Rangahaua Whanui National Theme c

THE CROWN'S ENGAGEMENT WITH CUSTOMARY TENURE IN THE NINETEENTH CENTURY

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LIST OF ABBREVIATIONS

AJHR	*Appendices to the Journals of the House of Representatives*
AJLC	*Appendices to the Journals of the Legislative Council*
BPP	*British Parliamentary Papers: Colonies New Zealand* (17 vols, Shannon, Irish University Press, 1968–69)
ch	chapter
DNZB	*Dictionary of New Zealand Biography*
doc	document
encl	enclosure
Epitome	*An Epitome of Official Documents Relative to Native Affairs and Land Purchases in the North Island of New Zealand*, H H Turton (comp), Wellington, 1883
JPS	*Journal of the Polynesian Society*
MA	Maori Affairs
NA	National Archives
NLC	Native Land Court
no	number
NZPD	*New Zealand Parliamentary Debates*
NZJH	*New Zealand Journal of History*
NZPD	*New Zealand Parliamentary Debates*
p, pp	page, pages
pt	part
RDB	*Raupatu Document Bank* (139 vols, Wellington, Waitangi Tribunal, 1990)
s	section (of an Act)
sec	section (of this report, or of an article, book, etc)
sess	session
vol	volume
Wai	Waitangi Tribunal claim

THE AUTHORS

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I am Hazel Riseborough, of Pukawa, rd 1, Turangi. I have a BA (first class honours) in Maori Studies and History, and a PhD in History from Massey University. My thesis topic was Government native policy in Taranaki (published in 1989 as 'Days of Darkness: Taranaki 1878–1884'). Until December 1995 I was senior lecturer in history at Massey, specialising in early New Zealand history and later nineteenth-century history ('48.323: The Government, the Maori and the Land').

In 1989, I was commissioned by the Waitangi Tribunal to write 'Background Papers for the Taranaki Raupatu Claim' (Wai 143 record of documents, doc a2). The report was presented orally to a full tribunal under the chairmanship of Chief Judge E T J Durie at Whakaahurangi Marae, Stratford, on 24 June 1992, and at Parihaka on 21 October 1992. In 1994, I was commissioned by the Crown Forestry Rental Trust to write 'The Crown and Tauranga Moana 1864–1868'. I also act as historical consultant to Tanenuiarangi ki Manawatu.

John Hutton

My name is John Hutton. I am a Pakeha male of English descent. In 1993, I graduated from the University of Auckland with a Bachelor of Arts in History and Anthropology. In 1995, I graduated from the University of Auckland with a Master of Arts (first class) in Anthropology. As part of my Master of Arts degree I wrote a thesis under the supervision of Professor Anne Salmond titled 'Troublesome Specimens: A History of the Relationship between the Crown and the Tangata Whenua of Hauraki, 1863–1869'. From March 1995 to October 1995, I was employed as a researcher for the Gregory–Mare claimant group. Between November 1995 and May 1996, I was employed by the Crown Forestry Rental Trust to write a number of reports about the administration of Maori land in the early part of the twentieth century.

I would like to express my appreciation to those staff members of the Waitangi Tribunal who have offered advice and assistance in this work. In particular, I would like to thank Professor Alan Ward, and Dr Grant Phillipson. I would also like to thank Dr David Williams, Dr Steven Webster, and Paul Monin for their advice and suggestions. Further, I would like to thank John Laurie, the staff of the Auckland University Library, and the staff of the National Archives in Auckland. All have been, as always, generous in spirit and assistance. Finally, I would like to acknowledge Victoria St John and Daryl Burns, who helped me in the final stages of the report.

PART I

The Crown and Customary Tenure, 1839–94

This report was commissioned by the Waitangi Tribunal on 8 March 1996 and was to be completed by 31 July 1996. It was prepared for the Rangahaua Whanui programme as an historical report on the Crown's treatment of customary tenure.

The Tribunal's direction commissioning research suggested a further topic, 'by way of comparison' – the Crown's actions in relation to Maori attempts to preserve and adapt customary tenure to meet contemporary needs, including engagement with the commercial economy. There simply was not time in the five months available for this research project to address this topic, and as explained in my progress report of June 1996, I see this as a quite separate topic – a major study in its own right, not a subject to be given scant treatment as part of another topic. I feel strongly about the Crown's treatment of Maori as regards their aspirations and initiatives over the nineteenth century. It would be one more insult to fail again to give them the serious consideration they deserve.

This report relies on official publications: mainly British and New Zealand parliamentary papers (BPP and AJHR) and *New Zealand Parliamentary Debates* (NZPD); on *New Zealand Statutes* and the *New Zealand Gazette*; and some use is made of the *Raupatu Document Bank*.

Considerable use is also made of Waitangi Tribunal reports and background papers (I quote liberally from my own), and of Alan Ward's *A Show of Justice*. There are also other useful secondary sources, especially journal articles.

SUMMARY

In the mid-nineteenth century, there was a widely-held belief that aboriginal people could lay claim only to the land they occupied and cultivated, that land was valueless as long as it lay idle in native hands, and that it would acquire value only through the application of European capital and labour to the soil. Given this belief, and the values and attitudes the New Zealand Company and its officials and settlers brought to New Zealand in the 1840s, there was an awful inevitability about Maori land loss. But the settlers had no part in the framing of the Treaty of Waitangi, and its provisions – especially its guarantee of Maori property rights – which, temporarily, frustrated their intention to 'possess themselves of the soil'.

Whatever the original intentions of the Crown with regard to the Treaty, settler rights soon came to outweigh Maori rights, and for the next 40 or 50 years New Zealand Company officials and settlers were in a position largely to determine Crown policy. From the start the settlers had agitated to get government into their own hands. By 1856 they had succeeded. Maori were denied the franchise, and the settler government was in a position to pass the laws which by one means or another got land out of Maori hands and into their own.

It is clear that the aim of successive governors and administrations was to extinguish native title and create a Crown demesne from the 'waste lands' of the new colony. The debate on customary tenure and whether or not it included the 'waste' lands, spanned almost a decade. Few were prepared to honour the Treaty as the Maori signatories understood it, and by 1848, when the Colonial Office reluctantly agreed that the Treaty guarantee did cover the wastelands, Governor Grey had already formulated a land purchase policy which would create a Crown demesne through the use of the pre-emption clause of the Treaty.

In the 1840s, land was purchased by deed of sale negotiated between the Crown and Maori chiefs. There was no prior investigation of title, but the decision to sell tribal land was often made openly and by consensus at large tribal hui. Problems arose, however, when purchases were made from strong tribes claiming to have conquered disputed areas, or from individual chiefs who did not consult adequately with their communities.

After Grey left New Zealand, purchases were increasingly made between Crown agents and compliant chiefs, often in secret. As the pressure on Maori to sell land intensified, tensions increased and inevitably led to confrontations. The spread of the King movement and increasing unwillingness to sell land alarmed settler and Government alike. The new Governor, Gore Browne, managed for some years to resist settler pressure to implement legislation aimed at wholesale land alienation, and instead instituted a series of boards or committees of inquiry on customary tenure, on 'seignorial rights', and on Maori attitudes to land alienation. But in 1859,

apparently ignoring much of the advice he had received over the years, he pressed to a conclusion a disputed sale at the Waitara, and the result was war.

In an attempt to regulate land sale and avoid further conflict, Parliament passed a series of Native Lands Acts which waived Crown pre-emption and created the Native Land Court to ascertain customary title and change it into individual title derived from the Crown. This supposedly honoured the guarantees of the Treaty, but instead resulted in land alienation on an unprecedented scale, and an assault on Maori society and especially on chiefly rights and status. Many of the negative effects of the court's operations, which in its early years fell largely on kupapa tribes, resulted from the autocratic character and unfettered influence of its first chief judge, F D Fenton.

The so-called rebel tribes, supporters of the King movement, would not alienate their land through the official Runanga that Grey set up in 1861 to 1862. Some other means had to be found to get the fertile and very desirable lands of Taranaki, the Waikato, and Bay of Plenty out of Maori hands. An interim answer was the New Zealand Settlements Act 1863, which provided for the confiscation of the land of those who had been in rebellion. Several million acres were confiscated – from both 'rebel' and 'loyal' Maori – under this Act and its amendments. Confiscation extinguished native title, so land returned as compensation was Crown land, and most of it passed quickly into European hands. The Compensation Court, established under the 1863 Act, seemed designed not to return land to loyal Maori or returned rebels, permanently, but on negotiable titles, which meant that sooner or later most of it passed out of Maori hands.

The Imperial Parliament was strongly critical of the confiscation policy, causing successive ministries to change the way they acquired 'rebel' land, or land supposedly for military settlement. The Compensation Court did not sit in Tauranga or on the East Coast, and the Native Land Court did not sit in Tauranga to ascertain native title. Instead, commissioners appointed under local Acts were given wide powers to decide the question of customary ownership and who was or was not a rebel. In any case, native title was extinguished over a wide area, and local Maori had few means of redress against the rulings of the commissioners.

On the East Coast, where some land was returned on a tribal rather than an individual basis, that land had become Crown land and special legislation was required so that it could be taken before the Native Land Court for ascertainment of individual title.

A much more sweeping approach was adopted by the legislature in the Native Lands Acts of 1862 and 1865. When land was put through the court, certificates of title were given to named owners, as absolute owners, with fully negotiable titles. The reciprocal relationship embodied with the rangatirotanga of chiefs and people was undermined. Nor could Maori avoid the court because prior dealings were no longer illegal and it only required a few willing sellers to bring a claim and others had to follow or be excluded from the title.

The Liberals passed the Native Land Purchase and Acquisition Act 1893 to extinguish native title over as much as possible of the seven million acres said to be

lying waste and unproductive in Maori hands. The Act virtually restored Crown pre-emption, and the Liberals went on to relieve Maori of another three million acres of their land by buying from some of the owners and forcing a partition. By the turn of the century, just 60 years after the signing of the Treaty which guaranteed Maori the full exclusive and undisturbed possession of their land so long as it was their wish and desire to retain it, customary native title had been extinguished over about 54 million of New Zealand's 64 million acres and the Maori people relegated to the fringe of society. Through pre-emption, confiscation, and legislation, a succession of governments had achieved what the Wakefieldian settlers had expected and intended to achieve.

CHAPTER 1

THE 1840s DEBATE ON THE 'WASTE' LANDS

The Treaty of Waitangi affirmed Maori customary tenure at 6 February 1840, but just what was Maori custom was not spelled out. Article 2 of the Treaty guaranteed to the chiefs and tribes of New Zealand 'full exclusive and undisturbed possession of their Lands and Estates Forests and Fisheries', and required that the chiefs yield to Her Majesty the exclusive right of pre-emption over such lands as they might wish to alienate. These could only be lands surplus to their needs – 'waste lands'. In other words, customary tenure was recognised by the Crown, and could only be extinguished through sale to the Crown. Maori title to the soil and the sovereignty of New Zealand had in fact already been given a qualified recognition in 1835 when the Colonial Office acknowledged the Declaration of Independence and assured Maori the protection of the British Crown, so far as was consistent with the rights of others. The problem facing the Crown from that time on was to establish just what constituted customary Maori tenure.[1] Fifty years later the problem remained: 'Maori experts' were asked in 1890 to provide an explanation of their views on what constituted customary tenure. In the meantime the question had been addressed by commissions of inquiry, land purchase officers, and after 1865, by the Native Land Court. Once the court was in operation its judges took it upon themselves to determine what constituted Maori custom and this judge-made law then regulated the operations of the court.[2]

In the years leading up to Waitangi, considerable acreages of land, especially in the north, had passed from Maori to European hands and one of the ostensible purposes of the Treaty was to prevent such sales, both to protect Maori from the actions of land speculators, and to provide an 'orderly' system of land sale. Even before the Treaty was signed, Sir George Gipps, Governor of New South Wales, had issued a proclamation declaring that title to land in New Zealand would be considered valid only if it were either derived from or confirmed by a Crown grant, and that any purchases made after that date, 14 January 1840, would be deemed 'absolutely null and void'. Moreover, it was announced that commissioners would be appointed,[3] in accordance with Secretary of State Lord Normanby's instructions

1. See, for example, Geo Clarke to Colonial Secretary, 17 October and 1 November 1843, BPP, vol 2, pp 356–359, 360
2. New Zealand courts denied legal continuity of tribal title subsequent to British annexation; P G McHugh, 'The Legal Basis for Maori Claims Against the Crown', *Victoria University of Wellington Law Review*, no 18, 1988, p 5.

to Hobson of 14 August 1839, to investigate all past sales and advise which, if any, of them should be confirmed by Crown grant.[4]

The question of what land could have been legitimately bought from Maori depended, among other things, on whether or not Maori were deemed to have 'owned' all the land they had sold. The land guarantee in the Maori version of the Treaty was clear, but the English version just spoke of the lands 'which they may collectively or individually possess'. To Maori that was the whole of New Zealand, and this was well understood by those who drew up the Treaty. But to many in England, and especially to successive secretaries of state over the next few years, the Treaty guaranteed possession only of that land which Maori 'owned and occupied' – their kainga and cultivations. The rest of the land – the bulk of New Zealand's 66 million acres – which Maori did not occupy or did not cultivate was considered 'waste' or 'wild' land – the Crown demesne. The gulf in perception between these two views sparked an often bitter and acrimonious debate which lasted for years.[5] Twenty years after the Colonial Office had reluctantly agreed that the Treaty must be accepted as Maori understood it, there were still Europeans in New Zealand who would argue for a narrow interpretation of the Treaty's land guarantees.[6] The idea died hard, for it was deeply embedded in the European psyche and had been brought to New Zealand especially by the New Zealand Company and its settlers. They held strongly to the views of Emerich de Vattel, a Swiss jurist, who believed that cultivating the earth was an obligation which nature imposed on mankind. Thus, those who did not cultivate the land had no right to it, and those who took it to cultivate were obeying the laws of nature. This view was reinforced by Dr Thomas Arnold, headmaster of an English public school and a New Zealand Company supporter, who approved the taking by civilised nations of the lands of savages.[7]

The New Zealand Company claimed to have bought 20 million acres on either side of Cook Strait.[8] The pre-emption clause of the Treaty, and Normanby's instruction that pre-Treaty sales were to be investigated, were of grave concern to a company reliant on the profits from resale of these lands to their settlers. The officers of the New Zealand Company spoke scathingly of 'Normanby's excessive view of Maori rights',[9] of the Treaty's 'tangled web of imbecility', of this 'blanket-bought missionary Magna Carta'.[10] The company had many prominent and influential supporters in Britain – in Parliament, in the business community, and in the

3. See, for example, Claudia Orange, *The Treaty of Waitangi*, Wellington, 1987, pp 33–34
4. BPP, vol 3, pp 85–90
5. A good analysis of this debate may be found in Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847*, Auckland, 1977, pp 176–191.
6. See, for example, NZPD, 1861–63, p 611
7. Patricia Burns, *Fatal Success: A History of the New Zealand Company*, Auckland, 1989, p 71
8. 'Possess yourself of the soil and you are secure.' E G Wakefield to the founders of the New Zealand Land Company, 20 March 1839 (cited in Burns, p 14).
9. Adams, p 184
10. David Williams, 'Te Tiriti o Waitangi: Unique Relationship Between Crown and Tangata Whenua?' in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, I H Kawharu (ed), Auckland, 1989, p 73

press – and their views served to influence the views of the Colonial Office. On the other side of the world, the representatives of the Crown, especially William Hobson and Robert FitzRoy, the first two governors, were more influenced by locally-held views – and these were supported by Normanby's instructions that Maori title to the soil and to the sovereignty of New Zealand were indisputable and had been solemnly recognised by the British Government. Hobson was instructed to acquire as much 'waste land' as would be required for settlement, provided that he bought only land which Maori could alienate 'without distress or serious inconvenience to themselves'.[11] This obviously referred to land other than their pa and cultivations – surplus lands, 'waste lands' – and if they were to sell them to the Crown by 'fair and equal contracts', then Normanby, at least, was acknowledging Maori ownership of them and their right to sell them. The pre-emption clause then could refer only to lands surplus to Maori needs – to 'waste lands', which the Crown would buy from those who had the right to sell them; and in this sense there should have been no debate over the ownership of the 'waste' lands.

Normanby was replaced at the Colonial Office by Lord John Russell in September 1839 soon after Hobson left for New Zealand, and his view of indigenous rights to land was that of Vattel. In a House of Commons debate on New Zealand early in 1840 he maintained the Government had acted 'entirely in accordance' with Vattel's theory.[12] As Adams said, 'The Colonial Office did not understand the purport of a treaty which its own representative had signed and which it had solemnly accepted'.[13] However, a select committee of the House of Commons sitting in July 1840 was not content to leave the inquiry into pre-Treaty sales in the hands of New South Wales officials and, possibly, land speculators, and its members recommended that the Imperial Parliament pass the necessary legislation to appoint impartial commissioners with no 'pecuniary interest' in either colony.[14] They also required the law to confirm article 2 of the Treaty as regarded both pre-emption and Maori property rights. The committee's recommendations were high-minded and humanitarian – but they did not spell out just what was meant by 'the possessory rights of the natives to their lands'.[15]

The views held by Russell and others at the Colonial Office came through clearly in the Royal Charter of 16 November 1840 by which New Zealand became a colony in its own right, separate from New South Wales. Maori rights were limited to:

> the actual occupation or enjoyment in their own persons, or in the persons of their descendants of any Lands . . . now actually occupied or enjoyed by such natives.[16]

In further instructions to Hobson of 28 January 1841, Russell added that the 'lands of the aboriginies' were to be defined on the colony's maps and surveys, and the

11. BPP, vol 3, p 87
12. Cited in Adams, p 180
13. Ibid, p 176
14. BPP, vol 1, paper 582, p viii
15. Ibid, p ix
16. BPP, vol 3, p 154

Surveyor-General was to report on which land Maori should 'permanently retain for their own use and occupation'.[17] He obviously had no understanding of the reality of Maori landownership. As he later put it, he had not imagined that:

> any claim could be set up by the natives to the millions of acres of land which are to be found in New Zealand neither occupied nor cultivated, nor, in any fair sense, owned by any individual.[18]

Russell's own permanent under-secretary, James Stephen, saw things differently, believing the 'waste lands' – the Crown demesne – would consist only of those lands in excess of claims declared valid by the proposed land claims commission. All the rest of the land belonged to Maori and could only accrue to the Crown by purchase. Russell, in his turn, left the Colonial Office before he was required to reconcile his view of the Treaty with that of the people on the ground in New Zealand. This was left to Lord Stanley, who succeeded Russell in September 1841, and it was occasioned by continuing disagreements with the New Zealand Company.

In November 1840, the Crown and the company had sunk their differences to the extent that they drew up an agreement by which the company was granted a charter of incorporation. The company would receive four acres of land for every pound sterling spent 'on colonization'. This land, which was to be granted at Port Nicholson, Nelson, and New Plymouth was not to exceed 160,000 acres. In return, the company would forgo its claim to the rest of the vast estate they claimed to have purchased. But as Burns said, in view of the care Russell had expended over the draft of the agreement, it was most unfortunate for New Zealand's future that he had to reach his decision before his officials had been long enough in New Zealand to investigate thoroughly and report on the company's exaggerated claims.[19] The company was now virtually the Crown's colonising arm. It was inevitable that the interests of the settlers would quickly come to outweigh those of Maori; that the Treaty's land guarantee would be subverted in settler interests.

But first the validity of the company's claims was to come under investigation in accordance with the proclamations of January 1840 issued by Gipps and Hobson. A commission was established by Governor Gipps under the New Zealand Claims to Land Act, passed on 3 August 1840. The debate on Gipps' Bill in the New South Wales Legislative Council had showed clearly where Gipps stood on the question of Maori rights to land. He understood, he said, as a political axiom he had never before heard disputed, 'that the uncivilized inhabitants of any country have but a qualified dominion over it, or a right of occupancy only', and as he read Normanby's instructions to Hobson, they confirmed his view. Gipps argued that as Maori had not subjugated the ground by cultivation they had no individual property in it, and thus could not 'grant to individuals, not of their own tribe, any portion of it'; that 'the right of pre-emption in the soil, or in other words, the right of

17. Ibid, p 174
18. Russell to Somes, 29 June 1844 (cited in Adams, p 181)
19. Burns, pp 165–166

extinguishing the native title', was exclusively in the government of any civilised power that chose to settle the country. He went on at length to show that this was the law of England and other European colonising powers and that it had been applied to settlement in the United States and become part of American law.[20]

The pre-emption clause of the Treaty has been widely debated over the years. It has been seen alternatively as a humanitarian move, as protection for Maori against land speculators, as an economic move – purely a means of creating an emigration fund, and even as a means of controlling Maori.[21] Most recently lawyers have put forth sophisticated arguments about the legal basis of pre-emption – that as radical title rested in the Crown, pre-emption was a necessary means of conveying legal title to individuals. But any reading of early Colonial Office documents reveals no evidence of a legal argument. Normanby's instructions spoke of protection for Maori – the humanitarian argument; and especially the creation of an emigration fund – the economic argument:

> The re-sale of the first purchases . . . will provide the funds necessary for future acquisitions; and, beyond the original investment of a comparatively small sum of money, no other resource will be necessary for this purpose. I thus assume that the price to be paid to the natives by the local government will bear an exceedingly small proportion of the price for which the same lands will be re-sold by the Government to the settlers.[22]

This reasoning was hardly consistent with his next exhortation to Hobson that 'All dealings with the aborigines for their lands must be conducted on . . . principles of sincerity, justice and good faith'.[23]

When Hobson finally went to Wellington in August 1841, the pressure on him from company officials and settlers to guarantee their land titles was such that he 'agreed' to waive the Crown's right of pre-emption to over 200,000 acres of land in Wellington, Porirua, Hutt, Wanganui, and New Plymouth.[24] This was the first of several decisions on the part of the Crown to waive its right of pre-emption.[25] It seems that pre-emption was, as Wards described it 'a matter of convenience to be modified at will'.[26]

The land commission appointed by Gipps began its work in the north early in 1841, but New Zealand Company claims were to be investigated by William Spain, the 'impartial commissioner' appointed by the Secretary of State, Russell. Although he was appointed in January 1841, he did not arrive in New Zealand until December of that year. The Colonial Office had not perceived any great need for

20. BPP, vol 3, pp 185–188
21. See, for example, Adams, pp 193–197
22. BPP, vol 3, p 87
23. Ibid
24. BPP, vol 2, pp 545–546
25. See, for example, Ann Parsonson, 'Nga Whenua Tautohetohe o Taranaki: Land and Confiscation in Taranaki, 1839–59', revised report no 1 to Waitangi Tribunal, claim Wai 143 record of documents, doc a1, November 1991, p 200
26. Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852*, Wellington, 1968, p 28

hurry; they had 'no idea that every day's delay made the Company's grip on the homes of dispossessed Maori more secure'.[27] Spain was to deal with 116 cases referred to him by Hobson.[28] The November 1840 agreement had assumed the company's original purchases to be valid, but it was soon clear to Spain that the company's titles were decidedly 'imperfect', and also that he would get no cooperation from the company in his investigation. Indeed, he found that Colonel William Wakefield was prepared to do all in his power to 'embarrass and impugn' Spain and the commission.[29] The company had expected a superficial investigation; Spain intended an exceedingly thorough one, but he was obliged to walk a fine line between the guarantees of the Treaty and the Crown's 1840 agreement with the company.[30] He began his investigation on the basis of both the Treaty and the 1840 select committee's report that the 'possessory rights of the natives to their land should be retained in full . . . so long as it is their wish and desire to retain the same in their possession'.[31] He had to establish the bona fides of both the sellers and the buyers – to come to terms with native tenure and determine who had the right to sell, and then to judge the validity of the sale. It was clear to him that those who had sold the land had no intention of selling their pa, cultivations, and urupa, yet the company had no intention of reserving them from sale.[32] To complicate the issue Hobson had told Wakefield for his 'private guidance and information' that the Government would 'sanction any equitable arrangement' to induce Maori living within the company's districts 'to yield up possession of their habitations', provided 'force or compulsory measures for their removal' were not used.[33]

The Crown itself was in a bind. Under the Treaty, Maori were to have all the rights and privileges of British subjects, but the rights of Her Majesty's other British subjects in the Cook Strait area had also to be taken into account, and Spain felt he could not simply declare the company's titles defective and leave several thousand British emigrants stranded in their new country. His solution was 'to settle a most difficult question upon quiet and equitable grounds' by having the company pay 'compensation' to those owners in the Port Nicholson area who either disputed the sale or had received no payment for land claimed by the company. This would mean unwilling sellers would be 'persuaded' off their lands – but this was no problem to Spain, since Maori disputing the sale seemed to him 'to be more anxious to obtain payment for their land than to dispossess the settlers'.[34] Furthermore, continuing delay would increase both Maori disinclination to part with their lands and their exaggerated ideas of its value. He had great difficulty making them understand that it was nothing they had done, but simply 'the capital and labour

27. Burns, p 170. Admittedly his journey was extraordinarily long; he had sailed from England in April 1841.
28. Rosemarie Tonk, 'A Difficult and Complicated Question: The New Zealand Company's Wellington, Port Nicholson Claim', in *The Making of Wellington 1800–1914*, David Hamer and Roberta Nicholls (eds), Wellington, 1990, p 36
29. Spain report, 12 September 1843, BPP, vol 2, p 291
30. See, for example, Burns, pp 214–215, 224–225; Tonks, pp 38–39, 47–50
31. BPP, vol 2, p 292
32. Ibid, pp 293–294
33. Hobson to Wakefield, 6 September 1841, BPP, vol 2, p 546
34. BPP, vol 2, p 295

brought by the white man from Europe' which had made their land valuable, and that therefore they had no right to expect to profit from its increased value. Nor could they be allowed to rent their lands and live idly off the rent money.[35] These were sentiments expressed continually throughout the nineteenth century. What was good for the white man was certainly not good for Maori.

Spain was insistent that pa, cultivations, and burial grounds be exempt from purchase, and in his final report of 31 March 1845 he pointed out that in addition to these, Maori also had 6000 acres of native reserves, while the company only acquired 'waste land'.[36] It was clear that Spain accepted that other than kainga, cultivations, and urupa, Maori land was wasteland and it was right that it be alienated. This would deprive Maori of nothing, it would benefit the colony as a whole, and Maori would benefit from the civilisation brought by the Europeans.[37] Spain, in his eurocentrism, considered occupation the sine qua non of ownership. He even quoted Vattel at length to Te Rauparaha, in a letter translated by Bishop Hadfield who 'not only approved of its contents' but thought Spain's view would be fully understood by Te Rauparaha 'and calculated to make an impression upon him'; that Te Rauparaha would be 'quite prepared for the dictum . . . respecting the law of nations, in treating a country thinly populated like New Zealand which they may have determined to colonize'. To show he was speaking on good authority, he sent FitzRoy a long quote from 'Chitty's new edition of the Law of Nations, from the French of De Vattel'.[38] The Crown's impartial commissioner was firmly in the camp of those who believed Maori had but a qualified dominion over the land.

In the wake of the Wairau affray of 1843, and hard pressed over land titles and impending financial disaster, the New Zealand Company managed to get another select committee appointed to inquire into New Zealand's affairs and the company's proceedings. The committee, which was chaired by a company supporter, Lord Howick (who, as Earl Grey, became Secretary of State in 1846), argued that it would have been better if no formal treaty had been concluded with Maori, since the Treaty of Waitangi was ambiguous, little more than a legal fiction, and highly inconvenient because of the interpretation placed on its stipulations regarding Maori land rights. They believed Hobson's instructions ought to have laid down clearly that once sovereignty was established, 'all unoccupied lands would forthwith vest in the Crown'. This, they thought, 'would have been attended with no sort of injustice' to Maori and would have been in their own real interests, since their 'unoccupied land, previously to European settlement, was of no value to them', as land derived 'its only value from the application of European labour and capital'.[39]

The committee reminded the House of the principles laid down by Gipps in 1840, that 'the uncivilized inhabitants of any country have but a qualified dominion over it or a right of occupancy only'. The Secretary of State, Lord Stanley, refused

35. Ibid, p 296
36. BPP, vol 5, p 71
37. See, for example, BPP, vol 2, pp 296, 306
38. BPP, vol 5, p 135
39. BPP, vol 2, pp 5–8

to accept the committee's 'far from unanimous' recommendations. He would not, for instance, comply with their wish that the Crown forthwith establish its title to all unoccupied land – at least not until it could be safely accomplished. And while he believed that restricting native rights to land was 'wholly irreconcilable with the large words of the Treaty', and claiming unoccupied land was contrary to Normanby's instructions, he had still assumed FitzRoy would have found 'that there were considerable tracts of country to which no tribe could establish a bona fide title', and even larger tracts that could be obtained 'on easy terms and by amicable arrangements'. Stanley, moreover, was clearly willing to accept the committee's resolution that land 'not made use of' be taxed at the rate of twopence an acre. He spelled out clearly, as not even the select committee had done, that it was intended the tax should also apply 'to all lands claimed as the property of native tribes, and not in actual cultivation'; and he presumed that non-payment would be followed by confiscation of part of the land. As long as this could be 'peaceably effected', he said, it would be an easy way to obtain a large amount of 'disposable land'.[40] He apparently saw no conflict between such a course of action and the 'large words' of the Treaty.

Stanley's ambivalence was apparent in his correspondence with FitzRoy over the waiving of pre-emption.[41] While he appreciated FitzRoy's motives and was not prepared to condemn his actions, he nevertheless pointed out that since FitzRoy had so pointedly cautioned chiefs against 'disposing lightly of their property', Maori now might be encouraged to make exorbitant demands for their lands. How far, he asked, would it be 'to their real advantage to receive large money-payments for the mere sale of waste land?'[42]

What was wasteland was still not entirely clear to Stanley, although he now conceded that 'much more land than was supposed is owned in New Zealand according to titles well understood, either by some individuals, or at all events by some tribes'.[43] By mid-1845, the Colonial Office was coming under powerful political pressure to review its policies with regard to New Zealand. It was decided to replace FitzRoy with Captain George Grey, then Governor of South Australia. Grey was to operate under quite different instructions, ones that would put the rights and welfare of settlers before those of Maori.[44] Grey was to be provided with double the salary and three times the funding allowed to FitzRoy.[45] Five months before he even arrived in New Zealand, Grey was instructed to direct his earliest attention to registering titles to all land, Maori or European. Since the Treaty had recognised Maori title to their lands, Stanley wanted the limits of those lands defined. The rest would be considered Crown land – and it could then be decided

40. Stanley to FitzRoy, 13 August 1844, BPP, vol 4, pp 145–149; Stanley to Grey, 27 June 1845, BPP, vol 5, p 233
41. FitzRoy to Stanley, 15 April 1844, BPP, vol 4, pp 172–179; Stanley to FitzRoy, 30 November 1844, BPP, vol 4, pp 203–210
42. BPP, vol 4, pp 197
43. Ibid, p 205
44. See, for example, Wards, pp 168–172
45. Stanley to Grey, 28 June 1845, BPP, vol 5, p 235

whether or not the pre-emption clause should stand. Stanley again expressed his approval of the idea of taxing wastelands to compel their cultivation or abandonment to the Crown. The provision was to apply equally to land recognised as Maori land; Stanley could see no reason why Maori should not carry their share 'of the common burthens'.[46]

About this time Stanley was obliged to define publicly the Colonial Office's attitude to the Treaty's land guarantee. He told the House of Lords that defining the limits and rights of tribes was 'a matter on which Maori law and custom would have to be consulted'.[47] The possibility of such a policy being pursued was sharply interrupted. When Earl Grey succeeded to the office of Secretary of State towards the end of 1846 he was in a position to put into practice the recommendations of the 1844 select committee. He told Governor Grey that he did not subscribe to the view:

> that the aboriginal inhabitants of any country are the proprietors of every part of its soil of which they have been accustomed to make any use or to which they have been accustomed to assert any title.

