in the 'mainstream' of world agriculture, and did well in the new country because of the very useful crops they grew.⁹¹

⁸⁷ *Muriwhenua Land Report*, 30-31.

⁸⁸ Bulmer, 17.

⁸⁹ See Tully, 72 ff. on the use of the 'hunter-gatherer' classification of Indigenous economies in justifying the 'planting' of 'European constitutional systems of private property and commerce around the world'.

⁹⁰ Bulmer, 17, 18.

⁹¹ Bulmer, 20.

The fact that Bulmer found it necessary to offer these corrections points to a weight of prejudice that Māori communities led a diminished life style before the arrival of Europeans. Further evidence against this sort of misconception is provided in many of the Tribunal reports. In the *Muriwhenua Fishing Report*, for instance, the Tribunal refers to the material it received from Dr Janet Davidson: '[Her] archaeological evidence reveals a long and rich history of Maori occupation in the Far North, extending back in time at least 700 years',⁹² and the Tribunal quotes her conclusion that: 'Stone adzes and other tools, and fine personal ornaments are indications of the wealth of the traditional communities of the Far North'.⁹³

The archaeological evidence regarding Ngati Kahu, and the density of its population in the period before European contact, contributes to the picture that one gains from the *Mangonui Sewerage Report* of autonomous and neighbouring communities that were far from impoverished. There are, in fact, a number of reasons that can be suggested for their prosperity. Because they had a rich resource base, they did not suffer from the vulnerability of communities who are dependent on a single crop for their livelihood. Then, making best use of that base, they drew skilfully on a wide range of resources according to season, and employed conservation practices developed through generations of intimate knowledge of the area in which they lived. In providing for themselves, the whānau and hapū of Ngati Kahu used various methods of food preservation, and benefited from their trading relationships.⁹⁴ Through these means many communities were able to draw a comfortable living from the Ngati Kahu lands.

Yet another important factor that contributed to the prosperity of the Ngati Kahu communities was the fact that their economies were established on a co-operative basis. As the evidence regarding the distribution of the fishing catches shows, this meant that whānau and hapū received the full benefit of their resources.⁹⁵ While trade led to the

⁹² *Muriwhenua Fishing Report*, 40.

⁹³ *Muriwhenua Fishing Report*, 50, citing 'Dr J M Davidson's evidence', Doc#A5, Wai 022, 1986, 4. The *Ngati Awa Raupatu Report*, in Section 9.3, refers to Ngati Awa's former (as in pre-confiscation) 'prosperous agricultural trade'.

⁹⁴ The evidence regarding trade and food preservation is spelt out in the *Muriwhenua Fishing and Land reports*.

⁹⁵ Whānau and hapū did help one another out in time of need. And generosity and hospitality to other communities were highly valued.

mutual enrichment of groups, there was no system – feudal, capitalist, or otherwise – for channelling the resources of the communities to some overlord, absentee owner, or outside controlling corporation. It is through the latter sorts of arrangements that the economic and political power of local communities is diminished.⁹⁶

The archaeological and historical evidence also points to the peaceful co-existence of the Ngati Kahu communities. While the *Mangonui Sewerage Report* says that ‘a late 18th century map [of the Oruru valley] recorded a fighting force of 2,000 men’, it would seem that these must have been available for battle with other tribes; the report goes on immediately to say that: ‘There were 57 pa along the ridges of Oruru valley, and each had many associated pit and terrace sites of undefended settlement’.⁹⁷ This observation accords with the general picture of the Ngati Kahu rohe in the eighteenth century as an area where many communities lived in close proximity, accommodating one another on the land.

All in all, the evidence about Ngati Kahu and the Far North peoples in general is far from the image of ‘the propertyless and wasteful hunter gatherer, the vicious savage and the rude native’.⁹⁸ Nevertheless there is in the commentary in the *Mangonui Sewerage Report*, as in the *Muriwhenua Fishing Report*, shades of the ideology that places the Western or European as superior to the tribal. This is notable where the Tribunal states that Ngati Kahu’s loss of land through Crown rule and colonisation led them to be better off because it delivered them from the tribal land wars waged against them by their neighbours:

The loss of land at least had the benefit of ending the tribal land wars, and the impositions of other tribes that had caused the identity of Ngati Kahu to be subsumed. Only then were Ngati Kahu freed to assert their own status ...⁹⁹

The evidence presented in the *Mangonui Sewerage Report* and the *Muriwhenua Land Report* shows that the above statement quite misrepresents what happened. In the early part of the nineteenth century, groups of Te Rarawa from the west and Nga Puhi from

⁹⁶ This is demonstrated through the evidence given in Part 2 of this thesis, and Chapter 8 in particular.

⁹⁷ *Mangonui Sewerage Report*, Section 3.2, citing ‘Submission, Dr S Bulmer, Regional Archaeologist (Auckland-Northland), Historic Places Trust’, Doc#A14, Wai 017, 1996.

⁹⁸ Tully, 80. See Introduction to the thesis.

⁹⁹ *Mangonui Sewerage Report*, 24.

the southeast encroached onto some of the Ngati Kahu lands. This followed a big loss of Ngati Kahu people in the late eighteenth century, when those in the highest population density areas were badly hit through the spread of diseases, caught as a result of contact with European whalers. During the occupations by Te Rarawa and Nga Puhi, some of the Ngati Kahu whānau were displaced but it was for a short time only.¹⁰⁰ Although there were tensions in the situation, it was certainly not a case of ‘tribal land wars’. The Tribunal in the *Muriwhenua Land Report*, where it is discussing an area under claim by Ngati Kahu, explicitly states: ‘Ngati Kahu, the ancestral title holders, were never subdued, and it is clear their possessory rights were not disputed’.¹⁰¹

While the Tribunal in the case of the Mangonui sewerage claim would not have had the detailed background that it had for the Muriwhenua Land hearings it is still hard to see how, based on the facts available to it,¹⁰² it could claim a comparability between the harm that came to Ngati Kahu through the encroachment of its neighbouring tribes¹⁰³ and that which came following the introduction of Crown rule. It was the Crown that did not recognise their position as the people with mana whenua in the area,¹⁰⁴ and largely excluded them from negotiations over land;¹⁰⁵ and as later chapters of the thesis will show it was Crown action that was responsible for the permanent dislocation of a huge proportion of Ngati Kahu, and their virtual exclusion from much of their best lands.¹⁰⁶ There is no comparison between the limited harm that came to Ngati Kahu from the encroachments of Te Rarawa and Nga Puhi, and the terrible losses that followed from Crown rule.

In the Tribunal’s assertion that ‘the loss of land’ following Crown rule was the source of benefit to Ngati Kahu, one can see echoes of John Locke’s principle that ‘the Aboriginal

¹⁰⁰ *Muriwhenua Land Report*, 79, 138-9. It is quite possible that as Ngati Kahu rebuilt their numbers over time they would have either incorporated the Te Rarawa and Nga Puhi who came on to their lands, or gradually edged them out. This sort of waxing and waning of groups was common.

¹⁰¹ *Muriwhenua Land Report*, 138.

¹⁰² See *Mangonui Sewerage Report*, Section 4.3 ‘Land Transactions’.

¹⁰³ These tribes were also relations of Ngati Kahu. The *Muriwhenua Land Report* (pages 78-85) makes it clear that the leaders of both ‘occupying’ groups claimed close family relationships into Ngāti Kahu. The ‘occupations’, therefore, were not those of alien tribes.

¹⁰⁴ A member of Ngati Kahu explained to me that it is only in the eyes of certain Pākehā that their identity was subsumed, certainly not amongst their own people or among their neighbours.

¹⁰⁵ See *Muriwhenua Land Report*, 118-120, 286.

¹⁰⁶ See also *Muriwhenua Land Report*, Section 9.2.

people are better off as a result of European settlement'.¹⁰⁷ As James S. Tully rightly points out, Locke's arguments about the necessary benefits of European colonisation to aboriginal peoples are very influential, and continue to provide justification for the imposition of the constitutional and economic institutions that have favoured the interests of the colonists.¹⁰⁸ The promulgation of the idea that European colonisation saved Ngati Kahu from (supposedly devastating) tribal land wars sustains the image of tribal peoples caught in a 'savage' world, and lends justification to the manner of Crown rule.

A final point from the *Mangonui Sewerage Report* concerns the understanding of transactions regarding land in the Māori tribal world. It is an important issue because these transactions have been described and treated by the colonists and others as 'land sales', as if the alienation of land was intended. Little will be pursued here about this matter because it is picked up and elaborated on in the discussions of the Te Roroa and Muriwhenua Land reports. It is sufficient to say that the *Mangonui Sewerage Report* makes it clear that rangatira, in allotting a place for European immigrants, had no intention of alienating the lands of their respective peoples. They sought and expected, as was customary in such cases, the establishment of ongoing and mutually beneficial relationships between their hapū and the parties concerned.¹⁰⁹

This chapter has opened up the discussion of the social relations of the Māori tribal world as they existed before the harmful impacts of Crown rule and as they have continued in spite of colonisation. The information that has been imparted about the Far North hapū in regard to their fishing economies, and the Ngati Kahu hapū in regard to their lands, shows their nature and operation as tribal communities. Something of the integrity in the relationships of the tribal world has been demonstrated, as well as the capacity of the tribal communities to take best advantage of their resource base while

¹⁰⁷ Tully, 74. See Locke, *Second Treatise*, s. 41.

¹⁰⁸ Tully, 75. See Introduction to the thesis.

¹⁰⁹ See *Mangonui Sewerage Report*, Section 3.4.1. See also: T. Rei, B. Young, Ngā Kairangahau and Manatū Māori staff, *Customary Māori Land and Sea Tenure: Ngā Tikanga Tiaki Taonga o Neherā*, Wellington, 1991, 14-22.

ensuring its sustainability. While the reports used for the chapter have provided valuable information, the commentary in them has needed critique because they sometimes use ideology that helps to justify the domination of the tribal world by the modern, capitalist state. The next chapter builds on the understandings developed here by investigating the many dimensions of the relationships that are important to the Te Roroa hapū.

Chapter 2

The Te Roroa Communities and their Relationships

Te Roroa are the northern most hapū of Ngāti Whātua, and their territory lies between the Kaipara and Hokianga harbours, ranging from Waimamaku to Tuawai and Pouto. They are not one people but rather a people of peoples, with Waipoua as their ancestral heartland.¹ This chapter uses as its main source *The Te Roroa Report*, which conveys a great deal about the Te Roroa communities and the reasons for their claim to the Waitangi Tribunal. The claim concerns the Crown's neglect to secure to the hapū promised reserves, the violation of their taonga, and their not being provided with the benefits of development enjoyed by other New Zealanders.

The Te Roroa Report offers a vivid and detailed picture of the social relations of the Te Roroa hapū before the harmful impacts of Crown rule, and how these have continued in spite of colonisation. The vividness is especially apparent in those parts of the report where claimant witnesses are quoted at some length, giving an immediacy of insight into their histories, relationships, worlds, and the effects of colonisation on their lands and lives. Although some of the Tribunal's commentary needs to be critiqued, *The Te Roroa Report* gives valuable insights into concepts and relationships that are important to Te Roroa, and to whānau and hapū generally.

The information in the report regarding the Te Roroa communities will be considered according to categories that encompass key aspects of their social, political, economic, and environmental order. These categories are: (i) the establishing of relationships between groups; (ii) the establishing of relationships within whānau and hapū; and (iii) the understanding of relationships to taonga, land, and resources. It is the undermining of these relationships and the rights associated with them that is very much at the heart of the Te Roroa claim. While the three categories will be examined in turn, there is

¹ New Zealand Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Roroa Claim, Wai 038*, (also named as *The Te Roroa Report, Wai 038*), Wellington, 1992, Te Tau (Introduction).

overlap in the treatment of them, not least because they have reference to an integral reality.

(i) The establishing of relationships between groups

The introductory chapters of the report describe the different groups that constitute Te Roroa and explain how their histories relate to one another and those of other peoples. The histories focus on ancestral links; the marriages that brought different groups into relationship; the land that was the source of sustenance, identity, and relationship for each group; the conflicts over land and resources; and the addressing of violations. The chapters also discuss how the Te Roroa communities received the European newcomers onto their lands.

In bringing their claim to the Waitangi Tribunal, the whānau and hapū of Te Roroa set out the bases for their rights to be claimants over the lands, resources, and taonga under question. Fundamental to this process is the laying out of the genealogical connections of the different groups to key ancestors, peoples, and places. The histories range across information about relatively immediate forebears, on to key leaders from around four hundred years ago, namely Manumanu 1 and Manumanu 2, and then centuries earlier to the captain of their waka tūpuna,² Whakatau, from whom all the claimants are descended. And Whakatau's people were not the first to live there. The history recognises Ngai Tuputupuwhenua as the people who were already occupying the land when Whakatau landed at Kawerua to the north of Waipoua. The report describes Tupu, the ancestor of Ngai Tuputupuwhenua, as 'the son or relative whom the legendary Kupe left behind after departing the Hokianga for his homeland ... He married Kui and from this union came Te Tini o Kui (the myriads of Kui)'.³ Also recounted are the relationships of the Te Roroa hapū one to the other, and their wider links and connections – especially to their neighbours, Nga Puhi to the north and Ngati Whatua in the south.

² For many Māori tribes their waka tūpuna (the waka that brought their ancestors from Hawaiki) is of major significance. We are told here that for Te Roroa their waka tūpuna is Mahuhu-ki-te-Rangi. However, they also linked to other tūpuna waka, as outlined in *The Te Roroa Report*, 5.

³ *The Te Roroa Report*, 8-9. Tupu is described as a "spring gushing from the earth" or as the "puna"(spring) from which all the life giving waters of the land were sourced.

Woven into the accounts of the genealogical connections are the stories of individuals, whānau, and hapū who migrated into the Te Roroa rohe from other areas. Their place on the land was established by various means. Sometimes it was through battle and the seizing of resources, sometimes through negotiation, sometimes through invitation. Even when a place was gained through conquest, rights in the land were established only if the conquering group settled permanently. In fact, the surest way for an immigrant group to gain access to rights in the land was through intermarriage with the tangata whenua, because ancestral connection was held as the first source of rights in the land.⁴

Extraordinarily, in spite of years of living in close proximity, groups were able to retain their identity and autonomy. This fact is commented on several times in the report. On the one hand, there is an amazing interconnection of relationships and, on the other, the retention by whānau and hapū of their own histories and self-determination. The following sentences from the report are indicative of the situation:

Te Roroa is essentially a borderlands⁵ community of closely related hapu, each retaining their separate identities.

The Te Roroa tupuna whaea (female elder), the late Raiha Paniora described the situation as "resembling the mange-mange vine"; she said "we are all inextricably tied together, both by tupuna and intermarriage".⁶

Elsewhere it is stated regarding the early settlers of the area:

It is not certain that Ngai Tupu were the occupants of these ancient sites, but it is known that they intermarried with the Mahuhu newcomers, living in co-existence in some cases but otherwise retaining their autonomy and individual identities.⁷

The ability of the tribal communities to maintain their autonomy and identity in living alongside one another on the land obviously caught the attention of the Tribunal. It is fascinating, too, for the reader of the report, and especially for those of us who have been formed in the understanding that the world is made up 'mutually exclusive

⁴ See Rei et al., 16ff. See also E. T. Durie, 'Custom Law', discussion paper towards the settlement of guidelines for the Waitangi Tribunal and the Māori Land Court, Wellington, January 1994, 6.

⁵ The idea that their land was a 'borderlands' is doubtfully one held by the Te Roroa hapū. The Te Roroa report (page 7) cites Craven Tane, great grandson of Hapakuku Moetara, as saying: 'Maunganui to me is the centre of a whole compass that goes to the house of Ngapuhi and goes to the house of Ngatiwhatua'.

⁶ *The Te Roroa Report*, 7, citing 'Evidence of John Klaricich on the Kohekohe wakatupapaku and the Spencer collection', Doc D#17, Wai 038, 1990, 6.

⁷ *The Te Roroa Report*, 10.

“sovereign” territorial communities’. This latter expression is that coined by James S. Anaya and, in reading the Te Roroa report, one can appreciate his judgment that such an understanding provides a limited conception of ‘peoples’, and ‘largely ignores the multiple, overlapping spheres of community, authority, and interdependency that actually exist in the human experience’.⁸

The capacity for different communities within Te Roroa to retain their unique character and identity is further illustrated by an account of how, at both Waimamaku and Maunganui Bluff, there is incorporated a community whose iwi identity and relationships remain with Ngati Kahu whose homelands lie many miles distant.

Te Roroa traditions state that Manumanu came first to the composite Waimamaku community, where his Ngai Tamatea relatives were living alongside Ngati Miru and Ngati Ririki. The latter were of tangata whenua stock. In that community too was a branch of Ngati Kahu, some of who were apparently living at Maunganui Bluff among Te Roroa.⁹

In this situation it is not so much the link with common ancestors that establishes the rights of the Ngati Kahu community in the area; it is the accepted and understood historical basis for their presence and the negotiation of ongoing subsequent relations between them and those who are of tangata whenua stock.

The report shows, too, that the Te Roroa communities and their leaders enjoyed a special rapport with their neighbours to whom the various Te Roroa communities were most closely related, namely, Nga Puhi to the north and Ngati Whatua to the south. These relationships, established through affiliation and intermarriage, illustrate the continuity of connection from one area to another, and a further counter to the model that suggests that human society is naturally made up of ‘mutually exclusive territorial communities’. The connections are highlighted where the Tribunal comments on the knowledge the Te Roroa leaders had of the Declaration of Independence, and of the Treaty of Waitangi with its establishing of a formal relationship with Pākehā.

Hokianga and Kaipara chiefs with whom Te Roroa had strong connections, such as Parore Te Awha, had signed the earlier Declaration of Independence. Accordingly there was already some familiarity with both signing a document

⁸ S. J. Anaya, *Indigenous Peoples in International Law*, New York, 1996, 78.

⁹ *The Te Roroa Report*, 5.

proposing a formal relationship with the newcomers to their land and with the people, such as Busby, promoting it. Ngapuhi and Ngati Whatua, to whom Te Roroa were closely related, signed the Treaty at Waitangi on 6 February 1840; at Mangungu mission station on the Hokianga on 12 February 1840; and at Karaka Bay, Tamaki, on 4 March 1840. Te Roroa chiefs Te Pana, Wiremu Whangaroa and Hamiora Paikoraha signed at Mangungu whilst Parore Te Awha's son, Te Ahu, was among the Ngapuhi signatories at the Bay of Islands.¹⁰

The alliances Te Roroa had with their neighbours meant that they were likely to join with them in the forging of new political arrangements.

The Tribunal for *The Te Roroa Report* provides further comment on inter-group relationships where it describes the accommodation of Pākehā by Te Roroa into their rohe. It does have to be said that the Tribunal's explanations on the subject in this report can be better understood if read alongside those given in its later *Muriwhenua Land Report*. From a reading of both reports, it is clear that Pākehā were given a place on the land according to customary tribal understandings of such arrangements.¹¹ These understandings meant that, when a community gave a place on its land to another group of people, it was always with the intention of establishing an ongoing and mutually beneficial relationship between themselves and the immigrant group. In discussing this matter the reports are referring to the period before the more negative consequences of colonisation had their impact, and when hapū were still fully in control of their lands. For Te Roroa this situation continued for some decades after the signing of the Treaty of Waitangi.¹²

The discussion of the land agreements in *The Te Roroa Report* is not always easy to follow, and tends to be contradictory. In order to develop a more satisfactory picture of the customary understandings of these agreements I will draw out the main points made in the report, highlight any contradictions, and with the help of supplementary sources attempt a more consistent explanation. This method is used because the somewhat confusing explanations in the report are reflective of a more general lack of clarity on what tribes and their leaders intended when they allowed an outside group a place on

¹⁰ *The Te Roroa Report*, 25.

¹¹ See *The Te Roroa Report*, Section 1.3; *Muriwhenua Land Report*, 106-8.

¹² Because the area was seen as remote by early Pākehā immigrants it was quite late in the piece before the Te Roroa hapū experienced the pressures of colonisation and land loss.

their land. Hopefully the analysis given will help shed light both on the tribal practice and some of the obscurity in the discourse about it.

The attitude of Te Roroa and their rangatira to the first Europeans is described early in the report:

Chiefs were generally friendly and hospitable towards European visitors and settlers, selling [sic] them pieces of land to use and occupy in return for goods and services. Relationships between Maori and Pakeha were essentially equal and reciprocal.¹³

There are stories from around the country about this sort of welcome being offered to European visitors and settlers, and it is a theme that will be returned to in the consideration of the *Muriwhenua Land Report*. The reciprocity of relationship between the resident whānau and early Pākehā is another common theme. And, in European accounts of the agreements over land, the word ‘sale’ regularly occurs. There is, however, good reason to question whether ‘sale’ as in alienation of land was intended by the rangatira in these dealings with Europeans. The question is specifically raised in the *Muriwhenua Land Report*, which deals with the pre-1840 land agreements in the Far North. In the Te Roroa report, the Tribunal’s approach to the question is more ambiguous.

Some of the inconsistency is encapsulated in the sentence, cited above, where the Tribunal is referring to the chiefs’ agreements over land with the European newcomers; it uses the words ‘selling them pieces of land to use and occupy in return for goods and services’. The inconsistency lies in the difference in meaning between a ‘sale’ and a grant to ‘use and occupy’. As the discussion of the *Muriwhenua Land Report* will show, rangatira were empowered by their hapū to grant to outsiders the right to ‘use and occupy’ certain areas of their land, but they were not able to alienate the land of the hapū.¹⁴ Since a ‘sale’ involves an alienation of land, this is not an apt word to use in describing what hapū and rangatira customarily intended in entering into land

¹³ *The Te Roroa Report*, 24.

¹⁴ *Muriwhenua Land Report*, 106-8.

agreements with groups from outside the hapū.¹⁵

The explanations of the agreements in *The Te Roroa Report* do indicate that a complete alienation of land was not intended, but the continued use of the words ‘sale’ or ‘selling’ makes for confusion. The report says, for instance:

Their concept of land selling was essentially reciprocal in nature, a new form of traditional gift exchange¹⁶ and hospitality. In return for letting land go they would receive goods or cash, but the transaction did not end there. In Maori terms there was a continuing obligation to give, to return and to receive ... They expected that the government would provide works and services, and the settlers would bring an abundance of trade goods. Small mixed communities would develop, and friendly co-operative relationships between Maori and settler would prevail.¹⁷

Although the Tribunal is quite rightly concerned to show that relationships of ongoing mutuality were intended, its use of the phrase ‘letting land go’ reinforces the common notion of ‘selling’ as alienation.

What the current research on tribal land agreements is showing, and much of this research is based on the nineteenth century Native Land Court records, is that the tribal intention in granting a place on the land to outsiders was not that of ‘letting land go’.¹⁸ This is made clear in an official document called *Customary Māori Land and Sea Tenure: Ngā Tikanga Tiaki Taonga ō Neherā*, published in 1991, which summarised the available evidence on customary tribal land and sea tenure.¹⁹ The document explains

¹⁵ Discussions of the custom of ‘tuku whenua’, as in granting a place on the land to ‘use and occupy’, are to be found in a number of texts including N. Smith, *Maori Land Law*, Wellington, 1960, 102-5; A. Ballara, ‘Customary Land Tenure in Te Tau Ihu (the Northern South Island) 1820-1860: an overview report on Te Tau Ihu (Wai 785): the evidence of Angela Ballara’, Waitangi Tribunal, Wai 785, Doc #D1, February 2001, Chapter 3; D. Arapere: ‘An analysis of tuku whenua according to tikanga Maori, and its implications for claimants before the Waitangi Tribunal’, Honours Dissertation in Law, University of Waikato, 2002. See also discussion of ‘tuku whenua’ in Chapter 3 of the thesis.

¹⁶ Some of the problems with the Tribunal’s use of the theory of ‘gift exchange’ are discussed in the next chapter.

¹⁷ *The Te Roroa Report*, 47-8.

¹⁸ The Tribunal in the Te Roroa case would not have had the benefit of the body of research on the subject that has built up through the 1990s and 2000s – although there is earlier written material: for example, F.O.V. Acheson, ‘The Ancient Maori System of Land Tenures (Some few aspects of)’, Thesis written for the Jacob Joseph Scholarship, Victoria College University, Wellington, 1913, 82-94; N. Smith: ‘Maori Land Law’, Wellington, 1960, 102-5.

¹⁹ Rei et al., 14-22. The document was prepared because Manatū Māori found they were being approached for information regarding customary land and sea tenure, ‘particularly in the Natural Resource and Treaty Issues areas’.

that in agreements over land, hapū and their rangatira had a precise understanding of the donor/donee relationship; this meant that, in giving a place to outsiders, the original community did not intend that their rights as donors be overridden. The right to use land was granted conditionally and the mana of the land remained with the donor community. The ‘donation’ was a grant to use and occupy, not an alienation of the tribe’s land.²⁰

Part of the reason for the Tribunal’s lack of clarity on these matters is because it attributes the difference between the Māori and European approaches to the agreements to one of motive, rather than social practice. When describing the land agreements, the Tribunal says:

Maori expectations of continuing obligations of both parties in business transactions conflicted with European expectations of bettering themselves and profit-making.²¹

One implication of this statement is that it was only the Europeans who were concerned to better themselves. Now, this is not consistent with the Tribunal’s own statement that Te Roroa entered into the land agreements because ‘they expected that the government would provide works and services, and the settlers would bring an abundance of trade goods’. The evidence in both this report and the *Muriwhenua Land Report* shows that Māori communities were interested in having Europeans settle among them on account of the advantages they could bring. It was because the Te Roroa communities and early European settlers had something to gain from each other that their relationships were ‘essentially equal and reciprocal’.

The actual source of the difference in expectation between Māori and European in their dealings over land was that in one society the alienation of land was not sanctioned and in the other it was. Although the Tribunal states that the Te Roroa communities expected that land agreements would entail continuing obligations between the parties, it does not make the logical connection that such reciprocity directly follows from understandings and practices that preclude the final alienation of land by the community that holds the mana of the land. Because the incoming or donee group does not gain

²⁰ See Rei, et al., 14-22.

²¹ *The Te Roroa Report*, 24.

absolute rights over the land it is allowed to settle on, it is thereby obliged to maintain its recognition for the original or donee community.²² In return, the mana and interests of the donor community mean that it has continuing duties of support and care that it must exercise towards those it has invited on to its land.²³ By contrast to the tribal arrangements, the colonisers' practice of dividing of land into sections that can be bought and sold at will makes of land a tradable commodity. Once this happens there is an immediate diminishment of the need for the parties to the land agreement to maintain relationships of ongoing mutuality. The Tribunal, in focussing on the motives and expectations of the respective parties, fails to identify the difference in social practice on which the motives and expectations are built.

While the above discussion has broadened beyond simply the issue of what was involved in inter-group land agreements it has been important, in terms of understanding the tribal practice, to clarify the sources of difference between the customary tribal agreements over land and the colonisers' land transactions. To construct the tribal land agreements as 'sales' is to support an ideology that conveys that tribes and their leaders were willing participants in the alienation of their lands to outsiders. It is very dubiously the case that hapu and rangatira intended to surrender the proprietorship of any of their land in their original acceptance of Europeans as settlers.

Another common misrepresentation of inter-tribal understandings over land, touched on in the report, is that the main basis for rights to land is through conquest. This idea was given a decided boost when, soon after its institution, the Native Land Court, which was charged by the settler Government with the investigation of claims to land, decided to give priority to rights of conquest when determining the ownership of land.²⁴ The Native Land Court's interpretation not only cut across the tribal customary order,²⁵ but also led

²² See I. H. Kawharu, *Maori Land Tenure: studies of a changing institution*, Oxford, 1977, 59-60.

²³ Rei, et al., 14-22.

²⁴ See E. T. Durie, 'Custom Law', 42-3; D. V. Williams, *Te Kooti Tango Whenua: the Native Land Court 1864-1909*, Wellington, 1999, 187-9. It is significant that the judges of the Native Land Court who made this determination about what was the tribal custom, were colonists and not Māori.

²⁵ See *The Te Roroa Report*, 79-80, where the Tribunal discusses the Native Land Court's favouring of Parore Te Awha's claim with respect to the 'Maunganui-Waipoua purchase' on the basis of rights of conquest held in 1840, when Te Roroa had not been displaced and had kept the home fires burning on their ancestral land – which proved they had retained their right in the land.

to a prejudice in the telling of the histories of whānau and hapū.²⁶ Those who came before the Land Court learned that it stood more in their favour to project their rights to land and resources as gained through conquest. This meant there was an exaggerated emphasis on stories of battles and conquests in evidence brought to the Court, and thus the written record that comes from the Court lends weight to the idea Māori tribal society was dominated by warfare.²⁷

There is a long history of assumption on the part of the European colonists that Māori tribal society is one in which ‘might is right’. It is significant that a number of the writers who have made a detailed study of the customary understandings with regard to land tenure have deemed it necessary to challenge this assumption.²⁸ Frank Acheson, who became a well know Native Land Court judge,²⁹ wrote a thesis in 1913 on the ‘Ancient System of Maori Land Tenures’ in which he directly argued against those who claimed that the governing principle of the Māori tribal world was that of ‘might is right’.³⁰ He substantiated his argument by describing the rules and understandings which governed land tenure. Much more recently, Ballara’s study of the Native Land Court evidence led her to the conclusion that amongst whānau and hapū there was a well-understood framework of rules for claiming land.³¹ Because, however, the notion that the tribal world was governed by war and conquest is so commonly held,³² more is spelled out here from the report and supplementary sources about how rights to land were established.

In the section of the report dealing with the history of Te Roroa, there is a quite a bit said about disputes and battles, both smaller and larger scale. Especially on the

²⁶ See Ballara, *Iwi*, 90-92.

²⁷ See Ballara, *Iwi*, 90-91; D. V. Williams, *Te Kooti Tango Whenua*, 187-9.

²⁸ Besides Acheson and Ballara, whose positions are discussed, another person who challenges this assumption in his paper on ‘Custom Law’ is Edward Durie, former Chief Judge of the Maori Land Court and Chairperson of the Waitangi Tribunal.

²⁹ Judge Acheson was quite an exceptional judge in his commitment to seeing that Maori communities were treated with justice. See *The Te Roroa Report*, 277.

³⁰ This is the main theme of Acheson’s thesis on ‘The Ancient Maori System of Land Tenures’.

³¹ Ballara, ‘Customary Land Tenure in Te Tau Ihu (the Northern South Island) 1820-1860’, 84-5.

³² Eddie Durie in his paper on ‘Custom Law’ (pages 42-3) discusses the notion that Māori society was one governed by warfare and conquest. He explains why it is not accurate and attributes the formulation of the notion to ‘a colonial perception, probably based on the aberrational Maori warfare of the 19th century, and probably perceived in the light of the Napoleonic wars of the same time and other European experience’.

boundaries between groups there were arguments over particular resources and pieces of land. In spite of this, the evidence in the report on the practices regarding the recognition of rights, coincides with what is stated in *Customary Māori Land and Sea Tenure: Ngā Tikanga Tiaki Taonga o Neherā*. The first basis for establishing rights with regard to resources and land is that of ancestry.³³ The document on customary Māori tenure expands on what is indicated in the report by explaining that communities ensured that they retained long and detailed histories of their relationships to taonga. A particular right might well be disputed, but in the sorting out of these disputes it was the party that could prove their prior historical links through their tūpuna that was in the stronger position.³⁴

Another important basis for rights in the land is that of ahi kā (keeping the home fires burning). A group that had maintained its presence in an area had a stronger right than a group that had only a short length of tenure or who had been away for quite some time. There are also the rights that come from conquest. However, if a group had overcome another in a particular battle, and then been unable to establish itself continuously on the land following that, then the prior rights of ahi kā prevailed. This is brought out in the report where the Tribunal agrees that Te Roroa had retained their right to a particular area of land because they ‘had kept their fires burning on this ancestral land’.³⁵ Indeed, even when an outside group managed to establish itself on another’s land the inherited rights of usufruct would prevail, unless there was a total annihilation or subjugation of the resident people. There is no history related in the report of this sort of annihilation.

Not only did the tribal world have a clear framework of rules for determining rights to land, but there were also well-established procedures for the resolution of differences, and the negotiation of agreements between groups.³⁶ Some insight into these procedures is offered in the report where Reverend Maori Marsden is giving evidence on how

³³ See *The Te Roroa Report*, 8-13. The importance of ancestry in claiming rights to land and access to mahinga kai (traditional resource areas) is very evident in these pages.

³⁴ See Rei, et al., 16 ff.

³⁵ *The Te Roroa Report*, 67.

³⁶ As Chapter 2 of the Te Roroa report shows much tension was generated for Māori communities and between Māori communities because Crown land agents often chose to ignore Māori means of settling differences and carrying out decision-making, or went further and deliberately exploited areas of unresolved difference between groups.

decisions were reached when different interests were at stake.³⁷ As he explains: ‘the normal method of decision making was by consensus’.³⁸ The observation is significant because it signals a society in which value is put on the maintenance of working relationships between groups, rather than war-like dominance. This is supported by Merata Kawharu in her thesis on ‘Kaitiakitanga’, where she discusses the steps taken by groups and their leaders to prevent disagreements.³⁹ In her conclusions, she agrees that: ‘In general then, it was important for neighbouring kin groups to maintain peace so as to not only maintain access to important resources, but also to ensure their own survival’.⁴⁰

In summarising this section, it can be said that the evidence from *The Te Roroa Report* points to the social relations of the Te Roroa hapū as being directed towards the strengthening of bonds between groups rather than the promotion of warlike divisions. Important in the building of bonds and the fostering of relationships are the laying out of genealogical connections, the recognition of ancestors and ancestral peoples, and the telling of histories that explain the place and placing of different peoples. At the same time there is the remarkable continuity, over very long periods, of the identity and autonomy of the many groups who together constitute the wider Te Roroa people. Of particular interest is that which is revealed about the framework of understandings by which the rights to land were understood. In the case of the accommodation of newcomers on hapū land, even though the report is somewhat contradictory on the matter, it is clear that the customary practice was designed to generate ongoing relationships of friendship and reciprocity between those with the mana of the land and outsiders who came to settle.

(ii) The establishing of relationships within whānau and hapū

A large part of the report’s introduction (Te Tau) is dedicated to demonstrating who are

³⁷ *The Te Roroa Report*, 78.

³⁸ His observation regarding the importance of consensus accords with what I have heard many Māori talk of when describing how decisions are reached in hui up to the present day. See also, A. Salmond, *Hui: a study of Maori ceremonial gatherings*, Wellington, 1975, 14: ‘Tribal and sub-tribal policy was forged by consensus’.

³⁹ M. Kawharu, ‘Dimensions of Kaitiakitanga: an investigation of a customary Maori principle of resource management’, PhD thesis, Oxford University, 1998. In Chapter 3, for instance, she explains that groups exercised their mana by granting access to resources to neighbouring groups, and thus ensuring relationships of mutual advantage and forestalling debilitating arguments.

⁴⁰ M. Kawharu, 42 (citing Sullivan MS. n.d.).

Te Roroa as an identifiable people, and who are the many whānau and hapū who make up Te Roroa.⁴¹ Essential to the identity of each of the communities are their links to their tūpuna. The information that demonstrates the significance of these links is built around the powerful image⁴² of the claimants as ‘whatu-ora’:

At the first hearing of this claim, kaumatua Maori Marsden declared that:
We the living are the ... 'Whatu-ora', the living seeing eyes of our sleeping ancestors.⁴³

The claimants come not only in their own person but also they bring the presence and vision of their ancestors. What Maori Marsden touches on is the immediacy of the relationships between the claimants and their tūpuna. It is an immediacy that is quite remarkable to a Pākehā person like myself. It reflects the value that is placed on the maintaining of relationships with one’s forebears. Community is the community of those who have gone before, those alive now, and those who are to come.

Just as there is this immediacy and continuity of the human community over time, there is seen to be a continuity of life and interest between the human community and the wider earth community. In giving his evidence Craven Tane, great grandson of the renowned Hapakuku Moetara, named Maunganui as ‘the centre of a whole compass that goes to the house of Ngapuhi and goes to the house of Ngatiwhatua’; he then named each of the many mountains that belonged to that compass, and the tūpuna and events associated with the different mountains.⁴⁴ As the Tribunal says: ‘All these mountains take on a special significance because of their association with tupuna of yore’.⁴⁵ Once again it can be seen that the history of the people and the history of the land are intertwined.

Members of the hapū can, of course, experience a diminishment of these links to

⁴¹ The report shows that there is not a clear-cut exclusivity about these relations, whether at the level of Te Roroa as a whole, or that of the hapū and whānau that make up Te Roroa. Ancestry, for example, is important in establishing who belongs to a particular people or group but at the boundaries between peoples there is nearly always a sharing of ancestry, and often some sharing of a place on the land.

⁴² The Te Roroa report is remarkable for its use of imagery from the tribal world. The report itself is structured according to the parts of a whare tūpuna.

⁴³ *The Te Roroa Report*, 4, citing ‘Evidence of Reverend M Marsden on te keehi mo Manuwhetai me Whangaiariki kaupapa (a) Part 2 on Manuwhetai-Whangaiariki’, Doc#A21, Wai 038, 1989, 9.

⁴⁴ *The Te Roroa Report*, 18, citing ‘Transcript of oral evidence of Craven Denny Tane Hohaia on Maunganui aspects of the claim’, Doc#A33, Wai 038, 1989, 1-2.

⁴⁵ *The Te Roroa Report*, 18.

ancestors and the land when they are separated from their communities. In spite of this, the work to keep the presence of the tūpuna before the people goes on. One way in which this is achieved is through carving, both in the whare whakairo of Te Roroa and the tribes related to them and also in places of national significance:

Hamiora Paikoraha is said by some members of Te Roroa to have been a descendant of Taoho's uncle, Paekoraha . The pou standing in the foyer of the Waitangi Tribunal offices, Seabridge House, Wellington, carved by Manos Nathan, represents Hamiora Paikoraha of Te Roroa.⁴⁶

Through this carved pou the people of Te Roroa, when in Wellington, have access to their ancestor and their history.

A further feature of the tribally-based world is the capacity for each member of the hapū to stand in several identities. The report cites the evidence of Pat Hohepa:

This point was pressed home by Dr Pat Hohepa when he spoke of his own ancestry and connections at one of the Waimamaku hearings:
From the Hokianga shoreline to Whiria, I am Ngati Korokoro. When I enter Waimamaku, Ngati Korokoro merges into Ngati Pou. When I go towards Waipoua or up to Waimamaku Block 2, I become more Te Roroa. If I go too far towards the Waoku Plateau I become Te Mahurehure. Those whanaunga still residing here in Waimamaku can belong to some or all hapu without leaving their community.⁴⁷

Hohepa's statement reflects the fact that, because an individual is genealogically placed at the nexus of several descent lines, there is a range of tribal affiliations for them to embrace. This capacity to stand in different places and to tap into different identities also applies at the level of major tribal groups. Thompson John Winitana, whose iwi is Tuhoe, speaks of this in his affidavit to the 1998 High Court Hearing regarding fisheries and the understanding of iwi:

When I was living in the Waikato, I was similarly accepted among the marae there, though it was helpful to show a blood connection. Most Maori who are brought up to know their whakapapa or ancient genealogies can connect to many tribal groups and so can move about in this way. I can personally establish links

⁴⁶ *The Te Roroa Report*, 26.

⁴⁷ *The Te Roroa Report*, 7, citing 'Evidence of Dr Patrick Wahanga Hohepa on Waimamaku aspects of the claim', Doc#D11, Wai 038, 1990, 8.

to most of the major tribal groups in the country. Most Maori, brought up properly, can do so.⁴⁸

Winitana's words echo those of Hohepa even though he is talking about tribal affiliations on a broader scale. These examples that show that whakapapa connections allow individuals a flexibility of identity and place to stand, counter to the often stated assumption that tribal structures hold people in a closed, fixed, and hierarchical system.⁴⁹

Another area that the Tribunal makes comment on in the Te Roroa report is that of tribal leadership. Although the words – mana, rangatiratanga, rangatira, and chief – are all used for political leadership and authority, the Tribunal gives particular attention to the term 'rangatiratanga' because it is used in the Māori text of the treaty of Waitangi. In discussing the term, the Tribunal makes it clear that rangatiratanga is not necessarily located just in an individual. Rangatiratanga can refer to the political authority of a hapū, and in a number of instances the reference moves freely from a particular leader to the people whom that leader represents.

To illustrate the meaning of rangatiratanga as it is understood by the Te Roroa claimants, the Tribunal cites the words of their late kaumātua, Turi Te Kani:

To give rangatiratanga to a person it must come and develop from the people – it applies to all rights, conduct, whakapapa; how they have held treasures, all those things and relative to a tribe being rangatira. There cannot be rangatira without people.⁵⁰

Turi Te Kani locates rangatiratanga in the people, and makes it clear that even when that authority is entrusted to a particular person it is an authority to be exercised for the benefit of the people, so as to secure the wealth and well-being of the people. 'Wealth' in this context refers to all that the people treasure, tangible and intangible; as Turi Te

⁴⁸ T. J. Winitana, 'Affidavit in Support of Te Runanganui o te Upoko o te Ika Association (Inc) & Ors, in the High Court of New Zealand Auckland Registry, in the matter of the Judicature Amendment Act 1972 and the Maori Fisheries Act 1989', No CP 122/95, paragraph 18.

⁴⁹ See, for example, P. G. McHugh, 'Aboriginal Identity and Relations in North America and Australasia', in K. Coates and P.G. McHugh, *Living Relationships: Kōkiri Ngātahi: the Treaty of Waitangi in the new millenium*, Wellington, 1998, 111. As will be shown later, the flexibility that allows tribal members to operate out of different identities at different times is not well accommodated by the bureaucracy of Crown agencies.

⁵⁰ *The Te Roroa Report*, 26.

Kani earlier says: ‘Taonga is a part of rangatiratanga’, where taonga means all that is precious to the people.

The inseparability of leadership and people is apparent in other passages. Alex Nathan, in sharing the knowledge he received from his kaumātua, speaks of the mana that belongs to the people.

Our people have always claimed the right to do these things even though the land was in Crown title. Our manawhenua gives us this right. The Waipoua forest [sold to the Crown in 1876] is as much a taonga, and as much a link with our past, as are our wahitapu. It is important to our mana as forest people and it is important to the maintenance of our way of life. We have always used the forest for physical and spiritual sustenance, even after the so called sale of 1876.⁵¹

While the community is seen as the locus of authority, there is a personal authority that is recognised as being carried by chiefly leaders. This is evident in various passages of the report, as in the following:

In time more pa were built by their descendants. The brothers Ikataora and Taramainuku built Wairarapa. Toa inherited Wairarapa and built Pahinui, Te Rurunga, Kiwinui and Pananawe. The increase of pa over generations was testimony to the richness of the resources in the valley and reinforced the mana whenua of successive chiefs.⁵²

Nevertheless, even where the chiefly role is highlighted, the report shows that leaders were required to act for the people and were dependent on the people for their livelihood. The following passage brings out this point:

In general, chiefs held relatively small rights of usufruct over land. Their leadership roles and the informal tributes of food they received, reduced the need for them to labour directly on the land and hold rights of usufruct in it. This is not to say that they did not or could not cultivate their own plots. Manumanu ... would have done so while acknowledging the right by occupation of every individual or family to an equal share of the community's resources. The protection of these rights and access to resources depended on his leadership,

⁵¹ *The Te Roroa Report*, 49, citing ‘Supplementary evidence of Alex Nathan on manawhenua’, Doc#D27, Wai 038, 1990, 7-8. The insertion [sold to the Crown in 1876] belongs to the original report. One cannot help wondering why the insertion was sanctioned by the Tribunal. The specific historical context is made clear by the speaker, both in terms of the date and the action that took place. The speaker specifically uses the words ‘so-called sale’. The insertion appears to be a correction of the speaker’s words – a matter for some concern if that is the case.

⁵² *The Te Roroa Report*, 6.

which in turn demanded the community's support. A system of mutual obligation and dependency was the result.⁵³

The passage is a significant one because it demonstrates how the leader-community relationship reflects the economic arrangements of the whānau and hapū. It is immediately noticeable that the chiefs 'held relatively small rights of usufruct over land'. Chieftainship did not equate with personal possession of large amounts of land or accumulated wealth. In fact, rangatira like other members of the community had use rights in the land rather than rights of individual ownership. The proprietorship of the land belonged to the hapū, in a system that was neither communist nor capitalist. Individual whanau had prior rights to the use of particular areas of land and resources, but the land was held in common. Because rangatira did not have an independent means of living apart from the usufruct rights they were entitled to, and they had less time to devote to the cultivation of crops, they were dependent on the contributions of other community members for their survival. Thus, as the Tribunal says, 'a system of mutual obligation and dependency was the result'.

It is intriguing that, when describing the fact that the chiefs received 'tributes of food' from other members of the hapū, the Tribunal says that this 'reduced the need for them [the chiefs] to labour directly on the land'.⁵⁴ The phrase carries connotations of manual labour as a lower-class and burdensome activity, and dubiously reflects the value placed on working on the land by Te Roroa. The passage cited above tells us, in fact, that the rangatira chose to establish their own cultivations. It is also significant that we are told that Manumanu's cultivation was established on 'Whenuahou', or 'new land'.⁵⁵ It is almost certain that he had to cultivate 'new', and probably more marginal, land because he had come more recently to the area. In forming a relationship with the local people, he was not in a position to override the established use rights that whānau had inherited from their tūpuna. Once he became a rangatira for the community, his role meant that he had to ensure that recognised rights to land were safeguarded.

The sort of use rights that whānau had, and the role of rangatira in protecting those

⁵³ *The Te Roroa Report*, 6.

⁵⁴ *The Te Roroa Report*, 6. Words taken from passage cited above.

⁵⁵ *The Te Roroa Report*, 6.

rights, are outlined in another passage:

Rights of use only belonged to individuals or to individual families. Such rights were inherited from ancestors or acquired through enterprise. And, as the feud between Te Whata and Moetara over fishing rights on the Waimamaku river demonstrated, were jealously guarded. Individuals claimed specific rights to eel weirs, bird trees, rat runs and cultivations and could protect these from poachers by erecting rahui (posts) which declared the resource tapu.... Such rights were handed on from generation to generation, with the chief providing control and overall protection, in exchange for which he could expect tributes and services of various kinds.⁵⁶

The Tribunal makes this explanation in the context of showing that, while chiefs had an important role of oversight regarding the land of the hapū, they did not own the land as such. Thus the mana whenua that is attributed to a chief has reference to an executive authority, not the authority of an owner. The Tribunal emphasises this point:

Mana whenua thus differed greatly from the idea of "ownership" in the European sense. Even when this notion was introduced with colonisation and its agency, the Native Land Court, it remained alien to Maori people.⁵⁷

Many of the difficulties that arose for hapū in relation to their lands from the mid-nineteenth century onwards were because the settler Government, through the Native Land Court and the Government's land agents, chose to cast chiefs as owners of the land rather than recognising that the chiefs were executors acting for their communities with whom the right of ownership rested.⁵⁸ Through its discussion of tribal leadership, the Te Roroa report shows that the whānau and hapū are not controlled by structures of top-down dominance but ones that favour relationships of mutual obligation and interdependence.⁵⁹

It is apparent from the report that it is not only rangatira who carry obligations to see to the provisioning and wellbeing of the people. Those who have access to a bountiful resource will customarily distribute out to the community the fruits of their harvest, as can be seen in Eruera Makoare's description of eeling.

⁵⁶ *The Te Roroa Report*, 13.

⁵⁷ *The Te Roroa Report*, 13.

⁵⁸ See, for example, *The Te Roroa Report*, 81. Under the Native Land Court system two rangatira were established as absolute owners of two important blocks of land, thus legally disinheriting all the rest of their hapū with rights in the land.

⁵⁹ I have used the word 'interdependence' rather than simply 'dependence' because, as the evidence in the previous section shows, the social order supports the autonomy of whānau and hapū, as well as favouring relationships of mutual obligation.

Eruera Makoare talked about eeling at the Kai Iwi lakes "in the way that our ancestors have done for generations" when the eels were running between February and April ...

Eruera summed up the custom practised for generations of sharing the catch:

We provide eels for the Kaihu people generally and also supply hui and tangi held at Kaihu. I see it as part of my obligation to the community and I am happy to fulfil it. When the eels are running we can feed the whole of Kaihu.⁶⁰

This example demonstrates the continuation of the customary practice through to the present, and I have heard other similar stories. A friend who is a descendent of Ngati Kahu has told me how members of the whānau who come through to Auckland will drive round to the different families in the city to share a catch of fish. These cases provide further evidence of how relationships of mutual obligation are lived out within communities.

In summarising, it can be noted that for the whānau and hapū of Te Roroa the links to ancestors are of vital importance. From the tūpuna the claimants receive vision, identity, rights, and obligations; and through genealogical ties a person can lay claim to a number of tribal identities. In the situation before Crown action imposed the individualisation of land title on the hapū,⁶¹ individuals and individual families had inherited rights to the care and harvesting of specific resources, but the land itself belonged to the hapū. The social, political, and economic arrangements of the communities meant that the relationships between the different whānau were characteristically ones of mutual obligation and interdependence – and with regard to the resources in which there is still a shared interest these sorts of relationships of reciprocity continue. Rangatiratanga, or the exercise of guardianship and political authority, is seen to reside in the group and in its leaders. Rangatiratanga cannot be understood apart from the objects of its exercise as in the care of tāngata, taonga, and whenua – people, taonga, and land.

(iii) The understanding of relationships to taonga, land, and resources

The Te Roroa Report is a particularly valuable document in terms of showing how claimants understand their relationships to taonga, land, and resources. One of the key

⁶⁰ *The Te Roroa Report*, 173, citing 'Evidence of Eruera Makoare on Taharoa aspects of the claim', Doc#C17, Wai 038, 1989, 1.

⁶¹ See *The Te Roroa Report*, Chapters 2-4.

concerns of the Te Roroa claim is the violation of taonga, and considerable attention is given in the report to what were the taonga in question and what they meant to the Te Roroa communities. There are also explanations of other concepts concerning land and resources that are of critical importance to Te Roroa. This section attempts to encapsulate what is conveyed in the report about some of these concepts, and the relationships to which they refer.

Te Roroa had had a long history of having to deal with various Pākehā collectors, archaeologists, museum curators, and others who have had an interest in their taonga. The lack of respect shown towards taonga by individuals and organisations over many decades, and the disregard for Te Roroa authority over the taonga, are major sources of grievance for Te Roroa. It is in contrast to this lack of respect that Te Roroa explain their understandings of the things that are so important to them.

In observing the behaviour of the various specialists, the claimants concluded that one of the reasons that the outsiders' did not have the same regard for the taonga was because they approached the natural world in a compartmentalised manner. The following paragraph from the report reflects the claimants' assessment:

Modern European views of the natural world and natural resources are essentially scientific. For the purposes of study and research scientists divide the whole into its component parts and classify the parts. In other words, they do not share the Maori view of the unity of people and the treasures they produce, with the land and the cosmos. Nor do they share the Maori view that "Names, knowledge, ancestors, treasures, and land are so closely intertwined ... that they should never be separated".⁶²

This statement brings out how the Te Roroa hapū, like other Māori communities, understand the unity and interconnectedness of all things,⁶³ and it is this holistic view that marks their approach to all matters concerning taonga, land, and resources.

The significance of the injunction that "names, knowledge, ancestors, treasures, and

⁶² *The Te Roroa Report*, 211. Quoted words are from A. Salmond, 'Nga Huarahi o te Ao Maori: Pathways in the Maori World', 137.

⁶³ It rather brings into question the common classification of indigenous peoples as animists – people who believe in many disparate spirits and, by implication, do not have an understanding of the unity of the universe.

land are so closely intertwined ... that they should never be separated" requires some comment. The 'intertwining' is especially evident when the naming of the land and the drawing of boundaries is discussed.⁶⁴ The example is given of Tohe, tūpuna of Manumanu, and his naming of many places both in Te Roroa and in Tai Tokerau.

Leaving Reinga, Tohe, accompanied by his servant Ariki, journeyed down the Ninety Mile Beach named for its length Te Oneroa a Tohe. On reaching Waimamaku, he thought the river resembled another in the far north called Waimamaku-nui-a-Rua and so conferred the name. Further south he gave the name Wairau to the stream which he found dammed by fallen leaves. Maunganui Bluff was named after the Maunganui along the Ninety Mile beach. Before reaching Maunganui itself he ascended a neighbouring peak which he called Maringinoa after shedding tears in the knowledge that he would never see his homeland again. Both Manuwhetai and Whangaiariki, subjects of this claim, were also named by Tohe.⁶⁵

These names and their associated histories are still important to the communities along the coast that Tohe travelled. The same is true for other places named by Te Roroa tūpuna:

The late E D Nathan said that the rohe potae (territorial umbrella) over which Te Roroa held mana whenua ranged from Waimamaku to Tuawai and Pouto. Within these boundaries the land was marked by named topographical features, made more indelible by stories of tupuna involved in the naming process. From north to south the "signalling" points Piwakawaka, Pawakatutu, Pukekaitui, Maunganui, Pouto-o-te-Rangi, Maunga raho and Tokatoka were prominences on the "oral map" which served to keep the history of the people alive.⁶⁶

This oral mapping is remarked on several times. The Tribunal notes that oral maps were used by the rangatira in the original negotiations over land with Crown officials in the nineteenth century, and again by the claimants at the time of the Tribunal hearings in the 1980s.⁶⁷

The term 'oral map' is used to indicate the stored memories of the history of the land, including an exact knowledge of names, titles, and boundaries.⁶⁸ The maps are carried in the minds of tribal experts, who ensure the knowledge is passed from generation to

⁶⁴ For a fuller discussion of the significance of the naming of the land, see D. Paul, "'What's in a Name?': Whaitiri: a partial representation of inherent meaning', MA Thesis, University of Auckland, 2000, and in particular the section on 'The functions of Māori names' (pages 29-32).

⁶⁵ *The Te Roroa Report*, 18.

⁶⁶ *The Te Roroa Report*, 16-17.

⁶⁷ See, *The Te Roroa Report*, 18-19, 52.

⁶⁸ The main explanations of 'oral mapping' are set out in pages 16-19 and 50-52 of *The Te Roroa Report*.

generation. The oral maps carry a great deal more meaning than ‘maps’ in our contemporary Western understanding of the word. They are the means by which whānau and hapū understand their respective domains and their relationships to them; and the ‘oral mapping’ is in itself an expression of the relationships, identity, and history of the people. Often the ‘mapping’ information is conveyed through pepeha (tribal sayings), whaikōrero (oratory), whakataukī (proverbs), waiata (songs), and traditional stories.⁶⁹ As was noted in the consideration of the *Muriwhenua Fishing Report*, the literary expression of the people reflects the practices by which they connect to the land.

What is notable from the information given on the naming of land and the oral mapping is the intimacy of the peoples’ knowledge of the land. Boundaries are not straight lines on a map. They take in a whole range of topographical features, and each of these features is known and carries a history of association.

At Waimamaku, Ngai Tupu were successful in fending off Ngati Ruanui, but capitulated when Ngati Ruanui joined forces with some of their Ngati Kahu relatives, the uri of Tumoana of the Tinana canoe. At that time the shining, yellow rock, Motuhuru became the boundary between Ngati Kahu of Waimamaku and Ngai Tuputupuwhenua of Waipoua and Maunganui. This rock has retained that significance to this day.⁷⁰

This passage also illustrates how the histories and the identities of the different peoples are written into the land.⁷¹

A point that can be overlooked by the outside observer but which is crucial to the claimants is the enduring nature of their relationship to the land and their taonga. This is highlighted in the report where one of the claimants is quoted as describing a particular archaeological project as a “*dig and run*” job.⁷² The description is applied to a case where the local community had seen an archaeological team come in to work on a site for three years, apparently only for archaeological gain, and then disappear. Although the archaeological work is meant to help in the protection and preservation of sites of

⁶⁹ See *The Te Roroa Report*, 18.

⁷⁰ *The Te Roroa Report*, 9.

⁷¹ This understanding is beautifully expressed by Alex Nathan on page 49 of the report. He quotes the proverb: "the signs or marks of the ancestors are embedded below the roots of the grass and herbs".

⁷² *The Te Roroa Report*, 241.

historical importance, this was often not evident to the claimants. It is worth keeping in mind that even for the most committed of archaeologists the history of their relationship to the sites is very short in comparison to the centuries of relationship carried by the whānau and hapū of Te Roroa, who look in turn to the generations ahead to maintain that relationship.

