

(6) The Treaty did not create or confer any legal rights on any individuals—Maori or pakeha—cognizable in a Court of law, excepting the moral obligation on the Crown to protect Maori rights.

(7) The Ordinance of 1841 directed an inquiry as to the equity of purchase from the Maoris—restricted purchasers to 2,560 acres, and fixed the scale of consideration. Transactions were declared null and void except to the extent allowed.

(8) The general effect of the Treaty was not to vest the land in the Crown by right of its prerogative, but to vest in the Crown a bare legal estate (in accordance with the legal theory that the fee of all land is vested in the Crown), subject to the rights of the Natives.

(9) No provision was made in the Ordinance of 1841 or at any time for compensation to the Natives in cases where a transaction was found to be inequitable.

(10) A transaction which was inequitable could only be such a transaction in which the purchaser did not pay or the Native vendors receive a consideration according to the scale. (Where fraud was involved clearly nothing less than complete restitution to the Natives could be supported or justified.)

(11) If the area of a purchase was reduced on account of inadequacy of consideration, then in equity and good conscience the Native vendor should have been compensated by either:—

- (a) Return of the surplus land; or
- (b) By payment of fair compensation.

(12) It is immaterial whether the Crown did or did not have any legal right to the surplus, but once having found that a purchase was inequitable, in equity and good conscience, the Native vendor was entitled to compensation. A purchase could not be inequitable or unreasonable on the purchaser's part without being inequitable to the vendors.

(13) The legality of the Crown's action is not in issue at any stage. Assuming that everything the Crown did was entirely legal, the question, nevertheless, is, Was it in accordance with equity and good conscience?

- (a) The appropriation of land by the Crown without cost of payment could never be in accordance with equity or good conscience.
- (b) From a legal point of view the effect of the Crown's action in declaring purchases null and void was to revive the Natives' customary title—i.e., the legal title remained in the Crown as it had been from the Treaty of Waitangi, subject to the Natives' communal rights of ownership. The only instance of the Crown claiming land without payment is that of surplus lands, excepting confiscation for disloyalties.
- (c) The Crown's expressed intention—prior to the Treaty of Waitangi—of protecting the rights and property of the Maori and the letter and spirit of the Treaty itself cast an onus or moral obligation on the Crown so weighty and paramount that the slightest element of unfairness could not be justified or supported.

(14) It is conceivable that if British sovereignty had not been established the Natives in the course of time might themselves have taken steps to nullify the purchases which were subsequently declared null and void by the Crown.

(15) The Crown cannot in equity and good conscience take any benefit for itself arising from an alleged extinguishment of Native title by private purchase prior to the establishment of sovereignty unless according to British standards of law and justice such purchase—

- (a) Was entirely free from fraud;
- (b) Properly understood in its effect by the Native vendors;
- (c) Fair and equitable in all respects;
- (d) Was for a reasonably adequate consideration.

Can the transactions which resulted in "surplus lands" measure up to such standards?

(16) The Crown must recognize and implement its obligation to protect the Maoris by compensating them for the lands which the Crown acquired "without cost to the Crown."

95. We agree with these submissions and proceed with reasons for recommending an amount as compensation to be *now* granted to the representatives or descendants of the aboriginal owners.

96. If words mean anything, then promises to return the surplus lands were made to the Maoris by many persons in "high places," amongst whom were Governor Hobson, James Busby, Henry Williams, and Governor Fitzroy.

97. Without a doubt these promises were made in all sincerity, and it could not have been contemplated by those responsible for making them that they could have any other meaning.