Instead he agreed with Arnold that 'Men were to subdue the earth . . . and with the labour so bestowed upon it came the right of property in it'. This reasoning was applicable to New Zealand, and 'fatal to the right which has been claimed for the aboriginal inhabitants . . . to the exclusive possession of the vast extent of fertile but unoccupied lands'. The Queen, he said, was 'entitled in right of her Crown to any waste lands in the colony'. But he did recognise that Maori had a clear and undoubted claim to lands which they really occupied, and attempting to deprive them of their potato patches or of room to move their cultivations 'would have been in the highest degree unjust'. The rest of the land, though, from the moment the Treaty was signed, 'ought to have been considered as the property of the Crown in its capacity of trustee for the whole community'.[48]

Earl Grey realised it was too late now to impose these principles, but for all that the Governor's policies were to be based on them. He was to avoid, as much as possible, 'any further surrender of the property of the Crown'; he was strictly to maintain pre-emption, since to set it aside 'would be to acquiesce in the ruin of the colony'; and, as a first step, he was to 'ascertain distinctly the ownership of all land in the colony'. Having registered the titles, the remainder of the land was to 'be declared to be the royal demesne', surveyed, and sold at auction, and the proceeds used in the main as an immigration fund.[49]

When news of the recommendations of the 1844 committee had reached New Zealand, there was reaction from the northern tribes. When news of Earl Grey's 'Royal Instructions' of 1846 arrived, the reaction came from settlers and prominent citizens in the north. Grey, feigning disapproval of their reaction, nevertheless

46. Stanley to Grey, 27 June 1845, BPP, vol 5, p 233
47. Cited in Adams, p 186
48. Earl Grey to Grey, 23 December 1846, BPP, vol 5, pp 523–525
49. Ibid, pp 523–526

forwarded to the Colonial Office a petition with 410 signatures, among them Bishop Selwyn, Chief Justice Martin, and Attorney-General Swainson, fearful for the safety of the colony in the face of such a change to native land policy, and praying that the instructions be revoked and the letter and spirit of the Treaty 'most religiously maintained'.[50]

The Governor managed to avoid implementing the Secretary of State's instructions regarding the registration of land titles and the confiscation of 'waste lands' by making it 'a work of much time'. But at the end of 1846, he reimposed pre-emption,[51] and by using it to devastating effect he substantially realised Earl Grey's goal of creating a royal demesne. What is more, by keeping Government land purchase far in advance of settlers' needs he was able to purchase all the land he required 'for a trifling consideration'. He even professed to believe that there were large areas in the country, including the densely populated north, claimed by contending tribes who would be happy to cede them to the Government in return for small reserves they could cultivate.[52] At the same time he was busy assuring Maori that he 'had always been instructed most scrupulously to fulfil the conditions of the Treaty of Waitangi'.[53]

Earl Grey, faced with the reality of the situation in New Zealand, reluctantly abandoned his attempt to take the 'waste lands' and agreed to Grey's purchase policy. The letter, if not the spirit, of the Treaty would be adhered to. Outwardly, it appeared that officials on both sides of the world had accepted that Maori owned the whole of New Zealand and not just those parts they occupied and cultivated. But Vattel's and Arnold's theories did not just go away; they were too deeply rooted. Official recognition of Maori rights to the 'waste lands' caused resentment among settlers and created barriers to colonisation which successive governors and later settler governments sought to overcome. By one means or another, Maori lost not just their so-called wastelands, but in some cases even their pa and cultivations where these stood in the way of European settlement. Many of the New Zealand Company's purchases were of dubious validity – but Hobson was prepared to 'sanction any equitable arrangement' to get Maori to abandon their pa and cultivations to the company, and Maori were told they had no choice but to accept compensation, since they would not be permitted to resume land already built on by settlers, even though the purchase might not have been valid. FitzRoy put pressure on Te Aro Maori to accept £300 'for valuable land which they had never sold and which happened to be right in the middle of Wellington'. The Colonial Office did its bit, by promising 'cordial assistance' to the company in its efforts to gain Maori land not already awarded to it by Commissioner Spain;[54] and, in addition, Stanley decreed that lands in excess of the 2560 acres Spain could award to settlers should be 'vested in the Sovereign, as representing and protecting the interests of society

50. Enclosed with Grey to Earl Grey, 9 March 1848, BPP, vol 6, pp 79–80
51. Through the Native Land Purchase Ordinance. See, for example, Orange, pp 105–106.
52. Grey to Earl Grey, 15 May 1848, BPP, vol 6, pp 23–25
53. Grey to Earl Grey, 13 November 1847, BPP, vol 6, p 15
54. Adams, pp 191–192

at large'. In other words, surplus land would belong to neither the seller nor the buyer but would become Crown lands, available for sale and settlement – a ruling which created resentment among both settlers and Maori.[55]

It became increasingly obvious that it was not just a question of land for settlement. A more basic issue underlay the drive to part Maori from their land: they were to be civilised through amalgamation, their reserves interspersed among the properties of European settlers. Allowing them to maintain their isolation from Europeans was considered tantamount to preserving them in a state of barbarism.[56] Those who had been obliged to accept the view that Maori owned all the land in New Zealand were determined, 'in the Maori's own interests', to relieve them of their so-called wastelands guaranteed them by the Treaty. They found a handy tool for their schemes in the pre-emption clause by which the Crown would monopolise land transactions. Maori who wished to sell land could sell only on such a scale and at such prices as the Crown would agree to. And both FitzRoy and Grey soon found:

> that there was no better way of controlling the Maoris than by refusing to buy land from those who opposed the Government; to them, pre-emption had possibilities as a political weapon to subdue recalcitrant Maoris.[57]

55. Stanley to FitzRoy, 26 June 1843, BPP, vol 2, p 390
56. 'Evidence of E G Wakefield to House of Commons Select Committee on New Zealand', July 1840, quoted in Kenneth N Bell and W P Morrell (eds), *Select Documents on British Colonial Policy 1830–1860*, Oxford, 1928, p 564
57. Adams, pp 187, 197

CHAPTER 2

GREY'S LAND PURCHASE POLICIES

> In the eight years of his first New Zealand governorship, Grey bought nearly 30 million acres of Maori land in the South Island and about three million acres in the North Island. The southern purchases cost roughly £13,000; those in the north, though only a tenth the area, cost nearly three times as much (£36,500).[1]

At the end of 1846 the expected extensive Crown demesne had not materialised. Neither through the use of nor the waiving of pre-emption had land sales created the hoped-for land purchase fund. Neither had successive secretaries of state managed to persuade a New Zealand Governor to claim wastelands on behalf of the Crown – but for pragmatic rather than moral reasons. But Grey, better supplied with money and troops than earlier governors, set about a massive land purchase programme between 1847 and 1853. Early in his governorship, in a deliberate policy to denigrate missionaries, neutralise a powerful opposition, and concentrate land policy in his hands alone, Grey first reduced and then disestablished the Aborigines Protectorate Department established by Hobson in accordance with Normanby's instructions.[2] The protectors' role was always ambivalent, as they were both protectors and purchasers of Maori land. Grey replaced the protectorate with a Native Secretary, who was little more than the Governor's clerk and whose role was largely to advance land settlement.[3]

2.1 South Island

Grey began by accommodating the New Zealand Company, which had already put settlers in possession of the land, by 'inducing' Ngati Toa to alienate a block of about 25,000 acres at Porirua. He paid £2000 for the land, in three payments over a three-year period.[4] Ngati Toa had agreed to sell after being promised 'an extensive reserve . . . in one continuous block'. Grey also extinguished Ngati Toa's claim to the Wairau Valley – about 240,000 acres of first class pastoral land, and

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1. James Rutherford, *Sir George Grey KCB, 1812–1898: A Study in Colonial Government*, London, 1961, p 163
2. See, for example, Michael Belgrave, 'The Recognition of Aboriginal Tenure in New Zealand, 1840–1860', paper presented to AHA conference, Washington DC, 28 December 1992, pp 16–17
3. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, 1973, pp 73–74; Keith Sinclair, *The Origins of the Maori Wars*, Auckland [1957], 1980, pp 28–33, 35
4. Grey to Earl Grey, 26 March 1847, BPP, vol 6, pp 7–8; Rutherford, p 165

80,000 acres of the best agricultural land – and to a block of good grazing land extending a further hundred miles south.[5] The setting of that boundary so far south, and allowing Europeans to settle the block without ascertaining Ngai Tahu rights to the area, was a major cause of contention from then on. Ngai Tahu believed the block was to be included in the Kemp purchase, and that they would be able to retain reserves there. When they found their title to the block had been denied, they began an eight-year agitation for redress. The Crown paid them a paltry £500 for a million-acre block on this Wairau purchase–Kemp purchase boundary, but granted them no reserves. There was no 'spare land'; the whole block was already occupied by European settlers.[6] Ngati Toa took more persuading to sell the Wairau, but they were granted their requested reserves and promised £3000, to be paid in five annual instalments. Grey was pleased with his purchases and especially his manner of payment: the drip-feeding of funds to 'a powerful and . . . very treacherous and dangerous tribe' would, he felt, give the Crown the upper hand in its dealings with them.[7] It must be remembered that the sale of the Wairau came only after extensive military operations against Ngati Toa in the Hutt and Porirua areas, and after Grey had cunningly captured Te Rauparaha and exiled him without trial to Auckland, and forced Te Rangihaeata into the Foxton swamps.[8]

Grey was unconcerned about the true ownership of the Wairau block. In both Porirua and Wairau, he simply accepted Spain's ruling that the blocks were 'the real and bona fide possession of the Ngatitoa tribe'.[9] He took no account of other possible claimants, and although he noted the doubtful 'sincerity and fair dealing' of Ngati Toa in the question of land sale, he excused any lack of action on his part by saying he could not either 'legally or with propriety' question Spain's ruling.[10] There is a suggestion that Grey bargained Te Rauparaha's liberty for the land – although it took almost a year after the sale for him to liberate Te Rauparaha. It certainly looks like an act in retaliation for the Wairau affray of 1843, and the resistance put up in the Hutt and on the Kapiti Coast in 1846.[11]

Grey's Ngai Tahu purchases have been examined in great depth by the Tribunal, and the Crown has been found to be in breach of the Treaty in numerous instances.[12] The Otakou block had already been purchased in 1844 under a pre-emption order in favour of the New Zealand Company. The block was estimated at the time to be 400,000 acres, but later shown to be 534,000 acres, and £2400 was paid for it. Between 1848 and 1864 the Crown purchased another 34 million acres of Ngai Tahu territory, and left only 37,492 acres in Maori hands.[13] By far the largest and

5. BPP, vol 6, p 8
6. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 1, p 109
7. BPP, vol 6, p 8
8. Ian Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852*, Wellington, 1968, pp 277–280, 287
9. BPP, vol 6, p 7
10. Ibid, pp 14–16
11. Rutherford, pp 165–166
12. Waitangi Tribunal, *The Ngai Tahu Report 1991*
13. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 3, p 821

one of the most controversial purchases was that carried out by H T Kemp in June 1848. Kemp, son of a missionary and a fluent native speaker, was a former sub-protector who had become Native Secretary of New Munster after the break-up of the protectorate. The purchase of 20 million acres, almost one-third of the country, was conducted carelessly, especially with regard to boundaries and the size and location of reserves, yet Governor Grey and Lieutenant-Governor Eyre both approved the meagre 6359 acres of reserves allotted to Ngai Tahu owners from this block. It does seem, though, that most of the leading chiefs of the hapu whose lands were purchased, either signed the deed themselves or gave their consent to it.[14] The Kemp purchase was followed by the 'high-handed' Banks Peninsula purchase, and by the purchase of seven million acres in Murihiku for £2600. The Crown treated the token payments made for the land in the three blocks not as purchase money at all, but further compensation for land already included in the Kemp purchase.[15] Again, boundaries and reserves were a problem. Walter Mantell, with a view characteristic of the time, decided that 10 acres per head was as much land as need be reserved for Maori, as that would prevent them being landed proprietors and continuing 'to live in their old barbarism on the rents of an uselessly extensive domain'.[16] Again, some care was taken over who signed the purchase deed – but that was all but immaterial if the deed did not reflect either the vendors' beliefs about or their understanding of the sale, or if the agreements in the deed were not later put into place.

The Arahura purchase of seven million acres was the last major purchase in the South Island, but it did not come until May 1860, between Grey's first and second governorships. Meanwhile, in a move designed to extinguish all other claims to parts of the South Island between 1853 and 1858, the Crown had purchased all the remaining rights of the South Island branches of several North Island tribes – some of them to parts of the west coast. As the Tribunal noted, Ngai Tahu were treated as the 'last and least important' of several tribes with claims to the coast. The Crown did not attempt to determine ownership – it simply paid off the claimants with sums vastly greater than those paid to Ngai Tahu, and apparently in relation to the 'relative size and power of each tribe'.[17] Crown purchase and payment for land in this period had nothing to do with recognition of customary tenure and everything to do with expediency.

The arrangement forced on Ngai Tahu over the northern boundary of the Kemp purchase – set at Kaiapoi Pa, the southern boundary of the Wairau purchase – was illustrative of the Government's attitude to, or inattention to, tribal rights. When the Wairau purchase was arranged, Ngati Toa were not in a position to refuse to sell, so it was certainly in their interests to sell as large a block as possible, including land which was the property of Ngai Tahu. The Government was bent on acquiring the land and settling Europeans on it, and at the same time gaining control over the

14. Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 1, pp 51, 58, 75
15. Ibid, pp 84–85, 89–90
16. Ibid, p 101
17. Ibid, pp 124–125

troublesome Ngati Toa. They had no need to concern themselves over the small and scattered Ngai Tahu population and, despite the Treaty, saw no reason to do so. Their title could be extinguished carelessly and for minimal payment, and the boundaries could be set where it pleased the Crown to set them. There was little Ngai Tahu could do about it, and the Crown was obviously banking on this fact. This pattern of accommodating 'troublesome' tribes or chiefs, or both, and riding roughshod over weaker or more compliant ones, was repeated in later years in other parts of the country.

2.2 Taranaki

While the South Island sales were taking place, Grey and his offsider McLean were also busy in the southern part of the North Island, where company settlers were clamouring for land and sheep men were fanning out onto tribal land and negotiating illegal leases. More care had to be expended on land purchase in the North Island, where Maori were stronger and far more numerous. With the immediate need for land for settlement satisfied through the huge Otakou and Kemp purchases, Grey could afford to take his time. New Plymouth settlers, constrained by FitzRoy's overturning of Spain's award[18] and confined to a 3000-acre block immediately around the Taranaki settlement, had to be satisfied first. Stanley had instructed Grey to give the New Zealand Company's agent 'every assistance' to secure more land in Taranaki for the company, and secretly provided him with £10,000 for the purchase of Maori lands in the various districts claimed by the company.[19]

Gladstone, briefly heading the Colonial Office in 1846, and well-disposed towards the New Zealand Company, hoped Grey would be able to reverse FitzRoy's decision and give full effect to Spain's award 'unless, indeed, which I can hardly think probable, you may have seen reason to believe that the reversal of the Commissioner's judgement was a wise and just measure'.[20] So when Grey went to Taranaki in 1847, he meant to impress the Colonial Office by taking a firm line with local Maori who, he thought, regarded the Europeans 'as in every respect in their power, and as persons who must submit to their caprice'.[21] Donald McLean, who had been a sub-protector in the department, was appointed by Grey inspector of police in Taranaki in April 1846, and from March 1847 he was 'entrusted' with the conduct of land purchase. But he was not given a free hand; 'in all matters of importance' he was to consult with Captain King, the resident magistrate, about what steps he proposed to take. McLean's formal appointment as land purchase commissioner was not gazetted until 6 April 1850.[22]

18. AJHR, 1861, c-1, pp 175–176
19. Stanley to Grey, 6 July 1845, BPP, vol 5 (cited in Ann Parsonson, 'Nga Whenua Tautohetohe o Taranaki: Land and Confiscation in Taranaki, 1839–59', revised report no 1 to Waitangi Tribunal, claim Wai 143 record of documents, doc a1, November 1991, p 67)
20. Gladstone to Grey, 2 July 1846, AJHR, 1861, c-1, p 181
21. Grey to Earl Grey, 2 March 1847, AJHR, 1861, c-1, p 181

Ann Parsonson dealt at length with the Crown's land purchases in Taranaki in her 1991 report for the Tribunal.[23] Briefly, some hapu to the south of New Plymouth could be persuaded to sell; those to the north could not. Grey tried to ride roughshod over their opposition, telling those Te Ati Awa who had returned from Waikanae that he would mark off ample reserves for their present and future needs, and that the rest of the district would be 'resumed for the Crown', and for settlement by Europeans. Native titles to the land would be determined by a specially appointed court, and those with valid claims would receive what Grey considered 'appropriate' compensation.[24] Grey proceeded to instruct McLean to mark out the reserves, telling him that:

> Those Natives who refuse to assent to this arrangement must distinctly understand that the Government do not admit that they are the owners of the land they have recently thought proper to occupy.

In very telling words Grey revealed what was dictating his policy, and driving the company and the settlers in Taranaki:

> I have never in any part of the world seen such extensive tracts of fertile and unoccupied land as at Taranaki. I have, therefore, but little doubt that so large a tract of country will ultimately be purchased by the Government in that District for a comparatively small sum, and that the lands required by the New Zealand Company will bear but a very small proportion to the whole district acquired by Government.[25]

Clearly Grey considered that the native title to north Taranaki (from about the Hangataua River to the Mohakatino and inland in a line drawn to and from the summit of Mount Taranaki) had been extinguished when 80 or so men and women, 'the small remnant of the Nga-te-awa tribe at Nga-Motu', signed a deed with New Zealand Company agents on 15 February 1840 – when the Treaty was already in place.[26] But Grey was in no position to enforce his will in Taranaki, and when Te Ati Awa stood firm, he was obliged to face the fact that he would have to gain the land by purchase, not by threats and bluster. McLean then patiently carried on negotiations until he secured three blocks in quick succession between May and October 1847: the Tataraimaka block of 3560 acres for £150; the 12,000-acre Omata block for £424; and the Grey (Mangorei) block of 9770 acres for £390.[27]

Again, the payments were made in annual instalments. McLean justified this drip-feeding of the purchase money, sometimes over a period of years, by saying the first instalment, the largest, went to 'the general and more remote claimants', while the 'real owners of the soil' waited for subsequent instalments. Before the last instalment was paid an announcement would appear in the *Kahiti* stating the

22. Parsonson, p 175
23. Parsonson
24. Grey to Earl Grey, 2 March 1847, AJHR, 1861, c-1, p 183
25. Grey to McLean, 5 March 1847, AJHR, 1861, c-1, p 184
26. Ibid
27. See Parsonson, pp 19–21, 72

amount due, and the date on which final payment would be made 'as a means of bringing forward and securing, to a certain extent, if not entirely, the acquiescence in the sale of dissenting or outstanding claimants'.[28] In the case of the Tataraimaka block McLean promised a further payment a year or two later, over and above the purchase price, if the vendors would agree to abandon their claims to an adjacent block by then.[29] C O Davis reported that the natives had 'a decided antipathy' to instalments; that they preferred 'a small sum in hand to a large amount in anticipation'.[30] Obviously this manipulation of the purchase money was a means of both coercion and control, although the district commissioner, reporting on the Wairarapa lands in 1860, was pleased to describe it as 'a system well adapted to enable the Maories to establish themselves comfortably and lay the foundation of future wealth and prosperity'. That the system had had 'a directly opposite effect to what was intended' was the fault of the vendors entirely.[31]

Grey had determined to get for the settlers at least the 60,000 acres awarded by Spain, if not considerably more, and he was not satisfied with these 25,000 acres. In February 1848, he returned to New Plymouth and deputed F D Bell, agent for the New Zealand Company (and a cousin of the Wakefields), to negotiate further purchases to the north of the company's settlement – land the company and its settlers had coveted from the start. Bell's 'negotiating' complicated an already tense situation. McLean had taken care in his land buying in Taranaki to call hui where the sale could be discussed openly and all the recognised owners could publicly agree to the sale. Only then would the land be surveyed, and if there was no opposition to the survey it would be clear that the sale was not disputed – that the sellers had the right to sell. Land to be retained by the Maori vendors would not be 'excepted' from sale; reserves would be set aside from within the block sold, so that land 'returned' to Maori would have had the native title extinguished.[32] This was standard Government policy; native title was to be extinguished and Maori were to hold land under Crown grants – and it seems the less they held the better. Maori who complained about niggardly grants were deemed greedy extravagant trouble-makers.[33]

When it came to the purchase of the 1500-acre Bell block it was not possible to get a unanimous agreement to the sale, but Bell, determined to get the land, proceeded to have the boundary lines cut. This brought out the opponents to the sale, and every inch of the lines were fought over.[34] The worst possible agent, a company official, had been entrusted with buying disputed land. He had been instructed not to attempt to finalise the purchase; that was to be left to Captain King, in consultation with McLean, who was to ascertain that the sellers were the

28. BPP, vol 11, pp 542, 545
29. Parsonson, p 73
30. BPP, vol 11, p 497
31. W N Searancke to McLean, July 1860, AJHR, 1860, c-3, p 3
32. P G McHugh, 'The Legal Basis for Maori Claims Against the Crown', *Victoria University of Wellington Law Review*, no 18, 1988, p 5
33. See Parsonson, p 77
34. Ibid, p 80

'true owners'. McLean knew full well the danger of trying to conclude a disputed sale, yet he pressed ahead and presided over the signing of a deed on 29 November 1848. But because only a majority, not all, of the claimants had signed the deed and received payment, McLean knew the sale could not be finalised until the dissenters could be persuaded to agree to it. That took until 1852, and until then the land could not be made available to company settlers.[35]

Unfortunately the lesson that a disputed sale was no sale was not learned. Taranaki settlers were determined to have the Waitara, and indeed all the land between the town (FitzRoy) block and the Waitara. In response to settler agitation Grey returned to New Plymouth in January 1850 for his third and last visit. He had failed to prevent Wiremu Kingi Te Rangitake and a party of over 500 of his people returning from Waikanae, and he had failed to 'induce' them to relinquish their 'pretensions' to lands south of the Waitara River. He had been determined to force them to settle on the north bank, out of the way of European settlers but in a position where they could act as a deterrent against a possible attack on New Plymouth by 'ill-disposed tribes' – although Grey knew every inch of the north bank of the Waitara was claimed by other Maori.[36]

Kingi and his people had been deeply disturbed by the Governor's proposals and intentions, but not intimidated. They returned to their Waitara home in November 1848, just days before the sale of the Bell block, and settled in three pa on the south bank of the river. They, not the Government, would decide where they belonged. Settlers complained to the company and to the Governor about the presence of these returnees, about the fact that they would not sell land, and that they were determined to farm their own lands using stock and implements bought with money earned by working for settlers – at 'very favourable' rates, considerably below those charged by European labourers.[37]

The Governor's visit served only to unsettle Te Ati Awa even further. Grey was physically challenged when he tried to visit Pukerangiora – and the settlers were outraged that he neither attempted to punish those who had threatened him, nor accepted offers of land made by a few 'dissidents' against the overwhelming opposition of the majority of right-holders.[38] As Grey's term of office came to an end then, Taranaki was in a tense and unsettled state. After he left at the end of 1853 McLean controlled land purchasing, and the continual pressure on owners to sell divided the non-sellers from the sellers. With government in settler hands, the situation deteriorated further, until the disputed Waitara purchase of 1859 ended in war which flickered and flamed across half the North Island for a decade.

35. Ibid, pp 78–84
36. Ibid, pp 86, 89
37. Ibid, pp 94–95
38. Ibid, pp 96–98

2.3 Rangitikei

Land purchase in other areas was sometimes as contentious, but not as violent as in Taranaki, but Grey and McLean were able to purchase several large blocks with little more than an initial formal protest from peripheral claimants. In January 1849, the huge Rangitikei block of a quarter of a million acres fell to McLean's patient diplomacy. When he had broached the subject of purchase two years earlier, Ngati Apa agreed to sell but Te Rangihaeata, at that time still defying the Government, objected: Te Rauparaha had 'conquered' that land back in the 1820s.[39] But by 1849 Te Rauparaha was nearing the end of his life and Te Rangihaeata had made his peace with the Government, so both could be ignored. Ngati Apa were free to sell; there was no one with the mana to gainsay them. But neither was there anyone who could stand up for their rights and force McLean to accept the reality of the complex local relationships. He reported 'the Natives . . . squabbling about the subdivisions of their Hapus which they have written down', with people recorded as belonging to more than one hapu merely, in his view, so they might qualify for more compensation. He took it upon himself to record hapu 'correctly' so he could simplify the purchase process and buy on a 'tribal' basis, ignoring the claims of individual hapu.[40]

McLean paid a mere £2500 for those broad and fertile acres, some of the richest farmland in the country. The sellers received £1000 at the time of the sale, and were to receive another three annual instalments of £500 from William Fox, principal agent of the New Zealand Company after William Wakefield's death in 1848. Fox defaulted on each succeeding payment, and the Crown had to find the money lest the vendors create a 'disturbance'.[41] McLean reported the payment of the last instalment in June 1852, saying he had now 'had an opportunity of satisfying the claims of such natives as had not previously received payment' – one of them 'a most troublesome claimant'.[42] He had also paid 'the Turakina natives' £12 for a 'portion' of land they had wanted reserved, but which he had 'induced' them to relinquish because it was on the European side of a stream; he had reserved 100 acres to a Ngatiraukawa chief, who had a claim 'in right of his wife', and a Taupo chief, a 'most exemplary and deserving' assessor and mission teacher, in order:

> to secure their residence as friendly chiefs in the vicinity of the English settlers, and to ensure their co-operation in preventing aggression by the Taupo or any other tribes passing to and from the interior

39. Rutherford, p 181
40. 2–5 April 1849, McLean diaries (cited in Angela Ballara and Gary Scott, 'Crown Purchases of Maori Land in Early Provincial Hawke's Bay', report on behalf of claimants to Waitangi Tribunal, claim Wai 201 record of documents, doc i1, 1994, p 71)
41. Grey dispatches, 13 June, 15 August, 26 September 1850, BPP, vol 7, pp 17, 28–29, 46; Rutherford, pp 181–182
42. McLean to Civil Secretary, 25 June 1852, BPP, vol 9, p 113

and 50 acres for 'an intelligent native, who surrendered the most of his claims for a small consideration, conditionally that he would have a piece of land near the Europeans'. All these deserving allies of the Crown had been rewarded with flood-prone land, of no use to Europeans, and 'only or at least better adapted for native cultivations'.[43]

McLean defended the purchase by saying that since having sold their district the 'Rangitikei tribe' had made noticeable progress 'in civilization and wealth': they were now more hospitable and friendly than any other tribe on the coast; and this was all very beneficial to the European inhabitants of Wellington.[44] But the Rangitikei lands, bought to satisfy the land hunger of company settlers, went instead to satisfy the vanity and greed of its officials. The Fox homestead, Westoe, was built on a river terrace overlooking the Rangitikei River flats. Fox had received 3658 choice acres for his pains.[45]

2.4 Wairarapa and Hawke's Bay

The New Zealand Company had long been interested in the Wairarapa, and in 1843 proposed it as a suitable site for the Anglican settlement then under discussion in London.[46] In 1848, with the 'Canterbury settlement' fast becoming a reality, F D Bell and H T Kemp were sent to try and buy the area. The Crown also enlisted the aid of William Colenso, of the Church Missionary Society, who was requested to point out:

> to the Natives the benefits they will receive from the Creation of a body of Church of England Ministers in their vicinity; from the establishment of superior schools; and from the neighbourhood of a numerous European population.[47]

Maori were said to be prepared to sell, but when news arrived that the Wairarapa might not be chosen for the site of the new settlement, their asking price became 'exorbitant': they refused £4000 for a million-acre block and demanded £16,000 instead.[48] When the Canterbury Association insisted that their colony must have a good port, negotiations to buy the Wairarapa were 'suspended for the time being'.[49]

However, by this time Maori had found a lucrative source of income from leasing grazing land to settlers who had pushed beyond the confines of Wellington. The first sheep stations were established in the lower Wairarapa in 1844 – in contravention of the Land Claims Ordinance 1841, which prohibited leasing. By

43. Ibid, pp 113–114
44. Ibid, p 114
45. Rutherford, p 192
46. Patricia Burns, *Fatal Success: A History of the New Zealand Company*, Auckland, 1989, p 219
47. Domett to Colenso, 7 November 1848 (cited in S L McHugh, 'The Issue of the Hawke's Bay Purchase Instructions, June 1848–October 1850', evidence for Waitangi Tribunal, claim Wai 119 and 210 record of documents, doc c2, pp 6–10)
48. Ibid, pp 11–16
49. Ibid, p 15

1848, they had spread as far as central Hawke's Bay.[50] Grey's Land Purchase Ordinance 1846 repeated the prohibition against leasing without the sanction of the Crown, but provided for Government licences for those already in possession and for prospective lessees, in situations where the Crown could make 'equitable arrangements . . . with the true native owners'. He envisaged ascertaining and registering Maori claims to such lands. This, of course, would give him control over both lessees and lessors – and facilitate purchase.[51] In practice however, Grey simply ignored the illegal leases – as long as it suited him. He was not concerned over the company's worries about the leases; if they wanted to bring prosecutions, it was up to them. Wool was by then Wellington's main export and he did not want to upset the economy or inflict 'serious injury' on the European settlers. But neither did he want to see Maori become rent collectors, and encourage their 'idle extravagant habits'.[52]

Once the New Zealand Company had surrendered its charter in July 1850, Grey moved to regularise squatter leases through the Crown Lands Amendment and Extension Ordinance 1851, under which runholders could take 14-year leases and purchase 80 acres of homestead land freehold. No longer would Maori be in a position to negotiate leases which gave them a good income but gave the squatters no security. Their only option now was sale to the Crown. Hawke's Bay Maori had already expressed a willingness to sell, and in 1849 first Te Hapuku, a central Hawke's Bay chief, then Tareha, Karaitiana, Takamoana, and other Ahuriri chiefs, the 'principal talking men' on behalf of all the people, offered land for sale.[53] The Government was interested; they hoped the sale of Hawke's Bay would put an end to the objectionable practice of squatting and lead to the sale of the Wairarapa.

It was December 1850 before McLean was sent to prospect the possibilities of land purchase in Manawatu and Wairarapa. He found Te Hapuku willing to sell land in both Hawke's Bay and Wairarapa. His right to sell was challenged, for although McLean chose to act as though Te Hapuku of Ngati Te Whatuiapiti was the principal chief of the region, there was no paramount chief of Ngati Kahungunu, and at least three other chiefs, also of major hapu in central Hawke's Bay – Tareha, Te Moananui, and Puhara – held equal rank with him. They were not necessarily against land sale, but they wanted to be able to control it. Te Hapuku, however, would sell on a grand scale, and that was enough to boost his status in the eyes of the Crown. In addition he had signed both the Declaration of Independence (on a trip to the north in 1839) and the Treaty of Waitangi, when Captain Bunbury searched him out at Ahuriri.[54] When McLean arrived in the area there was already a good deal of inter-hapu tension over land sales. Just two months earlier Te Hapuku and Te Moananui had renewed an old quarrel, and when Te Hapuku set up

50. Rutherford, pp 182–183
51. Parsonson, pp 188–190
52. McLean to Colonial Secretary, 6 February 1854, AJHR, 1861, c-1, p 264
53. S L McHugh, pp 17–18
54. Merran Lambeth, 'The Motivations Behind the Alienation of Maori Land in Hawke's Bay, 1850–1862', 300-level special topic, History Department, Massey University, 1993, pp 7–8. Only two other Hawke's Bay Maori signed the Treaty.

rahui posts Te Moananui determined to go inland and burn them. As McLean approached the area, Te Hapuku called a great hui at Waipukurau to meet him, but other chiefs were reluctant to take part and be 'insulted to death by Te Hapuku'.[55] McLean was impervious to inter-hapu tensions, and the fact that his presence and his activities exacerbated them. There would be little trouble, he thought, in acquiring the area 'as the natives in possession are the original and undisputed claimants of these districts'.[56] McLean travelled with a retinue of 'friendly' chiefs whom he lectured to fortify them 'against all arguments the natives could adduce', and he was pleased to note they used his advice 'admirably and conclusively' in favour of sale and against leasing of land.

McLean had soon added Te Hapuku to his team, and noted in his diary that 'Hapuku is acting precisely as I have directed him . . . he goes about negotiating and arranging with his tribe for the sale of more land'.[57] Fenton later told McLean he could 'see the strongest motives of policy, justice, and gratitude, why such men as Te Hapuku should be carefully provided for and their position secured'.[58]

McLean began his Hawke's Bay land-purchasing at Waipukurau, by buying 'Hapuku's block' of some 279,000 acres, but it was another four months before he got around to offering £3000 for the block for which they were asking £20,000. They wrote to Grey complaining of McLean's niggardliness, and saying they would now take £4800.[59] Grey was only too happy to oblige; by humouring Te Hapuku, he hoped to pave the way to purchasing the whole area. The first payment of £1800 was made in October 1851 and was divided among the constituent hapu, with payments also made to some Wairarapa people and Ngati Te Upokoiri (from inland central Hawke's Bay), who had claims to the land.[60]

Later in December, McLean arranged the purchase of the Ahuriri block surrounding the Ahuriri Harbour. The Government was most anxious to have access to the only port on that coast. Colenso advised the owners to have a clause inserted in the deed to ensure access for them to the port, but McLean thought such a precaution unnecessary.[61] He also thought it unnecessary to accede to demands for adequate reserves for the 500 or so people who gathered to discuss the sale. Their demands were:

> on the increase. I will give them their tether to see how far they will go then I shall bring them to reason afterwards and hold them exactly to what they agreed at the public meeting.[62]

The Ahuriri deed was not signed until November 1851, when 300 Maori put their signatures to it after weeping over the land and bidding it farewell.[63]

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55. Colenso journals (cited in Ballara and Scott, pp 54–56)
56. McLean diaries (cited in Ballara and Scott, p 58)
57. Ibid, p 61
58. Ibid, p 67
59. Fenton to McLean, 28 August 1871, AJLC, 1871, p 10
60. Lambeth, p 17
61. Ibid, p 18
62. McLean diaries (cited in Ballara and Scott, p 64)

By the end of 1851 McLean was able to report that, in addition to Te Hapuku's block, he had purchased the Ahuriri block of 265,000 acres for £1500 and the Mohaka block of 85,700 acres for £800, and had paid the first instalment of £3000 to the various claimants. Te Hapuku was so pleased with his payment that he was happy to sell 'another beautiful block' of about 20 miles by two miles on the Ruataniwha Plain, and McLean thought he had ensured Te Hapuku's cooperation in the purchase of 'upwards of 3,000,000 acres' from Hawke's Bay to Wairarapa, of which he was 'allowed' – by McLean at least – 'to be the most influential and powerful chief'.[64]

Other chiefs were less happy with arrangements made for them. The Ahuriri chiefs, among them Tareha, had demanded 'valuable' reserves around the harbour – land they were most reluctant to sell lest they lose their fishing rights in the area. McLean would not reserve the land for them, but simply assured them they could always freely exercise their rights there – 'in common with the Europeans'. The only reserve he was prepared to make was a pa occupied by Tareha, and the adjacent ancestral burial ground, which Tareha would be allowed to retain 'until such time as the Government may hereafter require the spot for public improvements'.[65] By now nothing was sacrosanct, not even pa in 'actual occupation', or urupa – but to win Tareha's compliance he was offered the choice of any town section on the north side of the harbour. He accepted; no one else was offered anything, except 'every facility . . . of re-purchasing land from the Government'.[66]

Grey had instituted a scheme at the time of his original purchases by which Maori could repurchase land (now Crown land) at the upset price of 10 shillings an acre before it was sold at auction.[67] McLean used the system in Taranaki in March 1854 when he bought the Hua block 'estimated to comprise from twelve to fourteen thousand acres of fine open agricultural country'. He had to pay £3000 to induce the reluctant owners to sell, but he felt justified in paying so much because he had managed to persuade them to forgo extensive reserves 'which would monopolize the best of the land', in return for the pre-emptive right to repurchase £1000 worth of land at 10 shillings an acre, out of the block.[68] This was hardly a viable option when the Government bought the land at the cheapest possible price. In the case of the Arahura purchase from Ngai Tahu, the repurchase price would have amounted to 12,000 times the price the Crown had paid for the land.[69] In any case, the provincial authorities objected to the Crown's generosity towards its Maori subjects and once the Crown lands were transferred to the provinces, Maori were denied this option.[70]

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63. Lambeth, p 19
64. McLean to Colonial Secretary, 29 December 1851, BPP, vol 8, p 63
65. Ibid
66. Ibid, p 64
67. Ward, p 113
68. McLean to Colonial Secretary, 7 March 1854, AJHR, 1861, c-1, p 198
69. Waitangi Tribunal, *The Ngai Tahu Report 1991*, p 124
70. Ward, p 113

With the purchase of Hawke's Bay complete, Grey needed to add the Wairarapa to his bag to bring the whole coast from Wellington to Napier into Crown hands. In 1853, as a prelude to his departure from the colony he set out to purchase it. Rutherford, quoting J D Ormond, painted a revealing picture of the Governor, who:

> made an impressive personal visitation, landing with his suite at Palliser Bay and staging a semi-royal progress up the Wairarapa Valley, accompanied by a multitude of excited Maori and two well-guarded pack-horses carrying the money bags. All the way up to Napier he addressed native gatherings, received memorials, and talked to them of the benefits of selling their land so that the Government could settle Europeans amongst them. Nearly every night blocks of land were offered, and small advances made on them.[71]

This was vintage Grey, talking Maori out of their land, in their own best interests – and showing them the colour of his money while he did it. McLean always tried to carry enough money to be able to purchase 'whatever blocks of land. . . . Chiefs were disposed to sell'.[72] He told Grey that in negotiating with Maori for land he could make 'a much greater impression' if he could actually show them the money: 'the knowledge of its being at hand when discussing a sale has sometimes a talismanic effect on their movements'.[73]

So in Grey's wake came McLean to finalise the purchases – beginning in the lower Wairarapa with the purchase of an area which included 'the Home stations and runs of several of the settlers'. The principal claimant in the area was an 'intelligent young Chief', Raniera; who was 'induced to relinquish his claims' on the promise of a Crown grant for a block of about 1400 acres. McLean admitted that this was a generous reserve, but not more than Raniera deserved since he had given up his right to the ferry, which brought him in £12 per year, plus 80 acres for a ferry station; and Raniera was already stocking his land, and obviously intended to farm it. McLean thought it 'desirable to secure such possessions to principal Chiefs under Titles from the Crown'. He gave no indication of how he judged Raniera's standing – apart from his readiness to sell land. Another whom he thought deserving of a reserve in the newly purchased block was Rihara, 'the principal Church of England Missionary in the valley' – who was all but landless, since he had no claim whatever to any land in the district.[74]

McLean preferred to deal with large blocks – the 'whole of the tribal claim' – to prevent disputes between individuals and factions and 'secure a clear title'.[75] But in this case he was obliged to buy small blocks, and pay more for them (£100 for 800 acres in one case) in order to 'secure the settlers in their homesteads'. He explained that they were still really getting the land 'at a wonderfully cheap rate' considering the natives were 'generally so apt to take advantage of improvements to increase their demands, and they are sufficiently intelligent to know that . . .