The concept that is brought forward in the report as holding together all those things that Te Roroa are concerned to protect is that of taonga. The Tribunal explains that taonga is an umbrella term; it embraces a wide range of things upon which Te Roroa, and other Māori communities, place great value and regard as treasures. Taonga ‘include the land, sea fronts, forests, lakes and rivers; also places and things associated with life and death’.⁷³ The significance of their taonga to Te Roroa is expanded upon by reference to the evidence provided by various claimants. Emily Paniora’s explanation is cited as giving a particularly clear view of the all inclusiveness of taonga and of the Te Roroa perspective with respect to them. She says:

This is all ancient ancestral land, rich in our history, of the lives of our Tupuna. It is land which, like Pakeha history books, tells us where we came from and where we belong in the Ao-Marama. It defines us as a people. It is land which vividly brings history to life for us. The location and stories of the Wahitapu, kainga, mahinga and pa remain known to this day. These places form an essential part of tangata whenua, part of the landscape of our hearts and minds, and remain part of our very existence to this day.⁷⁴

Of those taonga that are most important to the hapu are their wāhi tapu, a term which is often translated ‘sacred sites’. As with the understanding of taonga, the claimants show that wāhi tapu has for them a broader meaning. The section in the report on ‘Wahi Tapu’ opens with Alex Nathan’s explanation:

According to our kaumatua, kuia and tupuna the whole of Waipoua is tapu. All the valleys leading down into the main valley, all the streams feeding into the main river, these are all tapu because of the mauri and mana attendant to and imbued in them.⁷⁵

The vision of the tapu nature of the whole great valley and all that feeds into it is of

⁷³ *The Te Roroa Report*, 210.

⁷⁴ *The Te Roroa Report*, 210–11. The subject of Chapter 6 of the report is ‘Taonga’. It is worth reading to gain a fuller understanding of taonga and their significance to the claimants.

⁷⁵ *The Te Roroa Report*, 227, citing "Waipoua Wahitapu", draft prepared by Alex Nathan for the Department of Conservation, Kaikohe, 1988, 2 (held by the Tribunal as Doc#B19, Wai 038, 1989).

quite a different order from the identification of wāhi tapu as specific sites, covering a very limited area. This does not mean that there are not such sites that matter a great deal to Te Roroa. The Tribunal gives some attention to the issue, and its comments give an indication of reasons why an area might be regarded as a wāhi tapu:

For Maori, wahi tapu like taonga is an "umbrella term" that applies not only to urupa (burial grounds) but other places that are set apart both permanently and temporarily. These include places associated in some way with birth or death, with chiefly persons and with traditional canoe landing and building places. Temporary tapu are usually imposed and removed on hunting or fishing grounds or cultivations to conserve and protect the resource. They also include places associated with particular tupuna and events associated with them, set in order by whakapapa.⁷⁶

The Tribunal reinforces the point that it belongs to a particular people to identify its wāhi tapu by citing Alex Nathan's words: 'Only the kaitiaki or guardians of the tribal lore and history, in consultation with the iwi, hapu or whanau can bring together the different elements which must be considered, before the importance of particular places can be evaluated.'⁷⁷ His words actually fill out what is implicit in the official definition of wāhi tapu as being 'land of special spiritual, cultural, or historical tribal significance'.⁷⁸

Alex Nathan makes the point that the physical harming of the places that are tapu to Te Roroa compares with the destruction of national treasures 'in the Pakeha world' such as 'whole museums or art galleries'.⁷⁹ It is not that the claimants expect that Pākehā or anyone else will value their taonga and wāhi tapu in the way they do, but they do believe there should be respect for their authority over and guardianship of their taonga. It is the failure of the Crown and others to recognise their rights of authority over their taonga – as guaranteed in the treaty of Waitangi – that lies at the heart of their claim. The Tribunal indicates this when it says:

The claimants allege that the Crown has omitted actively and adequately to protect their wahi tapu and wakatupapaku and to recognise the tino rangatiratanga of Te Roroa in respect of their physical and spiritual heritage.

⁷⁶ *The Te Roroa Report*, 227.

⁷⁷ *The Te Roroa Report*, 228, citing 'Evidence of Alex Nathan on Waipoua aspects of the claim', Doc#C7, Wai 038, 1989, 48.

⁷⁸ See *The Te Roroa Report*, 227, citing s27 State-owned Enterprise Act 1986.

⁷⁹ *The Te Roroa Report*, 227, citing 'Evidence of Alex Nathan on Waipoua aspects of the claim', Doc#C7, Wai 038, 1989, 48.

This allegation is made with respect to the whole claim area, but more particularly, concerns Waimamaku wakatupapaku and Waipoua wahi tapu.⁸⁰

In fact, it is clear from the report that, for Te Roroa, the non-recognition of their ‘tino rangatiratanga’ is directly connected to the violation of their taonga, lands, and resources. In their experience, the undermining of their authority over their lands and the despoliation of their taonga have gone hand in hand.

When indicating Te Roroa authority over their taonga and lands, the terms ‘te tino rangatiratanga’, and ‘mana’ or ‘mana whenua’, are often used equivalently by the Tribunal. This equivalence is shown in the opening sentence of the chapter on ‘Taonga’: ‘Many aspects of the Te Roroa claim concern the Crown's undertaking to recognise their tino rangatiratanga or mana over their taonga in accordance with article 2 of the Treaty of Waitangi.’⁸¹ Since mana and mana whenua are concepts that frequently occur in descriptions of tribal authority over taonga and land, it is useful to see how they are employed in the Te Roroa report. What is made very clear is that the authority over taonga is inseparable from obligations of guardianship. The exercise of guardianship over their taonga – whether of land, resource, or wāhi tapu – is fundamental to the mana of a people and to their claims of mana whenua.

The claimants believe that their mana whenua over areas which contain taonga like wahi tapu, requires the fulfilment of certain obligations. There is the right as well as the duty to "keep warm" the taonga within the rohe. Claimant Tutenganahau Paniora was emphatic about this:

If they [the wahi tapu] are not cared for and protected they will start to lose their mauri and their tapu. Then they will die, and a part of Te Roroa will die with them.⁸²

It is because of their unique relationship to their taonga, and the duties of guardianship that they hold towards them, that Te Roroa believed it was vital that the protection of the taonga should be restored to their care. This is the only way in which the taonga will ‘come to be respected and valued for the treasures that they are’.⁸³ In addition, the

⁸⁰ *The Te Roroa Report*, 209. Wakatūpāpaku is translated as ‘burial chests deposited in ana (caves and crevices)’.

⁸¹ *The Te Roroa Report*, 209. In the glossary at the back of the report mana whenua is defined in terms of the ‘rights and prestige and authority over the land’.

⁸² *The Te Roroa Report*, 211, citing ‘Supplementary Evidence of Tutenganahau Paniora on Waipoua wahi tapu’, Doc#C2, Wai 038, 1989.

⁸³ *The Te Roroa Report*, 211, citing ‘Supplementary evidence of Alex Nathan on manawhenua’, Doc#D27, Wai 038, 1990, 6.

restoration of the guardianship of the taonga to Te Roroa, would benefit the iwi as a whole:

And since wahi tapu were and are taonga belonging collectively to the whole iwi (or to which the whole iwi belong) the benefits would be that:
the whole iwi ... gains spiritual identity and well being from these places, it is the iwi which attracts the duty of Kaitiakitanga or stewardship.⁸⁴

The exercise of authority and guardianship over its collectively held treasures is essential to the mana and well-being of the tribe.

With the regard to the land, even where ‘sales’ have taken place, the claimants argue that their mana whenua remains. In proof of this, Alex Nathan pointed to the fact that Te Roroa had used and still use the natural resources of the forest, the lakes, the rivers and the seacoast for food, medicine, building supplies and other purposes, and that this use of the natural resources takes place even when they are on Crown land. The Tribunal acknowledged that Nathan’s statement was supported by a lot of the evidence they had received.⁸⁵ In further proof that Te Roroa continue to exercise mana whenua over their territory, Nathan said: ‘If that were not the case, the territorial pepeha and the traditional stories about those places would not be maintained. The tupuna would have considered that the fires in respect of these lands had gone out ...’⁸⁶

The exercise of mana whenua is seen to be especially significant in relation to the Waipoua forest, even though the claimants recognise that the title of the forest land had gone to the Crown through the ‘so-called sale’ of 1896. Alex Nathan explains:

The Waipoua forest ... is as much a taonga, and as much a link with our past, as are our wahi tapu. It is important to our mana as forest people and it is important to the maintenance of our way of life. We have always used the forest for physical and spiritual sustenance, even after the so-called sale of 1876.⁸⁷

Alex Nathan’s explanations accord with that which was discussed above about customary understandings of what is involved in land agreements. In this case, the

⁸⁴ *The Te Roroa Report*, 211, citing J. V. Williams, ‘Closing Submission of Counsel for Claimants, volume 1’, Doc#I1(e), Wai 038, 1991, 61.

⁸⁵ *The Te Roroa Report*, 49.

⁸⁶ *The Te Roroa Report*, 49, citing ‘Supplementary evidence of Alex Nathan on manawhenua’, Doc#D27, Wai 038, 1990, 5.

⁸⁷ *The Te Roroa Report*, 49, citing ‘Supplementary evidence of Alex Nathan on manawhenua’, Doc#D27, Wai 038, 1990, 7-8.

claimants accept that the Crown has acquired a title to the forest but they believe that their mana over the Waipoua forest continues.

There is another interesting passage in the report that illustrates how Te Roroa understand the continuance of their mana whenua, even though there had been a ‘sale’ of a reserve to the Crown. Again it is obvious that, although they agreed to the sale, Te Roroa did not judge this to be a surrendering of all their interests in the reserve. The land at issue is the Taharoa Native Reserve, and the Tribunal explains Te Roroa’s concerns regarding it:

After the Taharoa Native Reserve was sold to the Crown in 1952 Te Roroa continued to use this dune lake area for traditional purposes. They believed that the sale had not extinguished their mana whenua or traditional mahinga kai rights.

In the decades to follow, these rights became severely restricted by the Hobson County Council, the local body responsible for implementing the Crown's policy of developing a public domain around the lakes. Te Roroa did not participate in this development; nor were they represented or consulted by the Taharoa Domain Board. Rather they became increasingly concerned over what they saw happening to the lake surrounds and the dwindling supply of eels.⁸⁸

Their exclusion from any decision making over the lake – in spite of their centuries-old relationship with it – is of concern to Te Roroa, not least because of their observation of the lack of care for the ecological balance and well being of the Taharoa lakes, and the consequent diminishment of their traditional resources. They believe that their mana whenua continues, and that this should be recognised by the Crown and the bodies that implement Crown policies.

The linking of the expressions ‘mahinga kai’ and ‘mana whenua’ in the above passage occurs often in the report. This is not surprising since the control and care of food sources are basic to a group’s well being, and are obviously an important part of their prestige and authority in the land. Mahinga kai are described as traditional resource areas, the places where food is procured, produced or processed.⁸⁹ Several of the claimants described how in their childhood their whānau used to go on ‘seasonal excursions to the mahinga kai “camp grounds” of tupuna where food was gathered and

⁸⁸ *The Te Roroa Report*, 173-4.

⁸⁹ *The Te Roroa Report*, 373, 171.

sometimes processed according to traditional methods and the conservation ethic'.⁹⁰ Particular areas were named and the foods and production methods associated with them. Some of these were on Crown land, and the people spoke regretfully about how their rights to their mahinga kai had been eroded as the Crown opened up the land for development.⁹¹

Historical evidence for extent of Te Roroa's mahinga kai resources is given in the introduction to the report. The Tribunal cites Polack who recorded his observations during travels through the country in the 1830s:

The intensity of gardening was recorded by Polack when travelling by canoe from the coast to the settlement (ibid: 209-210). He observed the neatness and regularity of the garden plots and the great variety of crops including the indigenous kumara and taro and introduced vegetables like Indian corn, melon, pumpkin and turnip. He took note of the karaka groves, the steamed fruit of which were served at a feast given by his host Parore. His description of the provisions is a good indication of the extent of mahinga kai resources:

The provisions consisted of about three thousand baskets of potatoes, kumeras [sic], water melons, steamed kernels of the karaka maori, taro [sic], preserved kou, or turnips; tawa, or dried codfish, and shell-fish: the baked roots of the Ti [cabbage tree] palm ... (ibid: 213).⁹²

As in the Muriwhenua Fishing and the Mangonui Sewerage reports, it is shown that there were a wealth of resources available to the hapū, resources that had been kept rich over centuries through Te Roroa's skills in conservation, cultivation, and harvesting.

There were circumstances in which communities experienced less favourable living conditions. This is commented on in the report with regard to the grandfather of Parore Te Awha and his people:

As a consequence of disputes between the descendants of Toa's first wife, Waitarehu, and his third wife, Te Hei, Parore's grandfather had been driven out of Waipoua and had gone to live at Mangakahia. His reduced circumstances gave rise to the pepeha, "Te Kuihi kai raupo" (the pukeko eating raupo) and his people became known as Te Kuihi.⁹³

⁹⁰ *The Te Roroa Report*, 171.

⁹¹ *The Te Roroa Report*, 172, ff.

⁹² *The Te Roroa Report*, 15. The Tribunal is citing J. S. Polack, *New Zealand: being a narrative of travels and adventures*, Volume 1, London, 1838.

⁹³ *The Te Roroa Report*, 35.

This short passage indicates why the retention of control over their mahinga kai was so important to communities. It is notable that, despite the relatively reduced circumstances experienced by his grandfather's people, Parore Te Awha became an influential leader in prosperous circumstances.⁹⁴ There is no evidence in the report to suggest that, before the major land alienations resulting from the Crown's dealings over land,⁹⁵ the Te Roroa communities were forced into the state of enduring physical poverty that became common for many whānau following colonisation.⁹⁶ Rather, the situation for most of the communities most of the time was one of access, according to season, to a variety of plentiful food sources from land and sea.

While giving evidence about the plenteousness of the food sources that they had been part of harvesting, the claimants also described how many of these sources had been diminished or polluted by outsiders over recent decades. In spite of the harm that has been done, Te Roroa communities continue to maintain their practices of care for the resources:

Reihana noted other rules like the rahui to protect Toheroa at the Waimamaku river mouth. This demonstrated that:

from very early times our people not only looked to the river and the sea as a source of food, but also tendered and conserved it to this day. The placing of a rahui on the gathering of seafood following the loss of life at sea, or to guard against over exploitation of our reefs is still practised today.⁹⁷

Because Te Roroa maintain this customary care of their fisheries they would like more support from the Crown for the protection of the fisheries against detrimental outsider actions. And because their concerns extend to the whole of the natural environment, Te Roroa want to have an effective part in the overall management of conservation in the region.⁹⁸ The Tribunal recognised the justice of what the claimants sought in these matters, and made specific recommendations that the Crown ensure tangata whenua participation in the management of reserves and conservation estates in the region.⁹⁹

⁹⁴ *The Te Roroa Report*, 35-8. See also the above passage citing Polack's observations.

⁹⁵ See *The Te Roroa Report*, Chapters 2-4.

⁹⁶ See *The Te Roroa Report*, Chapter 5. See also *Muriwhenua Land Report*, 335.

⁹⁷ *The Te Roroa Report*, 176, citing 'Evidence of Reihana Paniora on fisheries at Waimamaku', Doc#D19, Wai 038, 1990, 5.

⁹⁸ *The Te Roroa Report*, 292.

⁹⁹ *The Te Roroa Report*, 295.

One last matter for comment concerns the witness given by the claimants to the mutuality of relationship that exists between land and people. A river, a mountain, each taonga is approached as having its own integrity that is to be respected. To disregard that integrity is a violation:

Te Mamae Tane also remembered how "fish was always plentiful. The mullet would come up the river... to a place we call Puke Karuhiruhi" (Shag Point) to spawn, and that:

[Then the water] was beautiful and clean. Aata told us about the mullet going up the river.... We were told not to catch the mullet while they were swimming up river, but we could catch them when swimming downstream. There were plenty of whitebait, fish and eels in that river before they violated it.¹⁰⁰

Te Mamae is referring here to the violation of the Waipoua river by the Crown forest service. The extraction of gravel from the river for forest roads and the building of a headquarters' sewerage outlet into the river had contributed to the serious pollution of the river. Moreover, as the report says, the violation has deeply connected cultural and spiritual implications:

River pollution is not only a health hazard and a threat to a traditional fishery; it is culturally objectionable. It ignores Te Roroa's spiritual and cultural values relating to water and to the mauri of the river by which they identify themselves. Te Mamae Tane's words "All these things they did to us" are a sad indictment of forest service operations at Waipoua.¹⁰¹

The word 'mauri' is used to indicate the integrity of the river and the respect this demands. The concept is explained by Cleve Barlow, in his book entitled *Tikanga Whakāro: key concepts in Māori culture*:

Mauri is a special power possessed by Io which makes it possible for everything to move and live in accordance with the conditions and limits of its existence. Everything has a mauri, including people, fish, animals, birds, forests, land, seas, and rivers, the mauri is that power which permits these living things to exist within their own realm and sphere. No one can control their own mauri or life-essence...

Likewise with the oceans, rivers and forests, when the food supplies become depleted it is possible to retain the mauri through conservation (rahui) and appropriate ritual ceremony.¹⁰²

This philosophy of respect for the integrity of all living things indicates that, for the

¹⁰⁰ *The Te Roroa Report*, 178, citing 'English translation of oral evidence of Te Mamae Tane on Waipoua aspects of the claim', Doc#B44, Wai 038, 1990, 6.

¹⁰¹ *The Te Roroa Report*, 182, citing 'English translation of oral evidence of Te Mamae Tane on Waipoua aspects of the claim', Doc#B44, Wai 038, 1990, 2.

¹⁰² C. Barlow, *Tikanga Whakāro: key concepts in Māori culture*, Oxford University Press, 1991, 82-3.

claimants, mana whenua is closer in meaning to rights of authority from within the land rather than a right of domination over the land. Such an understanding accords with the fact that mana whenua is closely linked to rights and duties of guardianship. Indeed, the Tribunal says that for Te Roroa it is truer to say that the people belong to the land rather than the land belongs to the people:

These concepts of mana whenua and mahinga kai are basic to this claim. Underlying them is the concept of people belonging to the land, rather than the land belonging to people:
no individual or group "owns" the land, but rather ... the land "owns" them ...¹⁰³

The relationships of whānau and hapū to land and taonga are examined in detail by Merata Kawharu in her thesis on 'Kaitiakitanga'. Her views reflect those expressed in the Te Roroa report:

And so mana whenua is not just about the authority of people over lands, but also about the authority of lands (and resources) 'over' people. This world-view is summarised in the thinking that land, resources and people have a reciprocal relationship.¹⁰⁴

It is fair to conclude that mutuality of respect and reciprocity of relationship are key to all that is valued by the Te Roroa hapū: whether in the case of the relationships between groups, the expectations in entering into land agreements, the relationships to tūpuna, the understandings between communities and their leaders, or the relationships of the hapū to their taonga and land.

This section has concentrated on how the Te Roroa hapū understand their relationships with their taonga, land, and resources. There is much in *The Te Roroa Report* that points to their appreciation of the unity and interconnectedness of people, taonga, and land. An expression of this interconnectedness lies in the way the histories of the land and the hapū are intertwined. This is particularly evident from the descriptions of the 'oral mapping', which illustrate the intimate knowledge of the land carried in the communities. Also notable is the enduring nature of the relationships of the hapū to land and taonga. The violation of taonga is a major source of grievance for Te Roroa. The

¹⁰³ *The Te Roroa Report*, 49, citing 'Supplementary evidence of Alex Nathan on manawhenua', Doc#D27, Wai 038, 1990, 4. These relationships are examined in detail in Merata Kawharu's thesis (1998) on kaitiakitanga. She says: 'And so mana whenua is not just about the authority of people over lands, but also about the authority of lands (and resources) 'over' people. This world-view is summarised in the thinking that land, resources and people have a reciprocal relationship' (p. 28).

¹⁰⁴ M. Kawharu, 'Dimensions of Kaitiakitanga', 28.

recognition of their authority over their taonga is seen as linked to their mana as a people, and as essential to their being able to ensure that their taonga are treated with due respect. For Te Roroa, the exercise of their tino rangatiratanga or mana whenua involves duties of guardianship for land. This kaitiakitanga is expressed through conservation practices, and the careful use of mahinga kai and other resources. The information regarding mahinga kai and the harvesting of different foods points to the general abundance of resources for the Te Roroa communities, until the alienation of their lands and the gradual diminishment of their customary food sources. An important concept that supports Te Roroa's conservation ethic is that of mauri; in practice, it is a concept that engenders respect for all living things and the building of relationships of mutuality between hapū, taonga, and land.

The Te Roroa Report is a valuable source of insight into the social relations of the tribal world. Drawing on the richness of the material available in the report, this chapter has filled out the picture of the complexity and interconnectedness of relationship that exists for tribes in human, spiritual, and environmental terms. One can see from the descriptions in the chapter how the whole social, political, environmental, and economic dispensation favours relationships based on reciprocity. One also gets an intimation of how the capitalist order introduced by the Crown is at variance with the social order of the tribal world. The subject that is raised concerning the intentions of hapū in placing outsiders on their lands is further developed in the next chapter.

Chapter 3

Hapū and their Incorporation of Outsiders

This chapter continues the investigation of the social relations of the hapū, with a particular emphasis on how hapū incorporated outsiders. The *Muriwhenua Land Report* gives a good deal of attention to the practices of incorporation, and is used as the main source of information for the chapter. As with the *Muriwhenua Fishing Report* the focus is on the social relations of the hapū of the Far North: Ngati Kuri, Te Aupouri, Te Rarawa, Ngai Takoto and Ngati Kahu. There is, however, a good deal of broadly based comment in the *Muriwhenua Land Report* and, along with supplementary sources, this is used to indicate how the customary arrangements of the Far North hapū are typical of those in the Māori tribal world generally.

The focus of the *Muriwhenua Land Report* is the land agreements between the Far North hapū and Europeans in the period before the signing of the Treaty of Waitangi and up to 1865. This is because it was put to the Tribunal that the Crown's interpretation of these agreements as outright sales led to the extensive loss of land by the hapū. Counsel for the claimants argued that the hapū entered into the agreements with the European settlers according to their customary expectations of such arrangements, which did not allow for the alienation of land. The Tribunal gives some attention, therefore, to the nature of the social system and law which conditioned the view of the Far North hapū of the first land agreements with Europeans.¹ In the course of this consideration, the Tribunal notes that the understandings, practices, and values of the Far North communities continued largely unimpeded for some decades after 1840, and that they continue today in spite of external factors that limit their expression.

The understandings of the social relations of the Far North hapū taken from the *Muriwhenua Land Report* will generally be limited to those which supplement the information from the other reports. The main topics considered in this chapter are the

¹ *Muriwhenua Land Report*, v.

understandings and practices of the hapū in giving outsiders a place on their lands. Not only are these a major focus of the *Muriwhenua Land Report*, but the explanations of them given in this report are fuller and more consistent than those in the earlier reports. The reader will notice that in the passages quoted from the report, the generic term ‘Maori’ is often used in the descriptions of the land tenure practices. In reading the Tribunal’s descriptions, it needs to be remembered, that ‘Maori’ means tribal because the land tenure practices in question are those of the tribal world.

In the early part of the report some insight is offered into the basis for the relationship of the Far North hapū to land, and hence for the system of land tenure. Dame Mira Szaszy is cited in evidence of the hapū’s long and intimate association with the land:

we are the children of Papatuanuku, the Earth Mother, one of our divine Primal Parents. We contend that all of Nature derives from her – our lands, forests, rivers, lakes and seas and all the life contained therein. As such our spirituality is deep-rooted in the earth, the lands upon which our forebears lived and died, the seas across which they travelled and the stars that guided them to Aotearoa. They were also physically sustained by the produce of Tane and Tangaroa. The sanctity of the Mauri of all things was respected.²

The themes touched on by Mira Szaszy echo those discussed in the earlier chapters of the thesis. Similar echoes are to be found in the consideration of ‘place names’ and what they reveal about tribal life in, and relationship to, the land. The Tribunal notes, for instance, that: ‘The wealth of place names highlights the intensity of settlement and the people’s intimacy with the land.’³ Further on, it says that place names bring to mind ‘the wealth of landmarks and navigational points along coasts, the numerous sacred and historical sites in the area, the songs and proverbs connected to localities, the nature of the landscape, the extent of its resources, the variety of harvesting techniques, and throughout, the importance of the associated spirit world.’⁴

It must be noted that, although these observations reflect what the Tribunal learnt in the Far North, they have application to the philosophies and relationships to the land of Māori tribes in general. Because of the Tribunal’s decision to offer generalised

² *Muriwhenua Land Report*, 15, citing ‘Mira Szaszy re Spiritual and Ancestral Rights’, December 1987, Doc#A7, Wai 045.

³ *Muriwhenua Land Report*, 17.

⁴ *Muriwhenua Land Report*, 19.

conclusions regarding customary norms, there is a little detail on the histories and place names of the hapū that make the claim on the land.⁵ With regard to the specific relationships into the land of the Far North hapū, a wealth of insight is offered by the late Waerete Norman in a chapter that backgrounds the Muriwhenua claim.⁶ Not only does she trace the histories, kōrero, and names that are important to the hapū, individually and collectively, but also she indicates where the Far North tribes belong in the schema of spatial and ancestral relationships that bind Māori as a whole.⁷ This includes the point that Te Ara Wairua – the pathway for the spirits of all Kupe’s descendants who wish to return to the distant homeland of Hawaiki – passes through Te Hiku o te Ika, the end of the land.⁸

Just one example is given here from Norman’s work that illustrates the connection of the Far North people with particular places and natural features. She cites their well-known tauparapara, which takes its origins from the sentinel’s mātarā (watch-cry) when the warrior chief Tūmatahina boldly led his people from their vulnerable and isolated pā to the safety of the mainland at Murimotu (North Cape). The tauparapara makes specific reference to ‘he kūaka marangaranga’ which, as Norman explains, is ‘an important symbol to all far northern iwi and refers to the kūaka or godwit, a migratory bird, ever shifting and on the alert, whose long and arduous flight, from Parengarenga [in the Far North] to its homelands in Siberia, has been observed by the tangata whenua for centuries’.⁹ In this example, as in the many others Norman gives, one can see the weaving of the people and their genealogies into the land in a way that builds their unique identity and provides the base from which they form their relationships with others. This is why there is an obligation on outside groups to acknowledge the intimate connections of a hapū into its land: to act in ignorance of these connections is to threaten the very substance of the tribe itself.

⁵ The Te Roroa report does provide some specific examples showing the connections between the living community and specific places, names, and ancestors, as has been noted in Chapter 2 of the thesis.

⁶ W. Norman, ‘The Muriwhenua Claim’, in I. H. Kawharu, ed., *Waitangi: Maori and Pakeha perspectives of the Treaty of Waitangi*, Auckland: Oxford University Press, 1989.

⁷ See Norman, 186. The main sources of her data are oral traditions related by Far North kaumātua and kuia.

⁸ Norman, 197. The same tauparapara is also cited, with some explanation, at the beginning of Chapter 2 of the *Muriwhenua Fishing Report*.

⁹ Norman, 199-200.

In the report, the theme of the hapū's relationships into their lands is returned to where the 'Maori law of relationships' is discussed.¹⁰ The Tribunal notes that the claimants and the academic experts, Dr Rigby and Dame Anne Salmond, were in agreement that human and divine relationships were of primary concern to the Māori tribal world and its law, and on the basis of their evidence it concludes that:

The fundamental purpose of Maori law was to maintain appropriate relationships of people to their environment, their history and each other.¹¹

What is brought out more clearly by a study like Norman's, which is sourced in the oral traditions of the Far North people, is how each of these relationships has its own history; it arises from a distinct set of events, involves a particular group or groups, and recognises tūpuna and places by name.

The acknowledgement by the hapū of the connections between their tūpuna and the land is a recurring theme in the Tribunal reports. In questions regarding the rights of tribal groups to specific areas of land, the Tribunal observes the ancestral connection to be fundamental:

In all, the essential Maori value of land, as we see it, was that lands were associated with particular communities and, save for violence, could not pass outside the descent group. That land descends from ancestors is pivotal to understanding the Maori land-tenure system...¹²

The Tribunal describes the tribal community's ancestral right to land as being akin to that of 'occupation from time immemorial',¹³ and goes on to explain that past, present, and future generations have an interest in the land, and that this affects how the land is treated by the community: 'The main right, however, lay with the community in general. As a consequence, deceased forebears and generations to come had as much interest in the land as any current occupier. This view, once again, compelled punctilious observance of constraints on resource depletion'.¹⁴ The reference here is to the conservation practices of the communities, examples of which are detailed in the *Muriwhenua Fishing Report*.

¹⁰ *Muriwhenua Land Report*, 21-5.

¹¹ *Muriwhenua Land Report*, 21.

¹² *Muriwhenua Land Report*, 23-4.

¹³ See *Muriwhenua Land Report*, 24. In the British common law system 'occupation from time immemorial' is a recognised basis for a right to land.

¹⁴ *Muriwhenua Land Report*, 24.

That rights to land are situated in the community is a point that is stressed again and again in the report. The Tribunal distinguishes between the customary tribal understandings regarding land tenure and those of the English social order:

There was no equivalent to the English common law whereby people could hold land without concomitant duties to an associated community, or no parallel to the English social order wherein large land holdings could influence one's status in local society. For Maori, the benefits of the lands, seas, and waterways accrued to all of the associated community and the individual's right of user was as a community member. Similarly, rangatira held chiefly status but might own nothing.¹⁵

While *The Te Roroa Report* tells how individuals and individual whānau held recognised rights to the use of particular resources, usually through inheritance, the discussion in the *Muriwhenua Land Report* clarifies the conditions under which these rights were held. Use rights were considered to be dependent on the individual holder's residence and participation in the community. Descent gave a right of entry to a community, but because each person had links and hence rights of entry into many hapū, particular use rights were only retained through 'residence, participation in the community and observance of its standards'.¹⁶

These norms of residence and participation applied to all who had a place on hapū land, whether they were members, or outsiders who were allowed to settle – and this included the European settlers. By way of illustration, the Tribunal gives the example of an early European trader's property being subjected to the customary muru or plundering, when he and his wife went away from their property:

The trader Thomas Ryan and his Maori wife were twice subjected to muru, on each occasion for leaving their place of residence and thus breaching their contractual obligations as Maori saw them. It was 'their custom', Ryan said, 'to take all the possessions of any person who forsook any tribe, considering them forfeited'. That indeed was the custom as we understand it: the profit from the tribe had to return to it.¹⁷

The term used in this passage, 'contractual obligations', is one that belongs more to a British legal context than the tribal one. It is probably employed by the Tribunal to

¹⁵ *Muriwhenua Land Report*, 22-3.

¹⁶ *Muriwhenua Land Report*, 24.

¹⁷ *Muriwhenua Land Report*, 87.

emphasise that there was a formal understanding between the settler and the tribe. The example of what happened to Ryan and his wife is given by the Tribunal to show that the customary expectations with regard to the settlement on the land continued, even when a written deed was involved.

In the time leading up to the signing of the Treaty of Waitangi, a number of the missionaries and traders arranged with their hapū for a written deed acknowledging their right to be on the hapū's land. They did this in anticipation of the introduction of Crown rule and British law, with the preference for written documentation as proof of title to land.¹⁸ In the Tribunal's opinion, this securing of written 'title' to a place on the land did not take away from the settlers the obligations they incurred in entering into the arrangement with the hapū. The Tribunal says: 'Notwithstanding the paper conveyance in the deeds, on the ground nothing was given except the right to use and occupy; and that was subject to local laws and customs and contribution to the local community'.¹⁹

Europeans had been welcomed into a number of Far North communities from well before 1840 and for some years afterwards. The welcome was given according to long-held understandings:

Most early traders and settlers, being seen to have a contribution to make to a community, were invited by enterprising hapu leaders to join it. In the Maori scheme the focus was on gaining people for the tribe, and the allocation of land was incidental.²⁰ This practice of incorporating foreigners has been remarked on as a Pacific phenomenon. It was accompanied by an assumption so obvious to Maori as to require no specification: that the arrangement endured only for so long as the newcomers, like Maori, contributed to the community to the best of their ability and were committed to the community's best interests.²¹

The community presumed that this allocation of a place on their land would bear fruit in a relationship of ongoing and mutual benefit between themselves and the newcomers.²²

The Tribunal notes that the welcome was a personal one, and that the intention of the hapū in incorporating each European individual or family was the establishment a

¹⁸ *Muriwhenua Land Report*, 11.

¹⁹ *Muriwhenua Land Report*, 87.

²⁰ In view of the statements made in the report, regarding the importance of land to hapū, it is hard to conceive that 'the allocation of land was incidental'.

²¹ *Muriwhenua Land Report*, 4.

²² See *Muriwhenua Land Report*, Chapter 3.

personal and committed relationship with them.²³ There are examples that show that at least some of the early settlers understood this well, and in the case of certain individuals like Joseph Matthews the commitment was never forgotten, in spite of Crown actions that were to severely undermine these relationships.²⁴

The evidence given in the *Muriwhenua Land Report* makes it clear that, in giving a place on their land to outsiders, the hapū were granting a right to use and occupy, but this did not mean the alienation of their land. The Tribunal sums up its finding thus:

Accordingly, land allocation was not a permanent alienation of the land. Nothing could alter the reality that it was held from the ancestral community, and that a stranger taking land held it only by becoming part of that community. Thus the recipients or their issue could not part with the land. If they left it, the land remained where it always had been, with the ancestral descendants.²⁵

In other words, the alienation of land to outsiders was not part of the tribal order, and would have cut across the whole system of land tenure and the values and understandings associated with it. While the tribal communities welcomed trade in goods, this did not extend to trade in land. Individuals and groups from outside the community could be allocated land if it was seen to be to the advantage of the community but, as the Tribunal explains, the arrangement was closer to a lease than a sale.²⁶

In its submissions to the Tribunal, the Crown did not dispute that these were the hapū's understandings of agreements over land up to the time of contact with Europeans. What it did claim was that, as a result of engaging with Europeans, Māori rapidly took on European trading habits and abandoned their own: 'The Crown argued that Maori had been so affected by traders and their associated business and ethical codes that, by the time the [land] transactions were affirmed, Maori must have understood them as land sales'.²⁷ Conversely, the claimants and their Counsel said that the early agreements with Europeans over land must be seen in terms of Māori customary law.

²³ See *Muriwhenua Land Report*, 25, 106. This was to become an important issue because, as Chapter 5 of the thesis shows, the Crown made decisions that totally overlooked the personal nature of the arrangements that the hapū had made with the European settlers.

²⁴ See, for example, *Muriwhenua Land Report*, 258-262.

²⁵ *Muriwhenua Land Report*, 25.

²⁶ *Muriwhenua Land Report*, 73.

²⁷ *Muriwhenua Land Report*, 40.

The Tribunal judged some examination was needed into whether the social and economic order of the Far North communities had changed radically and rapidly as a result of the contact with Europeans in the decades leading up to 1840, and the years 1840-1865 which is the period in which the Crown dealt with the ‘pre-Treaty land transactions’. After being presented with a great deal of argument and evidence, it concluded that a rapid change in customary understandings would hardly have been the case. The main reason given was that the evidence showed that, although the hapū and their leaders accommodated changes to suit the dealings with Europeans, these were changes to outer form rather than fundamental values:

The traditional process of allocating land carried unique referents to continuing relationships and responsibilities, as was fundamental to Maori society. Despite changes in outer form, such fundamental values remained the same. Western land sales were diametrically opposed to the traditional concepts. They severed relationships and terminated obligations, while, for Maori, continuing obligations and relationships were essential. The evidence is that Maori still expected these relationships and obligations to carry on.²⁸

An example of a change in ‘outer form’ is to be seen in the willingness of rangatira to sign a written deed acknowledging that land had been allocated to a European settler. These deeds were later treated by the Crown and most of the settlers as a deed of sale, but the Tribunal is very doubtful that this was the intention of the rangatira in agreeing to sign a written document. Although the rangatira were willing to accommodate the Europeans in their desire for written ratification of the agreements that had been made, this did not mean that the rangatira saw the agreements as being fundamentally different from those they were accustomed to making.²⁹

The Tribunal believes that an understanding of the social context is essential to deciding whether the Far North economy had radically changed, including the understanding of agreements regarding land. It points out that up to 1865 the number of Europeans in the Far North remained very few, and the official presence was minimal. There were many signs that the Far North hapū saw themselves as being fully in control of their lands and resources, and there was little reason why they should question their customary political

²⁸ *Muriwhenua Land Report*, 74.

²⁹ See *Muriwhenua Land Report*, 106-7.

and economic order.³⁰ The Tribunal gives examples from the period from before 1840 till some years afterwards:

More particularly, however, there is evidence that Maori saw themselves as retaining control. This is demonstrated in their political acts of levying anchorage and watering fees, which Europeans found they were bound to pay. Much later, Maori were intensely opposed to Government customs duties and harbour charges, as they considered only Maori could levy these....³¹

These examples and other cited in the report show that, before and after the signing of the Treaty of Waitangi, the Far North hapū and their rangatira continued to act on the assumption of their ongoing authority over both land and sea. With regard to the agreements over land, the Tribunal's account of the 'Mangonui transaction 1840' is particularly interesting.³² While this agreement – effected between George Clarke, for Governor Hobson, and Panakareao, with four others – was later declared to be the first official land sale in New Zealand, there is evidence that at the time the 'transaction' was not seen as such by either party but rather as an acknowledgement of the hapū's ongoing authority in the area. At the time, Governor Hobson wrote that the deal had been made to prevent settlers encroaching on to the Mangonui land as this was 'still the cause of much annoyance to the natives'.³³ If the Governor had understood that the rangatira had agreed to an outright sale, he would have known that the 'natives' had no grounds for objecting to its being available to the settlers. As for Panakareao, his actions indicate that he was clear that he was not surrendering authority over the land, rather the opposite.

Later events would show that Panakareao saw the transaction as no more than an affirmation that he held authority over Mangonui and the eastern division. It is not always appreciated, although historians have noted it before, that in transacting with Europeans over land, the rangatira did not see themselves as ceding authority over that land but as asserting it, and as being acknowledged as possessor of that power...

Subsequent conduct, where Panakareao still dealt with the land as though his authority was unimpaired, shows that he did not regard the transaction as extinguishing his interests or authority.³⁴

What also needs to be remembered is that, while Panakareao and the other rangatira were

³⁰ See *Muriwhenua Land Report*, 4 and 74.

³¹ *Muriwhenua Land Report*, 44-6.

³² *Muriwhenua Land Report*, 118 -121.

³³ *Muriwhenua Land Report*, 119, citing letter of Hobson to Governor Gipps in New South Wales, 18 July 1840, BPP, vol 4, 57-58 (quoted in B. Rigby, 'The Mangonui Area and the Taemaro Claim', Doc#A21, Wai 045, 1990, 12).

³⁴ *Muriwhenua Land Report*, 118-20.

empowered to allocate land to outsiders for particular purposes, they did not have the authority to alienate hapū land. The Tribunal observes that Europeans, and especially Government officials, were inclined to inflate the role of rangatira to justify dealing exclusively with ‘chiefs’.³⁵ The Tribunal found, however, that rangatira were expected to act on behalf of the local community, and that the power to allocate land could be exercised only with the sanction of the community. This finding is put succinctly where the land agreements with the missionaries are being discussed:

We substantially agree also with Maori witnesses before this Tribunal who, speaking on different marae at separate times, were consistent in their view that the land transactions with the missionaries, beginning with the Kaitaia mission and the farm at Te Ahu, were not sales, and could not have been sales. We refer particularly to the Reverend Maori Marsden, Ross Gregory, and Rima Edwards. All three maintained that Panakareao could give no more than he had, and as a rangatira he had no more than the right to allocate land with the intention that the missionaries become part of the local community under his care, protection, and mana.³⁶

This evidence from the claimants was often included in their explanations of the custom of ‘tuku whenua’, as in the allocation of an area of hapū land to an outside group to use and occupy.³⁷ ‘Tuku whenua’ was the subject of quite some discussion during the hearings, especially because it was the expression used (supposedly meaning sale) in many of the written deeds.³⁸ The claimants were very clear that ‘tuku whenua’ referred to the allocation of land to particular persons on the basis of their entering into an ongoing and reciprocal relationship with the resident community. They were angered when they learned in the course of the Tribunal’s hearings how Crown agents, charged with investigating the original agreements between the hapū and European settlers, chose to treat these agreements as outright sales and thence contrived the ultimate alienation of much of the Far North land.

The claimants felt some outrage that so much land could have been taken on the basis of certain deeds in Maori when on their reading of these deeds, they did not effect a land sale. The deeds spoke of tuku whenua, a conveyance of land, when the only conveyance Maori knew of, in their view, was one with a string attached, rather more like a lease but nothing like a sale. They were angered that,

³⁵ *Muriwhenua Land Report*, 29. See also Ballara, *Iwi*, 80-85.

³⁶ *Muriwhenua Land Report*, 68.

³⁷ See ‘Evidence of Reverend Maori Marsden’, Wai 045, Doc#F25; ‘Evidence of Ross Gregory’, Wai 045, Doc#F28. See also ‘Evidence of Margaret Mutu’, Wai 045, Doc#F12; ‘Evidence of Shane Jones’, Wai 045, Doc#M3. Read together, this evidence provides a depth of insight into the understanding and practice of tuku whenua.

³⁸ *Muriwhenua Land Report*, 73.

while to them a traditional land conveyance was essentially a tribal arrangement to advantage the tribe, ‘tuku whenua’ had been manicured as a land sale, to advantage Europeans.³⁹

In the light of its considerations the Tribunal expressed its empathy with the claimants: ‘We can thus appreciate the claimants’ anger. Their land and their language were assaulted at the same time, and the capture of one was used to justify the taking of the other.’⁴⁰

There were witnesses for the Crown who argued ‘that the claimants had wrongly limited ‘tuku whenua’ to a type of transaction which had then been elevated to an institution, creating a strange new element in a long historical debate’.⁴¹ One of these was the historian, Fergus Sinclair, who said in his evidence:

In the academic world, the ‘tuku whenua’ hypothesis is a marked departure from what has previously been assumed about the nature of sales before annexation ... We are now told that the extensive sales of land before 1840 were construed in terms of a pre-European system of land transfer called ‘tuku whenua’ – a custom which seems to have escaped the attention of the pakeha historical community until very recent times and which is certainly difficult to detect in the historical sources.⁴²

Even if Sinclair’s observation was accurate for the ‘pakeha historical community’, it was not so for the academic world as a whole. Frank Acheson in his well-documented thesis on ‘The Ancient System of Maori Land Tenures’, written in 1913, devotes a section to ‘Gifts’, and says in the introduction:

Among the varied source of title in the Maori system of land tenures, that of “tuku” or gifts, stands out prominently as one of the most common. We constantly find it referred to by competent authorities, both Maoris and Europeans, as one of the main sources of title, though not so important a source as discovery and occupation, ancestry, or conquest and occupation.⁴³

The same weight of importance is attributed to ‘take tuku’ as a source of title to land by Norman Smith in his published work on *Maori Land Law*, a study based on knowledge

³⁹ *Muriwhenua Land Report*, 73.

⁴⁰ *Muriwhenua Land Report*, 75.

⁴¹ *Muriwhenua Land Report*, 73, citing L Head, ‘Maori Understanding of Land Transactions in the Mangonui-Muritoki Area during 1861-65’, Doc#F21, Wai 045, 1991, and F Sinclair, ‘Issues Arising from Pre-Treaty Land Transactions’, Doc#I3, Wai 045, 1993.

⁴² Sinclair, F., ‘Issues Arising from Pre-Treaty Land Transactions’, 5-6.

⁴³ Acheson, ‘Ancient System of Maori Land Tenures’, 82.

he had acquired over many years as a judge of the Native Land Court.⁴⁴ His explanations of *tuku whenua* or gifts of land reinforce points made by the Tribunal; he says, for instance: ‘Ordinary gifts of land were made for many reasons ... to prove the existence of such gifts, the right of the donors must be undoubted; it must be shown the tribe agreed, and that the recipients maintained their right by occupation of the land given’.⁴⁵ Further specific evidence on *tuku whenua* was given to the Tribunal by Maurice Alemann, who had researched the historical records on early land transactions in the Ngati Whatua and Tai Tokerau (Auckland and North Auckland) areas. In his thesis on ‘Early Land Transactions in the Ngatiwhatua Tribal Area’ he explains:

The “tuku-ing” of land to Maori, and before the Treaty of Waitangi to Pakeha, was a well-established custom and was applied when circumstance warranted it. In essence “tuku-ing” meant that the usufruct of land was given over to strangers to the tribal community, the land was theirs to use, but the underlying ownership of the land was not theirs. And it was expected from time to time presents, or help in warfare would be forthcoming for the donees.⁴⁶

More recent research supports and amplifies the information given in these three sources,⁴⁷ and accords with that which was communicated by the claimants and a number of other academics in the hearings for the Muriwhenua Land claim.⁴⁸ The Tribunal was convinced by the evidence it received that the early land agreements made by the hapū with Europeans were based on the traditional process of allocating land and the establishing of ‘continuing relationships and responsibilities, as was fundamental to Maori society’.⁴⁹

With respect to issues that arise from both the Te Roroa and Muriwhenua Land reports, there are matters regarding ‘*tuku whenua*’ or customary land allocation that call for a good deal more research. They concern the extent to which ‘*tuku whenua*’ has

⁴⁴ Smith, *Maori Land Law*, 102-105.

⁴⁵ Smith, *Maori Land Law*, 102-3.

⁴⁶ M. Alemann, ‘Early Land Transactions in the Ngatiwhatua Tribal Area’, MA Thesis, University of Auckland, 1992, 148-9.

⁴⁷ See, for example, M. Alemann, ‘The Impact of Legislation on Maori Land in Tai Tokerau’ PhD Thesis, Auckland, 1998, Chapter 2; M. Mutu, ‘Cultural Misunderstanding or Deliberate Mistranslation? deeds in Maori of pre-Treaty land transactions in Muriwhenua and their English translations’, *Te Reo: Journal of the Linguistic Society of New Zealand*, 1992, 57-103; Ballara, ‘Customary Land Tenure in Te Tau Ihu (the Northern South Island) 1820-1860’, 35-42, 79-84.

⁴⁸ Academics who gave evidence that accorded with the claimants’ views included M. Alemann, J. Metge, A. Salmond, and P. Wyatt - who in 1991 had completed an MA thesis in history from the University of Auckland, entitled ‘The Old Land Claims and the Concept of ‘Sale’: a case study’.

⁴⁹ *Muriwhenua Land Report*, 74.

continued as a practice since 1840, in terms of inter-tribal land agreements and those between hapū and the Crown. In his book, Norman Smith makes the comment: ‘The donees under a gift [tuku] should be able to show occupation down to the time of British sovereignty (1840); but gifts originating since 1840 and admitted and recognised by Maoris interested have been frequently given effect to by the Crown upon investigation of title.’⁵⁰ This is a significant observation because it shows how ‘take tuku’ has continued to be recognised as a source of right to land in the Native and Maori Land Courts, in spite of the Crown-instituted rules that are meant to guide Land Court decisions.

Further evidence of the continuation of the customary understandings that are associated with the practice of ‘tuku whenua’ can be seen in examples that were cited from *The Te Roroa Report*. Alex Nathan explained that regardless of the ‘so-called’ sale of the Waipoua forest to the Crown in 1896, Te Roroa considered that they retained mana whenua over the area.⁵¹ In other words, they did not judge that all their rights in the forest had been alienated through the ‘so-called’ sale. Similarly, in the case of the sale in 1952 of the Taharoa Native Reserve to the Crown, the claimants said that they continued to use the dune lake area for traditional purposes because they believed that the sale had not extinguished their mana whenua or traditional mahinga kai rights.⁵² Even more recent examples showing how tuku whenua is still practised within the Far North communities have been recorded by Margaret Mutu.⁵³

In all the instances of land agreements, from the nineteenth century to the present, one can see the retention of some fundamental elements: the allocation of a place in the land to use and occupy rather than an alienation of land, the continuing authority and interests of those with mana whenua in the land that has been allocated, the expectation of relationships of ongoing reciprocity between the two parties to the agreement, and the return of the land to the original community when the donees move away or the purpose for which the land was given has come to an end. These understandings and practices

⁵⁰ Smith, *Maori Land Law*, 102-5.

⁵¹ *The Te Roroa Report*, 49.

⁵² *The Te Roroa Report*, 173-4.

⁵³ Mutu, ‘Cultural Misunderstanding or Deliberate Mistranslation?’, 63-4.

that are part of customary land agreements accord with the intimacy of the connections between a tribe and its land. Outsiders can be accommodated on their land, but the mana of the land, and the responsibilities of care that go with that, remain with the tribe whose identity and ancestral history ties them immediately into their land and the features of it.

While the *Muriwhenua Land Report* offers considerable clarification of customary land agreements, there is ambiguity in its portrayal of the tribal trading. On the one hand, the communities are shown to have been keen traders and to have embraced trade with Europeans as an extension to their well-established inter-tribal trade. On the other hand, their customary trade is categorised as that of ‘gift exchange’, according to a description that suggests that their interest in trade and the exchange of goods was minimal.

Evidence is given in the report that shows that in the decades leading up to 1840 the Far North communities remained very much in charge of their situation, even though they were increasingly involved in trade with Europeans. Working from their customary base, they were able to expand their economic activities to accommodate the new trading opportunities.⁵⁴ Talking of the 1820s and 1830s, the Tribunal says:

Maori were involved mainly in provisioning ships and supplying them with cargo, either directly or through traders. Pigs, potatoes, other vegetables, fish, and fowl were loaded both for the crew and for export, along with curios. The scale of Maori agriculture and fishing, and industry in drying and packaging, was thus intensified, and reports of groups transporting goods over long distances by land or sea show that even remote places were affected. Similarly, it appears that all Muriwhenua communities had contact with ships in the Bay of Islands as well as those at Mangonui.⁵⁵

The Tribunal notes how this interest in trade with the Europeans fits with the early explorers’ accounts of the eagerness for business amongst the tribal communities;⁵⁶ and it comments on the business acumen shown by Māori in their trade with Europeans: ‘Maori shrewdness in bargaining, their avoidance of resident traders when ships were in port, and their ready acceptance of money as the medium of trade – often commented on by the Europeans – showed that Maori saw themselves as no less than equal in trading

⁵⁴ *Muriwhenua Land Report*, 42-6.

⁵⁵ *Muriwhenua Land Report*, 43-4.

⁵⁶ *Muriwhenua Land Report*, 41.

situations'.⁵⁷ Another aspect of this acumen was shown in the readiness with which the whānau and hapū sought to incorporate those with special skills as members of their communities. A good number of the early European traders and sawyers in the Hokianga settled down with local women, to their own benefit and that of the communities they came to live with.⁵⁸

The Tribunal points to 'the practice of incorporation' as holding the key to the ability of the communities to take on board new ideas and enterprises, while not letting go of the practices and values that were fundamental to their operation as a tribal or communally-based society.⁵⁹ It goes on to say that 'it is more important to discuss the practice of incorporation than to debate the degree of adaptation from gift exchange to barter and a cash economy'.⁶⁰ The Tribunal thus judges that the salient issue is the capacity of the tribal communities to accommodate new elements, rather than argument about the extent of progress along a specified path.

Unfortunately, the Tribunal does not question the assumed model for the path of adaptation, and at times relies on the model in a way that is contradictory to evidence it cites. The model of 'adaptation from gift exchange to barter and a cash economy' suggests that there is a series of distinct stages to economic development with the adoption of the 'cash economy' at the end point.⁶¹ Yet in the section where the Tribunal is stressing that the Far North communities embraced trade with Europeans without making fundamental changes to their social and economic order, it notes 'their ready acceptance of money as the medium of trade'.⁶² At this stage, the Tribunal is pointing out how the communities still worked from their communal base. Later in the report it

⁵⁷ *Muriwhenua Land Report*, 44.

⁵⁸ *Muriwhenua Land Report*, 45-6. On page 24, the Tribunal notes how this incorporation of outsiders is typical of a practice that is to be found throughout the Pacific.

⁵⁹ See *Muriwhenua Land Report*, 44ff. The Tribunal uses the word 'communally' here. It could be argued that 'co-operatively' would be a more accurate term. However, in this case, the Tribunal is emphasising that the new work was still being done through community effort.

⁶⁰ *Muriwhenua Land Report*, 46.

⁶¹ This is made very clear in the *Muriwhenua Fishing Report* where the Tribunal talks about the adaptation to 'Western norms', and cites the movement from gift exchange to barter as belonging to this adaptation. See discussion of the *Muriwhenua Fishing Report* in Chapter 1 of the thesis. See also reference in the Introduction to Meiksins Wood's critique of the classical economics which promotes the idea of set stages of economic development.

⁶² *Muriwhenua Land Report*, 44.

cites an account showing how rangatira in the early days of monetary payments for purchases would distribute the cash to each member of the tribe⁶³ – in the same way that the fruits of a harvest had been distributed.⁶⁴ As the Tribunal itself indicates, the acceptance of cash payments did not equate with a marked change in the social relations of the whānau and hapū.

Earlier in the report, the Tribunal refers to ‘gift exchange’ as the customary method of trade between hapu, and as typifying ‘the Maori system’.⁶⁵ It seems that, having accepted the ‘gift exchange’ hypothesis, the Tribunal tailors its observations to the theory. This can be seen where it states: ‘The explorers’ accounts, showing Maori as eager for business, describe the transfer of goods by the immediate exchange of presents and some bartering for a fair equivalence. While this was not the classical form of gift exchange, nor was it outside Maori experience’.⁶⁶ The ‘classical form of gift exchange’ is set as the measure of what is to be expected, and the Tribunal finds it has to provide explanations of behaviours that do not fit with that measure.

The Tribunal’s use of gift exchange theory is particularly open to question where it says that: ‘More significantly, the underlying purpose of gift exchange, as we see it, was not to obtain goods but to secure lasting relationships with other hapu’.⁶⁷ There is no problem with the second part of this statement, as the evidence in the report shows that the securing of lasting relationships between hapū was important both in their trade and agreements over land. The difficulty lies in the assertion that the underlying purpose of ‘gift exchange’ – which the Tribunal has equated with inter-tribal trade – was *not* to obtain goods. This is to spiritualise the Māori interest in trade,⁶⁸ and stands in contradiction to evidence cited in the thesis from this report and the other reports

⁶³ *Muriwhenua Land Report*, 195.

⁶⁴ See evidence regarding the distribution of the catch from major fishing expeditions in Chapter 1 of the thesis.

⁶⁵ *Muriwhenua Land Report*, 27.

⁶⁶ *Muriwhenua Land Report*, 41.

⁶⁷ *Muriwhenua Land Report*, 28.

⁶⁸ The thinking that has influenced the Tribunal can be seen in Christopher Johnson’s summary of the main elements of Marcel Mauss’s ‘gift exchange’ model; one of these is ‘the moral and spiritual continuum of donor, object and recipient: in gift ceremonies it is not so much the objects exchanged as the moral and spiritual relations created through the exchange that are at stake’. See C. Johnson, ‘Mauss’ gift: the persistence of a paradigm’ in *Modern and Contemporary France*, 1996, NS4 (3), 311. The model was put forward by Mauss in his work on ‘The Gift’ (‘Sur le Don’) in 1925.

considered. By drawing an artificial dichotomy between social and trading relationships, the Tribunal detracts from the fact that the whānau and hapū were engaged in authentic trading relationships, fostered in general through the building of long-term, mutually beneficial relationships between the trading communities.⁶⁹

A particular difficulty with the presentation of customary trade as having little to do with the material substance of trade is that it lends support to the ideology that projects tribal economies as lacking in commercial interests. The effects of this ideology are described in the *Muriwhenua Fishing Report*, where it is related how whānau and hapū were denied their rights in the sea for well over a century, because the Crown and its officials judged that Māori communities had no commercial interest in fishing.⁷⁰ The spiritualising of tribal interest in resources and trade can easily become a source of justification at the political level for the non-recognition of the economic rights of tribal communities.

Another doubtful aspect of the Tribunal's analysis of the social relations of the Far North hapū lies in its use of 'cultural difference' arguments to explain differences between the Far North and Pākehā communities. In its introductory discussion of differences between the Far North Māori and the European societies, the Tribunal cites Joan Metge's well-known phrase that 'Maori and Pakeha were talking past each other' and adds that 'in her view they are still talking past each other'.⁷¹ The cause for concern is not the validity of Joan Metge's observation, but its uncritical application – especially because the argument of cultural difference can be used to conceal the exercise of dominance by the colonisers.⁷²

In remarking on the differences between the Far North hapū and the missionaries in interpreting the Kaitaia and subsequent land agreements, the Tribunal gives as its opinion that: 'each was still a prisoner of their own world-view and mutual

⁶⁹ See *Muriwhenua Land Report*, 27-8.

⁷⁰ See *Muriwhenua Fishing Report*, Sections S1.5 - S1.8.

⁷¹ *Muriwhenua Land Report*, 13.

⁷² See discussion on Judith Simon's work in the 'Review of the Literature'.

comprehension was minimal'.⁷³ In saying this, the Tribunal has picked up on Metge's observation, but in a way that does an injustice to the hapū. To imply that the Far North people were prisoners of their own world-view because they took for granted their interpretation of the land agreements is to beg a number of questions. Why should those, whose land and country it is, do other than assume that their norms would be followed?⁷⁴ Are the citizens of any country imprisoned in their own world-view because they expect their authority and law to be respected by those who come from abroad? That these questions need to be asked is no doubt a reflection of the influence of the ideology, generated by John Locke and others, that depicts the social order of the European colonisers as having an inherent right to be counted as equal, if not superior, in the lands of indigenous peoples.⁷⁵

In fact, there are a number of reasons to think that it is likely that the Far North hapū were open to the accommodation of different world-views, as long as some basic courtesies were observed. There is evidence in the *Muriwhenua Land Report* that indicates the willingness of Far North communities to take into account the ways of the strangers.⁷⁶ Also, because the recognition of the authority and jurisdiction of local groups is fundamental to tribal politics, this means that the acceptance of and accommodation to different tikanga, and therefore different world-views, is a necessary part of inter-community relationships.⁷⁷ What is more, the Tribunal comments several times that Māori (tribal) law works from a consistency of principle and a flexibility of application – meaning that it accommodates itself well to particular circumstances and the reaching of consensus between groups. For all these reasons, the Far North hapū were unlikely to be caught in a rigid world-view – quite apart from the fact that they were more than entitled to expect that those wanting a place on their lands would accommodate themselves to their requirements.

⁷³ *Muriwhenua Land Report*, 58.

⁷⁴ This very point is made by the Tribunal on pages 178-9 of the *Muriwhenua Land Report*.

⁷⁵ See Tully, 70-82, for a discussion of the ideology that has supported 'constitutional imperialism'.

⁷⁶ After recording a situation where the missionaries got into difficulties because of failing to follow appropriate tribal protocols, the Tribunal says: 'On their part, Maori were willing to comply with protocols peculiar to their friends'. See *Muriwhenua Land Report*, 59-64. See also examples given in the discussion above of land agreements and trade.

⁷⁷ It is, nevertheless, an accommodation that is based on the recognition of due authority according to time and place; visitors or newcomers expect to follow the protocols of those whose land or place it is.

Another difficulty with arguments of cultural difference is that groups can be consigned to positions of irreconcilable difference. This is illustrated by the Tribunal's statement that 'Maori mental constructs', unlike European, 'were thus invariably circular'.⁷⁸ One might well ask, if this is the case, whether it is going to be possible for linear and circular to meet, or communicate? This implied irreconcilability appears more subtly in other discussions in the report, and underlies the picture of the Far North Maori and the Pākehā communities as each being 'a prisoner of their own world-view'. These sorts of explanations of cultural difference can be used to argue that 'the clash of cultures' was inevitable, that no party carries culpability for the harm done to the other, and that claims for redress do not carry any weight – which rather negates a key reason for the Tribunal's investigations. In the end, the Tribunal does make assessments of the actions of the Crown, but some of its discussion around cultural difference does not help the clarity of its argument.

The final consideration in this chapter is given to the evidence in the report for the Far North comprehension of the relationship between economy and spirituality, and the ability of the Far North people to incorporate Christian beliefs within their philosophical and theological framework. The Tribunal's treatment of these matters belongs within a discussion of the relationships between the hapū and the early missionaries, and follows the explanations of the hapū's incorporation of outsiders.

The subject of how the Far North people understood the relationship between economy and spirituality arises because some of the missionaries are recorded as being concerned 'that the Muriwhenua people were keener on trade than on God'.⁷⁹ The Tribunal believes that the missionaries did not seem to understand 'that Maori saw divine authority as part of everyday business, that gods supervised trade as much as anything else and they were not confined to a church'.⁸⁰ The Tribunal points out that the missionaries fail to see the linking of trade and religion in their own practice: 'The whole thrust of the missions was to introduce agriculture and industry at the same time as the Christian religion, so that the material advancement of the people was connected

⁷⁸ *Muriwhenua Land Report*, 26.

⁷⁹ *Muriwhenua Land Report*, 58.

⁸⁰ *Muriwhenua Land Report*, 58.

to religious enthusiasm and knowledge'.⁸¹ The Far North people had no difficulty in appreciating these links, for their whole pattern was to seek divine help in all their activities, whether it was planting, harvesting, fishing, hunting, travelling, or war.⁸²

The Tribunal also comments on the capacity of the whānau and hapū to incorporate Christian beliefs within their philosophical and theological framework. This is in further response to its question: did Māori, on interaction with Europeans, abandon their old ways and change to the new?⁸³ As with its earlier findings regarding the 'practice of incorporation', the Tribunal judged that the taking on of Christianity was a case of incorporation rather than outright conversion. Even during the Tribunal's hearings, it often found that Christian prayers were being used to safeguard Māori sacred places.

It seemed to us that Christianity has not taken over Maori culture but had been incorporated into it. The missionaries went to debase Te Reinga, and now, Christian services are used to maintain its sacred character.⁸⁴

The Tribunal notes the input of Reverend Maori Marsden and Rima Edwards who both showed how scriptural understandings, and Hebrew and Greek theology, 'offered a spiritual and philosophical dimension with which Maori could be immediately knowing and comfortable'. Indeed, in Rima Edwards' view, 'Even the biblical understanding of land tenure had close empathy with Maori thinking'.⁸⁵ The information and explanations offered on these matters convinced the Tribunal that, in matters of religious belief as well as trade and the reception of outsiders into the community, the Far North hapū had continued to act on the basis of incorporating new elements rather than any radical conversion to European ways.⁸⁶

By way of footnote, mention is made here of an incident that receives the briefest of attention in the report. In order to resolve tensions that had arisen between Panakareao's and Pororua's people in 1843, two outside rangatira were called on to act as mediators.

⁸¹ *Muriwhenua Land Report*, 48.

⁸² *Muriwhenua Land Report*, 48.

⁸³ See *Muriwhenua Land Report*, 50.

⁸⁴ *Muriwhenua Land Report*, 50.

⁸⁵ *Muriwhenua Land Report*, 51. Another interesting point is that while literacy 'spread rapidly amongst Maori' the medium was the Māori language and 'the written material was almost entirely from the Bible, where the tradition was not English but Judaic'.

⁸⁶ See *Muriwhenua Land Report*, 40-52.

Skirmishes occurred elsewhere in Oruru Valley, however, and about a dozen had been killed when, as was also usual in Maori affairs, two well-known rangatira from outside intervened as mediators: Tamati Waka Nene and Mohi Tawhai. These Nga Puhi rangatira were linked to Pororua but also had aligned before with Panakareao.⁸⁷

This detail is of some significance. It provides insight into the means used by groups to reconcile differences. It clarifies why certain missionaries were called on to act as mediators between groups, especially in the late 1820s and 1830s. Having gained the respect and trust of the communities, they were called on to carry out a traditional role. As a commentary on the missionary, Henry Williams, notes when discussing how he was called on to negotiate peace between hostile groups: ‘Only a person who was held in regard would be invited to settle a conflict, and it required even greater mana to be successful’.⁸⁸ Once again, there can be seen at work that which is highlighted again and again in the *Muriwhenua Land Report*, the incorporation by the Far North hapū of outsiders and outside influences into their established dispensation.

This chapter has focused on the important issue of the intentions of the Far North hapū in giving a place to Europeans on their lands. These intentions are shown to be in accord with the established custom of ‘tuku whenua’, which involves the allocation of a place on hapū land to an outside group. It is a custom that was understood and practiced by tribal groups throughout the country. This custom allowed for the accommodation of outsiders according to understandings that made for the maintenance of long term, mutually beneficial relationships between tangata whenua and newcomers. It has been in the Crown’s interests to cast the transactions involved as ‘land sales’, but as the *Muriwhenua Land Report* shows it is very doubtful that the Far North hapū and their rangatira intended the outright sale of land in the agreements they made with European settlers leading up to 1840, or in the arrangements over land they made with the Crown in the years immediately following the signing of the Treaty of Waitangi. The chapter has shown that the hapū did not readily abandon their practices in favour of the ‘more advanced’ European ways, but that they had the capacity to embrace outside influences

⁸⁷ *Muriwhenua Land Report*, 136-7.

⁸⁸ R. Fisher, 'Henry Williams, 1792 - 1867', Dictionary of New Zealand Biography, updated 16 December 2003, URL: <http://www.dnzb.govt.nz/>

while retaining their accustomed social, economic, and political order.

This completes the considerations of the tribal communities in this part of the thesis.

The next chapter is based round information that relates to Te Whanau o Waipareira, a non-tribal Māori community. There is much in the forthcoming chapter, however, that adds to the understanding of how the tribal experience shapes the life and relationships of Māori communities today.

Chapter 4

At the Interface of the Tribal and Non-Tribal

The previous chapters have sought an understanding of the social relations of the tribal world through the study of information on the tribal communities of the Far North and Te Roroa. This chapter extends that understanding by drawing on material in the Waitangi Tribunal's *Te Whanau o Waipareira Report*. Although Te Whanau o Waipareira is a non-tribal community, there is a good deal in the *Te Whanau o Waipareira Report* that adds to an understanding of the practices, processes, and philosophies of the Māori world in its tribal and communal base. This is especially so because Te Whanau o Waipareira was established to 'reconstruct traditional Maori structures and patterns in an urban setting'.¹ The evidence in the report shows that although Te Whanau o Waipareira is not a tribal community, it is encompassed in the network of relationships that belong to the tribally-based world. The themes covered in this chapter include: the urban trust's recognition of tribal mana, the misrepresentations of the tribal world as hierarchically structured, the flexibility of the tribal order, the importance of locally-held authority for all Māori communities, rangatiratanga and its meanings, and the network of relationships that bind Māori communities, tribal and non-tribal.

The Te Whanau o Waipareira claim is particularly interesting because, as the Tribunal says, it 'breaks new ground in contending that a non-tribal group of Maori has rights under the Treaty of Waitangi'.² Background on the history, constitution, and work of the community is summed up as follows:

Te Whanau o Waipareira traced its origins to the first generation of Maori migrants to West Auckland during and after the Second World War, and the welfare work done ever since then by Maori community leaders for other Maori who had lost their traditional support networks as a result of urbanisation. The

¹ See New Zealand Waitangi Tribunal, *Te Whanau o Waipareira Report (Wai 414)*, Wellington, 1998, 10. There is also a significant correspondence between the Crown's treatment of Te Whanau o Waipareira, and of whānau, hapū, iwi, and marae generally – as later chapters of the thesis show.

² *Te Whanau o Waipareira Report*, xxii.

development of Hoani Waititi Marae during the 1970s and 1980s was seen as a major factor in drawing Te Whanau o Waipareira together as a community. It was argued that this solidarity now provided a mandate for the trust they established, which was constituted under the Charitable Trusts Act in 1984 as an umbrella organisation to promote the welfare and development of West Auckland residents, especially Maori.³

The trust's claim concerns the right of Te Whanau o Waipareira to be dealt with by the Crown as a Treaty partner. Legislation introduced in the late 1980s had put an obligation on Crown agencies to recognise 'Iwi' as Treaty partners, but in the early to mid 1990s this was interpreted by the Department of Social Welfare and the Community Funding Authority as referring only to kin-based groups. The claimants' counsel argued that this limiting of the understanding of who could be a Treaty partner did not accord with the recommendations that had led to the drawing up of the legislation;⁴ and the narrow interpretation of iwi went against the more liberal approach taken by Government departments in the period following the passing of the legislation.⁵

Right at the beginning of the *Te Whanau o Waipareira Report* the claimants made it clear that they recognise the mana whenua of the traditional hapū of West Auckland. The Tribunal says that: 'Waipareira ... acknowledged the mana whenua claims by Ngati Whatua Nui Tonu and Tainui Nui Tonu. The trust said it had no desire to usurp the status of the traditional hapu, but neither did it want to be prejudiced by an ideology that deals exclusively with or prefers kin-based bodies'.⁶ The Tribunal, too, made its acknowledgement of the tangata whenua, recognising Ngati Whatua as the tribe with mana whenua in the area:

While the focus of this inquiry was on Waipareira and its relationships with the Crown, the Tribunal well understood that Waipareira's operations are conducted within the mana whenua of Ngati Whatua, and that Ngati Whatua maintain their own relationships with the Crown. The Tribunal was also aware of Ngati Whatua of Tamaki's relations with Maori who migrated into Auckland, in particular the hapu's long history of attempting to fulfil *its* obligations of providing care and hospitality to the living and the resources of its urupa to the dead for those not of Ngati Whatua.⁷

³ *Te Whanau o Waipareira Report*, xxii.

⁴ See *Te Whanau o Waipareira Report*, Chapter 4.

⁵ *Te Whanau o Waipareira Report*, 6.

⁶ *Te Whanau o Waipareira Report*, 3.

⁷ *Te Whanau o Waipareira Report*, 3.

This acknowledgement reveals the same understandings with regard to mana whenua that were discussed in the Te Roroa report. Mana whenua belongs to those that have established ancestral connections to the land and have kept the home fires burning. They are recognised as having authority over the land and resources of their rohe, and as having duties of care towards the land and those that come to reside on the land. In giving recognition to those with mana whenua, the Tribunal does not suggest that they are the only Māori authority that should be recognised within a particular area; it cites the Waipareira Trust's assertion that 'both non-tribal and kin-based Maori organisations should be recognised as having a mana of their own, and funding should be adequate for both to provide services to their communities'.⁸

In the discussion regarding the respective mana of the tangata whenua and the non-tribal trust, one can discern that both Ngati Whatua and Waipareira have concerns about recognition and funding. As will be shown, the Tribunal assesses that Waipareira deserves recognition in terms of principles that come out of the Māori tribal tradition; in part, this is because it is a tradition that can accommodate overlapping groups, each with its own authority. Working from the traditionally-derived principles, the Tribunal ensures that at the same time due recognition is given to Ngati Whatua as tangata whenua, and sums up the apprehensions expressed by Tom Parore of Te Runanga o Ngati Whatua:

Thus, while Ngati Whatua were willing to recognise non-tangata whenua initiatives in caring for their own, the Tribunal was told that they, Ngati Whatua, hoped non-tangata whenua would not now come to subvert Ngati Whatua's right to an appropriate share of Crown welfare resources to care for themselves and to provide for others who turn to the tangata whenua for assistance.⁹

Tom Parore went on to say that just as with future health funding the Runanga, representing Ngati Whatua as tangata whenua, hoped to have a particular role to play in determining the overall funding of community services in their area. The report does not give a response by Te Whanau o Waipareira to Tom Parore's statement of position, although the general statement is made that 'Waipareira saw no conflict with the

⁸ *Te Whanau o Waipareira Report*, 3.

⁹ *Te Whanau o Waipareira Report*, 4.

traditional hapu of West Auckland arising from this claim.’¹⁰ What comes through from the Tribunal’s treatment of these matters, is the contemporary relevance of traditional values and practices. The recognition of mana whenua is shown to be of consequence still, as are the principles for understanding the respective authorities of different groups within an area.

There are other characteristics of the tribal order that are alluded to in this report and are demonstrated to be alive and active today. One is the autonomy of Māori communities, as recognised in the courtesies that groups practise towards one another. For example, Mr. John Tamihere in speaking for the Waipareira trust says: ‘It is important and significant for the Tribunal to note that under no circumstances does Waipareira Whanau hold itself out as advocating or having the ability to speak on behalf of Ngati Whatua or Tainui.’¹¹ Mr. Tamihere’s clarity about the limits of his and Waipareira’s authority is like that of the claimant witnesses cited in the Muriwhenua Fishing report who, ‘spoke for their own hapū or tribes and did not presume to describe areas to which they did not belong’.¹²

A further characteristic of the tribal order, alluded to earlier, is the geographical overlapping of the boundaries between groups. Distinctions between communities are established by the relationships between people, not by the drawing of rigid lines on a map. In response to questions that were raised by Crown representatives as to whether or not Te Whanau o Waipareira represents the Māori of West Auckland – with the implication that it would thereby have to represent all the Māori in the area – the Tribunal said:

Importantly, however, it is our view that Waipareira does not have to represent every individual Maori in West Auckland in order to qualify for the recognition of its rangatiratanga by the Crown. The traditional hapu of West Auckland clearly have interests in terms of the Treaty without having to demonstrate that they represent ‘the West Auckland Maori community’. Each group simply represents its own community, and there can be more than one Maori community in West Auckland. No doubt there are other Maori groups in West Auckland as well.¹³

¹⁰ *Te Whanau o Waipareira Report*, 3.

¹¹ *Te Whanau o Waipareira Report*, 76.

¹² *Muriwhenua Fishing Report*, 37.

¹³ *Te Whanau o Waipareira Report*, 14.

As the report indicates, when Government departments operate within defined regional boundaries, they can have considerable difficulty in responding to the needs of communities whose criteria for belonging do not correspond to these boundaries.

A critical aspect of the tribal social and political order that the Tribunal makes comment on is the understanding of whānau, hapū, and iwi relative to each other.¹⁴ One of the first clarifications made is that traditionally the tribal world was *not* built on a hierarchy of groups, with iwi at the top and whānau at the bottom.

The conception that all these groups [iwi, hapu and whanau] function in much the same way, but are found at different levels of the organisational hierarchy, (i.e., that hapu are sub-divisions of iwi, and whanau sub-divisions of hapu) may be a Eurocentric view of Maori society, one where power is seen to reside at the top with its exercise delegated to the people below.

The Maori reality prior to European contact appears to have been quite different. It was the whanau and hapu that were the effective and autonomous units of Maori social and political organisation. These provided a person's primary source of security and identity, because members lived and acted together as a community.¹⁵

Since the 'hierarchical' conception alluded to by the Tribunal is still widely held and continues to have an influence on the Crown's dealings with Māori communities, some supplementary sources that lend support to the Tribunal's assessment are referred to here.

Angela Ballara's work on 'Iwi' shows that there has been a history of scholarly and official writing going back to the nineteenth century that has promoted the hierarchical model of Māori society, with iwi as most important, then hapū, and lastly whānau.¹⁶

Ballara demonstrates the inaccuracies on which the model is based.¹⁷ Her studies lead her to conclude that historically hapū rather than iwi autonomy has been crucial, and that despite contact with and pressure from the Pākehā world the assertion of hapū autonomy continues.¹⁸

¹⁴ *Te Whanau o Waipareira Report*, 17-19.

¹⁵ *Te Whanau o Waipareira Report*, 17.

¹⁶ Ballara, *Iwi*, Chapters 5 and 6.

¹⁷ Ballara, *Iwi*, Chapters 4, 5, and 6.

¹⁸ Ballara, *Iwi*, 282.

The value that Māori groups have traditionally placed on local autonomy has been elucidated by Edward Durie, former Chief Judge of the Maori Land Court and Chairperson of the Waitangi Tribunal. In 1996, he delivered the 'F W Guest Memorial Lecture' and made the following comments when generalising some key elements of Maori law, and of the society that animates it:

The first [principle] is that political power was vested at the basic community or hapu level. Power flowed from the people up and not from the top down. Control from a centralised or super-ordinate authority was antithetical to the Maori system. Indeed, it is probably an understatement to say that Maori did not develop a central political agency, and more correct to assert that Maori ethic was averse to it.¹⁹

Although, Ballara and Durie are talking more in terms of the historical context, they both see the historical as having a bearing on contemporary tribal values and practices. The contemporary importance of local autonomy to tribal communities is apparent from the writing of a number of Māori scholars who are challenging pressures from the Crown to conform tribes to a hierarchical model. This stems from Government moves since the late 1980s to establish 'iwi authorities' as centralised bureaucracies designed to handle the allocation of resources from the Treaty settlement process, and the service and delivery agents of Government departments.²⁰ In commenting on this situation as it affects the Treaty settlement process, Roger Maaka says:

Even in a political climate that recognises the tribe, the government has pressured Māori to codify the tribe into a form that fits its own notions of political organisation. This pressure has resulted in a hierarchical model that leads to a centralisation of tribal influence ...
The concentration of tribal power in a centralised form, such as trust boards or rūnanga, may be effective for some, notably Ngāi Tahu, Tainui and Ngāti Tūhwharetoa. For others, local interest by far outstrips any notion of centralised control, as is illustrated in difficulties with settlement processes in Taranaki, Muriwhenua, and Te Whakatōhea. For the majority of tribes tino rangatiratanga as self-determination means a major emphasis on local control of local resources.²¹

¹⁹ E. T. Durie, 'F W Guest Memorial Lecture 1996: Will the Settlers Settle? Cultural Conciliation and Law', Otago: Faculty of Law, University of Otago, 1996, 2.

²⁰ See, for example, Cheryl Waerea-i-te-rangi Smith, 'Kimihiā te Maramatanga: colonisation and iwi development', MA Thesis, University of Auckland, 1994, 72-8. Waerea-i-te-rangi Smith discusses how after decades of state neglect of tribes, the Government has recently introduced policies to support 'iwi development', but according to Government-prescribed definitions of 'iwi'.

²¹ Roger Maaka, 'A Relationship, Not a Problem', in Kenneth Coates, P.G. McHugh, *Living Relationships: Kōkiri Ngātahi: the Treaty of Waitangi in the new millenium*, Wellington, 1998, 203.

Maaka's connection of the exercise of tino rangatiratanga with the 'local control of local resources' reflects the understandings of the respect for the autonomy of communities that are conveyed in the Muriwhenua Fishing and Te Roroa reports.

While the Tribunal for the Te Whanau o Waipareira claim emphasises the importance of local autonomy in the tribally-based world, it recognises the capacity of the hapū who were linked by common descent to federate as an iwi under a single leader in order to pursue common enterprises, but even then the wider authority 'depended on the support from below'.²² It also recognises that: 'Following European colonisation the term 'iwi' came to signify the larger aggregations of hapu that more regularly came together for political purposes'.²³ In discussing the meanings of 'iwi', the Tribunal gives examples that show that 'iwi' has been used to refer to the people of a district or country, and those engaged in an expedition, as well as those of the same kin-group.²⁴ Significantly for this claim, the Tribunal points to a consistency of opinion that today 'iwi' can mean 'either the people of a place or a large tribe composed of several dispersed groups'.²⁵

The Tribunal reiterates other themes regarding tribal communities and their membership that appear in the earlier-considered reports. It explains that:

In traditional Maori society, prior to European contact, descent determined eligibility, but Maori custom required that inherited rights in the community be maintained by an *ahi ka*, a burning fire that was kept alive through residence or continued association. Status as a member of a hapu depended on the commitment and contribution to community undertakings. So a person's hapu affiliation could change during their lifetime, as a result of defeat in battle, family feud, strategic alliance or change of residence.²⁶

The flexibility of the tribal order is emphasised by the Tribunal. It notes that members of a single whānau, could identify with different hapū, where, for instance, brothers and sisters were raised by different grandparents.²⁷ The identity of the group could also change: 'Whanau and hapu were constantly coalescing, splitting up and regrouping in a

²² *Te Whanau o Waipareira Report*, 17. See Ballara, 145.

²³ *Te Whanau o Waipareira Report*, 18.

²⁴ It includes as an example the use of 'nga tangata o tona iwi' in the Treaty of Waitangi for the people of the Queen's nation, 'meaning settlers and migrants from England'.

²⁵ *Te Whanau o Waipareira Report*, 18.

²⁶ *Te Whanau o Waipareira Report*, 17-18.

²⁷ *Te Whanau o Waipareira Report*, 18.

dynamic state of flux'.²⁸ The flexibility and adaptability of Māori tribal society, in contradistinction to the presentation of it as static in structure, is also highlighted by Angela Ballara. She believes that, as yet, there is little written material that fully comprehends the dynamic nature of the tribal system, and the capacity of the social and corporate groups within it to adapt to changing circumstances.²⁹ In summing up its own reflections on 'iwi, hapu, and whanau', the Tribunal says: 'Clearly, descent does not provide a complete explanation of Maori identity, nor of the dynamics of group formation and interaction, prior to European contact or since. Ancestry provides a grid, or a framework, but there is more to Maori identity than that'.³⁰

While the Tribunal stresses the flexibility of the tribal social order, it does distinguish the non-tribal community from the tribal, as can be seen from its explanation of why Te Whanau o Waipareira does not count itself as a tribal community: 'Waipareira did not claim to be an 'iwi', in the tribal sense, because membership is not on the basis of kinship, and the trust does not have a rohe, a customary territory, over which it claims mana whenua'.³¹ The Tribunal thus specifies three general characteristics of a tribal group: kinship, customary territory, and mana whenua.

Because Te Whanau o Waipareira does not embrace these characteristics, the Tribunal seeks criteria by which to judge whether it deserves to be recognised by the Crown as a Treaty partner. The Tribunal does this by looking to the structures, organisation, and values that have traditionally been carried by Māori tribal communities, to see whether it can identify principles by which a Māori community can qualify for recognition by the Crown as a Treaty partner.³² In seeking out such principles, the Tribunal does not want to be unnecessarily prescriptive; and it settles, in fact, on one overarching criterion: the exercise of rangatiratanga by the community, or in other words, 'the demonstration of rangatira values in action, albeit in a modern setting'.³³ The Tribunal consequently takes some care to spell out the meaning of rangatiratanga, and how it

²⁸ *Te Whanau o Waipareira Report*, 18.

²⁹ Ballara, *Iwi*, 18-21.

³⁰ *Te Whanau o Waipareira Report*, 18.

³¹ *Te Whanau o Waipareira Report*, 6.

³² See *Te Whanau o Waipareira Report*, Chapter 3.

³³ *Te Whanau o Waipareira Report*, xxv.

could be expected to apply in a community like that of Te Whanau o Waipareira. It is in these explanations of rangatiratanga that much is revealed about the working of the tribally-based world, adding to understandings that have emerged in earlier considerations.

In presenting ‘a considered Maori opinion’ of the meaning of rangatiratanga, the Tribunal turns first to the definition put forward by the New Zealand Maori Council in 1983, and which provided the philosophic basis for the Te Ture Whenua Maori Act of 1993.³⁴ This definition places the reciprocity of relationships and the trusteeship of a group’s taonga at the heart of rangatiratanga:

In its essence it [rangatiratanga] is the working out of a moral contract between a leader, his people, and his god. It is dynamic not a static concept, emphasising the reciprocity between human, material and non-material worlds. In pragmatic terms, it means the wise administration of all the assets possessed by the group for that group’s benefit: in a word trusteeship. And it was this trusteeship that was to be given protection [by the Crown], *a trusteeship in whatever form the Maori deemed relevant*. [Emphasis added.]³⁵

Through the report, the Tribunal expands on the implications of the Maori Council’s definition. It clarifies that the base for the exercise of rangatiratanga is a world where the sacred informs the secular, and vice versa. ‘For Maori, rangatiratanga has both sacred and secular aspects, neither of which should be isolated from the other.’³⁶ The explanation regarding the guardianship of taonga illustrates this point:

The exercise of rangatiratanga over taonga proceeds from the perception that the people and taonga are part of the same universe, regulated by the atua (gods). In exercising care and protection, nurturing, conserving and maintaining taonga for the future benefit of the group (commonly called kaitiakitanga), rangatira have always sought divine sanction for the responsible use of those taonga.³⁷

In this passage, another important aspect of rangatiratanga is brought out, that of the obligations of care and nurture that it involves, whether of people, the land, or taonga in general. In the tribally-based world, the exercise of authority presupposes the exercise

³⁴ *Te Whanau o Waipareira Report*, 23.

³⁵ *Te Whanau o Waipareira Report*, 23; citing New Zealand Maori Council, *Kaupapa: Te Wahanga Tuatahi*, 1983.

³⁶ *Te Whanau o Waipareira Report*, 23.

³⁷ *Te Whanau o Waipareira Report*, 25. One can recognise in this passage themes that were important in the Te Roroa report: the unity of all things, the importance of taonga, and the intimate link between the exercise of rangatiratanga and kaitiakitanga.

of kaitiakitanga or guardianship for all that is important to the group.³⁸

Implicit in the Maori Council's definition and the explanations given by the Tribunal, is the understanding that rangatiratanga resides – of necessity – in a community, and that rangatiratanga has application to all that is important in the life of a community.³⁹ This was a matter of particular concern to the Tribunal because the Crown, in its submissions, had argued that the 'tino rangatiratanga' of Article 2 in the Treaty of Waitangi has reference to 'issues of ownership of land, forests, fisheries, and other Maori taonga', and *not* the sorts of activities carried out by Te Whanau o Waipareira 'concerning training, employment, education and community development'.⁴⁰ The Tribunal does not agree with the Crown's position. Although it recognises that the understanding of rangatiratanga is rooted in a pre-European tradition, and that the 1840 context was that of whānau and hapū with a shared heritage and territory, it points out that the Maori Council was aware of the consequences of urbanisation and deliberately did not limit rangatiratanga to hapū, or a narrow range of activities.⁴¹ The Tribunal shows, in fact, that the care of community members belongs to the essence of the exercise of rangatiratanga.⁴²

The Tribunal reinforces the point that the principle of rangatiratanga is seen as applying generally – that is, as a right of autonomy in a variety of situations neither restricted to tribes nor confined to the management of lands and fisheries – by referring to the conclusions of the Tribunal in other reports and recent Court judgments. These conclusions and judgments have described the Treaty relationship as a partnership where the Crown's kāwanatanga, or the Crown's authority to govern, is juxtaposed with the rangatiratanga of tribes and Maori in general.⁴³ The Tribunal speaks, too, about the importance of rangatiratanga to all Māori communities, and in a whole range of situations:

³⁸ For further explanation of the rangatiratanga/kaitiakitanga connection, see M. Kawharu, 'Dimensions of Kaitiakitanga', Chapter 3.

³⁹ *Te Whanau o Waipareira Report*, 23-26.

⁴⁰ *Te Whanau o Waipareira Report*, 11.

⁴¹ *Te Whanau o Waipareira Report*, 23-4.

⁴² *Te Whanau o Waipareira Report*, 24. The Tribunal cites the example given in William's *A Dictionary of the Maori Language*: 'Ko te rangatiratanga o te wahine nei, he atawhai ki nga tangata o tona iwi': 'The rangatiratanga of this woman is in the kindness she shows the people of her tribe'.

⁴³ *Te Whanau o Waipareira Report*, xxv-xxvi.

A relationship of rangatiratanga between leaders and members is how a Maori community defines itself; it gives a group a distinctly Maori character; it offers members a group identity and rights. In short rangatiratanga applies to much more than the customary ownership of lands, estates, forests, fisheries and other taonga. It describes a value that is basic to the Maori way of life, that permeates the essence of being Maori.⁴⁴

This statement reflects another point brought out by the Tribunal: that it belongs to Māori people and Māori communities to define who they are and their mode of operating.

In a similar vein, the Tribunal asserts that the principle of rangatiratanga requires the recognition and enhancement of the ‘autonomous action and management’ of Māori communities.⁴⁵ Rangatiratanga derives its meaning from how relationships are lived out in the Māori world, and respect for the autonomy of each community is a basic principle of inter-group relations.

[Rangatiratanga] is attached to a Maori community and is not restricted to a tribe. The principle of rangatiratanga appears to be simply that Maori should control their own tikanga and taonga, including their social and political organisation, and, to the extent practicable and reasonable, fix their own policy and manage their own programmes.⁴⁶

The Tribunal explains that tikanga includes all customs, values and laws⁴⁷ and that taonga ‘encompasses all those things which Maori consider important to their way of life’.⁴⁸ The reason the Tribunal spells out these matters is because the policies of the Crown and the actions of its departments had not shown due regard for the autonomy that the Waipareira Trust needs to exercise if it is to be effective in pursuing the best interests of its people.⁴⁹ This understanding of a community’s autonomy would not normally need to be explained to a Māori audience, because respect for the tikanga and taonga of each group is built into protocol that is accepted across the Māori tribally-based world. As the Tribunal points out ‘respect for other Maori communities’ is an

⁴⁴ *Te Whanau o Waipareira Report*, 26.

⁴⁵ *Te Whanau o Waipareira Report*, 16.

⁴⁶ *Te Whanau o Waipareira Report*, xxv-xxvi.

⁴⁷ *Te Whanau o Waipareira Report*, 26-7.

⁴⁸ *Te Whanau o Waipareira Report*, 26.

⁴⁹ See discussion in Chapter 9 of the thesis.

important Māori value, one which is ‘still played out in marae proceedings’.⁵⁰

Though the Tribunal insists that rangatiratanga equates with a right of autonomy that cannot be limited to a narrow range of situations, it also says that rangatiratanga is not absolute.⁵¹ This follows from the fact that an important dimension of rangatiratanga is the establishing of relationships of reciprocity. The flexibility and respect required of such relationships are discussed by the Tribunal when it looks at what is required in the Treaty-based relationship between Māori communities and the Crown. The Tribunal says, ‘In this situation neither rights of autonomy nor rights of governance are absolute but each must be conditioned by the other’s needs and their duties of mutual respect.’⁵² The partnership is described as ‘a relationship where one party is not subordinate to the other but where each must respect the other’s status and authority in all walks of life’.⁵³

The Tribunal takes the understandings it has outlined regarding rangatiratanga, and applies them to assessing whether Te Whanau o Waipareira is a Māori community marked by rangatira relationships. The Tribunal found that it was in the operation of Te Whanau o Waipareira’s marae that the exercise of their rangatiratanga was most clearly to be seen.

It was the marae, however, that eventually consolidated and focused the Maori ethos and identity of Te Whanau o Waipareira ... It was evident to the Tribunal that the principle of reciprocity and loyalty between kin in a tribal group had been transposed into a group of non-kin at Waipareira and enhanced through their common endeavour of building the marae. On its completion, there was an effective network of kaumatua and kuia, of rangatira, of rangatahi and mokopuna, all bound together by a Maori spirit unique to Te Whanau. It was not the bond found at a deeper level of spirituality that is inherent in the reverence among kin for their ancestors. But Waipareira was indeed a community, one in which there were both leaders and the led, where there were rewards of approval and promotion, protected by sanctions of rebuke and exclusion, and where voluntary service was the high ideal. While not at all limited to the marae, these values and attitudes were brought to a focus on the marae, where debate could be joined, hospitality offered, cultural exercises practised, and grief for the departed shared.⁵⁴

⁵⁰ *Te Whanau o Waipareira Report*, 219. Each marae, for instance, has its own kawa or etiquette, which visitors are expected and expect to follow. See Salmond, *Hui*, 147-166.

⁵¹ *Te Whanau o Waipareira Report*, 25, 30-31.

⁵² *Te Whanau o Waipareira Report*, 30-31.

⁵³ *Te Whanau o Waipareira Report*, 27-8.

⁵⁴ *Te Whanau o Waipareira Report*, 76-7.

The detail in this passage is revelatory not only of Te Whanau o Waipareira but also of what is typically to be found in kin-based marae. It was on the basis of such evidence that the Tribunal was able to say of Te Whanau o Waipareira that it nurtured and fostered ‘dimensions of rangatiratanga and the ethic of whanaungatanga’.⁵⁵

While the contribution of Te Whanau o Waipareira as a Māori community that exercises rangatiratanga in welfare matters is recognised, the Tribunal includes a reminder of the particular benefits that come through membership of a tribal community. Through kinship tribal members may gain access ‘to their own traditional natural resources, tribal history, oral literature and traditions, tribal dialect, and other taonga which are only accessible through this channel, and only by the appropriate people’.⁵⁶ These are treasures that cannot be procured except through the kin-based group. The Tribunal stresses, therefore, the need for the active protection of the tribal communities.⁵⁷ Having given this affirmation of the importance of the kin-based community, the Tribunal immediately adds: ‘But it does not follow from this that genealogy is the only principle of Maori social and political organisation’.⁵⁸

The Tribunal goes on to explain that the Māori tribally-based world has always accommodated change and the existence of different sorts of communities, and no doubt will continue to do so.⁵⁹ Māori people have been creative ‘in adopting a range of institutions to meet their needs’ and this creativity is ‘consistent with a freedom of choice, and there is historical evidence that Maori valued their freedom’.⁶⁰ The Tribunal believes that this freedom of choice stems from the nature of rangatiratanga itself:

We have noted that rangatiratanga arises from the reciprocal relationship between members and leaders of a Maori community. The loyalty and support of the community is a vital ingredient of rangatiratanga, and that flows from the exercise of choice by individuals. Rangatiratanga cannot be imposed on the people – the people choose their own rangatira and create their own communities.⁶¹

⁵⁵ *Te Whanau o Waipareira Report*, 79.

⁵⁶ *Te Whanau o Waipareira Report*, 217-18.

⁵⁷ *Te Whanau o Waipareira Report*, 217-18.

⁵⁸ *Te Whanau o Waipareira Report*, 218.

⁵⁹ *Te Whanau o Waipareira Report*, 218. See also, Ballara, *Iwi*, 18-21.

⁶⁰ *Te Whanau o Waipareira Report*, 218-19.

⁶¹ *Te Whanau o Waipareira Report*, 219.

Because there has always been this flexibility in the constitution of Māori communities, the Tribunal is of the opinion that the Treaty must allow for change in the structure and composition of Māori communities. What does remain the same are the customary values and principles, of which one is fundamental:

The fundamental principle of customary organisation is the survival of the community, requiring that its autonomy is to be protected, and ensuring the location of power and decision-making at the basic level of the functioning community.⁶²

This statement echoes another where the Tribunal is laying out what the Crown must comprehend in its devolution of resources and power to Māori communities as required by the Treaty of Waitangi.

What is the principle behind devolution to Maori but that Maori communities should be empowered to take control of their own affairs? What is the customary Maori principle but survival of the group, and therefore that community autonomy is to be maintained, ensuring the location of power at the basic level of the functioning community?⁶³

The principle that the Tribunal enunciates, that power and decision-making are located at the basic level of the functioning community, articulates well that which has been noted from the other reports regarding the location of political power in the tribal world. The Tribunal identifies the principle as one that derives from the tribal experience but which has application to all Māori communities that exercise rangatiratanga.⁶⁴

Interestingly, one can see from the discussion in the *Te Whanau o Waipareira Report* how the customary recognition of the rangatiratanga or autonomy of each community leads to the importance of consensus decision-making in the political process.⁶⁵ In explaining how the Crown can appropriately consult with Māori communities, the Tribunal says that approaching groups individually with surveys or requests for responses to policy documents is not good enough. The Tribunal advises that, instead, the Crown needs to provide the means for the communities to come together so that on the basis of acknowledging one another's rangatiratanga they can have the opportunity

⁶² *Te Whanau o Waipareira Report*, 219.

⁶³ *Te Whanau o Waipareira Report*, 216-17.

⁶⁴ *Te Whanau o Waipareira Report*, 216-19.

⁶⁵ See discussion of consensus decision making in Chapter 2 of the thesis.

to work for consensus. Such a process will not only facilitate a better overall outcome with regard to the issue under consideration but will also enhance the rangatiratanga of each of the communities involved.

We are suggesting here that each Maori group in a district should be consulted about how the delivery of funding for social services might best promote the development of Maori communities in the district. What is crying out throughout this claim is the lack of consultative forum, equivalent to the now-abolished district executive committees of the DSW [Department of Social Welfare]. On committees such as these, all the Maori groups of the district could come together, acknowledge the rangatiratanga of each other in accordance with Maori custom and, on this basis, seek a consensus on how best to apply whatever funding is available for welfare services, so as to maximise their rangatiratanga.⁶⁶

The Tribunal believes that this will lead to more effective debate between the Crown and the Māori groups of a district, as to ‘how to best balance the requirements of rangatiratanga with those of kawanatanga’, and that the outcomes of this sort of consultation will bring benefits both to the Māori communities and the Crown. In the words of the Tribunal: ‘By providing an opportunity for Maori communities to reach consensus, which enhances their rangatiratanga, the Crown enhances the quality of its kawanatanga, and the Treaty partnership is greatly strengthened’.⁶⁷ In this observation the Tribunal is making an assessment of what the Treaty requires of the Crown in the exercise of government; and the Tribunal does this on the basis of principles that are recognised in the tribally-based world, namely, the autonomy of each group and the reciprocity of relationship between groups.

The Waitangi Tribunal approaches the Te Whanau o Waipareira claim by identifying principles that have been fundamental to the social organisation of Māori communities from pre-European times to the present. It recognises the flexibility in the Māori social order that sanctions adaptation while holding to certain ‘essential principles’.⁶⁸ While these principles take their origins in the tribal world, they have application to a non-tribal Māori community like Te Whanau o Waipareira which is established to ‘reconstruct traditional Maori structures and patterns in an urban setting’. Nevertheless, the Waipareira community can only partially embody the comprehensiveness of

⁶⁶ *Te Whanau o Waipareira Report*, 220-1.

⁶⁷ *Te Whanau o Waipareira Report*, 220-1.

⁶⁸ *Te Whanau o Waipareira Report*, 15.

relationship that belongs to a tribal community. Te Whanau o Waipareira has a place within the tribally-based world but it stands alongside the tribal world.

It is from the basis of the understandings of the social relations of the Māori tribally-based world developed in this first part of the thesis that the actions of the Crown, and the social, political, and economic order that the Crown introduced, will be examined and assessed in Part 2.

Part 2

The Crown and the Tribally-based World

Chapter 5

The Establishment of Crown Authority

This chapter looks into the significance of some key steps taken by the Crown in establishing its authority in New Zealand. The chapter is divided into two sections: (i) the ‘pre-Treaty transactions’ and the initial assertions of Crown authority, and (ii) Crown rule and the active rejection of the tribal base to Māori society. The first section traces how the Crown dealt with issues over land in the Far North in the two decades after the signing of the Treaty of Waitangi. The area was the object of particular Crown attention because of the number of pre-Treaty land agreements between hapū and settler that had been made there. The consideration of what happened in the Far North has a broader perspective in that it includes the examination of policy and legislation that applied nationally. The second section of the chapter concentrates on the Crown’s actions with regard to tribes and their lands in the late 1850s and 1860s. The links between the Crown’s entrenchment of its rule and its rejection of the tribal base to Māori society are explored. Throughout the chapter any contradictions between the framework of authority established by the Crown and the ordering of the tribal world are highlighted.

(i) The ‘pre-Treaty transactions’ and the initial assertions of Crown authority

The subject of the pre-Treaty land transactions receives a good deal of attention in the *Muriwhenua Land Report* because the Crown’s promised investigation of these transactions resulted in a major loss of land for the hapū of the Far North. This section calls on information in the report in order to examine the Crown’s actions with regard to the Far North hapū and their lands that were the subject of pre-Treaty agreements or ‘transactions’. These actions are very much associated with early land policy and legislation, and the initial assertions of Crown authority.

The ‘pre-Treaty transactions’ is the name given by the Tribunal to the land agreements that were made between Far North hapū and European settlers in the time leading up to

the signing of the Treaty of Waitangi in February 1840. These agreements were accompanied by written deeds; and in 1839 and early 1840 there was a rapid rise in their number, arranged as they were by the settlers in anticipation of British ‘annexation’ of the country.¹ In total there were 62 deeds, and these related to ‘the most fertile land or that most accessible to the port for the export of timber’.²

The Tribunal is of the opinion that none of the transactions constituted a sale or alienation of land to the Europeans by the hapū concerned. This was on account of its findings on the understandings by which the hapu entered into land agreements with outsiders:

Maori contracted [the agreements] with Europeans on the basis of Maori law, which was the only law known to them and the only cognisable law in New Zealand before 1840. As a consequence, the pre-Treaty land transactions were not sales but at best conferred a personal right of occupation conditional upon the acceptance of the norms and authority of the local Maori community as represented in the rangatira.³

This statement is, of course, a summary of the Tribunal’s lengthy consideration of the pre-Treaty agreements, which is discussed in Chapter 3 of the thesis. It is important to keep in mind what the hapū intended in entering into the agreements when it comes to looking at the actions of the Crown in its investigation of the ‘pre-Treaty transactions’.

The investigation of the pre-Treaty land agreements, which took place in the early 1840s, was a consequence of assurances given by Governor Hobson at the time of the signing of the Treaty of Waitangi. During the debates at Waitangi, Hobson declared that all pre-Treaty land deals would be looked into.⁴ As the Tribunal indicates, this promise was probably designed ‘to appease the assembled Europeans’, who were anxious about the claims made by some Europeans that they had purchased large areas of land from

¹ *Muriwhenua Land Report*, 54.

² See *Muriwhenua Land Report*, 54, 173. The agreements were of three types: the granting of the use of an area to a settler family; agreements between hapū and settler to joint use of a specified area of land; and, least often, a deed where a Pākehā missionary or doctor was named to hold land in trust for a Māori community.

³ *Muriwhenua Land Report*, 392. The Tribunal adds: ‘The transactions imposed obligations on the settlers, of which the settlers ought reasonably to have been aware but which they generally did not fulfil’.

⁴ See *Muriwhenua Land Report*, 115. Although the Crown promised to investigate all the pre-Treaty agreements, in the end only 14 of the 62 were investigated. See *Muriwhenua Land Report*, 173.

Māori.⁵ The hapū and their rangatira did not share the same concerns as they did not judge that they had parted with their land. What was important to them was Hobson's promise, following complaints made to him, that the pre-Treaty transactions would be inquired into so that lands unjustly held by certain settlers would be returned to the hapū concerned.⁶ Also relevant to the Crown's treatment of the pre-Treaty land agreements were the explicit assurances given by Hobson, both before and at the time of the signing of the Treaty, that chiefly authority would be upheld and Māori custom would be protected.⁷

These assurances given by Hobson accord with what the Tribunal judges to be a principle intrinsic to the Treaty: 'that Maori would recognise and respect the Governor and the Governor's right of national governance, while the Governor would recognise and respect Maori and their rangatiratanga, by which was meant their laws, institutions, and traditional authority'.⁸ The Tribunal notes that the aspects of rangatiratanga that are important to this case 'include the right to have acknowledged and respected the hapu's system of land tenure and of contracting'.⁹ It is the argument of the thesis that this acknowledgement and respect were not given by the Crown. Although Governor Hobson paid some deference to tribal authority in the Far North in the first year following the signing of the Treaty, some of the historical evidence suggests that this was from convenience rather than any principled commitment to the relationship established through the Treaty of Waitangi.¹⁰

The history of the Crown's direct involvement in the pre-Treaty Far North land agreements extends from 1840 to 1865. The main events in this history are now outlined, and more detailed explanations of their significance follow. The first

⁵ See *Muriwhenua Land Report*, 115.

⁶ *Muriwhenua Land Report*, 390. The Tribunal explains (page 115) how the promise was given by Hobson in the days before the signing of the Treaty 'in direct response to Te Kemara, Rewa, and Moka, who alleged that seven Europeans (who were specifically named) were wrongly claiming their land and who challenged them to return it'.

⁷ See *Muriwhenua Land Report*, 113-15; 'Hobson to the New Zealand chiefs', 27 April 1840, cited in T. L. Buick, *The Treaty of Waitangi*, Wellington, 1914, 191; A. Ward, *A Show of Justice: racial 'amalgamation' in nineteenth century New Zealand*, Auckland, 1974, 45.

⁸ *Muriwhenua Land Report*, 390.

⁹ *Muriwhenua Land Report*, 390-91.

¹⁰ See *Muriwhenua Land Report*, 118-19. This gives background to the '1840 Mangonui transaction', which was discussed in Chapter 3. See also Ward, *A Show of Justice*, 45 ff.

legislation that was put in place to authorise the Crown's investigation of the agreements was the 1840 New Zealand Land Claims Act. It was enacted by the Legislative Council of New South Wales in Australia because, for the first few months after New Zealand was proclaimed as a Crown colony, the country was placed by the British under the jurisdiction of the New South Wales Government. The 1840 Land Claims Act was modelled on earlier New South Wales legislation which, as will be seen, was designed to address a situation in Australia that was not the same as that in New Zealand. Once the New Zealand Legislative Council was installed it replaced the New South Wales Act with very similar legislation, the 1841 Land Claims Ordinance. The 1840 Land Claims Act and the 1841 Land Claims Ordinance were meant to set the parameters for the Crown's investigation of the pre-Treaty land agreements. They were called 'Land Claims' legislation because they were directed to the investigation of claims to land made by Europeans on the basis that they had 'purchased' the land from tribes before the signing of the Treaty.

Commissioner Godfrey was sent to the Far North in 1843 to conduct the initial investigation of the agreements. His inquiry was a first step in the process, and was seen as such by the Crown. Godfrey helped execute a Government policy called 'the granting of scrip', which was to lead to the loss of land by the Far North hapū. In 1848, Magistrate White was assigned as the official Crown representative in the Far North. While it was not his task to follow up on the inquiry into the pre-Treaty land agreements, he took action that affected the final ownership of some of the land in question. Then in 1858, Commissioner Bell was sent to complete the investigation begun by Godfrey 16 years before. Through a scheme called the 'taking of surplus' he acquired a great deal of Far North land for the Crown.

The first of the land laws enacted in New Zealand was the 1841 Land Claims Ordinance which, as has been mentioned, was based on the 1840 Land Claims Act passed in New South Wales. The background given to this legislation given carries some important pointers as to how the Crown set about establishing its authority in New Zealand and its relationship with the Māori tribally-based world.

This ordinance [the Land Claims Ordinance 1841] was virtually identical to the New Zealand Land Claims Act passed by the New South Wales Legislative Council in 1840, which in turn was modelled upon a New South Wales Act of 1833 ... This [1833] Act concerned Australians who had purchased lands from earlier Australian squatters without title. Unlike the New Zealand legislation it had nothing to do with the indigenous people as the Aborigines were not seen as having any land rights. The intention was to give a title where none had previously existed. The only issue was whether one European had sold to another European ... It was accepted that any such transaction would be governed by English law, as that was the law common to both parties. In New Zealand, however, the pre-Treaty transactions were with Maori, who were governed by their own distinctive land laws.¹¹

The Tribunal goes on to argue that the transactions should have been assessed in terms of Māori law because English law had no currency in New Zealand prior to 1840, and it was Māori law that applied at the time the ‘transactions’ were made.¹² While there is a validity to the Tribunal’s reasoning, it is doubtful that a British colonial Government had the capacity to give due recognition to ‘native’ law. The Tribunal might equally have argued that the legislation did not sufficiently require the Commissioners to find out from the tribes what they had intended in their various land transactions with the Europeans, since the terms of the Treaty were very clear that the Crown was to ensure that the tribes retained their properties ‘so long as it is their wish and desire to maintain the same in their possession’.¹³

In its conclusions, the Tribunal does offer an assessment of the 1841 Land Claims Ordinance in terms of the Crown’s duty to protect the interests of the tribes as guaranteed in the Treaty. The Tribunal found the legislation to be deficient because it did not provide the basic means needed to assess: the true nature of the agreements; the absence of fraud or unfair inducement; the clarity of the boundaries of the land that was supposed to have been sold; the sufficiency of other land in the possession of Māori (to see that they had a viable economic base for the future); the right of the ‘seller’ to enter into the agreements; equity of treatment towards ‘settler’ and Māori; and an appropriate provision of reserves for Māori.¹⁴ This assessment of the first land legislation suggests a lack of commitment by the New Zealand Legislative Council to governing in the

¹¹ *Muriwhenua Land Report*, 393.

¹² *Muriwhenua Land Report*, 393.

¹³ Article 2 of the English language version of the Treaty of Waitangi.

¹⁴ See *Muriwhenua Land Report*, 395-6.

interests of Iwi Māori.

While the Tribunal criticises the Land Claims Ordinance because it fails to take into account the difference between the systems of law that applied in the Australian and New Zealand situations, it is the difference in the source of title to the land that is more significant. The initial 1833 New South Wales legislation concerned land that had been occupied by squatters, who had no title to the land. In the New Zealand situation, the occupants of the land were the hapū who had ancestral title to their lands, usually long held,¹⁵ and whose possession of their lands and estates was recognised by the Crown in the Treaty of Waitangi (Article 2). The fact that legislation designed for an inquiry into the acquisition of squatters' land was used, with minimal change, as the basis for inquiry into the acquisition of ancestrally owned land, indicates the superficial regard by the early Crown administration for the tribes and the ownership of their lands.

The example of the Land Claims legislation highlights an important factor in the establishment of Crown authority in New Zealand, namely, the effect of practices that were carried from colony to colony, with some local modification, across the British Empire. In the case of the Land Claims legislation an Australian model was used even though it did not fit the New Zealand situation, and the early land commissioners were appointed by the Governor of New South Wales.¹⁶ Elsewhere, David V. Williams has commented on how treaties were commonly used in the path towards the establishment of colonial rule.¹⁷

In tracing the loss of land by the Far North communities, the Tribunal discusses two methods by which the Government effected the alienation of hapū land that had been subject to pre-Treaty agreements with particular settlers: 'the granting of scrip' and 'the taking of surplus'. Before looking at each method in detail, it is as well to recall some

¹⁵ The ownership and entitlement of tribes to their lands has been described as arising 'from the original and inherent cultural integrity of the tribe'. See P. McHugh, 'The Legal and Constitutional Position of the Crown in Resource Management', in R. Howitt, ed., *Resources, Nations & Indigenous Peoples*, Melbourne, 1996, 302, citing B. Slattery, *Ancestral Lands, Alien Laws: judicial perspectives on aboriginal title*, Saskatchewan, 1983.

¹⁶ D. M. Loveridge, 'The New Zealand Claims Act of 1840, evidence given to the Waitangi Tribunal for Claims Wai 45 and Wai 12', 1993, 56.

¹⁷ See Williams, 'British Colonial Treaty Policies: a perspective', 48-50.

key points about these agreements.¹⁸ Through the early decades of the nineteenth century various European settlers were given a place on the land by the Far North hapū, according to their customary understandings of such arrangements. In the time leading up to the signing of the Treaty of Waitangi a number of the settlers arranged for a written deed of confirmation of the agreement between themselves and the hapū. This did not change the fact that for the hapū, whose land it was, the agreements gave conditional rights of occupation and were personal to the individual or family that concerned. In the Tribunal's assessment, none of the agreements involved the alienation of hapū land.¹⁹

The granting of scrip was a Crown solution to an issue that became apparent in the years immediately following the signing of the Treaty of Waitangi. When Commissioner Godfrey was sent in 1843 to inquire into the pre-Treaty land claims, he found that some of the land claimed by settlers was under dispute as to which tribal groups had the rights of ownership, and that it would be some time before the disputes could be sorted out. Because this was a cause of anxiety to the settlers, the Government offered them an arrangement whereby it would take on the land the settlers claimed they had bought from the tribes and give them land elsewhere, for the most part in Auckland.²⁰ This was called the granting of scrip, and quite a few of the settlers agreed to it.²¹ In sorting out scrip, the Commissioner, at the Governor's direction, arranged for a hearing with each of the settlers to assess the amount of land entailed and to identify its location. The hapū and their rangatira were excluded from these hearings, and thus from a knowledge of Government negotiations that affected their land.²²

Over time, the granting of scrip was to lead to the loss of land by the Far North hapū. In his inquiry, Commissioner Godfrey, was careful 'to show that the claims for which scrip was given were only 'alleged and not proven', thus indicating that further investigation

¹⁸ See Chapter 3 of the thesis.

¹⁹ See, *Muriwhenua Land Report*, 392: '... the pre-Treaty land transactions were not sales'.

²⁰ This accorded with the Governor's plan to bring as many settlers as possible to Auckland.

²¹ *Muriwhenua Land Report*, 128-9. Scrip was a certificate entitling the holder to a given amount of land. Most of the settlers took the scrip, apart from those who had married into local families.