71. Rutherford, p 185
72. McLean to Colonial Secretary, 6 February 1854, AJHR, 1861, c-1, p 264
73. Quoted in Sinclair, p 54
74. McLean to Civil Secretary (New Munster), 7 September 1853, AJHR, 1861, c-1, p 261
75. BPP, vol 11, p 542

settlers on Native land, are quite in their power'.[76] This was nonsense. McLean, by bribes, threats, and blandishments, continually got his own way in land deals. When it came to major deals, if Maori managed to talk up either the purchase price or the extent of reserves, McLean would threaten them with the Governor's displeasure – until they threw in another block to demonstrate their goodwill. Between 22 June 1853 and 11 January 1854, McLean made 39 purchases in the Wairarapa, totalling almost two million acres, for less than £18,000.[77] The speed of purchase precluded all but a cursory inquiry into title.

In the Wairarapa, as elsewhere, the purchase money was drip-fed to the vendors over a period of two, three, and even five years. In addition, they were promised that 5 percent of the net proceeds of future sales by Government of some of the blocks purchased would be set aside for 'certain Native institutions', especially schools, hostels, and hospitals, and also annuities to chiefs. This was in part to compensate for the loss of the considerable rentals (£1200 a year) they had received from the leases taken out years before with settlers; and of course such 'consideration' was necessary to induce them to part with the land. The leases were illegal under the existing law, but the authorities had always turned a blind eye to them, and were anxious now to 'put settlement on a more regular basis'.[78]

While the idea of these 'five percents' may have been an excellent principle in theory, in practice it left much to be desired. The beneficiaries waited years for payment; in August 1867 they petitioned the General Assembly, saying it was 'several' years since they had sold their land to the Queen, but the Government had not paid them 'the per cents as agreed upon'.[79] In 1873, they were complaining of the meagre sum they received, and of course their dissatisfaction was put down to the 'pernicious influence' of 'certain Europeans'. The Maori committee organised to inquire into the payments were labelled 'members of the old Hau-Hau party', while its spokesman was dismissed as an associate of the Repudiation movement's Henare Matua.[80] The Commission of Inquiry into Native Land Laws 1891 reported that Wairarapa Maori were still complaining about the contracts they had made with the Government being 'broken in many ways – reserves not made, money not paid, and other breaches of faith which call for reparation'.[81]

Grey and his offsider McLean may have succeeded in extinguishing native title over most of the South Island and a large area of the lower North Island, but the policy of buying as much land as possible for as little as possible and with minimal attention paid to the rights of all owners, and of leaving Maori with meagre reserves while satisfying settler demand, was both one-sided and shortsighted. Grey left the country before the effects were really felt. It was for his successor to cope with the inevitable consequences.

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76. McLean to Civil Secretary (New Munster), 20 September 1853, AJHR, 1861, c-1, p 262
77. Rutherford, p 185
78. AJHR, 1861, c-1, pp 261, 264; AJHR, 1874, g-4, p 1
79. AJHR, 1867, g-1, p 11
80. Charles Heaphy to Native Minister, 31 December 1873, AJHR, 1874, g-4, pp 1–4; Ward, p 88
81. AJHR, 1891, sess ii, g-1, p xiii

CHAPTER 3

INQUIRIES AND DEBATES ON CUSTOMARY TENURE IN THE 1850s

Grey's departure from New Zealand in December 1853 marked the end of an era. There was not to be another Governor until the arrival of Thomas Gore Browne in September 1855, and in these crucial leaderless months, tensions over land sales rose to new heights. In 1854, the King movement was extending its sway, and an important anti-land-selling hui was held at Manawapou in south Taranaki. In 1856z at Pukawa, Lake Taupo, the names of prominent chiefs were put forward as contenders for the kingship, and the choice fell on the ageing Waikato warrior chief Te Wherowhero. In 1854, too, the Land Purchase Department was established under Donald McLean. The activities of his land purchase officers in Taranaki exacerbated tensions between tuku whenua (sellers) and pupuri whenua (non-sellers) into a state of feud which simmered and flared until the Waitara purchase of 1859 led to all out war. And in 1854 the New Zealand Parliament, the General Assembly, met for the first time in Auckland. At last the settlers had government in their own hands. They had agitated for it from the start; self-government was the hallmark of a sovereign state and an important constituent of the Wakefieldian theory of colonisation.[1]

The Constitution Act 1852 of the Imperial Parliament had spelled out a legislative structure for New Zealand, consisting of six provincial assemblies and a bicameral General Assembly which, until 1865, met in Auckland. The provincial councils were each headed by an elected superintendent; in all but Auckland they were prominent New Zealand Company men. All the early premiers and the greatest proportion of all the early ministries were company officials or settlers. They cast a long shadow over New Zealand affairs. Edward Stafford, superintendent of Nelson, headed the two longest serving ministries, in 1856 to 1861 and 1865 to 1869 – and he married William Wakefield's daughter; William Fox, the New Zealand Company's principal agent from 1848, was Premier four times, the last in 1873. Francis Dillon Bell, a cousin of the Wakefields, was Colonial Treasurer in the first ministry in 1856, Native Minister in 1862, and several times a legislative councillor. He was also a land purchase agent for the company and for Governor Grey, and acted as a land commissioner at various times between 1851 and 1880, before becoming New Zealand's agent-general in Britain. The Richmond–Atkinson

1. Vattel (cited in Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi*, Auckland, 1991, p 14

clan from New Plymouth (and later Nelson) provided a judge, Cabinet ministers, and parliamentarians: Harry Atkinson was Premier four times and died in office as speaker of the Legislative Council in 1892; C W Richmond and J C Richmond both filled the office of Native Minister at various times, and the former was still a Court of Appeal judge in 1895.

Thus Wakefieldian settlers held many of the highest public posts in New Zealand for 40 and even 50 years after Waitangi. They were members of ministries which passed New Zealand's most controversial legislation, especially that concerned with the acquisition, by one means or another, of Maori land. Inevitably, they brought their Wakefieldian beliefs and values to office with them.[2] Bell defended the Waitara purchase; Fox was instrumental in legalising the confiscation of Maori land for 'rebellion'; C W Richmond was out to destroy the 'beastly communism' of Maori society.

When the representative Parliament met for the first time in May 1854 membersd demanded the immediate introduction of ministerial responsibility. They were granted it for the 1856 session of the Parliament, and since the ministers would be responsible to a Parliament in which Maori were not represented, the new Governor, Gore Browne, chose to retain control of Maori affairs – in essence to stand between Maori and settlers. Parliamentarians were not pleased, and for the rest of the decade there was a continuing struggle between Governor and ministers over the control of native policy.[3] The ministry was entitled to be informed of, and to record its opinions on questions of native affairs, so they had some input, if not control.[4] But they did control the purse strings, and McLean had de facto charge of day-to-day native affairs, so Gore Browne could actually do little more than withhold assent from the most controversial legislation – and he did that sparingly.

The Governor's first months in New Zealand were taken up with travel and with consultation with various 'experts' on Maori affairs. In April 1856, Bishop Hadfield responded to Browne's request for information on native affairs by assuring him that around Otaki at least there appeared to be no hostile feeling towards settlers or Government, 'no inclination to provoke war, or create a disturbance'. There was, however, a kind of 'restlessness', and a feeling of dissatisfaction among Maori leaders, manifested in large meetings in various parts of the central and southern North Island. He noted that chiefs used to decision-making and the management of tribal affairs were now denied this role, and he warned that if it came to war it would be on a scale not seen since before the Treaty was signed. The main grievance, he said, had to do with land purchase, and it was a shared grievance since chiefs could now communicate over distance, and this would lead to more 'unanimity of purpose', more 'unity of action'. Hadfield put his finger on the problem when he said that until some 'clearly defined principle' of landownership

2. On Wakefieldian beliefs and values see Ann Parsonson, 'Nga Whenua Tautohetohe o Taranaki: Land and Confiscation in Taranaki, 1839–59', revised report no 1 to the Waitangi Tribunal, claim Wai 143 record of documents, doc a1, November 1991, p 172.
3. See, for example, AJHR, 1858, e-5, pp 2–6
4. C W Richmond to Waikato Committee, 15 October 1860, AJHR, 1860, f-3, p 52

was laid down, difficulties must continue. Land purchase officers had no intelligible principle to guide them, and commissioners made arbitrary decisions in favour of occupiers or conquerors or conquered, according to which party was the more disposed to sell. Such actions inevitably led to disenchantment and a disrespect for the law. He suggested the establishment of courts presided over by 'discreet magistrates' assisted by native assessors to teach 'natives of all ranks' to respect the law. It was purely European law he had in mind. Tikanga Maori was to have no place, for at all costs Hadfield wanted the Government to 'do nothing towards establishing the influence of the chiefs', but rather to lessen it by 'every legitimate means'. He made no suggestion as to how landownership was to be established, especially if chiefs were not to be given a leading role in the process.[5]

Gore Browne's closest adviser on Maori affairs generally, and especially on land purchase policy, was McLean, on whom he was extraordinarily dependent. His correspondence with McLean was littered with such remarks as 'I wish you were here to advise me', and 'You know how entirely I depend on you, and how ill I get on without you'.[6] It did not bode well for Maori whose interests were to all intents and purposes in McLean's hands – especially since the position of Native Secretary was merged with that of Chief Land Purchase Officer in 1856, and McLean then held both posts. And it did not please settlers, the press, or parliamentarians, all of whom were scathing about McLean and his Native Department, which they saw as a barrier to colonial expansion and prosperity. The Governor noted 'the constant abuse and misrepresentation heaped upon the meritorious department by which native affairs are conducted'.[7] But Fox called the Department 'a great mystery, into whose sacred precincts none might penetrate'. There sat the Native Secretary 'enveloped in clouds of darkness – a "medicine man" – a Grand Lama, absolute in power and irresponsible to authority'. No one knew on what principles McLean acted, he said:

> no one had any clue to the rules by which he proceeded in his transactions with the Natives. . . . At one time they found him dealing with chiefs for tribal rights; at another he would only recognise individual claims, and the title of single hapu. At one time they saw incomplete purchases hastily hurried over; at another, Natives eager to sell, were put off from time to time, till at last they retracted their offers, and declined to sell when he was ready to buy.[8]

Fox's rhetoric enlivened somnolent afternoons in the House, but there was more than a kernel of truth in his argument. McLean had engineered an empire for himself and made the Governor one of his subjects. C W Richmond (the Native Minister) complained that the Native Secretary acted on his own judgement; most of his correspondence was in Maori – and there was 'no Interpreter specially

5. Hadfield memo, 15 April 1856, BPP, vol 11, pp 471–472
6. R W S Fargher, 'Donald McLean, Chief Land Purchase Agent 1846–1861, and Native Secretary 1856–1861', MA thesis, Auckland University, 1947 (quoted in Keith Sinclair, *The Origins of the Maori Wars*, Auckland [1957], 1980, p 56)
7. Gore Brown dispatch, 20 September 1859, BPP, vol 11, p 98
8. NZPD, 1861–63, p 361

attached to the Native Minister'.[9] For all that, the ministry of the day, despite their criticism in opposition, would hasten to defend the activities of the chief land purchase commissioner and his Department.[10] A little politicking was one thing, but the noble work of getting land out of Maori hands had to go on.

In 1856, Gore Browne appointed a 'Board of gentlemen . . . to inquire into the system of purchasing land from the Natives, and other matters'.[11] The board sat in April, just before the House convened, and reported back early in July. It took evidence from nine or 10 Maori, Christian and respectable, presumably; from the Bishop and several missionaries; and from an assortment of early settlers and others 'well informed' on native affairs. The Governor had asked them, among other things, to inform him about Maori authority and willingness to sell land. There was no unanimity about the answers received, in part because of tribal differences, but obviously also because of prejudice or ignorance or misunderstanding. The clearest ideas on the nature of native tenure came from the old identities whose knowledge and experience dated back to the 1820s and 1830s. Even so, when it came to the question of whether or not anyone had 'a strictly individual right to any particular portion of land, independent and clear of the tribal right', there were 27 negative replies and only two affirmative, and one of these was qualified.[12] This was the nearest to unanimity the witnesses came in their answer to any question (except for one on which all 33 were unanimous, and that concerned 'laws intended to restrain the Maories from indulgence in intoxicating drinks').[13] In some cases the proportion of affirmative and negative answers was nearer to half and half.

The board concluded that tribal title or claim to land arose from occupation, or conquest followed by occupation; that retention of title depended on successful defence of it – in other words, that might was right; that boundaries were known and often clearly defined, but they were often a source of strife; that all land was claimed by one party or another, but where it was disputed neither party could occupy it; that transfer of land came about through gifting, or as recompense for one reason or another, so that several tribes might have claims within another's tribal territory.

When it came to the claims of individual natives to land, the board reported that each native had a right in common with the whole tribe over the disposal of tribal land, and a right of usufruct in those parts that he or his parents had regularly occupied or cultivated or used, but that this individual claim did not amount to a right of disposal to Europeans 'as a general rule'. This qualification was added because one Pakeha witness maintained that some individuals of the 'Ngatewatua' tribe near Auckland had sold lands to settlers, and also to the Government, under the waiver of the Crown's right of pre-emption. A few examples of 'individual' sale were raised by witnesses, but it was never shown conclusively that they did not

9. AJHR, 1860, f-3, p 53
10. See, for example, NZPD, 1861–63, pp 359–360
11. Gore Browne dispatch, 23 July 1856, BPP, vol 11, p 473
12. Ibid, p 483
13. Fenton report, March 1857, AJHR, 1860, e-1c, p 9

have tribal consent. And in many cases when witnesses spoke of 'individual' claims to land they did not make it clear that they were speaking only of the right to use the land, not to dispose of it.

Sometimes Maori and Pakeha views were at odds; for example Ngapora: 'The Waikato tribes could not at present define their respective boundaries'; Wilson: 'The Natives, as tribes, can define very accurately their boundaries'; Whiteley: 'In some cases the natives would not define the boundaries unless it was done with the consent of the adjoining tribes'; Te Ahu: 'The natives mark off their boundaries without reference to other tribes who may dispute the boundary'.[14]

On the question of whether or not the natives were generally willing to sell their lands, opinion was divided, with 16 believing they were, and seven saying they were not. Maori opinion was split: four witnesses were undecided, saying that opinion differed from area to area, that there was more suspicion than formerly about disposal of land, and that they would refrain from selling on political grounds because of a 'feeling of nationality' that had grown up amongst them.[15]

In answer to the question 'after the boundaries are defined, should a public notice be given, calling upon all claimants to appear within a given time or forfeit their claims', there was a clear majority in favour by 16 to four. This did not bode well for the future, especially since only two of the respondents (McLean and Johnson, a district land commissioner) stated clearly that claimants could not be compelled to forfeit their claims; and the board's recommendation was that a notice be published setting out the details of any block for sale and listing the known claimants. Other claimants would then be given a certain time – 'at least three months' – or their claims would be considered as forfeited.[16]

There was a strong divergence of opinion over whether or not Crown grants should be given, and if so whether they should contain a restriction on alienation. One witness thought Maori should be encouraged to get Crown grants so they could register as voters. Some thought Crown grants would 'civilize the natives', but that they would not accept restrictive clauses as these would suggest inferior titles; others thought awarding Crown grants would just cause confusion and dishonesty as conflicting claims were advanced, and that grants must contain a restrictive clause at least until Maori were 'out of their minority'.[17]

The board noted that Maori were becoming more unwilling to sell 'their large tracts of land' because they were profiting from rising land values, and the longer the Crown delayed, the more it would cost to extinguish native title. The solution was to give them security of tenure through Crown grants for any land they actually required for occupation, and thus they would be induced to 'part with their surplus lands'. At the same time they would have an incentive to improve their 'social condition', for as long as they held land as communities, they would look to them, not to British law and institutions, for protection.[18] The board had noted Bishop

14. BPP, vol 11, pp 552–553
15. Ibid, pp 551–552
16. Ibid, p 479
17. Ibid, pp 559–562

Selwyn's complaint that native title was recognised readily enough when the Crown wanted to alienate the land, but that it should also be recognised to enable Maori 'to hold their own land by a more secure tenure, and as a legal estate protected by our laws'. Selwyn also wanted the land of principal chiefs entailed, at least for a time, so that the family would be secured 'in its hereditary influence and respectability'.[19] This was a less appealing idea; most preferred to destroy, not perpetuate, chiefly influence.

McLean and Fenton pointed out some of the practical difficulties of trying to separate individual claims from tribal claims. According to McLean, Maori would only consider relinquishing native title in the case of sale; they could see no point in obtaining an individual Crown grant for land they wished to retain. His solution was not to deal with individual claims at all, but to extinguish native title over a whole block through purchase by the Crown, and then, possibly by making Government loan money available, encourage Maori to 'acquire land at the Government sales, both town, rural and country sections'. He hoped by this means every native would get a Crown grant: 'it would be the means of dissipating many jealousies, and breaking up their confederacies' – and no amount of money, he said, would induce them 'to part with the lands they hold by Crown grant when they obtain it by purchase from the Crown'.[20] The question of the morality of buying land for a trifle and obliging Maori to get into debt to buy a fraction of it back was not raised.

Various witnesses made it abundantly clear that the Crown should not consider buying disputed land. The bishop said it was 'dangerous' to buy land from one tribe if it was disputed by another, and anyway the seller could not put the buyer in undisputed possession unless the title was 'clear and good'.[21] McLean emphasised that the 'utmost caution' should be observed at every step of the purchase programme, and that 'the respective merits of rival claimants' had to be ascertained at the start. He said he had already instructed his land purchase officers to study the whakapapa and history of the people in their area, as well as the nature of the tenure, and to familiarise themselves with the 'various conflicting claims'. They were to walk the external boundaries of land offered for sale with the native owners, and survey the reserves, but on no account were they to attempt the survey of land unless there was unanimous agreement to its sale. Surveying was considered 'an exercise of the right of ownership', and would only excite animosity towards his officers and prejudice their land purchasing.[22]

The question of chiefly power was raised by various witnesses. According to one historian, McLean 'strongly emphasized the general influence of chiefs in land sales'.[23] Certainly McLean pointed out that Te Heuheu had decreed that 'a large portion of the interior of Waikato, Waipa, Whanganui, and the Rotorua Lakes' was sacred and not to be sold, but Te Heuheu's wishes, he said, 'would only be partially

18. Ibid, p 476
19. Ibid, pp 561–562
20. Ibid, pp 542, 562
21. Ibid, p 555
22. Ibid, p 545
23. Sinclair, p 139

carried out in the Waipa and Waikato districts'; and he said that when a chief undertook to sell land he did 'not allow after claimants to trouble the purchasers'; and he recommended 'some distinctive dress' being given to deserving chiefs who 'evinced a decidedly friendly feeling for the Government'.[24] But none of that constitutes strong emphasis on chiefly influence in land sales. In fact, McLean suggested that it might be desirable, when arrangements were being made to purchase land, 'to make it a special condition . . . that certain properties should be secured by the Crown to influential and deserving chiefs and others'.[25] This sounds rather as though McLean intended to buy the compliance of chiefs in the business of land sales. One Maori witness explained that, while the chiefs laid claim to 'some right over the whole of the land', this was resisted by the younger men of the tribe; and a Pakeha witness maintained that chiefs claimed the right to retain or sell the land.[26] The strongest acknowledgement of chiefly influence came from a Maori witness: 'Many individuals would like to get their land set out and surveyed . . . but I think the chief would oppose it'.[27] The board summed up these diverse opinions in a few words: 'The chiefs exercise an influence in the disposal of the land, but have only an individual claim, like the rest of the people, to particular portions'.[28]

In several instances, the question of a combination or a league against selling land was raised. McLean talked of it operating in Taranaki, Waikato, and Bay of Plenty. He thought it originated out of Maori fear of losing their independence and being dispossessed of their own country. But John Whiteley, a Wesleyan missionary, formerly of Kawhia, spoke of 'an idolatrous clinging to the land by the old native party', and he thought the Crown should adopt whatever plan would 'most expeditiously settle the land question', since possession of large tracts of land was 'injurious to the natives'.[29] Clearly, land and mana and pagan beliefs in false gods were closely linked in his mind. The board dismissed the idea of a 'combination' as a passing fad since 'no advantage of a practical nature to the natives' could be derived from it.[30]

On the question of whether Maori would rather sell land to the Government or the private individual, there was a clear consensus (including most of the Maori witnesses) in favour of sale to the Government. But opinion was less clear on whether Maori would be satisfied with the Government acting as agents for them, perhaps at auction, and simply giving them the net proceeds of the sale.[31] Maori witnesses were sceptical of the idea, one of them explaining that he would want to see an upset price fixed for each acre, and any land remaining unsold he would want returned to him, clothed with its native title. He would not be willing to allow the Government simply to set the level of expenses for such a service as it saw fit,

24. BPP, vol 11, pp 524, 543
25. Ibid, p 545
26. Ibid, p 557
27. Ibid, p 560
28. Ibid, p 475
29. Ibid, pp 512–513
30. Ibid, p 478
31. Ibid, p 483

since it would probably leave but little for himself. Time enough to part with the title, he said, when he received payment for the land. He did not even want to see his evidence written down, lest it bind him to the plan submitted to the board for its consideration.[32]

The board concluded that such a plan, involving 'complete surrender and extinguishment of the native title' before the receipt of any payment, would be contrary to native custom and therefore not generally popular. They preferred the existing mode of land purchase and thought it the best adapted to the difficulties of the time, but they put forward some suggestions for its improvement. They began with Lord Howick's 1844 idea – registration of all native claims and claimants. They wanted greater publicity given to purchases under negotiation, to bring rival claimants forward before the sale was completed; and they wanted no instalments paid before completion of the sale – in other words no laying of 'ground bait' by McLean's land purchase agents; and they wanted all the land surveyed, whether or not it was offered for sale.[33]

McLean dissented from some of these suggestions of the board, which he obviously saw as quite impractical. He pointed out that survey before sale was not a valid option; that notification of land offered for sale would be ineffective as claimants in the more remote districts would simply never see the *Kahiti*; and he defended his practice of drip-feeding the purchase money over a period of months and years, saying that it provided for 'absentee proprietors' who missed out on the first payment – but he thought notification in the *Kahiti* of final payments might bring forward dissenting claimants. He warned that care must be taken to ensure that those offering land were indeed the rightful owners and not dubious claimants trying to make a sale of land to which they had a questionable title. The true owners, he said, were often not so ready to sell, and would not come forward to defend their claim but would make a point of ignoring a Government notice triggered by an offer of disputed land.[34] McLean showed a keener understanding of Maori views and values than the board did, but in the end it was immaterial. Regardless of McLean, the board, and the Governor, the ministers would get their way.

The 1856 parliamentary session was a shambles. There was dissension between the provinces, and between provincialists and centralists, and too much bickering for parliamentarians to attend to native affairs. Continuing dissension with his ministers over responsibility for native affairs led Gore Browne, in September 1856 to seek once more 'the advice and opinion of persons best acquainted with the Native race, and least likely to be biassed by political or party motives'. The Governor wanted their opinion on whether the management of native affairs could be conceded to a (possibly unstable) ministry chosen from a purely European assembly and restrained only by the Governor's veto; or whether the 'evil' that might result from such a system of shared responsibility would indicate that the

32. Ibid, pp 555–556
33. Ibid, pp 477–479
34. Ibid, pp 544–545

entire management of native affairs should be reserved to the Governor alone. He was surely gratified to find that all but two of his 38 informants agreed, although for various reasons, that the control of native affairs must remain with the Governor.[35]

Several of the Governor's 'experts' agreed that, while Maori had confidence in the Governor as the Queen's representative, they did not have confidence in a settler ministry, and it would be an injustice to Maori to leave their affairs in the hands of an assembly where they were not represented, and where many members belonged 'to a school who have described the treaty of Waitangi as a harmless device to amuse savages'.[36]

Archdeacon Hadfield's minority view was that ministers and legislature could not continue to neglect Maori affairs, but would have to give much more care and attention to them if they were obliged to take responsibility for them.[37] In the light of future events this was a somewhat pious hope.

There was no parliamentary session in 1857, but C W Richmond, who held five portfolios (two of them twice) in the first Stafford ministry, lent his learned judgement to advising Gore Brown on Acts regarding Maori affairs which the ministry wanted to bring forward in the1858 session. Since the Governor meant to retain Native Affairs, no Native Minister was appointed in 1856, but Richmond was de facto Native Minister until his appointment to the post in 1858. So although the final decision was in the Governor's hands, the ministry managed to pass legislation that required the assent not simply of the Governor, but of the Governor in Council – the Governor acting on the advice and with the consent of the Executive Council.[38] Richmond, particularly, wielded a strong influence, and he brought to the post not only his Wakefieldian prejudices and values but also the typical views of the hard-done-by, land-starved Taranaki settler. Above all, he was determined to purchase at least a site for a town and port at the Waitara – although he warned Parris against buying a disputed title. The Government, he said, would not 'have anything to do with land which it would require an armed force to keep possession of'.[39]

Robert Parris was appointed Land Purchase Commissioner for Taranaki in 1857, and under pressure from the Governor, Richmond, and the settlers, he was ultimately responsible for the Waitara purchase because he was on the spot, while McLean managed to keep his distance. McLean had instructed Parris in 1857 on his duties. He was to buy the land 'in such a manner as to prevent disturbances', he was to buy it as cheaply as he could get it, and if he was forced to make large reserves he should allow 'the Natives (subject to certain limitations) a pre-emptive right over such portions as they may desire to re-purchase'. They were then to hold their lands under individual Crown grants, instead of holding large reserves in common; thus 'their present system of communism' would be gradually dissolved.[40] McLean

35. Gore Brown despatch, 21 September 1856, BPP, vol 10, pp 634, 639
36. Ibid, pp 641, 660, 661
37. Ibid, pp 648–649
38. Sinclair, pp 88–89
39. C W Richmond to Parris, 6 July 1857, in *The Richmond–Atkinson Papers*, G H Scholefield (ed), Wellington, 1960, vol 1, p 282

impressed on Parris the points he had outlined to the board: he was to study native title in his district through getting local Maori to 'converse freely' on genealogies, tribal history, and tradition; he was not to attach too much weight to the claims of absentees, since they had probably 'acquired a vested interest in lands elsewhere, and should not now be considered as having an equal claim with their relatives who remain in actual possession of the soil'. At the same time he was to make a separate investigation into their claims at their actual place of residence. McLean warned Parris to beware of those claimants who were the first to offer their lands for sale, since they often had a defective title, while the 'actual owner' seldom made a 'noisy or boasting demonstration', but quietly showed that his rights were not to be trifled with.[41]

When it came to the crunch, though, neither the claims of residents nor those of absentees were allowed to stand in the way of the Waitara purchase. Those who were the first to offer the land for sale were heeded, while those who remained silent were slighted. The Governor's advisers knew very well how they should proceed, but they ignored all the rules, and the result was war.

The impasse grew out of settler attitudes – embodied in the Premier Stafford, and C W Richmond, the most influential minister in Stafford's Cabinet. According to Richmond, the two alternatives facing the Maori population were extinction of the race or its fusion with the European population, and obviously the moral duty of the colonists was to 'preserve and civilize the Native people'. The Government intended to do this by bringing them 'under British institutions', no easy task since they were dealing with a 'self-willed, suspicious and warlike race'. Since the Government lacked sufficient military power to overawe Maori, they meant to harness 'the good sense of the people and their innate capacity, under wise guidance, for self-government'.[42] In other words, they would capture and contain the Maori initiatives flourishing at the time, by bringing runanga under Government control.[43]

In 1858, Richmond introduced to Parliament three important Bills: the Native Districts Regulation Bill, the Native Circuit Courts Bill, and the Native Territorial Rights Bill. All three passed the General Assembly, but the Native Territorial Rights Act 1858 failed to receive the royal assent. The other two underpinned the Native Department for the next 30-odd years until their repeal in 1891.[44] The Native Districts Regulation Act 1858 provided that the Governor in Council, working as far as possible in cooperation with the local runanga, would make and enforce regulations concerning local matters such as petty crime, health, and stock trespass. The regulations would apply only to districts in which native title had not been extinguished, and they would be enforced by courts, set up under the Native Circuit

40. McLean to Parris, 26 August 1857, AJHR, 1860, e-3, pp 1–2
41. Ibid, p 1
42. Richmond memo, 29 September 1858, *Epitome*, a-1, pp 58–59
43. See Stafford memo, 6 May 1857, AJHR, 1858, e-5, pp 8–10; Fenton memo, March 1857, AJHR, 1860, e-1C, p 8
44. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, 1973, p 303

Courts Act 1858, where the resident magistrate, styled a Circuit Court judge, would be assisted by Maori assessors and juries. It was proposed that Fenton should introduce the new system in the Waikato on a trial basis. Stafford hoped the Circuit Courts would ultimately have jurisdiction over intra- and inter-tribal disputes concerning territorial rights – 'decisions being given according to Native usage'.[45] However, they never did deal with issues of land rights.

The Native Territorial Rights Act 1858 was to have provided for both individualisation of title and direct sale to settlers. Circuit Court judges and Maori juries would have determined tribal titles, and up to 50,000 acres a year could then be Crown-granted to individual Maori and on-sold to settlers who would be liable for a tax of 10 shillings per acre on their purchases. This was supposed to limit demand, but in effect it simply meant Maori would end up paying the tax, which settlers would subtract from the purchase price. Browne was not in favour of limiting the area which could be Crown-granted each year. He wanted Maori to be granted title to more extensive areas but restricted from alienating most of it, a provision which would never find favour with settlers. Since he would have had little control over the workings of the Act under the Governor in Council clause, he advised its rejection by the Colonial Office.[46] This brought on a new round of discussions on native tenure and highlighted the issue of who was to control native affairs. The division was between the Governor and McLean on the one hand, and the ministers backed by Fenton on the other, and it was brought to light by the deliberations of the Waikato Committee of the House of Representatives in 1860. Despite Richmond's assertions to the contrary, it was a measure that would enhance settler interests and do incalculable damage to Maori. McLean described it as a means of legalising speculation.[47] It was not that McLean was against individualisation; but he had grave objections to the way ministers intended to carry it out; and he meant to keep the business in his own hands.

Richmond launched into a passionate defence of his Bill, claiming that it had but two inseparable objects: to civilise the natives and to promote European settlement of the country. But it was by no means a measure designed 'to increase the immediate facilities for the acquisition of land by Europeans' – although he did mention in passing that 'the proposed registration of Native title (too long neglected) would facilitate the operations of the Land Purchase Department'.[48] Richmond expressed the inherent feelings of racial superiority of many settlers when he said:

> It is . . . indisputable that the communistic habits of the aborigines are the chief bar to their advancement. Separate landed holdings are indispensable to the further progress of this people. Chastity, decency and thrift cannot exist amidst the waste, filth and moral contamination of the pas.[49]

45. Stafford memo, 6 May 1857, AJHR, 1858, e-5, pp 9–10
46. Ward, pp 107–108
47. McLean memo, 25 June 1858, *Epitome*, f, p 6
48. C W Richmond memo, 29 September 1858, *Epitome*, f, pp 7–8
49. Ibid, p 8

He went on to say that even if the business of extricating native title 'from its present entanglement' might entail a measure of risk:

> that surely ought not to deter a great Christian Power from some effort to avert the shame and sin of remaining . . . the passive witness of murderous affrays between Her Majesty's subjects almost under the guns of her garrisons.[50]

Richmond's pious, self-serving protestations were in vain. The Colonial Office shared the Governor's misgivings and mistrust of settler intentions and disallowed the Bill. It was only a temporary set-back, however, for the ministry and land-hungry settlers. This Bill was a clear indication of the policy they were working to get in place.