²² See *Muriwhenua Land Report*, 128.

was necessary.²³ A very few years later, Magistrate White took no heed of Godfrey's advice and 'treated each one as though the native title had been fully extinguished and the land had become the Government's.'²⁴ From White's time (1848 onwards), the land was treated by the Crown as its own. By this process, a considerable quantity of land was taken from the Far North hapū and, as the Tribunal explains, the lands taken were some of the hapū's best, because the areas subject to the pre-Treaty agreements involved either the most fertile land or the land closest to ports for the export of timber.²⁵

In its examination of this matter and other measures taken by the Crown, the Tribunal points out that the effects of the Crown's actions were not seen by the hapū till some years later. The Far North communities continued to occupy and use the land that the Crown, on paper, had taken over. For them, their authority and their relationships to their lands and those who had come to settle were unchanged. Indeed, they were eager to have more Pākehā settle on their land, in anticipation of advantage to their communities. For many of the settlers, however, there had been a marked change of relationship.²⁶ Whereas their place on the land had been established in relationship to the local hapū, they now looked to the Crown to sanction their rights of settlement and ownership of land. For them, this was the consequence of Britain's annexation of New Zealand as a colony, and the passing of sovereignty to the Crown.

The granting of scrip demonstrates how Crown policy, right from the beginning, cut across the authority, rights, and social order of the tribal world. The agreement by which hapū gave European settlers a place on their land (*tuku whenua*) was personal to the settler concerned, and it was over to the hapū, as owners and source of the right to the land, to determine with whom the agreement was made.²⁷ Under the customary arrangements *tuku*'ed land could be transferred to a third party, but only if the transfer was cleared with the donor and their consent was obtained.²⁸ In any such transfer, the

²³ *Muriwhenua Land Report*, 188.

²⁴ *Muriwhenua Land Report*, 188-9.

²⁵ *Muriwhenua Land Report*, 54.

²⁶ Most of these settlers would have moved to Auckland under the scrip arrangement.

²⁷ Background on *tuku whenua* is given in Chapter 3 of the thesis.

²⁸ M. Kawharu, 'Dimensions of Kaitiakitanga', 40.

underlying title to the land remained with the donor, that is, the tribe who had the mana of the land.²⁹ In the transfer overseen by Godfrey, the Crown substituted itself as the party to the land agreement without the consent of the hapū whose land it was. By excluding the tribal proprietors from their dealings over scrip, settler and Crown acted in a way that overlooked the hapū's authority and law, and set aside the right of the hapū to establish with outsiders the conditions for settlement on their land.³⁰ Under Magistrate White, the Crown went further. When Godfrey marked off the areas claimed by the settlers under the scrip arrangements, he recorded that the claims had yet to be investigated. White simply took possession of the land for the Crown in an act of presumptive ownership. In effect, this action resulted in a complete denial of any hapū authority or interest in the land.

The Tribunal points out that the Crown's policy of substituting scrip for claimed land was contrary to its own Land Claims Ordinance, and previous proclamations 'that European land rights were not to be recognised until proven before land commissioners'.³¹ This was not to be the first time that the Government would overlook its own laws in dealing with tribal properties. The Tribunal was also critical of the fact that in the years since, the Crown had persisted in the view that 'the Government should not be obliged to prove its acquisitions or the valid extinguishment of native title'.³² The Tribunal's assessment regarding the scrip lands indicts not only the original acquisition of the lands but also the Crown's 'regular presumption' that it could not be subjected to enquiry or held to account over its acquisitions.³³

The second method by which the Crown took hold of lands that were subject to pre-Treaty agreements was through the taking of 'surplus' land. The 1840 New Zealand Land Claims Act and the subsequent 1841 Land Claims Ordinance set in place the conditions for the investigation of the pre-Treaty land claims. The purpose of the legislation was not only to enquire into the validity of the original agreements but also

²⁹ M. Alemann, 'Early Land Transactions in the Ngatiwhatua Tribal Area', 149-50.

³⁰ See *Muriwhenua Land Report*, 392.

³¹ *Muriwhenua Land Report*, 392.

³² *Muriwhenua Land Report*, 397. The justification for the Crown's position lies in the assumption of English law that 'the extinguishment of native title was an act of State and, as such, was not reviewable in the courts'. See *Muriwhenua Land Report*, 121-2.

³³ *Muriwhenua Land Report*, 398.

to ensure that there were limits to the amount of land gained by any particular individual.³⁴ Once the investigation had been conducted, the European concerned would receive their share as a grant from the Crown. The ‘surplus’ was the difference between the amount of land claimed by the individual as having been ‘purchased’ from the hapū and the amount allowed as a result of the Crown investigation. It was this surplus, which should have been returned to the hapū owners, that the Crown took for itself. The official who carried out the Government’s policy in the Far North was Commissioner Bell, whose ‘investigation’ of the pre-Treaty land claims took place in 1858.³⁵

The Crown’s taking of surplus raises a number of issues regarding the treatment of the Far North hapū, their mana, and the whole fabric of their relationships. The first point that the Tribunal brings out is that the Government wrongly assumed that there was a sale of land in the first place.³⁶ Without a sale, the Government had neither the right to grant ownership of land to the settler nor to take surplus for itself. The one thing it was entitled to do was to investigate the occupation of land by the settlers to see whether the rights to occupy were held justly. This was what was discussed and agreed at the signing of the Treaty of Waitangi.

Another issue is the Government’s *intrusion* upon the relationships that had been established between hapū and settler. These relationships were built on understandings of the hapū’s authority in the land and the fulfilment of on-going obligations between the parties. They were also personal to hapū and settler. The Tribunal explains how the particular conditions under which the agreements were made were overlooked by Bell.

Bell’s inquiry, 16 years later, altered the contractual relationships. Godfrey had simply given the area to which the European claimant was entitled, repeating (except in Puckey’s two cases) such joint occupancy or other special clauses as may have been in the deeds. Bell, however, not only increased the Europeans’

³⁴ Donald Loveridge’s background on the New Zealand Land Claims Act of 1840 (the Act that preceded the 1841 legislation) shows that this requirement had a great deal to do with the Crown’s ensuring its control of colonisation in New Zealand. The Crown did not want its authority to be upstaged by independent colonists with large land holdings. See D. M. Loveridge, ‘The New Zealand Claims Act of 1840’.

³⁵ The details of how ‘surplus’ was taken and how it affected the different Far North communities are given in Chapters 4 and 5 of the *Muriwhenua Land Report*.

³⁶ *Muriwhenua Land Report*, 177. The Tribunal also states on page 173 that: ‘In all circumstances, we consider there were no grounds for treating any transaction as a full and final conveyance of the land described in it’.

share substantially, but he gave unconditional grants, severing such ancillary obligations as may have been apparent.³⁷

In executing the policy of the taking of surplus, the Crown presented itself as the sole authority over the land in question. Its action undermined the authority of the hapū whose land it was, and diminished the relationship between hapū and settler.

A third difficulty with the taking of surplus land relates to the doctrine of tenure, which provided the theoretical justification for the Crown's action. The Tribunal explains the theory and its application to 'surplus':

The theoretical position was apparent from 1839, when the New Zealand Land Claims Ordinance was first proposed in New South Wales. Governor Gipps explained, after obtaining instructions from England, that it was founded on a political, legal theory that British law would be ushered in on the assumption of British sovereignty and, with it, the doctrine of tenure. Under this doctrine all land belonged to the Crown, subject only to native rights of user until those rights were extinguished. It followed that no individual could hold land except by Crown grant. In applying this theory, it was assumed that a sale by Maori did not convey land to the purchaser, but none the less it extinguished the Maori interest, leaving the land unencumbered in the Government's hands to dispose of as it wished. The Government could then decide how much it would give to the purchaser and what surplus it might keep for itself.³⁸

According to this theory, the Treaty of Waitangi made way for the assumption of sovereignty by the Crown and with that the underlying or radical title to all the land in the country.³⁹ The inherent title of hapū to their lands was considered as having been moved over to the Crown, and all that remained to the hapū were rights of use. This meant a complete overturning of the tribal system, something that could hardly be agreed to by the rangatira in signing the treaty.

The Tribunal discusses the doctrine of tenure and its implications in the *Muriwhenua Land Report*, and concludes that it does not fit with the Crown's commitments in agreeing to the Treaty. The Tribunal argues that if the Crown intended to claim rights to land other than those gained by 'fair and equal' contracts with Māori, then this needed

³⁷ *Muriwhenua Land Report*, 159.

³⁸ *Muriwhenua Land Report*, 174-5. For further background see D. M. Loveridge, 'The New Zealand Claims Act of 1840'.

³⁹ The 'radical' title is the technical term used in discussions of the doctrine of tenure; it means the same as the underlying title to the land.

to be stated at the time the Treaty was signed.⁴⁰ However, ‘quite the opposite impression was given’.⁴¹ After some length of argument, the Tribunal held that the doctrine of tenure was not applicable to the circumstances of New Zealand. Its reasons are summed up in the sentence: ‘All land belonged to Maori, the English legal doctrine had not been agreed upon when the Treaty of Waitangi was signed, and the underlying title was already spoken for.’⁴²

The Tribunal makes the point that the doctrine of tenure was not subscribed to, as a matter of course, by all British citizens, and notably so in the time nearer to 1840. The New South Wales land buyers argued against the theory saying that Māori were a sovereign and independent people. They, of course, did not want the Crown to intervene in their ‘purchases’. The settlers in New Zealand argued much the same although some of them admitted that the Government had the right to control land-buying, to prevent such things as undue land aggregation.⁴³ The Tribunal notes that many North Auckland settlers, in particular, ‘had developed close relations with Maori, and were strongly of the view that any part denied to any purchaser should return to Maori’.⁴⁴

The majority of the settlers, however, did not stay firm in their opinion that the balance of the land should return to the hapū. A decade later, most were happy to co-operate with Commissioner Bell when he introduced policy that encouraged them to claim as much land as possible as having been bought in their pre-Treaty agreements.⁴⁵ This would be to the advantage of both settlers and Government, at the expense of the tribal owners. The settlers who claimed large amounts of land were rewarded with a large share as grant from the Crown. At the same time, the ‘surplus’ gained for the Crown was even larger still.

As with the granting of scrip, the effects of the taking of surplus were not felt by the Far

⁴⁰ ‘Fair and equal contracts’ is the phrase used by Lord Normanby, Colonial Secretary, in his ‘Instructions’ to Hobson in 1839. See *Muriwhenua Land Report*, 118-19. For text of Normanby’s ‘Instructions’ see, T. L. Buick, *The Treaty of Waitangi*, Wellington, 1914, 70-9.

⁴¹ *Muriwhenua Land Report*, 175.

⁴² *Muriwhenua Land Report*, 177. See Section 5.7 ‘Assessment of the Issue of Surplus Lands’.

⁴³ *Muriwhenua Land Report*, 175.

⁴⁴ *Muriwhenua Land Report*, 175.

⁴⁵ *Muriwhenua Land Report*, 132-4.

North tribes till years afterwards. The transfer of land to Crown ownership had taken place on paper, and the communities continued to occupy their territories as before. In many instances, it was not till some decades later that the hapū realised that the Crown was acting as owner of land that they knew as theirs.⁴⁶ Once they came to that realisation, they immediately protested the taking of their land and their protests have continued through to the present claim to the Waitangi Tribunal.⁴⁷ As part of its investigation, the Tribunal looked into how the Crown had responded to the appeals that had been made to it over the years. It found that the basis for the Government's claims to 'surplus' were not simple, and that the matter had been dealt with 'by successive governments in an inconsistent, obscure, and irresolute manner',⁴⁸ with the result that the attempts of the Far North tribes to have their complaints addressed were repeatedly unsuccessful.

In offering a resume of what has been the situation with regard to the taking of surplus land, the Tribunal points out that over the years the Far North hapū have described the taking of the land as raupatu or confiscation:

Consistently, Maori have described the surplus land taking as 'confiscation'. Regularly, governments and commissions have said it was nothing of the sort. To the Maori mind, however, when the Government claimed the surplus land because it held the underlying title, it was confiscating the underlying title of the tribe; and when it took the surplus without arrangement with Maori, it was abrogating the rights and obligations Maori considered they had contracted with the Europeans.⁴⁹

The Tribunal acknowledges that there are some commentators who say that the use of the word 'confiscation' is inappropriate in the situation in the Far North as 'confiscation applied only to those who had taken up arms against the Government'. While these commentators might be accurate in a technical sense, the land was taken under the authority of the Crown and without any authority from the hapū to whom it belonged; in its effect the taking of surplus was the same as a confiscation of land.⁵⁰

⁴⁶ See Chapter 7 for some more detail on this situation.

⁴⁷ See *Muriwhenua Land Report*, 260-2, 404.

⁴⁸ *Muriwhenua Land Report*, 174.

⁴⁹ *Muriwhenua Land Report*, 177-8.

⁵⁰ See *Muriwhenua Land Report*, 3.

The loss of significant Far North lands, through the granting of scrip and the taking of surplus, resulted in the ‘substantial exclusion’ of the hapū from those lands and jeopardised ‘their future contribution to the community’.⁵¹ There was more, too, to the manner of the Crown’s acquisition of Far North land through its policies of scrip and surplus. By acting as it did, the Crown undermined the authority of the Far North tribes and devalued the relationships they had established from the base of that authority. All of this was in contradiction to the Crown’s treaty obligations, as is made clear by the Tribunal:

The Tribunal finds that the Crown policies and practices and acts which gave rise to the appropriation of the surplus lands were inconsistent with Treaty principles which require the Crown actively to protect Maori rights to their land, to ensure they maintain an economic base, and to respect the tribal autonomy and law. As a consequence, Maori were wrongly deprived of land they had not sold and over which they continued to exercise rangatiratanga.⁵²

While this statement specifically addresses the appropriation of surplus lands, it applies to the whole of the Crown’s dealings with the lands that were subject to the pre-Treaty agreements. These dealings, which belong to the very beginnings of Crown authority in New Zealand, were damaging to the economic base of the Far North hapū and undermining of their political authority and social relationships.

Far from signifying the start of a partnership between the Crown and the hapū, these dealings of the Crown demonstrate the arbitrary base on which the Crown established its authority in the Far North and throughout the country. Firstly, the Crown, by an act of its own definition, laid claim to the radical or underlying title of all the land. Then it set in place legislation and policy that worked to its own advantage and that of the European settlers. Where the hapū had welcomed the settlers onto their lands with a view to forming relationships of ongoing, mutual benefit – and looked to the Crown to reinforce their traditional authority and to help in the building of the new relationships – the Crown very quickly moved to a one-sided relationship with the tribes, a relationship that would lead to its own profit and dominance, at the expense of the prosperity and mana of the hapū.

⁵¹ *Muriwhenua Land Report*, 399.

⁵² *Muriwhenua Land Report*, 399.

(ii) Crown rule and the active rejection of the tribal base to Māori society

The Crown's policies regarding 'scrap' and 'surplus' had a particular impact on the Far North because of the number of pre-Treaty land agreements that had been made there.⁵³ From the late 1850s, the Crown adopted policies that were more wide reaching in their effects; these were purposely directed against tribal authority and the tribal ownership of land. The nature of these latter policies and the circumstances that led up to their adoption are outlined in this section.

There is some debate about whether the British Crown, in establishing an official presence in New Zealand, originally intended to extend its rule over Māori communities or just over its own people.⁵⁴ Regardless, however, of the intention of the British Colonial Office and Parliament at the time of the signing of the treaty at Waitangi, once sovereignty was proclaimed the colonial administrators started taking measures to establish Crown rule over all the communities in New Zealand, according to patterns they were familiar with from other parts of the British Empire.⁵⁵ For the colonial administration, the work of effectively establishing Crown rule was a slow process. Even though the Governors worked from the presumption that 'annexation' had taken place and that the country was under Crown rule, they knew that effectively this was far from the case. As the legal historian legal Richard Boast has pointed out, defining Crown sovereignty was one thing – ensuring its establishment was another:

Hobson's proclamation of sovereignty in May 1840 hardly touched Maori life and political structures at all. Whatever legal theory might be, the process of establishing *effective* State sovereignty took decades, and in the case of remote places such as the Urewera region was barely achieved by the start of the 20th century.⁵⁶

For a long time, in many areas, the colonial presence was too thin on the ground for Crown rule to have much, if any, impact. Then, as the evidence from the Far North shows, once hapū and their leaders became aware of the undermining of their authority through the actions of Government agents and officials, they were quick to show their

⁵³ The Far North had attracted the greater proportion of European settlers in the early decades of the nineteenth century.

⁵⁴ See, for example, P. Moon, *Te Ara ki te Tiriti: The Path to the Treaty of Waitangi*, Auckland, 2002.

⁵⁵ See P. Moon, *Hobson: Governor of New Zealand 1840-1842*, Auckland: David Ling, 1998.

⁵⁶ R. Boast, 'The Law and the Maori' in P. Spiller, J. Finn, R. Boast, eds, *A New Zealand Legal History*, Wellington, 1995, 133.

resistance.⁵⁷ In other parts of the country, and especially through the central part of the North Island, the resistance to the Crown's acquisition of tribal lands led to the formation, in the 1850s, of anti-selling leagues.⁵⁸

There were two intimately linked factors that influenced the efforts of the colonial government to overcome this resistance. One was the concern for the assertion of Crown rule over all areas in the country and the other was the advancing of the Government's land purchase programme.⁵⁹ Following the passing of the New Zealand Settlements Act in 1852 and the installation of a settler Government, the pressure for the acquisition of tribal land had greatly increased. While the Governors retained particular responsibilities for 'Native affairs', the settler Government gained a great deal of legislative and executive power over matters that were of vital importance to the Māori tribal world. From the late 1850s, both the Governor and the Government took action which showed a determination to break the strength of the tribes and their hold on their lands.⁶⁰

This determination is elucidated in the *Muriwhenua Land Report* where the Tribunal considers the Government's efforts to purchase the desirable Far North lands not acquired in 'the tidy-up' of the pre-Treaty agreements.⁶¹ The Tribunal notes that, while the hapū continued to see the transactions from their customary perspective on land agreements, and as part of a plan for European settlement, the purchases were treated as land sales by the Government.⁶² It is in the Tribunal's description of the philosophy and practice that drove the Government's purchase programme that the contradictions between the expectations of the hapū and the Crown become clear, as well as the basis for the Crown's undermining of tribal society. Again it needs to be noted that when the Tribunal use the term 'Maori' in this context, it is using it as a generalised term for

⁵⁷ See, for example, *Muriwhenua Land Report*, 185, 260-2.

⁵⁸ See R. J. Walker, *Ka Whawhai Tonu Mātou: struggle without end*, Auckland, 2004, 110-14, 'Pupiri whenua'; J. Belich, *The New Zealand Wars and the Victorian Interpretation of Racial Conflict*, Auckland, 1998, 75-6.

⁵⁹ See Chapter 6 of the *Muriwhenua Land Report*.

⁶⁰ Governor Gore Browne, for instance, authorised the Taranaki War of 1860-1, because he was determined to override the veto on the sale of Waiatara land by Wiremu Kingi, senior chief of the area. See Belich, 76-80; Walker, *Ka Whawhai Tonu Mātou*, 113 ff.

⁶¹ *Muriwhenua Land Report*, Chapter 6, 'The Government Purchase Programme'. For cited words see, 181.

⁶² *Muriwhenua Land Report*, 181-2.

whānau and hapū.

The Tribunal explains that critical to the Government's programme for land purchase and settlement was its policy for 'the total extinguishment of native title'.⁶³ Although there was no formal statement of this policy, the correspondence of the Governor and Government officials shows that from at least 1858 'such a policy was generally accepted, understood, or tacitly agreed'.⁶⁴ The rationale for the policy derives from the doctrine of tenure which postulates, as mentioned above, that with 'annexation' and the proclamation of Crown sovereignty the underlying title to the land is vested in the Crown. Under this understanding, 'native title' is the recognition of the continuing rights of use and authority in the land of the native inhabitants, but subject to the sovereignty of the Crown. In effect, the land is treated as belonging to the Crown, meaning that the native inhabitants are deemed not in a position to sell land as owners but rather to cede title to the Crown, usually for a purchase price. In the words of the Tribunal:

[By] taking a cession of the land, preferably by purchase, the Government deemed the native title – that is, both the native right to use it and the native authority over it – to have been extinguished.⁶⁵

The Tribunal goes on to explain that in order to erect one form of tenure and authority for the whole country, the Government used the term '*total* extinguishment' to indicate 'the need for a cession of everything and the complete replacement of Maori tenure and control'.⁶⁶ The desired outcome of the land purchase programme was the individualisation of land ownership throughout the country, apart from the retaining of some reserves for Māori communities:

It [the Government] therefore wanted large purchases, with parts to be handed back as freehold grants to individual Maori in the same way as grants were made for settlers. Tribal ownership would end and Maori would hold lands as Europeans did, except that the Maori lands, or reserves, would be managed by Government agents for them, or would be held by a few chiefs.⁶⁷

The implementation of the programme would constitute a two-pronged attack on the

⁶³ See *Muriwhenua Land Report*, 205-8.

⁶⁴ *Muriwhenua Land Report*, 206.

⁶⁵ *Muriwhenua Land Report*, 205.

⁶⁶ *Muriwhenua Land Report*, 205. Emphasis is the Tribunal's.

⁶⁷ *Muriwhenua Land Report*, 205.

tribal base. On the one hand, community proprietorship of land was to be replaced by individual ownership and, as will be seen, much of this was achieved through the work of the Native Land Court. On the other, those who did receive an allotment of land would receive it as a grant from the Crown.

This latter action, both effectively and symbolically, reconstituted vital hapū relationships to their lands, ancestors, and neighbours. Whereas each hapū held the rights of proprietorship of its land on the basis of its own authority and history in the land, they were now to hold land through a grant from the Crown. This meant that the Māori title, whether individual or communal, would originate with the Crown – making the holders dependent on the Crown for their title to land. What is more, once the land was recast as a Crown grant it could be treated as a tradable commodity, thus altering the historical relationships associated with it. This was undermining to the tribal proprietorship of land because of the crucial value placed by the tribes on the ancestral connections into the land, and the inter-community relationships formed through such things as the negotiation and recognition of boundaries between neighbouring groups.⁶⁸

It was not only through the Government's land purchase programme that the policy of 'total extinguishment of native title' was put into effect. The Waitangi Tribunal's *The Ngati Awa Raupatu Report* shows how the confiscation of Ngati Awa lands was used as a means to bring about the individualisation of tribal land, and the inception of title as a grant from the Crown. Land confiscation was officially recognised as the Government's way of bringing to order those who were in 'rebellion' to the Crown,⁶⁹ and according to the Government's own legislation 'the preservation of peace' was ensured through the establishment of military settlements on land confiscated from 'rebels'.⁷⁰ In 1865, the lands of 'rebel' and 'loyal' tribes of the eastern Bay of Plenty were subjected to a blanket confiscation through the Government's declaration that the entire district was needed for military settlement. The Tribunal explains the underlying reasons for this

⁶⁸ In Chapter 2 it was pointed out that geographic features could serve as boundary markers; a particular feature might have a whole history of inter-community relationship associated with it.

⁶⁹ The 'rebels', in fact, were those who took up arms in defence against the Government's incursions into their lands.

⁷⁰ The Tribunal explains (page 78) that 'the stated purpose of the New Zealand Settlements Act 1863 was to 'preserve the peace of the Country' through the establishment of military settlements on confiscated land'.

action:

While there was no proper and lawful basis upon which the Governor could confiscate all the land within the district, it was a necessary step to achieving the Government's objectives. In the first instance, it would ensure that any land returned by the Government would be in freehold as opposed to customary native title. Secondly, it would ensure effective Government control over the compensation process as a whole.⁷¹

The conversion of tribal title to freehold title was intended to advance the settlement of a district 'by finalising the issue of Maori ownership and creating an individual – and more readily alienated – title to land'.⁷² In this way tribal authority and strength would be greatly weakened, and Crown rule more securely established. The Tribunal is forthright in its description of the situation:

Put another way, the individualisation of title could destroy the very cohesion and independence of Maori society and, in turn, the source of any future threat or resistance to British authority. It could thereby provide a means of achieving what military campaigns, the imprisonment of 'rebels', and other such punitive actions could never have: the final defeat of Maori through the acquisition of their land and the destruction of their customary tenure and society.⁷³

Following the confiscation of the Ngati Awa lands, a special commissioner was appointed for the district to negotiate the 'return' of land to Māori on behalf of the Government. The instructions from Native Minister Fitzgerald outlined the commissioner's role as the restoration to both 'rebel' and 'friendly' Maori alike, areas they 'consent to occupy', 'only insisting that they shall take Crown grants for the land ... and shall clearly understand that they are living under the laws of the Queen'.⁷⁴

The effect of the confiscation of Ngati Awa land was thus to be the same as that of the land purchase programme elsewhere: the individualisation of title and the recasting of title as a grant from the Crown. In assessing the evidence regarding the treatment of

⁷¹ New Zealand Waitangi Tribunal, *The Ngati Awa Report (Wai 046)*, Wellington, 1999, 78. The Tribunal explains (page 78) that the Government's compensation process was designed to prevent whānau and hapū from having recourse to the courts over the return of land. It is notable that the Tribunal that investigated the Government's 2003 foreshore and seabed policy was critical of the policy because it denied Māori communities access to the courts regarding their claims to property in the foreshore and seabed, a right not denied to others. See Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, 136-7.

⁷² *The Ngati Awa Report*, 78.

⁷³ *The Ngati Awa Report*, 78.

⁷⁴ *The Ngati Awa Report*, 78, citing 'Fitzgerald to Pollen', 8 September 1865, AGG-A1/1, NA Wellington (copy held by Waitangi Tribunal in Doc#A2(1)(3), p 3, Wai 046).

Ngati Awa, the Tribunal says: ‘... it was somewhat irrelevant to the Government whether Ngati Awa had been ‘loyal’ or ‘rebellious’. Maori society as a whole was now the object of the Government’s campaign, and individualisation was the means of finally enforcing Maori submission’.⁷⁵ In other words, the Crown’s stance towards Ngati Awa was reflective of its determination to break the power of the tribal world as a whole. Expanding on the same theme, the Tribunal makes a specific link between the individualisation of tribal title that followed from the Ngati Awa confiscation and that which was ‘elsewhere being achieved under the auspices of the Native Land Court’.⁷⁶ At this point, it is as well to note that the Tribunal tends to emphasise the individualisation of title as the single, most important cause of the weakening of tribal authority, and it somewhat overlooks the significance of the recasting of title as a grant from the Crown in the process of ensuring Crown dominance. The Tribunal is correct, nonetheless, in making the link between what was involved in the confiscation of the Ngati Awa lands and the work of the Native Land Court. The Court was to have the most far-reaching effects on tribally held lands, and some brief comment on its role in effecting ‘the total extinguishment of native title’ is offered here.⁷⁷

The Native Land Court was established through the Native Land Acts of 1862 and 1865.⁷⁸ The introduction of this legislation marked a distinct change in the Crown’s approach to tribes and their lands from that of the years immediately following the signing of the Treaty of Waitangi. In the early stages of land ‘purchase’, there was an acceptance by the Government that land was held tribally, and negotiations over land operated from that understanding.⁷⁹ By the time of the Native Land Acts, the Crown was facing tribal reluctance to alienate land and was determined to overcome it.⁸⁰ Although the Native Land Court was supposed to have been established so that the tribal owners

⁷⁵ *The Ngati Awa Report*, 78.

⁷⁶ *The Ngati Awa Report*, 78.

⁷⁷ A detailed account of the operation of the Native Land Court and its impacts on tribal land and authority is given in D. V. Williams, ‘*Te Kooti Tango Whenua*’, *the Native Land Court 1864-1909*, Wellington, 1999.

⁷⁸ See H. Bassett, R. Steel, D. Williams, *The Māori Land Legislation Manual: Te Puka Ako Hanganga mō ngā Ture Whenua Māori*, Wellington, 1994, 22.1: ‘The Native Lands Act 1862 was the first piece of legislation to establish the Native Land Court, although it was rarely used and was soon superseded by Native Lands Act 1865’.

⁷⁹ Admittedly, even then, Government commissioners showed a tendency to require corroboration of a land transaction from only one or two Maori. See *Muriwhenua Land Report*, 169. Further background to the change in the Government’s approach is given in *The Te Roroa Report*, 39 ff.

⁸⁰ See Bassett et al., 22.1.

could have title to their land recognised by the Crown, the Court proved, in fact, to be a powerful instrument in undermining tribal ownership of land.

There were a number of ways in which the Native Land Acts were directed against communal ownership. For instance, although it was well known that land was held tribally, individuals were permitted to bring a case to the Native Land Court without the sanction of the tribe. The consequences are explained in a manual on Māori land legislation by Heather Bassett, Rachel Steel, and David Williams:

Individual Maori could initiate proceedings for investigation of title thus setting the Land Court machinery in motion and requiring all other interested claimants to appear in Court if they wanted to have any recognition of their rights. In this way all a prospective purchaser of land had to do was to find one Maori willing to sell or able to be bribed into approaching the Court.⁸¹

The legislation thus undercut the tribal polity, and constituted abnegation by the Crown of its Treaty commitment to uphold chiefly authority.

Another assault on the tribal ownership of land lay in the ‘10 owner rule’ of the 1865 Act. This rule required that when the Court judged that a block of land rightfully belonged to a particular whānau or hapū then the Certificate of Title was to be awarded to no more than ten owners. Initially, tribes had no difficulty with this arrangement as they understood that the ten were named as trustees for the community. What they did not realise was that the ten had been constituted in law as absolute owners and could deal with the land as they wished.⁸² Although there was a provision in the Act for a Certificate to be issued to a tribe, admittedly only in the case of land blocks of over 5000 acres, the ‘reluctance by Land Court Judges to allow Maori tribalisation to be reflected in the new land laws’ meant that it was rarely used.⁸³ Following the enactment of the 1865 legislation, there were Government agents who became expert in finding all sorts of means, many quite devious, in procuring a sale of land from each of the

⁸¹ Bassett et al., 37.1.

⁸² An example of this situation as it affected Waipoua land is described in *The Te Roroa Report*, 100-107. See also New Zealand Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim (Wai 009)*, Wellington, 1987, Section 11.5.7.

⁸³ Bassett et al., 37.1. In *The Te Roroa Report*, pages 42-3, an example is given where the Attorney-General intervened to prevent the formation of a tribal trust to hold the land for the whole tribe.

individual ‘owners’.⁸⁴ The ‘10 owner rule’ proved, in fact, to be the most effective weapon in the attack on the tribal ownership of land.

Once land went through the Native Land Court an issue of grant from the Crown was made out to those whose title had been proved. The pattern of land individualisation and the recasting title as a grant from the Crown was again in evidence. In the issuing of the grants, the Crown was establishing itself as the source of title to the land and ensuring the extinguishment of ‘native title’. It was for this very reason that the Orakei Maori Parliament objected to the establishment of the Native Land Court. Paora Tuhaere, speaking for the Parliament in 1879, says: ‘[The Native Land Court] took away the authority of the land from the owners, and put the authority in a Crown grant’.⁸⁵ This statement by Tuhaere goes right to the heart of the means by which the Crown undermined the mana that the hapū derived from their authority in the land, and secured its sovereignty over the tribes and the lands of this country.

The Government’s policy of ‘the total extinguishment of native title’ – whether effected through its land purchase programme, confiscation of tribal lands, or the Native Land Court – had enormous impacts on much of the tribal world, including the hapū of the Far North. The Tribunal for the *Muriwhenua Land Report* describes some of the longer term effects:

It is also clearer today that the individualisation programme imposed on Maori led to the disinheritance of large numbers, title fragmentation, ownership splintering, the elevation of absentee interests, and the loss of group authority, social cohesion, and economic strength.⁸⁶

In assessing the policy, the Tribunal judges that it was an important part of the Crown’s Treaty obligation to ensure the protection of ‘Maori’ interests and this included the tribal ownership of land. The Tribunal regards the Crown’s legislation that promoted the breaking up of tribal blocks as a breach of these obligations.⁸⁷ The Tribunal was more than aware, however, of the connection between the assertion of Crown rule and the

⁸⁴ Examples of this are detailed in *The Te Roroa Report*, 148-68. The *Report of the Waitangi Tribunal on the Orakei Claim* recounts a similar history.

⁸⁵ *The Te Roroa Report*, 263-4, citing AJHR, session II, 1879, G-8, 30.

⁸⁶ *Muriwhenua Land Report*, 205.

⁸⁷ See *Muriwhenua Land Report*, 274-6.

Government's drive to ensure 'the total extinguishment of native title':

Where Maori expected their authority to continue as before, the Government, in asserting British rule, assumed that Maori authority, law, and land tenure, should be replaced.⁸⁸

The success of the Government, its agents, and its policies in the effort to break down the tribal base in the Far North lands is sadly revealed in the conclusion to the *Muriwhenua Land Report*, where the Tribunal says:

By the turn of the century, the hapu of Muriwhenua were in a parlous condition. They were in every sense living on the fringes, a marginalised and impoverished people on uneconomic perimeter lands. They were struggling to survive, both individually and as a people, and the effect was to disperse and destabilise the polity of the hapu.⁸⁹

The evidence in this chapter has pointed to the arbitrary base on which the Crown established its rule over the Māori tribal world. This is demonstrated in the Crown's decision to call on the doctrine of tenure, a legal fiction, to justify its claim to the underlying title to all land in the country. The doctrine was also used in the validation of the taking of 'surplus' land and the policy of the total extinguishment of native title. In the 1860s, without consultation with the tribes, the Crown introduced land legislation that, both in its design and application, was directed towards the dismantling of tribal authority and tribal ownership of land. The next chapter considers what the hapū had expected in entering into an alliance with the Crown and why the Crown failed to meet those expectations.

⁸⁸ *Muriwhenua Land Report*, 205.

⁸⁹ *Muriwhenua Land Report*, 335.

Chapter 6

Crown Authority and Hapū Expectations

This chapter considers the expectations of hapū regarding the Crown's relationship with them, and the institutional structures carried by the Crown that militated against its meeting those expectations. Such an investigation is important because in New Zealand it has been the official view for so long that in 1840 Māori tribes unreservedly ceded their sovereignty to the British Crown.¹ If this view is correct, then there might be relatively little to question about the way in which the Crown has exercised its authority in relation to Iwi Māori. The long-held official view continues to hold some weight, but there is far more recognition now that the tribes and their leaders who signed Te Tiriti o Waitangi had good reason to expect that they would continue to exercise their mana or rangatiratanga over their lands and other properties.² This raises the question of what were the hapū's expectations of the Crown and the sort of authority it would exercise. An understanding of the answer to this question should throw light on tensions that have existed between the Crown and tribes over the exercise of Crown authority.

A key source for the chapter is the *Muriwhenua Land Report*. The Tribunal for the Muriwhenua Land claim, possibly more than any other, sets out to gain an understanding of hapū expectations, mainly in relation to their land transactions but also as to what they expected of the relationship with the Governor as the personal representative of the Queen and the leader of her people. In making this enquiry, the Tribunal brings out how the hapū and their rangatira of the Far North perceived and exercised their authority in the land after 1840. Since particular use is made of the *Muriwhenua Land Report*, the understandings for the chapter are built on the experience of the Far North hapū. As the chapter proceeds, however, it is shown how these understandings apply to the experience and expectations of other tribal communities.

The first section of the chapter looks at the evidence on how the hapū of the Far North

¹ See Introduction to the thesis.

² See Hill, 13-15, for comment on the contemporary position of scholars on this issue.

exercised their authority in the decades following the signing of the treaty. This evidence shows that their expectations were far from a cession of authority to the Crown. The next section searches out the basis for the hapū's understanding of the relationship with the Crown that was established through the treaty, and therefore of the sort of authority they granted to the Crown. The last section looks into the institutional basis for the Crown's view of its sovereignty and relationship with Iwi Māori, and how from the beginning this has stood in the way of its meeting the hapū's expectations of a mutually beneficial relationship. The sections are entitled respectively: (i) the expectations of the Far North hapū with regard to their continuing authority in the land; (ii) the basis for the hapū's view of the relationship with the Crown; and (iii) the institutional basis for the Crown's understanding of its sovereignty and relationship with the tribes in New Zealand.

(i) The expectations of the Far North hapū with regard to their continuing authority in the land

In assessing what were the hapū's intentions with regard to European settlement and the Crown's presence, the Tribunal for the *Muriwhenua Land Report* found that the rangatira continued to assert their authority after the signing of the Treaty, and that they saw no diminishment of the hapū's traditional independence and mana. If anything, the status of the hapū would be increased by the alliance with the Crown and having European settlers resident within their territories.³ In discussing the understanding of the Far North hapū of the Government's 'land purchases', the Tribunal says:

For Maori, the discussion about land purchases would have been concerned, not about conveyancing and alienation, but with settling Europeans on the land in large numbers ... Their whole history supports the view that Maori never willingly ceded their traditional power. Mana was too integral to their culture, and Maori policy was not to give their mana away but to enhance it.⁴

The evidence that the hapū continued to exercise their traditional authority is demonstrated through a number of situations described in the report. Reference was earlier made to the 'Mangonui transaction' of 1840.⁵ This was a case where the rangatira, Panakareao, made an agreement with the Governor in order to reinforce his

³ See *Muriwhenua Land Report*, 118-20, 178-9, 183 ff.

⁴ *Muriwhenua Land Report*, 201.

⁵ See Chapter 3 of the thesis.

authority over the Mangonui land; indeed, the agreement came about because of Panakareao's complaints that 'Pakeha were entering Mangonui without his permission'.⁶ The rangatira did not see his agreement with the Governor as the surrendering of his authority over the land, but rather as an affirmation of it.⁷ In 1847, Panakareao wrote in complaint to the Native Secretary when Captain Butler appeared to establish a monopoly over all trading activities at Mangonui: 'A person whose name is Butler will not permit our goods and the goods of some of the Europeans to be sold to the vessels that come hither to trade, he wants everything to go through his hands.'⁸ The matter was obviously resolved to Panakareao's satisfaction as later we are told: 'Captain Butler in particular came under his protection as 'my' Pakeha, even though Panakareao had challenged his domination of the provisioning industry.'⁹

The rangatira also exercised their authority in pursuing their policy of encouraging European settlement. Panakareao, for instance, wrote several letters to the Governor in support of different settlers, and he successfully discouraged a number of missionaries and traders from leaving the district.¹⁰ The Tribunal records how the Far North policy of friendship to Pākehā and the Governor that began with Panakareao continued after his death in 1856.

On 16 February 1861, Muriwhenua Maori affirmed their relationship with Governor Browne at a hui at Mangonui. There, with representatives from Hokianga and the Bay of Islands, and also with Waikato in attendance, Muriwhenua rangatira confirmed that, while they would not oppose the Maori King, they would support the Governor by keeping out of the war. They had placed 'their Pakeha' on the land and implied they would protect them if need be. Muriwhenua leaders affirmed their position again later, independently of the Government, at a meeting with Nga Puhī at Ahipara in 1863, when they were again urged to join the Maori forces against the Governor. Wi Tana Papahia replied: 'These tribes are old friends of the Pakehas, and my determination to protect the Pakeha is fixed.' It was a classic restatement of the Muriwhenua position. Panakareao may have died, but old policies had not given away to new.¹¹

⁶ *Muriwhenua Land Report*, 119.

⁷ *Muriwhenua Land Report*, 118-20.

⁸ *Muriwhenua Land Report*, 184, citing 'Panakareao to Grey', 30 January 1847, MA 1/7 (quoted in D. Armstrong and B. Stirling, 'Surplus Lands. Policy and Practice: 1840-1950', Doc#J2, Wai 045, 1991, 185).

⁹ *Muriwhenua Land Report*, 185.

¹⁰ *Muriwhenua Land Report*, 185-6.

¹¹ *Muriwhenua Land Report*, 193.

The care of the Far North rangatira for ‘their Pakeha’ came out of several decades of relationship between various hapū and Pākehā. Henry Williams, for instance, records the indignation expressed by the rangatira Haratua and his people when, in 1840, a Māori from another area murdered the shepherd employed ‘by his own *pakehas*’. They wanted to deal with the matter but were advised to leave it with Shortland, the Governor’s deputy.¹² The instances recorded in the *Muriwhenua Land Report* and other sources show the duty of protection the rangatira felt for all who came, by agreement, to settle on the hapū’s lands.

It is most likely that the rangatira took it for granted that the Governor would show a similar regard for them and their people. Coming out of their own experience of what rangatiratanga meant,¹³ and the assurances about the Crown’s protection given at the time of the signing of the Treaty of Waitangi, the hapū and their rangatira would have expected a level of personal care from the Crown – who was made present through the Governor as the Queen’s representative and chief of the Queen’s tribe. The confidence with which Panakareao made his complaints and submissions to the Governor over matters to do with Pākehā settlers indicate his expectation that the Governor would intervene in the interests of the hapū, as well as his view of the Governor as a peer.

While the Far North communities and their leaders wanted Europeans to come and settle on their lands, Wi Tana Papahia, Panakareao, Pororua, and other rangatira had problems with the settlement of Europeans when Resident Magistrate White ‘presumed to act in an independent manner’.¹⁴ Once White started to allot land to settlers, without the sanction of the rangatira or hapū whose land it was, he was challenged. There are several passages in the report that record the objections of rangatira to actions that ignored their authority and that went against the interests of their hapū.¹⁵

A particular difficulty that the hapū and their rangatira had when it came to

¹² See Carleton, 21. Shortland had the culprit and was determined to be the one to punish him regardless of the advice offered to him by one of the missionaries.

¹³ See Chapter 4 of the thesis for a fuller explanation of rangatiratanga, and the duties of care for the community that it imposes on leaders and the community as a whole.

¹⁴ *Muriwhenua Land Report*, 193.

¹⁵ See *Muriwhenua Land Report*, 119-120, 155-7, 185, 246.

safeguarding their rights, was that much of the Crown's action with regard to their lands took place without their knowledge, especially in cases of the granting of scrip and the taking of surplus. The procurement of the land by the Crown was cited in official records, but often there was no visible sign of the Crown's claims of possession. The hapū continued to occupy their land, and often it was not till some decades later that they were disturbed by the Crown's seeking to make use of it. Once it was seen on the ground what the Government's intentions were, there were ongoing objections and petitions by whānau and hapū over the taking of their land.¹⁶ These objections have continued to the present day and have been manifest in recent times through the 1975 Land March which started in the Far North, the various claims to the Waitangi Tribunal, and a number of protest actions that have gained media attention.¹⁷

The exercise of tribal rangatiratanga following the treaty was further manifest in the maintenance of the customary control over hapū resources by the rangatira and hapū. In the mid-1840s, Panakareao protested when he found that the Government was imposing restrictions on timber cutting on Oruru land, land that he knew had not been subject to any agreement with the Crown. He objected to the undermining of his authority and that of his people.¹⁸ The Far North hapū also expected that they would continue to benefit financially from their resources. Coming out of their history of interaction with European traders from at least the 1820s, the hapū looked to the European interest in their resources as an important source of revenue. By 1840 they were used to receiving harbour dues and payments for access to resources on their land, and they assumed this would continue.

That the hapū expected and received royalties for the extraction of different resources over many decades, is illustrated by Timoti Te Ripi's actions in the case of the Tangogne land block.¹⁹ This block was taken for the Crown in 1858 by Commissioner Bell, without the knowledge of Timoti Te Ripi's people. Again without their

¹⁶ See, for example, *Muriwhenua Land Report*, 286, 293ff.

¹⁷ On February 7 2004, Te Rarawa organised a major gathering at Ninety-Mile Beach called 'Hands Across the Beach' to affirm their 'continuing ownership of Te Oneroa a Tohe, also known as Ninety-Mile Beach', in the face of the proposed Foreshore and Seabed legislation. Thousands took part, and there was support from across the country.

¹⁸ See *Muriwhenua Land Report*, 184-5.

¹⁹ See also *The Te Roroa Report*, 47.

knowledge, the Crown later zoned the land as the Tangogne kauri gum reserve. When, in 1890, Te Ripi found that work had started on the extraction of gum he demanded royalties for the gum extracted, because this was owing to him and his people as the owners of the land. He immediately objected when he found the Crown was claiming the land as its own.²⁰

One of the surest signs that the Far North and other hapū did not accept that Crown authority had replaced their own, lies in the fact that they objected when the Government tried to impose taxes and customs on ships entering their harbours. Panakareao, for example, repudiated Resident Magistrate White's authority as collector of customs and continued to conduct his trade with ship captains directly.²¹ The Tribunal records that 'on 23 December 1851 Panakareao remonstrated with the resident magistrate, claiming he was restricting Maori access to the ships for trade'.²² Panakareao's stance reflects that of Hone Heke and others who did not see that the Pākehā government had the right to interfere in their trading relationships with overseas vessels through the imposition of taxes and customs.²³ As the Tribunal says, 'Maori were intensely opposed to Government customs duties and harbour charges, as they considered only Maori could levy these. This became a factor in the later northern wars between Maori and the Governor.'²⁴ In this matter, as in others, the hapū and rangatira of the North showed that they had an understanding of the relationship established by the Treaty of Waitangi that was far removed from the cession of sovereignty that was sought by Hobson and those who followed him.²⁵

²⁰ See *Muriwhenua Land Report*, 260.

²¹ *Muriwhenua Land Report*, 187.

²² *Muriwhenua Land Report*, 187.

²³ The Tribunal for the *Muriwhenua Fishing Report* notes (page 59 -60) notes how from the 1830s the practice of Maori claiming levies on boats entering their harbours had become widespread 'from the bottom of the South Island to the top of the North'.

²⁴ *Muriwhenua Land Report*, 44.

²⁵ See M. Mutu, 'The Humpty Dumpty Principle at Work', in S. Fenton, ed., *For Better or Worse: translation as a tool for change in the South Pacific*, Manchester, 2004, 12-27, for explanation of the complete authority guaranteed to the hapū in Te Tiriti o Waitangi, and which reflected the affirmation of tribal authority contained in the Māori text of the 1835 Declaration of Independence. For comment on Hobson's aims and achievements towards the establishing of British sovereignty and the usurpation of Māori sovereignty see: P. Moon, *Te Ara ki te Tiriti: The Path to the Treaty of Waitangi*, Auckland, 2002, Chapter 6, 'Usurping Maori Sovereignty 1840-1842'.

(ii) The basis for the hapū’s view of the relationship with the Crown

The Tribunal for the *Muriwhenua Land Report* gives some attention to the original Far North perspectives on the relationship established between them and the Governor, and how the hapū understood the authority granted to the Crown. The Tribunal’s approach offers some helpful insights into the intentions of Māori in entering into a relationship with the Crown but, as the following discussion shows, some of the Tribunal’s arguments on the subject are lacking in consistency. In order to develop a more consistent understanding of the basis for hapū expectations of the relationship with the Crown and the sort of authority they granted to it, use is made of information from the *Muriwhenua Land Report* and other sources, along with a critique of the Tribunal’s arguments.

There is a fundamental ambivalence in the Tribunal’s position regarding the intentions of the hapū in entering into a relationship with the Crown. This is exemplified in its statement that: ‘In return for ceding sovereignty to the Queen, the chiefs, the hapu and all the people were guaranteed their tino rangatiratanga’.²⁶ There are at two contradictions implicit in the statement. For a start, the evidence in the *Muriwhenua Land Report* and other sources shows that it is questionable that the hapū and rangatira freely agreed to a cession of their sovereignty, or at least in the sense that that was understood by the British. The other contradiction stems from the assumption that the exercise of Crown sovereignty and tribal tino rangatiratanga were compatible. On the one hand, the Tribunal argues that because of the treaty agreement the two sorts of authority ought to hold together and, on the other, it gives many instances that demonstrate their incompatibility.

The incompatibility, in practice, between the colonisers’ presumptions about what was allowed by Crown sovereignty and the hapū’s views of Crown authority in relation to their own is highlighted in the Tribunal’s discussion of the Government’s process for inquiring into the pre-Treaty land transactions.

The colonisers, presuming to be superior as a race, imagined that matters should be managed on their terms. Maori, who were no less independent as a people,

²⁶ *Muriwhenua Land Report*, 388. Here the Tribunal is reiterating the understanding of the Treaty of Waitangi spelled out in *The Te Roroa Report*, page 30.

equally assumed that their government of their own districts would continue. Subservience to another cultural regime was so outside their experience, and so contrary to that which any free people would knowingly subscribe, that any act of diminution imposed upon them would necessarily be seen as such until some time afterwards, if at all. Accordingly, while we have examined matters in terms of the land claims inquiry process, we do not thereby say that any part of that process was appropriate. Consistently, behind Maori claims is the Maori expectation, legitimate in Treaty terms, that they should control their own affairs, transact with others on their own terms, and have their own cultural expectations respected.²⁷

The Tribunal affirms the hapū's rights to control their own affairs and condemns the unilateral process used by the Crown – in a matter that was critical to the early exercise of Crown authority in New Zealand. If the hapū had ceded their sovereignty to the Crown, it is hard to see how the Tribunal could be so emphatic about the autonomy due to the hapū.

In the above statement, where the Tribunal says that the colonisers thought the 'matters should be managed on their terms' because they saw themselves as racially 'superior', it appears that the Tribunal has lost sight of the institutional basis for the exercise of Crown rule. It was pointed out in the previous chapter that European settlers dealt with the hapū on hapū terms as long as the hapū were clearly in control of their land, but that the behaviour of many of the settlers changed as Crown rule became established. It was not the attitude of cultural superiority that made the difference to the respect that was shown, but the fact that the European settlers judged that political control was moving from the hapū into Crown hands. While the ideology of superiority served to justify the manner of Crown rule, it was with the actual establishment of Crown sovereignty that the mechanisms were set in place which allowed the colonisers to dominate.

When considering the Far North understanding of the relationship with the Crown in the decades immediately following the signing of the treaty, the Tribunal supports the explanation of Claudia Orange, historian, that Māori generally perceived the relationship with the Crown as a partnership or alliance, and judges that the notion of an

²⁷ *Muriwhenua Land Report*, 178-9.

alliance was particularly appropriate in the case of the Far North.²⁸ The Tribunal goes on to explain that the Far North tradition of alliances was based in the ‘same customary source’ as ‘the incorporation of individuals’ on the land.²⁹ This meant that there were the same expectations of the relationship established by the alliance. As in the agreements whereby outsiders were allotted a place on hapū land, the relationship was seen to be a personal one. In the case of the alliance with the Crown, the relationship with the Governor carried this personal element. It was also assumed, as with the land agreements, that both parties to the alliance had a loyalty and commitment to each other, and that these would be reinforced through ‘the regular renewal of bonds, promises, or undertakings’.³⁰ The intention of the alliance was the formation of a relationship that would bring ongoing, mutual benefit, and in the case of the alliance with the Crown the first benefit to the Far North hapū was to come from the location of Europeans on their lands.³¹ These points made by the Tribunal, showing how the Far North perception of the relationship with the Crown was in line with customary expectations of land agreements and other political alliances, are supported by the evidence given in the *Muriwhenua Land Report*.

The Tribunal then discusses the changes that followed from the alliance with the Governor, especially as regards the settlement of Europeans on the land.³² Throughout this discussion, the Tribunal states that the alliance with the Governor, while signalling some change, did not stand in opposition to customary understandings: ‘Maori status and authority in the land would still be enhanced, and their association with their ancestral land would still continue’.³³ The important change was that under these new agreements the Governor, rather than the local rangatira, was empowered to allocate places ‘to both European and Maori’ on the land given over to the Crown by the hapū. The Tribunal emphasises that the hapū expected that the Governor would hold sufficient of this land for them so that their interests would be made safe. This part of the

²⁸ See *Muriwhenua Land Report*, 191ff. See also Section 4.2, ‘The Treaty of Waitangi and Maori expectations’.

²⁹ *Muriwhenua Land Report*, 192.

³⁰ *Muriwhenua Land Report*, 192. See also, page 202. Chapter 3 of the thesis gives more detailed background to the customary practices and expectations when outsiders were incorporated on hapū land.

³¹ See *Muriwhenua Land Report*, 192.

³² See *Muriwhenua Land Report*, Section 6.3.5, ‘The expectation of a comprehensive settlement approach’.

³³ *Muriwhenua Land Report*, 201.

Tribunal's discussion is reasonably reflective of the evidence, but some of its next argument is less so.

In describing the new order, the Tribunal says: 'Maori could no longer deal directly with settlers. They were bound only to deal with the Governor, and he alone could allocate land to settlers'.³⁴ This statement is puzzling because there is plenty of evidence that, in the decades after 1840, the hapū continued to deal directly with the settlers over a range of issues concerning land and settlement. As was shown above, rangatira still demanded royalties from the settlers for resources taken, they expected harbour dues from visiting ships, and they challenged Magistrate White when he started allotting places for settlers on their lands without their permission. Possibly, the Tribunal had in mind the Crown's right of pre-emption in the securing of land for settlement,³⁵ but its observation that 'Maori could no longer deal directly with settlers' is made in the wider context of the whole approach to the settlement of Europeans on the land. The effect of the observation is to suggest that the hapū had surrendered more authority to the Governor than they had.

The Tribunal's argument becomes complicated when it tries to convey that the hapū accepted that new powers had been granted to the Governor, but at the same time they 'never willingly ceded their traditional power'.³⁶ The difficulty with the Tribunal's position is that it keeps maintaining that both powers were meant to hold together, while not exploring the contradictions between the two – at least as understood by the Tribunal – or how, from the hapū's perspective, the two powers might be reconciled.³⁷ Insight on these matters could have been gained by the Tribunal if it had looked more deeply into the explanations of 'tuku whenua', the customary hapū practice in allotting land to outside groups, that were presented at its hearings.³⁸

³⁴ *Muriwhenua Land Report*, 201.

³⁵ Under the Treaty of Waitangi, the procuring of land from Māori belonged to the Crown. Private individuals and companies could not purchase land directly from Māori.

³⁶ See *Muriwhenua Land Report*, 202.

³⁷ See *Muriwhenua Land Report*, 201ff.

³⁸ Probably, the fact that the Tribunal was contending with representations from the counsel for the Crown that 'tuku whenua' was not established custom, did not help it to look further into what was presented to it regarding the fuller ramifications of 'tuku whenua'.

In his evidence to the Tribunal the scholar, Maori Marsden, indicates that there was an aspect of 'tuku whenua' that was particularly relevant to the issues being examined in the Muriwhenua Land claim, and he names it as 'tuku rangatira'. He gives examples of tuku rangatira: 'The tuku of Tongariro park by Te Heuheu Tukino to the nation', and 'the tuku of Kennedy Bay by Ngati Maru to Ngati Porou as a staging and resting area on the occasions when they came from the East Coast to trade in Auckland'.³⁹ 'Tuku rangatira' he says 'may be translated as gifts of nobility'.⁴⁰ His explanation is brief, ending with the statement that: 'Under this type of gift, it was understood when the receiver had no more use for it, he must return it to the original donor. In other words, he could not alienate the land'.⁴¹

More insight into tuku rangatira, as it applied to the sort of authority that the hapū allowed to the Governor, is to be found in the 2001 Hillary lecture delivered by Sir Hugh Kawharu of Ngati Whatua ki Orakei.⁴² The lecture is entitled 'Land and Identity in Tamaki: a Ngati Whatua perspective', and it describes how Ngati Whatua ki Orakei through their rangatira gifted land to the Tainui and Ngati Paoa tribes in the early nineteenth century. Hugh Kawharu explains the nature of the 'gifts':

These acts were known as 'tuku rangatira', gifts between chiefs. But chiefs were acting here less in their personal capacity than as representatives of their people. In fact, such transfer of use rights in land was an effective and proven mechanism for establishing alliances – a mechanism, however, in which the underlying title remained with the donor group.⁴³

In 1841, Apihai Te Kawau, as rangatira for Ngati Whatua ki Orakei, sought a similar alliance with Governor Hobson by offering him two sizeable pieces of land for European settlement, under a tuku rangatira understanding.⁴⁴

Hugh Kawharu's explanations show that a 'tuku rangatira' is a gift made with quite specific constraints on it. Not surprisingly, the physical boundaries of the gifted land are made clear. The rangatira of a hapū thus grants an authority in a set area of the hapū's

³⁹ M. Marsden, 'Evidence of Reverend Maori Marsden', Wai 045, Doc#F25, 8.

⁴⁰ Marsden, 8.

⁴¹ Marsden, 8.

⁴² I. H. Kawharu, 'Land and Identity in Tamaki: a Ngati Whatua perspective', Hillary Lecture 2001, Auckland War Memorial Museum, 14 November 2001.

⁴³ Kawharu, 'Land and Identity in Tamaki: a Ngati Whatua perspective', 2.

⁴⁴ See Kawharu, 'Land and Identity in Tamaki: a Ngati Whatua perspective', 2-3.

land to the rangatira of an outside group so that his/her group can benefit from the use of the land.⁴⁵ Limits also apply to the authority granted to the donee group and their rangatira and to the uses they can make of the land. Merata Kawharu, in her thesis on 'Dimensions of Kaitiakitanga', says that in a tuku rangatira arrangement, 'the land gifted remains under the mana of the rangatira who gave it on behalf of his/her people ... the recipients were kaitiaki in one sense but certainly not in the same class as the donor group that had title and mana over lands and resources ... the recipient had to be careful with what they did with the land or resources given for their use'.⁴⁶ She adds that, while land could be transferred to a third party, the recipients had first to clear it with the donor and obtain their consent.⁴⁷ The work of other authors, on the more general practice of tuku whenua, indicates that the understandings under which such grants were made were common to tribes across the country.⁴⁸

In discussing the particular alliance Ngati Whatua sought with the Crown, Hugh Kawharu clarifies that the gifting of the two pieces of land to Governor Hobson was not intended as an alienation of the hapū's land, nor did it signify surrender by Ngati Whatua ki Orakei of their traditional authority in the land. While history has shown that Governor Hobson had quite other ideas about the land allotted to him, Hugh Kawharu says that subsequent to Hobson's taking up residence:

The people [of the Ngati Whatua hapū] undoubtedly continued to believe that the land and their mana were still theirs, untouched and beyond negotiation. Hobson and his officers and their families were invited – like the missionaries before them – to share the bounty of the land and the harbours so long as they resided within the Ngati Whatua domain and shared their taonga, ie. their skills and knowledge, with Ngati Whatua.⁴⁹

Other sources show that Ngati Whatua's expectation of the Governor, as leader of his people, would have been that he would uphold their authority, as the hapū to whom he and his people were beholden, and whose action in granting them a place on the land

⁴⁵ See Kawharu, 'Land and Identity in Tamaki: a Ngati Whatua perspective', 3-4. See also M. Kawharu, 'Dimensions of Kaitiakitanga', 40.

⁴⁶ M. Kawharu, 'Dimensions of Kaitiakitanga', 40.

⁴⁷ M. Kawharu, 'Dimensions of Kaitiakitanga', 40.

⁴⁸ See D. Arapere: 'An analysis of tuku whenua according to tikanga Maori, and its implications for claimants before the Waitangi Tribunal', Honours Dissertation in Law, University of Waikato, 2002; Alemann, 'The Impact of Legislation on Maori Land in Tai Tokerau'; Ballara, 'Customary Land Tenure in Te Tau Ihu (the Northern South Island) 1820-1860'.

⁴⁹ Kawharu, 'Land and Identity in Tamaki: a Ngati Whatua perspective', 3-4.

was the source (putake) of any rights they had there.⁵⁰ Ngati Whatua would also have been expected that the Governor would want to maintain the honour of his people by ensuring that the gift of a place in the land was duly reciprocated.⁵¹ On their part, Ngati Whatua and their rangatira would respect the authority the Governor had over his people, and maintain a protective interest for those who had come to live on their land.⁵²

The Far North hapū would have had similar expectations to those of Ngati Whatua in their granting of land to the Governor. The Tribunal records, for example, how the ‘payments’ the hapū received from the Governor when land agreements were made were seen as a sign of commitment to the agreement, and the beginning in a relationship of ongoing mutual benefit and reciprocation.⁵³ Most importantly, for the Far North, Ngati Whatua, and the other tribes, the limits of the gift and authority that they allowed to the Governor were clearly understood. In the land that was granted to him, the Governor had the right to allocate places for his people; but he and the settlers, in making use of the land, had to maintain due respect and consideration for the hapū with the mana of the land.⁵⁴ The Governor’s authority did not extend to the land that had not had been granted to him to use. This is why the hapū and their rangatira objected when officials like White started allocating places on the land that had not been granted to the Crown,⁵⁵ and when the officials began claiming customs and dues in the harbours over which the hapū retained their authority.

⁵⁰ See, for example, Rei, et al., 14ff.

⁵¹ Ngati Whatua had quite practical expectations of the advantages that would come to them as a result of the Governor and his people settling in their midst. These included the provision of schools, hospitals, and improved access to trade. These expectations were in line with promises that had been made by missionaries and officials.

⁵² See M. Belgrave, *Historical Frictions: Maori claims and reinvented histories*, Auckland, 2005, 65: ‘For at least a good proportion of its signatories in the north, the treaty should be seen as adding a new web of personal relationships, in the person of the governor and perhaps even of the Queen herself’. Although Belgrave does not attempt to look into the customary understandings of tuku rangatira and tuku whenua, beyond looking at the Tribunal’s handling of the debates round tuku whenua (pages 122-4), this statement of his accords with what is described here about how the hapū and their rangatira saw their relationship with the Crown.

⁵³ See *Muriwhenua Land Report*, 191.

⁵⁴ This latter included letting hapū members have continued use of access routes to their different resources.

⁵⁵ The rangatira also questioned the right of officials like White to allocate land as that was the role of a rangatira, and in the case of the Pākehā the Governor was clearly the rangatira. The Tribunal is not correct when it says (page 192) that the Far North hapu saw the alliance as being personal only to the Governor and not the settlers or officials. The hapū more than understood that alliances were people to people arrangements, but within those arrangements there are particular roles and duties that belong to the rangatira, and rangatira will only deal with other rangatira over those matters. It is common to all societies that certain matters are delegated to leaders, as appointed representatives, to sort out at a leader to leader level.

From these explanations of what is involved in the practice of *tuku rangatira* – the system of allowing for other tribal groups to come with their established leaders on to a specified area of hapū land – it can be seen how the hapū were able to maintain their traditional authority and accommodate that of the Governor. It is most likely that, in relation to the Europeans, this was where any newness lay in the arrangements that were sanctioned by the tribes when they embraced the treaty alliance. Before that, Europeans were directly incorporated within the hapū. They came as individuals or individual families on to hapū land and they were immediately under the authority and protection of the local hapū and its rangatira. With the formalisation of the alliance with the Queen, it was recognised that the Europeans now had their own rangatira, and the establishment of *tuku rangatira* arrangements were appropriate. In terms of tribal authority, these arrangements took nothing from the rangatira and hapū who allowed another group, with their leader, a place on their land. The established practice of *tuku rangatira* meant that the tribes retained their traditional authority while being able to accommodate the authority of the Governor as the recognised leader of the Pākehā people.

The problem with the Tribunal's explanation of the hapū's expectations of the relationship with the Governor is the lack of clear definition of the *limits* of the authority that the hapū gave to the Governor.⁵⁶ When one looks to the customary tribal practice, it becomes clear that the Governor was empowered to allot places for the European settlers *on the land that was designated* by the hapū. This authority did not extend to other areas, nor was it to be exercised in a way that undermined those who, by right of their *mana whenua*, had allowed a place for the Governor and his people. It was in the observance of those limits that the balance would be kept between the respective authorities of the hapū and the Crown. The hapū and their rangatira would continue to exercise their authority as before, enhanced if anything by the relationship with the Crown and the Governor. In return, the Queen and her people would have their *mana* enhanced by the relationship with the tribes by being granted a place within the tribal

⁵⁶ There is room for a good deal of research to be done as to the limits of the authority given to the Crown by the hapū. For instance, Ward notes, in *A Show of Justice* (page 43), that: 'In general the chiefs considered that the authority of the Governor was to apply to matters involving Pakeha, not internal Maori disputes.'

lands; and it would have been expected that the Governor, like other rangatira in his position, would have observed the courtesies and respect that groups show when given a place in another people's land.

Finally, it can be noted that the Tribunal does express similar understandings to these when it sums up Dame Anne Salmond's opinion regarding the Māori view of the treaty relationship, an opinion which it says accords with that of Rima Edwards, 'a claimant well versed in Maori law'. The Tribunal says:

As we understood Dame Anne Salmond to say, the Queen would serve as kaitiaki, as guardian and protector. Maori in turn would protect the Queen, the two standing in alliance. The Governor would stand as kai-whakarite, as broker and mediator between Maori and European, but the authority of the land would remain with the rangatira, with whom it had always been.⁵⁷

(iii) The institutional basis for the Crown's understanding of its sovereignty and relationship with the tribes in New Zealand

It is the contention of this section that the Crown authority that was brought to New Zealand was institutionalised in a way that made it very difficult for the Crown to meet the hapū's expectations of a mutually beneficial relationship, founded on the recognition of the respective authorities of the hapū and the Crown. Evidence has already been given of the practical character of Crown rule as it was established in relation to the tribal world, especially through the implementation of the policy of the 'total extinguishment of native title'.⁵⁸ This showed that mutuality between hapū and the Crown was scarcely a consideration for the Crown. In order to gain more insight into the basis for the Crown's expectations of its authority, the section examines the suppositions that underlay the Crown's early legislation for the regulation of trade. The contradictions between these suppositions with regard to trade and those of the hapū are discussed, as indicative of the difference in expectation of how Crown authority would operate. At the end of the section, there is brief reference to writing that sheds light on the presumptions that have informed the institutional structures and understandings of Crown authority from its beginnings.

⁵⁷ *Muriwhenua Land Report*, 113.

⁵⁸ See Chapter 5 of the thesis.

A study of the early legislation with regard to trade regulation helps to clarify the assumptions about Crown authority that the first New Zealand Legislative Council worked from. The initial legislation regarding trade regulation was contained in the 1840 New Zealand Acts, instituted by the Governor and Council of New South Wales.⁵⁹ This legislation was subjected to formal repeal within a year and replaced by very similar legislation, as a result of the establishment of New Zealand's own Legislative Council. In the new Council's First Session, in June 1841, laws were passed with regard to customs, duties, and trade – specifically making provision 'for the collection of certain Duties on Goods imported into, and for the general regulation of certain Duties on Goods imported into, and for the general regulation of the revenue of Customs in the Colony of New Zealand and its dependencies'.⁶⁰

The Preamble to this legislation reveals what the colonisers saw as the source of Crown authority in New Zealand, the powers that went with that authority, and something of the British interests in New Zealand. It opens with the words:

Whereas her Majesty Queen Victoria by her Royal Charter and Letters Patent, has been pleased to erect the Islands of New Zealand into a separate and independent Colony, and it is necessary to provide for the collection of certain duties on goods imported therein and for the general regulation of Customs and trade thereof ...⁶¹

The Queen's 'Royal Charter and Letters Patent' are named as the source of the Crown's rights and authority in New Zealand, authority which immediately allowed her governing Council to regulate the 'Customs and trade thereof'. The authority of the tribes, and their agreement through the Treaty of Waitangi as constituting the basis for the Crown's authority in the country, are not mentioned. Nor was account taken of the facts that Māori tribes were engaged in extensive trade out of their own authority, and accustomed to collecting levies from ships that came into their harbours, or even that it might take several decades before the Government would be a position to fully and

⁵⁹ As was noted earlier, New Zealand was placed under the jurisdiction of the New South Wales Legislative Council from 1840 to the first half of 1841.

⁶⁰ New Zealand Legislative Council, 'The Ordinances of the Legislative Council of New Zealand and of the Legislative Council of New Munster, From 4 Victoriae to 16 Victoriae inclusive, 1841 to 1853', Session 1 (1841), No. III, Wellington, 1871.

⁶¹ New Zealand Legislative Council, 'Preamble', Session 1 (1841), No. III.

effectively regulate all of New Zealand's trade.⁶²

The next part of the Preamble gives further background on why the Queen's Council in New Zealand had the power to control Customs and trade. It is explained that an Act passed by the British Parliament during the reign of the late King William the Fourth, and called 'An Act to regulate the Trade of the British Possessions abroad', allowed the Crown to regulate the trade and commerce of British possessions. The New Zealand colony is identified as a 'possession' of the Crown and, hence, it was over to the New Zealand Legislative Council to make provisions 'for the collection of duties on goods imported and for regulating the Customs and trade within the said Colony (of New Zealand and its dependencies)'.⁶³

The designation of New Zealand as a 'possession' of the Crown fits with the 'doctrine of tenure' and the Crown's belief that it had gained the underlying or radical title to all of the land in the country. 'Possession' says a good deal about how the Crown saw its relationship with the country and its peoples, and explains the one-sidedness of the Government's decision-making so soon after the signing of the Treaty of Waitangi. Just as with the drawing up of the policy and legislation with regard to land, negotiation with the tribes over the rules for the regulation of customs and trade was not a consideration. New Zealand was now the Crown's possession and would be governed accordingly.

The Crown's passing of legislation to regulate customs and trade was, of course, a significant assertion of its sovereignty and was seen as such by the tribes once the legislation came to be implemented. Mention has already been made of the objections by the Far North rangatira to the collection of customs by the Crown's officials and the consequent restriction on their peoples' access to trade with ships. For the hapū and the rangatira their ownership and authority over their harbours had not been given away and it belonged to them to deal directly, as they always had, with those who came into their waters. The issue of who had the right to control duties and trade was fundamentally a

⁶² See Richard Boast's assessment, cited in Chapter 6, that the establishment of effective State sovereignty took decades.

⁶³ New Zealand Legislative Council, Session 1, No. III, 'Preamble', 1841.

sovereignty issue and the differences over this issue led to war. Comment on this is made in the *Muriwhenua Fishing Report*, where it is explained that from the 1830s the tribes ‘from the bottom of the South Island to the top of the North’ levied boats that came into their harbours. Their continuation of this practice was objected to by the Government, and became a justification for war against the tribes: ‘Continual Maori attempts to levy boats was to be a contributing factor to the wars in the Far North and the Waikato and Maori still claimed the right to harbour dues as late as the Orakei Conference in 1879’.⁶⁴ As much as anything these wars reflected the Crown’s determination to establish its substantive sovereignty throughout the country.⁶⁵

This is not to say that the Governors, or the settler Parliament that was instituted in 1852, had abandoned all regard for the Treaty of Waitangi. In his book *Historical Frictions: Maori Claims and Reinvented Histories* the historian Michael Belgrave traces the survival of the treaty from 1840 to the present, recognising how it has been invested with many meanings and interpretations, depending on the era in which it was being discussed and the interests of the groups that were involved in the discussion.⁶⁶ He believes, in fact, that ‘throughout the nineteenth century, most politicians, if they were forced to think about it, believed that their actions were in some way consistent with the treaty’.⁶⁷ There is no argument here with Belgrave’s assessment. Regardless, however, of the attitude of any of the governments to the Treaty of Waitangi, the Crown established its authority in New Zealand out of an historical practice and institutional framework that were not conducive to the recognition of tribal autonomy or the negotiation with the tribes over policy in matters that were of vital concern to them.

Further insight into the ideology that lay behind the Crown’s practice is to be found in writing by Paul McHugh, legal historian, where he discusses the doctrine that has informed the exercise of Crown sovereignty in the Anglo-Commonwealth jurisdictions of Australia, Canada, and New Zealand. He is of the opinion that right through the nineteenth century and up to the late twentieth the prevailing legal view of Crown

⁶⁴ *Muriwhenua Fishing Report*, 59-60.

⁶⁵ See discussion in Belich, *The New Zealand Wars*, 76-80.

⁶⁶ Belgrave, *Historical Frictions*, Chapter 2, ‘Lost Treaties and the Making of a Modern Treaty’.

⁶⁷ Belgrave, *Historical Frictions*, 44.

sovereignty has been predicated on the ‘orthodox doctrine’, which gives the Crown ‘a Hobbesian sovereignty over its territory which neither court nor subject can refute’. He explains the doctrine thus:

The Crown’s sovereignty is regarded as absolute, unitary and unaccountable, the ultimate expression of this supreme power being the enactment of legislation (the Crown in parliament). Being absolute, this sovereignty is viewed as undivided and indivisible – it can never be shared with any other sovereign entity. It is also unaccountable. The Courts will recognise no law-giving power other than the Crown and will not call the sovereign to account for the exercise of its legislative power.⁶⁸

McHugh’s description is consonant with the actions of the Crown towards the Māori tribal world. Although the New Zealand Constitution Act 1852 did have a section making allowance for designated areas where native custom would apply, the section was never used. As Alex Frame explains the recognition of Māori custom was a temporary measure, only meant to remain in place until the Crown had fully established its sovereignty over the country.⁶⁹ Certainly, the pattern of the Crown’s unilateral decision-making from very early years demonstrates little, if any, understanding by the Crown that the authority of tribes was to be taken into account in determining how the country was to be governed.

The discussions in this chapter help to explain tensions that have existed between the Crown and tribes over the exercise of Crown authority since the 1840s. The tribally-based world recognises the autonomy of different communities, and the building of alliances through the negotiation of mutually beneficial relationships between communities. The hapū and rangatira who agreed to the treaty expected that the alliance with the Queen and her people would be accommodated within the network of relationships that made up their world. The contemporary assertions of rangatiratanga by tribes and other Māori groups are reflective of this history of expectation.⁷⁰ The Crown, on the other hand, comes out of an historical understanding that its authority is absolute and not to be shared with any other entity. There are fundamental

⁶⁸ P. McHugh, ‘The Legal and Constitutional Position of the Crown in Resource Management’, in R. Howitt, ed., *Resources, Nations & Indigenous Peoples*, Melbourne, 1996, 302.

⁶⁹ See A. Frame, ‘Colonising Attitudes Towards Maori Custom’, *The New Zealand Law Journal*, 5, 1981, 106-110. In the rewritten Constitution Act of 1986 the section was completely removed.

⁷⁰ See M. Mutu, ‘The Humpty Dumpty Principle at Work’, 12.

contradictions between the tribally-based system of government and that of the Crown, and as long as the Crown is constituted in a way that it can accommodate no authority but its own, the tensions between the Crown and Iwi Māori are likely to continue.

The next chapter seeks further understanding of the nature of Crown rule by identifying some of its significant characteristics and how these have impacted on hapū.

Chapter 7

Crown Rule and its Consequences for Hapū

This chapter seeks further understanding of the nature of Crown rule by identifying some of its significant characteristics and how these have impacted on hapū. The emphasis is on the Crown's nineteenth century rule and its more immediate consequences as there is a considerable detail about the twentieth century in the following chapters. Where relevant, the discussion will indicate how an action or policy of the Crown has continued into the twentieth century. The themes treated in the chapter have relevance to tribes throughout the country, but in the fleshing out of the themes most of the detailed examples are drawn from the *Muriwhenua Land Report*, which largely concentrates on the nineteenth century. It is, therefore, the Far North's experience of Crown rule that is particularly reflected on in the chapter.¹

The Waitangi Tribunal's words regarding the establishment of Crown rule were cited at the end of Chapter 5: 'Where Maori expected their authority to continue as before, the Government, in asserting British rule, assumed that Maori authority, law, and land tenure, should be replaced'.² The implications of the assertion of British rule for hapū, and especially those of the Far North, are considered here under the following headings: (i) the culture and policy of assimilation; (ii) the exclusion of tribes from government and due consideration by the Government; (iii) the generation of indebtedness and social relations of dependence; (iv) the inequity in the Government's treatment of the hapū; and (v) the lack of accountability by the Government in its treatment with the hapū and their lands.

¹ Each tribal area carries its own history of how they have been engaged by the Crown in the establishment and exercise of its rule, and how they have responded to that engagement. The difference between the experiences of the Te Roroa and the Far North hapū are illustrated through the thesis. Study of a range of Waitangi Tribunal reports provides an understanding of the particularity of each history, as well as the commonalities across the different histories.

² *Muriwhenua Land Report*, 205.

(i) The culture and policy of assimilation

A key feature of Crown rule as it was asserted in the Far North and elsewhere lay in its policy and practices of assimilation, which were closely linked with the British colonisers' view of the advanced nature of their institutions. In explaining the cultural perspective of the Crown officials in their dealings with the hapū over land, the Tribunal for the *Muriwhenua Land Report* says:

Nineteenth-century colonial officials assumed that the natural movement for native peoples was from darkness to light, that Maori progress was to be measured by the rate of assimilation, that rapid acceptance of change was evidence of cultural collapse, that indigenous cultures must inevitably die, or that Maori would move from custom to law. Some of those views survive even today.³

A similar appraisal of the colonial perspective is apparent in the conclusion of Alan Ward's work on racial 'amalgamation' in the nineteenth century.⁴ Ward writes:

The colonisation of New Zealand, notwithstanding the Treaty of Waitangi and humanitarian idealism, was substantially an imperial subjugation of a native people, for the benefit of the conquering race in which the notions of white supremacy and racial prejudice, familiar in other examples of nineteenth-century imperialism were very much in evidence.⁵

The Tribunal and Ward both make the connection between the Crown's assimilation policy and the assumptions carried by the colonisers about the superiority of their culture. Ward's assessment, however, of the capacity of the British Crown and its officialdom to enter into relationships other than those of colonial domination with indigenous peoples is less hopeful than that of the Tribunal, who says:

Whatever the mismatches of Maori and Pakeha aspirations, none gainsay the Treaty's honest intention that Maori and Pakeha relationships would be based on mutual respect and the protection of each other. For Maori, these principles were essential to any alliance. For the British, they were part of the art of statesmanship and of humanitarian objectives.⁶

That this is an overoptimistic view of the respect held for 'Maori' by the official British presence at the time is signified by a later statement in the report: 'The principles

³ *Muriwhenua Land Report*, 198. In fact, a good deal of the argument from the Crown counsel in the Muriwhenua Land hearing was based on arguments of the 'rapid acceptance of change' by the Far North hapū. See Chapter 4 of the thesis.

⁴ Ward, *A Show of Justice: racial 'amalgamation' in nineteenth century New Zealand*, 36. Ward explains that 'amalgamation' was the stated, official policy that Māori were to be brought into the institutions of British civil life.

⁵ Ward, *A Show of Justice*, 308.

⁶ *Muriwhenua Land Report*, 117.

already developed, of respecting Maori law and authority and protecting Maori interests, were lost almost immediately, by officials, in a preoccupation with the English system.⁷

While this study finds that the early British bureaucracy in New Zealand was lacking in the capacity to form relationships of mutuality with the hapū because of the culture of colonial domination that informed its operation, it is not the position of the thesis that this lack existed inherently amongst the early Europeans that came to the country. There is plenty of evidence that shows that as long as hapū controlled their lands, Europeans generally accorded them due respect, regardless of any theoretical notions of superiority they held. From the time of Cook's first visit, explorers and traders dealt with hapū on hapū terms. In the 1830s, ships were paying levies for entry into hapū controlled harbours and this continued well after the signing of the treaty.⁸ Some of the early missionaries had learned an understanding and respect of tribal custom, so much so that in the years immediately following 1840 they went out of their way to try and persuade officials to modify their decisions in order to avoid unnecessary offence to the local people.⁹ And in the early years of their presence in an area, when Europeans were still in the minority, officials often worked with a certain respect for the tribes.¹⁰

It was as the institutions of Crown rule became more established that the level of respect amongst the European community for the hapū, and their law and authority, decreased – and it was more and more taken for granted that Māori communities would have to conform to the demands of British rule. The settlers' change of position with regard to the taking of 'surplus' land is indicative of the changing attitudes to tribal authority.¹¹ The growing supposition that the Māori tribal world would have to fit in with the norms

⁷ *Muriwhenua Land Report*, 121. The indications are that the respect for Māori tribal custom, expressed at the time leading up to the signing of the treaty, was quite ambiguously held by Hobson and those whom he represented. See, Ward, *A Show of Justice*, Chapter IV, 'The Introduction of British Law'.

⁸ See *Muriwhenua Land Report*, 44. See also *Muriwhenua Fishing Report* (pages 59-60): 'Continual Maori attempts to levy boats was to be a contributing factor to the wars in the Far North and the Waikato and Maori still claimed the right to harbour dues as late as the Orakei Conference in 1879'.

⁹ See, for example, H. Carleton, *The Life of Henry Williams, Archdeacon of Waimate*, Vol II, Auckland, 1877, 20-2, 62-4.

¹⁰ See, for instance, *The Te Roroa Report*, 39.

¹¹ There were individuals who maintained their love and respect for the hapū that had welcomed them in the first place. Joseph Matthews is one who is named in the *Muriwhenua Land Report* (pages 64-5) as maintaining this respect. Such individuals, however, are named as exceptions.

laid down by the Crown became an active policy of assimilation under Governor Grey. In 1862, he introduced the rūnanga system to ‘native districts’. This was to be a hierarchical system of local and regional councils, operating under the auspices of European district commissioners – an adaptation ‘of Maori structures to serve State-driven purposes’.¹² Although the national rūnanga system was not greatly successful, it is symptomatic of the assimilatory policy that has marked the Crown’s relationship with Māori communities over many generations.¹³

The most effective Crown move in terms of drawing the Māori tribal world away from its traditional foundations, and into line with the British-based social, political, and economic systems, was the implementation of the policy for the extinguishment of native title. This policy involved far more than guiding, or even goading, Māori communities into European ways. It was directed towards the breaking down of the tribal structure of Māori society. The communal base in the land – on which hapu autonomy and a whole way of ordering society rested – was intentionally targeted so that it could be recast into a system of private property that suited Crown and colonist interests. The changing of the tribal title to land so that it became a title granted by the Crown and the individualisation of title to land were almost certainly the most complete acts of assimilation by the Crown in relation to the tribal world.

There were contradictions, however, in the Crown’s stated positions of ‘amalgamation’ and assimilation. Ostensibly the Māori communities were to have their interests advanced by induction into the British system, but often measures were put in place that prevented the communities from becoming full participants in the system to which they were supposedly being assimilated. This is intimated in the statement from the *Muriwhenua Land Report*, cited in the previous chapter, about the intended outcome of the policy of total extinguishment of native title: ‘Maori would hold lands as Europeans did, except that the Maori lands, or reserves, would be managed by Government agents for them, or would be held by a few chiefs’.¹⁴ In practice, this meant that most Māori

¹² See Cox, *Kotahitanga*, 80-2. Similar assessments are offered by Lyn Waymouth and Richard Hill, as mentioned in the Introduction to the thesis.

¹³ For background on a range of nineteenth and twentieth policies that have been assimilatory in nature see Cox, *Kotahitanga*, 75-102 and Walker, *Ka Whawhai Tonu Matou*, 174-181.

¹⁴ *Muriwhenua Land Report*, 205.

groups were effectively precluded from administering their properties that became available by way of reserve. The report points to various instances where racially mixed boards were placed in charge of tribal reserve lands. The structure of these boards was determined by the Crown and, while there was generally a place for Crown-approved tribal representation on them, the chair and the ultimate control were not in the tribe's hands.¹⁵ Assimilation did not mean that Māori communities were to be granted 'the rights and privileges' of British citizens to the administration of their properties.

This early presumption that it was appropriate for the Crown to control the structure and representation of Māori organisations set a pattern of assumption which still affects Crown action. The Crown's direct involvement in the administration of Maori Trust Boards continued right through to the end of the twentieth century. In 1996, the Maori Trust Boards Amendment Act amended sections of the Maori Trust Boards Act 1955 to remove the involvement of the Minister of Maori Affairs from some of the day-to-day activities of the Board.¹⁶ This was a first step in a wider process of reform of the Maori Trust Boards Act, reform which included the intention to replace the accountability of the Maori Trust Boards to the Minister of Maori Affairs with accountability to the boards' beneficiaries.¹⁷

There are other areas, however, where the Minister still has considerable say in who will represent Maori in their dealings with the Crown. This is notably the case in matters relating to the settlement of Treaty claims. Te Ururoa Flavell, in his maiden speech to Parliament in 2005, comments both on the opportunity created for tribes by the settlement process, and the way in which the Crown maintains its controlling hand:

Consider then one of the most important matters affecting Maori today, including most especially those of my electorate. The tribes are engaged in a process of rebuilding their tribal institutions, in ways that are consistent with our culture and traditions, in order to meet Crown requirements for the settlement of Treaty claims. Maori have not had a comparable opportunity to manage our affairs through our own institutions since the State was established in 1840. It is likely to be the only chance they will get.

¹⁵ *Muriwhenua Land Report*, 328 and 368.

¹⁶ Te Puni Kōkiri /Ministry for Maori Development, 'Post Election Brief October 1996', Wellington, 1996, 22.

¹⁷ Te Puni Kōkiri, 'Post Election Brief October 1996', 215.

But, the State has set, and controls the process by which iwi representatives are selected to settle the claims and to establish the governing bodies. The State has a hands-on role in deciding who can speak for the tribe in negotiations with the State itself. It appoints the person who will conduct the selection process, whether or not the tribe has a structure or a process of its own in place. The State process can determine how the tribe should be shaped for the future management of its affairs, often having little regard for the traditional tribal policy. Iwi were not involved in determination of the process.¹⁸

Flavell observes that he does not believe that Pākehā would be expected to tolerate such treatment. In his view the cause for real concern, however, ‘is that matters like this give rise to strong feelings of injustice, of outside domination and control’.¹⁹ There is obviously a great deal more reform needed if the Crown is to move right away from its history of assimilatory control over the affairs of hapū and iwi.

The effect for the Far North of the Crown’s nineteenth century policies of assimilation, the ones mainly discussed in the *Muriwhenua Land Report*, was to relieve the hapū of much of their property and to undermine the exercise of their rangatiratanga.²⁰

(ii) The exclusion of tribes from government and from due consideration by the Government

There is no evidence to suggest that in the first decades after the signing of the treaty the Far North hapū and their rangatira sought representation on the Governor’s Council or the Parliament set in place in 1852.²¹ This is because the tribes of the North regarded the treaty as an alliance between the Crown and themselves – an alliance based on their shared interest in the benefits that would accrue to the hapū and the Europeans through

¹⁸ Te Ururoa Flavell, ‘Maiden Speech’, Parliament House, Wellington, Thursday 24 November 2005.

¹⁹ Flavell adds: ‘Such practices are an impenetrable barrier to the improvement of Maori and Pakeha relations in this country’. This control by the Crown can also result in negative outcomes for the internal relationships of hapū and iwi. Margaret Mutu explains (*Te Whānau Moana*, 210) how Crown control of the settlements process ‘has caused major intra-iwi conflict as the iwi try to retain control over their claims against members of the tribe who work under Crown direction and whom the Crown unilaterally declares to be the leaders of those iwi’.

²⁰ See *Muriwhenua Land Report*, 399.

²¹ By the 1870s there were Māori groups in the country who were actively advocating tribal representation in the Parliament. The four ‘Maori seats’ established in 1867 were not seen as being tribally representative, or to provide a fair representation of Iwi Māori. See L. Waymouth, ‘Parliamentary Representation for Maori: debate and ideology in *Te Wananga* and *Te Waka Maori o Niu Tirani*, 1874-8’, in J. Curnow, N. Hopa, and J. McRae, eds, *Rere Atu, Taku Manu! discovering history, language & politics in the Maori-language newspapers*, Auckland, 2002, 154.

the settlement of Europeans on the land.²² The relationship between the hapū and the Crown would be an alliance or partnership of peers.²³ For the hapū, this was in accord with their experience of how inter-community relationships were formed: groups retained their autonomy and from that base negotiated with one another in areas where their interests overlapped.²⁴ In view of the treaty that had been negotiated, it was more than reasonable for the hapū to assume that the arrangement between themselves and the British Crown was based on the same sort of understanding.

By contrast, the Crown through its officials was committed to a path that in the end would accommodate the recognition of no authority but its own. The Tribunal sees the appointment of Magistrate White in 1848 as marking the introduction of British rule in the Far North, which in his case meant a highhanded treatment of the hapū of the area.²⁵ Nor was he an exception. The climate that allowed for White's manner of administration had been set much earlier. Ward passes the telling comment about Hobson: that 'from the moment of landing [he] began to perform acts of sovereignty'.²⁶ And the missionary, Henry Williams, records separate incidents in 1840 where Mr. Shortland, one of Governor Hobson's deputies, and Hobson himself were quite prepared to act in defiance of local custom, disregarding advice they were given that their actions could have disturbing consequences.²⁷ The pattern of behaviour followed by all three officials is basically that of the colonial servant who has the duty to ensure the assertion of Crown authority over the natives. Their training had not equipped them to work with a model of government that was based on the sharing of political authority and the negotiation of mutual benefit between indigenous and colonising communities.²⁸

²² See *Muriwhenua Land Report*, 110-15.

²³ *Muriwhenua Land Report*, 114. The report actually uses the word 'equals' where I have used 'peers'.

²⁴ See Chapter 3 of the thesis.

²⁵ See *Muriwhenua Land Report*, 129-130, 186 ff. The Tribunal says of White (page 130): 'we would describe his actions as consistently high-handed'.

²⁶ Ward, *A Show of Justice*, 43. His observation is based on I. Wards, *The Shadow of the Land*, Wellington, 1968, 43-4.

²⁷ Carleton, 20-2, 62-4.

²⁸ Donald Loveridge, historian, analyses Lord Normanby's 'Instructions' to Hobson, and believes that they indicate that 'the British Government had no intention of encouraging or assisting Maori to preserve their customs [institutions], except in the short term while the process of 'civilization' was underway'. See D.M. Loveridge, 'The Origins of the Native Lands Acts and the Native Land Court', Evidence given to the Waitangi Tribunal in hearings for the Hauraki Claim (Wai 686, and Wai 100 & Ors), 3 November 2000, 29.

The indications are that, as the colonial Government became established, the path was set for an increasing dismissal of the hapū and their authority, and the generation of a general antagonism towards tribal communities.²⁹ There are frequent allusions in the *Muriwhenua Land Report* to the displacement of the authority of the Far North hapū from the early 1840s onwards. In relation to the land, the desire to move whānau out of the areas where Europeans wanted to settle was obvious from the mid 1850s.³⁰ The Tribunal says that ‘the historical record points to one consistent theme: a desire to acquire as much Maori land as could be, to limit Maori lands as much as possible, and to remove Maori entirely from the town areas and the nearby fertile flats and valleys.’³¹ As time went by, Crown officials, with the support of most of the European settler community, moved more and more to dislodge the Far North communities physically and politically from their place on the land.³²

The record of the Crown’s dealings in the Far North shows that, from the point of view of the Government and its officials, Crown rule meant there was to be one governing authority and one law, controlled by Crown and colonist. From the time of Magistrate White’s administration, the possibility of any conjoint exercise of authority by the hapū and the Crown was not considered. Ultimately, the exclusion of the Far North hapū from an effective say in the government of their region was largely achieved through the Crown’s unyielding approach in establishing the dominance of its own systems and, particularly, its legal system. This is articulated by the Tribunal when it discusses what the British anticipated from the Treaty of Waitangi:

When considering the Treaty of Waitangi and British expectations, the Treaty debate is more significant for what was not said than for what was. It was not said, for example, that for the British, sovereignty meant that the Queen’s authority was absolute. Nor was it said that with sovereignty came British law, with hardly any modification, or that Maori law and authority would prevail only until they could be replaced.³³

This statement encapsulates what is shown in the *Muriwhenua Land Report* to be the history of how the Crown dealt with the hapū.

²⁹ See A. Ward, *A Show of Justice*, 49. Ward is making reference to a ‘shift of attitude’ amongst the settlers that was noticeable across the country.

³⁰ See *Muriwhenua Land Report*, 224.

³¹ *Muriwhenua Land Report*, 333-4.

³² See *Muriwhenua Land Report*, 206 and 121.

³³ *Muriwhenua Land Report*, 115.

The Tribunal does not consider that the terms of the Treaty of Waitangi allowed for the unrestrained dominance of the Crown but rather that they required ‘a working relationship’ between Crown and Māori.³⁴ In the Tribunal’s opinion reciprocity is fundamental to the Treaty of Waitangi because it ‘is essentially a contract or reciprocal arrangement between two parties, the Crown and the Maori, a ratification of the terms and the conditions on which Europeans were allowed to settle in the country’.³⁵ It is on the basis of the principle that the treaty intended a working partnership that the Tribunal critiques the Crown’s manner of reaching decisions about matters that were of vital concern to the Far North hapū.

The Tribunal believes that the Crown ought to have worked with the tribal leaders to sort out a plan ‘for how settlement would be arranged, the lands for Maori and those for the settlers, how continuing benefits to Maori might flow, how Maori authority might be recognised and provided for, and so on’; and judges that the fact that this did not happen lies at the heart of the injustice to the hapū:

These were not matters that could be dealt with by ad hoc land transactions, as the circumstances show, and as the effect was then, and has been ever since, to cast the whole debate about equity between Pakeha and Maori only in legal terms.

As we see it, the problems were not primarily those of ‘price’, ‘title’, and the like; the real problem was the assumption that all matters could be resolved by the application of English law, authority, and process alone, when what was most needed was a fair and agreed political plan.³⁶

This unilateral process is described as inappropriate,³⁷ and the theme of appropriate process is one the Tribunal returns to. Its conclusion regarding the official investigation of the pre-Treaty land transactions was that: ‘the process as a whole was wrong’.³⁸ Again, the hapū had had no part in agreeing to it. What is more, the process ‘demeaned Maori as supplicants before a foreign court where their actions would be judged on

³⁴ *Muriwhenua Land Report*, 386.

³⁵ *Muriwhenua Land Report*, 388. The Tribunal makes these assessments because it is required by law to examine the actions of the Crown with regard to Māori in terms of its treaty obligations.

³⁶ *Muriwhenua Land Report*, 171.

³⁷ *Muriwhenua Land Report*, 171.

³⁸ *Muriwhenua Land Report*, 178.

foreign terms.³⁹ The whole conduct of the investigation was exclusive of the hapū's law, authority, procedures, and input, and thus cast the Far North communities as aliens in their own lands.⁴⁰

The lack of interest in any input from the hapū was also apparent in the land purchase programme, which was developed by the Government in pursuit of its aims to acquire and control as much tribal land as possible:

While the Government was never so explicit as to state that its [land purchase] policy was to relieve Maori of as much land as possible, as quickly as practicable, and for the least cost, official statements and reports, combined with the outcome, show that that was the policy in fact. It is not difficult to form the impression that Maori interventions or complaints were seen as having a nuisance value only, standing in the way of a necessary objective.⁴¹

A similar criticism can be made of the Government's establishment of the system for converting tribal land tenure into Crown-recognised title. As the Tribunal explains, the main problem with the system was that it was put in place without the agreement of Māori:

Whatever the good and bad elements in the mixed motives of the time, it is clear from later actions that the new system was not agreed. Maori never consented to the substitution of an alternative tenure system or the diminution of the laws of their ancestors. When a Native Land Court was established to change Maori land tenure generally, and the policy was thus obvious for the first time, Maori in various parts of the country immediately objected.⁴²

The system was not developed through a process of negotiation between tribal leaders and the Government. Indeed, as these examples show, negotiation with tribes over policy and legislation that concerned their land and resources was not a consideration.⁴³

³⁹ *Muriwhenua Land Report*, 178.

⁴⁰ See *Muriwhenua Land Report*, 178-9.

⁴¹ *Muriwhenua Land Report*, 206.

⁴² *Muriwhenua Land Report*, 205-6.

⁴³ The Government at the time, the early 1860s, was entirely made up of European settlers because the granting of the franchise in 1852 was granted only to men with freehold (individual) title to land. 'Representative' government in New Zealand, established through the 1852 New Zealand Constitution Act, was nothing of the sort for the Māori tribal world. See M. P. K. Sorrenson, 'A History of Maori Representation in Parliament', *Report of the Royal Commission on the Electoral System*, Appendix B, 1986, 12-14, 18-21; L. Waymouth, 'Parliamentary Representation for Maori' for background on the inadequacy of the 'representation' of tribal interests that was contained in the establishment of the four Māori seats in 1867.

Not only were the hapū excluded from the processes of political decision-making, their interests received little or no consideration from the Government. This is regarded by the Tribunal as a major reason for the redress sought by the claimants – because of the onus on the Crown to fulfil a fiduciary or protective role with regard to Iwi Māori and their interests. The principle of protection is fundamental to the treaty: the Crown’s commitment to ensure the protection of Māori tribes and Māori people generally is explicitly stated in the treaty text, and is part of what was discussed and promised at the time of the signing.⁴⁴ Unfortunately, as the *Muriwhenua Land Report* shows, the protection given was little more than token.

The Crown’s failure to protect the interests of the Far North hapū is traceable to two main causes. One is the inadequacy of the safeguards for the tribes in the Government’s legislation and policy; these have already been discussed at some length. The other lay in the appointment of the Crown’s officials, and the tacit approval that was given to the way in which they carried out their duties. The two officials most discussed in the report are Magistrate White and Commissioner Bell, because it was through their work that the stage was set for the loss to the hapū of much of their best land.⁴⁵ Their administrations are discussed briefly here, along with the Crown’s failure to ensure adequate reserves for the hapū’s needs.

For slightly different reasons, the appointments of White and Bell are expressive of the Crown’s lack of regard for the Far North hapū. Magistrate White’s appointment, in 1848, reflected Governor Grey’s policy of imposing British law through Government agents serving as judges.⁴⁶ The Tribunal relates that, although White was poorly qualified for the task, he readily took to himself the roles of law maker, law manager, enforcer, and dispenser all at the same time; and it adds the comment: ‘By so combining executive and judicial functions, English law was introduced to Far North without those safeguards that gave it respect.’⁴⁷ White, in his administration, showed a positive

⁴⁴ See *Muriwhenua Land Report*, 389.

⁴⁵ The Tribunal points out that White got involved in the acquisition of land for the Crown in ways that went well beyond his appointed role. See *Muriwhenua Land Report*, 187, 188.

⁴⁶ *Muriwhenua Land Report*, 186 ff.

⁴⁷ *Muriwhenua Land Report*, 187.

antagonism towards the interests of the Far North hapū.⁴⁸ Commissioner Bell, whose work of investigating the pre-Treaty land transactions began in 1858, was more able for his task and politically ambitious. He sought favour with those in Government by setting out to gain as much Māori land as possible. The Tribunal says of Bell that ‘the protection of Maori interests barely figured throughout Bell’s operations’.⁴⁹

The following generalisations can be made about the work of both White and Bell, as revealed through pages of evidence in the *Muriwhenua Land Report*.⁵⁰ The sole aim of their efforts was the securing of land for the Crown and colonists, and any concern to protect the hapū’s interests was negligible; the land reserved for whānau was minimal and there was no equity between the amounts granted to colonists and that safeguarded for the Far North communities.⁵¹ Nor was the maintenance of respect for the authority of the hapū a consideration; the most that was given by way of acknowledgement of any Māori interest was the seeking of token affirmations of a few of the land agreements.⁵²

In their administration of matters concerning tribal land, both White and Bell demonstrated a considerable lack of exactness. The Tribunal uses the word ‘loose’ to describe the arrangements they made, and the evidence shows that the word ‘shoddy’ could have just as accurately been used.⁵³ It was a looseness that served the purposes of gaining land for the Crown and colonists and securing the release of land from the hapū. There was often, for example, a great deal of carelessness in the determination of the boundaries of the land purportedly sold, even though the stated policy was that boundaries should be clearly defined.⁵⁴ In this matter as in others, White and Bell showed they were unconstrained by articles in the land legislation that were directed towards the safeguarding of Māori interests, inadequate as these were. There was, in fact, little check by the legislators on the actions of the officials.

⁴⁸ See section (v) below for the example of his actions with regard to the Takerau and Taemaro blocks.

⁴⁹ *Muriwhenua Land Report*, 132.

⁵⁰ This is detailed in Chapters 5-8 of the *Muriwhenua Land Report*.

⁵¹ See section below on ‘The inequity in the Government’s treatment of the hapū’.

⁵² *Muriwhenua Land Report*, 173, 206.

⁵³ Cf. *Muriwhenua Land Report*, 250: ‘... and, as happened at Waikiekie and Oruru, a shoddy deed resulted’.

⁵⁴ See, for example, *Muriwhenua Land Report*, 240ff. and 276-8. The Tribunal points out that the unsurveyed boundaries and poorly defined boundary descriptions led to a ‘legacy of numerous boundary uncertainties’.

In regards to the Crown's duty to govern in the interests of the hapū, the meagreness of the reserves of land secured to the hapū are identified by the Tribunal as possibly marking the Crown's most serious lapse.⁵⁵ The legislation required that, in its land purchase programme, the Government ensure that sufficient reserves be kept for the needs of Māori communities. This requirement, however, was rendered ineffective in practice. The Tribunal found, on the basis of extensive evidence, that:

No adequate reserves policy was implemented or adhered to, and insufficient reserves were made. The evidence points convincingly to an alternative policy of acquiring as much Maori land as could be, as soon as practicable and with as few reserves as possible.⁵⁶

The failure of the Crown, through its officials White, Bell, and others, to ensure adequate reserves for the hapū led, by the turn of the century, to their marginalisation on 'uneconomic perimeter lands'.⁵⁷ As the Tribunal says: 'Few things would have provided for equity and future Maori participation in the economy as a fair share of the land'.⁵⁸

The evidence given in the *Muriwhenua Land Report* shows that the exclusion of the hapū from an effective say in the political decisions that affected the Far North – and of tribes generally from national decision-making – along with the lack of due consideration shown to the hapū by the Crown in the exercise of its authority, resulted in the preclusion of the hapū 'from participating in the eventual benefits of settlement' and from being 'stake-holders in the new social and economic order that Europeans knew would follow'.⁵⁹

(iii) The generation of indebtedness and social relations of dependence

The actions of the Government in the Far North forced the tribes into a position of dependence on the Crown, and many whānau and hapū into debt to Crown and settler. It has already been noted that the Government in its dealings regarding tribal land, whether through its land purchase programme or the Native Land Court, stipulated that

⁵⁵ See *Muriwhenua Land Report*, Section 10.2.

⁵⁶ *Muriwhenua Land Report*, 400.

⁵⁷ *Muriwhenua Land Report*, 335.

⁵⁸ *Muriwhenua Land Report*, 327.

⁵⁹ *Muriwhenua Land Report*, 400.

in the end Māori would receive their land as a grant from the Crown. This action was immediately undermining to the autonomy of the Far North communities.

Specific examples are given in the *Muriwhenua Land Report* that show how further dependence and indebtedness were generated for the Far North hapū as a result of the Crown's dealings. Some of these are examined here. The first example relates to land on the Karikari Peninsula which had been held in trust for the whānau of the area by the missionary Joseph Matthews, as a result of a pre-Treaty land agreement.⁶⁰ When the land was 'investigated' by Commissioner Bell in the late 1850s, he decided to allot a certain acreage to the missionary, took the largest area by far as surplus for the Crown, and allotted a small share (138 hectares) as a reserve for the Far North owners. This was in spite of Joseph Matthews' request that the whole of the Ramarama section (1021 hectares) be reserved for the whānau 'in performance of my promises'.⁶¹ In fact, Bell treated the land as if all whānau interest in it had been extinguished, although it was clear that the land had not been sold or alienated because whānau and missionary were living alongside each other on the land. Bell was prepared to reserve the small amount for the tribe's needs, but he saw this as a favour from the Crown. The Tribunal sums up Bell's position thus: '... if Maori were to receive any part of the block at all, it would be by grace and favour only, no matter what promises were made.'⁶²

The bitter consequences of being made dependent on the Crown's grace and favour became evident with time. This was notably so in the case of the Tangogne block to the south-west of Kaitaia, another area in which Matthews had an understanding with the local whānau.⁶³ In 1858, this block was taken as surplus by Commissioner Bell without any consultation with the whānau or clarification of the situation with Matthews. The procurement of the land by the Crown was a pen and paper arrangement, and the whānau continued to live in the area as before. The Tribunal says: 'Nothing happened on the ground to cause Maori to think this land had ceased to be theirs, until 1890.'⁶⁴ However, as soon as Timoti Te Ripi and others discovered the Government was

⁶⁰ See *Muriwhenua Land Report*, 144-6 and 230-5.

⁶¹ *Muriwhenua Land Report*, 146, citing 'Old Land Claims Files', 1/328 (Doc#D12(a)), Wai 045, 44.

⁶² *Muriwhenua Land Report*, 146.

⁶³ See *Muriwhenua Land Report*, 258-62.

⁶⁴ *Muriwhenua Land Report*, 260.

claiming the land as its own, they objected. In 1893, they petitioned Parliament with Matthews' support. Further petitions followed. However, despite the recommendation of the Resident Magistrate in 1906 that the land be made available to the whānau as they were otherwise landless, the Government prevaricated and referred the matter to two further commissions of inquiry in 1924 and 1927.⁶⁵ The final outcome is recorded by the Tribunal:

These inquiries did not resolve the occupation of the land. By the 1960s large parts of the area had been given out on licences by the Government for sawmilling; this made local living uncomfortable, but seven Maori families still clung to their homes, without title, on the perimeter. There are reports that the families were large but the homes well cared for. Witnesses described with anger how these seven families with young children, were finally forced from their homes, landless and nowhere else to go, more than a century after the Europeans had been so well provided for. The Government finally won the Tangonge block, and with it the undying bitterness of the local Maori people.⁶⁶

Sadly, the case of the Tangonge block is but one example of how many whānau in the Far North had control of their land wrested from them.⁶⁷

There were other means used by the Crown that led to the generation of dependence and indebtedness amongst the Far North communities. One was the costs imposed on tribes in putting their land through the Native Land Court so as to procure Crown-recognised title. In spite of their aversion to the Court, many communities found they were forced to go it to assert their rights to their land,⁶⁸ and sometimes this was because of the carelessness of Crown officials in their investigation of land claims. The *Muriwhenua Land Report* details a number of cases where Government officials claimed land for the Crown with a totally inadequate survey of boundaries. In order to rectify the errors the officials had made and have their title to the land recognised through the Court, the Far North owners had to pay both for survey costs and the costs of the hearing. These were no small amounts and many communities became beholden to the Crown, a surveyor, or a European sponsor in finding the means to cover the costs. In requiring hapū and whānau to have expensive and exact surveys of their land, the Government was

⁶⁵ See *Muriwhenua Land Report*, 260-1.

⁶⁶ *Muriwhenua Land Report*, 262.

⁶⁷ Chapters 7 and 8 of the *Muriwhenua Land Report* look into a considerable number of particular claims from the Central, Eastern, Western, and Northern areas of the Far North. Again and again the dubious actions of the Crown and its agents are detailed, and the subsequent loss of land for whānau and hapū.

⁶⁸ *Muriwhenua Land Report*, 286.

demanding standards it did not apply to itself.⁶⁹

Two examples from the north of the claim area show the indebtedness and social dependence that arose for Māori communities from the costs associated with Native Land Court hearings. The first concerns land on the northern peninsula around the Parengarenga Harbour.

The Native Land Court became active in the area in about 1899, and surveyed the balance of Maori lands for the investigation of the titles, partitioning the blocks amongst the owners. The survey cost was L1000 [one thousand pounds]. To recoup the cost, the Maori land, some 59,531 acres (24,092ha) excluding the ‘reserves’ above-mentioned, was vested in the Tokerau Maori Land Board, to be leased formally. In that way Maori lost control of all but a few reserves. All rents and royalties went to the board to clear debts and Maori became totally dependent on gumdigging. There were pleas for at least part of the lease land to return to Maori, but to no avail.⁷⁰

In understanding this situation, the reader needs to bear in mind that the Land Board was appointed by the Government. It was not in the control of the Māori communities whose land was placed under the administration of the board.

The other example relates to a case where a community enlisted the help of a European sponsor to pay for costs incurred in taking a claim to the Native Land Court. The reason the claim had to be made is of significance. It was a situation in which the land had been placed in a trust for local Māori under the name of a missionary, the Reverend Taylor. Once again a Government official had wrongly assigned the greater share of the land as surplus for the Government. The Land Court hearing, initiated by the Māori to whom the land rightfully belonged, led eventually to the withdrawal of the Government claim. (Such a withdrawal was quite exceptional.) However, in order to pay for the costs imposed by the Court, the community concerned had turned to Samuel Yates, a local European colonist, to provide the financial backing needed. Unfortunately, the outcome of this sponsorship meant that Yates ended up owning the greater share of the land. The Tribunal’s summing up of the whole affair, which has been only briefly related here, is telling:

⁶⁹ *Muriwhenua Land Report*, 276-8.

⁷⁰ *Muriwhenua Land Report*, 368.

The Government enabled and facilitated one European to acquire over 56,000 acres (22, 663ha) in Muriwhenua North and later more, leaving over 400 Maori on much less, when the original arrangement was to maintain the whole area under a tribal trust, and when the Government's own claim to the 56,000 acres as surplus land made the private alienation inevitable.⁷¹

This, unfortunately, was not the end of Māori loss and indebtedness to Samuel Yates. Yates gained a monopoly on the gum trade in the upper part of the Muriwhenua peninsula, and similarly the Evans family in the lower part. Yates, in particular, managed to gain the lease on all the Māori land in his area, apart from the few native reserves, and this put him in a particularly powerful position in relation to those who sought to gain a living from the gum fields. Yates, and others like him, ensured that theirs were the only retail outlets for gum and for the procuring of food and other provisions.⁷² This sort of control led to the gum-suppliers being caught in a circle of indebtedness to the monopolists. Also, the 'further effect of gumdigging as the only source of cash was to encourage more energy into digging and less into food production. Cultivations were neglected as debts grew and dependence on store-bought food increased.'⁷³ Whānau, who had had the independence that comes from self-reliance in food provision, now had that independence severely undermined by the cycle of debt they were forced into.

The consequences of the monopolistic control of the gumdigging industry were disastrous for the gum diggers. Far North Māori, and a large number of people brought in to work the fields, mainly Dalmatians, 'were to be ensnared in an unwholesome system of debt peonage'. The claimants submitted that their people got into this situation as a direct result of land loss, and that the bondage to the stores which the gum traders operated caused their forbears 'to sell, or lease, more of such land as remained to them in an attempt to release themselves from both debt and servitude'.⁷⁴ The Tribunal found that the effects of this cycle of indebtedness have continued to the present day. 'The effect of gumdigging was to lock Maori (and others) into an ever-widening cycle of poverty and dependence from which they were not relieved until the 1960s. Even today,

⁷¹ *Muriwhenua Land Report*, 274.

⁷² *Muriwhenua Land Report*, 365.

⁷³ *Muriwhenua Land Report*, 365.

⁷⁴ See *Muriwhenua Land Report*, 356-7.

in the Far North social problems continue to abound.⁷⁵

There are further examples given in the *Muriwhenua Land Report* of how Government agencies, both in the nineteenth century and well into the twentieth, were instrumental in putting the Far North whānau into relationships of dependence on the State. To cite them all is beyond the scope of the thesis. On the basis of the evidence given, the observation can be fairly made that the actions of the Crown over the decades from the 1850s were responsible for forcing the Far North communities into indebtedness, and dependence on the State. These same communities, before Crown rule had its effect, had retained their autonomy in the land over centuries.

(iv) The inequity in the Government's treatment of the Far North hapū

There are a good number of examples given in the *Muriwhenua Land Report* that show discrepancies between the way the Crown treated the European settlers and the Far North hapū, and notably in the areas of allowance for land ownership, development assistance, and forward planning.

In procuring land from tribes the Government had an acknowledged duty to ensure that Māori communities had sufficient land reserved for their present and future needs.⁷⁶ This was a specific direction from Lord Normanby in his 'Instructions' for the settlement of New Zealand, and was recognised in the New Zealand Native Reserves Act 1856. Unfortunately, the legislation was not cast so as to guarantee Māori communities the protection intended by Normanby.⁷⁷ It is in the light of the duty of the Government to ensure these reserves to the communities that the Tribunal makes the observation:

From the very beginning, one European could hold up to 2560 acres (1036 ha) (or more if the Governor allowed, and as he did in fact allow), while reserves for a Maori community of some 100 or more people might be 200 acres (81 ha) or less.

Later, no ceilings for Europeans applied. The Government enabled and facilitated Europeans to acquire 7710 acres (3210 ha) on the southern Aupouri

⁷⁵ *Muriwhenua Land Report*, 363.

⁷⁶ See *Muriwhenua Land Report*, 170, and Bassett et al., 14.

⁷⁷ See Bassett et al., 14.

Peninsula when that was the last of the Maori land in the area; and allowed a European to purchase 68, 607 acres (27,765 ha), and then to lease more, on the same peninsula, while more than 100 Maori had access to only 820 acres (332 ha), much of which in winter was under water. Consistently, Maori were allocated far less than was seen as necessary for a European. The laws to control land allocation simply did not include any adequate provision to maintain fair shares with Maori.⁷⁸

Comment is also made on the prejudice against the Far North whānau with regard to development assistance. While such assistance was made available from early years to European settlers who bought land and started farming, there was none given to the Far North whānau until the 1920s, by which time their land holdings had been greatly reduced.⁷⁹ In a submission to the Rees Commission in 1891, Wi Pere, who was to become Member of Parliament for Eastern Maori, identified shortage of capital as a general problem facing Māori in the development of their land. He said that Māori ‘wanted to develop and farm their land themselves, but needed capital to do so, which should be provided at a reasonable rate of interest by the State’, and he was supported in this by other influential Māori leaders.⁸⁰

The evidence in the *Muriwhenua Land Report* shows that when finally the Government offered help to the Māori farmers of the Far North in the 1920s and following decades, the assistance was given under tight bureaucratic controls and in such a way as to keep the farmers beholden to the Government. The effect, once again, was to create conditions of dependence.⁸¹ The injustice in the different treatment of the Pākehā and Māori farmers is pointed out by the Tribunal:

Maori, if anyone, were entitled to development assistance. It was well known at the time, and had even been predicted as necessary by Lord Normanby, that the cost of selling and developing the country was being met by the on-sale of Maori land. They were funding the country. The irony would later be, as Europeans took possession of the land and Maori were excluded, that it was the Europeans, not Maori, who received the State’s land development assistance from the accumulated profit in the public revenue.⁸²

The point that the Government had built up its profits from its sales of tribal lands and

⁷⁸ *Muriwhenua Land Report*, 400.