In September 1859 Gore Browne sent the Duke of Newcastle, Secretary of State for the Colonies, the results of his latest consultations with yet another group of 'influential persons best acquainted with native affairs', this time on the question of 'the waste lands belonging to the aboriginal natives'.[51] He considered the time had come for a change in land purchase methods before the increasing settler numbers on one hand and Maori reluctance to sell on the other led to a clash of mammoth proportions. It was clear to him that 'a ministry, responsible to a popular assembly', would yield to settler pressure to make land available, with or without the 'full and intelligent consent' of the Maori owners. Thus it was imperative that Maori affairs continue to be the responsibility of the Crown and not the ministers, but he recommended the establishment of a permanent council of native affairs, nominated by the Crown, to assist the Governor to govern the Maori. He suggested a panel of seven Europeans – men of the calibre of the Bishop and the former chief justice, William Martin; men who were known and trusted by Maori. Together with the Governor they would draw up regulations concerning the settlement of the 'waste lands'.

His first requirement was consideration of the 'real interests of the aboriginal owners'. As much land as was 'necessary for their use and support' – perhaps one-fifth of their lands – was to be Crown-granted to them and made inalienable, and another fifth was to be set aside as reserves exclusively for their use. Then in European districts, once native title had been 'well ascertained', the land could be 'clothed with a Crown title' and sold by public auction 'for the benefit of the aboriginal owners'. All the remaining lands, which were not only useless, but actually harmful to Maori, should then be made available to settlers, with part of the proceeds from sale set aside for the 'moral and social improvement of the Maori race in the locality from whence it is derived'. Such a scheme, so obviously advantageous to Maori, should 'induce them to sell their lands more freely to the Crown', and thus satisfy settler demand and reduce the risks of a clash between the two races.[52]

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50. Ibid
51. Gore Brown dispatch, 20 September 1859, BPP, vol 11, pp 93–99
52. Ibid, pp 93–96

Although Gore Browne obviously believed he was putting the interests of Maori first, he showed no inclination to consult them on the issue; and while he understood full well that Europeans coveted the best land and were not about to sacrify themselves to 'sympathy for the natives, and all that kind of humbug' (as a member of the Auckland Provincial Council had put it),[53] he did not face the fact that that was exactly the land Maori would wish and need to retain for themselves. Nor did he suggest how native title was to be 'well ascertained', or how settlers with their importunate demands were to be restrained in the meantime. While his scheme might not be a 'panacea for all evils', he thought it was surely an improvement on the present system;[54] and he looked back rather nostalgically to the time when the South Island was acquired 'for an almost nominal sum', and large parts of the North Island for not much more. The pity was that the remaining millions of acres had not then been acquired too, 'at a cost too insignificant to be calculated by the acre'.[55] He obviously did not think it in Maori interests to be paid fairly for their land.

In the years after Grey's departure there was an escalation in Taranaki of tensions over land sales, caused and exacerbated by the operations of McLean and his land purchase officers. They reached dangerous proportions in 1858, only to subside again in mid year. As Parris prepared to take up his land purchase operations again, McLean warned him to wait, saying the Government was considering a 'more general plan' for the purchase of land in Taranaki, the effect of which might take 'some little time to unfold'. He would not be more specific.[56]

At the end of 1858 Parris reported that Teira was 'working hard' for the sale of Waitara.[57] The Governor's acceptance of Teira's offer of the land in March 1859 marked a turn around in Government policy. Possibly this was 'the more general plan' McLean had mentioned some months before. Certainly Gore Browne had told a delegation of 'respectable inhabitants' of New Plymouth that he would not allow 'the rights of chieftainship' to prevail over the rights of 'such as have a claim in the land in question'[58] – those he would call 'owners', but who were merely useholders. He told the Maori gathering on 8 March:

> that he would never consent to buy land without an undisputed title. He would not permit anyone to interfere in the sale of land unless he owned part of it; and . . . he would buy no man's land without his consent.[59]

And the offer of the land was not unexpected. McLean most probably, and Parris certainly knew, though perhaps not the Governor nor even Richmond.[60] Wi Kingi

53. Ibid, p 96
54. Ibid, p 97
55. Ibid, pp 93–94
56. McLean to Parris, 14 August 1858, AJHR, 1861, c-1, p 224
57. Parsonson, pp 164–165
58. Gore Brown dispatch, 29 March 1859, AJHR, 1861, c-1, p 226; A S Atkinson journal, 12 March 1859 (cited in Scholefield, vol 1, p 452)
59. *Taranaki Herald*, 12 March 1859 (quoted in Sinclair, p 137)
60. AJHR, 1861, f-2, p 4

knew too, and a month before the meeting with the Governor, wrote to remind him that he had always said he would not sell his land at Waitara.[61]

There is no doubt there was quite a conspiracy among McLean and his men to engineer the situation in the hope that this offer of land would trigger further offers so that the long-desired Waitara would finally pass into European hands – and just as importantly rid the area of what Richmond was pleased to call 'a pack of contumacious savages'.[62] Just how far the Governor was implicated in the plot is unclear. Maybe he had succumbed to ministerial pressure. Certainly, he had gone to Taranaki determined to deny chiefs their right of chieftainship, their rangatiratanga guaranteed by the Treaty, and there was no better chance than this to do it. All the advice he had sought and received over the years had gone for nothing. His stubborn single-mindedness and the lack of any word of caution from his officials, led to a decade of war.

In December 1860, in the midst of the first Taranaki war, C W Richmond wrote a memo in answer to a question from the Colonial Office to Gore Browne, on the question of whether or not there existed in the chief or tribe:

> a right distinct from one of property, to assent to or forbid the sale of any land belonging to members of the tribe, in cases where all the owners are willing to sell.

He was convinced no such right existed prior to European settlement since at that time 'such a thing as a sale of land, in our sense, had not been heard of'; and by very sophisticated and self-serving argument he showed, at least to his own satisfaction, that it had not been 'recognized or asserted' since then, and therefore no such right could be supposed to exist. But he warned that did not mean in future principal chiefs might not attempt to use their influence 'to check the exercise by Native landowners of those independent rights of alienation which they have hitherto enjoyed'; and he thought it would be 'generally prudent' to respect de facto chiefly authority and influence 'without too nice an enquiry' as to whether it really existed de jure.[63]

In his attempt to answer the Colonial Office's question Gore Brown at least turned for information to 'reliable authorities' – all those he could find who could or had already expressed an opinion on the topic. They included the Board of Inquiry of 1856, several missionaries, officers of the protectorate or the native office, and other Crown officials, many with long experience in New Zealand and native affairs. They did not include members of his current ministry.[64]

None of Gore Browne's authorities really answered the question. Several talked of a tribal right to alienate, but not a chiefly right to forbid alienation. Only Bishop Hadfield (in evidence to the House in August 1860) came close to a full answer when he repeated his 1845 opinion, written for Grey in the wake of the 'collision' at Wairau. It dealt with the exercise of rangatiratanga, and implied that of course a

61. AJHR, 1860, E-3A, p 5
62. Cited in Sinclair, p 133
63. C W Richmond memo, 3 December 1860, *Epitome*, f, pp 27–28
64. Gore Brown dispatch on 'Seignorial Right', 4 December 1860, AJHR, 1861, e-1, pp 5–25

chief would have power of veto over any sale which might threaten the tribe's well-being. He said:

> Allowing [the] very questionable right of the chief to alienate any part of the territory of a tribe, it can scarcely be allowed to any chief of a hapu, even should he act in accordance with the various individuals of the hapu. It must be remembered that a tribe, however subdivided into hapu, is one, and cannot allow its integrity and strength to be impaired by the independent act of one hapu, which it is bound to identify with itself in all things, and to protect if involved in any quarrels or difficulties.[65]

But in any case, the Colonial Office's question was totally illogical, since it confused owners with users. It had long been acknowledged that title was tribal, not individual, so if all owners were willing to sell, then the chief, who was ipso facto an owner, was also willing to sell, and the question of his forbidding the sale would not arise.

The illogicality escaped Gore Browne, and he embarked on a lengthy justification for his denial of Wi Kingi's 'seignorial right' to veto the sale of the Waitara. He admitted that in the case of 'certain great tribes in full possession of their tribal territories', the Crown had recognised both the tribal right to sell their 'ancient inheritance', and the influence of their 'principal men in assenting to or preventing sales':

> No Government for instance would have thought of making a purchase at Ngapuhi or at Waikato, in the teeth of the veto of great Chiefs such as Tamati Waka Nene and Potatau Te Wherowhero.

But in the case of tribes 'broken and scattered by conquest', the Crown had neither recognised the tribal right of alienation, 'nor permitted the exercise of a veto on such alienation by the chiefs'. This was the case with 'the Ngatiawa of Taranaki',[66] and whether or not it was correct policy, he was not prepared to argue. It was sufficient for him that that was how it had been 'since the foundation of the Colony'; he was simply following precedent.[67]

He illustrated this by detailing actions of Hobson, FitzRoy, and Grey 'in the matter of the Taranaki Land Question',[68] and although none of these precedents had provided any solution to Taranaki's problems, Gore Browne was prepared to try more of the same. When it led to war he thought it right to justify his actions by saying he had done no more at Waitara than all the governors before him had done in Taranaki.[69]

As well as asking Gore Browne about the existence of an 'alleged' seignorial right, the Colonial Office also asked whether he believed there were reasons 'apart

65. 'Opinions of Various Authorities on Native Tenure', AJHR, 1890, g-1, pp 9–10
66. In the nineteenth century, Te Ati Awa of Taranaki were referred to in official documents as Ngatiawa.
67. AJHR, 1861, e-1, p 8
68. Ibid, pp 10, 13–14
69. Ibid, p 14

from the Treaty of Waitangi, in favour generally of the recognition of such a right', and whether they justified Wi Kingi's stance over the Waitara.[70] Gore Browne questioned whether in fact such a right was guaranteed to the chiefs by the Treaty. Busby, he said, absolutely denied it; he could find no evidence that Hobson 'anywhere admitted it'; and he thought the Maori interpretation of the Treaty was clearly demonstrated by a lower Waikato man, who had told a recent Kingite hui that each man should be allowed to do what he liked with his own land, 'that their right to their land was secured to them by the Treaty of Waitangi', and that no king ever interfered with his people when they wished to sell their land.[71] This was 'humpty dumptyism' taken to extremes: the Treaty could be made to mean whatever it was chosen to mean.[72]

Gore Browne quoted Sir William Martin, who said that the Treaty 'neither enlarged nor restricted the then existing rights of property. It simply left them as they were'. The Governor claimed that this principle had been recognised 'in every cession of territory since the Treaty', and that to attempt to introduce some new kind of right now would be an immensely difficult task:

> Assuming any right, distinct from a right of property in the soil, to be admitted in a Chief to assent to or forbid the sale of land where the real owners are willing to sell, it would still have to be determined in whom that right should vest. The Government would first have to decide what was the 'Tribe', and who was the 'Chief' of the Tribe. Failing this they would have to decide what were the respective subdivisions of the tribe, and who were the Chiefs of those subdivisions.[73]

He felt it would be both 'unjust' and 'impolitic' for the British Government suddenly to announce that 'any Chief whatever, distinct from his right of property in the soil', had the right to forbid the 'real owners of the land' from ceding it to Her Majesty.[74]

It seems that despite all the 'expert' advice handed out over the years, the decision-makers could not or more likely would not understand the fundamental issues of rangatiratanga; that article 2 of the Treaty guaranteed Maori not just 'ownership', but full authority over their lands. This was something Europeans did not want to know.

70. Ibid, p 5
71. Ibid, pp 9–10
72. See Bruce Biggs, 'Humpty-Dumpty and the Treaty of Waitangi', in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, I H Kawharu (ed), Auckland, 1989, p 304
73. AJHR, 1861, e-1, p 25
74. Ibid

CHAPTER 4

THE NATIVE LANDS ACTS AND THE NATIVE LAND COURT

The Native Lands Acts and the establishment of the Native Land Court which provided for individualisation of title and direct sale to settlers might be seen as an inevitable outcome of the debates of the 1850s over native title and seignorial rights. Both Maori and settler were dissatisfied with the Crown's handling of the land question. Settlers wanted easier access to land; many Maori were totally opposed to sale, although some wanted the freedom to sell on the open market, and others preferred to derive an income from leasing their land but retaining the freehold.

The system introduced in the early 1860s by the Lands Acts was supposed to acknowledge Maori rights as British subjects by recognising their legal right to all their land, and allowing them to do what they chose with it, including getting full market value if they sold it. It would also 'unlock' the lands hungered after by the settlers, yet prevent another disaster such as had happened at Waitara over the purchase of land with a disputed title. And it would curb the exercise of the chiefly veto – it would deny rangatiratanga. Although the Queen's assent had been withheld from a similar measure in 1858, the Colonial Office, with the experience of Waitara before it, had reversed its policy and advised the Governor that Her Majesty's Government would be:

> willing to assent to any prudent plan for the individualisation of native title and for direct purchase under proper safeguards of Native lands by individual settlers, which the New Zealand Parliament may wish to adopt.[1]

Various schemes had been suggested in the late 1850s to give Maori some measure of local autonomy and some say in the disposal of their lands. In 1857, F D Fenton was sent to the Waikato as resident magistrate in response to a request by Waikato Maori for an appropriate code of laws, to control problems such as adultery, trespass, European squatting, drunkenness, violence, and cursing, and to prohibit or restrain acts of muru and makutu and the power of tapu ('except in very special cases'). They wanted the laws to be binding on both races residing in native districts.[2]

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1. Dispatch, 5 June 1861 (cited by Bell, NZPD, 1861–63, p 610)
2. Gore Brown memo, 28 April 1857, AJHR, 1858, e-5, p 7

Fenton, 'an ambitious, conceited and fractious man', according to Ward; 'a cultivated man' with an 'intellectual comprehension' of acculturation, according to Sinclair,[3] had impressed himself on the Government, and especially on the ministers, through a series of memos written while resident magistrate at Whaingaroa in 1857. Fenton was impressed with the efforts of younger Maori leaders to come to terms with the new world through the activities of traditional runanga dealing with contemporary problems. It was these men who wanted a European magistrate to advise them and guide their efforts. The runanga movement of this period ran parallel to the King movement, and runanga were operating efficiently far beyond the Waikato. For the most part they aimed at social control – of both Maori and Pakeha in their area – and they expected Government approval, guidance, and support. Government, however, was more interested in acquiring Maori land and subjecting the people to British law and authority than supporting their efforts at self-help, and ultimately Fenton's role was to capture and contain Maori initiative and bring it under Government control:

> the movement will, if properly guided, result in nothing more than the permanent establishment of a powerful machine, the motive power and *the direction of which will remain with the Government*. [Emphasis in original.][4]

Fenton envisaged 'fixity of residence and thickening of the population' by concentrating the people in villages.

> Amidst a fixed and large population individuality is lost, public opinion is formed, and can easily be moulded into a beneficial and productive form by the superintendence and care of the central power . . . Thus also will the waste land cease to be regarded as the bulwark of independence, and the importance attached to the possession of it will be transferred to the laws.[5]

According to Fenton, Maori were retaining their land principally from political motives, but if land purchasing was only properly regulated, and Maori shown that 'their importance and position [were] properly recognized and protected', they would 'cease to fear for their independence and . . . cease to regard the possession of the land as a matter of such deep interest'.[6] Such was the reasoning of the man whose 'unusually perceptive reports' would 'do credit to a modern anthropologist'.[7]

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3. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, 1973, p 94; Keith Sinclair, *The Origins of the Maori Wars*, Auckland [1957], 1980, p 100
4. Fenton memo, March 1857, AJHR, 1860, e-1c, p 8. See also 'Report of the Waikato Committee', 31 October 1860, AJHR, 1860, f-3, p 2: 'The Governor approves the appointment of Mr Fenton, and desires to urge on his Advisers the importance of giving him instructions without delay. The present moment is . . . a critical one; and if the Government does not take the lead and direction of the Native movement into its own hands, the time will pass when it will be possible to do so.'
5. AJHR, 1860, e-1c, pp 9–10
6. Ibid, p 10
7. Sinclair, pp 100, 102

Working in various villages throughout the lower Waikato, Fenton had some success as a circuit court magistrate, but his ulterior motives were very evident as he worked to create a 'Queen party' and deliberately ignored or slighted the great Kingite chiefs. Gore Brown withdrew him on McLean's recommendation before he exacerbated the situation further,[8] and before the Native District Regulations Act, whose provisions he was supposedly trailing, was put in place.

The report of the Waikato committee, a select committee which reviewed Fenton's operations in September to October 1860 – and commended his work – was critical of his withdrawal and the abandonment of the great experiment, and against McLean's objections recommended further efforts to civilise Maori and introduce law and order through the medium of that 'old Maori custom . . . the Runanga'. While they were about it, the committee criticised McLean's view of and attitude towards the King movement, and his influence in the matter of Fenton's removal; and they called attention to 'the entire want of harmonious action between the Ministry and the Department of the Native Secretary'.[9] This was indeed a crucial factor in the whole mismanagement of the period, and the antagonism between Fenton and McLean endured until McLean's death in 1877, and reflected negatively in amendments to the Native Lands Acts and the operations of the Native Land Court.

When Grey returned for his second governorship in September 1861, he worked with the Fox ministry on a scheme which would involve Maori in their own local Government. Grey's 'new institutions' were not so new. Like Fenton's scheme they were based on the traditional runanga, operating under the direction of the resident magistrate, but they also involved the creation of district runanga under the direction of a civil commissioner. The districts of course were a European construct, overriding tribal boundaries, and grouping antagonistic tribes in a largely unworkable structure. Village runanga worked well in several areas, and dealt successfully with questions of stock trespass, fencing, and dog nuisance, as well as traditional questions such as puremu. But Grey's runanga were designed to have another function, that of determining tribal, hapu, and individual land interests, which could be Crown-granted, and alienated – but under tribal direction. Land of course was the sticking point, and nowhere did resident magistrates or civil commissioners have any lasting success in dealing with land issues. Settlers were impatient over the whole question of Grey's runanga. They were not interested in Maori self-government, and certainly not in the recognition of tribal title. What they wanted was rapid individualisation of title, and direct purchase from individual Maori.[10]

8. Ward, p 106
9. AJHR, 1860, f-3, pp 2–4
10. On Grey's runanga system, or 'new institutions', see Ward, ch 9.

4.1 The Native Lands Act 1862

The Governor and ministers lost interest in their latest scheme for unlocking Maori lands when it became clear that it would not succeed, yet when Parliament met in 1862, Fox still had ideas of using the runanga system as the basis of new land legislation. On 22 July he introduced his Native Lands Bill to Parliament, and it was read a first time but lapsed when the Fox Government resigned a few days later.[11] Fox's Bill would have enabled Maori to determine their own land titles and alienate their land directly to settlers; and it would have prevented speculation by delaying the granting of freehold title for 10 years to one economic block per settler, conditional on occupation. Such far-sighted restrictions on wholesale alienation of Maori land were bound to find little favour among settlers, speculators, and most parliamentarians.

Within a month there was a new Native Lands Bill before the House, 'more calculated to suit European tastes'.[12] It was brought in by Dillon Bell, Native Minister in the Domett ministry, with the backing of Thomas Russell and Frederick Whitaker. Sewell, Attorney-General in both the Fox and Domett ministries, voted for the Bill, but he had grave reservations about it and regretted the loss of the safeguards built into the earlier Bill.[13] He predicted that within five years it would be worth £10,000 a year to Russell. 'I am frightened of it all', he wrote. 'I detect influences at work out of sight which are not simply dangerous, they are corrupting'.[14] His qualified acceptance of this legislation led to his replacement as Attorney-General on 1 January 1863 by Whitaker, a member of the Legislative Council, who took the position, 'but not in a ministerial capacity'.[15] It was typical of Whitaker to accept an appointment to office on his conditions, which did not include denying himself time and space to continue the lucrative legal and land speculation practices he conducted in partnership with Russell. It was also indicative of the ministry's intentions: there would be no impediment to the alienation of Maori land.

All signs of Fox's 'peace policy' were swept away in this new Native Land Bill. This was a hard-line ministry. Alfred Domett, the Premier, was a Wakefieldian settler and one of Nelson's early leaders; he had told the House 'he still believed that, if the Natives had been taught first to respect the power of English arms, the schemes proposed for their benefit would have had much better chance of success'.[16] Now he explained that he would still argue in favour of the theories of Vattel and Arnold, but it would be 'of very little use nowadays to assert and prove their correctness . . . unless we could get the natives to take the same view as ourselves'. Unfortunately, he said, Europeans had given Maori the idea they owned

11. NZPD, 1861–63, pp 421–426
12. Ward, p 152
13. NZPD, 1861–63, pp 686–691
14. Sewell journal, 9 September 1862 (quoted in J Rutherford, *Sir George Grey KCB, 1812–1898: A Study in Colonial Government*, London, 1961, p 478)
15. *Statistics of New Zealand 1891–93*, pt 1, p 5
16. NZPD, 1861–63, p 516

all the land in New Zealand and the Treaty of Waitangi, for which he had no more respect now than he had 20 years ago, had only confirmed them in this idea. He said:

> But there was something mean, insidious and almost dishonest in the Treaty. For while thus professing to acknowledge their ownership, it gave a right of pre-emption to the Queen which took away all the value of the ownership.

And the result of this was that Maori felt 'a deep sense of wrong . . . a feeling that they had been unjustly dealt with', since the Government made such a profit on the resale of their land. He was sure this Bill would remove a great grievance and restore Maori confidence in the British Government. It was the maintenance of the Queen's right of pre-emption, he said, that had been 'one of the main causes of producing actual civil war' in the country. Such were the views of the Premier of the time.[17]

The Domett ministry proposed that all land over which the native title had not been extinguished be declared 'the absolute property of the persons entitled to it by native custom', then once ownership had been ascertained and registered by properly constituted courts under the control of the Governor, the owners would be able to deal with it as any of Her Majesty's European subjects dealt with their own Crown-granted land. Bell argued that Maori would thus 'obtain the full benefit of their wealth', they would regain confidence in the Government, they would have an interest in submitting to British law, and by doing so they would 'infallibly themselves become wealthy men'.[18] He denied his Bill would promote landsharking, but suggested that anyway it would not be a bad thing if one wealthy man bought up the whole of the Waikato. He would have to pay a decent price for it, the Maori owners would receive vast sums of money – and most of it would return to Europeans in trade. He wound up his speech by assuring the House that the new system would be workable, beneficial to both races and to the colony as a whole – and infinitely preferable to the system which led to war in 1860.

Others in the House were not convinced by Bell's suave reasoning, calling the Bill illegal, an abnegation of the fundamental principle of the Treaty, an adroit evasion of clause 73 of the Constitution Act (which entrenched pre-emption), and warned that it would 'attract a host of land jobbers and speculators' from across the Tasman and all around New Zealand. One member though, would rather see the land 'in the hands of a few white men than of the Natives'; at least roads would then be made through it.[19]

I E Featherston, superintendent of Wellington, was appalled that the Treaty was being 'denounced as an insuperable barrier to colonising operations'; and that any sane man would believe 'that the Natives had not received full value for the lands sold . . . to the Government', since obviously the land had 'no value but what it acquired by colonization', and the Government made no profit from selling high-

17. Ibid, p 650
18. Ibid, pp 650–611
19. Ibid, pp 616, 623, 624, 646

priced land, since all of the money was ploughed back in the shape of roads and bridges.[20] Featherston, though, had an ulterior motive. He was determined that the Manawatu–Rangitikei block, which he claimed was already under negotiation between the 'owners' and the Wellington Provincial Council, would be exempted from the workings of the Act. Individualisation of title and direct purchase by settlers would, he claimed, 'be the financial ruin of the Wellington province'.[21]

Bell brought up again one of the arguments advanced in favour of the Act – that the illegal leasing of land was threatening the peace in more than one area, where disputes over 'grass money' had broken out. If they were unable to enforce the Native Land Purchase Ordinance 1846, which prohibited the purchase, use, or occupation of customary land not clothed with a Crown title, then it must be repealed or amended. 'You cannot carry out the ordinance; you cannot any longer tolerate the public scandal of its violation; and therefore legislate in some direction you must'. And, going back to the Newcastle despatch of 5 June 1861, he claimed the Queen's Government had 'expressly invited' them to waive the right of pre-emption.[22]

The Bill required the royal assent, and possibly an Act of the British Parliament, since it varied the terms of the Treaty and was in conflict with section 73 of the Constitution Act, so despite their reservations about a lack of safeguards in the Bill a sufficient number of members supported it for it to pass through both the upper and lower House by 15 September 1862. In relation to the Fox ministry Bill, Grey had proposed that no one be allowed 'to grasp' more land than he could use, that a 10-year occupancy be required of the purchaser, and that the runanga concur in the sale of the land.[23] None of these safeguards Grey had considered essential were built into this Bill, but both he and many members of Parliament felt that despite its faults it was essential that it be passed; 'an indispensable condition for quieting Native difficulties' was to recognise customary native title and put in place an orderly means of extinguishing it.[24]

The preamble to the Act recited the provisions of article 2 of the Treaty and stated that it would be in the interests of 'the peaceful settlement of the Colony and the advancement and civilization of the Natives' if their rights to land were ascertained and defined and then 'assimilated as nearly as possible to the ownership of land according to British law'. The primary interest of the legislature was to advance the peaceful settlement of the colony, and that necessitated destroying the 'beastly communism' of Maori society. Transmuting communal title to freehold title would break down Maori society – in the language of the politicians, it would 'allow Maori to advance in civilization' – and of course it would destroy their power base. However, under the 1862 Act a certificate of title could be issued by a specially constituted court to a 'Tribe Community or Individuals'. If the certificate

20. Ibid, p 647
21. Merran Lambeth, 'Ture, Manawhenua, me Tino Rangatiratanga: Rangitane and the Crown', BA (Hons) research exercise, Massey University, 1994, pp 17–18
22. NZPD, 1861–63, pp 652–653
23. Ibid, p 686
24. Ibid, p 687; AJHR, 1863, a-1, pp 7–8

was issued to an individual, or to fewer than 20 persons, they could retain native title if they wished, or they could have the certificate endorsed by the Governor, and it would have the force of a Crown grant. The person or persons named in the certificate could have the land partitioned if necessary and then be free to sell or lease to whomsoever they chose. If more than 20 persons were named in the certificate they could have some or all of the land partitioned and individualised, or they could sell or lease if they wished on a tribal basis, subject to certain restrictions.[25] They could not sell under the certificate of title, 'because the "tribe" cannot make a conveyance'; they would have to go back to the court for a partition order or 'a new certificate issued in the names of trustees, with a proper declaration of trust to act on their behalf'.[26]

The Governor, not the Governor in Council, was to have the responsibility of constituting the courts which would have the power:

> to declare, record, and amend the Native law or custom relating to land: so that in process of time some Canons of Native Tenure may be laid down, and the varying customs of different Tribes acquire some settled form; and so that the same tribunal which ascertains title by Native Custom, may purge it from barbarous practices by refusing to admit these as Custom at all.[27]

The court was to be 'mainly composed of Native Chiefs' of the district, although they would work under the 'presidency' of a European magistrate. But there were no provisions to safeguard the disposition of the land once title was ascertained, apart from the restrictions the Governor could impose on the wholesale alienation of tribal land. He could make:

> Tribal or other Reserves for the special benefit of the tribe . . . or of particular Chiefs or families . . . to prevent the whole of their land being improvidently disposed of by them.[28]

It was late 1864 before the Act received the royal assent and could officially be brought into force. In the meantime, the speculators had had a field day, making private arrangements with 'complaisant chiefs' in anticipation of the passage of land through the courts.[29] The 1891 report of the Commission into Native Land Laws called the 1862 Act 'practically a dead letter',[30] but it did operate quite successfully in the north for a few months from June 1864. The land purchase officer at Kaipara, John Rogan, assembled a court to determine the title to a block under negotiation by an anxious buyer and willing sellers. The assessors – some leading men of the district – did a good job of determining the rightful owners, and the press reported they seemed well suited to the task.[31]

25. AJHR, 1867, a-1, p 10
26. Bell memo, 6 November 1862, AJHR, 1863, a-1, p 11
27. Ibid, p 9
28. Ibid, p 10
29. Ward, p 152
30. AJHR, 1891, sess ii, g-1, p vi
31. Ward, p 180

When the Whitaker–Fox ministry were notified in August 1864 that the Act could come into operation they made some tentative moves towards setting up a court. George Clarke, once Protector of Aborigines and now Civil Commissioner at Waimate, was asked to draw up regulations for its operation, to take the chairmanship himself, and to suggest a panel of assessors who could work with him. But the ministry was on its last legs after a long battle with Grey over land confiscation, and in late November it was replaced by a 'self-reliant' ministry under Weld. It fell to Weld to bring the Act into operation in December 1864, and he appointed three judges, George Clarke, W B White, and John Rogan, each to act in his own district; and as assessors for each court a number of local chiefs, including W Kukutai, A Kaihau, H Tauroa, W Te Wheoro, H Matini, H Nera, and T Tarahau.[32]

This was the sort of court envisaged by the 1862 Act, and the sort of role for Maori leaders intended by Fox when he introduced his Native Land Bill, by Grey in his 'new institutions', and by those who had advocated working through traditional runanga. It could have worked well – Rogan's court was evidence of that. Maori leaders, denied any official role since Waitangi, had long sought to play a part in 'native administration', especially in the vital sphere of deciding land boundaries in their own areas. They were the experts, the only ones competent to ascertain and declare, in the words of the Act, 'who according to Native Custom are the proprietors of any Native Lands and the estate or interest held by them therein'. But no ministry could hope to survive in that climate of racial tension and antagonism if they made serious efforts to involve Maori in decisions relating to land. The settlers were intent on getting land out of Maori hands, their parliamentary representatives were intent on 'getting rid of the Native difficulty'.[33] The 1862 Act was part of their pacification programme, a means of giving Maori something to do to take their minds off politics – those endless 'discussions of the runanga which lead to no practical result'.[34] As such, the effort to 'involve Maori in their own administration' was little more than window dressing, as was shown clearly after F D Fenton was appointed chief judge of the Native Land Court by Weld early in 1865.

Fenton, 'who was eventually to have a fateful influence on the whole future of Maori land legislation . . . was given virtually a free hand in reorganizing the Court and making appointments', and he held the position until his retirement in 1882.[35] His condition of accepting the appointment was that the court be founded on his 'own principles', and that he held office 'during good behaviour, responsible only to Parliament'.[36] Far from continuing with the type of court Rogan had put into operation in the far north, Fenton set up a new one, closer to the Supreme Court model, whereby the districts established under the 1862 Act would be replaced by a colony-wide system, with judges moving from centre to centre, and supposedly

32. Ibid, pp 180, 333
33. NZPD, 1861–63, p 649
34. Ibid, p 684
35. Ward, p 180
36. Fenton evidence to Native Affairs Committee, 1 September 1885, AJHR, 1885, I-2B, p 31

handing down uniform decisions. The loss of knowledgable local magistrates and assessors, and the imposition of eurocentric court procedures, resulted in a system far removed from anything previously envisioned. But it was one favoured by many settlers, who believed decisions must be imposed on Maori, and that it would be impossible otherwise to get them to agree over disputed boundaries – and this despite the successful resolution of such issues by runanga in many areas.[37] What settlers really meant was that the Maori way of solving such problems took time, and this they were not prepared to concede.

Although Fenton had warmly recommended the working of runanga in the Waikato in 1857, he had more than once expressed his disapproval of Government-appointed assessors. He told the Board of Inquiry in 1856 that they lacked weight, that they acted partially in matters concerning their own tribe and 'injuriously' when dealing with others.[38] The problem was that their position was not founded 'on the only basis known to the usages of the Maori, the expressed approval of the people'. However, he thought that many of the Government-appointed assessors were the very men the people would themselves have chosen, and suggested it was in the Government's interest to allow them this choice while retaining a veto in case of an 'unsuitable' decision.[39] However, when it came to running his own court he was not interested in Maori having a consultative – and delaying – role. 'The pontifical decisions of Fenton and his brother Judges were expected to follow quickly from a hearing of evidence and alienation of land could ensue'.[40]

4.2 The Native Lands Act 1865

There was opposition to a court such as Fenton intended to run being enshrined in legislation, but settler and speculator pressure won out and the Native Lands Act 1865, 'suggested' by Fenton himself, provided for the establishment of a formal court, not one comprised of a panel of chiefs working with a European judge or magistrate.[41] Two assessors would be assigned to each court, they would be appointed by the Governor and would hold their office 'during pleasure'. There would be a chief judge and other judges, also appointed by the Governor, and they would hold their office 'during good behaviour'. The chief judge could make, revoke, or alter the rules by which the court would operate, and he would have the same power as any Supreme Court judge to summon witnesses and punish those who failed to attend or were hostile to the court. All the laws relating to land over

37. Ward, p 181. For examples of successful resolutions achieved by contending parties in the 1860s, 1870s, and 1880s, see Ward, p 182.
38. BPP, vol 11, p 505
39. AJHR, 1860, E-1C, p 11
40. Ward, p 182
41. He told the Native Affairs Committee that while he suggested the 1865 Act, the 1862 Act 'was not mine'; 4 September 1885, AJHR, 1885, I-2B, p 52. However, he is reported elsewhere to have helped draft the 1862 Act; W L Renwick, 'Francis Dart Fenton, magistrate, judge, public administrator, musician', in W H Oliver (ed), DNZB, Wellington, 1990, vol 1, p 122.

which native title had not been extinguished were to be amended and consolidated by this Act. As it repealed the Native Land Purchase Ordinance 1846, it would no longer be illegal to make private deals with Maori before title was ascertained. J E FitzGerald, Native Minister in the Weld ministry, had had 'to give up' some of his earlier-stated intentions and give in to land speculators, who were now free to risk their money by financing a claimant group in the expectation that the court would award them title.[42] There was little fear of the speculator losing his money. Non-sellers could not hope to afford an expensive court appearance without having to sell land to pay for it, but neither could they avoid one, since Fenton required all claimants to appear in court if their claim was to be considered. A move to require sale to be by auction only was defeated,[43] but in contrast to the lengthy debate in both House and council over the 1862 Bill, this one created almost no debate. It was introduced by one Government and passed by another, and obviously it suited the mood of the times, for it faced almost no opposition from the time of its introduction until it was passed a few weeks later. After several years of war, settler and Government attitudes had hardened, and the new Act reflected this. Despite Sir William Martin's pleading,[44] British legal procedures and ideas on land holding and descent were to be imposed on Maori with little or no consultation and no leeway such as under the 1862 Act.