⁷⁹ See *Muriwhenua Land Report*, 367 ff.

⁸⁰ R. Boast, ‘The Law and the Maori’ in P. Spiller, J. Finn, R. Boast, eds, *A New Zealand Legal History*, Wellington, 1995, 153, with reference to ‘Minutes of Evidence’, 1891, AJHR, G-1, 9.

⁸¹ Cf. *Muriwhenua Land Report*, 372-7.

⁸² *Muriwhenua Land Report*, 208.

therefore some of the advantage from those profits should have returned to Māori communities is taken up again at the end of the report: ‘In the meantime, the Government was funding immigration and colonisation from the sale of Maori land, so that Maori had a prior claim on such funds for their own training and development.’⁸³ Mention might also have been made of the fact that Māori communities resourced the development of much of the country’s infrastructure, in that extensive areas of tribal land were used in the development of road and rail routes.⁸⁴

All of the above is indicative of the major inequity identified by the Tribunal: that the Government in its forward planning was entirely focused on providing for the needs of the European immigrants and did not make provision for the future needs of Māori communities. Its planning was not directed to ensuring that whānau and hapū would benefit from European colonisation, as was promised at the signing of the Treaty of Waitangi and many times subsequently.⁸⁵ Rather, the opposite was the case.

Clearly, again, planning for a Maori future was required. Crown historians often stressed to us that things must be seen according to their own times, and little long-range planning would have been going on then. We do not accept that, however. The whole business of colonisation was about providing for the future. Thus the large land acquisitions, even before the settlers arrived. The entire scheme was future-driven and the problem was simply double standards: there was one standard in securing land for European settlers, and another in reserving land for Maori. Reserves were not created as they should have been, those that were created were not protected, and as a result Maori were denied the single most obvious opportunity they had to share in the economic development of the country.⁸⁶

(v) The lack of accountability by the Government in its treatment of the hapū and their lands

In the light of the evidence that emerged regarding the Crown’s dealings with the Far North hapū, the Tribunal raises the following question:

⁸³ *Muriwhenua Land Report*, 399.

⁸⁴ See M. King, *The Penguin History of New Zealand*, Auckland, 2003, 251-2; M.K. Watson and B. R. Patterson, ‘The Growth and Subordination of the Maori Economy in the Wellington Region of New Zealand, 1840-52’ in *Pacific Viewpoint*, 26, 3, 1985, 538 and 541-2.

⁸⁵ See *Muriwhenua Land Report*, 399.

⁸⁶ *Muriwhenua Land Report*, 208.

In 1840, a significant rationale for reserving to the Government the exclusive purchase of Maori land was to protect Maori from rapacious private land-buyers who would rapidly deprive the hapu of their patrimony. By 1860 the question had become: who would protect Maori from the Government who was doing the same thing?⁸⁷

An important reason, in fact, for the Crown's failure in its duty of protection towards the hapū was because there was neither independent monitoring of the Government's land dealings, nor a requirement that the Government prove the validity of its acquisitions. The Tribunal found that:

There was no independent audit of Government action for fair and equitable contracts, no judicial confirmation process, and no access for Maori to independent and informed advice to enable proper decisions to be made. There were no independent monitoring of issues of title, representation, boundaries, land descriptions, fair prices, and reserves, and there is considerable looseness in each of these areas, as summarised at section 8.4. In fact, there were no protective arrangements overall. The Government's purchase monopoly and fiscal interest in buying and selling Maori land at this time made independent advice essential.⁸⁸

Originally, the British Colonial Office had required the New Zealand Government to appoint a Protector of Aborigines but this office was abolished as early as 1845 and no equivalent was put in its place.⁸⁹ According to the report: '... at all times in Muriwhenua, there were no provisions for an independent audit of the Government's policy and practice, or for the judicial supervision of individual agreements. No one was responsible for checking that title and representation matters were adequately looked into or that sufficient reserves were maintained.'⁹⁰

The unassailability of the Government's position was reinforced because 'the extinguishment of native title was viewed as an act of State and, as such, was not reviewable in the courts. This was despite the fact that Maori were New Zealand citizens'.⁹¹ This position was later given statutory reinforcement. As the Tribunal explains: 'In the result, and at the time, it was sufficient for the Government to say that native title had been extinguished. It was not necessary for the Government to show

⁸⁷ *Muriwhenua Land Report*, 275.

⁸⁸ *Muriwhenua Land Report*, 399.

⁸⁹ *Muriwhenua Land Report*, 275, 211.

⁹⁰ *Muriwhenua Land Report*, 211.

⁹¹ *Muriwhenua Land Report*, 121-2.

how this had been done.⁹² The fact that the Government was thus secured against challenge helps to explain the lax practices of its officials in their dealings over tribal land.

Why, then, did the Government accept a lesser standard for itself [in the surveying of land]? In part, the reason was partly structural. The Government was never bound to prove its acquisitions of Maori land. It was not required to register a conveyance. Native title was simply extinguished by a Government declaration that it had been purchased. Nor did the Government's acquisition have to be scrutinised by an independent judicial agency. The system enabled the Government agents to take unacceptable liberties where Maori lands were concerned.⁹³

This statement has reference to the Crown's land purchases. In the cases where the Government had claimed land through the taking of surplus, there was room for appeal by a hapū by taking their claim to the Native Land Court and supposedly, therefore, some protection for the tribes. Unfortunately, recourse to the Native Land Court did not guarantee the delivery of justice to the Māori concerned. The difficulty for the hapū was that much of the taking of surplus was a pen and paper affair, generally taken by the land commissioners without the knowledge of the Far North owners. 'On the ground', to use a phrase from the report, there was no visible difference. Māori communities continued to live on the land as before and, often, it was not till two or more decades later that they were confronted with the fact that the Government was asserting ownership of the land.⁹⁴ By then, the Crown's presence was much more firmly entrenched, and with it the power that officials like White felt they had to override decisions that might favour the hapū.

This is shown where, in an exceptional case, the Land Court did recognise hapū claims to two blocks of land, against the Government claim. In 1870, the Court issued titles to the claimants for the Takerau and Taemaro blocks, to the surprise of Magistrate White who had already taken political steps to thwart the granting of the claims. Not prepared to accept the judgment of the Court, the resident magistrate used his influence to have the Court's decisions overturned.

⁹² *Muriwhenua Land Report*, 122. For further comment see pages 288-9.

⁹³ *Muriwhenua Land Report*, 277.

⁹⁴ See, for example, *Muriwhenua Land Report*, 285ff.

The resident magistrate was apparently unprepared for a Native Land Court that might grant to Maori without his say-so, and he wrote to the Native Minister. The Government responded with an order in council of 4 May 1870, pursuant to the Native Land Act, directing the court to conduct a rehearing ... Again, nothing survives of the rehearing record except an annotation on the Takerau plan, that as a result of the rehearing, the Maori claim was then dismissed. It is possible the Government argued a case ... We think it unlikely, however, that the Government mounted a case to prove its right, for it was sufficient for the Government simply to assert the extinguishment of native title. In the Taemaro case, where there was no rehearing, the Government simply intervened to cancel the grant by legislation.⁹⁵

This example indicates the powerlessness experienced by many tribes when it came to defending their rights to their lands in the face of the state machinery that was so weighted against their interests. The lack of the Crown's accountability towards the tribes is demonstrated by the totally inadequate records that were allowed in recording official actions with regard to hapū land, making it very difficult for the hapu in any future appeals they made. These particular claims had been brought to the Native Land Court by Ngāti Kahu at considerable expense to themselves, and following the overturning of the Court's decision in their favour petitions challenging the Crown's actions were filed by the people over many decades.⁹⁶

In commenting on Ngāti Kahu's initial proceedings in 1869 to claim their land in the Native Land Court, the Tribunal makes the observation: 'Already the roles had changed, for it was no longer for the Government to prove its acquisition of the land but for Maori to prove they still owned it, provided the law even let them bring a case.'⁹⁷ The history given in the report of several blocks of land that were subject to protest and investigation over the decades shows how the legacy of opinion, which has put the Government's actions in extinguishing native title as beyond question, has deprived the Māori claimants of an essential base for recourse to justice.⁹⁸

The Tribunal is quite definite that there must be an onus on the Crown to prove its acquisitions. It believes that it is unfair to expect to take all responsibility in proving

⁹⁵ *Muriwhenua Land Report*, 292.

⁹⁶ *Muriwhenua Land Report*, 294 ff. See pages 285-98 for the full explanation of this case.

⁹⁷ *Muriwhenua Land Report*, 286.

⁹⁸ E.g. the Opouturi case, *Muriwhenua Land Report*, 300-2.

their claims, especially as over the years they often have not been given and even prevented from having access to the official records about their land.⁹⁹ Many whānau and hapū petitions regarding blocks of land have been dismissed over the years because they are said to contain errors of fact, as in giving precise acreages of the land in question. But the Tribunal says that it must be recognised that these sorts of errors arise because the whānau and hapū were being compelled to make a case from what they might guess at. The real problem ‘stemmed not from the claimants’ error or incomprehension but from the lack of transparency in past Government action or the fact that the business was done entirely on European terms’.¹⁰⁰ The Tribunal explains how this lack of transparency subsequently affected further attempts to have matters rectified.

The significance, then, is not in the Maori error or confusion but in the inadequacy of the Government’s response. Rarely were the facts properly inquired into and explained. Assumptions were made. Files were not fully examined or read. A previous clerical opinion on file might be simply copied and repeated, again and again, until it became viewed as unassailable truth; or it was seen as sufficient to poke holes in the Maori claim to avoid a full investigation. Moreover, the Government itself was confused. Land would be claimed as surplus one day, and as having been purchased the next, especially in Muriwhenua East, where the Government argument kept changing. It was regularly asserted the old land claims has been fully and perfectly investigated by two commissions in 1843 and 1856, when that was not the case. Honesty of purpose required a full and impartial examination of the relevant circumstances, but that was not given.¹⁰¹

The issue of the onus on the Government to prove its acquisitions of land is a matter of present concern. Claimants to the Waitangi Tribunal have to establish their claims in terms of the Treaty of Waitangi Act 1985 which requires that ‘they must show the matter complained of is an act or omission of the Crown, that the act or omission has caused prejudice to them, and that the act or omission was contrary to the principles of the Treaty’.¹⁰² The Tribunal believes that does not mean that the statutory framework relieves the Government of the onus it would otherwise have of accounting for its performance:

As part of its protective responsibility, the Government must demonstrate the probity of its conduct and establish, for example, the propriety of its acquisition

⁹⁹ See *Muriwhenua Land Report*, 300-2. ‘Maori are considerably disadvantaged by the lack of access to the official record, and by the capture of that record by officials’ (page 344).

¹⁰⁰ *Muriwhenua Land Report*, 336.

¹⁰¹ *Muriwhenua Land Report*, 337.

¹⁰² *Muriwhenua Land Report*, 391.

of Maori land. It must show, in other words, that its extinguishment of native title was valid. As we understand it, that is also demanded as a matter of general law.

Accordingly, while the claimants must establish a claim, a point may be reached where the onus must shift to the Government to establish the propriety of its actions or acquisitions, or to show how it came by certain lands.¹⁰³

Elsewhere, the observation is made that the Crown ‘should not have the benefit of its own lapses’.¹⁰⁴

This chapter has built on the material in the two previous chapters to fill out the picture of how Crown rule was exercised in relation to tribal communities through the nineteenth century. Some of the nitty gritty detail of Crown rule and its consequences has been presented here. What is revealed is the penetration of Crown rule and the many layers of its effect. While the detail of the picture is specific to the experience of Crown rule by the Far North hapū, the broad outlines are common to all tribes, and indeed of all Māori communities.¹⁰⁵ The next chapter looks at the Crown’s actions in establishing the capitalist system of social relations in opposition to the social, political, and economic order of the Māori tribally-based world, as this has occurred in both the nineteenth and twentieth centuries.

¹⁰³ *Muriwhenua Land Report*, 391. See also, page 398.

¹⁰⁴ *Muriwhenua Land Report*, 261.

¹⁰⁵ The Parihaka community, which had attracted a wide membership, experienced the full and devastating brunt of nineteenth century Crown rule.

Chapter 8

Crown Promotion of Capitalist Interests

In order to gain a fuller understanding of the implications of Crown rule and the nature of the relationship that the Crown has established with Iwi Māori, this chapter examines the Crown's instalment and promotion of capitalist interests in opposition to the social, political, and economic order of the tribally-based world. Measures taken by the Crown in the nineteenth and twentieth century are considered. The chapter draws mainly on evidence in the Muriwhenua Land and Muriwhenua Fishing reports, since these are the reports that most clearly show the working of the capitalist economy. Reflecting the respective emphases of these reports, the chapter is divided into two sections: (i) the Crown, capitalist interests, and hapū lands; and (ii) the Crown, tribal fisheries, and capitalist interests in fishing.

The understanding of capitalism that is brought to this examination is that emphasised by Meiksins Wood: capitalism as a historically specific system of social relations and political power.¹ An important objective of the chapter is the identification of what characterises the system of social relations put in place by the Crown so that the capitalist economy can take off, how Crown power and the development of capitalist interests are linked, and what are the contradictions between the economy promoted by the Crown and that of the tribes. Themes covered in the chapter include the connection between the Crown's assertion of its sovereignty and its promotion of capitalist interests, the undermining effects for the tribal economies and communities, the contradictions between the tribal and capitalist economies, and the ideology that is used to justify the state's imposition of the capitalist order.

¹ Capitalism is often identified with factors such as the use of money, trade, and the imposition of duties. All of these factors have been found in non-capitalist systems. Trade has always been an essential part of the tribal economies, and the tribes came to incorporate the use of money and the imposition of harbour dues without a change to the communal ownership of land and the co-operative operation of their major economic enterprises. The imposition of dues and levies was, in fact, an extension of their own systems of giving and receiving tributes.

The Crown, capitalist interests, and hapū lands

The *Muriwhenua Land Report* provides information on the customary economy of the Far North hapū, the impact on that economy of Crown action, the sort of economy that was promoted by the Crown, and the reasons why the hapū came to suffer economically as a result. The material on the customary economy has been discussed in earlier chapters. In that discussion it was noted that there are times when the Tribunal works from assumptions that treat the ‘Western’ economic path as the norm.² The same tendency is apparent in parts of the Tribunal’s discussion of what followed from Crown rule and the Crown’s economic involvement. Such assumptions can act as powerful justifiers for the supplanting of tribal economies by the capitalist and the tribal political order by the capitalist state. Since these assumptions are influential in so much writing, it is important to question them where they occur. The analysis of a debateable statement made by the Tribunal early in the *Muriwhenua Land Report* is used as the lead into the issues discussed in this section.

In its introductory ‘Overview’ of the *Muriwhenua Land Report*, the Tribunal summarises the acts and omissions of the Crown that led to the exclusion of the Far North hapū from ‘a stake in the economic order for which they bargained’.³ These include the manner of the Crown’s ‘investigation’ of the pre-Treaty land agreements, the granting of scrip and the taking of surplus, and the insufficiency of the reserves kept for the hapū. The Tribunal goes on to say that: ‘Serious shortcomings [in the Crown’s provisions] ... may have amounted to naught if a fair share of the land had been secured for Maori at the time, and if, as a result, Maori had been participants in the new economic order that the Treaty ushered in.’⁴ The reference to ‘the new economic order that the Treaty ushered in’ is puzzling because it does not fit with much of the evidence presented in the *Muriwhenua Land Report*. This evidence makes it clear that the social and economic life of the Far North hapū continued as before in the decades straight after the signing of the Treaty of Waitangi.⁵ The continuity for the hapū with respect to their economy, from the time before and after the signing of the Treaty of Waitangi, is also commented on in the *Muriwhenua Fishing Report*. The Tribunal for the Fishing claim

² This is true for the respective Tribunals for the Muriwhenua Land and Muriwhenua Fishing claims. See Chapters 1 and 3 of the thesis.

³ *Muriwhenua Land Report*, 5-7.

⁴ *Muriwhenua Land Report*, 7.

⁵ See Chapters 3 and 6 of the thesis.

says that ‘Maori [were] involved in export, even before the Treaty, and their enterprise continued well after it.’⁶ It shows how trading with Europeans over fish was but an extension of the inter-tribal trade that flourished well before Europeans were involved.⁷ While the Far North hapū hoped for increased trade with Europeans, there is no evidence that they sought or experienced a new economic order as a direct consequence of the signing of the Treaty.

There is, moreover, a difficulty with the Tribunal’s use of ‘the new’ in this context, in that the expression tends to carry connotations of ‘freshness’ and ‘modernity’ and of something more advanced than the economy that was already there.⁸ The imposed nature of the Crown’s economic order can thus be hidden, as well as its fundamental oppositions to the economic, social, and political relations of the tribal world. Indeed, it was not the treaty that ushered in ‘the new’ economic order but the later enactment by the Crown of its policy and legislation with regard to tribal properties. It was this which led to the dismantling of the tribal base in the land, and the individualisation of tribal title so that the capitalist economy might take off. ‘The new economic order’ was more accurately the imposed capitalist order.

In enquiring into the economic order put in place by the Crown, and its impacts on the tribes, it is important that the connections between the economic, social, and political are held together. It would appear that it is when these connections are lost sight of that the economy imposed by the Crown is more likely to be euphemistically labelled as ‘the new’ or ‘the modern’. For example, in his study on *The Economic Impoverishment of Hauraki Maori Through Colonisation 1830-1930*, R. C. Stone argues that for the survival of the Hauraki Māori there was ‘a need for Hauraki people to be provided with an opportunity to work within the new economy in a way that did not destroy their social order’.⁹ The problem with this statement is that it overlooks the contradictions between ‘the new’ economy and the social order of the hapū. An economy built on the

⁶ *Muriwhenua Fishing Report*, xv.

⁷ See, for example, *Muriwhenua Fishing Report*, Section S1.5.

⁸ See definitions given for ‘new’ in *The Concise Oxford Dictionary*. The expression, ‘the new’, is specifically listed as having the meaning of ‘advanced’.

⁹ R.C.J. Stone, *The Economic Impoverishment of Hauraki Maori through Colonisation, 1830-1930*, Hauraki Maori Trust Board, Paeroa, 1997, 3.

assigning of individual, tradable title to land is immediately alien to a tribal culture built on the social relationships that result from the communal ownership of land. Stone's failure to make the links between the economic and the social contrasts with Joan Metge's analysis where she is describing the effects of Crown action on whānau from 1840 to well into the twentieth century: 'At the same time the whānau's economic base was undercut by the loss of land and the incorporation of the Maori population into a capitalist economy based on individual employment, individual property rights and individual legal responsibility'.¹⁰ In Metge's statement, the social implications of the economic system are presented, and the system is named as capitalist. By making the connections between the social and economic, Metge gives a more complete picture of the difficulties created for whānau by the economy put in place by the Crown.

In the following paragraphs, the subject of the Crown's implementation of its land policies is re-visited in order to draw out more regarding the interrelated economic, social, and political implications for the hapū. As has been shown, the Government's land legislation and policy were quite purposely directed against tribal ownership of land. The underlying aim of the Government's policy of 'total extinguishment of native title' was to relieve Māori communities of their land and resources and make them available, to the Crown first and European colonists subsequently, as an unencumbered property right.¹¹ The term 'unencumbered' is used by the Tribunal; it points to one of the key economic differences between the Crown and the tribes. For the Crown, it was not just the fact that the land belonged to a community of people that was the problem; it was that the communities did not want to sever their ancestral relationships to the land. The tribes were open to the placing of settlers on their land but on the condition of ongoing commitments being exercised between themselves as original proprietors and those who were immigrant.¹² The making of land into a commodity that could be bought and sold at will was totally alien to the tribes, while fundamental to the economy that the British Crown and moneyed settler wanted to impose.

¹⁰ J. Metge, *New Growth from Old: the flax bush: family and whanāu*, Wellington, 1995, 17.

¹¹ See *Muriwhenua Land Report*, 210, on the lack of mutuality in 'contracts' over land. 'Each also had different expectations that were fundamental to the terms of the contracts, the one bargaining for a continuing social contract, the other for an unencumbered property transfer' (page 210).

¹² A similar pattern of giving Europeans a place on the land, but precluding a permanent alienation of the land, is described in L. Kame'eleihiwa, *Native Land and Foreign Desires*, Honolulu, 1992, 97.

The enforced individualisation of tribal land ownership was, of course, a major attack on the resource base of the hapū and their tribal polity. The Tribunal says that ‘the main loss to the Maori capital base arose from the Government’s extinguishment policy generally’.¹³ This was the policy, with its associated legislation, that worked to change communally based ‘title’ to individual title. Not only that, it led to the introduction of inheritance laws that, along with other measures of land individualisation, resulted in a hopeless fragmentation of tribal properties, as the Tribunal explains:

It is also clearer today that the individualisation programme imposed on Maori led to the disinheritance of large numbers, title fragmentation, ownership splintering, the elevation of absentee interests, and the loss of group authority, social cohesion, and economic strength.¹⁴

The loss to the tribes was gain for the Government and individual Pākehā settlers. An economy that was founded on communal benefit and control was systematically undermined in order to make way for an economy based on the individual and unencumbered ownership of land.

It is notable that in the enactment of the Crown’s policies and legislation with regard to tribal land, the issues of sovereignty and economy noticeably come together. The Crown judged that it needed to undermine the power of the tribes in order to assert its sovereignty, and that it needed to make land available as alienable property if colonial capitalism was to flourish. The land legislation the Crown unilaterally introduced, especially from the 1860s onwards, achieved both those objectives. Tribal authority was undermined, and huge areas of land were lost to the tribes and made available as property for sale and investment.

Another factor involved in the economy imposed by the Crown was the reproduction of the English system that divided society into property-owning and labouring classes. Interestingly, it was the stated intention of the Crown that these divisions would be

¹³ *Muriwhenua Land Report*, 217.

¹⁴ *Muriwhenua Land Report*, 205. See also Bassett et al., 37.2, which explains that: ‘Rather than following either the English intestacy law of primogeniture, or the diverse Maori rules of succession which made allowance for, among other things, occupancy, rank, sex, and various members of the hapu, Fenton [the Chief Native Land Court Judge] created a new and arbitrary precedent in the Papakura Claim of Succession. All living children of the deceased were to succeed equally to Maori freehold land. Generations of this process divided Maori land into unusable portions’.

extended to the Māori tribal world. This is indicated in the *Muriwhenua Land Report* in the discussion of the aims of the Government's extinguishment policy: 'Tribal ownership would end and Maori would hold lands as Europeans did, except that the Maori lands, or reserves, would be managed by Government agents for them, or would be held by a few chiefs.'¹⁵ The same aim is referred to when the issue of reserves for the hapū is being talked about: 'Chief Land Purchase Commissioner Donald McLean envisaged reserves for all of the hapu at one point, and then, soon after, as providing only a small amount of land for a few chiefs, with the remainder to constitute a labouring class.'¹⁶ Whatever the stated intentions of the Crown with regard to the establishment of a chiefly upper class, the actual ruling class was to be essentially British.

The evidence from the Far North shows how the Crown put in place the conditions for a privileged class of European land-owning settlers to emerge. Through its actions in alienating hapū land, individualising title, and favouring the interests of particular settlers, the Government made the land available as a commodity to be bought and sold by a select group of European settlers. The loss to the Far North hapū and the gain to a favoured class of European are conveyed in the report:

By [1900] Maori were about half the population with less than a quarter of the land, and that which was held was mainly remote and marginal, incapable of supporting more than a few on pastoral farms. Meanwhile, a few Europeans held to several thousand acres each. While many more Europeans had latterly come into the district, these were not farmers but gumdiggers.¹⁷

It was the land-holding Europeans who now had control of the greater part of the resource base of the area. They were the employers of labour and the controllers of capital. Their labourers were dependent on them for the conditions of their work, as the

¹⁵ *Muriwhenua Land Report*, 205. The New Zealand Company had similar aims for its settlements in the North and South Islands. In an article on the Maori economy in the Wellington region from 1840-52, M. K. Watson and B. R. Patterson explain that it was the intention of the New Zealand Company that land would be reserved for 'chiefly families in the fashion of European proprietors' and 'that other Maori would become wage labourers'. See M. K. Watson and B. R. Patterson, 'The Growth and Subordination of the Maori Economy in the Wellington Region of New Zealand, 1840-52', *Pacific Viewpoint*, 26, 3, 1985, 523.

¹⁶ *Muriwhenua Land Report*, 206. The Tribunal here makes reference to the evidence of Professor Oliver. See W. Oliver, 'The Crown and Muriwhenua Lands: An Overview', Doc#L7, Wai 045, 1994. The Tribunal also makes the significant comment that of the [meagre] reserves made in the Far North 'none was reserved for hapu'. The names of specific members of the hapū were attached to the title, and these were then treated as individual owners. See *Muriwhenua Land Report*, 333.

¹⁷ *Muriwhenua Land Report*, 335.

case of the gumdigging industry illustrates.¹⁸ Whereas the control of resources, and the benefit from them, had once rested with Far North communities it had now passed into the hands of the elite class of European landowners. What is more, in this order of affairs, economic, political, and judicial control went hand in hand.¹⁹ It was from the elite few that key Government appointments were made as in the local magistrate, Native Land Court judges, and key positions on Maori Land Boards.

With regard to the distribution of wealth and the control of resources, it is interesting to compare the social relations of the tribal economies with those of the economy put in place by the Crown. In the tribal order individuals and individual whānau had recognised use-rights to particular resources but the proprietorship of the land rested with the community as a whole. While there were leaders who were empowered to allocate places on the land, the final authority in the land rested with the hapū. The status of these leaders was not related to the accumulation of individual and exclusive wealth, but rather to how they exercised their leadership for the community. The social and economic structures of the tribal world were geared to leadership being exercised in accountability to the communities being served. The relationship of rangatira to the hapu is described in a passage from the Government agent Kemp who had grown up in the North and knew the Māori language.²⁰

A special feature connected with the old purchases is one, I think, that should not pass without recognition, viz, that the distribution of the money payments in the early days was in cash, gold and silver. The claim of each member of the tribe, or section of a tribe, however small, was honourably recognised by chiefs of the old school, who frequently left themselves minus the share to which they were equitably entitled. These traits in the character of comparatively uncivilised men were remarkable in their way, and warranted the impression that though without any written code to guide them, their common sense and observance of

¹⁸ See Chapter 7 of the thesis. In fact, the Tribunal describes (page 356) the situation for the gumdiggers, who were mainly Far North Māori and Dalmatians as ‘an unwholesome system of debt peonage’.

¹⁹ See *Muriwhenua Land Report*, 186ff. The Tribunal notes how the appointment of Magistrate White in 1848 reflected Governor Grey’s policy of imposing British law through Government agents serving as judges. Also, D. V. Williams in *‘Te Kooti Tango Whenua’: the Native Land Court 1864-1909* demonstrates the close working connections between Parliament and the Native Land Court. Both the Tribunal and Williams point out that these arrangements went against the independence between Court and Parliament which has been essential to the tradition of British justice.

²⁰ The Tribunal does say that Kemp tended to interpret matters like agreements over land in terms of European concepts. That his thinking was imbued with notions of the superiority of European civilisation is evident from his words.

traditional customs and traditions had by this means secured the loyalty and affection of their people.²¹

This passage also shows how monetary payments were accommodated within the tribal system.

Another area in which the tribal economic understanding and practice differed markedly from the colonisers' was that of environmental conservation. Much has been said already in this thesis about the relationship of Māori communities to their land and the thoroughness of their conservation practices. An aspect that has been less remarked on is the operation throughout the tribes of a strong ethic that restrained people from the excessive taking and accumulation of resources. The ethic is articulated several times in the *Ngai Tahu Fishing Report*. For instance, Hana Morgan in her evidence says:

Our people enjoyed having as much kai moana [sea food] as their hearts desired. Many of them have been raised on this kai, it has constituted a major part of our diet. Our dependence on the sea for sustenance goes back many generations and sadly, we are now having to compete with a faceless majority for the right to food that was traditionally ours. Our tupuna ... [were] ever mindful and appreciative of what Tangaroa provided for their sustenance and never abused the laws of nature. They took only what was necessary.²²

Reference to the same ethic is made by Rere Pumipi in the Te Roroa hearings. With regard to the collection of seafood, he relates how he was taught to take 'only enough kai to feed the family and not so much that it is sometimes wasted'.²³

This practice of restraint contrasts with the extractive approach to natural resources that marked colonial capitalism and was sanctioned by the Crown. The wholesale clearing of forests and draining of wetlands across the country is vividly described by the conservationist, Geoff Park, in his book on New Zealand ecology and history.²⁴ His accounts record the speed at which much of the clearance occurred.²⁵ Geoff Park does

²¹ *Muriwhenua Land Report*, 195, citing H.T.Kemp, *Revised Narrative of Incidents and Events in the Early Colonizing History of New Zealand from 1840 to 1880*, Auckland, 1901, 10-11.

²² New Zealand Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report*, Wellington, 1992, Section 2.5.2.

²³ *The Te Roroa Report*, 177.

²⁴ G. Park, *Ngā Uruora: The Groves of Life: ecology and history in a New Zealand landscape*, Wellington, 1995.

²⁵ See, for example, Park, *Ngā Uruora: The Groves of Life*, 167. The speed at which settlers cleared ancient forest is also remarked on by the traveller, Dieffenbach, when he visited the Far North in 1840. See *Muriwhenua Land Report*, 86-7.

make the pertinent observation that Māori communities in the centuries before European colonisation did not leave the landscape untouched, but he also notes that the changes they made were within some important limits. Talking of the Mua-upoko hapū who lived in the Horowhenua sandplain, Park says:

Prudently obeying customs that sustained valued species, people had shaped the sandplain. The Māori did not avidly preserve their habitat unchanged until the advent of the Europeans, they did what all colonising people did: to make a living they actively manipulated the ecosystem they lived in. Mua-upoko or their predecessors could have incinerated the whole plain at any time, but what is now fashionable to call ‘biodiversity’ was crucial to their quality of life, and they treasured it.²⁶

Park’s observation accords with that which has been commented on in earlier discussions in the thesis: the tribal economies were built on the careful and sustainable use of a range of environmental resources, meaning that their modification of the natural ecology was limited.

By contrast, settler development, which had the active support of the Government, involved the clearance of vast acres of land for a more monocultural-type (single species) agriculture. This specialisation in its own way ran counter to the tribal economies. The Tribunal for the *Muriwhenua Land Report* provides an illustrative example regarding the draining of Lake Tangonge.

It could not have been apparent to them [Maori] that Lake Tangonge, for example, their largest food source, might be threatened. Pickmere also wrote: There is still a quantity of land for sale on this block, at the upset price of ten shillings [per acre] principally marsh. The Rev Duffus and Captain Butler both bought hugely. Captain Harrison and others bought large tracts of marsh. A quarter of mile only separates it from the Awanui River, and as soon as the marsh is all brought, and they agree to the expense, the marsh will be drained by cutting through the river.... The Lake Tangonge, which holds the surplus waters of the marsh, has thousands of black ducks, and the eels caught in it are about three to five feet long, and range up to 60lbs in weight.

We understand it was not unusual to speculate in wetlands at this time, which could be more cheaply bought, in anticipation of assistance. The national injunction was to clear forests and drain swamps and the Government appeared willing to subsidise the latter.²⁷

²⁶ Park, *Ngā Uruora: The Groves of Life*, 184.

²⁷ *Muriwhenua Land Report*, 265, citing S. C. and L. J. Matthews, *Matthews of Kaitaia: the story of Joseph Matthews and the Kaitaia Mission*, Dunedin, 1940, 205-6. R. Pickmere was a settler who came to the area close to 1860.

Much could be said about the matters touched on in this short extract. A few brief points are made here. The draining of the lake was to remove an important source of livelihood from the local people, one that had provided for them and their forebears over centuries. Their interests were not a consideration in the decision to drain the lake. Those who made the decision appear to have had little personal interest in the lake, apart from its speculative potential. This, of course, was a major difference between the capitalist economy and the tribal. Under the capitalist, people who lived at a distance and with no history of personal interest could own and determine what would happen to land, without any negotiation with those who actually lived there. The Government's willingness to sponsor the speculative interests of the settlers is significant.²⁸

The Tribunal for the Muriwhenua Land claim considers the broad topic of economic development when it looks at the implications of the gumdigging industry. This consideration comes in reply to some of the positions taken by the Crown counsel for the claim. The latter, for instance, had said that 'Maori sold their land because gumdigging was more lucrative than horticulture'.²⁹ In response, the Tribunal points out that those concerned did not have free choice over the sale of their land.³⁰ The Tribunal proceeds then to give a summary of input it had received on economic development from Brian Easton, which it says it found more helpful than the analysis offered by the Crown. The summary is quoted here because it relies on assumptions that require some examination:

We do not agree with the Crown's analysis of the context. We found more assistance from the evidence of economist Brian Easton, although he did not address the gumdigging industry in particular. Unlike the Western economy by which future development could be measured, Maori had two of the prerequisites for growth, as we see it: the people or human capital, and the resource in the land. However, they also lacked two of the essentials: the technology and the necessary infrastructure – knowledge, for example, of the nature of property ownership in the Western economic system. Basically, for lack of that knowledge, and because they understood an alternative economic regime, that Maori lost most of the land, the essential resource base. It was also for lack of knowledge and technology that they were unable to develop such

²⁸ The issue of the Government's providing development assistance to the settlers and not to the hapū is discussed in Chapter 7 of the thesis.

²⁹ *Muriwhenua Land Report*, 357, with reference to A. Gould, 'Crown Purchases in Muriwhenua to 1865', Doc#J4B, Wai 045, 1993.

³⁰ *Muriwhenua Land Report*, 358.

land as they retained for pastoral farming, or they were unable to manage the gum industry themselves.³¹

The most striking aspect of this statement about what is needed for economic development is the setting of the Western economy as the standard by which economic growth is to be measured. In following this model, the Tribunal effectively contradicts a good deal of its own evidence.

It is odd, for instance, that the Tribunal would say at this late stage of the *Muriwhenua Land Report* that it was because of their lack of knowledge of the nature of property ownership in the Western economic system that Māori communities lost most of their land. The evidence presented by the Tribunal points to Crown action as the major cause of land loss by the hapū.³² Equally questionable is the suggestion that Māori communities lost land ‘because they understood an alternative economic regime’. It is truer to say that it was because the Crown would not tolerate a regime alternative to its own that the hapū lost their land: it was Crown policy and legislation that enforced the individualisation of communal title to land and the subsequent alienation of vast areas of tribal land. The evidence in the *Muriwhenua Land Report* shows that the hapū had healthy economies as long as they retained their lands and authority according to their customary understandings and practices. The individualisation of land title – imposed by the Crown to facilitate the conversion of communally-held land to private and alienable property – was a major factor in leading to the impoverishment of the hapū.

Another troublesome statement in the above passage is that it was ‘for lack of knowledge and technology that they [Maori] were unable to develop such land as they retained for pastoral farming, or they were unable to manage the gum industry themselves.’ There is no evidence given in the *Muriwhenua Land Report* that shows that the Māori communities were not capable of running the gumdigging or any other chosen industry. The readiness and capability of the Far North Māori to enter into astute trading relationships with Europeans, and their participation in new forms of business, is

³¹ *Muriwhenua Land Report*, 357-8.

³² See Chapters 6 and 7 of the thesis.

commented on in the section of the report, ‘The Trade in Goods and Religion’,³³ and there are plenty of similar accounts for other tribal groups.³⁴ In the *Muriwhenua Fishing Report*, which is a stated source for the *Muriwhenua Land Report*, there is ample evidence that the communities were not only involved in the business of fishing but also that the scale and organisational level of the fishing industry of the Far North Māori were considerably greater than those of their European counterparts;³⁵ and, as was noted above, Maori were involved in export ‘before the Treaty, and their enterprise continued well after it’.³⁶ This in itself points to the capacity of Māori communities for learning and taking on the skills and technology needed for other businesses. Moreover, when Māori communities did not have the skills needed for a particular enterprise they wanted to be involved in, part of their strategy was the incorporation into their communities of those who did.³⁷

Much more could be said on this subject, but it is sufficient to say here that the statement, that it was because of their lack of knowledge and technology that the Māori communities were unable to develop their resources economically, is questionable. The more likely reason that communities did not take on pastoral farming or gumdigging as their own businesses is that, by the time these had the potential to be income-generating industries, the communities had been so undercut in their resource base that they no longer had the land or finance needed for the investment. The readiness with which the Tribunal accepted the ‘Western’ model of economic growth, against its own evidence, indicates the influence of the ideology that assumes that there is a universal, natural path for economic progress, namely that which leads to Western capitalism.³⁸ It might be noted, in passing, that the evidence in the *Muriwhenua Land Report* shows that for the Far North hapū the implantation of Crown rule and the capitalist economy was anything but natural.

³³ *Muriwhenua Land Report*, Section 2.6. Admittedly, the analysis in this section is somewhat inconsistent because of the Tribunal’s application of ‘gift exchange’ theory. See Chapter 4 of the thesis for comment on this.

³⁴ See, for example, Walker, *Ka Whawhai Tonu Matou*, 99ff.

³⁵ See Chapter 1 of this thesis and Section S1.5 of the *Muriwhenua Fishing Report*.

³⁶ *Muriwhenua Fishing Report*, xv.

³⁷ See *Muriwhenua Land Report*, 46. See also background given in Chapters 1 and 4 of the thesis.

³⁸ See E. Meiksins Wood, *Democracy Against Capitalism: renewing historical materialism*, Cambridge, 1995, 4 ff. Comment on this is made in the Introduction to the thesis.

To conclude this section, some of the other ideologies that have been used to justify the economic domination of the tribes are examined, along with the contradictions they carry. A number of these are brought out in the *Muriwhenua Land Report*. While discussing the British expectations of the Treaty of Waitangi, the Tribunal for refers to the ‘wastelands’ argument and the influence it was likely to have had on officials:

A more astonishing assumption by the British persisted from 1840 to 1846: that all lands not stocked, gardened, or lived on by Maori would be wastelands of the Crown ... Although wastelands were not mentioned at Waitangi, as Normanby regarded all the land as Maori-owned, and although scorn would justly have greeted that doctrine had it been raised in the Treaty debate, it gained currency soon after the Treaty’s execution. It is likely to have influenced those who subsequently held official positions, including examiners of the pre-Treaty transactions.³⁹

Similar views are identified as being of significance when it comes to explaining the general laxness of the methods used by officials in procuring land for the Crown. The Tribunal links these views with the colonists’ convictions about the superiority of their economy and ‘civilisation’.

Dr Rigby opined that certain other assumptions influenced policy and action at this time: for example, that Maori would so want ‘civilisation’ and European commodities that they would readily give of their land. We think this view prevailed among officials. Related to it was another: that the land was valueless in Maori hands, for only individual labour for personal gain gave it value. This meant that an overly meticulous determination of the proper owners or of fair price was not needed, for by this ‘trickle-down’ process the larger reward would come eventually, and to everyone, from the spread of civilisation.⁴⁰

A notable contradiction in the argument that the value of land came from ‘individual labour’ lies in the fact that much of the land brought by the Crown in the Far North was for speculative purposes. For decades after supposed land ‘sales’, the Crown did nothing with the land or sold it to select European settlers, many of whom were land speculators in their turn. This apparently was the case with Lake Tangonge. A lake that had been highly productive for whānau was drained of that productivity by the land speculators who bought it, and who subsequently had no problem with letting it ‘lie idle’ until they were ready to on-sell. Meanwhile, Māori communities continued to live and work on other land that the Crown claimed to have acquired, again for speculative purposes. The

³⁹ *Muriwhenua Land Report*, 116. See Belgrave, 149-50, 161, for further background on the influence of the ‘wastelands’ doctrine. See Tully, 73 ff. on Locke and the rights of Europeans to the ‘vacant’ lands of Aboriginal peoples.

⁴⁰ *Muriwhenua Land Report*, 206.

communities cultivated and harvested the diversity of resources as before, believing with every good reason that the land was still theirs. In terms of the argument that it was ‘individual labour for personal gain’ that gave land its value, Māori were the ones who in concrete terms both gave and received value from the land. The character of ideology, like that round the ‘wastelands’ and the value of land coming from ‘individual labour’, lies, of course, not in its accuracy but in the justification it gives to acts of exploitation.

The persistence of the ideology generated by philosophers like John Locke in providing justification for the projects of European colonisation is traced by James Tully in his history on modern constitutionalism. Particularly relevant here is Locke’s stipulation that the sole title to property is ‘individual labour’, as against ‘vacant land’, which is any land ‘uncultivated’ or ‘unimproved’ according to European understandings of cultivation and improvement.⁴¹ As Tully points out Locke’s definitions served to support his position that Europeans may cultivate land in America without the consent of the native Indians; and as Tully adds, these were ‘the peoples who have lived there for thousands of years’.⁴² Locke provides further support for his position by arguing that European commerce is superior to that of the Aboriginal peoples, and therefore must of necessity bring benefit to them.⁴³ While it was never the Crown’s overt position in New Zealand that land could be taken from Māori communities without their consent, there were actions such as the taking of surplus that showed that often enough that this was the Crown’s effective position – undoubtedly sanctioned in the colonisers’ minds by their beliefs in the superiority of their civilisation and commerce.

While some of the underlying ideology that has justified European colonisation has endured over centuries, much ideology is developed to provide a rationale for particular circumstances. In the *Muriwhenua Land Report* it is noted how, in the early and mid-twentieth century, officials argued that Māori farmers’ output was reduced by their obligations to marae and community.⁴⁴ The research of Joan Metge shows that, to the

⁴¹ See Locke, *Two Treatises of Government*, Second Treatise, ss. 32-6. See Tully, 72-4.

⁴² Tully, 73.

⁴³ See Locke, Second Treatise, ss. 32-46.

⁴⁴ See *Muriwhenua Land Report*, 372-7, for fuller background to the matters related in this paragraph.

contrary, tribal practices of reciprocity ensured that there was mutual help in times of need and that on a daily basis the circulation of provisions and help with work ensured that a sustainable living was made possible for all.⁴⁵ Another reason the whānau survived on the farms was because they were still in the custom of supplementing their diet with a range of resources from the land and sea. The survival of the whānau on the farms was in spite of the extremely reduced land holdings that were theirs as a result of the Crown's actions in their regard.⁴⁶ Not only was the ideology subscribed to by the officials based on a superficial understanding of the situation but, like much other ideology, it laid blame on the Indigenous communities for situations that were not of their making.

The commentary in the *Muriwhenua Land Report* provides some useful pointers to ideology that has obscured the economic exploitation of the tribal communities. If the Tribunal had been clearer in its understanding of the specific nature of the social relations of the capitalist system, it might have been less ready to adopt the 'Western' model for its theoretical assessment of the economic development of the tribes, or to describe the Crown's imposed economic order with the misleading euphemism – 'the new economic order ushered in by the Treaty of Waitangi'.

(ii) The Crown, tribal fisheries, and capitalist interests in fishing

At the heart of the Fishing claim by the Far North hapū are the actions of the Crown that have led to the undermining of their fishing economies, the decimation of their fisheries, and the diminishment of their communities. The *Muriwhenua Fishing Report* covers Crown policy and legislation, as they have affected tribal fisheries, from the 1860s through to the late 1980s. In the case of the Far North fisheries, it is the Crown's policy of the past three decades that has had most impact. In this section, the history of how the Crown has dealt with tribes over their fisheries is examined. The main theme of this section is the Crown's promotion of capitalist interests in fishing at the expense of the economic interests and social well-being of the tribes.

⁴⁵ See J. Metge, *A New Maori Migration: Rural and Urban Relations in Northern New Zealand*, London, 1964, 33-4.

⁴⁶ See *Muriwhenua Land Report*, Section 10.9; Metge, *A New Maori Migration: Rural and Urban Relations in Northern New Zealand*, 32-6.

In its Findings on the Muriwhenua Fishing claim, the Tribunal provides a useful summary of the value of their original fisheries to the Far North hapū. The points made include the following:

- The common cultural characteristic of the Maori tribes was the paramount dependence upon the products of an aquatic economy. Their fisheries had subsistence, commercial, recreational and cultural characteristics.
- They [the fisheries] were essential not only for the physical survival of individuals and communities but the whole economies and social networks of the hapu and tribes involved ...
- Fishing was important for all tribes, but the lack of comparable inland resources in Muriwhenua made the sea resource more important for them than for most others ...⁴⁷

The summary is cited as a reminder of the information on the customary fishing economies covered in Chapter 1 of the thesis, and as a point of reference for the assessment of the Crown's actions in regard to the tribal fisheries. It also serves to indicate how damage done to a hapū's fishing economy would have far-reaching consequences for the whole life and wellbeing of a tribal community.

The Crown's dealings with tribes over their fisheries have particular significance in terms of the Treaty of Waitangi, because Article 2 of the English version carries a specific guarantee that tribes would retain 'the full, exclusive, and undisturbed possession' of their fisheries for as long as they wished. Unlike with the land, there has not been an attempt by the Crown to buy fisheries from tribes. Nevertheless, the Crown has fundamentally acted all along as though it has undisputed rights of ownership to the seas and fisheries – apart from the some of the very recent settlements where the tribal title to the bed of certain lakes has been recognised.⁴⁸ There are many parallels between the Crown's manner of dealing with fisheries and land, and the policies that affected tribal authority and land have had consequential effects for the tribal fisheries.

⁴⁷ *Muriwhenua Fishing Report*, 200.

⁴⁸ The traditional ownership of Lake Taupo by Tuwharetoa, and Lake Rotorua by Te Arawa hapū are examples. The discriminatory nature of the Crown's position is shown by the fact that it has always recognised the riparian rights of those citizens and organisations who hold freehold title on banks and in the shores.

In outlining the history of how Crown action and colonisation impacted on tribal fishing, the Tribunal points out that, in the early years following 1840, Pākehā lived in the country largely on Māori terms. The situation changed following the wars of the early 1860s, and with a settler government well installed there was instituted a legislative regime that was directed quite deliberately against the tribes and their economies.⁴⁹ In this regard, the Tribunal cites a telling observation made by Earl Grey in 1864: ‘The effect of our having established not only representative Government, but democratic institutions, had been to throw the whole power of governing the colony into the hands of the settlers, who had used it to their own exclusive benefit’.⁵⁰

It was from the 1860s that decisions were made by the Government that would lead to the diminishment of the tribal fishing economies. The attack on the fisheries came from two directions. Firstly, there was the land legislation, starting with the Native Land Acts 1862 of 1865, which were used to enforce the individualisation of title. This helped impair the authority of the tribes and their leaders, led to the alienation of much land, and thus weakened the relationship of whānau and hapū to the waters that belonged or were adjacent to their lands.⁵¹

Secondly, there were fishing laws that limited the access of whānau and hapū to their fisheries to simply that of personal use and passed the commercial development of the fisheries into Pākehā hands. The first of these laws was the Oyster Fisheries Act of 1866. It provided for the leasing of oyster beds for commercial purposes and artificial propagation. The fact that hapū had ownership of these beds was not recognised, nor were there any specific provisions made for Māori communities; it is true that foreshore oystereries were excluded from the Act and it is thought that that the exclusion was made ‘out of consideration for the aboriginal natives’.⁵² This initial Act, which took no account of tribal rights and interests in the oyster beds at issue, was passed at a time

⁴⁹ See *Muriwhenua Fishing Report*, Section 5.2, and Chapter 6 of the thesis.

⁵⁰ *Muriwhenua Fishing Report*, 79, citing Earl Grey in *The Home News*, May 26, 1864, 9-10.

⁵¹ In Chapter 1, it was pointed out that in the tribal dispensation there was a continuity of property rights between the land and the foreshore. Rights to land included the adjacent inshore sea, as well as the associated inland waterways.

⁵² *Muriwhenua Fishing Report*, 81.

‘when there were no Maori representatives in the House’.⁵³ Although the laws that followed were made after the institution of the four Māori seats, the powerlessness of the handful of Māori MPs to ensure the protection of tribal interests is shown by the fact that ensuing legislation had the effect of more and more marginalising tribal fishing interests.⁵⁴

The assumptions under which the initial fishing laws were made were to become so ingrained that they would determine the shape of fishing legislation for over a century.⁵⁵

A key assumption, underlying all others, is described thus in the report:

The oyster laws assumed the unrestricted right of the Crown to dispose of inshore and foreshore fisheries. Inherent in that assumption was the view that the foreshore and the seas beyond them were held by the Crown without encumbrance. There was some uncertainty about that at first, but the opinion was soon almost sacrosanct that the Crown owned all the foreshores, including that adjoining Maori lands.⁵⁶

Another effective premise was that tribal interest in fishing was subsistent and not commercial: ‘a regime was assumed whereby non-Maori interests could be licensed for commercial exploitation, while Maori interests should be provided for in non-commercial reserves near major habitations’. While the interventions of Maori members of Parliament had led to provision for these reserves in the legislation, it was over to the Crown alone to recognise ‘Maori fishing grounds’ near ‘major Maori habitations’, and therefore the recognition was dependent ‘upon the whim of political and administrative opinion’.⁵⁷

The effect of the Crown’s regime meant that fisheries that were the source of tribal livelihood, trade, and mana, were taken from Māori communities and placed at the disposal of Pākehā commercial fishers, with no attempt at negotiation with or compensation to the communities concerned.⁵⁸ Moreover, while the legislation allowed for the reserving of Māori fishing grounds for personal needs these were rarely

⁵³ *Muriwhenua Fishing Report*, 81.

⁵⁴ See *Muriwhenua Fishing Report*, Section 5.4 ‘The First Fish Laws’.

⁵⁵ See *Muriwhenua Fishing Report*, 81 ff.

⁵⁶ *Muriwhenua Fishing Report*, 81-2.

⁵⁷ See *Muriwhenua Fishing Report*, 81-3.

⁵⁸ *Muriwhenua Fishing Report*, Section 5.4.

established.⁵⁹ As with the land, the effect of Government law and policy was to take away the authority of whānau and hapū over their properties and reduce them to a dependence on the Government for the sorts of access they might have to their resources.⁶⁰ To use the Tribunal's words, substantive rights were converted to mere privileges.⁶¹

The Crown's fishing legislation applied nationally, but for many decades its main effect was felt by whānau and hapū that lived closer to European settlements. Because the Far North fisheries were largely remote from major towns, the fisheries and the hapū's access to them remained intact into the second half of the twentieth century. As has been noted, fishing had always been important historically to the Far North hapū and, following the loss of land and reduced opportunities for employment, many households were dependent on fishing as a supplementary source of income and food. Well into the twentieth century, a good number of Far North commercial fishers were involved in small and part-time fishing businesses.

For the hapū of the Far North the direct harm to their fisheries started in the 1960s, when the Government became actively involved in promoting the fishing industry. From 1937 to 1963, there had operated a restricted licensing regime in order to conserve the fish resource. Then, in 1963, the Government decided to delicense the fishing industry and introduce state incentives for expansion. This led to a gradual and, later, an accelerated growth in commercial fishing. Also, from the mid-1960s there was an increase in foreign fishing activity. These factors caused a decline in fish numbers. There was stress on local fishing businesses as they found it harder to make a satisfactory catch.⁶²

Until 1980, however, the total catch take remained relatively small as compared with the rapid development after that time. The first move by the Government that led to the change was the declaration in 1978 of a 200 mile Exclusive Economic Zone (EEZ),

⁵⁹ *Muriwhenua Fishing Report*, 222.

⁶⁰ See *Muriwhenua Fishing Report*, Sections 5.6.7, 6.2.2, and 6.2.5.

⁶¹ *Muriwhenua Fishing Report*, 224.

⁶² See *Muriwhenua Fishing Report*, Sections 6.4 and 6.5.

resulting in a policy of controlled development of the deepwater fishery, and eventually, a sharing of that resource between foreign licensed vessels in joint ventures with New Zealand companies, and domestic vessels. The move was accompanied by the provision of Government incentives to the fishing industry to meet foreign competition by expanding into deeper offshore waters. This led to a rush of investment by fishing companies in the deepwater fishery. For much of the fishing industry this was followed by disillusionment and a quick move to inshore waters, resulting in the exacerbation of the pressure on the inshore fish stocks, which were already in a state of serious decline.⁶³ Stating its concern at the serious depletion of fish stocks, the Government decided in the 1983 to place a moratorium on issuing new licences, and to cancel the licences of those not then in use. From 1984, small and part-time fishers had their licences removed.⁶⁴ No account was taken of Māori fishing interests in the making of these decisions, and the impacts were indeed negative for Māori operators and the communities to which they belonged.

From the mid-1980s the Government started introducing a Quota Management System (QMS). This system involved the allocation to fishers by the Crown of a quota of allowable catch for a particular species over a set time. Conservation was given as the rationale for the establishment of the system, and that was something that Māori fishers, like others, were in favour of. In practice, however, the system worked to the disadvantage of most Māori fishers. There was, moreover, much about the system and the manner of its implementation that went against the rights and authority of tribes in the seas and inland waters, and the traditional relationships of hapū to their fisheries. The main features of the system are outlined in order to highlight its economic underpinnings and how these were promoted by the Crown, and how the system impinges on tribes and their relationships to their fisheries.

The first point to be noted about the Quota Management System is that the Crown's original decision to allocate quota was built on the assumption that the Crown had an unrestrained right to deal out the resources of the sea. This was in direct contradiction to its Treaty commitment with regard to tribal fisheries. Secondly, the system was devised

⁶³ See *Muriwhenua Fishing Report*, 112.

⁶⁴ *Muriwhenua Fishing Report*, 118.

and set in place without any consultation with the tribes whose fisheries were at stake. While some Māori individuals were involved in 1983 in the Government's country-wide consultation regarding the introduction of the system, they were not there as tribal representatives.⁶⁵ This meant there was no input to ensure the safeguarding of hapū and iwi interests in fisheries. When it came to the assignation of the initial quota, the basis set for the assignation favoured the large scale fishing enterprises – those who had done most to deplete the fishing resource.⁶⁶ The Tribunal notes that 'the initial quota holders did not purchase these rights', and records the wry comment of the claimants in the Muriwhenua Fisheries case: 'The claimants graphically described it [the assignation of quota] as a free gift of 'their' property to those who had destroyed their resource.'⁶⁷

A vital aspect of the Quota Management System is the creation by the Crown of a property interest in fish. This is explained by the Tribunal:

While conservation was the scheme's rationale, and the basis on which it was promoted, the more radical feature of the scheme was the creation of a property interest in an exclusive right of commercial fishing ...

It is an important feature of the system that individual quota can be readily transferred by sale, lease or licence. Thus the right to fish is given the characteristics of a property right. It is called an individual transferable quota (ITQ).⁶⁸

Parallels have been drawn between the development of the individual transferable quota and the measures taken in the nineteenth century to convert communally held land to individual title.⁶⁹ The commercialisation of the fisheries that has followed from the introduction of the Quota Management System certainly has parallels with the trade in land that followed the Crown's acquisitions of land and title, admittedly with modern technology thrown in. This can be seen from the Tribunal's description of what has happened to the fishing business:

Buying is competitive and the Government operates a tender system for new quota, and a quota exchange for existing quota. Undoubtedly it is the case that those with the ability to marshall and mobilise capital are best placed to tender.

⁶⁵ See *Muriwhenua Fishing Report*, 154-7.

⁶⁶ See *Muriwhenua Fishing Report*, 142 ff.

⁶⁷ *Muriwhenua Fishing Report*, 144, citing Counsel for Claimants, 'Submissions of Claimants in Reply to (1) the Crown and (2) the Fishing Industry', Doc#H2, Wai 022, 1988, 6-7.

⁶⁸ See *Muriwhenua Fishing Report*, Section 8.2.5, 'The Property Interest Created'.

⁶⁹ It is interesting that in the cases of the fisheries the resource was regarded as communally held by both Māori and Pākehā – until, that is, the introduction of the ITQ.

There is apparently a market now in quota 'futures' trading and quota are traded using videotex terminals. Nor can it be assumed that aggregation controls will remain.⁷⁰

The reaction of Northland Māori is recorded in the Fairgray Report, which resulted from a study commissioned by the Ministry of Agriculture and Fisheries at the time it was implementing the system. Fairgray says:

They [Maori] feel there is a fundamental incongruity about ... [the ITQ] ... system ... They draw uncomfortable parallels with the history of Maori tribal lands where, apart from losses through confiscation, conferment of individual ownership was a major part of the process of alienation. ITQs run contrary to the concept of communal guardianship (not ownership) of and access to the fish resource ... Moreover, fragmentation of a communal resource through the creation of individual property rights is ... based on only three recent years of catching history, when traditional harvesting of the sea and foreshore goes back many generations.⁷¹

Fairgray also recognises that the Quota Management System and the creation of individual transferable threaten whānau and hapū relationships to their fisheries, harbours, and bays.⁷² These relationships are about relating to particular sea environments both as a source of sustenance and trade and as requiring duties of care and protection. The relationships and duties belong to local communities, and are actually designed to safeguard against individual interests overriding those of the community as a whole.

While the Quota Management System is meant to help in fisheries conservation, it is based on the isolation of species and not on the ecology of sea environments. As was shown in Chapter 1, customary hapū understandings and practices of conservation are thoroughly based in the preservation of the ecology of their harbours, bays, and lakes. Claimants to the Tribunal expressed their concern that under the system there was pollution of the sea, caused by the dumping of unwanted catch. The Tribunal notes that 'for many Maori, the wastage offends their traditional belief that the despoliation of fish habitats with dead food attracts predators and forces fish away'.⁷³

⁷⁰ *Muriwhenua Fishing Report*, 142.

⁷¹ J. D. M. Fairgray, 'Fairgray Report', Doc#A40, Wai 022, 44, cited in the *Muriwhenua Fishing Report*, 146-7.

⁷² See *Muriwhenua Fishing Report*, 146.

⁷³ *Muriwhenua Fishing Report*, 145.

The fact that the Quota Management System system favours the large operators means that those who have the highest stakes in the new regime are those least likely to be concerned about the effects of their enterprise on particular local communities, ecologies, and economies.⁷⁴ The reality for the Far North communities is that those who now fish their waters commercially are outsiders;⁷⁵ and as the Fairgray Report shows the substantial loss of the local fishing economy has led to problems of unemployment and the diminution of communities.

High unemployment ... demonstrates that there are few job opportunities for fishers and others displaced from the industry. Therefore the loss of jobs will directly and indirectly result in population loss, with the consequent decline in the living standards of those remaining in the depleted communities.⁷⁶

The Tribunal explains how, under the QMS system, the entry of smaller-scale local enterprises into the fishing business has become exceedingly difficult.⁷⁷ The outcome of the changes has meant that ‘despite their one time pre-eminence in fishing’, Māori are now ‘at the blunt end of the Fishing Industry ... they are now mainly labourers involved as crew or factory workers’.⁷⁸ What is more, there has been a rationalisation in the processing section, ‘with small plant closures and the concentration of processing in fewer and larger plants’.⁷⁹ This impacts on small communities because those seeking work in fish processing have to move to larger, more distant centres.

The parallels between the Crown’s commercialisation of fishing in the twentieth century and its commercialisation of land in the nineteenth have already been mentioned. Yet another parallel is the diminishment of a communally held and cooperatively worked resource so that it might be available for the capital investment of a relative few. In the case of the land, it was noted how the Crown’s policies led to huge losses for the hapū

⁷⁴ See *Muriwhenua Fishing Report*, 142ff. for explanation of how the QMS system favours the large operators. See also Chapter 1, where note is made of the complaints of the hapū regarding the effects of ‘outsider raiding’ on their fisheries – where the ‘raiding’ refers to the incursions of the large commercial operators. These complaints were supported by other local people.

⁷⁵ *Muriwhenua Fishing Report*, 29 and 120-1. The Tribunal points out (page 96) that ‘... in the lay off of fishermen that was needed to reduce the fishing effort, Maori fishermen were the first to go’.

⁷⁶ Fairgray, ‘Fairgray Report’, cited in the *Muriwhenua Fishing Report*, 119. The Tribunal notes (page 147) that ‘while Fairgray concluded that the quota management system would indeed have impact on the North, his report appears to have had little impact on the introduction of the system. It belongs to that category of report that is commissioned so that it can be said that all aspects have been reviewed’.

⁷⁷ See *Muriwhenua Fishing Report*, 142.

⁷⁸ *Muriwhenua Fishing Report*, 121. See also Section 7.6.

⁷⁹ *Muriwhenua Fishing Report*, 146.

of the Far North and worked to the benefit of an elite class of European landowners.⁸⁰ The diminishment of the tribal fisheries through the Government's promotion of a highly capitalised fishing industry has also led to the emergence of a privileged class of beneficiary.

These beneficiaries are indicated in the 1988 *Muriwhenua Fishing Report*.⁸¹ In the first place, there are those who have most to gain financially from the fishing industry: the owners, directors, and managers of seafood companies and brokerage firms that deal in fishing quota, and those who speculate in company shares and 'futures trading'. There is also the Government; it benefits not only from its tax take but also from sales, rentals and licence fees. From these returns it funds the Ministry of Agriculture and Fisheries 'which performs essential functions in administration and research.'⁸² The Ministry is thus a substantial beneficiary of the Quota Management System, and the businesses that pay into that system. Another beneficiary of the money that comes into the Government is the Fishing Industry Board that represents the interests of the larger commercial fishing organisations. In 1986 they received \$550,000 from the Government. In effect, the finance given is also an endorsement of the Board's key place in shaping national policy and direction. The information in the *Muriwhenua Fishing Report* shows that from at least the 1980s there has been an aligning of the Government, its Ministry, and big business in determining fisheries policy.⁸³

It is interesting to trace some of the political, economic, and social connections that are involved in the introduction of the Quota Management System and the Crown's general promotion of a highly capitalised fishing industry. The present domination and effective control of the country's fisheries by major corporations has been facilitated and effected by Government policy. Fisheries are now privatised, and the commercial benefit from them substantially lies with the corporations. As a result of the changes the majority of the many small, part-time, local operators, which is the group to which most Māori

⁸⁰ See Chapter 8 of the thesis.

⁸¹ These beneficiaries are mostly the same today - with the inclusion since 1992 of the Māori corporate interest that has come as a half share in the Sealords company. For background to the Sealord deal see Paul Moon, 'Creation of the "Sealord Deal"; Mutu, *Te Whānau Moana*, 197-8. See below for further comment on the implications of the Sealord deal.

⁸² *Muriwhenua Fishing Report*, 140.

⁸³ See *Muriwhenua Fishing Report*, Sections 8.1 and 8.3.2.

belonged, have been put out of business. If they are still involved in the fishing industry it is mainly as labourers; they are crew or factory workers, largely working under conditions that others determine. Another result is that hapū, like those of the Far North who had been able to maintain their traditional relationships with their fisheries through the greater part of the twentieth century, are now finding those relationships put under considerable strain. In addition, their communities are experiencing renewed pressures of unemployment and loss of membership because an important source of their economy has to a great extent been taken from them.

It was by ignoring the social *and* economic relationships of the hapū to their fisheries that the Government judged itself free to introduce measures that favoured the interests of the big fishing corporations at the expense of the Far North and other tribal fishing economies. By assuming that there was only one economic path to be followed, that of large-scale capitalist development, the government not only overlooked the rights of the hapū to their fisheries but also the advantages to the Far North if the hapū had been given assistance to develop their fisheries. Such development assistance could have led to local employment, the self-determination that comes from the control of assets, resource conservation through the continuation of guardianship roles and practices, and collective benefit for the hapū and whānau of the Far North.

The Tribunal, in viewing the situation under the changed fishing environment, was still hopeful that steps could be taken to ensure the rebuilding of the whānau and hapū of the Far North through the development of their economic base in fishing. The Tribunal recognised the hapū's rights of control over their fisheries, their ancestral association with them, and the need for the Crown to support the rebuilding of their communities.⁸⁴ The Tribunal insisted, furthermore, that recognition of the Far North right to their fisheries includes the obligation on the Crown to negotiate with the Far North hapū any right of major public use. 'In terms of the Treaty, it is not that the Crown had a right to licence a traditional user. In protecting the Maori interest, its duty was rather to acquire or negotiate for any major public user that might impinge upon it.'⁸⁵ The reason for this insistence goes back to the Treaty and the guarantee that 'Maori would not be relieved

⁸⁴ See *Muriwhenua Fishing Report*, Sections 11.2.2 and 12.2.

⁸⁵ *Muriwhenua Fishing Report*, 217.

of their important properties, which included their interest in fishing, without their full consent'.⁸⁶ By reinforcing the principle of 'full consent', which goes back to the guarantees made in the Treaty, the Tribunal highlights a standard which has application to other settlement arrangements initiated by the Crown and the processes by which such arrangements are set in place. For this case, the Tribunal's conclusion is telling: 'In Muriwhenua, the Crown must bargain for any public right to the commercial exploitation of the inshore fishery.'⁸⁷

Since the *Muriwhenua Fishing Report* was presented, a settlement was made in 1992 by the Crown with all Māori over fisheries. It is called the Sealord deal, because a major part of the settlement was the granting to Māori of a 50 per cent share in Sealord, one of the country's biggest fishing companies. Another important part of the deal was the extinguishment of tribal Treaty-based fishing rights.⁸⁸ An investigation into this deal is well beyond the scope of the thesis, but some of the issues concerning the deal, particularly as they exemplify aspects of the Crown's relationship with Iwi Māori, are mentioned here. For a start, the principle of 'full consent' was not in evidence in the manner of obtaining the ratification of hapū and iwi for the deal. Margaret Mutu sums up the situation as it is described by a number of commentators: 'The Sealord deal was pushed through with unseemly haste and amidst a great deal of confusion'.⁸⁹ Those who attended the 'settlement' meeting were given less than two hours to study the document before the actual signing. Honore Chelsey, the Fisheries Officer representing Te Runanga o Ngati Porou, later judged that 'this was clearly a ploy instrumented by the Crown to have this deal done on their terms as there was a suggestion that if Maoridom didn't sign the Crown would proceed and produce legislation anyway'.⁹⁰

The question also needs to be asked as to the extent to which the Sealord deal represents a conversion of the customary and Treaty rights of hapū to their fisheries into a form that is consistent with the social relations and economic requirements of capitalist

⁸⁶ See *Muriwhenua Fishing Report*, 196 and 206-7.

⁸⁷ *Muriwhenua Fishing Report*, 239.

⁸⁸ See M. Durie, *Te Mana, Te Kāwanatanga*, 158.

⁸⁹ Mutu, *Te Whānau Moana*, 197. See also Walker, *Ka Whawhai Tonu Matou*, 295-6.

⁹⁰ P. Moon, *The Sealord Deal*, Palmerston North: Campus Press, 1999, 76, citing H. Chelsey, 'Letter to Paul Moon', 22 September 1994.

society – to the detriment of the traditional relationships of tribal communities with their fisheries and with one another. Robert Webb, a sociologist of Tainui and Nga Puhu descent, believes that this sort of conversion is involved. Speaking of the Sealord deal he says:

The deal both legitimated the quota management system, with transferable property rights in fish, as well as the government's authority to define these property rights, contradicting tino rangatiratanga. A traditional fishing right guaranteed in the Treaty had become a limited commercial enterprise, for which all commercial fishing rights under the Treaty were extinguished. The question of rights over the entire fisheries as specified in the Treaty, were effectively denied, and the issue of Maori sovereignty, was construed by the state to mean the control of the limited fiscal settlement, rather than wider political authority.⁹¹

Webb thus identifies that the deal immediately confines the mana of the hapū in their seas and in relation to their fisheries. He goes on to point out that, in terms of the deal, 'Maori spiritual and traditional relationships with fishing were transformed into a profit making business'.⁹²

Webb's analysis is filled out by that of Paul Moon in his book on *The Sealord Deal*. Moon says: 'The Deed of Settlement [for the Sealord deal] was a substitute for the fulfilment of the promises contained in the Treaty, and the extinguishing of the right of Maori to make further fisheries claims, which was fundamental to the Settlement Deed, indicates that there was a trade-off of rights for financial gain, and a smothering of the essence of the Treaty's promise relating to fisheries was a planned byproduct of the settlement'.⁹³ Moon's account of the background to the Sealord deal points to a choice by the Crown to subsume tribal fishing rights into a commercial company so that the large fishing corporates could proceed with their business without having to be concerned that tribes might prove through the Courts that they had a right to significant fishing grounds.

Webb also makes the point that: 'Sealords had become the Maori fishing interest, based

⁹¹ R. Webb, 'The Sealords Deal and Treaty Rights: what has been achieved?' in L. Pihama, C. W. Smith, eds, *Fisheries and Commodifying Iwi*, Auckland, 1998, 38.

⁹² This observation aligns with that of Fairgray, who says in his report that 'to the Maori of Taitokerau the northern tribes, the . . . changes [brought about by the QMS system] . . . are fundamental, as the sea and kaimoana (food from the sea) have immense spiritual and cultural value of no less significance than the land itself'. See *Muriwhenua Fishing Report*, 146-7.

⁹³ Moon, *The Sealord Deal*, 80.

mainly upon ownership, rather than the participation of Maori in the activity of fishing'.⁹⁴ This is a significant remark in terms of the hopes of the Tribunal and the claimants in the Muriwhenua Fishing case, that the communities of the Far North hapū can be rebuilt through their renewed involvement and participation in local fishing enterprises. There is certainly room for a good deal of research to be done on the extent to which the Sealords deal has contributed to the well-being of whānau and hapū throughout the country, and the ways in which traditional tribal relationships to their fisheries have been affected. Webb is of the opinion that the Sealord deal had more to do with the cementing of a regime based on capitalist accumulation than the return to Māori communities of the ownership and control of their respective fisheries and the rangatiratanga that comes with the exercise of political authority over, and guardianship of, a group's resource.

The final theme in this section is that of the prejudice that has been exercised against tribes and their fishing interests by Government departments. While the Tribunal notes signs of institutional change that should make a difference,⁹⁵ it gives some attention to the prejudice, because it had long historical and ongoing consequence. It takes its roots in the actions of the Crown in enacting the first and subsequent laws that denied Māori commercial rights to their fisheries.⁹⁶ The Tribunal makes the point, however, that the antipathy of Government departments to Māori fishing interests has gone beyond that carried in fishing legislation.

The real problem for Maori was that, unlike the Englishman who could establish a private fishing right through the courts by proof of long term use, Maori were totally dependent upon political and administrative whim. The statutory provision to reserve fishing grounds was on the statute books from 1900 to 1962, but despite many requests, and a welter of Parliamentary petitions throughout that period, we have not found one fishing ground reserved under those particular provisions.⁹⁷

The Tribunal believes that 'it is difficult to escape the conclusion that even the best of laws for Maori fishing reserves were no match for the departments that administered them, for not only was the political climate unfavourable, but when it came to Maori

⁹⁴ Webb, 38.

⁹⁵ *Muriwhenua Fishing Report*, 157.

⁹⁶ See *Muriwhenua Fishing Report*, Section 5.4. The first of these laws was the Oysters Fisheries Act 1866.

⁹⁷ *Muriwhenua Fishing Report*, 100.

fisheries the departments also had policies of their own!’⁹⁸ The Tribunal found it significant that the departments ‘have never had an ample Maori staff’.⁹⁹

There were two major grounds on which departments justified their actions, or failure to act, in regard to the fishing interests of Māori communities. The first was that Māori had no commercial interest in fishing, an argument that started to be used in the late nineteenth century and was still being promulgated late in the twentieth. The second belonged more to the twentieth century and was based on the argument that Māori could claim no particular rights in the sea, and certainly no more than any other sector of the public. It was on the basis of these suppositions that the Secretary of Marine in 1948 refused to grant Māori fishing reserves. While Section 33 of the Maori Social and Economic Advancement Act 1945 continued the provision for exclusive Māori fishing grounds to be reserved, the Marine Department was set against its implementation. In the face of requests for reserves the Secretary of Marine ‘advised that the Marine Department had never supported Section 33, wanted to limit its operation and would be seeking to change it as soon as possible’.¹⁰⁰ The reason given for not making a Māori fishing reserve is to ‘preclude the possibility of unsavoury repercussions that would most certainly arise if the area were reserved for the sole use of one section of the community only’.¹⁰¹ This, of course, reflects an opposition by the wider Pākehā public to any recognition of Māori ancestral rights to their fisheries.

The Tribunal expresses some exasperation at the way in which the Ministry of Agriculture and Fisheries in the 1980s pressed ahead with its plans for the introduction of a quota management scheme without any real effort to identify the nature and extent of Māori fishing interests. This was despite the fact that the Tribunal had recommended in the *Manukau Report* (May 1985) that such studies needed to be done. The Tribunal then found that further advice it had given, and assurances that it had received, had counted for nothing. Their condemnation of the Ministry is telling.

⁹⁸ *Muriwhenua Fishing Report*, 100.

⁹⁹ *Muriwhenua Fishing Report*, 100.

¹⁰⁰ *Muriwhenua Fishing Report*, 101.

¹⁰¹ *Muriwhenua Fishing Report*, 102, citing ‘Secretary of Marine to the Under-secretary for the Department of Maori Affairs’, 1948, in M1 2/12/517, Part 1 National Archives, Wellington.

We do not wish to dwell on this matter, but we began to understand how difficult it had been for Maori to have their fishing interests examined. We had no need to look beyond our own experience to gain the impression that the Ministry was and had been intent on pursuing its own plans, *recte si possint, si non, quocunque modo* (legally if they can, otherwise, by any means).¹⁰²

The report does record that finally a Maori Fishing Programme had been established within the Ministry of Agriculture and Fisheries. The report says that ‘the importance of that programme cannot be over-stressed’.¹⁰³ The difficulty with the programme lay in the fact that it was introduced after the shape of future fisheries management had been determined. ‘Unfortunately, however, the programme was not even started before 1985, by which time the major decisions had been made on quota planning and the other matters mentioned’.¹⁰⁴

The Waitangi Tribunal, in its assessment of the Muriwhenua Fishing claim, found against the Crown. ‘Our main finding however is that Governments rarely attempted to ascertain and enforce the Crown’s Treaty responsibilities to Maori in relation to fishing, with severe prejudice to Maori in the past, to the prejudice of the Maori position today, and to the detriment of all people.’¹⁰⁵ The Tribunal places the Crown’s actions in the context of the whole colonising process by which there was ‘a general ousting’ of one people by another, and one economy by another.¹⁰⁶ The Tribunal expresses particular concern regarding the Crown’s failure with regard to tribes. ‘Administration generally has ignored the tribal reality of Maori life, either dealing with Maori as individuals or treating Maori as Maoris, a national group... In enacting laws and policies no adequate regard has been given to the dependence of Maori communities on the sea for livelihoods and the maintenance of local communities.’¹⁰⁷ It is certainly evident from the information presented in the *Muriwhenua Fishing Report* that, from the nineteenth century through to the time of the Tribunal’s hearings in the late 1980s, the Crown has favoured capitalist interests in fisheries over those of the tribes – the rightful owners of the fisheries in the first place.

¹⁰² *Muriwhenua Fishing Report*, 149.

¹⁰³ *Muriwhenua Fishing Report*, 154.

¹⁰⁴ *Muriwhenua Fishing Report*, 154.

¹⁰⁵ *Muriwhenua Fishing Report*, 225.

¹⁰⁶ See *Muriwhenua Fishing Report*, Section 11.5.1, ‘General Overview’.

¹⁰⁷ *Muriwhenua Fishing Report*, 226.

The first section of this chapter has shown that it was in the determination to establish a capitalist economy and to assert its own sovereignty, that the Crown introduced legislation from the early 1860s which forced the individualisation of tribal title to land, thus undermining the tribal polity and making land available as tradable property. Crown policy and legislation facilitated the movement of a good deal of economic resource and political control into the hands of a select group of Europeans, resulting in the formation of a society divided into land-owning and labouring classes. Crown policy also supported an overly extractive approach to the taking of natural resources, and the indiscriminate clearing of land. For the hapū, the result of the Crown's actions in exercising its rule and implanting its economy was the diminishment of their tribal resource, the impoverishment of their communities and the forcing of many of their members into relationships of dependence as poorly paid and exploited labourers.

The second part of the chapter has pointed to the effects for whānau and hapū of the Crown's promotion of capitalist development in the later part of the twentieth century; this included the favouring of the interests of the large fishing corporations over those of local fishers, tribal and non-tribal. In the Far North the rebuilding of tribal communities through the restoration of hapū fishing economies and hapū relationships to their fisheries was not a priority for the Crown. The Crown's privatisation of the fishing resource through the Quota Management System reflected its presumption that it held the underlying ownership of the tribal seas and was a move akin to the earlier individualisation of tribal lands.

This chapter has demonstrated the interconnected social, political, and economic factors that have been involved in the Crown's establishment of its authority over Iwi Māori and the exercise of its rule as a capitalist state. The following chapter looks at further dimensions of what Crown rule has meant for the Māori tribally-based world through to the twenty first century.

Chapter 9

Crown Authority Through to the Twenty First Century

This chapter extends the investigation of what Crown rule has meant for tribal communities by examining material from *The Te Roroa Report* and the *Mangonui Sewerage Report* and related sources. The two reports look at the respective experiences of the Te Roroa and Ngati Kahu hapū. Following this, there is consideration of the Crown's action towards the non-tribal community, Te Whanau o Waipareira, as brought to the attention of the Waitangi Tribunal. Similarities between the Waipareira experience and those of the tribal communities are commented on, and are the basis for further reflection on the Crown's relationship with Iwi Māori. The chapter mainly covers situations that belong to the twentieth century, although often these arise because of decisions made in the nineteenth.

There are common themes that emerge from the three studies. A major theme is the participation of Iwi Māori in the formulation of Government policy, in local and national planning, and in the management of resources. The lack of established structure in governing bodies for input from hapū, iwi, and other Māori communities is a related theme. In most cases, this study does not take the observations on particular issues like resource management and policy development beyond either the period or parameters of the discussion in the reports. In order to take the consideration of the Crown's relationship with Iwi Māori through to the twentieth-first century, brief comment is made at the end of the chapter on the Crown's actions in 2003-4 with respect to hapū and their rights in the foreshore and seabed.

With regard to their lands, the Te Roroa experience of the establishment of Crown rule in their rohe is like that of the Far North hapū in a number of respects. There was the

work of the Native Land Court in bringing about the alienation of tribal land,¹ the failure of the Crown to secure reserves for the hapū, the carelessness of officials in recording the boundaries to the lands that hapū agreed to make available to the Crown, and the dubious dealings of the officials in a whole range of matters to do with land.² There was, in fact the same general failure by the Crown to protect the interests of whānau and hapū. What is remarkable about the Te Roroa claim is that the actions that caused the loss of their land belong as much to the twentieth century as to the nineteenth.

A significant example of a twentieth century injustice is the ‘1917 Proclamation’, which was applied to tribal land in the Waipoua area. The background to the proclamation is as follows. Although a large part of the Waipoua forest had been acquired by the Government in 1876 as the Waipoua No 1 block, there were over 12,000 acres called the Waipoua No 2 block that was kept for Te Roroa ownership.³ In the second decade of the twentieth century the Government became determined to prise the Waipoua No 2 land from its owners. This determination apparently arose from Hutchin’s “Report on the Demarcation and Management of the Waipoua Kauri Forest” in 1916, which identified Waipoua No 2 on a map as being an area “To be acquired for reforestation”.⁴ With this end in mind, the Government’s 1917 Proclamation prohibited the owners from selling their land to anyone except the Crown and this prohibition remained in place, with its prejudicial effects, till 1972.⁵

The discriminatory nature of the Proclamation became obvious when the Government found that some European-owned land had been included in the area of prohibition.

¹ This loss was greater for Te Roroa than the hapū of the Far North because the Crown’s dealings with Te Roroa over land are from the 1860s onwards, thus coinciding with the establishment of the Native Land Court as a significant instrument in dealing with tribal land.

² See *The Te Roroa Report*, Chapters 2 and 3.

³ Right from the beginning, the second block was made vulnerable to alienation because the title to the block was assigned to named individuals rather than to the community as a whole; this individualisation was enforced by the Native Land Court in spite of the fact that the people had explicitly stated that they wanted the land be held under a tribal trust.

See *The Te Roroa Report*, 99-106, 165.

⁴ *The Te Roroa Report*, 166.

⁵ See *The Te Roroa Report*, 166-8. The obligation on Māori to sell land only to the Crown, as specified in the Treaty of Waitangi, had been terminated with the land legislation of 1862 and 1865. According to this legislation, once title had been established through the Native Land Court the Māori owners were free to sell to whomsoever they wished. The 1917 Proclamation was an arbitrary embargo on the right of the Waipoua owners to sell land to other than the Crown.

Amendments were immediately made to exclude that land. The Proclamation was to apply only to the Māori-held land.⁶ With the Proclamation in place, the Te Roroa owners were subjected to the less than scrupulous attentions of land agents working for the Government. The aim of the agents was to procure the release of as much land as possible to the Crown. Their work was helped by the decisions of the Native Land Court, which led to further fragmentation of the land, the imposing of untenable survey charges and other costs, and the procuring of land for the Crown at prices way below their market value.⁷

The evidence presented to the Tribunal showed that the land agents and the Native Land Court were taking direction from the Government itself.⁸ Significantly, in the process of reviewing the evidence for the Te Roroa claim, the Tribunal found references in official documents and correspondence which suggested that ‘the Crown policies and practices were not confined to Waipoua, but applied to many other areas in Tai Tokerau’.⁹ In summing up its findings regarding Waipoua No 2, the Tribunal says: ‘The Waipoua No 2 blocks were firmly within the Crown’s grasp by 1936. In every sale, both to Europeans in the early stages and to the Crown after the proclamation issued in 1917, there are undeniable injustices – out of date and incomplete valuations; incorrect surveys; land taken for roads without compensation; arbitrary partitions; Crown partitions leaving the residue without access and so on’.¹⁰ Many of the Crown’s part interests in Waipoua 2 had been acquired during ‘the period of the first world war’, when a number of the owners were overseas fighting.¹¹

The 1917 proclamation on the Waipoua land was not lifted till 1972, and the injustices to Waipoua whānau continued right up to the end of that period, as the Tribunal observes:

⁶ See *The Te Roroa Report*, 167.

⁷ See *The Te Roroa Report*, 142 ff. for details. After examining the Court’s activities with regard to the Waipoua land, the Tribunal came to the conclusion (page 164) that: ‘Apart from outward appearances, the Native Land Court bore no resemblance to a Court of Law’.

⁸ See *The Te Roroa Report*, Section 4.4.

⁹ *The Te Roroa Report*, 154. The Tai Tokerau is the whole Far North of the country.

¹⁰ *The Te Roroa Report*, 165.

¹¹ *The Te Roroa Report*, 165, and 149-50.

The final purchases illustrate the use of the 1917 proclamation by the Crown to prevent the alienation of the remaining Waipoua No 2 blocks to family members and other Maori at Waipoua, and to deny the vendors market prices. When the death of an owner came between it and purchasing an interest in 1972, the Crown filed and prosecuted a succession application in the Maori Land Court, obtaining an order vesting the interest in the Maori Trustee, thereby enabling it to purchase, to the complete ignorance of the beneficiary and her immediate family.

Negotiations by the Crown for its last purchase at Waipoua commenced in 1970, were well-advanced by the time the proclamation was lifted in April 1972, and completed the following year. The Crown's acquisition policy at Waipoua had subsisted for 55 years. A short time later it sold a small unwanted portion of this last block to Maori neighbours at market value, at a profit of 573 per cent.¹²

Of the 12,220 acres of Waipoua land originally set aside as a native reserve, only 691 acres remains as Māori freehold land, the titles of which are all in multiple ownership. The Tribunal's comments on the situation echo observations made earlier in the thesis: 'The evidence in this claim explains how multiple ownership came about – by the Native Land Court's inclusion, against the wishes of Maori, of the few as absolute owners (and the exclusion of the many whose interests they were supposed to represent) and the succession orders made in most cases to all the children equally of a deceased "owner", down through the generations'.¹³

The Te Roroa Report, more than some of the Tribunal's reports, conveys the hurt of the people in their experiences over what was done to their land, their taonga, and themselves. One thing that was particularly hurtful to the Waipoua community was that, in justification of the 1917 Proclamation, they were officially represented as a 'menace' to the forest. The Tribunal says that this is 'a myth that has persisted to the present day in the Crown's administration of the Waipoua forest',¹⁴ and that 'not only has the Crown's policy dispossessed Te Roroa ki Waipoua of its land and heritage: it has also dealt them a grave cultural insult'.¹⁵ The portrayal of Te Roroa as a menace to the forest has provided, of course, an ideological justification for the Crown's actions. In fact, as the Tribunal points out, the nation owes a debt of gratitude to Te Roroa for conserving the kauri forest for centuries.

¹² *The Te Roroa Report*, 165.

¹³ *The Te Roroa Report*, 165. See Chapters 6 and 8 of the thesis.

¹⁴ *The Te Roroa Report*, 166.

¹⁵ *The Te Roroa Report*, 168.

Quite some attention is given in *The Te Roroa Report* to those things that are most precious to Te Roroa, their taonga, and how the taonga have been violated as a result of actions, or the failure to act, by the Crown.¹⁶ Burial places have been desecrated, human remains taken to the Auckland Museum without the knowledge of the people, historic sites taken over by the Government for mundane use and damaged in the process, the mauri of the Waipoua River has been diminished, and important food sources have been polluted. In all of this the concerns of Te Roroa have counted for little or nothing.

The lack of regard for Te Roroa is shown by the response to Iehu Moetara, when he pleaded that chests containing the bones of their tūpuna be returned to them. These had been uplifted from burial caves by two of the settlers, and subsequently handed over to the local government road inspector, G. G. Menzies. Iehu Moetara wrote to Mueller [the Commissioner of Crown Lands] to remind him of their deep grief as a people because of the desecration of the resting place of their ancestors, and requesting the return of the chests:

The bone chests containing our ancestors were uplifted by the pakeha from land that had been illegally taken by the Government....
... We are in deep grief of your misunderstanding: – i.e. that you own our Wahitapu ...
This letter really pleads to you to leave with us the right of our Tupunas bone chests of which you have given G. G. Menzies the right to take to Rawene ...
... we plead to you to heed our prayers to our rights of sacred ground (Wahitapu) of our noble ancestors and that they be returned with all its possessions as those places are very dear to us.¹⁷

The cries went unheeded by the Crown. The bone chests were handed over to the curator of the Auckland Institute and Museum. These events took place in 1902.¹⁸ The Tribunal records that by the late 1980s ‘attitudes to the appropriateness of the museum as a repository for wakatupapaku and kōiwi were being questioned’, and in May 1988 there was a formal return of the kōiwi to Waimamaku, although not without remaining

¹⁶ See *The Te Roroa Report*, Chapter 6.

¹⁷ *The Te Roroa Report*, 214, citing ‘Evidence of Benjamin Te Wake on the Waimamaku tiki’, Doc#D14, Wai, 038, 14, 1990.

¹⁸ See *The Te Roroa Report*, Section 6.4.1 for the account of these events.

tensions for the tangata whenua.¹⁹

The Crown's disregard for Te Roroa's taonga and heritage continued through much of the twentieth century. The Maunganui Bluff is an historical and archaeological site of great importance to the hapū; the Crown's uses of the site from the early 1940s have caused damaged and not shown respect for the summit as a wāhi tapu. There has been failure to consult with Te Roroa over the site, and most importantly as the Te Roroa submissions to the Tribunal showed, there has been the notable non-inclusion of Te Roroa input into the management of the scenic reserve that had been established there.²⁰

From 1949 legislation has been passed that allows for the protection of historic sites, although in many cases there has been little official interest in applying the provisions of the legislation to the safeguarding of wāhi tapu.²¹ In this regard the most preferred mechanism by Maori is Section 439 of the Maori Affairs Act, 1953, which is conducive to use by Māori communities.²² Since the mid-1980s there have also been efforts by the Department of Conservation and the Historic Places Trust to address the Treaty relationship, and to incorporate Maori perspectives in their work. Background on these and other Crown efforts are recorded in the report.

The Tribunal recognises the efforts that have been made, but also offers analysis of why they have proved less than satisfactory to the Te Roroa hapū.

We have heard evidence that in the past, appointments have been made to Department of Conservation organisations by casual, informal contact within a network of friendly advisers in the Maori community. We consider this unsatisfactory. Such appointments lack the support and confidence of the community whose perspective the appointee supposedly represents, leaving the community in ignorance both as to the functions of the organisation and whether their perspective is in fact being represented. We are in no doubt that this lack of representation has been the principal cause of the antagonism towards the Department of Conservation and the Historic Places Trust which was apparent at the hearings.²³

¹⁹ See *The Te Roroa Report*, 220.

²⁰ See *The Te Roroa Report*, 243 ff.

²¹ See *The Te Roroa Report*, Section 6.5.3.

²² *The Te Roroa Report*, 231, 254-5.

²³ *The Te Roroa Report*, 255.

The point is that, while the Government's official bodies have made more effort to take account of the views of Te Roroa and other hapū, they have not recognised the autonomy of the hapū. The tendency of officials to choose those who are to be the tangata whenua 'representatives', rather than seeking them from the local hapū, is reflective of the Crown's long history of exercising control over who are to represent Māori.²⁴

A related aspect of the Crown's treatment with the hapū and their taonga that is identified in the report as being less than satisfactory is that the Crown was loath to acknowledge Te Roroa authority in a significant way. For instance, although the special interests of tangata whenua in forest resources and access to them had to come to be to some extent recognised, it was at the Crown's pleasure'.²⁵ Also, the Crown agencies still had problems with accepting that it belongs to Te Roroa to manage their wāhi tapu.²⁶ A theme that runs through the Tribunal's discussion of the Crown's relationship with the Te Roroa hapū, especially as regards environmental conservation and the protection of their taonga, is the need for the Crown to give due recognition to the authority and rights of the Te Roroa hapū. The Tribunal is convinced that as a Treaty partner Te Roroa should have a real share in the environmental management of the area.²⁷ With regard to their wāhi tapu, it belongs to Te Roroa to have full rights of management.²⁸ It is evident from *The Te Roroa Report* that, if Te Roroa had been treated by the Crown as a Treaty partner and their authority as tangata whenua been recognised, the harm that came to the hapū and their taonga would have been prevented.

Through the discussion in *The Te Roroa Report*, it is shown that a great number of organisations and individuals have been part of actions that have been detrimental to the Te Roroa hapū.²⁹ Those named include the: Native and Māori Land Courts, Judges of the Native Land Court, the Departments of Native and Māori Affairs, Prime Ministers

²⁴ See Chapter 7 of the thesis.

²⁵ *The Te Roroa Report*, 182.

²⁶ *The Te Roroa Report*, 254.

²⁷ *The Te Roroa Report*, 183.

²⁸ *The Te Roroa Report*, 254.

²⁹ The Tribunal's main focus is on the actions of the Crown because that is its mandate, and because the Crown has a duty to ensure that all sections of the nation's community are treated fairly, as well as a particular duty of protection towards Māori.

and Native Ministers, numerous other civil servants, Ministry of Lands and Surveys, Surveyors-General, Commissioner of Crown Lands, Tokerau Māori Land Board, Crown Forestry Service, Timberlands, Department of Conservation, Hobson County Council, Hobson Acclimatization Society, Northland Catchment Commission, Soils Conservation and River Control Council, North Auckland Power Board, Air Department, New Zealand Police, Nature Conservation Council, the Minister of Lands, Ministry of Works, Correspondence School, Historic Places Trust, New Zealand Archaeological Association, and various local Pākehā landowners. The evidence in the report indicates a widespread culture of acceptance amongst the Pākehā community, certainly through the later nineteenth and the greater part of the twentieth century, that the Te Roroa hapū could be treated with a fair degree of dismissal.³⁰

The evidence from the other reports considered in this study, and many other sources, shows that this culture, in its stance towards tribal interests generally, has been common throughout the country. There still exists a considerable indifference and even antagonism to Iwi Māori in a reasonable proportion of New Zealand's non-Māori population.³¹ The significance of this lies in the fact that the Crown effectively equates with 'the Crown in parliament' – and in a state democracy that means that government rule is largely determined by the wishes of the majority. As a result, unless there is constitutional protection of the rights of tangata whenua communities, at the level of national government and other organisations, the recognition of those rights remains dependent on the tenuous support of non-Māori.³² The situation is described, as it relates to treaty-based issues, by Joseph Williams, Chief Judge of the Maori Land Court, in an address in 2000 on 'The Treaty of Waitangi and Western Democracy in Practice':

The development of Treaty policy has always been dependent on the support of the mainstream electorate. While Treaty issues are perpetually at the forefront of Maori thought, there appears to be a somewhat less consistent concern from the

³⁰ *The Te Roroa Report* does refer to exceptions. Judge Acheson, who investigated Te Roroa land claims in 1939, is one. The Tribunal says of him (page 277): 'Indeed he stands out as a lone voice in the government establishment of his day. He had an empathy with the people and he listened to their grievances. He saw it as being essential that the honour of the Crown and the standard of British justice should be upheld.'

³¹ This is something a number of politicians are willing to capitalise on. See Walker, *Ka Whawhai Tonu Matou*, 392-401, where he discusses 'The Politics of Race'.

³² See reference in the Preface to the observations from the 1995 Hirangi Hui on this subject. See also the Tribunal's assessment of the need for the setting up of systems of shared management between the Crown and Te Roroa as tangata whenua.

general public. Maori issues are not as fashionable with the wider electorate as they once were. This poses a real problem for progression of the settlement process and consequently the social and economic development of hapu and iwi.³³

Judge Williams' concerns are very much for the well-being of the hapū and iwi, so while he endorses the importance of 'a role for the Treaty in our constitutional arrangement' he emphasises the need for the pursuit of a range of measures to ensure the up-building of Māori communities.³⁴

One of the Te Roroa grievances relates to their not being provided with the benefits of development enjoyed by other New Zealanders. Especially with regard to the tangata whenua in the Waipoua settlement, the Tribunal found that the Crown had denied them access, public utilities, and social services that were provided to the community generally. There were aspects of this disadvantage that were still in existence through to 1990.³⁵ The Tribunal also found that the group had been subject to 'the Crown's persistent harassment' by the withdrawal of practical and legal access to their homes and property.³⁶

While the tangata whenua of Waipoua were particularly poorly treated in this regard, the Tribunal makes the point that historically there has been disadvantage in the provision of public services for most rural Māori communities: 'As three quarters of the Maori population lived in remote communities separate from European town and districts, until migration and urbanisation accelerated in the 1960s, they benefited least of all from public works and utilities'.³⁷ The Tribunal attributes the disadvantage to the fact that Māori had so little representation in national government and on local authorities. As the Tribunal explains, 'the main beneficiaries of state assistance were those sections of the community that exerted the strongest political pressure on "roads and bridges" politics in Parliament and local bodies'. Because Māori as a whole had

³³ J. Williams, 'The Treaty of Waitangi and Western Democracy in Practice', in *Proceedings of Treaty Conference 2000, Glen Innes, 6-8 July 2000*, 3. Judge William's 'once were' would be in comparison to the 1980s, and possibly early 1990s: a time over which there had been a growing sympathy for Treaty issues amongst the general public.

³⁴ J. Williams, 8.

³⁵ See *The Te Roroa Report*, 291, and Chapter 5.

³⁶ *The Te Roroa Report*, 290.

³⁷ *The Te Roroa Report*, 184.

only four representatives in Parliament and few if any representatives on local authorities, they could exert little influence on these politics. They depended, rather, ‘on special services provided by the Department of Maori Affairs’.³⁸ The significance of these observations by the Tribunal is that they demonstrate how the Crown’s early and ongoing exclusion of Iwi Māori from effective political power has resulted in the practical disadvantage of Māori communities from then to the present day.

There is a final point to be taken from *The Te Roroa Report*; this relates to the question as to what stage did tribal communities understand that the ‘sale’ of land meant total alienation as in the European sense of ‘sale’. The Te Roroa claim deals with land agreements that took place from the 1870s onwards, and the evidence given in the report on the transactions and how they were understood by the Te Roroa hapū is somewhat conflicting. The report affirms ‘the persistence of traditional notions of reciprocity in Te Roroa’s concept of land sales’ but goes on to say that by the mid 1870s ‘there is little doubt that they [the Te Roroa leaders] appreciated that the Europeans regarded land as private, conveyable property and land-selling as permanent alienation’.³⁹ The tenor of the report’s argument at this point is that by the mid 1870s Te Roroa must have had an appreciation of the European view of land sales and therefore the sales were sales in the European sense. The Tribunal for the *Muriwhenua Land Report* follows a different line of argument. Its argument is a legal one: both the Crown’s and the hapū’s intentions in entering into land ‘sales’ are considered to be critical because, if there is not a mutuality of understanding between both parties to a ‘contract’, then the ‘contract’ is not valid.⁴⁰ The latter Tribunal is of the opinion that the Far North hapū retained their customary view of land agreements well after 1840.⁴¹

The interesting thing is that, in spite of its deciding that by the mid 1870s the Te Roroa leaders must have appreciated the European understanding of land sales, *The Te Roroa Report* includes several references that show the continuation of their traditional understanding when it comes to agreements over land. In discussing the sale of the

³⁸ See *The Te Roroa Report*, 184-5.

³⁹ *The Te Roroa Report*, 48.

⁴⁰ See *Muriwhenua Land Report*, 167-9, 210-11.

⁴¹ See Chapter 6 of the thesis.

Taharoa reserve to the Crown in 1952, the Tribunal says that after the sale the people continued to use the dune lake area for traditional purposes, and that ‘they believed the sale had not extinguished their mana whenua or traditional mahinga kai rights’.⁴² The Waipoua whānau had a similar view of their continuing mana in relation to their forest and their rights of ongoing access, even after the ‘sale’ of the forest to the Crown in 1876. Their claimant witness at the Tribunal hearings, Alex Nathan, used the words ‘so-called sale’ in reference to the arrangement that had been made with the Crown over the forest, and made it clear that the people had not intended alienation in the European sense of a sale. They had always used the forest ‘for physical and spiritual sustenance’, and it was still important to the maintenance of their way of life.⁴³ These examples involving the Taharoa reserve and the Waipoua forest show that the whānau and hapū of Te Roroa did not, and still do not, understand their ‘sale’ to the Crown of these significant tribal areas as a complete relinquishment of possession. This indicates a persistence of the understandings and practices associated with ‘tuku whenua’: the maintenance of a hapū’s mana in and relationship to its lands while allowing others access to and use of the land.⁴⁴

This consideration of matters arising from the Te Roroa claim to the Waitangi Tribunal has shown how the Crown’s discriminatory treatment of tribes that marked the second half of the nineteenth century continued through to late in the twentieth. The Crown’s disregard for the hapū and their interests reflects the preclusion of Māori from any effective say in the government of the country, a pattern established from the early days of Crown rule in New Zealand. While the more recent efforts of some Government departments to seek input from tangata whenua are commendable, there is still the tendency for the Crown bodies to consult as it suits them, rather than approaching hapū as bodies with their own integrity and naturally wanting to determine who will represent their interests.

The Mangonui Sewerage claim by the Ngati Kahu hapū is unusual in that the Tribunal’s hearings did not lead to a finding in favour of the claimants. The Tribunal did think that

⁴² *The Te Roroa Report*, 173-4.

⁴³ See *The Te Roroa Report*, 49.

⁴⁴ See Chapter 3 of the thesis.

Ngati Kahu had valid grievances, coming out of a long history of Crown misdealings over their land. These grievances were later dealt with in the wider Muriwhenua Land claim and resulted in recommendations of recompense to Ngati Kahu. Although Ngati Kahu knew that its historical grievances were to be heard by the Tribunal, the immediate proposal to establish a sewerage works on a site of great historical and social significance was anathema. In addition the twenty acres, on part of which the sewerage works was to be built, was their only tribally-held land. In spite of this the Tribunal judged that the plans for the sewerage works were too advanced, that the local County Council did not have the means to afford a much more expensive option, and that Council planners had now done as much as possible to take into account issues of visual impact and the environmental concerns of local hapū. The Tribunal based its judgment on the fact that the Treaty required the accommodation of two peoples on the land and decided that, in this case, the sewerage project proposed by the County Council should be allowed to go ahead.

The Tribunal recognises that the issue of the sewerage works is symptomatic of a wider problem for the Ngati Kahu claimants.⁴⁵ For around a century the Mangonui area was ‘a quiet backwater’, meaning that Māori and Pākehā families were able to co-exist with relative ease. However, at the time of the hearing the population was rapidly increasing ‘as holiday makers, retired persons and resort developers discover the advantages of its climate and scenic havens’.⁴⁶ It is the increase in population that has generated the need for a new sewerage scheme; and is having the effect of pushing Ngati Kahu people off land and properties that either they owned or had access to.⁴⁷ The Tribunal believes that the Crown has an ongoing obligation under the Treaty to see that tribes are secured a place in their own lands, and in view of the contemporary pressure on land use in and around Mangonui the Tribunal says: ‘It may be crucial, if the Treaty is to work well in our time, that the tribe be better involved in planning for the Bay and that new arrangements be made for the protection and use of existing Maori lands’.⁴⁸ With regard to tribal land generally, the Tribunal says: ‘Planning laws in our view ought properly to recognise the retention of Maori lands and the maintenance of tribal endowments as

⁴⁵ *Mangonui Sewerage Report*, 3.

⁴⁶ *Mangonui Sewerage Report*, 13.

⁴⁷ See *Mangonui Sewerage Report*, 8.

⁴⁸ *Mangonui Sewerage Report*, 8.

proper national objectives'.⁴⁹

The need for the involvement of tangata whenua, meaning the local hapū and whānau, in planning processes is one of the major themes of the *Mangonui Sewerage Report*. If Ngati Kahu had contributed to the original planning for the sewerage works, the present problem would almost certainly not have arisen. The first opportunity for Ngati Kahu to participate came when a well-developed plan was made available for public objection. Ngati Kahu were judged at the time as having rights no different from any other group in the community.⁵⁰ The Tribunal points out that it has now been established by a decision of the High Court (1987) that ancestral relationship to land must be taken into account in land use planning. Unfortunately, this was not the case when the County Council did its planning for the sewerage works.

As it was, the County Council went to the Historic Places Trust to find out whether there were any archaeological sites on the Otengi point that needed preserving. The Trust had no problems with the proposed site. Consultation with Ngati Kahu as to the historic significance of the Otengi point was not considered. Yet, the fact that this was the landing point for the Mamaru waka and the place where Ngati Kahu began⁵¹ means that the site had every claim to be regarded as of national importance. Tipene O'Regan's wry comment, cited in the *Te Roroa Report*, is pertinent here: that it has been easier to gain protection for ancestral rubbish dumps [middens] than waka landing sites.⁵² While organisations like the Historic Places Trust are now in the process of improving the recognition of the tribal histories of areas, there is still an enormous amount to be done to raise the general awareness that New Zealand has a significant history that long precedes the arrival of the first European settlers.⁵³ As long as this

⁴⁹ *Mangonui Sewerage Report*, 6-7.

⁵⁰ The Tribunal is clear that Ngati Kahu had a Treaty right to be consulted about the Otengi headland at an early stage of planning, and not just the general right of objection which operates after the local authority's plans have been drawn and publicised. See *Mangonui Sewerage Report*, 4-5, 40-1, 60.

⁵¹ *Mangonui Sewerage Report*, 43.

⁵² See *The Te Roroa Report*, 233, citing 'Evidence of Tipene (Stephen) O'Regan', Doc#G2, Wai 038, 1990, 2.

⁵³ In a 2005 list of New Zealand's top 100 history makers, compiled by a lay panel with some historical expertise, there was only person named that exercised their influence before 1800; that was Kupe, known as the first to touch land in New Zealand. He was 54 on the list. See *Sunday Star Times*, November 13, 2005, C3. Margaret Mutu mentions ('Humpty Dumpty Principle at Work', page 27) the research that

awareness remains minimal, groups such as the County Council who are involved in making planning and resource management decisions are likely to continue to allow development to proceed without adequate consultation with tangata whenua.

With regard to the whole issue of planning, the situation is such that the Crown has not sufficiently ensured that it has passed on to local government and other planning authorities its Treaty obligations towards tangata whenua. These bodies gain the authority to exercise their jurisdiction from the Crown and it is the Crown that sets the broad parameters within which they carry out their respective functions. The situation was highlighted in an address in 2000 by Sandra Lee, as Minister for Local Government:

In recent years a considerable amount of effort and energy has been channelled into work to accurately define the Treaty relationship between the tangata whenua and the Crown. The relationship between local government and Maori has fallen largely outside this process in recent years....
What we don't have at the moment is a complete overview of the whole body of local government-related legislation and its relationship to the Crown's obligations under the Treaty.⁵⁴

Speaking from a Māori perspective, Lee says: 'We do not believe the Crown's obligations are lessened by the fact that some functions rest with central government and others with local government. Treaty obligations should not go down some sort of 'black hole' in relation to an issue because it is dealt with by local rather than central government'.⁵⁵ Lee thinks that, as legislator of the rules for local government, the Crown needs to acknowledge its obligations under the Treaty. This means that local authorities ought to be given 'proper legislative guidance as to what the Crown expects of them in terms of acting consistently with the Treaty'.⁵⁶ The Tribunal also indicates the need for the Crown to ensure that its Treaty obligations towards tangata whenua are made effective in local decision-making.⁵⁷

needs to be done so that there is made available 'the history and traditions of this country, which all New Zealand citizens at least have a right to know and understand'.

⁵⁴ Honourable Sanda Lee, Minister for Local Government, 'Speech to Labour Local Government Sector Council', Parliament Buildings, Wellington, 12 May 2000, 7-8, available at: <http://www.localgovt.co.nz/ceoissues/law/mediaspeechsandraleee.htm> (25 June 2002).

⁵⁵ Lee, 8.

⁵⁶ Lee, 10.

⁵⁷ See *Mangonui Sewerage Report*, Section 1.7.

In the *Mangonui Sewerage Report*, the Tribunal raises a particular matter with regard to how government agencies and other bodies deal with tangata whenua over resource management and planning issues. This is the importance of identifying correctly who has authority over the land or resource in question. The Tribunal, in making this point, expresses its concern that there is ‘a decided lack of structure by which to determine the proper tribal members to deal with, or by which an authoritative tribal position can be obtained.’⁵⁸ The Tribunal warns that District Maori Councils might well not be able to speak for local tribes;⁵⁹ and it believes that the Crown ‘must provide a legally recognisable form of tribal rangatiratanga or management’.

In view of this recommendation, made in 1988, it is interesting that four years later the Tribunal in its *Te Roroa Report* is cautioning against recourse to the recently instituted ‘iwi authorities’ for the identification of owners of Māori land. The Tribunal’s position needs some explanation as the ‘iwi authority’ does qualify as a ‘legally recognisable’ form of management. The Tribunal for the Te Roroa claim explains, however, that the ‘iwi authority’ has been instituted by the Crown as a solution to the problems that arise for resource management when dealing with multiply-owned Māori land. While the ‘iwi authority’ may appear to be a traditional body, it is not.⁶⁰ The Tribunal points out that the owner of a particular piece of land might well not be known to ‘the appropriate iwi authority’.⁶¹ This is an important point because there are many who wrongly identify ‘iwi’ as a more important level of tribal organisation and do not understand that land and resources are customarily held by particular whānau, hapū, and even individuals.⁶² Planners may find it easier to approach corporate iwi organisations, but the latter may well not hold the legitimate authority over particular taonga or land. Underlying the difficulties in finding out which tangata whenua ought to be dealt with in particular situations, is the Crown’s long determination to control how it deals with Māori communities and Iwi Māori as a whole. As a consequence, there is not a body that is fully representative of Iwi Maori for the Crown to consult, or with whom to develop

⁵⁸ *Mangonui Sewerage Report*, 5.

⁵⁹ *Mangonui Sewerage Report*, 41.

⁶⁰ See *The Te Roroa Report*, 355-6. See also discussion in Chapter 4.

⁶¹ *The Te Roroa Report*, 356.

⁶² While land was not customarily held in individual ownership, *The Te Roroa Report* points out (pages 356-7) that, because the Crown forced individual titles on the members of Te Roroa hapū, those individuals must now be protected in their rights to their land.

satisfactory guidelines for matters such as this.

Issues of planning and consultation lie at the heart of the Mangonui Sewerage claim. The Ngati Kahu experience reflects the Crown's long history of excluding tangata whenua from its planning processes. Until very recently, the Crown had not ensured that at the level of local government there were measures in place to safeguard the interests of those who are tangata whenua. As Sandra Lee points out, there is still a great deal more that the Crown needs to do if its Treaty obligations towards tangata whenua are to be fulfilled by local as well as national government. The Tribunals for both the Te Roroa and Mangonui Sewerage claims stress that whānau and hapū must be protected in their rights to their properties according to the promises made in the signing of the Treaty of Waitangi; and that this must include a guaranteed input into planning decisions that affect their ancestral lands.

The Te Whanau o Waipareira claim deals with actions of the Crown that adversely affected the urban Māori trust's delivery of social services following the establishment of the Community Funding Authority in 1992. The Tribunal upheld the complaints of the trust. These include the fact that Te Whanau o Waipareira was not given due recognition as a Māori community providing appropriate social services to the Māori people of West Auckland, nor had they been treated equitably in the distribution of social welfare funds. Part of the difficulty lay in the fact that the Department of Social Welfare and the Community Funding Authority had decided that their Treaty partnership obligations applied only to iwi. The Tribunal found that the Crown agencies were too restrictive in their interpretation of the Treaty, and the reforms advocated by *Puao-te-Ata-tu*, the 1986 landmark report on the Department of Social Welfare and its delivery of services to Māori.⁶³

A brief history, up to the 1992, of what the Crown's social welfare delivery had meant to Māori, helps to put the issues in context. In the 1930s the Government had

⁶³ *Puao-te-Ata-tu* was presented in 1986 by the Department's highly regarded Maori Perspective Advisory Committee. At the Tribunal hearing, both the Crown and the Waipareira trust affirmed the importance of the recommendations in the *Puao-te-Ata-tu* report.

established an extensive system of social welfare.⁶⁴ This system worked from a model of highly centralised management, a model that held sway through to the late 1970s. While the benefit system provided some security of income for those without paid employment, Māori suffered both from the dependency it fostered and from the manner of its delivery, which was largely determined by a Pākehā bureaucracy. The Tribunal describes the beginnings of the change from this model:

Maori have long suffered from official control in the management of their affairs, even of their land and children. It robbed them of their dignity and sapped them of their once renowned initiative and energy...
Change only came late, from about 1978, but not too late for a resurgence to occur. Under the Tu Tangata philosophy of community empowerment, the transfer of decision making through Kokiri units backed with resources, and a range of community based programmes under Maatua Whangai, Mana Enterprises and Mana Access schemes, a renaissance was evidenced in the unleashing of a creative energy that Maori had not witnessed for many years.⁶⁵

All of these schemes had a community focus. They fitted well with a holistic and Maori model of self-determination and they stimulated ‘genuine socio-economic development among Maori in West Auckland’.⁶⁶ There was, nevertheless, some dissatisfaction for the Māori providers in that they were not involved in the design of the programmes or in social welfare policy development.⁶⁷ It was this dissatisfaction that led, in part, to the recommendations in *Puao-te-Ata-tu* that Māori be included in the design and delivery of social services to Māori. The strengthening of Māori communities and networks was seen as essential to improved Māori welfare; and important to the process of up-building was the devolution of power and resources to Māori groups so that they could deliver services that were appropriate to the needs of their communities. Following the *Puao-te-Ata-tu* report, the devolution of welfare delivery to Māori communities gained in momentum.⁶⁸

⁶⁴ New Zealand was often referred to as a Welfare State.

⁶⁵ *Te Whanau o Waipareira Report*, 220.

⁶⁶ See *Te Whanau o Waipareira Report*, 50, citing ‘Statement of William Hanley’, Doc#A8(t), Wai 414, 1994.

⁶⁷ See *Te Whanau o Waipareira Report*, 50 ff.

⁶⁸ Preceding the *Puao-te-Ata-tu* report, a very important factor in moves by the Government towards the empowerment of Māori communities was the 1984 Hui Taumata, a major Government-sponsored consultative hui with Māori, facilitated through the leadership of the then Minister for Maori Affairs, Koro Wetere. Following this hui there was a marked increase in Māori input into Government policy. See Mason Durie, ‘Hui Taumata 2005: a brief backgrounder’, 2005, available at www.huitaumata.maori.nz/pdf/hui_paper/pdf (23 February 2006).