Over the years, great things were claimed for the Act. It was, of course, said to be in the natives' own best interests. F E Maning, one of the earliest Native Land Court judges, maintained that it held out to Maori 'their last chance of temporal salvation', for the difference between holding land 'as commonage and holding it as individualized real property' was 'the difference between civilization and barbarism'.[45] As Fenton expressed it:

> in the destruction of the communal system of holding land is involved the downfall of communal principles of the tribe, and the power of combination for objects of war or depredation. When a man is comfortably settled on his own farm, he is not ready to follow his chief in an agitation which promises nothing beyond a little excitement, and jeopardizes all he has got.[46]

According to him, nothing that had yet been tried had 'so largely tended to produce in the minds of the Maori peaceful desires and a grateful confidence in the Legislature' as the 1865 Act.[47] He qualified this in later years by saying that 'it could not have been expected that the first Act, drawn when nobody had any experience, should have been very good'.[48]

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42. NZPD, 1864–66, pp 370, 371
43. Ibid, p 729
44. W Martin, 'Notes on the best mode of introducing and working the Native Lands Act', 30 June 1865, *Epitome*, g, pp 3–13
45. Maning to Fenton, 24 June 1867, AJHR, 1867, a-10, p 8
46. Fenton to McLean, 28 August 1871, AJLC, 1871, p 10
47. Fenton to J C Richmond, 11 July 1867, AJHR, 1867, a-10, p 5
48. AJHR, 1885, i-2B, p 47

The success of the Act was judged by the fact that in less than two years from its passage into law the court had awarded title to 1,220,477 acres, 957,774 of them in the Auckland province.[49] But the Act was said to have two objectives: to bring the bulk of the North Island 'within the reach of colonization'; and to detribalise native society:

> to destroy if it were possible, the principle of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the native race into our own social and political system.[50]

This conscious attack on Maori society was exacerbated by the way the Crown permitted the court to operate under Fenton. Since there was no case law to guide him, he aimed to create his own, and after some months of operation he laid down the rules that were to guide his fellow judges. They were to return to 'the original principles of equity' until such time as they had established a common law.[51] The Native Land Court, he said, must respect its own precedents, or it would never build up a system of common law. The practice of the court fell far short of this ideal. The 1865 Act required the court to investigate title according to 'Maori proprietary customs', but it was free to interpret those customs as it should 'think fit'. As each judge had his own ideas about Maori custom, court decisions were far from uniform. It took years – until about 1895 – before 'the rules of Native custom, with proper regard to any exceptions prevalent in different parts of the country, became more or less clearly defined'.[52] Norman Smith, a judge of the Native Land Court in the early twentieth century, admitted that at times court-defined custom did differ from traditional Maori custom, but he thought much of the original custom remained, though with necessary changes grafted onto it:

> Where a custom was uncertain or appeared to be inapplicable then the Court had to make modifications to fit as nearly as the basic custom would permit, consistent of course with Maori idea and the dictates of equity and good conscience.[53]

This left ample leeway for personal or idiosyncratic judgments.

Maori customary tenure was seen to arise from four major take: discovery – take kitea; ancestry – take tupuna; conquest – take raupatu; and gift – take tuku. In each case occupation or use of the land – ahi ka or ahi ka roa – was required to substantiate the claim.[54] The court found it necessary to fix a time at which native customary titles would be 'regarded as settled', and that time was the signing of the Treaty and the 'coming of the law' in 1840:

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49. AJHR, 1891, sess ii, g-1A, p 9
50. Henry Sewell MLC, NZPD, 1870, vol 9, p 361
51. AJHR, 1891, sess ii, g-1, p 55
52. Norman Smith, *Native Custom and Law Affecting Native Land*, Wellington, 1942, p 48
53. Ibid
54. Ibid, pp 49, 62–72

> All persons who are proved to have been the actual owners or possessors of land at that time must be regarded as the owners or possessors of those lands now, except . . . where changes of ownership or possession have subsequently taken place with the consent . . . of the Government.[55]

This '1840 rule' was first laid down in the Compensation Court in 1866, but it was applied also in the Native Land Court. In a judgment on the Orakei block in 1869, Fenton ruled that the court:

> would recognize no titles to land acquired by intertribal violence since 1840. . . . It would be a very dangerous doctrine for this Court to sanction that a title to Native lands can be created by occupation since the establishment of English sovereignty, and professedly of English law, for we should then be declaring that those tribes who had not broken the law by using force in expelling squatters on their lands, must be derived pro tanto of their rights.[56]

The '1840 rule' was clearly a very arbitrary decision, which served to impose a static state on a dynamic society. It worked to the benefit of those tribes such as Ngati Toa who had conquered territory in the years immediately preceding Waitangi, and to the detriment of those conquered who had held their territory for generations and who, through the imposition of Pax Britannica, did not have the time or opportunity to regroup and reoccupy their ancestral lands. It was a mixed blessing to north Taranaki tribes. Those who remained in the Chathams were ruled in the Native Land Court to be the rightful owners according to Maori custom; those who returned to Taranaki were excluded from Compensation Court awards on the grounds that they had lost their rights there since they were not in occupation of their ancestral lands in 1840.

Fenton ruled that court sittings would be scheduled only when, in his judgment, 'a sufficient number of claims' were 'in a sufficient state of forwardness' to make it worthwhile to hold a sitting in any district.[57] The result of this was that a backlog of claims – in one case an 'arrears of seven years' – would be gazetted for hearing on the first day of the sitting.[58] All the claimants involved had to be present on the opening day and then wait weeks or months for their case to be heard. In a landmark essay, M P K Sorrenson described the devastating effect this had on both the claimants, invariably far from home, and on Maori communities near European towns where the court sat.[59]

The 1865 Act had four main aims: to amend and consolidate the laws relating to lands still subject to 'Maori proprietary customs'; to ascertain who, according to

55. Sitting of Compensation Court at New Plymouth, 1 June–12 July 1866, AJHR, 1866, a-13, p 4
56. Cited in Smith, p 50. For the effects of the application of the 1840 rule in the Chathams, see Bryan D Gilling, 'By Whose Custom? The Operation of the Native Land Court in the Chathams', *Victoria University of Wellington Law Review*, vol 23, no 3, 1993, pp 45–58
57. 'Rules and Regulations for the Procedure of the Native Lands Court', drawn up by Fenton, 26 January 1867, AJLC, 1871, p 239
58. Chief Judge J E MacDonald to Native Minister, 23 June 1883, AJHR, 1883, g-5, p 2
59. M P K Sorrenson, 'Land Purchase Methods and Their Effect on Maori Population, 1865–1901', JPS, vol 65, no 3, 1956, pp 186–192

these customs, were the owners of the land; to encourage the extinction of this customary tenure and replace it with titles derived from the Crown; and to regulate the mode of succession to deceased owners of native lands. The Act authorised 'any Native' to give the court written notice that he wanted his claim investigated, and this was sufficient to get the whole claim process started. Commenting on the process, Sir William Martin explained that capitalists looking for investment had 'no difficulty in finding the single man needed', and the rest of the owners were 'forced to submit to the burden or risk the loss of their property'.[60] By the time the Act was in place a host of would-be purchasers had done deals with Maori claimants so that they would be ready as soon as the court began its hearing. It was already obvious that the Act would encourage irregular and fraudulent dealings, but recommendations that it be amended to prohibit speculation were ignored by both the Weld and Stafford governments. The Act:

> was driven overtly by expediency. . . . Gone was the previously-declared need to honour the Treaty of Waitangi, to be replaced by aims seeking solely to expedite the conforming of Maori custom to English law and thus the easier acquisition by settlers of Maori land.[61]

Just as each judge had his own ideas on Maori proprietary customs, so too he had his own ideas on the aims of the Act. Maning believed it was there to satisfy the wants and needs of Maori 'by offering them a means of extricating themselves from the Maori tenure';[62] he would have scant sympathy therefore for counter-claimants who opposed individualisation of title. But to Fenton the aim of the Act was to put an end to Maori communal ownership so that chiefs would become landed gentry while other Maori would be landless and forced to labour for a living.[63] He still espoused this view in 1885 when he told the Native Affairs Committee that the sooner Maori got rid of all their surplus lands the better for them; the sooner they were taught that every man must work for his living, the better for them. But one of his 'most painful thoughts' was that the operations of the Native Land Court had entirely destroyed the chiefs. He would have liked to see 'a very considerable proportion' of the proceeds of the lands that had been sold 'invested in some way for the chiefs'.[64] This was a Wakefieldian view, a hangover from the 1840s, and one with some appeal – although there were many in the country who were totally against any entrenchment of chiefly status.

Fenton's interpretation of section 23 of the Act was one of the worst features of his administration. The court was required to issue certificates of title to no more than 10 persons, unless the block before the court was in excess of 5000 acres, in which case the certificate could be made out to a tribe by name.[65] The intention was

60. Martin memo on the operation of the Native Land Court, 18 January 1871, *Epitome*, g, p 35
61. Bryan D Gilling, 'Engine of Destruction? An Introduction to the History of the Maori Land Court', *Victoria University of Wellington Law Review*, vol 24, no 2, 1994, p 124
62. Maning to Fenton, 24 June 1867, AJHR, 1867, a-10, p 7
63. Ward, pp 216–217
64. AJHR, 1885, I-2B, p 41
65. This was only ever done in 'two or three instances'; AJHR, 1891, sess ii, g-1, p vii.

that blocks with many owners would be subdivided into smaller blocks with a maximum of 10 owners. Fenton, however, anxious to pass land through the court and careless of the rights of 'ordinary' Maori, chose to award large undivided blocks to 10 'principal' owners. They were then 'in perfect legal possession' and 'could sell and do anything they liked with the land'. In no way, he said, were those 10 owners to be regarded as trustees, although he knew various members of Parliament were under the impression that they were.[66] When he was asked if it were not a dangerous practice to ignore the interests of the other owners, he put the blame for the situation squarely on the Maori themselves, saying they were supposed to have the land subdivided into smaller blocks but were not prepared to pay for the surveys, so were content to name but 10 owners for large undivided blocks. Those 10 were then 'treacherous': they cheated, they accepted no moral trust – and were under no legal one; so when tempted or badgered to sell they did so, and used the money to clear their debts or 'gratify their tastes for luxuriousness'.[67]

From the start, Fenton had accepted that the operations of the Native Land Court would result in two classes of Maori: 'one composed of well-to-do farmers, and the other of intemperate landlords'. He had already noted 'intemperance and waste' among Maori landlords in Hawke's Bay, and while he regretted the situation, he felt it was not part of their duty:

> to stop eminently good processes because certain bad and unpreventable results may collaterally flow from them, not can it be averred that it is the duty of the Legislature to make people careful of their property by Act of Parliament, so long as their profligacy injures no one but themselves.[68]

The results of the processes were anything but unpreventable; the Crown had a moral duty and a responsibility under the Treaty of Waitangi to ensure the welfare of its Maori subjects, not to throw them to the speculator wolves. Apparently this was clear to the Crown in the first two decades after Waitangi: after all, it was not considered safe to allow government in European hands; the Crown would stand between the Maori and the settler. But with government in settler hands and Maori unrepresented in the Parliament, Treaty obligations were conveniently ignored.

It was clear even to Fenton that it was not Maori who initiated land sales: 'there always has been, and probably always will be, a strong desire on the part of the Natives to retain their lands as long as they can'. It was Europeans who initiated sales by advancing money and starting the process that inevitably ended with the land being taken before the court.[69] Maybe it was surveyors, maybe storekeepers or publicans who advanced credit, then threatened legal action if their bills were not paid. Once in the land court there were fees, and lawyers and interpreters with their

66. AJHR, 1885, I-2B, pp 34, 39, 30
67. Ibid, pp 39–40, 51. Rogan, a close colleague of Fenton, commented approvingly on the 'marked improvement in the mode of living adopted by the chiefs' in his district; Rogan to Fenton, 29 July 1867, A-10A, p 2.
68. AJHR, 1867, A-10, p 4
69. AJHR, 1885, I-2B, p 51

often exorbitant charges. Even those who had gone to court to prevent sale of their land ended up selling some to pay for trying to save the rest. But often the first the great majority of owners knew about the sale of their land was the arrival of a European already in possession of a Crown grant. At best, the land was sold without their agreement and against their wishes. Fenton claimed he knew nothing about deals done prior to the land passing through the court: 'When I left the Court I found that I had to a certain extent been up in a balloon all the time; things were going on that I had not the slightest conception of.'[70]

It was an unlikely story. He had already been denounced in Parliament in 1880 as incompetent,[71] and the *New Zealand Herald* had reported that the working of the Native Land Court had been a scandal for many years, 'but as the chief sufferers were the Maoris, nobody troubled themselves very much'.[72] And the Premier, Robert Stout, had been very scathing about Fenton's judgement (or lack of it) in the Owhaoko case:

> No more monstrous injustice could be done by any Court than by declaring certain persons were owners, and treating them as absolute owners, when the Court knew they were not the whole owners, but only some of those who were owners. It was the Court's duty to name all the owners, and not to select a few only and call them 'absolute owners'. Communal title no doubt was and is bad, but depriving some of the 'community' of all their possessions was and is worse. So far as I can see, no Maoris wished to perpetrate any 'monstrous injustice': those who were the means of accomplishing that were Europeans.[73]

The next chief judge of the Native Land Court, J E MacDonald, whom Ward described as 'equally careless of Maori interests and duller witted into the bargain',[74] thought that the greatest evil arose from 'lands being contracted to be bought from Natives before the ownership is ascertained'. He did not think highly of what he called European dealers, but, 'to give . . . these people their due', admitted that their 'enterprise' had hastened the passage of large amounts of land through the court.[75]

The other most pernicious aspect of Fenton's administering of the 1865 Act related to the question of succession. The Act required the court to decide 'by such evidence as it may think fit who according to law as nearly as it can be reconciled with Native custom' should succeed to the land of those who died intestate. Fenton decided that, in the interests of retaining individual title, land should not descend as it would by Maori custom to those children who continued to occupy and use their ancestral land. His fellow judge, John Rogan, explained in 1867 that:

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70. Ibid, p 49
71. Ward, p 289
72. 2 March 1883 (cited in Sorrenson, p 189)
73. AJHR, 1886, g-9, p 14
74. Ward, p 289
75. MacDonald to Native Minister, 22 June 1883, AJHR, 1883, g-5, p 2

> it would be highly prejudicial to allow the tribal tenure to grow up and effect land that has once been clothed with a lawful title, recognised and understood by the ordinary laws of the Colony . . . it will be the duty of the Court in administering this Act to cause as rapid an introduction amongst the Maoris, not only of English tenures but of English rules of descent as can be secured without violently shocking Maori prejudices.[76]

Fenton's arbitrary decision then was to divide the estate of both parents equally among all surviving children, regardless of their place of residence. This was the beginning of absentee ownership and the disastrous fragmentation of title which bedevilled Maori land from then on. Soon shares in land became so scattered and so miniscule that they were good for only one thing – sale to a European who would accumulate share after share until he could freehold the whole block. Only a latter-day solution, incorporation – a return to communal tenure – could keep land in Maori hands.

As Alan Ward said, J E FitzGerald, J C Richmond, and the Stafford government all bear a responsibility for making the Act so destructive to Maori society and so rewarding to speculators. The great tragedy:

> was not simply that the utter disruption of Maori social relations was deliberately initiated but that it was initiated through a system of land purchase that encouraged cupidity and unscrupulousness among Maori landholders rather than thrift and responsible use of land.[77]

The greater part of the debate in Parliament on the 1865 Act concerned section 82, which repeated section 31 of the 1862 Act by which the Manawatu block was excepted from the operations of the Act. Featherston had been successful in having the block excluded from the 1862 Act on the basis of a provision of the Land Orders and Scrip Act 1858, which reserved the right to select lands to settlers who held land orders issued by the New Zealand Company. Although Spain had ruled in 1843 that the company's purchase was invalid and the New Zealand Company had collapsed in 1850, the Crown still chose to treat the Manawatu block as 'under negotiation and subject to New Zealand Company conditions'. The exclusion of the block from the Act meant ownership of the land was never ascertained through any formal process of investigation. The New Zealand Company had negotiated the 'purchase' with Ngati Toa, and subsequently a hapu of Ngati Raukawa resident on the Manawatu coast, and any later investigation began from the assumption that they were the customary owners.[78] The rights of Rangitane, resident on the land for some centuries, were first overlooked and then denied when Featherston succeeded in making a deal with other provincial authorities for their support in allowing Wellington 'monopoly rights of purchase' in the block. The deal (under which Otago got possession of the Princes Street reserve), did not bear close investigation,[79] but it left Featherston free to purchase 'the finest and

76. Cited in Ward, pp 186–187
77. Ward, p 187
78. Lambeth, pp 4–11, 17–20

richest block of Native land' in the Wellington province.[80] The southern boundary of the block had somehow been designated in the Act as at the Ohau River, halfway down the Horowhenua. Featherston took it upon himself to decide how the purchase money should be divided among the iwi, and he gave £10,000 to Ngati Raukawa, whose territory was south of the Manawatu River, and £15,000 to Ngati Apa, whose territory was north of the Rangitikei River. Those two tribes were to share their windfall with any other claimants; it was up to them how they should distribute it. Thus Rangitane, tangata whenua of the Manawatu, got £600, and Whanganui, whose territory was even further distant than that of Ngati Apa, got £2000.[81] The Crown had once more failed to take McLean's advice not to buy from the most insistent sellers, but to have regard to the least clamorous, whose title would likely prove to be the best. Having surrendered to Featherston its responsibility, the Crown was seemingly satisfied that justice had been done under the Native Lands Act 1865.

4.3 The Native Lands Act 1866

The negative consequences of the 1865 Act were soon evident. Within a year it was amended to give the Governor in Council the power to restrict the alienation by sale or lease of native reserves, and to direct the manner in which any sale or lease money should be invested or applied. The Act also declared it now to be not just 'lawful', but the duty of the court to consider whether or not restrictions on alienation should be written into certificates for blocks awarded by the court. Even these minimal restrictions on the alienation of Maori land, designed 'to protect the public generally, and the Natives themselves from the curse of pauperism', incurred the wrath of the Auckland Provincial Council, which did not want any restrictions to stand between them and the acquisition of Maori land. J C Richmond, the de facto Native Minister in the second Stafford ministry, explained with brutal clarity that they would not affect the majority of cases or permanently prevent alienation, but would simply:

> tend, with respect to a small part of the Native property, to retard its sale, so as to give a somewhat longer time and better chance for the adoption of European habits of mind before the Maori settles down to the poverty and necessity for labour to which he must in most cases come.[82]

A further provision of the 1866 Act ensured that the Government could maintain its pre-emptive right in certain cases. Section 18 of the Act made it lawful for the

79. Ibid, p 21; Ward, p 190
80. Buller memo, 5 August 1865, AJHR, 1865, e-2B, p 5
81. Lambeth, pp 22–23
82. J C Richmond to J H Burslem (surveyor), 15 January 1867, AJLC, 1867, p 41. See also Colonial Secretary (Stafford) to Superintendent of the Auckland Province (Whitaker), 7 January 1867, AJLC, 1867, pp 39–40.

Governor in Council from time to time 'to suspend the Native Lands Act, 1865, or any part of it, in districts to be defined'. Stafford argued that this provision was simply to enable the Government to fulfil the obligations it had incurred to both 'loyal and rebel Native inhabitants' in the suppression of insurrection in a district; although he admitted that the Government already had the power of suspending the Native Lands Act 1866, albeit 'in a less convenient manner', through the New Zealand Settlements Act 1863.[83]

4.4 The Native Lands Act 1867

The 1866 Act was said to be 'mischievous, needless and inoperative'[84] and it was repealed by the Native Lands Act 1867, with the aim of curing 'the defect in the Act of 1865 which enabled the land to be vested in 10 persons, thereby ignoring the interests of the majority'.[85] It did not achieve this aim, but it did require the court to ascertain the names of all the owners of a block and record them on the back of the certificate and enter them in court records. J C Richmond obviously still regarded the 10 owners as trustees, but admitted the trusts were tacit, unrecorded, and unacknowledged. He wanted those who held certificates 'virtually in trust' to be required by the court to execute a declaration of trust,[86] as was required under the 1862 Act, but as long as Fenton had his way – and speculator interests in Parliament saw that he did – this would not happen. Under the 1867 Act the court could still issue a certificate of title to 10 of the owners, and those 10 were free to lease the land for up to 21 years – and pocket the lease money. However, the land could not be permanently alienated before subdivision, and this required the knowledge and consent of the majority of the owners.

The few safeguards in the Act, such as these restrictions on alienation, were outweighed by provisions which enabled speculators and surveyors to obtain mortgages over the land. There were any number of people eager to offer their services or advance money to claimants as a lien against the land. And, whereas the 1865 Act had required that interpreting of conveyances and deeds be supervised by a judge or justice of the peace, the 1867 Act simply required the presence and approval of any 'male adult'. Many fraudulent deeds were executed by unscrupulous interpreters.

It was evident that the provisions of the Acts were not widely known to a lot of owners. In 1871, T M Haultain, who had been Minister of Defence in the Stafford Cabinet, was asked by McLean to report on the working of the Native Lands Acts. He consulted widely and reported Maori generally satisfied with the operations of the court; although he commented with some surprise on the strange fact that Hawke's Bay Maori had registered their names as 'interested claimants . . . in only

83. Stafford to Whitaker, 7 January 1867, AJLC, 1867, p 40
84. NZPD, 1867, vol 1, pt 1, p 31
85. Thomas Mackay minority report, AJHR, 1891, sess ii, g-1A, p 10
86. NZPD, 1867, vol 1, pt 2, p 1136

twelve blocks of some 42,000 acres'. But he admitted that the people of the district knew little or nothing of the Native Lands Acts 'for they have never been instructed, and no translations . . . or full information of their details, have ever been circulated amongst them'.[87]

It was all part of Fenton's campaign to run the courts as he saw fit, regardless of Parliament, ministers, and Native Lands Acts. He took little notice of the 1867 amendment, claiming 'discretion on the grounds that the overriding individualising and "civilizing" principles of the . . . 1865 Act would be compromised by reintroducing numerous "communal" owners',[88] and he managed to resist naming his 10 owners as trustees and creating trusts under which they should operate. There were many instances where Maori had complained of being greatly disadvantaged by the operation of the Acts, and especially of the 10-owner provision and the ruinous cost of surveying. But according to Fenton, the 'entire submission of the Maoris to the decisions and orders of the Court is a feature of most encouraging promise'. The few objectors the court had had to deal with were, he said, drunken chiefs.[89]

By the end of 1870, North Island land courts had heard 3489 applications for investigation of title, and awarded 2619 certificates of title or Crown grants for nearly two and a half million acres. There had been only 35 applications for rehearing – hardly surprising, given the cost of taking claims before the court, and the fact that only six rehearings had been granted – and only two of those had resulted in the previous judgments being reversed.[90] In 1875, upper Whanganui Maori petitioned for a rehearing of the investigation of title to a block in which they had interests. Fenton advised the Native Minister that he did not recommend a rehearing, but it was pointed out that these people lived more than 100 miles up the river and they had not received a *Kahiti* or any other notice of the court sitting at Patea. Five years later they heard that their application had been refused.[91] It was as though the court was run for anyone but customary owners.

Some of the worst excesses generated by the operations of the court were to be seen in Hawke's Bay. The blocks dealt with there by the court were larger than usual – great pastoral runs, many of them illegally leased for many years. The principal chiefs had been in the habit of collecting and distributing the rent money, generally without much hassle, but once the law enabled the runholders to legalise their tenure, there was a scramble to get the signatures of the 10 owners specified by the court. A commission of inquiry into abuses complained of in the sale of Hawke's Bay lands revealed some 'unsavoury' transactions. Typically owners were led into debt, then threatened with law suits unless they agreed to take their land before the court. Squatters, storekeepers, publicans, interpreters, and even missionary families and the provincial authorities all played a part in what were, at best,

87. Haultain to McLean, 18 July 1871, AJHR, 1871, a-2A, p 4
88. Gilling, 'Engine of Destruction?', p 131; see also Ward, pp 216–217
89. Fenton to J C Richmond, 11 July 1867, AJHR, 1867, a-10, p 4
90. AJHR, 1871, a-2A, pp 3–4
91. See Aroha Harris, 'Crown Acquisition of Confiscated and Maori land in Taranaki, 1872–1881', report commissioned by Waitangi Tribunal, claim Wai 143 record of documents, doc h3, 1993, p 29

sharp business deals and at worst fraudulent practice. Some chiefs lost their land through debts incurred when they fought as kupapa in the campaign against Te Kooti. Payment for their service to the Crown was delayed until it was too late for the claimants to clear their debts and save the land. As M P K Sorrenson said of the loss of the 20,000-acre Heretaunga block:

> This was not an isolated example but typical of nearly all transactions under the Native Land Act 1865 in Hawke's Bay. By 1873, when the Act was repealed, all the valuable grazing land had been secured by squatters. The Ngati Kahungunu . . . were friendly and fought the battles against Te Kooti which made Hawke's Bay safe for European settlers. But they could not fight the battle for land against the European squatters at the same time.[92]

4.5 The Native Land Act 1873

After McLean's appointment as Native Minister in 1869, the old feud between him and Fenton flared anew. McLean turned to the ex-chief justice, Sir William Martin, for advice on how the defects in the Native Lands Acts should be remedied. Over the years, Martin wrote several lengthy, erudite, and thoughtful memos on the working of the Acts and the court, and on how justice could be done to Maori.[93] Martin was very charitable towards settlers and politicians, and had great faith in British justice, but it seemed no one was interested – least of all Fenton. Martin's suggestions of naming the 10 'owners' as trustees, prohibiting the mortgaging or selling of undivided shares, and adopting a just rule of succession to hereditaments,[94] were all rejected outright by Fenton as ill-advised, ill-informed, or unworkable, as well as ridiculously pro-Maori.[95] Fenton wrote his own draft Bill to counteract the one Martin had sent to McLean, and to increase the power of the court where Martin had sought to reduce it to the status of a commission working locally, on the ground. He asked:

> Why keep up the resort to English counsel in a Court which is not constituted for the administration of English law, but only for the ascertainment of Native custom, and of the facts of occupation and ownership?[96]

Alan Ward answered Sir William's question when he said that the status Fenton demanded for his court and his unwillingness to reform Maori land law, stemmed largely from his 'own ambition and vanity', his 'wilfulness and self-aggrandisement'.[97]

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92. Sorrenson, p 188
93. See, for example, *Epitome*, g, pp 2–20, 33–35, 37–38; AJHR, 1871, a-2, pp 3–5
94. AJHR, 1871, a-2, pp 3–5
95. Fenton to McLean, 28 August 1871, AJLC, 1871, p 10
96. Martin memo, 18 January 1871, AJHR, 1871, a-2, p 5
97. Ward, pp 181, 216

Although McLean used Martin's draft as the basis of a new Bill, it was Fenton's Bill that appealed to Parliament, 'and the Native Land Act of 1873, re-established the Land Court and Fenton's powers much as before'.[98] There were some reforms though, especially with regard to the vexed question of surveys. The Government at last undertook the responsibility for authorising and regulating surveys and surveyors and ensuring that the maps so produced could become part of the national register. The costs – at least now fixed by the Government – were still to be paid by the owners 'in money or land'. Maori had long complained of the ruinous cost of surveys and the number of times the same piece of land had to be surveyed, and several reports from surveyors and various officials had pointed out that in fact Maori were virtually funding the national survey.[99] The Haultain report had noted that the expenses incurred by the Survey Department were far outweighed by the value of the maps acquired by the provinces 'at the expense of the Natives';[100] and a surveyor's report stated that the land court insisted on 'a far more elaborate and expensive survey for Native lands than the Provincial Government undertakes in completion of the title to lands sold by it'.[101]

One of the aims of the 1873 Act was to reduce the cost to Maori of surveying and determining title to their land. The Act was a major amendment and consolidation of the existing Native Land Acts, supposedly to obviate many of the difficulties and disadvantages associated with the operations of the courts. And yet it was little, if any, improvement on any of the earlier Acts. Perhaps this was inevitable; the Bill was prepared with 'the valuable assistance and advice of Judge Richmond',[102] fresh from the Hawke's Bay Native Lands Alienation Commission. Hawke's Bay Maori had lodged over 300 complaints with the commission, but only a fraction of them were heard, as Richmond, the chairman, had to hurry away to his Supreme Court work. The complaints referred to the actions of prominent local runholders, storekeepers, grog-sellers, interpreters, lawyers – even Government officials and missionaries.[103] According to M P K Sorrenson:

> From the evidence presented to the commissioners it seems obvious that widespread use was made of credit, the sale of liquor, and the threat of court writs to force Maori grantees to dispose of the freehold of land. But Richmond, who wrote the main report, was content to criticise the way in which the Native Land Court had interpreted the Act of 1865 and saw no reason why any of the transactions should be declared invalid, simply on the ground that some of the consideration money had in fact been paid in liquor.[104]

98. Ibid, p 254
99. See, for example, Fenton to McLean, 28 August 1871, AJLC, 1871, p 11; Heale report on surveys, 2 August 1867, AJHR, 1867, a-10B, p 5
100. AJHR, 1871, a-2A, p 9
101. H C Field to G S Cooper, 27 June 1871, AJLC, 1871, p 21
102. NZPD, 1873, no xiv, p 604
103. See AJHR, 1873, g-7
104. M P K Sorrenson, 'The Politics of Land', in *The Maori and New Zealand Politics*, J G A Pocock, Auckland, 1965, p 41. It was illegal at the time to sell liquor to Maori.

An important provision of the 1873 Act concerned the listing of the name of every owner of a block on the memorial of ownership which replaced the earlier certificate of title. Land buyers would now be required to get the signature of every owner before a sale could be effected. This slowed the process of alienation but it did not stop determined purchasers from gaining the coveted freehold. It was McLean's intention to end Fenton's notorious 10-owner provision and ensure that each owner was safe from the actions of irresponsible 'trustees', but the effect of the provision was to accelerate fragmentation of titles, since a group of willing sellers could opt to have their shares partitioned and other owners could be left with scattered and uneconomic holdings which were not worth retaining. The principle of individual ownership, carried to an extreme in the 1873 Act, only served to perpetuate the evils associated with individual dealing with tribal lands.

The Government apparently was becoming concerned about the minimal land holding remaining to some Maori, for the Act required Native Department officers to ensure that sufficient lands were reserved from sale in each district to aggregate 'not less than fifty acres per head for every Native man woman and child resident in the district'. Unfortunately this safeguard, like many others, was rendered ineffective, first because too few reserves were created, and then because reserves could be leased, sold, or mortgaged with the consent of the Governor in Council, and that consent was too often given. Thus:

> the 1873 Act did little but prolong the passing of the land. Indeed, in a sense, it made things very much worse. Since all owners were listed, such chiefs as were still good trustees of their people's land, were powerless to stop surreptitious sales by rank and file owners. Consequently those chiefs who had long resisted now tended to sell in their old age because the land was passing anyway and they sought to share the proceeds before they died.[105]

The 1891 Commission of Inquiry condemned the 1873 Act and all its 'amendments, repeals and alterations . . . and their name is Legion, for they are many', as the source of all later difficulties with regard to the transfer and settlement of land. The Act, they said, undermined Maori leadership and placed even slaves and children on equal terms with the 'noblest rangatira'. European agents, interpreters, and lawyers, armed with the money of capitalists and speculators, would pester owners for signatures; and once the 'charmed circle' was broken, Europeans would gradually push Maori out and take possession:

> The crowds of owners in a memorial of ownership were like a flock of sheep without a shepherd. . . . The right to occupy and cultivate possessed by their fathers became in their hands an estate which could be sold.[106]

In the Auckland province in the year ending 30 June 1873, before the Act was passed, title was ordered by the court to 221,776 acres; in the following year this

105. Ward, p 256
106. AJHR, 1891, sess ii, g-1, pp viii–x

figure had risen to 283,896 acres, and by 30 June 1875 to 767,339 acres, before falling back in 1876 to 207,042 acres. At the same time for the Wellington province the figures were 270,111 acres, 358,651 acres, and by 1875 only 2077 acres, although they rose again in the 1876 year to 61,627 acres.[107]

Fenton, predictably, put the shortcomings of the 1873 Act down to the Act itself, not his interpretation of it. He thought the lawmakers had departed from the true aim of the Native Land Acts when they omitted 'all reference to the expediency of extinguishing or converting the Maori customary title to land, or to the advantage of clothing these lands with titles derived from the Crown'. He was concerned that now native title was simply to be 'ascertained and recorded', with no mention of the need to then seek a Crown grant; and that native custom, not good English laws of inheritance, would decide who succeeded to Crown grants.[108] Fenton and his fellow judges were at pains to point out to the Government the defects in the Act, which would frustrate its operation – although it was largely Fenton himself who frustrated its operation.[109] His insistence that claimants must appear in court if their claim was to be considered led to more than frustration. In 1873, it almost led to a renewed outbreak of fighting in the Waikato when a European worker, Timothy Sullivan, was murdered on leased land on the Kingite side of the aukati. Some of the traditional owners were Kingite Maori, who did not recognise the Government's right to determine their land titles. They had not appeared when their land was taken before the court, so they were excluded from the grant. They took their frustration out in violence, and the affair left the frontier in a state of high tension with new redoubts and blockhouses being constructed and manned by the armed constabulary. The Government sent James Mackay to the Waikato to inquire into the situation there. Among other things, he reported that he had had to stop the survey for a patrol road and the building of a blockhouse to protect settlers living at Taotaoroa, because of the uncertain attitude of some Maori who were 'at present friendly', but who:

> claim to have a right to have their names inserted in the Crown Grant of the Taotaoroa block, and they were excluded from it in consequence of not knowing of the sitting of the Native Land Court.[110]

Fenton may have been right in saying the 1873 Act was unworkable; but his claim that the Act of 1865 was preferable was untenable. No Land Act that required Europeans to decide what constituted native custom and thus determine title and questions of succession in a formal court, could hope to be workable. What was needed was a return to a system whereby knowledgeable local Maori played a major role in determining land boundaries – a situation that would never be tolerated by a settler- and speculator-driven legislature.

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107. AJHR, 1873, g-5, p 2; AJHR, 1874, g-3, p 2; AJHR, 1875, g-9, p 2; AJHR, 1876, g-6, p 2
108. AJLC, 1874, no 1, pp 2, 7–8
109. Ward, p 255
110. Mackay to Native Minister, 10 July 1873, AJHR, 1873, g-3, pp 9–10

4.6 The Native Land Administration Act 1886

The 1873 Act went through five or six amendments in the next 10 years, but it was not until a Government of an entirely different hue came to power in 1884 that major changes were proposed. By then, the Native Land Court had determined title to over nine million acres of customary land.[111] John Ballance, Native Minister in the Stout–Vogel ministry, revived the practice, which had died with McLean, of travelling to Maori districts to meet and talk with the local people at a series of hui.[112] Ballance referred to this as 'consulting' with Maori, but he was too paternalistic for that; he was more inclined to tell the people about his proposed legislation and explain why it was good for them. It was not that he was unsympathetic or unaware of their plight, but simply that he knew best: 'it is beyond doubt that the Native is in many respects an infant needing a guardian', he wrote.[113] Ballance looked forward to the day when Maori and European would be assimilated and there would be no need for special 'Maori' measures, but until then Maori would need protection and he intended to legislate to achieve it. His ultimate aim was nationalisation of all land, but meanwhile he wanted to see Maori land leased. He envisioned native committees – representative bodies of owners – with the power of leasing tribal land. 'The Native [would] become by our proposal the landlord, with the right of sale limited to the State.' Half of the proceeds would be converted 'into stock, to be held by the Public Trustee for their benefit', and thus 'the welfare of the Natives would be combined with the best interests of the colonists', and within a few years the country would see 'the nationalization of sixteen million acres of land'.[114] Ballance's policy was clear: Maori would be relieved of their land, but naturally they would benefit financially in the process.

Ballance tried without success in 1884 and 1885 to get Bills through the Assembly, but in 1886 he finally saw a modified version, the Native Land Administration Act 1886, passed into law. The Act, which according to its preamble was simply to control dealings with land owned by natives, combined Ballance's own philosophy whereby the Crown would act as agent for Maori, and the idea of incorporation proposed by W L Rees, a lawyer, and Wi Pere, an East Coast leader, 'partners in a scheme for land settlement' on the coast.[115] Incorporation was a move away from individualisation of title and back towards tribal land holding. The Act allowed for elected block committees of seven owners, who would decide which land should be held, sold, or leased. Dissenting owners could opt not to have their land come under the Act, in which case the land would be partitioned by the Native Land Court. Committees or individual owners could deal directly with the Crown – but not with individual purchasers – and any sale or lease of communally-held land would have

111. E J Haughey, 'The Maori Land Court', *New Zealand Law Journal*, vol 9, 1976, p 206
112. See AJHR, 1885, g-1
113. John Ballance, 'Nationalisation of the Land: A Native Land Policy', *Dunedin Echo*, 6 May 1882, reprinted in John Ballance, *A National Land Policy Based on the Principle of State Ownership*, Wellington, 1887, p 15
114. Ibid, pp 16–17
115. Ward, p 296; Rees memo on the Native Land Laws, not dated, AJHR, 1884, sess ii, g-2, pp 3–4

to be approved by a meeting of the 'incorporated' owners, and effected by a commissioner appointed under the Act. The commissioner would bank the proceeds and pay appropriate shares to each owner after the deduction of all expenses, or owners could opt to have some or all of the money invested on their behalf.

Ballance was confident that he had the approval of Maori generally for his Act, but although it did have the sanction of several notable leaders, in practice the Act was a dismal failure. After negative experience of the 10-owner system, Maori were reluctant to put their land into the hands of block committees, who after all, could only operate under a European commissioner – another Government official. G W Williams, a Hawke's Bay commissioner, in his first annual report on the operation of the Act, noted that when 'certain owners' who wanted to do something with their land found 'they could not carry out their intentions without proceeding under the Act they positively refused to take any further steps'. Williams gathered that their opposition 'was based less on the ground of distrust in Government administration than upon a deep-rooted distrust of one another, and therefore of any Committee which might be elected'. None of the commissioners that year was able to report any activity under the Act, except for some applications under section 24 which allowed a person in the process of purchasing or leasing some of the shares in a block to complete his transaction or have it validated.[116] It appears there was but one transaction under the Act; for the rest, 'Ballance's Commissioners waited in vain for land to be invested in them', and land speculators fulminated over the virtual resumption of Crown pre-emption.[117]

4.7 The Native Land Act 1888

While Ballance's Act was in place, land purchasing practically came to a standstill. The Act pleased no one, and when the Government lost the 1887 election it was replaced by yet another Atkinson ministry – the 'scarecrow ministry' – in which Whitaker was again Attorney-General and Edwin Mitchelson, Native Minister – John Bryce having lost his seat. The new Government moved quickly to repeal the 1886 Act and restore direct purchase – 'free trade in Native lands' – the Government's only option since they did not have the money to purchase 'the whole of the lands, and so extinguish the Native title to all lands other than what would be sufficient for their use and occupation'.[118] Three of the four Maori members elected to Parliament had campaigned against the 1886 Act, but Atkinson's assumption that they would therefore support his ministry's Bill was misplaced. Hirini Taiwhanga opposed it 'vigorously', and introduced his own Bills, aimed at restricting the land court and returning to tribal, not individual, land dealing.[119]

116. AJHR, 1887, g-8, pp 1–2
117. Ward, p 297
118. NZPD, 1888, vol 61, p 669
119. Ward, p 298

Section 4 of the Native Land Act 1888 provided that, subject to the Native Lands Frauds Prevention Act 1881 and its 1888 amendment, Maori could 'alienate and dispose of land or of any share or interest therein as they think fit' – which gave free licence to speculators to pursue owners and accumulate individual shares until they had enough to secure the freehold. However, the Government managed to explain the clause as putting 'the land of the Natives . . . in the same position as the land of Europeans', while at the same time preventing them 'selling the whole of their lands, and so becoming a burden upon the State'. The fraud commissioners were to ensure that they retained 'sufficient land for the occupation of themselves and their families'.[120]

An even worse clause was section 5 which allowed the Governor in Council to remove restrictions on alienation which for 20 years had protected major reserves around the country. The Act required only an application of a majority of the owners to have existing restrictions removed or declared void; but section 6 of the Native Land Court Act 1886 Amendment Act 1888, passed the same day, did include some provisos. The court had to be satisfied first that the owners of the land from which the restrictions were to be removed had enough other land or shares in land for their maintenance and occupation; and second that all beneficial owners, not just those making the application, concurred as to the removal of the restrictions. These provisos did not satisfy everyone. Hoani Taipua, Western Maori, thought the Government was sweeping away all the safeguards that had 'prevented the Natives from pauperizing themselves'; and J C Richmond, who had originally legislated for the restrictions, accused the Government of 'abdicating a trust it had assumed for the Maori'.[121] If the Atkinson ministry 'only managed to buy some 865,000 acres between 1887 and 1890' then it must have been the result of the economic climate of the time, and not a lack of opportunity presented by this predatory legislation.[122]

4.8 Land Legislation of the Early 1890s

New Zealand historiography has bestowed upon the Liberals epithets they do not merit when it comes to Maori land legislation. The 1890 election ushered in one of the greatest Maori land-buying sprees the country has ever seen; about 3.6 million acres was purchased between 1891 and 1911, most of it in the 1890s. 'This penultimate grab of farmable Maori land ensured that most first class land had passed from Maori hands by 1900.'[123] It was underpinned by a raft of interlocking legislation passed in the early 1890s.

120. NZPD, 1888, vol 61, p 670
121. Ward, p 298
122. Tom Brooking, '"Busting Up" the Greatest Estate of All: Liberal Maori Land Policy, 1891–1911', NZJH, vol 26, no 1, 1992, p 82
123. Ibid

Less than three weeks after the first Liberal ministry was formed, a commission under W L Rees was established to inquire into the native land laws and the practice and procedures of the Native Land Court.[124] Ballance had come to power promising more land for small farm settlement – and a ready source for it: Maori land which he intended to acquire on perpetual lease.[125] He had also taken the portfolio of Native Minister, although that passed to A J Cadman for the second session of Parliament in June 1891.

The Rees commission 'traversed nearly the whole of the North island', sitting in 19 centres and interviewing a wide range of Pakeha and Maori, including leading chiefs and representatives from 'all the principal tribes'.[126] Rees had already publicly criticised the activities of the Native Land Court, and especially its judges, who 'seemed quite unable' to understand the law they had to apply.[127] Rees was 'an astute choice as chairman of the commission' because of his strong liberal (and Liberal) views, and his association over many years with Maori land matters.[128] The commission's report was 'harshly critical of both the Legislature and the Court'.[129] It condemned the endless stream of native land legislation that had emanated from Parliament for over a quarter of a century, and reported that the attempts of successive Governments to establish individual title over communally-owned land had resulted in chaos.[130] But true to Liberal philosophy, the commission had no intention of locking up Maori land – in fact it was 'proposing to render available for settlement an area of land greater in extent than some kingdoms and independent States'. However, safeguards must be built into new legislation since it would deal with 'the land of great multitudes of a semi-savage race of whom the majority, including women and children and old and ignorant people [were] incapable of prudent management'.[131] For all that, the commission was in favour of Maori playing a greater role in the management of their lands which should be leased, not sold.

James Carroll, one of the commissioners, disagreed with certain of the commission's findings – especially the one concerning the resumption of Crown pre-emption, which he felt would be a retrograde step, and little short of confiscation. What he wanted was legislation which would grant Maori the power to control their own affairs, and encourage and support those wishing to farm their own lands.[132]

Some of the commission's recommendations found their way into Liberal Maori land legislation in the next few years, but certainly none that had to do with Maori having more control or being encouraged to farm their own land. John McKenzie, Minister of Lands and Minister of Agriculture, and one of the architects of the

124. AJHR, 1891, sess ii, g-1, p iii
125. Timothy McIvor, *The Rainmaker: A Biography of John Ballance, Journalist and Politician, 1839–1893*, Auckland, 1989, pp 183–184
126. AJHR, 1891, sess ii, g-1, p v
127. Rees memo, not dated, AJHR, 1884, sess ii, g-2, p 1
128. Brooking, p 84
129. *The Maori Land Courts*, report of the Royal Commission of Inquiry, Wellington, 1980, p 12
130. AJHR, 1891, sess ii, g-1, pp vi–xi
131. Ibid, pp xviii, xix
132. Ibid, pp xxvii–xxx

legislation, 'ensured that Maori farming could never become a serious competitor to the heavily subsidized . . . white settler farmer'; and Seddon, who claimed he accepted the position of Native Minister 'with some diffidence',[133] boasted that the Liberals would break the annual record for Maori land purchase.[134] This was a foundation stone of Liberal policy – but the only new thing about it was that they admitted it – proclaimed it with brutal honesty – after 50 years of cant about simply having the 'natives' own best interests at heart, and not intending to take an acre more Maori land than was necessary.

The Liberals continued the reduction in Maori administration that had been going on since Bryce became Native Minister in 1879, all through the years of the 'long depression'. In 1892, Cadman took the process to its inevitable conclusion and disbanded the Native Department; the need for special provisions for Maori no longer existed. Maori were to be treated like any other citizen – except in matters concerning their land.

The Native Land Purchases Act 1892 enabled the Government to borrow in order to finance Crown purchase of Maori land. Once the Government had notified its intention to purchase a block, private dealing with that land was prohibited for up to two years, and anyone but the owners who went onto the block would be treated as a trespasser. Restrictions on alienation were no bar to the Crown's purchase of a block; they could be removed or declared void by the Governor in Council. Government tentacles extended beyond Maori land to the proceeds of land sale: half the purchase money was to be compulsorily invested in the Public Trustee as an 'endowment in perpetuity' for the luckless vendors.

The Native Land Purchase and Acquisition Act 1893 authorised the acquisition of at least some of the seven million acres of Maori land 'lying waste and unproductive' in the North Island; it was in the interests of both Maori and settlers that 'such land . . . be made available for disposal'. There was a rapidly increasing demand for land for settlement, and Maori were retarding the progress of colonisation. This Act, adopting Rees' suggestion, constituted a Native Land-purchase Board of three Pakeha and two Maori (one of them to be the local Maori member of Parliament, and the other nominated by the four Maori members and appointed by the chief judge of the Native Land Court). The Pakeha chairman's casting vote ensured Pakeha control of the board. The Crown could declare its interest in any Maori land in a 'proclaimed' district and the board would be required to report on its suitability for settlement. The owners would be given a 'limited' time to decide whether to sell to the Crown or have the land leased. Either way it immediately became Crown land 'vested in fee-simple absolute in Her Majesty', or 'vested in Her Majesty in trust for the Native owners . . . and their heirs' – until and unless they thereafter elected to sell the land to Her Majesty. Regardless of any restrictions on the land, the decision of a simple majority of owners bound all the owners, whether assenting or dissenting, and again half the proceeds of alienation were to

133. NZPD, 1894, vol 86, p 370
134. Brooking, pp 82, 88

be paid to the Public Trustee for the 'benefit' of the owners, as directed by the Governor.

Owners could refuse to have their land acquired in this way – but it took 'a duly authenticated petition . . . signed by not less than two-thirds of the owners' – whose bona fides had been established – to prevent it happening. Owners who were not heard from were of course assumed to have assented; but there was provision for a dissenting owner to have his shares partitioned out of the block. The only lands safe from the predatory eyes of the Liberal Government were those which were part of a pa 'for the time being in use or occupation', or a kainga or a cultivation. This much at least, as in Wakefieldian times, was to be reserved to Maori. But in fact the Liberals went further. Before alienation to the Crown was completed, the Governor was to ascertain whether vendors had 'other land sufficient for their maintenance'. If they did not, reserves were to be set aside at the rate of 25 acres of first class land, 50 acres of second class land, or 100 acres of third class land, for each man, woman, or child. Since development finance did not become available to Maori until the first decade of the new century, any man, woman, or child would be hard-pressed to maintain themselves on these acreages. But the Liberals were acknowledging their often expressed fear of having the natives on their hands as paupers for the rest of their lives; of having landless Maori drifting into the towns. And they were ensuring that Maori would still need to labour for a living, working for the white man.

4.9 The Native Land Court Act 1894

Since there was no time limit on the Government's dealing with land under the 1893 Act, full Crown pre-emption had virtually been resumed, but Seddon and Carroll (who had had his ideas changed for him by Cabinet) put it beyond doubt in section 117 of the Native Land Court Act 1894. It was now unlawful for any private person to acquire any estate or interest in any Maori-owned land. The Liberals justified the resumption of pre-emption by saying that if 'free trade' in Maori land were allowed to endure, 'it would all be owned by land speculators and lawyers within twenty years'.[135] There had been some discussion about the necessity of reserving the Act for the royal assent. They had had to do so for the 1862 Act, which waived pre-emption; perhaps it was necessary for this Act which restored it. Certainly the Governor entertained some doubts, but he was persuaded by his responsible advisers that it was not necessary. Incidentally, the Governor described the pre-emptive right as 'the most important part of the treaty with the Natives under which they acknowledge the sovereignty of the Crown', which was an interesting reflection of European perceptions of the Treaty.[136]

Since the demise of the Native Department the court had come under the jurisdiction of the Justice Department, but its basic operations were not greatly

135. NZPD, 1894, vol 86, p 237
136. Glasgow dispatch, 12 November 1894, AJHR, 1895, a-1, p 3

changed by this Act. It was still to ascertain titles to Maori land 'according to Native custom', and determine succession. But it also had the power to remedy some of the mistakes or omissions of the past, and it could do what Fenton had always held it could not do: determine whether owners named by the court were intended to hold the land in trust for others whom the court had not named in the title, but who were now to be included. The provision, of course, could only apply to land not yet alienated, and it would only apply if the Governor in Council so ordered. It was little enough, but it was an admission that the 10-owner system had been a gross miscarriage of justice. The court could still summon witnesses to appear and produce evidence, but it would now accept written evidence, given by a person who could not attend the land court, to any judge or stipendiary magistrate in a more convenient court. Little by little Fenton's ghost was being exorcised from the Native Land Court.

A further move in that direction came with the creation of the Native Appellate Court under the provisions of the Native Land Court Act 1894. Maori had not previously been able to appeal decisions made by the court. The Native Rights Act 1865 had declared every Maori (whether or not their tribal leaders had signed the Treaty) to be a 'natural-born subject of Her Majesty to all intents and purposes whatsoever'; and it gave the Supreme Court jurisdiction in all cases concerning Maori people and property, including titles to customary land – but questions of disputed title had still to be referred to the Native Land Court. The Supreme Court was obliged to accept unchallenged the decisions of the Native Land Court as to fact and as to Maori custom or usage. Fenton would have no interference with his decisions; he told the Native Land Laws Commission in 1891 'the less you have to do with the Supreme Court the better'.[137] Now 'aggrieved' Maori could appeal a Native Land Court decision in the Appellate Court, but it was quite a complicated and costly process and the Appellate Court judges were the very land court judges whose decisions were being appealed. And while provision was made for points of law to be referred to and decided by the Supreme Court, in the end the Appellate Court's decisions were to be 'final and conclusive'.

A further provision of the 1894 Act concerned incorporation, an idea strongly favoured by Rees.[138] It was the first move back to tribal dealing and away from Fenton's determined individualisation of title. A majority of the owners of a block or adjoining blocks could be constituted a body corporate and appoint a committee of from three to seven persons, not necessarily owners, to administer the land. They would, of course have the right to alienate the land (it was Liberal legislation after all) – and, as Seddon boasted, it would be more readily alienable in large blocks; on the East Coast, 'with plenty of money available for land-purchase, with these corporations or committees appointed, we shall have no difficulty in obtaining as much land as we require'.[139] But committees would not have the right to administer

137. AJHR, 1895, sess ii, g-2, p 55
138. See, for example, AJHR, 1884, sess ii, g-2, pp 3–4; AJHR, 1891, sess ii, g-1, p xviii
139. NZPD, 1894, vol 86, p 371

the proceeds of sale; they were to be paid in their entirety to the Public Trustee and used for the 'benefit' of the owners in any way the Governor in Council saw fit.

Liberal legislation was characterised by its paternalism. Maori were to be protected, especially from themselves, lest they become a charge on the state. But their grip on their last remaining acres was to be broken to enable Pakeha family farmers to be settled on the land. Maori were to be subsistence farmers at best, and a convenient source of seasonal labour. It was almost the last act in a long drama begun by the Wakefieldians. As long as land remained in Maori hands, Pakeha agitated about the bar to progress. If Maori wished to lease their land there was an outcry about Maori landlordism.[140] Every facility was given to Maori to sell their land; leasing was circumscribed with difficulties. If Maori wanted to farm their land they would constitute unfair competition to struggling whites; if they wanted to run their own affairs they were told they were children needing guidance – but if they complained about the loss of the Native Department they were told it was time to stand on their own two feet, that they were to be 'placed in the same position' as Europeans. Fifty years after the signing of the Treaty all the old arguments still got a regular airing – and the myth of the liberal Liberals hid the brutal reality that it was in the 1890s that Maori aspirations to farm their own land and take their place in te ao hou received a blow from which Maori society is still struggling to recover.

The operations of the Native Land Court in the nineteenth century had very detrimental effects on Maori society, stripping tribes of land, weakening tribal structure, undermining leadership, and destroying trust among and between hapu and whanau. The worst effects, at least in the first two decades of its operation, fell on kupapa tribes who had taken up arms on the side of the British during the wars of the 1860s. They were ill-rewarded for their trouble.

It cannot be argued that the deficiencies of the Native Land Court were the responsibility of the court, not the Crown. Parliament passed the laws that gave the court its being and its structure; and it was the Governor who approved the rules and regulations under which it operated. When it became obvious that Maori society was suffering grave damage through the operations of the court, Parliament continually heeded settler and speculator demands and overlooked wiser counsel that warned changes were essential. The only Maori the Native Land Court advantaged were those whom the court should have named as trustees, not outright owners, or those prepared or actually encouraged to defraud their fellow claimants. The 1873 Act supposedly gave the House more control over the court, and the court was required to be guided by equity and good conscience, yet Fenton was 'soon back to his high-handed ways with Maori land, playing fast and loose with requirements about succession and reserves' – and it was not until the early 1880s that he was 'at last exposed and denounced as incompetent and an antagonist of the Maori people'.[141]

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140. See, for example, Angela Ballara, *Proud to be White? A Survey of Pakeha Prejudice in New Zealand*, Auckland, 1986
141. Ward, pp 255, 289

The Crown, by omission and commission, had exposed Maori to 30 years of legalised malpractice. No wonder a Maori elder, disillusioned by the working of the court and expressing the sentiments of his people, said: 'The law has been our ruin. In the time of our ancestors . . . we received no hurt similar to this. Give us back what land is left.'[142]

142. Cited in Sorrenson, 'Land Purchase Methods', p 187

CHAPTER 5

CONFISCATION, COURTS, AND COMMISSIONS

The Native Land Acts were drafted with alienation in mind, but they could only operate successfully in districts where there were at least some owners willing to take their land before the Native Land Court. In the fertile and very desirable areas where the King held sway and Maori had ceased to sell land, some other means had to be devised to pry lands out of Maori hands. The problem was not beyond the wit of the legislature.

5.1 Confiscation

In mid-1863, with war a distinct possibility, an elaborate plan to confiscate 'rebel' land on which to establish European settlements was drawn up by the Premier, Alfred Domett, an aggressive Wakefieldian.[1] His ideas of what should have happened to Ngati Toa's leaders after the Wairau affray of 1843, and his criticism of the Government's 'humanitarian' policy toward Maori, shaped his views and attitudes as Premier at a crucial stage of New Zealand's history. When Parliament met in October 1863, Domett laid before the General Assembly a 12-page memo which clearly expressed his views. It would be 'only just and reasonable', he said, to take all the Waikato and Taranaki lands best suited to English settlement, and banish the rebellious tribes to 'the valleys and plains further up in the interior'.[2] He would put military settlers on some of the confiscated lands, and sell the rest to defray the cost of the war – a war which did not begin until imperial troops invaded the Waikato a few weeks after Domett had begun to draft his proposals.[3]

Prospective military settlers had already signed Government contracts specifying the terms on which they would be granted land, several months before the New Zealand Settlements Act 1863 was passed.[4] A retrospective clause had to be written into the Act to validate the contracts and legalise the confiscation of land that had

1. Domett memo, 23 May, 1863, AJHR, 1863, e-7A, pp 7–8; Domett memo, 24 June 1863, AJHR, 1863, e-7, p 8
2. AJHR, 1863, A-8A, p 7
3. On confiscation in general and its application in Taranaki in particular, see Hazel Riseborough, 'Background Papers for the Taranaki Raupatu Claim', report to the Waitangi Tribunal, claim Wai 143 record of documents, doc A2, 1989
4. The first was dated 6 July 1863; AJHR, 1866, A-13, pp 7–8

already been 'given away' to military settlers. According to ministerial reasoning, it was the paucity of the European population and the lack of respect on the part of Maori for settler and Government power that had led them to rebel, and the solution would be to introduce a sufficient European population to overawe them and secure peace.[5]

The Government had its eyes on the fertile lands of Taranaki and Waikato from the start; the Tauranga and Bay of Plenty lands were later swept into the net. It just happened that these were the most fertile and desirable lands in the country – lands the Maori owners would not part with. T M Haultain, Minister of Defence from 1865 to 1869, reported in 1871 that Maori had 'always been loth to part with their fertile land' and it was chiefly by confiscation that Government had 'obtained any large tracts of really good land'.[6]

The Whitaker–Fox ministry succeeded the Domett ministry in October 1863 and adopted unchanged the elaborate confiscation scheme; two months later they passed the New Zealand Settlements Act 1863 into law. The ostensible aim of the Act was to establish settlements for colonisation in the North Island; in practice it authorised the confiscation of the land of those tribes deemed to have been 'engaged in rebellion against Her Majesty's authority'. The ministry was dominated by Auckland capitalists, notably Whitaker and Russell. They claimed that taking land from rebellious tribes was not punishment for the past, but a guarantee for the future – a deterrent to rebellion.[7] Domett had proposed raising a loan of £4 million, £1 million of it to fight the war which would justify taking the land, to be repaid by the sale of the land.[8] Reader Wood, treasurer in the Whitaker–Fox ministry, reckoned on making £3 million from the sale of the land. Fox was careful to point out that the Government proposed 'to confiscate (that is, to take without compensation) no lands except those of which the owners have been engaged in open rebellion'. The Act would not empower the Government to confiscate other lands, but only to take other lands on payment of full compensation.[9] Only the land of those in rebellion would be confiscated; the land of 'really loyal natives' would just be taken. The problem of distinguishing the one from the other was passed over very lightly, but it was a problem that was to bedevil successive governments for years to come.

Under the New Zealand Settlements Act 1863, the land of any tribe or section of a tribe 'or any considerable number thereof' deemed to have been in rebellion since 1 January 1863 could be declared a 'district' within the provisions of the Act. Land in that district could then be set apart as 'eligible sites for settlements for colonization', and such sites would become 'Crown land freed and discharged from all Title Interest or Claim of any person whomsoever'. Compensation would be paid to those with title interest or claim to such lands, provided they had not themselves

5. AJHR, 1863, A-8, pp 2–4
6. AJHR, 1871, A-2A, p 8
7. NZPD, 1861–63, p 783
8. AJHR, 1863, A-8A, p 7
9. AJHR, 1864, appendix to e-2, p 18

been in rebellion or aided, assisted, or comforted those who had; and to those who, having been in rebellion, should come in within a specified time, deliver up their arms, and submit to trial.

Since the Act required the Governor in Council to proclaim the districts and set apart the sites for settlement, no land could actually be confiscated until the Governor and his responsible advisers were agreed on the procedure. They were agreed on the necessity for confiscation; what they could not agree on was the extent to which it should be carried. The Governor, acting on instructions from the Colonial Office, had confiscation for punishment in mind. The ministers were intent on confiscation for profit. While Grey and his ministers bickered all through 1864, no land was confiscated. The ministry tried repeatedly to pin Grey down and have him proclaim districts under the New Zealand Settlements Act 1863, and he as often managed to procrastinate. It was the last straw for the ministry when Reader Wood returned from London with the news that he had failed to negotiate the loan on which the ministry was relying to suppress the rebellion, settle immigrants on the confiscated land, and undertake public works. He had found there was considerable disquiet at the Colonial Office over the Government's intentions with regard to confiscation. With no loan and no confiscated land as 'an important source of revenue', their financial policy was in tatters, and they formally tendered their resignations.[10] Whitaker expressed the opinion of the ministers and, they believed, 'a large majority of both Houses of Assembly and of the public in general', when he said that 'Responsible Government in New Zealand can never be satisfactorily worked under His Excellency Sir George Grey'.[11]

Grey had so far successfully thwarted his ministers' intentions to confiscate huge quantities of land, but he was obliged to accept the conditions specified by Weld if he was to form a new ministry – and one of them was that proclamations of confiscation under the 1863 Act be issued without delay.[12] The first appeared on 17 December 1864; it declared that the Governor would 'retain and hold as land of the Crown' all the land in military occupation in the Waikato and as much rebel land in Taranaki and as far south as Wanganui as the Governor should think fit.[13] Much more extensive confiscations were proclaimed in both areas the following year,[14] and in addition the whole of the Tauranga–Moana block, supposedly of 214,000 acres but nearer to 290,000 acres, was declared to be a district under the 1863 Act.[15]

Once a district was declared under the Act, the Colonial Government could 'at any time thereafter confiscate within that district such lands as they may from time to time consider requisite for the purposes of settlement'.[16] The native title to the

10. AJHR, 1864, e-2, pp 110–111
11. Ibid, p 100
12. Weld memo, 22 November 1864, AJHR, 1864, A-2
13. *New Zealand Gazette*, 17 December 1864, p 461
14. *New Zealand Gazette*, 31 January 1865, pp 15–17; *New Zealand Gazette*, 7 June 1865, pp 170–171; *New Zealand Gazette*, 5 September 1865, pp 265–267
15. *New Zealand Gazette*, 27 June 1865, p 187
16. Cardwell dispatch, 26 April 1864, AJHR, 1864, appendix to e-2, p 20

land was thereby extinguished and the land became Crown land. Clearly only the land designated as a site for settlement should have become confiscated land; the rest should have been returned to those who had taken no part in the rebellion. The Attorney-General, James Prendergast, gave his opinion on this point in 1866.

> The operation of the New Zealand Settlements Acts appears to me to be that as to such land within the declared districts as is not set apart for Settlement, that part may be given back to the Natives as abandoned by the Crown or be disposed of in compensating those Natives who establish their claims without any grant; but that as to such land as is reserved for settlement that becomes Crown Land and would require a grant to dispose of it.[17]

In other words, land within a district not designated as a site for settlement retained its native title. But this is not what the Government intended. One of the aims of confiscation was to extinguish native title over vast areas, and in most cases the Government got around the problem by declaring whole districts to be sites for settlement. Mount Taranaki, the Poukai Ranges, the eastern side of the Kaimai Range, and the Waikato swamps, all became part of the legal fiction that they were eligible sites for settlement for colonisation. Lest there be any doubt about the status of land within a district under the New Zealand Settlements Act 1863, the Confiscated Lands Act 1867 resolved the question. Any land taken under the 1863 Act and its amendments and declared to be a district, whether or not set apart as a site for settlement was to be deemed to be 'Waste Lands of the Crown'. The intention of a succession of ministries was crystal clear.

5.2 The Compensation Court

Proclamations of confiscation issued in accordance with the New Zealand Settlements Act 1863 and its amendments applied to huge areas of land: in Taranaki 1,275,000 acres; in Waikato 1,202,172 acres; in Tauranga 290,000 acres; in Opotiki 448,000 acres.[18]

The question was how to distinguish the lands of 'loyal' and 'rebel' Maori and compensate loyal Maori and surrendered rebels in accordance with section 5 of the New Zealand Settlements Act 1863. An order in council of 2 September 1865 promised that no land of any loyal inhabitant would be taken except as necessary for the security of the country, and then only against payment of compensation; and that all rebel inhabitants who came in within a reasonable time and submitted to the Queen's authority would receive 'sufficient' land under a Crown grant. The peace proclamation of the same date repeated the promise to restore land 'at once' to well-disposed natives, and it promised that commissioners would be sent 'forthwith' to the Waikato and Taranaki to settle the people on the land and to mark out the boundaries of the blocks they were to occupy.[19]

17. Prendergast to Native Minister, 16 January 1866, RDB, vol 125, pp 47911–47912
18. Royal Commission on Confiscated Lands (Sim commission), AJHR, 1928, g-7, pp 6–22

The 1863 Act had provided for the establishment of Compensation Courts to determine claims for compensation, but no court sat until May 1865 when one was convened in Auckland to hear claims relating to the Waikato confiscations. Hearings around Auckland (at Mangere and Orakei) and in the Waikato (Port Waikato and Ngaruawahia) continued sporadically until July 1868. In Taranaki, the first hearings were at New Plymouth between June and October 1866, followed by Wanganui in December 1866 and January 1867, and again in February 1874. In Bay of Plenty there were hearings at various centres throughout most of 1867.[20]

The Compensation Court was no more conveniently organised than the Native Land Court. Fenton ran them both, styling himself senior judge of the Compensation Court. Claimants had six months in which to submit their claim in writing to the Colonial Secretary, and it was up to him to refer the claims to the judge of a court competent to hear them; and up to the judge to determine the right of each claimant and the amount of compensation to which he was entitled. Claimants had to travel long distances to attend the court; notifications of hearings, adjournments, or delays were often inadequate; and until June 1866, when the first rules and regulations for the conduct of the court were gazetted,[21] each judge had power under section 12 of the 1863 Act to make his own rules for the conduct of the business of his court. Claimants who did not attend the court were excluded from compensation.

In Taranaki the Compensation Court made 518 awards covering nearly 80,000 acres.[22] The task of reconciling the various Acts and proclamations of confiscation was not an easy one. Decisions had to be made on the order of priority of claims; on just how much land was 'absolutely necessary for the security of the country'; on whether or not Parliament had meant that loyal natives should be ousted to make way for military settlers; on what share of the tribal estate constituted 'the land of any loyal inhabitant'; on whether loyal natives who were dispossessed should be compensated in land, and if so, in what land. Under the 1865 amendment to the Act, the court was supposed to 'determine the extent of land' to be given as compensation, and awards of the court were to be accompanied by such plans and particulars as would be decided from time to time by regulation. The problem was that the regulations of June 1866 and September 1867[23] were 'mutually exclusive' in that not until an award was made could the claimant select his piece of land, yet the land awarded was to have been already selected and surveyed. As the 1880 West Coast commissioners said:

> The Court was called upon to do an impossibility, and naturally did not do it. Awards for more than 60,000 acres were not signed for 3 years after the judgements,

19. *New Zealand Gazette*, 5 September 1865, pp 265–267
20. RDB, vol 100, pp v–vii
21. *New Zealand Gazette*, 20 June 1866. The New Zealand Settlements Amendment and Continuance Act 1865 provided that the Governor in Council could make regulations for the practice and procedures of the Compensation Court.
22. AJHR, 1880, g-2, and appendix b, pp 17–24, 51–56, 80; AJHR, 1883, g-3, pp 12
23. *New Zealand Gazette*, 20 June 1866, p 250; *New Zealand Gazette*, 16 September 1867, pp 346–347

> and when they were signed, the words which . . . were inserted in the printed form to describe the land, were struck out. In point of formal validity . . . there is no doubt that the awards of the Court were not made in accordance with the law, and that they are thereby reduced from the rank of a statutory 'determination' to that of mere promises or engagements binding in good faith upon the Crown.[24]

Several of the rules under which the Compensation Court and later the Native Land Court operated were laid down at the first sitting of the Compensation Court in Taranaki when Judges Fenton, Rogan, and Monro heard claims to the Oakura block, part of the Middle Taranaki district proclaimed on 30 January 1865. Fenton found the titles in the Oakura block 'extremely simple' – but it is difficult to see how he could reach such a conclusion, when he found the main problem in arriving at the truth was the loss of traditions and genealogies due to the long absence and dispersion of the owners of the land.[25] He obviously ignored evidence that complicated the formula he had established for awarding compensation: the court excluded the claims of absentees, even though they were 'generally admitted' by the resident owners.