The Department of Social Welfare began to fund social services according to a community development philosophy, a philosophy that was amenable to the work of groups such as Te Whānau o Waipareira; it also recognised the importance of the delivery of culturally appropriate social services. Te Whānau o Waipareira was identified as a Māori organisation that was successfully serving the needs of Māori in West Auckland and was actively encouraged by the department to extend and develop its operation. The community development philosophy coincided well with Waipareira's overall aim to provide whānau-type support for its members. The Tribunal affirms the description of the Te Whānau o Waipareira trust as 'very much family oriented in its approach' and as having a sense of responsibility for its members 'from birth to death'.⁶⁹ The holistic approach of Te Whānau o Waipareira and its concern for the overall wellbeing of those to whom it caters is commented on several times by the Tribunal.

The community development approach also allowed for the integration and co-ordination of services. The Te Whānau o Waipareira trust is an affiliation of independent businesses, but the trust as a whole seeks a consensual and collective approach to the distribution of funds and other resources.⁷⁰ Under this arrangement, the trust could direct resources according to need. It was also in a position to expand its enterprises, offer a modest remuneration to its community workers, and implement a policy of furthering the training and qualifications of its members. These decisions accorded with its vision of being a Māori community that was moving itself and its members beyond relationships of dependency.

The *Puao-te-Ata-tu* report had emphasised the importance of power sharing and partnership relationships between the Department of Social Welfare and Iwi Māori in the delivery of social services to Māori. There was wide acceptance of the report, and Te Whānau o Waipareira experienced the immediate benefits of its recommendations. For them, the partnership relationship with the Department was a fruitful one. In May 1992, however, the Community Funding Authority was established on a totally new philosophy of social delivery. This was done without consultation with Māori social

⁶⁹ *Te Whanau o Waipareira Report*, 76, citing 'Affidavit of Daryl Cross', Doc#A8(p), Wai 414, 1994, 3.

⁷⁰ See *Te Whanau o Waipareira Report*, 43, citing M. Brown, Doc#A8(r), Wai 414, 1994, para 25.

service providers.⁷¹

Te Whānau o Waipareira's difficulties with the Community Funding Authority arose because the latter organisation allocated its funding according to philosophy, criteria, and practice that ran counter to those of the trust. A particular difficulty lay in the fact that the Community Funding Authority was established on a philosophy of 'service development', instead of the former 'community development'. In practice, the new approach meant the provision of set amounts of discrete services, determined according to nationally set goals.⁷² The comment made in the report is interesting: 'Under the State Sector Act, the Government alone sets the social goals to be achieved by the department and the agency (by a process which was not known to the general manager of the Community Funding Authority)'.⁷³ Each year, at Budget time, the Minister of Social Welfare announced which particular social services would be funded and to what level. Community groups could apply to the regional office of their area for funding for the provision of the nominated services.

Waipareira experienced considerable frustration with the new system. In the years before the Community Funding Authority, the trust had built up a productive relationship with the Department of Social Welfare, which recognised Te Whānau o Waipareira as an organisation with a proven record of delivery of services to Māori made in response to the needs of its community, and on a basis of ongoing assessment and accountability. Waipareira was funded accordingly; each year it could work out with its affiliates the priorities of the community and distribute the allotted funds according to the need. The trust now had to line up in a queue of service providers contending for funds for the provision of services that might, or might not, be priorities

⁷¹ The Government's commitment to *Puao-te-Ata-tu* had waned and the recommendations in *Puao-te-Ata-tu* did not inform the establishment of the new organisation. Significantly, none of the senior management of the new Community Funding Authority were Māori. See *Te Whānau o Waipareira Report*, 107.

⁷² Officials acknowledged that no means were set in place to assess the outcomes of the services delivered, although they did say that there were hopes to correct this deficiency. The agency is monitored under the State Services Act on its outputs not its outcomes. See *Te Whānau o Waipareira Report*, Section 6.2.1, including reference to H. Aikman and B. Gordon, 'Transcript of fourth hearing by Crown counsel', 20 March 1995, 15.

⁷³ *Te Whānau o Waipareira Report*, 212.

for funding for the community at that time.⁷⁴ Inevitably, there was an undermining of the trust's ability to deliver a holistic social service in accord with its commitment to the overall wellbeing of the members of the community it served.⁷⁵

The Tribunal found that there were a number of areas in which Waipareira was being unfairly treated under the new arrangement, and gives detailed background on each of them. One area was that of funding; the Tribunal recognised that the claimant witness judged this to be inequitable in regards to Waipareira.⁷⁶ Even more important to the trust, however, than the amount of funding was the lack of a forum by which it could have effective input into the direction of social welfare policy. The fact that the new system was designed and set in place without consultation with Māori social service providers has already been mentioned, but there was also the issue of how communities like Waipareira could have input into the actual running of the system.⁷⁷ Since Te Whānau o Waipareira was one of the major Māori social services providers in the country, this was not an unreasonable expectation.

A factor in the Community Funding Authority's failure to appreciate adequately the Māori situation and the significance of the work being done by a trust like Te Whānau o Waipareira is indicated by the Tribunal. It specifically mentions that, at the national level, the management were entirely Pākehā, and the management that oversaw the area to which the trust belonged were also Pākehā.⁷⁸ There was a Māori outreach worker who liaised with the trust but the report shows that this man found himself caught between 'two different ships' that often were on opposing courses. Theoretically, he had the power to make decisions at the local level but, in the issues that really mattered to the trust, he had no power at all and his representations on behalf of the trust were not

⁷⁴ The claimants questioned the efficiency and cost of the competitiveness engendered by the Community Funding Authority. Examples were given of smaller businesses outside the trust that had tendered successfully for the delivery of social services with Community Funding Authority funding, but which later collapsed because they could not manage on the funding allotted and did not have back-up support. The collapse of the businesses led to the non-delivery of the intended services. See *Te Whānau o Waipareira Report*, Section 7.10.3, including reference to H. Aikman and B. Gordon, 'Transcript of fourth hearing by Crown counsel', 20 March 1995, 20.

⁷⁵ See *Te Whānau o Waipareira Report*, 139.

⁷⁶ See *Te Whānau o Waipareira Report*, Section 7.11.

⁷⁷ For the Tribunal's assessment of these matters, see *Te Whānau o Waipareira Report*, Sections 8.3.6 'Findings on funding' and 8.4 'Recommendations'.

⁷⁸ *Te Whānau o Waipareira Report*, 89.

heard. He could see that if the area manager had been prepared to meet directly with the trust many difficulties could have been ironed out, but direct access by the trust to Community Funding Authority's management was counted as contrary to policy.⁷⁹ The system, certainly as it operated in the trust's area, was effectively closed to input from a key Māori community and service provider.

Of particular concern to the claimants and the Tribunal was the overly prescriptive approach of the Department of Social Welfare in interpreting the recommendations of *Puao-te-Ata-tu*. Peter Boag, as a member of the committee that produced the *Puao-te-Ata-tu* report, explained that the committee undoubtedly saw the upbuilding of whānau, hapū, and iwi as an important key to Māori welfare. However, the report called on the Government 'to maintain a search for solutions in consultation with the community and not just tribal authorities but with other 'cultural structures' and with 'Maoridom''.⁸⁰ This search for solutions was seen to be particularly important in terms of what was recognised as the crisis situation in Auckland and other major cities.⁸¹

The Social Welfare Department justified its limited recognition of Te Whanau o Waipareira as a provider of social services to Māori because it was not an iwi, and yet the trust was playing a vital role in helping those who wished to connect to their whānau and hapū. The Tribunal says:

If and when appropriate, Waipareira tried to meet the individual's need for knowledge of and contact with kin and traditional culture by re-establishing contact between the individual and his or her tribal group(s).

On the facts presented in this claim it appears to us that Te Whanau o Waipareira is well equipped to do that, and that indeed it does so. It is they who operate in the urban areas where Maori most estranged from kinship ties are found. It is they who are best located to bring in 'te pani me te rawakore' and re-establish their connections to their kin.

In this regard, we heard that Waipareira's roopu kaumatua was set up initially to help young people trace their whakapapa back to their tribes. Equally relevant

⁷⁹ See *Te Whanau o Waipareira Report*, Section 7.3.6 and 7.3.7, citing 'Transcript of Wiremu Takerei's oral evidence', 24-28, April, 1995. This was partly due to the position of the particular area manager. There were other areas where a more open approach was taken. Part of the difficulty with the system was that it laid itself open to a narrow bureaucratic interpretation. The Tribunal footnotes the interesting observation that some time after the hearing of this claim, the area manager in question 'was appointed general manager of the agency'. See *Te Whanau o Waipareira Report*, 83.

⁸⁰ *Te Whanau o Waipareira Report*, 119, citing *Puao-te-Ata-tu* report, 1986, 45.

⁸¹ See *Te Whanau o Waipareira Report*, Sections 5.4 and 5.5, citing Mr. Boag opinion.

was the evidence of Pita Sharples that he knew of tribal spokespeople and kaikaranga who began to learn their skills through Waipareira and practice them on Hoani Waititi marae before returning to their tribal areas.⁸²

The work of Waipareira was not only helping individuals make links to their whānau and hapū, but was also equipping them to contribute positively to their kin communities. This work accorded with the vision expressed in *Puao-te-Ata-tu* that Māori would have the benefit of being strengthened in their tribal identity. It was on the level of appreciating the range of practical means needed to address the issues raised by *Puao-te-Ata-tu* that the then management of the Department of Social Welfare was found to be wanting.⁸³

The Tribunal was convinced that the Department would have been better informed if it had received the views of Māori communities on the ground. In fact, the Tribunal was of the opinion that the Department, in order to fulfil its Treaty obligation to consult with Māori, should be required to consult with representative gatherings of Māori service providers over the formulation and implementation of funding policy for welfare provision to Māori.⁸⁴ The crying need that emerged from the claim is for ‘a consultative forum equivalent to the now-abolished district executive committees of the DSW’.⁸⁵

The Tribunal advocates a return to some form of the previous consultative fora for two reasons. One is so that together the members could help determine how the delivery of funding for social services might be of best benefit to the Māori communities of the area.⁸⁶ The other concerns the network of relationships that belongs to the world of Iwi Māori. In its report, the Tribunal emphasises that the enhancing of Māori communities in their identity, autonomy, relationships, and the carrying out of their obligations of reciprocity must be of primary concern to Māori and the Crown. This is why the

⁸² *Te Whanau o Waipareira Report*, 219.

⁸³ For example, the Social Welfare Department refused to recognise the trust as an appropriate body for the sole guardianship of children, because it was not an ‘iwi’, in spite of the fact that the Children and Young Persons Service of the same department still directed young people to the trust’s care, and, ironically, immigrants groups could also be granted sole guardianship of children on the basis of being ‘cultural service providers’. This refusal affected the community’s status and funding as a social services provider. See *Te Whanau o Waipareira Report*, pages 203-4 and 164-5.

⁸⁴ See *Te Whanau o Waipareira Report*, Section 8.3.

⁸⁵ *Te Whanau o Waipareira Report*, 226. The committees were abolished prior to the advent of the Community Funding Authority.

⁸⁶ See *Te Whanau o Waipareira Report*, 226-7.

Tribunal places such importance on matters being decided through committees made up of all the Māori communities of an area. In the Tribunal's words: 'On committees such as these, all the Maori groups of the district could come together, acknowledge the rangatiratanga of each other in accordance with Maori custom and, on this basis, seek a consensus on how best to apply whatever funding is available for welfare services, so as to maximise their rangatiratanga'.⁸⁷ The Tribunal's statements show its conviction that it is through the enhancing of tribal and non-tribal communities, in their identity, autonomy, and relationships, that improvements in welfare will most surely be guaranteed to Māori.

Because the strengthening of Māori communities involves the recognition of and support for the networks of relationships that connect and bind them, both Te Whanau o Waipareira and the Tribunal were concerned that the Community Funding Authority's practice and policy that favour kin-based groups at the expense of other Māori groups are potentially damaging to the relationships between tribal and non-tribal Māori communities. A particular example illustrates this. In the years 1991-2, Te Whanau o Waipareira used some of its own general funds to help Te Ropu Matahi, a small Ngati Whatua group, to get established as a social services provider in the south Kaipara. It was well known that this area was lacking in social services provision. In giving its support to Te Ropu Matahi, the trust was acknowledging and reciprocating recognition and support they had received from the wider Ngati Whatua hapū.⁸⁸ The following year Waipareira's act of graciousness was turned against them by the Community Funding Authority. Their gift to Te Ropu Matahi was used, on ill-founded grounds, to justify a reduction in funding to the trust.⁸⁹ 'Not only was funding lost, but the relationship between the Maori parties was disrupted by the Community Funding Authority's action.'⁹⁰

If the delivery of social welfare to Māori in West Auckland had been, as the Tribunal suggested, under the guidance of a Māori district committee, constituted by

⁸⁷ *Te Whanau o Waipareira Report*, 226.

⁸⁸ Ngati Whatua hold the mana of much of the land in which Te Whanau o Waipareira operates. This is why their recognition and support are important to the Waipareira trust.

⁸⁹ See *Te Whanau o Waipareira Report*, Section 7.6.

⁹⁰ *Te Whanau o Waipareira Report*, 174.

representation from each of the Māori communities of the area, this situation would not have arisen. District committees had been functioning well, but had been abolished in preparation for the new arrangements.⁹¹ Previous experience had shown that such committees enabled Māori groups to come together to have an effective say in the policies and decisions that affected their people, and at the same time relationships of reciprocity between the communities were facilitated. In effect, the committees provided the opportunity, at the point of interface between a Crown agency and Māori communities, for the exercise of customary values and relationships. As the Tribunal pointed out, *kāwanatanga* (the authority of the Crown) and *rangatiratanga* (the authority of tribes and other Maori communities) could be exercised in juxtaposition, for the welfare of the tribes, the communities, and Māori generally.⁹²

The difficulties Te Whanau o Waipareira was having with the Department of Social Welfare was occurring at a time when the department had a declared policy of biculturalism and had provided bicultural training for much of its staff. Unfortunately, the understanding of biculturalism practised by the department in relation to Māori communities like Waipareira was not based in a power sharing arrangement. Rather it rested on the idea of generating greater cultural sensitivity in the department's staff. It is this view of biculturalism that the Tribunal is critiquing when it says:

We commend the department for seeking a bicultural understanding and process, as reflected in its policy documents *Te Punga* and *Te Wakahuia o Puaote-Atatu*. Their intention is clearly to promote affirmative action within the department and the agency to ensure Maori are not prejudiced through ignorance. However, it has constantly to be borne in mind that, in a Treaty-based relationship, a bicultural dimension to policy and practice is not an end in itself but the means to an end. *Puaote-Atatu* went much further than encouraging a bicultural perspective within the department. The goal, in terms of the report, is a proper engagement between the Crown and the Maori, a sharing of power and control over resources, a mutual accountability, where the relationship harnesses the potential of all Maori in the most effective manner. That in our view goes more to the heart of the Treaty as well.⁹³

The Tribunal's stress on the 'sharing of power and control over resources' and 'mutual accountability' is directly in line with the recommendations in the *Puaote-Atatu* report. It also reflects the customary expectation of Māori communities that the alliance

⁹¹ See Te Whanau o Waipareira Report, 223 and 226-7.

⁹² See *Te Whanau o Waipareira Report*, xxv-xxvi.

⁹³ *Te Whanau o Waipareira Report*, 128.

with the Crown, as with other inter-group alliances, would be a relationship based on mutuality. The Tribunal returns to the above point when it says that ‘informed unilateral action’ is not a substitute for ‘proper interaction between Treaty partners’.⁹⁴

As with the tribal communities, it is the ‘unilateral action’ of the Crown that lies at the heart of the grievances brought to the Tribunal by Te Whanau o Waipareira. And once again an ideology has been at work to justify the action. In this case, the justification lay in the Department of Social Welfare’s stated commitment to biculturalism; this was a worthy goal in itself, but the language of biculturalism served to conceal the actual relationship between the Department and the Māori providers. The department controlled all the significant decision-making when it came to policy and funding, and the Māori providers were not recognised as partners at the level of management. The Department of Social Welfare had a stated policy of ‘biculturalism’ but its practice was still that of a unilateral decision-maker.

It is significant that only six years after the presentation of the *Puao-te-Ata-tu* report, the Government of the day could authorise the marked change in the policy of the Social Welfare Department, without the involvement of key Māori stake-holders in welfare provision. The fact that this happened exemplifies the situation referred to in the statement from the Hirangi Hui: ‘Maori are not content to depend on the goodwill of successive Governments or to be exposed to inconsistent policies developed to suit the needs of Pakeha. Progress in one decade all too frequently must be revisited a decade later’.⁹⁵ The inconsistency addressed by the Tribunal for the Te Whanau o Waipareira claim is part of a far wider problem than the behaviour of one Government department at a particular point in time. It signifies, at the level of the country’s constitution, the preclusion of the means that guarantee to Iwi Māori the power to determine policy directions that are best for them.

There is a further point of interest that arises from the discussion in the report of the

⁹⁴ *Te Whanau o Waipareira Report*, 224.

⁹⁵ M.H. Durie and S. Asher, ‘A Report Concerning the Government’s Proposals for the Settlement of Treaty of Waitangi Claims and Related Constitutional Matters, based on the proceedings of a hui held at Hirangi Marae, Turangi, 29/1/95’, Hirangi Marae, Turangi, 1995, 9. See Preface to the thesis.

Crown's justification of its position with regard to Te Whānau o Waipareira. The Crown reasoned that it was not required to be accountable to communities like Te Whanau o Waipareira. Its accountability was 'to Maori as a whole and to all New Zealanders'.⁹⁶ Accountability to 'all New Zealanders', whilst very broad in its answerability, is that owing to the citizens of the country in the form of the electorate. Accountability to 'Maori as a whole' is accountability to a nebulous entity. It allows the Crown to take advice on matters that affect Māori communities from those whom it chooses. There is, in fact, no constituted procedure by which the Government and its departments can make themselves accountable to Māori as a whole. As was pointed out with regard to the consultation of tangata whenua over planning issues, there is not a body that is fully representative of Iwi Maori for the Crown to consult.⁹⁷

The above discussion has shown that at the heart of the Te Whanau o Waipareira claim to the Waitangi Tribunal is the onus on both Crown and Iwi Māori to see to the enhancing of Māori communities in their identity, autonomy, relationships, and the carrying out of their obligations of reciprocity, that is, in the exercise of their rangatiratanga. The Tribunal for the claim makes it clear that for this enhancement to be achieved there must be a sharing of power between Māori communities and the Crown. 'The goal ... is a proper engagement between the Crown and the Maori, a sharing of power and control over resources, a mutual accountability, where the relationship harnesses the potential of all Maori in the most effective manner.'⁹⁸ The problems with the Crown's treatment of Te Whānau o Waipareira in the 1990s came from its unilateral action in formulating and implementing social welfare policy. It abolished the district committees that were representative of the Māori communities that were involved in the delivery of social service; it thus cut off a vital avenue of advice for itself, and an important medium for the up-building of the communities.

Between them the five selected Tribunal reports, considered in this and previous chapters, record evidence regarding the Crown's actions towards Iwi Māori from 1840

⁹⁶ *Te Whanau o Waipareira Report*, 11-12.

⁹⁷ The Tribunal makes the point that there is no longer a Māori Parliament. Unfortunately, when there were Māori Parliaments the Crown did not seek direction from them.

⁹⁸ *Te Whanau o Waipareira Report*, 128.

through to the late 1990s. Since then, in 2004, the Crown has passed legislation regarding the foreshore and seabed that denies to hapū rights in property that were guaranteed to them by the Treaty of Waitangi. As was noted in the Preface and Introduction to the thesis, the Government proceeded with the legislation in spite of the sound rejection of its proposals by Māori at every one of the consultation hui on the issue.⁹⁹ The findings from the Tribunal that heard the claim against the Crown's foreshore and seabed policy show there were substantial reasons for this rejection.¹⁰⁰ This was because the proposed legislation went against the Treaty guarantee of the Crown's protection of Māori rights to 'their Lands and Estates, Forests, Fisheries and ... other Properties';¹⁰¹ involved the abolition of 'the common law rights of Māori in terms of the foreshore and seabed' while the private property rights of other citizens were protected; and went against the rule of law by preventing the Māori common law owners from taking their case to the courts.¹⁰² What the foreshore and seabed case has illustrated is the continuing ultimate power over tribes that is held by the Crown in parliament.¹⁰³ As with the other cases studied, this one from the twenty-first century demonstrates the need for change in New Zealand's constitution if Iwi Māori are to have confidence that their rights as tangata whenua and as citizens of the country are to be protected, and if the Crown and Iwi Māori are to move forward in a relationship based on mutual respect and benefit.

⁹⁹ See comment in *Report on the Crown's Foreshore and Seabed Policy*, 125.

¹⁰⁰ See *Report on the Crown's Foreshore and Seabed Policy*, 'Findings and Recommendations', 127 ff.

¹⁰¹ Article 2, English version.

¹⁰² See *Report on the Crown's Foreshore and Seabed Policy*, 127-29.

¹⁰³ For further comment on this point, see D. V. Williams, 'Whither the Treaty of Waitangi and its Principles?', A paper to support the oral presentation by Dr David V Williams, Professor in Law, University of Auckland to the Auckland District Law Society Conference, 5 July 2005.

Conclusion

This study has investigated the nature of the Crown's relationship with Iwi Māori by looking into the history, from 1840 to the present day, of how the Crown has acted in relation to the Māori tribally-based world. The sources of tension and contradiction for Māori communities in the relationship the Crown has established with them have been looked into. The study shows that the Crown has established itself in a relationship of power and control over the Māori tribally-based world, against the express will and intention of those who belong to that world. The evidence and argument in the thesis demonstrate that Māori communities have continuously sought an upholding of their autonomy, and a relationship with the Crown based on the negotiation of mutual benefit rather than domination.

In the endeavour to gain an understanding of the Crown's relationship with Māori, the decision to focus on Māori society as coming from a tribal base has proved to be a fruitful one. From the beginning, this research was motivated by questions that centred on why much writing presents tribes in a negative light, and why the tribal world has been so undermined in the process of colonisation. The questions arose because it was obvious that whānau, hapū, iwi, marae, and whakapapa relationships are of vital importance to Māori, and that a significant number of Māori people are putting a huge amount of work into the strengthening of whanaungatanga relationships and the building of Māori communities that provide whānau-type support. These efforts stand in contradiction to the portrayal of the tribal as a more primitive stage of societal evolution, one implicitly to be left behind. The thesis has critiqued the ideology that underlies this portrayal because of its influence in justifying the domination of tribes by the state and capitalist society.

Important to the approach of this thesis has been the holding together of social, political, and economic considerations in the examination of the social order of the tribally-based world and that brought by the Crown. Significant aspects of the Crown's relationship

with Iwi Māori are overlooked if attention is not given to the Crown's entrenchment of the capitalist economy and the nature of the Crown as a capitalist state. It has been through developing an understanding of the social relations of the tribal world and, by comparison, the capitalist social relations brought by the Crown that it has been possible to identify much about the sources of contradiction and tension for Māori communities in the relationship the Crown has established with them.

The first part of the thesis shows that the underpinnings of Māori tribal philosophy and practice were such as to preclude fundamental elements of the capitalist order. This does not mean that the tribal order was one of a 'primitive communism'. It is true that the rights to land, and especially the guardianship of land, belonged to hapū and whānau, not individuals. Nevertheless, individuals and individual whānau had long-established use-rights to particular resources, including sections of land. There was a whole framework of understandings by which these rights were recognised. Not only does the capitalist order run contrary to this framework but it militates against a great deal else that has been fundamental to tribal identity and autonomy. This includes, as was exemplified in the Chapters 1-3, the retention by hapū of their authority in and guardianship of their ancestral lands and seas, the collective and ongoing proprietorship of the group's base in the land, the co-operative management of and benefit from resources, and leadership that is directly accountable to those who do the work of production and is no more than a beneficiary alongside others when it comes to the distribution of profits from communal enterprises. By contrast, as shown in Chapters 5, 7, and 8, the Crown instituted land individualisation and the unencumbered right to private property; this led to the accumulation of wealth by a few and the creation of a class division between the elite group of settlers who became the owners of capital and those, like the dispossessed Māori, who were reduced to labouring in other people's enterprises.

The thesis has examined the connections between the political domination of Māori communities and the promotion of the capitalist social and economic order which underpins the Crown's relationship with Māori tribes. These connections are not explored in the Tribunal reports. In fact, they are generally only pursued in works like

David Bedggood's *Rich and Poor in New Zealand* which considers the effects of the class relations of international capitalism on New Zealand's political, economic, and social formation.¹ Much other writing shows the influence of the assumption that capitalism provides the natural endpoint for all economic development. Where the Tribunal relies on this assumption, there are discrepancies in its discussions about the Māori tribal economies.

In the *Muriwhenua Fishing Report*, for example, there are at least two conflicting analyses of the fishing economies. First, there is the portrayal of the economies as flourishing enterprises and of tribal groups as successfully expanding their markets to supply to Europeans. European involvement in the fishing industry was accommodated on tribal terms. This situation continued for at least three decades after Britain established a colonial presence in New Zealand. The diminishing of the tribal fishing economies came about not because hapū were overwhelmed by contact with a 'more advanced' society but through Crown action – especially the deliberate undermining of the tribal base through the individualisation of title to land, and the denial to whānau and hapū of their commercial interests in the sea.

Elsewhere in the *Muriwhenua Fishing Report* the tribal economies are considered in terms of their evolution towards 'Western norms'; they are measured according to the laws of those who believe that there is only one path for economic development, the one that culminates in the capitalism that has its historical development in Europe. The presumption is that it is necessary for the advancement of tribal economies that they develop along such a path. This is to tap into an ideology which helps conceal the Crown's deliberate attack on the tribal base. The evidence in Part 2 of the thesis shows how the tribal economies were diminished through the Crown's policies and actions that were directed towards relieving tribes of their lands, fisheries, and other resources. Conversely, the information given in Chapters 1 and 3 indicates how, especially in the early to mid-nineteenth century, the hapū were able to expand their economies through the new opportunities for trade with Europeans. This expansion continued as long as the hapū retained their fisheries and lands. The retention of the tribal base was not in itself a

¹ See 'Review of the literature' in the Introduction to the thesis.

barrier to economic growth, rather the opposite.

With regard to economic development, it has been noted that the Crown has shown a preference for supporting capitalist interests over those of the tribal communities. This can be seen from the material cited in Chapter 8 of the thesis. The *Muriwhenua Land Report* shows how, in the nineteenth century, the Crown assisted settlers who were involved in extractive land-based industries and land speculation. Comparable assistance was not given to the tribal communities. The development assistance given to settlers contributed to the wholesale clearing of forests, and the draining of wetlands that were a rich food source for hapū. A similar pattern can be seen in the later twentieth century with regard to fisheries. In the 1980s the Crown introduced policy that favoured the large capital-intensive fishing corporations – those who had done most to reduce the fishing resource – and that disadvantaged the local fishers, tribal and non-tribal – who had a care for their local environments. What is more, in moves akin to the land individualisation of the nineteenth century, the Crown presumed an underlying ownership of the seas and privatised the fishing resource, again to the advantage of the major corporations. As a consequence, in recent decades the communities of the Far North, who had retained the bounty of their seas over centuries, have had their fisheries depleted and are finding it a struggle to maintain their customary care of their bays and waterways.

The first three chapters of the thesis reveal how the Far North and Te Roroa hapū carry a very long history of practice and philosophy that has ensured an intimacy of relationship with their natural environments and fostered a replenishing of resources from generation to generation. The evidence presented points to the profound links between how the tribal communities relate to the natural world and how they identify and relate as social groups. The identity and autonomy of groups are connected with their active, historical relationships with particular bays, rivers, mountains, and lands. It is out of these relationships that the communities embrace their obligations as kaitiaki (guardians) of their lands and seas, and the exercise of the political authority which belongs to them as holders of mana whenua. The pattern of localised authority is apparent from a whole web of commentary in the thesis. A remarkable aspect of this

heritage is that groups hold the same sorts of rights in the sea as they do on the land. In the *Muriwhenua Fishing Report* it is noted ‘that witnesses ... did not presume to describe [the fishing] areas to which they did not belong’. This is indicative of the respect for another hapū’s mana over its fishing grounds and, in turn, of a whole mode of respecting the mana and autonomy of groups in their respective areas. Counter to this, as Part 2 of the thesis shows, there has been a pattern of Crown action from 1840 to the present that has involved the overriding of the mana, authority, and environmental relationships of the tribal communities.

Significantly, there is in the *Te Whanau o Waipareira Report* a decided reinforcement of the customary understanding about the autonomy of local groups, significant because the Waipareira report is dealing with the case of a non-tribal community. In affirming the right of Te Whānau o Waipareira to have an effective input into how social services are to be delivered to their community the Tribunal says:

What is the principle behind devolution to Maori but that Maori communities should be empowered to take control of their own affairs? What is the customary Maori principle but survival of the group, and therefore that community autonomy is to be maintained, ensuring the location of power at the basic level of the functioning community?²

This passage shows that respect for the autonomy of groups has application to all Māori communities, regardless of whether the group has mana whenua because of ancestral links into the land. In addition, this pithy statement of principle by the Tribunal has extension to a number of themes that are picked up in this thesis.

One theme is the diversity that is allowed by a social order where the autonomy of local communities is fundamental to the exercise of political power. Such an order contrasts with the high degree of centralised authority that belongs to the ‘modern’ state like the Crown in New Zealand, and the homogenisation of society that follows from the constitutional uniformity of these states.³ Nor does the autonomy of the tribal communities equate with a myriad of groups working in isolation from one another. The details about the different whānau and hapū given in the *Te Roroa Report* indicate the

² *Te Whanau o Waipareira Report*, 216-17.

³ See comments on this ‘homogenisation’ and imposed uniformity by Suresh Sharma, Richard Hill, and James Tully, cited in the Introduction to the thesis.

interconnection of relationships between the groups and, at the same time, the retention by them of their own histories and self-determination. Unfortunately, as the thesis shows, the Crown has not been prepared to tolerate any political authority but its own and has done a great deal to undermine the customary self-determination of Māori communities.

One result of this study has been to bring to light the importance to whānau and hapū, not only of their autonomy but also of the relationships they form with one another out of that autonomy. In looking back, I realise that I was initially concerned to understand the Crown's relationship with whānau, hapū, iwi, and marae as independent communities. What I came to understand, especially from the clarifications in the *Te Whanau o Waipareira Report*, is that the exercise of rangatiratanga has as much to do with the working out of the bonds of reciprocity between groups as with the rights of communities to their self-determination.

Study of the Tribunal reports has made it evident that there is an onus on the Crown, because of its Treaty obligations, to support the upbuilding of Māori communities. This means that the Crown must have due regard for the principle of rangatiratanga which requires 'that Māori should control their own tikanga and taonga, including their social and political organisation'.⁴ The autonomy of the communities is to be upheld. However, in cases involving general policy the Tribunal advises, as is noted in Chapters 4 and 9, that the Crown ought also provide the means for the Māori communities of an area to come together so that, on the basis of acknowledging one another's rangatiratanga, they have the opportunity to work for consensus. Following the presentation of the *Puao-te-ata-tu* report, the Department of Social Welfare did have a system of district executive committees that provided this opportunity, but then in the early 1990s the Department unilaterally made the decision to abolish the committees. In making this decision, the Department failed to understand that the rangatiratanga of the communities is enhanced through the relationships that are established by working together for consensus.⁵ What is manifest from the sum of the evidence in the thesis is that, where the autonomy of groups is a recognised reality, accord between groups is

⁴ *Te Whanau o Waipareira Report*, xxv.

⁵ See *Te Whanau o Waipareira Report*, 226-7.

achieved through the gaining of consensus, the disposition towards which is nurtured by histories of practiced reciprocity between groups. One can understand, moreover, that for those who come from this sort of experience there must be considerable reluctance about accepting the unilateral decision making of a dominating party, such as that of the Crown.

Another connection made in the thesis is that between the autonomy of Māori tribal groups, the control by groups of their resources, and the exercise of accountable leadership within the groups. It is a connection that belies the myth that it is liberal democracy that distinguishes ‘modern’ societies from those, like the tribal, that are ‘dominated by tradition;’ and the lie is given to similar claims about the freedom that has been brought about by the complementary workings of democracy and capitalism.⁶ The traditional Māori tribal order, which ensures ‘the location of power at the basic level of the functioning community’, provides an immediate example of a political economy that is essentially democratic in that it is geared to participatory government and consensus decision-making. It is an order that differs markedly from that of the Crown which, as a capitalist state, sanctions the accumulation of resources and power to centres of concentration with the resulting disempowerment of many individuals and communities.⁷

Pertinent here is the conclusion reached in Chapter 1 where the economies of the Ngati Kahu hapū are discussed: that, ‘while trade led to the mutual enrichment of groups, there was no system – feudal, capitalist, or otherwise – for channelling the resources of a community to some overlord, absentee owner, or outside controlling corporation’.⁸ Communities controlled their land and resources, and this was the basis from which they exercised their political power. What is more, because lands and seas belonged to communities and not individuals there were clear limits to the authority that could be exercised by those in leadership roles. Leaders were held in a very real accountability to

⁶ See comments in the Introduction to the thesis.

⁷ See M. O’Connor, ed., *Is Capitalism Sustainable? political economy and the politics of ecology*, New York /London, 1994. This book brings together the reflections of international scholars from a range of disciplines. Many of the contributors make comment on the centralisation of power and resources, and the loss of democracy, that accompanies the capitalist order. Their observations in this regard are summed up in the introductory statement (pages vii-ix) of James O’Connor, Series Editor.

⁸ See Chapter 1 of the thesis.

the communities they served, and they were not in a position to accrue large amounts of personal wealth, nor the dominance that comes to be associated with such accruals.⁹ In Chapter 2, which looks at the experience of the Te Roroa hapū, the important observation is made that the relationships of leaders to their communities and of communities to their leaders cannot be understood apart from the economic arrangements held by the communities. A key reason why, in the customary tribal order, there is ‘the location of power at the basic level of the functioning community’ is because ‘the functioning community’ is in control of its resources and in a position to demand accountability from those who act on its behalf.

One of the crucial reasons for spelling out the limits of the authority of rangatira in the *Muriwhenua Land Report* is do with the intentions of hapū in allowing outsiders onto their land. Rangatira were not in a position to sell land because land belonged to the hapū and was held as an inalienable trust. What rangatira were empowered to do, in acting for their hapū, was to allocate a place on the land to outsiders. This allocation was made on the understanding that the right to the use of the assigned land was dependent on the incoming group continuing in residence, contributing to the well being of the local community, and observing its standards. In return, the newcomers gained a share in the benefits of the land and came under the protection of the hapū and its leadership. Pākehā, like other outside groups, were made welcome dependent upon the establishing of ongoing, reciprocal, and mutually beneficial relationships with the resident hapū.

The alliance with the Crown entered into through Te Tiriti o Waitangi was seen by the hapū and rangatira of the North as coming from the ‘same customary source’ as the incorporation of ‘individuals’ on to the land. This point is made in the *Muriwhenua Land Report*. The Tribunal also emphasises that the hapū and rangatira expected their law and authority to continue as before, enhanced if anything by the new arrangement. What the Tribunal does not identify so well are the limits of the authority that were

⁹ The interesting thing is that the evidence from the reports does not suggest that such accountability meant a stifling of the initiative of those in leadership. Leaders are shown as being proactive in negotiating trade arrangements and securing wealth and advantage for their communities. The mana of leaders and of their communities was inextricably linked.

given over by rangatira to the Governor in his role as the personal representative of the Crown. However, by following the customary principles for the making of such agreements and the evidence from sources such as Hugh Kawharu's lecture on Ngāti Whātua's intentions in granting land to the Governor, one can appreciate the expectations of the hapū in forming an alliance with the Crown. The Governor was treated in the same way as the rangatira of any other group to whom a hapū wished to assign a place on the land. In the area that was assigned, the Governor was empowered to settle his /her people on that part of the land. The Governor and his people were generally free to have the use of the land, and to establish themselves as an autonomous community, on the understanding that they would maintain due regard for the authority of the hapū whose land it was;¹⁰ and they would make ongoing contributions to the welfare of the resident hapū in return for the privileges that were being accorded to them. In return, the Governor and the Pākehā people who settled in that area could expect protection from the hapū and its leaders, and support and co-operation in the enterprises they wished to develop – as long as those enterprises contributed to the common wellbeing. Differences between the communities would normally be settled by negotiation and consensus.

This sort of alliance provides the foundations for a reciprocal and mutually beneficial relationship between communities and stands in contrast to a regime where one party is established in domination over the other. That the latter, regrettably, was the pattern of British imperial rule is demonstrated in the thesis by the examples given in Chapters 5-7 of how, right from 1840, the Crown introduced legislation and policy for the country without any consultation with the tribes who were to be vitally affected by these decisions. Despite the promises that were made at the time of the signing of the Treaty, and regardless of hapū intentions in allowing a place for the Queen's tribe, Hobson and those who followed him deliberately worked towards the displacing of tribal authority so that British sovereignty could reign supreme. Jock Brookfield makes a relevant point about this when he speaks of 'the revolution initiated by the British Crown in 1840 when, purportedly under the Treaty of Waitangi and under proclamation of sovereignty, the Crown began the seizure of Aotearoa New Zealand upon which the present legal and

¹⁰ There would also be the expectation that they would respect the whānau who continued to reside in the area assigned to them, knowing that their leader – the Governor or his deputy – was obliged to ensure the protection of the taonga, cultivations, and access routes of those whānau.

constitutional order is based'.¹¹

This thesis has examined claims against the inappropriate exercise of Crown power over Māori communities, as recorded in five Waitangi Tribunal reports that cover the period from 1840 to the late 1990s. In each case, the claimant communities could reasonably have expected from the Crown recognition, honourable conduct, fair process, and protection. But, as the specific examples in Chapters 5-9 confirm, time after time most if not all of these basic elements are shown to have been wanting. What is made clear through the study is that, while each grievance is specific and local, together they reflect an underlying order of domination. It is an order that is built into 'the new revolutionary institutions', institutions that place the Crown in a position of power and control over Māori communities, and less than capable of the mutuality of relationship expected by hapū and rangatira in allowing a place for Europeans and the Crown on their lands.

In considering the range of means by which the Crown wrested power and resources from Māori communities, I have argued by example in the thesis that the most insidious was the reconstitution of whānau and hapū title to their lands, notably brought about through the policy of 'total extinguishment of native title'. A first step in effecting this policy was the arbitrary application of the 'doctrine of tenure' to the New Zealand situation. Using this doctrine, it was claimed that, with the declaration of British sovereignty in 1840, in itself an arbitrary act of definition, 'all land belonged to the Crown, subject only to native rights of user until those rights were extinguished.'¹² The doctrine of tenure was used to justify the taking of 'surplus' in the Far North and other parts of the country. It was also influential in the Native Land Acts of 1862 and 1865, which led to the establishment of the Native Land Court, which was a powerful instrument in undermining tribal autonomy and the tribal ownership of land.

¹¹ Brookfield, 'The Historic Impact of Crown Law on Maori Law', 1. Brookfield, unfortunately, fails to trace accurately and in detail the effects for Māori of this seizure of power over time. If he had, it is doubtful that he would have asserted so definitely that the Treaty 'afforded a partial legitimation for the new revolutionary institutions that have culminated in that order' or that 'the passing of time and certain benefits to the colonized have carried the process of legitimation further'.

¹² *Muriwhenua Land Report*, 174. The sentence that follows the one cited here is also significant: 'It followed that no individual could hold land except by Crown grant'. See Chapter 5 for further elaboration.

Through the implementation of the policy of ‘total extinguishment of native title’, the Crown struck at the heart of the autonomy of Māori communities and set itself up to become the sole source of law and authority in the country. This was recognised by Paora Tuhaere when, speaking for the Orakei Māori Parliament in 1879, he proclaimed that the Native Land Court operated so as to take away the authority of the land from the owners, and put the authority into a Crown grant.¹³ The administrators of the New Zealand state in the nineteenth century, by extinguishing ‘native title’ and making the Crown the source of all title to land, had the express intention of ensuring the ‘absolute’, ‘unitary’, ‘undivided and indivisible’ sovereignty of the Crown in New Zealand.¹⁴

By being made beholden to the Crown for the recognition of their rights to their properties, whānau, hapū, and iwi were undermined both in the autonomy that derived from their mana whenua, their established authority in their lands, and in the relationships they formed with others out of that autonomy. One could say, that from the Crown point of view, whānau, hapū, and iwi were being reduced from the status of peoples in their own right to simply that of citizens of the state, too often dispossessed ones at that. This reduction was reinforced by the work of the Native Land Court in bringing about the individualisation of tribally held land, generally without the knowledge of the group whose land it was.¹⁵

The individualisation of land ownership, which is referred to in Chapters 5-9, had a profound effect on the Māori social, economic, political, and environmental order. Lands, understood as inclusive of seas and waterways, were foundational to a group’s identity and economy. Having obtained the individualisation of land ownership, by laws that Māori had no part in making, the Crown then sanctioned the assiduous, and often manipulative, work of its agents in securing ‘sales’ from the individual ‘owners’. Land that had been held in communal trust, usually as a long held and prized heritage, was divided into parcels that could be bought and sold at will. The traditional tribal order was being cut down so that the capitalist could take off. As the discussion in Chapter 8 of the material in the Muriwhenua Land report shows, the immediate beneficiaries of

¹³ *The Te Roroa Report*, 263-4, citing AJHR, session II, 1879, G-8, 30. See Chapter 5 of the thesis.

¹⁴ See McHugh, ‘The Legal and Constitutional Position of the Crown in Resource Management’, 302.

¹⁵ See Chapter 5 of the thesis.

this new order were a privileged class of European settler¹⁶ – the class of those with the means to accumulate large areas of land, and the positions of influence that would determine the direction of local, provincial, and national government.¹⁷ Inasmuch as the Far North is typical, it was a direction that was to lead to the marginalisation and impoverishment of whānau, the dispersal and disestablishment of hapū.¹⁸

It has been the position of this thesis that, for any depth of appreciation of a contemporary political and social relationship, a thorough historical understanding of its development is needed. Certainly, that which is outlined above lends considerable insight to the underlying sources of difficulty in situations of grievance between Māori communities and the Crown, from the nineteenth century through to the present. Fundamental to each of the claims in the five reports studied is the failure of the Crown to act as a Treaty partner. Planning, at local and national levels, has proceeded with inadequate negotiation and consultation with those whose lands, taonga, and tapu historic sites are at stake. The thesis argues that the Crown has taken presumptive ownership of seas, waterways, and other properties of whānau and hapū, in moves that are effectively confiscations. Whānau and hapū have been made dependent on the Crown for the sort of access they can have to resources that are theirs by heritage and Treaty guarantee. Too often, over the years, as has been shown by the record in the Tribunal reports, Māori and their communities have been treated with disdain by Government departments and officials. The exemplar of the Waipareira Trust provides continuity to the thesis argument for, in the 1990s, a highly successful Māori trust was undermined in its work to provide the delivery of holistic social services to its people, and in its efforts to move them beyond the relations of dependency for which the Crown must take ultimate responsibility. In this and other instances the thesis provides some compelling examples of how Iwi Māori have experienced to their detriment the exercise of unilateral and unaccountable power by a Government that took sovereignty to itself

¹⁶ Interestingly, in the case of Auckland, a lot of these speculators were based in Sydney. This point is made in D. McCarthy, *The First Fleet of Auckland*, Balmoral, Auckland: Tower Publishing Associates, 1978. She says (page 24): ‘Governor Hobson’s plan was to auction land ... In practice it worked out differently. Scores of speculators came from Sydney, where Governor Gipps was closing down on their schemes. So little land was offered at the first land auctions in Auckland that bidders pushed one another sky-high ... To get back their money, they divided their holdings into tiny sections that would degenerate into slum sites. Nearly all the surnames of owners of central Auckland’s first land titles are unknown in the city today: that means they were fly-by-night speculators’.

¹⁷ See Chapter 8 of the thesis.

¹⁸ *Muriwhenua Land Report*, 335. See Chapters 5 and 7 of the thesis.

by an act of its own definition, and worked to make that sovereignty a reality through the imposition of institutions designed to its own advantage and that of the capitalist economy.

It is certainly not the argument of the thesis that every action of the Crown and its officials has been directed against the wellbeing of Māori communities. Over the past three decades, in particular, there have been steps taken by the Government and its departments towards the honouring of the Treaty commitment and in support of the efforts of Iwi Māori in the upbuilding of their communities. Unfortunately, as the evidence from the reports shows, the reality is that Māori communities are still largely ‘dependent upon political and administrative whim’¹⁹ when it comes to recognition by the Crown. In the case of the Te Roroa claim the Tribunal found that, although the special interests of tangata whenua in forest resources were now to some extent recognised, it was ‘at the Crown’s pleasure’.²⁰ Also, in spite of stated Treaty of Waitangi policies, the Crown agencies had difficulties in accepting that it belongs to Te Roroa to manage their wāhi tapu (sacred places).²¹ In the case of Te Whānau o Waipareira, the non-tribal trust had seen a gradual improvement – from the later 1970s into the 1980s and even to the very beginnings of the 1990s – in the Government’s provisions for its funding as a Māori social services provider. The marked change in Social Welfare policy in 1992, and the manner of its implementation, was a real set back for the trust in its work for its community. The situation was exacerbated by the fact that the trust was now shut out of having any effective input into Government policy with regard to social services, even though the Department of Social Welfare had an avowed bicultural commitment and the trust had a proven record as an outstanding provider of social services to Māori. In spite of the Department’s stated commitments to the Treaty of Waitangi, it was acting unilaterally with regard to the provision of social services to the Māori of West Auckland. This is to neglect the sharing of power and resources, and the mutual accountability between Crown and Māori, which, as the Tribunal says, goes to the heart of the Treaty.²²

¹⁹ Phrase used in the *Muriwhenua Fishing Report*, 100 – when referring to the treatment, by Government departments, of Māori fishing rights and interests for the greater part of the twentieth century.

²⁰ *The Te Roroa Report*, 182.

²¹ *The Te Roroa Report*, 254.

²² *Te Whanau o Waipareira Report*, 128.

One aspect of the relationship between the Crown and Māori tribes which the thesis points to is that the inconsistencies of the Government departments in following through on a Treaty commitment are a reflection of the Crown's own position, which effectively is that it belongs to the Crown to determine the extent to which it will adhere to its Treaty obligations. This is not to act as a treaty partner but in domination.²³ The requirement for the Crown to be in a working partnership with Māori and their communities is stated repeatedly by the Waitangi Tribunal, both as a general principle and with regard to specific situations. The Tribunal also makes it clear that its assertion of the 'partnership' requirement is in accord with recent major decisions of the Courts.

Although this point adds some weight to the thesis argument, it does have to be said that there is certain ambivalence in the Tribunal's statements on the issue of partnership. For example, in the *Te Roroa* and *Muriwhenua Land Reports* it is said that 'in return for ceding sovereignty to the Queen, the chiefs, the hapu, and all the people were guaranteed their rangatiratanga'.²⁴ The evidence from the thesis, based mainly on what is in the selected Tribunal reports, shows that it is very doubtful that hapū and their rangatira chose to cede their sovereignty, apart from granting the Governor a particular right to exercise authority over the British settlers in their lands. Possibly more significantly, the Tribunal fails to identify the underlying sources of the incompatibilities between the rangatiratanga of Māori and the sovereignty of the Crown. The latter, as set in place by the Governors from Hobson onwards and the New Zealand Parliament from 1852, was designed so as to tolerate no authority but its own and, over time, to ensure the holding of property in a way that was directly contrary to tribal law and custom.

It is an interesting conclusion of the study of the reports that in the latest of the selected reports, the *Te Whanau o Waipareira Report*, the Tribunal does not talk of 'ceding sovereignty' but, rather, of the balance that ought to exist between the exercise of

²³ The Tribunal makes the apt observation in the *Muriwhenua Land Report* (page 386) that: 'The Treaty is also a treaty, not a unilateral declaration'.

²⁴ *The Te Roroa Report*, 42; *Muriwhenua Land Report*, 388.

rangatiratanga by Māori and kāwanatanga by the Crown.²⁵ The Tribunal thus highlights the reciprocity and mutuality that it believes should characterise the relationship between the Crown and Iwi Māori. The reason the Tribunal gives for this opinion is that ‘Maori have a special status in the life of the country as the first inhabitants and, as Treaty partners, [they are] the people who gave the rights of European settlement and national governance in the first instance’.²⁶ The relationship between the Crown and Iwi Māori is meant to be a partnership ‘where one party is not subordinate to the other but where each must respect the other’s status and authority in all walks of life’.²⁷ While the Tribunal is quite clear that Māori communities must be upheld in their authority to ‘control their own tikanga and taonga, including their social and political organisation’,²⁸ it also points out that the rights of rangatiratanga are not absolute in every instance.²⁹ Nor does the Tribunal put kāwanatanga, or the Crown’s rights to govern, as absolute. Speaking of the *Te Whānau o Waipareira* case, the Tribunal says: ‘In this situation neither rights of autonomy nor rights of governance are absolute but each must be conditioned by the other’s needs and their duties of mutual respect.’³⁰ What the Tribunal recognises are two distinct authorities – those of rangatiratanga, belonging to Māori and their communities, and kāwanatanga, belonging to the Crown – which ought to be exercised in complementarity.

The same principle of distinct authorities is recognised in the *Muriwhenua Fishing Report* where the Tribunal recalls the Treaty principle of ‘full consent’ and says that ‘the Crown *must bargain* [with the Muriwhenua hapū] for any public right to the commercial exploitation of [their] inshore fishery.’³¹ In spite of this, in making its ‘settlement’ over fisheries, the Crown ignored the imperative of the Tribunal as Robert Webb’s background to the Sealords deal shows.³² The difficulty with any of the Tribunal’s positions on partnership is that, while they state what ought to hold in terms of the Treaty commitment, they fail to identify what change is needed, at the level of the

²⁵ The Tribunal in the *Te Whānau o Waipareira Report* says (page 27) that ‘in the Treaty the gift of kāwanatanga was in exchange for protection and the guarantee of rangatiratanga in all its forms’.

²⁶ *Te Whānau o Waipareira Report*, 16.

²⁷ *Te Whānau o Waipareira Report*, 27-8.

²⁸ See *Te Whānau o Waipareira Report*, xxv-xxvi.

²⁹ *Te Whānau o Waipareira Report*, 25.

³⁰ *Te Whānau o Waipareira Report*, 29-30.

³¹ *Muriwhenua Fishing Report*, 239. Emphasis is my own.

³² See Chapter 8 of the thesis.

fundamental constitution, to ensure that the Crown behaves as a Treaty partner.

Another weakness of the Waitangi Tribunal's position that has been made evident in the scrutiny of their reports, and particularly the *Muriwhenua Land Report*, is the failure to identify the limits of the authority that hapū and their rangatira gave over to the Governors in allowing them to place European settlers on hapū lands. This is an important issue in terms of clarifying the bases for the legitimacy of Crown rule and the balance between the exercise of rangatiratanga by Māori and kāwanatanga by the Crown. The *Muriwhenua Land Report* correctly points out that Māori intentions in giving a place to the Crown are key to what is allowed by the Treaty of Waitangi.³³ In terms of the origins of the rights to govern, this is basically the same position as that held by those who emphasise that Māori chose to cede their sovereignty to the Crown when they agreed to the Treaty of Waitangi. The latter opinion places the justification for Crown rule in the will of Māori, albeit their supposed choice to cede sovereignty. The intentions of Iwi Māori in agreeing to the Treaty of Waitangi are recognised as critical to the legitimacy of the New Zealand Government's authority. What is clear, however, from the evidence advanced in the thesis is that hapū and their rangatira in agreeing to Te Tiriti o Waitangi had no intention of giving up their authority in their lands and, in fact, looked to the Crown to protect that authority. What was granted to the Crown in the person of the Governor was a limited authority, like that customarily given to the rangatira of an outside group under a *tuku rangatira* arrangement, on the understanding that the authority of the land remained with the whānau or hapū whose land it was. In this sort of arrangement lay the possibilities for relations of mutual benefit between Iwi Māori and the Queen's people as sought by hapū and rangatira, rather than the domination that the Crown took on itself to impose.

The analysis of how the state, and hence the Crown, holds and exercises its power over the tribal world and Māori as a whole has been the subject of this study. The evidence advanced and the arguments pursued all point to the need for constitutional change if

³³ See *Muriwhenua Land Report*, 174-177. See commentary in Chapter 7. As noted in that chapter, the Tribunal's position accords with the *contra preferentum* principle of international law regarding the interpretation of treaties, which says that the understanding of the indigenous party has preference in the interpretation of this sort of treaty.

Iwi Māori are to have any confidence that they will be upheld in the exercise of their rangatiratanga, as promised by the Treaty, and if the Crown and Iwi Māori are to move forward in a relationship of a true working partnership. On the basis of these findings, the key institutional barrier to a genuine partnership relationship is the Crown's arbitrary constitution of itself as the sole source of law and authority in this country.

In any moves towards a constitution based on a real sharing of power between Iwi Māori and the Crown, the results of this study suggest that there would need to be some cautions kept in mind. It would be possible to have a form of national Māori government that was little different in its institutional framework from that of the present state structure. The socio-political-economic order would remain much the same, apart from a dual power-head. More than that is needed if the autonomies and relationships of the tribally-based world are to be sustained and strengthened. According to the Waitangi Tribunal, speaking through its reports, the exercise of rangatiratanga involves the rights of whānau and hapū to: an economic base in and effective guardianship of their ancestral lands, community autonomy, the location of power at the basic level of the functioning community, leadership that is directly accountable to the members of its community, and the promotion of ongoing relations of reciprocity between groups. All of this belongs to an order geared to the collective interests which are so evident in the depiction of the tribal order in the first chapters of the thesis. It stands in contradiction to capitalism, which permits the expropriation of the direct producer and the maintenance of absolute private property for the capitalist. A constitution that safeguards the rights of Māori and their communities to the exercise of their rangatiratanga would demand a different political economy, one designed to safeguard their interests against the unilateral and unaccountable exercise of power by the Crown. Such a political economy might well be structured in a way that it brings mutuality of benefit to all the communities that make up New Zealand society, Tauiwi as well as Māori; this, after all, was the intention and expectation of the hapū and their rangatira who in 1840 and later entered into an alliance with the Crown.

Glossary of Māori Words

This glossary provides a guide to the meanings of key Māori words that are used in the body of the thesis.

hapū	group of related families
hui	gathering, meeting
iwi	group of hapū
kai	food, eat
kaimoana	seafood
kaitiaki	guardian
kaitiakitanga	guardianship
kaumātua	respected elders
kawa	ceremonial
kāwanatanga	government (transliterated from English)
kōiwi	bones, human remains
kōrero	speak, speech, articulation
mahinga kai	places where food is procured or produced, traditional resource areas
mana	power, authority, ownership, respect derived from the gods
manaaki	show respect or kindness to, entertain
manaakitanga	hospitality
māori	normal, ordinary
marae	local community and its meeting place and buildings
mauri	essential life force, special character
moana	sea, lake
pā	occupation site

Pākehā	person /people of European descent
pepeha	saying
rāhui	protection by forbidding access or harvest
rangatahi	younger generations
rangatira	leader of a Māori community
rangatiratanga	chieftainship, the authority and power of iwi and hapū to make decisions and to own and control resources
reo	language; as ‘te reo’ often used in English to mean the Māori language
rohe	geographical territory of a hapū or iwi
rūnanga	council
take	topic, issue
tangata	person, human
tangata whenua	the hapū and whānau who hold mana whenua in an area; also used to refer to Māori people as a whole
taonga	valued possessions, anything highly prized
tapu	sacredness, spiritual power or protective force
tauīwi	stranger, foreigner, non-Māori
tiaki	look after
tika	correct, just, right
tikanga	customary, protocols
tino rangatira	paramount chief
tuku	allow, lease, send
tuku whenua	allocation of land use rights
tūpāpaku	deceased person’s body
tūpuna	ancestors, grandparents
utu	return for anything, satisfaction, reply

wāhi	place, locality
wāhi tapu	special and sacred places
waka	vessel of transport, canoe, significant to the identity of many whānau, hapū, and iwi
whakapapa	layers of genealogical connection (not limited to the human world)
whānau	extended family group
whanaunga	relative
whanaungatanga	kinship, relationship through whakapapa bonds
whare	house, people in a house
whenua	afterbirth, land

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