> We do not think that it can reasonably be maintained that the British Government came to this Colony to improve Maori titles or to reinstate persons in possessions from which they had been expelled before 1840, or which they had voluntarily abandoned previously to that time. Having found it absolutely necessary to fix some point of time at which the titles as far as this Court is concerned must be regarded as settled, we have decided that that point of time must be the establishment of the British Government in 1840,[26] and all persons who are proved to have been the actual owners or possessors of land at that time must be regarded as the owners or possessors of those lands now, except in cases where changes of ownership or possession have subsequently taken place with the consent, expressed or tacit, of the Government, or without its actual interference to prevent these changes.[27]

The 1840 rule, which was applied in both the Compensation Court and the Native Land Court, was particularly prejudicial to Moriori of the Chathams; to South Island tribes displaced by Ngati Toa; and to those Taranaki tribespeople who had migrated from Taranaki in the 1820s and 1830s, and who had not returned to occupy any part of their ancestral land. 'In this way 908 loyal claimants were shut out for non-possession or insufficient occupation' of the Oakura block.[28]

Another rule the court laid down for its guidance concerned the status of the resident owners. The court inquired into what parts of the block each resident owned and which of them 'had joined the rebellion or done some Act which brought them within the fifth clause of the Act of 1863'. For 'brevity's sake' Fenton

24. AJHR, 1880, g-2, pp xxxvi, 59
25. AJHR, 1866, A-13, p 3
26. 14 January 1840 – 'the date of proclaiming the Queen's sovereignty'; second report of West Coast Commission, 14 July 1880, AJHR, 1880, g-2, p xxxv
27. AJHR, 1866, A-13, p 4
28. AJHR, 1880, g-2, p xxxv. It should be noted that Te Atiawa themselves had displaced earlier tribes in the Horowhenua district and Whanganui-a-Tara.

called 'this class of persons' rebels. His criteria for so judging them were not explained. Then, having found it impossible to 'appraise' the value of chiefs on the loyal or rebel side, the court deemed each man, loyal or rebel, to be of the same value and to have an equal estate.[29] It was convenient reasoning. There were fewer loyal men than there were rebels; only 10,927 acres of the 27,500-acre block could be said to belong to them; and because some of that was mountainous they were really entitled to only 7400 acres of 'available' land (meaning available for cultivation).[30] Rebels were found to be valuable men when it came to calculating how much land could be taken from them without payment of compensation.

Under the 1863 Act, 'loyal natives' could be deprived of their land, but they would be paid monetary compensation for it; under the 1865 amendment compensation could be given wholly or partly in land in lieu of money – not because the Government was anxious to return land to Maori, but because the Treasury was short of funds. If compensation was paid in land, it should have been their own land that was returned to loyal owners. A proclamation of 17 December 1864 had promised to those who had remained and should continue in peace and friendship 'the full benefit and enjoyment of their lands', and that surely meant 'not lands of equal value somewhere else, but their own ancestral territory'. But much of the Oakura block had already been granted to military settlers. The court could not find 7400 acres of good land there for the loyal owners; only 2500 acres remained.[31] The court's dilemma was evidenced by Ropata Ngarongomate, of Ngamahanga hapu, who addressed the court. He said:

> I demand that our compensation shall be within the block; the blood of my relatives is on my land. You must remember my services during the war. My cattle, my sheep, my pigs, and all my property went in the war; my wheat, my cultivations, and I never received anything for them, though the pakehas have all been compensated. What I did was without remuneration, I was never paid, and now let the Government fulfil its promises.[32]

If justice was to be done and the promises of the Crown fulfilled, then 'compensation in land to be ordered to the Oakura claimants' had to come out of the Oakura block.[33] Since this was an impossibility, the court referred the problem to the Crown. Section 9 of the New Zealand Settlements Amendment and Continuance Act 1865 authorised the Colonial Secretary to agree to an out-of-court settlement by which any claimant might be given 'money or land or both to withdraw his claim'.[34] In the case of the Oakaura block, A H Russell, then Native Minister, 'effected an arrangement with the claimants', and ultimately all the claimants except one withdrew his claims to the court's satisfaction. But what the terms of the arrangement were 'the Court did not think it their duty to inquire'.[35]

29. AJHR, 1866, A-13, p 5
30. Ibid
31. Ibid, pp 6, 10–11
32. Ibid, p 5
33. Ibid, p 11
34. Ibid, p 10

The arrangement was in fact effected by W S Atkinson as Crown agent, and Robert Parris as native agent. Atkinson:

> applied for and obtained a suspension of judgement for two days, in the hope that the matter might be arranged out of Court, by offering the Native claimants the whole of the remaining land in the Oakura block in full compensation for their claims.

The offer was accepted by Parris 'on behalf of the natives'.[36] Whether 'the natives' had any real say in the matter, or whether it was simply a convenient arrangement between two Government-appointed officials, is not clear.

This was not the only out-of-court settlement – far from it; it was an arrangement used almost anywhere the court sat. When claims in the Waitara South block were being investigated, 'the Crown Agent announced that negotiations were being undertaken, and the Court adjourned to give the parties time and opportunity to agree'. This they eventually did, and all the claims were withdrawn – but again the court:

> did not think it its duty to inquire what were the terms of the agreement, but it appeared . . . that the rights of the Maoris (inter se) were to be settled by the Native Land Court at some future time.[37]

The Legislative Council was less easily satisfied about these out-of-court settlements than the Compensation Court had been, and Parris was required to provide a full explanation. Several hundred claims in the Oakura block had been submitted; only 76 were admitted (two-fifths of the claims of those found to be in rebellion). All the rest were rejected on various grounds, such as non-residence or non-appearance in court. The successful claimants were offered 'over 10,000 acres', which obviously included the 8000 acres of 'worthless' land the court had excluded in its first calculations. This small point was not elaborated on for the benefit of the Legislative Council.[38]

The investigations of claims into the Waitara South block had not proceeded as far as they had in the Oakura block when the court case was halted, but again Parris agreed 'on behalf of the Natives to accept in full compensation of their claims' what land was left in the block (something over 10,000 acres) after 14,000 acres of the best land had been awarded to military settlers.[39]

Reports on the Oakura and Waitara South blocks were laid on the table of the House and printed in the *Appendices to the Journal of the House of Representatives*, but when the Ngatiawa and northern Ngatiruanui Coast blocks came before the court in September and October 1866 this was not done. Increasingly sketchy

35. Ibid, p 12
36. W S Atkinson to R Parris, 29 June 1866, AJHR, 1866, a-13, p 17
37. Ibid, p 16
38. Parris memo, 8 August 1866, AJHR, 1866, a-13, p 19
39. Parris to W S Atkinson, 10 July 1866 and Parris memo, 8 August 1866, AJHR, 1866, A-13, pp 17, 19. See also Janine Ford, 'The Decisions and Awards of the Compensation Court in Taranaki, 1866–1874', report to the Waitangi Tribunal, claim Wai 143 record of documents, doc e6, 1991, pp 32–47

records of the court's proceedings exist in Department of Survey and Land Information (DOSLI) files. Again, claims to the Ngatiawa Coast block, and possibly the northern Ngatiruanui Coast block, were settled out of court.[40] Claims to the southern portion of the Ngatiruanui Coast block were heard in Wanganui beginning in December 1866. The judgment in these claims was both gazetted and published.[41] Sixty-eight claims concerning 630 people had been submitted to the court; the claims of only 265 were heard, and of them only 119 were admitted. They were awarded a total of 17,264 acres; '40 claimants were awarded 400 acres each, and 79 claimants received 16 acres each'.[42] Many claims were not heard because of the non-appearance of the claimants in court; some were rejected on the grounds that the claimants were unsurrendered rebels.[43] At the Wanganui sittings, the rule of exclusion of absentees was reversed, 'but absentees were only let in on a fantastic scheme'. The court in its wisdom decided that 'the interest of a loyal absentee was to bear the same proportion to the interest of a loyal resident as the number of loyal residents bore to the number of resident rebels'. The effect of 'this queer equation was that as there were only 40 loyal residents to 957 rebels, the loyal resident got 400 acres, while the absentee got 16'.[44]

Absentees whose claims had been rejected at earlier hearings petitioned the General Assembly, and a number of them gathered at the Native Office in Wellington in July 1867 to press their case. The New Zealand Settlements Act Amendment Act 1864 enabled the Governor to give compensation where none had been awarded by the court, and the Government now 'advised His Excellency, without reversing the decision of the court, to extend his kindness to these men'. Thus another 12,200 acres, almost all bush land, were awarded to 755 Ngati Tama, Ngati Mutunga, Te Ati Awa, Puketapu, and Taranaki absentees, each of whom was to get 16 acres.[45] A further 200 acres were awarded to Te Puni, and 100 acres each to Wi Tako, Mohi Ngaponga, and Hemi Parai, who for various reasons deserved the special consideration of the Government. The recipients were not happy with their measly grants; Mohi Ngaponga declined his 'so that the Government might be ashamed of their kindness'.[46] In any case, 14 years later none of these chiefs had yet been allocated 'the paltry dole of land which had been promised to them in recognition of loyal service'.[47]

Some months before the court sat in Taranaki the provincial authorities were complaining about Parris endeavouring to adjust the claims of Taranaki Maori to confiscated lands 'in such a manner that their final adjudication by the Compensation Court may be a matter of form only'. They wanted the claims settled 'in open

40. Ford, pp 48–64
41. *New Zealand Gazette*, 20 April 1867, pp 189–191; F D Fenton, *Important Judgements Delivered in the Compensation Court and Native Land Court, 1866–1870*, Auckland, 1879
42. AJHR, 1880, g-2, p 79
43. AJHR, 1872, c-4, p 19; Ford, pp 67–68
44. Second report of West Coast Commission, AJHR, 1880, g-2, p xxxv
45. Ibid, p xxxviii
46. Ibid, appendix c, pp 1–3
47. Ibid, p xxxviii

Court . . . with the sanction of law', both because the settlers were uneasy and distrustful of the 'private nature' of Parris' negotiations, and because the natives were 'perplexed and exceedingly discontented' with the way their claims were being handled – or ignored.[48]

Parris had been 'invested', confidentially, by the previous Government with 'full and uncontrolled discretion' in negotiating with all the rebels in his district to persuade them to 'come in at once', accept defined blocks under Crown grants, and 'promise to live peaceably under the law'. He was to use his discretion 'in dealing liberally in the disposition of the land' in order to 'win their final acquiescence' in the settlement of the whole district. The Weld government wanted the matter settled with 'the utmost expedition'.[49] Arranging for the Compensation Court to sit in Taranaki did not appear to be part of their plan.

The Stafford ministry was just as anxious to get the confiscated lands colonised, but it spent several months arguing with the provincial government over how the scheme was to be financed, before it asked Fenton to call a sitting of the court.[50] Although Parris held a commission as judge in the Compensation Court, the Government meant to continue to employ him on the ground. Just before the September 1866 sittings in New Plymouth to hear claims in the Ngatiawa and northern Ngatiruanui Coast blocks, J C Richmond, head of the Native Department in the Stafford government, issued Parris with new instructions. He was to induce absentee owners of these blocks to abandon all their claims (there were about 216 of them) in return for reserves of about 5000 acres and payment of £1500.[51] These were claims which, if taken to court, would be excluded from payment of compensation. The Government did not want these absentees returning to Taranaki for Compensation Court hearings; but neither apparently did they want to cross Fenton by obliging him, by legislation if necessary, to provide for absentees in his court awards. Fenton was already a law unto himself.

Parris was also to 'arrange' the claims of residents so that the court would only have to give 'formal sanction to adjustments previously assented to by the claimants'; and claimants were to understand that the whole district would be passed through the court and their claims 'entirely disposed of, and no further claim afterwards allowed'.[52]

The Government meant to get Maori claims out of the way so that they could put military settlers on the land long promised to them. Actually settling Maori on their land was much less of a priority. North of the Waingongoro River, compensation was awarded and scrip issued for a specified quantity of land, but only a small portion was actually allocated under arrangements made by Parris. Most awardees got nothing but land scrip and promises for the next 15 or 20 years, until Fox as sole

48. H R Richmond to Stafford, 8 February 1866, AJHR, 1866, A-2A, pp 7–8
49. FitzGerald to Parris, 30 August 1865, AJHR, 1879, A-8, p 3
50. See AJHR, 1866, A-2A, pp 1–9
51. J C Richmond to Parris, 10 September 1866, AJHR, 1879, A-8, p 4
52. Ibid

west coast commissioner awarded their reserves in the 1880s.[53] South of the Waingongoro, awards were allocated to:

> specific sections of land, after which the allottees were considered by the Government to have a valid and transferable title even before the Crown grants were issued; and it was not long before the owners sold or leased (chiefly the former) nearly the whole of it, the Government being itself the principal purchaser.[54]

Far from ensuring that confiscated land was returned to loyal Maori or returned rebels, the system operated to deprive Maori of their land.

Of the 17,264 acres awarded by the court at the Wanganui sitting, Parris allotted only 9864 acres to 56 claimants.[55] None of the other claims were allotted for another six years, and by that time only 6304 of the original 17,264 acres were still in Maori hands.[56] By 1880, despite the inalienation clause supposedly required in all Crown grants, practically the whole of the awards had 'passed into the hands of Europeans, either by sale or lease', and the Crown grants were 'only required in order to perfect the titles' of the European purchasers who had acquired the interests.[57]

Clearly the Government did not mean Maori, loyal or rebel, to continue to hold lands on the west coast. In 1865, when the confiscations were first promulgated by proclamation, Whitaker's partner, Thomas Russell, Minister for Defence when the New Zealand Settlements Act 1863 was passed, expressed the mood of the House when he said he wanted all natives, loyal or rebel, moved off confiscated land and concentrated on reserves 'to prevent their rambling over the entire extent of the Waikato and picking out the best portions, thus interfering with the future settlement in blocks by Europeans'.[58] And by as early as December 1865, Julius Vogel had drawn up a detailed scheme for disposing of the 'magnificent lands acquired from the Natives'.[59] In the event, he had to wait until the 1870s to put his scheme into practice – but only because Parliament was not yet ready to sanction the borrowing of 'large sums' for the purpose.[60]

As far back as 1859, T H Smith, Assistant Native Secretary, had suggested a scheme that was echoed in the New Zealand Settlements Act 1863. Gore Browne had asked him for his views on 'the question of making further provision for the extinguishment of the native title over the unacquired waste lands of this country, with a view to the extension of European settlement'. Smith's idea was that:

> districts should from time to time be defined, each district to be . . . comprised within natural boundaries, and to include an eligible site for a township, and other requisites

53. See, for example, AJHR, 1882, g-5C; AJHR, 1883, g-3; AJHR, 1884, sess i, A-5A
54. AJHR, 1882, g-5C, p 1
55. AJHR, 1880, g-2, p 79
56. AJHR, 1872, c-4, p 21
57. AJHR, 1880, g-2, p 80
58. NZPD, 1864–66, p 715
59. Vogel to Stafford, 14 December 1865, AJHR, 1866, a-2B, pp 1–3
60. Ibid, p 1

> for the formation of a complete settlement. The native title should be extinguished over the whole of any such district before any portion of it is settled.[61]

When it came to granting compensation in land in the confiscated blocks, C D Whitcombe, commissioner for Crown lands in Taranaki, was unhappy with Fenton's requirement that all Crown grants of confiscated land were to contain an inalienation clause. That might do for those lands that had been 'individualized', but he 'hoped it was not going to apply to large blocks of confiscated land to be returned, otherwise it would have a bad effect on settlement'. When he took over his position as commissioner, he found in his office 'Native grant forms' containing the inalienation clause, but the clause in most cases had been struck out. All the grants for the large Waitara east and west blocks had been executed without the clause, with the result that almost the whole area had 'fallen into the hands of settlers'.[62]

In the 1870s, when Vogel's long-delayed immigration and public works scheme was put in place, Parris was issued with yet more instructions with regard to the settlement of the confiscated lands. South of the Waingongoro the awards of the Compensation Court had still not been defined on the ground, and McLean wanted Parris to buy out, at £1 per acre, all the awards of those who were willing to sell.[63] George Worgan, an interpreter and land purchase officer, was entrusted with the job of surveying and subdividing awards, and purchasing all he could of them. He was pleased to report that he had been 'enabled to acquire a considerable estate for the Government'.[64] He forgot to say he had also acquired a considerable estate for himself and his friends. Instead of confining himself to his official duties, he also negotiated purchases for private individuals, and in so doing allocated choice blocks to awardees who were willing to sell. Instead of paying £1 per acre as authorised by the Government, he would offer lesser chiefs 10 shillings per acre, and split the other 10 shillings between himself and the principal chief. He would induce awardees to leave the allocation of their claims to him, then he would group them together in one block – which made them very attractive to European purchasers.[65] Ngarauru owners particularly were severely disadvantaged by Worgan's handling of compensation awards. By threats, cajolery, and trickery, awardees were persuaded to relinquish their claims, in some cases without ever receiving full payment for them.[66]

Of all the nefarious deals done over the confiscated lands, Worgan's were some of the most reprehensible, but nowhere on the west coast were the promises of the Acts and proclamations of confiscation fulfilled. The non-fulfilment of those promises by ministry after ministry, and the implementation of the confiscation policy in settler, not Maori interests, were at the heart of the troubles which plagued the west

61. T H Smith to Gore Browne, 20 September 1859, BPP, vol 11, pp 100–101
62. AJHR, 1880, g-2, p 59
63. McLean to Parris, 20 January 1872, AJHR, 1872, c-4, pp 26–27
64. Worgan report, 2 August 1872, AJHR, 1872, c-4, pp 20
65. AJHR, 1873, h-29, p 11
66. AJHR, 1880, g-2, pp lix, 41, 43

coast and the colony for years to come. The grievances of those who never were in rebellion, or who actually took up arms on behalf of the Queen yet still lost their land by confiscation and were then cheated of their compensation, are a poignant and lasting legacy of the intolerance, arrogance, and racism brought to New Zealand by its European settlers in the nineteenth century.

5.3 Tauranga Moana

A block of land estimated at 214,000 acres was confiscated around Tauranga by an order in council dated 18 May 1865, issued under the New Zealand Settlements Act 1863.[67] The confiscation of the whole block came after one-quarter of it had already been 'ceded' to the Government, and half of it 'purchased'; and after the Tauranga Moana people had been solemnly promised by Governor Grey that the rights of friendly natives would be scrupulously respected and that not more than one-quarter part of the lands of surrendered rebels would be taken.[68] Had either the cession or the sale been voluntary agreements, carried out by those who had the right to alienate the land, there would have been no need to confiscate it. As it was, the legislation was necessary simply to overcome local opposition and circumvent the need to deal with grievances.[69]

The confusion and contention over the Tauranga lands grew out of fundamental differences of opinion between Grey and his ministers, which made the effective management of native affairs impossible. When the Whitaker–Fox ministry came to power in October 1863, William Fox dispensed with the position of Native Minister and simply assumed the functions under the rubric of the Colonial Secretary's portfolio.[70] He and Whitaker (and Thomas Russell operating in the wings) were anxious to impose the confiscations provided for in the New Zealand Settlements Act 1863; the Tauranga lands were an attractive target. However, Grey would not countenance confiscation until he had tried, and failed, to obtain cessions of land from 'defeated rebels', as required by the Colonial Office.[71]

In August 1864 Grey, followed by his ministers, went to Tauranga to accept the submission of 'Ngaiterangi' – by which they meant the Tauranga Moana people in general, not the Ngaiterangi tribe in particular. The ministers wanted to see the submitted rebels settled in 'a permanent place of residence . . . not inconsistent with the location of the military settlers'. They had advised Grey that the land allotted should be held under Crown grants 'and not in common but in severalty'.[72] The location of military settlers had first priority as far as ministers were concerned.

67. *New Zealand Gazette*, 27 June 1865, p 187
68. AJHR, 1867, a-20, p 6
69. For more detail on this section see Hazel Riseborough, 'The Crown and Tauranga Moana, 1864–1868', report for Crown Forestry Rental Trust, October 1994
70. NZPD, 1861–63, pp 780–782
71. Grey memo, 10 October 1864, AJHR, 1864, e-2A, p 9; Cardwell dispatch, 26 April 1864, AJHR, 1864, appendix to e-2, p 22
72. Whitaker memo, 28 July 1864, AJHR, 1864, e-2, p 79

They would not specify the extent and location of land that would be left to Maori. What they had in mind was to establish a frontier line from Raglan or Kawhia to Tauranga, to confiscate 'all the land belonging to Rebel Natives within that line', and return 'in convenient locations, estates varying from 10 to 2,000 acres' to each of the former inhabitants who wished to return and reside in the district.[73] But Grey would not entertain such a proposal. He had already promised Ngaiterangi 'generous terms',[74] and at the pacification hui, when he accepted the 'absolute and unconditional submission' to the Queen's authority of all those present, Grey assured them they would be dealt with generously and 'cared for in all respects as other subjects of the Queen'.[75] When the ministers failed to convince Grey to confiscate widely, they tried instead to convince the surrendered rebels to cede 'some specific block of land'. They failed in that too, as the Tauranga Moana people had given up 'the mana of the land' to the Governor. They would 'leave the entire settlement of their lands' to him and 'receive back from him so much as His Excellency might think proper to restore'.[76] Grey took it that 'Ngaiterangi' had relinquished 'the whole of their lands as forfeited'.[77] Ngaiterangi believed they had relinquished only the shadow of the land. They had left the precise details of the arrangement to the Governor, on the understanding that they were to make only a 'nominal or temporary' forfeiture.[78]

The 'one-fourth part of the whole lands' the Governor meant to take as punishment for rebellion was later defined as 50,000 acres of choice agricultural land between the Waimapu and Wairoa Rivers (south and west of present-day Tauranga).[79] The land the Government proposed to keep was Ngatiranginui land; most of that which they proposed to return was Ngaiterangi land, and nowhere in official papers was Ngatiranginui considered as a separate entity. They were simply subsumed under the title 'Ngaiterangi'. When there were objections to the arrangement, the people were told other land (mainly sandy islands in the harbour) would be reserved for them, that their claims would be individualised and they would receive inalienable grants for them.[80]

Ministers were not satisfied with their meagre remuneration. When Grey left Tauranga they stayed on, and by the end of the week they had gained almost another 90,000 acres; they had managed to purchase from a few compliant chiefs the Te Puna–Katikati block. There appears to be no record of the deal struck in that week. It was always said publicly that the 'Tauranga natives wished their land to be purchased by the Government', but the bulk of the people certainly had no knowledge of and no part in the sale process, and the deal was finalised in Auckland by a group of about 18 chiefs who accompanied Fox and Whitaker on their return.[81]

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73. Whitaker memo, 25 June 1864, AJHR, 1864, e-2, p 5
74. *New Zealander*, 31 May 1864, p 5
75. AJHR, 1867, a-20, p 5
76. Clarke to Fox, 7 August 1864, AJHR, 1867, a-20, p 7
77. Grey dispatch, 6 August 1864, BPP, vol 14, p 114
78. AJHR, 1869, a-18, p 9
79. AJHR, 1867, a-20, p 12
80. Ibid

No sooner had the sale become known than the right to sell was disputed by other claimants. Fox was soon tired of the endless stream of petitions and letters, and wrote icily to the Governor about this 'early and very clear proof of the inconvenience and impolicy of the cession principle as opposed to that of confiscation'. All these complaints and claims over what was 'after all a forced acquisition of Native Lands under colour of a voluntary sale' would never have been heard of if only Grey had taken his ministers' advice and confiscated the entire block.[82] Native title would have been extinguished, the whole block declared Crown land, and the Government would no longer be burdened with the need to deal with local opposition and grievances.

When the Weld ministry succeeded to office two months later, they did so with certain stipulations, including 'the right of determining the question as to what land should be confiscated and subject to what conditions'.[83] Their determination in the case of the Tauranga lands was expressed the following May by order in council, declaring all the lands of 'the tribe Ngaiterangi' to be a district 'set apart and reserved as sites for settlement and colonization'.[84]

Meanwhile, Weld had appointed James Mackay, a senior Native Department officer, and H T Clarke, formerly resident magistrate at Tauranga, to inquire into the claims of the Marutuahu (Thames) tribes to the Katikati lands. They spent four days in December 1864 investigating the claims of the Tawera or Ngatipukenga people. They found the evidence 'very lengthy and conflicting', and their report was not presented to the Native Minister for another six months.[85] They concluded that Tawera had an ancestral claim to the land, and Ngaiterangi a claim by conquest, about 70 years earlier. About 1857, after a dispute between Ngaiterangi and Ngatihe over an eel pa, Tawera were invited by Ngatihe to return to the district and were reinstated on a small portion of their original claims. In the judgement of Mackay and Clarke, Tawera could 'fairly claim' only that land of which they had retained possession, or which had been 'returned to them by their former conquerors'[86] – which ignored the fact that the major 'conquering tribe', Ngaiterangi, had not invited Tawera to repossess the land. It is also hard to see how the investigators could uphold a claim to land lost by conquest about 1795, and 'returned' only seven years before the investigation in 1864.

Mackay and Clarke were also appointed not just to investigate, but to arbitrate in the dispute between Ngaiterangi and Te Moananui and his people of Ngatitamatera – as though it were already acknowledged that Te Moananui's claim was good. Clarke arbitrated on behalf of Ngaiterangi, and Mackay on behalf of Ngatitamatera.[87] This investigation was also held in Auckland at the end of December. It lasted five days, but was apparently more easily decided than the Tawera claim. Again it

81. *New Zealander*, 16 August 1864, p 3
82. 'Native Claim to Katikati', Fox to Grey, 24 September 1864, g-17/3, no 15, NA Wellington
83. Weld memo, 22 November 1864, AJHR, 1864, a-2; Weld memo, 11 August 1865, AJHR, 1865, a-1, p 26
84. *New Zealand Gazette*, 27 June 1865, p 187
85. Mackay to Mantell, 10 January 1865, AJHR, 1867, a-20, p 7
86. Mackay and Clarke report, 22 June 1865, AJHR, 1867, a-20, p 11
87. Mackay and Clarke report, 10 January 1865, AJHR, 1867, a-20, p 7

was clear that Ngaiterangi had a claim by conquest, while Ngatitamatera had an ancestral claim. But despite the fact that Ngaiterangi had exercised their rights to a greater extent than Ngatitamatera, the decision of the arbitrators was that the purchase money for the land should be equally divided between the two claimant groups. The purchase price was to be two or three shillings per acre, the actual rate to be decided once the area was surveyed and valued. The arbitrators' decision on the claim was confirmed by Walter Mantell, Native Minister in the Weld government.[88]

Nothing was then done to settle the claims the Government had investigated – no surveys, no payments, no one settled on the land with Crown grants. In October 1865 there was yet another change of ministry, and a new round of inquiries began. The Defence Minister, T M Haultain, was sent to Tauranga in February 1866 to 'settle' the land question by getting the local people to help in the carrying out of the peace terms. But Maori and British understanding of the peace terms were far apart. According to Haultain the peace agreement required the local people to give up 50,000 acres, one-quarter of the 200,000-acre block; but they maintained the Governor had said he would take one-quarter of the whole of the rebels' land, not of the whole block.[89]

Haultain left them 'to think it over', and a month later the Governor and Whitaker returned to Tauranga to settle the boundaries of the block to be retained by the Crown. No direct report of this vital meeting was published at the time, and the question of just what happened there became a very contentious issue. Grey apparently confirmed his intention to take a 50,000-acre block, but 'the definite boundary of the land to be taken by the Governor for the sin of the Ngaiterangi' was to be decided later – by Clarke.[90] And Clarke thought 'these natives . . . must see that they are great gainers by having their land taken from them', since so little of it was cultivated and so much 'lying waste'.[91] The local people understood the western boundary would be fixed at the Wairoa. When they were told it might extend much further towards Te Puna they became 'rather excited' and refused their consent until threatened with the force of arms.[92]

In the event, the block did extend to Te Puna. The surveyors had crossed the Wairoa because nothing like an adequate quantity of 'good agricultural land' could be obtained within the limits of the 'confiscated' block.[93] The Government was not taking land for the punishment of Ngaiterangi's hara, but for the enrichment of Whitaker's province of Auckland. The survey was deliberately provocative, encroaching on Pirirakau villages at the edge of the bush. Clarke ignored all warnings and requests that the survey be stopped. In his view it would be:

88. Mackay report, 26 June 1867, le1/1867/114, RDB, vol 7, p 2320
89. AJHR, 1867, a-20, p 19–20
90. Ibid, pp 62–64
91. Clarke to T H Smith, 18 April 1866, Smith ms (qms 1839), ATL
92. W G Mair to Rolleston, 20 March 1867, AJHR, 1867, a-20, p 53
93. 29 May 1866, 'District Surveyor Tauranga Letterbook' (cited in Evelyn Stokes, 'Te Raupatu o Tauranga Moana: The Confiscation of Tauranga Lands', report to the Waitangi Tribunal, 1990, p 102)

> a manifest injustice to the other Tauranga Natives that the Pirirakau – the most implicated in the rebellion, many of whom have never surrendered, and who are now the most troublesome in the district – should be allowed to escape without the forfeiture of a single acre of land.[94]

Pirirakau had protested continually over Ngaiterangi's sale of the Te Puna–Katikati block, but they were simply labelled 'a turbulent and obstinate people'[95] and the Government refused to address their complaints. They referred to Pirirakau as a hapu of 'Ngaiterangi'; according to Clarke they were 'of the inferior hapus of Ngaiterangi . . . always kept in a state of vassalage'.[96] The existence of Ngatiranginui, and the status of Pirirakau as one of its hapu, were simply not acknowledged. When Pirirakau interrupted the survey for the second time at the beginning of 1867, tensions boiled over; the Tauranga bush campaign had begun.

The next three months were characterised by brief exchanges of fire and massive destruction of rebel villages, crops, and plantations on the edge of the bush outside the boundaries of the 'ceded' block or just within them.[97] The wanton devastation resulting from this military action of early 1867 was graphically described in a biography of the Mair family:

> Apparently the Government of the time could conceive of no other way of dealing with this poor remnant of the defeated tribes than harrying them into the bush and, by the destruction of their homes and food plantations, rendering them homeless and foodless and, later, by the confiscation of the land itself, landless. The extent of their cultivations and the attractiveness of their villages showed them to be industrious and orderly. No doubt conquering and dispersing them seemed the simpler way of dealing with them, but it left an aftermath of bitterness which never died.[98]

Meanwhile, Whitaker had instructed Mackay and Clarke to meet all the claimants of the Te Puna–Katikati block – not to discuss the purchase, but to settle who was to receive the purchase money.[99] The hui lasted three weeks, and was attended by Ngaiterangi and eight other tribal groups, all of whom contested Ngaiterangi's right to sell the land. According to Mackay's report, written a year later,[100] he rejected one claim, persuaded one group to accept a few hundred acres, and five other groups to accept cash payments of a few hundred pounds. Ngaiterangi could not be persuaded at that hui to agree to terms, and Pirirakau would not accept Mackay's terms at all, so they were dismissed as Hauhau and excluded from the agreement. In fact, Mackay thought of Pirirakau that 'it would be only just to confiscate all their lands, reserving about 2500 acres for their use and occupation', and giving some of the rest to 'those friendly Natives' who had lost land in the block retained by the Crown.[101]

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94. Clarke to J C Richmond, 20 September 1866, AJHR, 1867, a-20, p 21
95. *New Zealander*, 15 January 1865
96. Clarke to Richmond, 25 September 1866, AJHR, 1867, a-20, p 23
97. Ibid, pp 43–44
98. J C Andersen and G C Petersen, *The Mair Family*, Wellington, 1956, p 157
99. AJHR, 1867, a-20, p 64
100. Mackay report, 26 June 1867, le/1867/114, RDB, vol 7, pp 2329–2334

Mackay's instructions – that he was not to discuss the purchase, but simply decide how to distribute the purchase money – made it clear that his decisions were a matter of expediency, designed to quiet potential opposition, not dispense justice. The wording of his report suggested a sort of contest for compensation, with purchase money paid out on the strength of a tribe's bargaining power rather than on the strength of their claim. He reported that 'the claims of the Thames natives are nearly all inferior to those of Ngaiterangi, the latter having exercised more of the rights of ownership than the former'.[102] He had previously found that 'Ngaiterangi proper have no claims by right of inheritance to lands in the district of Tauranga, but have their claims on right of conquest only'.[103] Anywhere else in New Zealand at the time, especially in Fenton's courts, right of conquest would have taken precedence over any other right – but the Tauranga people were denied the opportunity to have their titles ascertained in either the Compensation Court or the Native Land Court. The Government had acquired land by cession or purchase from 'Ngaiterangi', their catch-all name for the several tribes of the district. They would compensate Ngaiterangi 'proper', but they continually acted as though the one were the other. They wanted everyone to admit to being Ngaiterangi 'really' so the problems would be solved, but in fact the confusion between 'Ngaiterangi' and Ngaiterangi 'proper' bedevilled the whole issue in Tauranga.

If the claims to the Tauranga lands were to be finally and justly settled, competent courts would have to hear the claims and settle the ownership. Clarke had presumed in 1865 that the Native Land Court would investigate all claims in the area, and he warned that the rebels would probably be found to be 'very small claimants' and that the major claimants would be found to have taken 'no active part in the war'.[104] But the Government had no intention of allowing the Native Land Court to sit at Tauranga; one of the reasons for declaring the whole district a site for settlement, and therefore Crown land, was to extinguish native title and prevent long, complicated court hearings and the recital of traditional claims to the land. The Compensation Court could have dealt with the land, but Fenton claimed that the Colonial Secretary had not referred any cases to the court, as required by the New Zealand Settlements Act 1863. According to Richmond, all the claims that had come forward had been extinguished out of court.[105]

Fenton was determined that the Native Land Court should sit in Tauranga, so he advertised a sitting for 28 and 29 December 1865, and sent five applications for investigation of title to the Colonial Secretary.[106] Whitaker (then agent for the general government) said that the Tauranga land, having been confiscated, was Crown land and the Native Land Court therefore had no jurisdiction over it.[107] But

101. Mackay to Rolleston, 25 September 1866, AJHR, 1867, a-20, p 22
102. le/1867/114, RDB, vol 7, p 2339
103. AJHR, 1867, a-20, p 7
104. Clarke to Mantell, 23 June 1865, AJHR, 1867, a-20, p 12
105. NZPD, 1867, vol 1, pt 1, p 29; NZPD, 1867, vol 1, pt 2, p 978; Fenton to Richmond, 29 July 1867, AJHR, 1867, a-13, p 1
106. Fenton to Colonial Secretary, 1 November 1865, ia 1/1865/13015
107. Whitaker to Fenton, 14 December 1865, Fenton correspondence, RDB, vol 125, pp 47,893–47,894

Fenton pointed out that as 'no block of land' had been confiscated in Tauranga, but 'merely the land of a certain Tribe in a defined Territory', without a court sitting it could not even be determined whether or not the land to be investigated was part of the confiscated block.[108] Moreover, once a hearing was advertised, claimants had a right to be heard:

> I cannot imagine that the Crown can step in and demand the closing of a Court in any case in which the involvement of its own interests places it in the position of a quasi defendant.[109]

The issue was apparently resolved when all the claims set down for the hearing were withdrawn by the claimants concerned – for what reason, or under what coercion, is not clear.[110] What is clear is that in a clash of the giants the Government would win. They had already decided to amend the law, and added section 18 to the Native Lands Act 1866 to empower the Government to define districts within which the provisions of the 1865 Act could be suspended from time to time. This was supposedly to enable the Government to fulfil its obligations to both loyal and rebel Maori in a more 'convenient manner' than through the operations of the Compensation Court.[111] It looked more like a case of the Government protecting its own interests than those of its Maori subjects, loyal or rebel.

In the following year the Government introduced the Tauranga District Lands Bill to validate the order in council of 18 May 1865, which had confiscated the land of the 'tribe Ngaiterangi', and 'to prevent future litigation'. Richmond assured the House that:

> It was by the very strong desire of the tribe that the land was formally taken by the Government, as there were so many tribal disputes that they were unable to deal with their own claims and they asked the Government to take the matter in hand and deal with it.[112]

The Act may have prevented any legal appeal on the part of all and any owners of the confiscated block against the Government's actions, but it did not prevent future expression of grievance. The Act provided for commissioners, authorised by the Governor, to make 'grants, awards, contracts or agreements', and it declared them, and those already made in accordance with the order in council, to be 'absolutely valid'. But the Act had to be amended the following year when it was found that the schedule to the order in council of 1865, and to the Act of 1867, did not include the whole of the lands of the Ngaiterangi tribe. Once more Government action was justified by claiming that Ngaiterangi earnestly desired to have their land confiscated – this time lest the Arawa 'dispossess them' of part of it.[113] Petitions heard by

108. Fenton to Native Minister, 22 January 1866, Fenton correspondence, RDB, vol 125, pp 47,905–47,907
109. Fenton to Whitaker, 18 December 1865, Fenton correspondence, RDB, vol 125, pp 47,895–47,897
110. Fenton to Whitaker, 23 December 1865, Fenton correspondence, RDB, vol 125, pp 47,900
111. Stafford to Whitaker, 7 January 1867, AJLC, 1867, p 40
112. NZPD, 1867, vol 1, pt 2, pp 978, 979
113. NZPD, 1868, vol 3, p 404

the Native Affairs Committee in later years noted that the commissioners appointed under the Act to settle the question of titles and awards operated in a most informal manner, with 'no public advertisement' and 'no formal records such as are kept in the Native Land Court'.[114]

It may have been more convenient for the Government to 'fulfil its obligations' in this way, but by ensuring that the Compensation Court never sat in Tauranga, and that the Native Land Court never sat there to determine native title, the Tauranga Moana people were strongly disadvantaged. There were few means of redress available to them against the ruling of the commissioners acting under the Tauranga District Lands Act 1867.

5.4 The East Coast

The true intent of the Government's confiscation policies were never so clearly revealed as on the East Coast, where the Government showed its determination to confiscate for profit, regardless of who owned the land they coveted or what part the owners had played in the war. The East Coast was one of the most rugged and isolated parts of the North Island, an overwhelmingly Maori district, with only a small European population. East Coast Maori were independent and not easily to be drawn into swearing allegiance to either the King or the Queen, but ready to oppose whoever threatened their independence or their land-holding. The Government presence on the coast was negligible and McLean's efforts to buy land in the district in the 1850s had ended in failure. The Crown found the fierce independence of the local people a challenge, and the rich alluvial river flats of the region an enticement. They had the excuse they needed to intervene in the district when Pai Marire emissaries arrived from the Bay of Plenty in 1865; and an urgent need to do so when oil springs were discovered in early 1866.

These many factors complicated relations between iwi and Crown in the next decade, and while the Crown was as intent on extinguishing native tenure here as in every other district, the means they used to do it differed markedly.[115] During the war in the Waikato, and especially in the Tauranga region, some Ngati Porou had taken up the King's cause and some the Queen's, but around Tauranga the iwi for the most part had remained aloof from the struggle. However, in 1865 Pai Marire became a much more divisive issue that the earlier fighting had been. The result was virtual civil war on the coast through much of that year, with the anti-Hauhau party automatically labelled 'friendly', 'loyal', 'Queenites'. The Government's response to this new 'rebellion', as to earlier ones, was to demand that the rebels pay a penalty in land. They could have exacted this under the New Zealand Settlements Amendment and Continuance Act 1865, which made the 1863 Act perpetual but provided that no districts could be proclaimed, or land taken for

114. See, for example, AJHR, 1879, sess i, i-4, p 4

115. This section draws extensively on a detailed study by Vincent O'Malley, 'Report for the Crown Forestry Rental Trust on the East Coast Confiscation Legislation and its Implementation', February 1994

settlement after 3 December 1867. But the New Zealand Settlements Act 1863 was falling out of favour with the New Zealand Parliament. The 1863 Act, and especially the 1865 amendment, had been strongly criticised – although not disallowed – by the Imperial Parliament; and as was often said in the House over the following years, the confiscated lands were more trouble than they were worth. With the lesson of Tauranga so recently learned, the Government was ready to find other means of gaining the land – 'a more convenient and better fashion of confiscation' which would save 'the expense and complication' of taking land through the Compensation Court;[116] a means of inflicting 'some sort of punishment upon those . . . Ngatikahungunu and Ngatiporou, who had been in rebellion', and rewarding those who had done the Crown good service.[117]

According to official reports they found willing allies in both 'friendly and hostile Natives' of the coast, who were suddenly anxious to divest themselves of all their land and leave the Government to return to them so much as they saw fit.[118] It was the same argument the Government had put up in Tauranga; it is not clear who they hoped would believe it. In any case, they needed a new law that would enable them to take the land 'without causing discontent' and they meant to put it in operation while the worst of the 'rebels' were out of the way in imprisonment without trial in the Chatham Islands. The law they devised was the East Coast Land Titles Investigation Act 1866, which was introduced and passed into law in four or five days with minimal debate. According to Stafford, the object of the Act was, 'after a careful and judicial investigation before the most competent existing tribunal . . . to secure their land to the loyal Natives individually under Crown Grant'.[119] It was intended to give the Native Land Court full power and jurisdiction to inquire into and determine title to all land in a specified district – whether or not the owners requested it. The court would issue certificates of title to those who it found were entitled to land and who, in the opinion of the court, were not rebels as defined in section 5 of the New Zealand Settlements Act 1863. The Government would then issue Crown grants to loyal Maori for their land, or for their 'just portion' of land held jointly with rebels. The rest of the land, from the date the certificates were issued, would be deemed to be Crown land, some of which would be reserved for the benefit of those who had been engaged in rebellion.

The Native Land Court was thus to be given the dual powers of ascertaining title, and of deciding who was and who was not a 'rebel'. Fenton had managed to combine the Native Land Court and the Compensation Court into one. It was he who had 'first recommended' the Act 'to avoid the most vexatious part of the New Zealand Settlements Act'; Whitaker then helped the Government to 'devise' it. Under this Act there would be 'no possibility . . . of taking the land of any man who had been friendly to the Government'.[120] It was not 'a general confiscation with

116. NZPD, 1867, vol 1, pt 2, p 868
117. NZPD, 1868, vol 3, p 145
118. NZPD, 1867, vol 1, pt 2, p 868
119. Stafford to Whitaker, 7 January 1867, AJLC, 1867, p 40
120. NZPD, 1867, vol 1, pt 2, p 693; NZPD, 1868, vol 3, p 155

subsequent restoration, but merely permitted certain lands to be taken through the operation of the Court'.[121] Those certain lands were meant to be those desired by the Government regardless of ownership, and taking them through the operation of the court would forcibly extinguish the native title to kupapa land, regardless of the owners' wishes.

But, in any case, the Act was unworkable. It had to be amended in 1867 to correct errors in the wording of section 2 (where 'include' should have read 'exclude') and of the schedule (which listed non-existent points of reference). Then it depended on East Coast Maori providing the information the court needed – that is testifying against close relatives – and as Richmond later told the House:

> there are a large number of so-called friendly Natives who were on the verge of hostility and who were not at all willing to give any assistance in ascertaining the title.[122]

And, most importantly, the Crown would have ended up with scattered, and maybe inferior, blocks of rebel land – not what they intended at all. For all their protestations, the aim was not simply to punish rebels. It was to extinguish native title, and gain fertile land in as large blocks as possible so they could quickly settle the 150 men for whom 'The Colony was bound to find a settlement'.[123] The Government would then sell the rest to pay compensation and the costs of military settlement and of putting down the rebellion.

Land confiscations had been widely expected on the East Coast, and soon after the fighting ended speculators were moving to buy up land before it was lost to the Crown. Then the discovery of oil brought new pressures to the district. Under the Native Lands Act 1865 private dealings in Maori lands were void, so there was pressure from several quarters for a sitting of the Native Land Court, and one was advertised for 12 September 1866 at Turanganui. But there was pressure in other quarters to prevent the court from sitting. McLean thought it would be 'both inexpedient and impolitic', and J C Richmond requested a postponement lest a sitting 'give rise to embarrassment and be injurious to the public service', whatever that might mean.[124] Despite Fenton's opposition, the Government managed to get its way – long enough to pass both the East Coast Land Titles Investigation Act 1866 and the Native Lands Act 1866, by which they could suspend the operations of the court in the district. The Government had achieved its aim of ensuring that East Coast lands would fall to the Crown, not private interests, but it now had to cope with interprovincial rivalry and the determination of both Hawke's Bay and Auckland to win the struggle to obtain the lands. In the event, Whitaker claimed the prize and, he hoped, some very profitable oil springs. He had considerable competition, especially from the Auckland firm of Brown and Campbell, whose lawyer,

121. NZPD, 1867, vol 1, pt 2, p 868
122. NZPD, 1868, vol 3, p 145
123. NZPD, 1867, vol 1, pt 2, p 693
124. McLean memo, 4 September 1866, RDB, vol 131, p 50,431; Richmond to Fenton, 8 September 1866, RDB, vol 131, p 50,411

Thomas Gillies, was owed a favour by Fenton. Hence Fenton's determination that the Native Land Court would sit in the district, and Whitaker's that the Native Lands Act be amended to prevent it.[125] Whitaker won: he succeeded in getting section 13 written into the Act to allow provincial superintendents to make valid contracts for native lands in their province before the court had issued a certificate of title.

Maori interests in all this bickering and manoeuvring were ignored, although pressure on them lessened late in 1867 when the oil springs were shown to be not commercially viable. In the end it simply came down to the question of who would take their lands off them, and how, since in the interests of the colony the East Coast must be opened up to colonisation – and Maori independence and isolation ended. McLean's displeasure over this whole affair and the fetters put on him by the Stafford ministry, was expressed later by his defection from the Stafford government. He joined the Fox opposition, then became Native Minister in the Fox government in June 1869 and retained the post through most of the next seven years.[126]

Although the Government had amended the East Coast Land Titles Investigation Act in 1867 to repair the defects in the 1866 Act, they had already decided that cession of land, voluntary or forced, was a better option than total reliance on the Act. Richmond told the House that:

> it would be much the best to obtain cessions of land to be afterwards confirmed under the Act – to make arrangements with the friendly Natives that certain portions of land should be taken, and the rest should be free from all claim on our part.[127]

Lest the East Coast Land Title Investigation Act 1866 appear too much like a confiscation Act to the Imperial Parliament, the Government would now demand 'voluntary' cessions of land, as required by the Colonial Office when the first New Zealand Settlements Act 1866 was put in place. As in Tauranga, the Government would persuade or coerce friendly Maori to cede land, not necessarily their own, but land which the Government was determined to have. In fact the schedule to the 1866 Act was amended in 1867 not just because of the 'clerical' errors, but because it had failed to include the district 'in which are the petroleum springs together with a considerable portion of the agricultural land'.[128]

Since the war on the coast had been virtually a civil war, with close relatives fighting on either side, there was no way rebel and loyal land could easily be distinguished. When the Government faced this fact they first suspended the operation of the Native Lands Act in the district by order in council of 4 February 1867,[129] then pressed ahead with their plan to gain cessions of land. At Wairoa in

125. On this whole question, see O'Malley, pp 60–79.
126. Alan Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, 1973, pp 227–228
127. NZPD, 1868, vol 3, p 145
128. RDB, vol 131, p 50931
129. *New Zealand Gazette*, 11 February 1867, p 72

April 1867, J C Richmond was reported to have told a large gathering from coastal tribes that, as the Government had decided to take the land, 'it might therefore be said that it was gone'.[130] When it was pointed out that the block the Government proposed to take was mainly kupapa land, McLean would have none of it, saying friendly Maori were simply trying to pass themselves off as the owners of rebel land.[131] This was vintage McLean; he would bully and intimidate the owners, then offer them minimal compensation for their claims. In fact the leading claimants, including a Government assessor and an Anglican deacon, sanctioned the cession of the Kauhouroa block, variously estimated to be 71,000 acres or 42,438 acres, in return for a promise that the Government would respect the claims of 'friendly' chiefs.[132] Clearly their claims were not fully respected, with the result that loyal natives whose land had been taken were not compensated with rebel land as promised; and 'rebels' with interests in the Kauhouroa block were not even a party to the agreement and were deprived of their lands without any compensation, supposedly with the freely-given consent of their 'loyal' kin.[133]

The transaction was typically confused and controversial, especially since it involved taking land from an aged and ailing assessor, Kopu Pitiera, who had 'rendered signal service' to the Government during the war – and who died a few days later, supposedly of pleurisy.[134] It was 18 months before the Wairoa deed of cession came before the Native Land Court, and although it was confirmed by the court, this was apparently not done in accordance with section 4 of the East Coast Land Title Investigation Act.[135] It was 1872, more than five years after the cession, before anything further was done about returning land to the friendly chiefs. In August that year a new agreement was negotiated between a Government agent and loyal Maori, but even that was not honoured; and the question was still unresolved in 1927, when it was taken before the Sim commission.[136]

After their success at Wairoa, Richmond and Reginald Biggs, the local military commander and resident magistrate, went on to Turanga to demand further cessions. Richmond took the trouble to warn the tribes that if they did not cooperate with the Government and work under the East Coast Land Title Investigation Act a 'harder' law, the New Zealand Settlements Act 1863, would be brought into operation. The tribes offered about 60,000 acres 'including much of the best agricultural lands to the east of the Waipaoa river'.[137] Biggs, 'a zealot for confiscation', was not satisfied; he wanted nothing less than about 200,000 acres, on both banks of the Waipaoa, a demand which even the local settlers considered excessive.[138] Even Richmond thought Biggs was going too far, but the Stafford government was barely managing to hold onto office, so Richmond's priority was not to dispense justice,

130. *Hawkes Bay Herald*, 23 April 1867 (cited in O'Malley, p 84)
131. *Hawkes Bay Herald*, 27 April 1867 (cited in O'Malley, p 85)
132. See O'Malley, pp 85, 86
133. Ibid, p 87
134. Ward, p 225
135. O'Malley, p 138
136. Ibid, pp 140–142, 172–174
137. Ibid, p 91
138. Ward, p 225

but to avoid being labelled as weak. As was so often the case, Maori rights were sacrificed to political expediency. Richmond could see that he would not win Maori cooperation under the East Coast Land Title Investigation Act, so he advised Cabinet to use the more 'workable' New Zealand Settlements Act 1863 instead; it would give title to the Crown and throw the burden of proving their claims on loyal Maori. He thought that 'a large block around Turanga' should be brought under the Act, lest:

> the so-called loyal natives and the returned rebels with their European advisers . . . triumph over Government which it is most inexpedient to allow them. Land is moreover wanted for the Napier Defence Force. I recommend immediate action.[139]

There could be no clearer explanation than this of the Government's confiscation policy.

The New Zealand Settlements Act 1863 was never brought into operation on the East Coast. It would have been too damaging to the Government's credibility in Britain to use it – and in any case the options under the 1865 amendment were due to run out on 3 December 1867. Thus Government tried for further cessions of land, and met Ngati Porou in May 1867. Considering that Ngati Porou had been such valuable allies of the Government, their offer of almost 40,000 acres of land, some of it 'very rough' and some 'good agricultural land', should have satisfied the Government. But Biggs demanded twice as much, and only succeeded in antagonising Ngati Porou, who were more interested in receiving payment for war service and compensation for losses, than ceding 'rebel' land to the Government. Biggs came away empty handed.[140]

The struggle to ensure the Native Land Court sat, or to prevent it sitting, continued through 1867. When it did sit under Judge Monro in July, it was promptly adjourned 'on the ground that there appeared to be a clerical error' in the East Coast Land Title Investigation Act – and anyway the Crown agent, Biggs, needed more time 'to get up evidence, as the Natives had combined to keep back information'.[141] Loyal Maori were now being blamed for Government inefficiency, and the judge took up their cause and committed the Government to reimbursing their costs, since it was the third time 'they had been brought . . . from great distances to attend the Court'. He was severely reprimanded by Richmond, who told him, among other things, that 'the Courts – Native Lands and Compensation – are alike established by the Legislature to watch over the interests of the innocent', and Judge Monro could pay the promised compensation out of his own pocket.[142]

None of this bickering helped Maori, and 256 'faithful friends of Poverty Bay' petitioned Parliament on 8 July 1867 complaining of their treatment, of how they were wearied at Biggs' constant teasing for land, and intimidated by the Government's words. They had waited patiently 'hoping to get relief by the law, but in vain'. They had handed over a large piece of land to Biggs and kept a smaller piece

139. J C Richmond memo, 23 April 1867, RDB, vol 131, p 50371
140. O'Malley, pp 89–90
141. Monro to Fenton, 25 July 1867, AJHR, 1867, a-10D, p 4
142. Ibid, pp 4–8

for themselves, but he was not satisfied. 'What he wanted was, to get all the level country, and we might perch ourselves on the mountains.' Then he said he would bring the court and for the third time they assembled, hoping this time it would bring them relief: 'Alas! where was the relief?'[143]

Indeed, there was none. The Government, with no workable legislation on their books, continued to try to win cooperation for their policy of cession. It was a losing battle. Maori throughout the district were disillusioned with the shabby treatment meted out to them, and were determined to boycott the Native Land Court as long as it was used as an instrument of confiscation – a 'land-taking court' – under the East Coast Land Title Investigation Act. In early 1868, hundreds signed petitions calling for the repeal of the Act. Later in the year the Stafford ministry's land-taking policy on the East Coast came under close scrutiny in Parliament. Richmond tried to resist the pressure to repeal the Act by arguing that to do so would be to retreat before 'a victorious foe' – not Maori, but 'harpies' and 'land-jobbers' who had supposedly put Maori up to opposing the Act. He reinforced his argument by warning Parliament that if the Act was repealed, they would have to find other means of compensating kupapa for military service and war losses – instead of rewarding them with a gift of rebel land.[144] Stafford supported him by quoting Fenton, that the East Coast Land Title Investigation Act:

> was one of the best Bills ever devised for the settlement of disputes where there had been large sections of the Native race in organised aggression against the supremacy of the Crown.[145]

The weakness of Richmond's arguments – that the Government had never intended to make a profit from East Coast lands, and that the essential principle of the Act was to reward the Crown's allies and punish its enemies – was obvious to all.[146] But Parliament allowed the offending Act to stay in place until the Government could come up with a better one: the East Coast Act 1868. This 'no longer pretended to be a confiscating measure'; it was 'simply to prevent those persons who had been notoriously in rebellion from obtaining a Crown title to their land' – a Crown title being considered the greatest gift the Government could bestow.[147] This new Bill hardly caused a ripple in Parliament, probably because, like so much controversial Maori land legislation, it was introduced in the very last days of the session.

Under the East Coast Act 1868 the Native Land Court could award a certificate of title for the whole of the land under investigation to those customary owners who had not engaged in rebellion; or where land was held jointly between rebel and friendly Maori (as it almost all was) the court could make an 'equitable partition' of the land between the Crown and loyal Maori. It was not much of an advance on the old Act. Depending on the discretion of the judge, loyal Maori might retain all their

143. AJHR, 1867, g-1, p 10
144. NZPD, 1868, vol 2, pp 518–519
145. Ibid, p 520
146. NZPD, 1868, vol 3, p 146
147. NZPD, 1868, vol 4, p 383

land – but not under native title. Rebel Maori would still lose their land; and the Crown stood to profit as before.

It was little more than a face-saving measure, since the Government still meant to seek 'voluntary' cessions of land. But Te Kooti's escape from the Chathams and his attack on Poverty Bay in November 1868 put a different complexion on things. Once again, and perhaps as never before, the Government was dependent on Ngati Porou kupapa – to the extent that they were finally obliged to give up the idea of confiscating their land. But they thought to make up for that by taking Turanga land – the land of Te Kooti's 'allies', never mind that his people had been held without trial in the Chathams for two years. Maori in fear of Te Kooti were said to be only too anxious to cede their land to the Government in return for protection.[148]

The Government moved swiftly. On 18 December 1868, 279 loyal Turanga Maori signed a deed of cession for about 300,000 acres of the most desirable Poverty Bay land, and accepted that they had but three months in which to lodge their claims to a commission of two judges of the Native Land Court. Claimants with valid claims would receive Crown grants – for rebel land if their own had to be retained by the Crown for 'military settlements'.[149] Maori were no better off than they would have been under the New Zealand Settlements Act 1863 – but the Government was. They had avoided the stigma and complications of that Act and the censure of the Colonial Office, but they still got the land.

Two months later, native title was proclaimed extinguished from the date of the deed of cession, and on 29 June 1869 the Poverty Bay Commission, consisting of judges Rogan and Monro, convened to hear all claims which had been lodged by 18 March.[150] The commissioners had the widest possible discretion to deal with the claims as they saw fit,[151] but the Crown agent, the practiced W S Atkinson, appointed by his brother-in-law, J C Richmond, was to deal with 'exorbitant' demands – and see that the Crown got the land it wanted.[152] He immediately announced that he was in the process of effecting one of his out-of-court settlements, by which part of the ceded block would be given up to the Crown in return for the waiving of its claims to the rest of the land.[153] However, misunderstandings between the Crown and loyal Maori soon emerged. The local tribes – Rongowhakaata, Te Aitanga a Mahaki, and Ngaitahupo – had intended to cede three blocks totalling about 15,000 acres, but the Crown had succeeded in taking about 56,000 acres. The commission seemed to be less concerned than earlier commissions to exclude from awards those who had taken up arms in the Pai Marire cause, but the memory of Te Kooti's activities were still too fresh to be ignored, and those who had voluntarily aided him were among the few excluded,[154] although those who had voluntarily aided the Crown were rather 'ignored than recognized'.[155]

148. O'Malley, pp 113–114
149. Ormond memo, 4 August 1869, RDB, vol 131, pp 50,239–50,240
150. *New Zealand Gazette*, 13 February 1869, p 60
151. RDB, vol 130, p 50,164
152. RDB, vol 131, p 50,297
153. See O'Malley, pp 122–129
154. Ibid, pp 129–131
155. McLean to Ormond, 18 November 1869 (cited in O'Malley, p 134)

As was the case in most other areas, awards on paper and awards on the ground were two different things. The Crown bought out awards where it could[156] and it eventually relinquished most of its claims to Ngati Porou lands in acknowledgement of that tribe's active military assistance; but other awards remained in contention for years. Further Acts of Parliament such as the Poverty Bay Grants Act 1869 and its 1871 amendment were required so that grants could be issued or validated. But this only confounded the issue, since grants were issued not to 'tenants in common' (each with a defined individual entitlement), but to 'joint tenants' (all with equal interests in the land).[157]

The Poverty Bay Commission had to be reconvened in 1873 to try to deal with both settler and Maori discontent. Settlers could not get title to the land they had leased or purchased from Maori whose awards had not been finalised; and Maori with joint tenancy neither received an equitable entitlement nor were able to pass their estate on to their children. Maori first boycotted the commission, then arrived en masse with the Porangahau chief, Henare Matua, a leader of the Repudiation movement.[158] The hearings became so disorderly that the commission achieved little in its August and November sittings, although at the urging of Wi Pere it did return some land in the ceded blocks on a tribal basis. It appears that the Turanga tribes won by default. O'Malley reported that the details of this transaction are not clear; but 'the Government had lost all interest in the return of lands at Poverty Bay, since it had already got the blocks it had sought' and 'all the good land' was already gone.[159]

There was then a further complication: there was no way title to the land returned to the tribes could be ascertained and the land subdivided, as the Native Land Court could not deal with Crown land. Yet another Act had to be passed – the Poverty Bay Lands Titles Act 1874 – to allow the Native Land Court, operating under the Native Lands Act, to investigate and determine titles and subdivide the land 'as effectually to all intents and purposes as if the Native title . . . had not been extinguished'. It seemed that 'humpty dumpty' was at work again.

The whole situation was a shambles. Maori discontent in all parts of the coast ran deep, and with good reason. By one measure or another the Crown had acquired the land it set out to acquire; it had extinguished native title over most of the coast, and it was not too concerned about the mess in which it left its Maori subjects. Appeals and petitions and commissions continued through the rest of the nineteenth and into the twentieth century. It is clear that the East Coast people were never properly compensated, and it was not to the honour of the Crown that they treated so shabbily some of their firmest allies.

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156. Ngati Porou agreed to take £5000 for their claim to 10,000 acres in the Turanga lands; Ngati Kahungunu argued with the Government for years over their share and eventually received a few pounds and a few acres. See O'Malley, pp 135–136.
157. AJLC, 1872, no 9, p 3
158. RDB, vol 129, pp 49,541–49,543
159. O'Malley, pp 154–155

CHAPTER 6

CONCLUSION

At the time the Treaty was signed there was an expectation in Britain that the Crown would be the beneficiary of the 'waste' lands in New Zealand, that Maori could not lay claim to lands they did not occupy and cultivate. When it was finally admitted that Maori ownership of all the land in the country was guaranteed by the Treaty of Waitangi, the Crown set out to create a royal demesne, extinguishing customary native title at first by purchase, and over the years by a variety of other means. It is clear that the Crown's ultimate aim was to extinguish customary title to all the land in New Zealand – first cultivable land, then pastoral land, and finally land for small family farms.

In the early years of settlement, land purchase was effected through deeds of sale, and some care was taken to see that negotiations were carried out openly and on a tribal basis. But from the start Grey preferred that Maori hold land on Crown grants, rather than having land excepted from sale. Thus native title was extinguished and the land they held was on titles derived from the Crown. As immigration rapidly increased, the drive to separate Maori from their land intensified, and less care was taken to ensure tribal consensus over sale. Crown land purchase officers would buy from willing sellers, regardless of their right to sell. Those who resisted sale were treated as antagonistic, and the resulting tensions led to confrontations and finally war.

The establishment of settler government did not bode well for Maori society. Most of New Zealand's early premiers, ministers, and members of Parliament were Wakefieldian settlers, and they had brought their values and beliefs with them. They had come to New Zealand in the 1840s to possess themselves of the soil, and they were now in a position to pass the legislation to ensure that they did. But the Crown's single-minded determination to extinguish customary native title did not stem simply from a need for land for settlement. A more basic issue underlay the Crown's actions: a widely-held belief that holding land communally was equivalent to living in a state of barbarism. Communal title was to be replaced with individual Crown grants and Maori were to be civilised through amalgamation with the European population.

After a year of war, and little more than two decades after the signing of the Treaty, the Colonial Office was prepared to allow the New Zealand Parliament to adopt any prudent plan it wished for the individualisation of native title. The Native Lands Acts of 1862 and 1865 abolished Crown pre-emption and allowed individualisation of title and direct sale to settlers. The Native Land Court was charged with

ascertaining title according to native custom, but it was the judges of the court, especially the first chief judge, F D Fenton, who took it upon themselves to decide what constituted native custom. But 'traditional' custom and court-defined custom were not the same thing; where traditional custom was uncertain or inapplicable, it was modified to suit (as in the law on succession), or it was extinguished. The result was confusion and injustice.

It was the kupapa tribes who bore the brunt of the operations of the Native Land Court; they were ill-rewarded for their service to the Crown. Those tribes who had resisted land sale to the point where they were deemed to be in rebellion, lost their land by confiscation and through the activities of the Compensation Court. The same judges reigned supreme in both courts, and in addition to deciding who owned the land according to Maori custom, they also decided who had been in rebellion, and how much land and what land each loyal Maori and returned rebel should have returned to them. In all events, land returned was Crown land; confiscation had extinguished native title. Even in the rare event that land was returned on a tribal basis, native title had been extinguished.

It was all supposedly in the Maori's own best interests; communally held land was a barrier to progress. But talk of it being the duty of colonists to relieve Maori of their wastelands and thus help preserve and civilise them was little more than greed and notions of white racial superiority cloaked in hypocritical rhetoric. There was no altruism in relieving Maori of land; it simply impoverished them and enriched Europeans. Clearly, destroying communal Maori life meant weakening the authority system, the power base, and ultimately rendering Maori landless. At times it was even admitted that this was the aim so they would be obliged to labour for a living. At best each man should hold just as much land as he required for his own and his family's needs, and it should be held on secure Crown title to give individual Maori a stake in society, a reason to abandon their traditional leaders, and cling to the laws and institutions of Britain.

The personalities of governors, ministers, and judges all played a crucial role in the Crown's treatment of customary tenure. There were those like ex-Chief Justice Martin who were truly humanitarian, and who spoke out for justice for the Maori people. But the thoughtful and erudite advice he tendered to various governments over the years went for nothing. Governor Gore Browne called various commissions and committees of inquiry and received abundant advice, but ignored it all when it came to the Waitara purchase. Wakefieldian settlers cast a long shadow in New Zealand, and in the end settler governments and speculator pressure prevailed. Judge Fenton was given a free hand to run the Native Land Court and the Compensation Court as he saw fit. His 1840 rule, his 10-owner system, and his rulings related to the question of succession, were a conscious attack on Maori society. He was out to create a landed class of chiefs and a host of landless labourers. In a 30-year period from 1865 Maori were stripped of their land, communities were divided, and leadership undermined. Ministers confiscated millions of acres of land, supposedly as punishment for rebellion. It is odd that in almost every case the land confiscated was some of the most fertile and highly desirable agricultural land

in the country. When confiscation under the New Zealand Settlements Act 1863 caused more problems than it was worth, other means of extinguishing native title were found. They were no less contentious. There were few means of redress available to the people of Tauranga and the East Coast against the rulings of commissioners appointed to deal with land in their areas.

Within 50 years of the signing of the Treaty of Waitangi, almost the only land remaining to Maori – and not all of that on native title – was marginal, largely remote, and mountainous. Clearly Maori were in no position to create competition for struggling white farmers. Extinguishing native title and facilitating alienation may have satisfied settler demand; but the grievances stacked up through forced purchases, disputed sales, and 'voluntary' cessions; and the operations of courts and land commissions were the subject of appeals and petitions and commissions of inquiry for years. To this day most of them remain to be requited.

CHAPTER 7

SMITH'S GENERAL PRINCIPLES OF MAORI LAND TENURE

7.1 Introductory Notes

This section reviews the important work by Norman Smith, titled *Native Custom and Law Affecting Native Land*.[1] Smith acted as judge of the Maori Land Court and brought his considerable experience to the task of collecting the 'facts', and discussing the way that the court interpreted Maori land tenure. Smith's exposition displayed quite a sophisticated, albeit limited, understanding of Maori land tenure and it is worth considering in full.

Following Smith, this section will suggest that although certain principles of Maori land tenure can be revealed, and these principles are widely recognised today, they need to be treated with care as they are in part the product of a historical process. Indeed, Smith explained that the Maori Land Court both interpreted and codified Maori land tenure. Smith believed that this process of interpretation derived from the court's need both to rule on what were complex and contested systems of tenure, and to facilitate the individualisation of title.

This section will therefore look at what Smith understood the court's interpretations or misinterpretations to have been. Of specific concern is the following question: did the court have an accurate understanding of what constituted Maori land tenure and did its operation reflect this understanding? With a degree of caution it will be suggested that this question should be approached in two places:

(a) the court's understanding and interpretation of evidence which was presented in court sittings and was meant primarily to establish what 'general group', or in particular circumstances what 'general groups' owned the land under investigation;[2] and

(b) the subsequent award by the court of 'relative interests' in land.

Smith appeared to have believed that the court took a radical departure from Maori custom only in the latter of the two areas. That is, Smith's comments suggest that the court had a good understanding of the 'rules' of Maori land tenure, but that it departed from Maori custom when freehold or individual title was actually awarded. How accurate Smith was in this respect will be discussed in subsequent sections.

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1. Norman Smith, *Native Custom and Law Affecting Maori Land*, Wellington, 1942
2. The term 'group' is used to cover sometimes problematic distinctions between whanau, hapu, and iwi.

It must be noted, however, that Smith's analysis remained uncritical and strongly Anglocentric. Broadly speaking, Smith saw Maori tenure as being of a lesser nature when compared to English tenure, and supported the moral imperative of the court to act as an instrument of civilisation. In this respect, Smith glossed over injustices that the court may have perpetrated, suggesting that they were an unfortunate aspect of an otherwise worthwhile process. For example, Smith acknowledged that Maori 'are not now rich in landed property when one compares their possessions today with those of years ago', and that the operation of the Maori land laws 'are largely responsible for this'.[3] But, for Smith:

> a close study of those laws from the time New Zealand became part of the Empire appears to reveal the underlying principle that the interests of the Natives were to be given adequate protection.[4]

Moreover, Smith blamed the failure of Crown's good intentions on the:

> complexities of Native tenure of land, based as it was and is on complicated customs, [that] conspired to render the efforts of the Legislature somewhat nugatory, and to force it to seek remedies for the ills, which practical application of its measures had revealed, by the introduction of further legislation which in many cases only aggravated the evil it was intended to remove or prevent.[5]

This argument is deeply flawed.

Where possible, therefore, this section shall offer an exposition of, and critically reflect upon, Smith's comments. Much of the criticism will be covered in subsequent sections, though. Subsidiary questions such as the court's treatment of evidence shall also be mentioned. This section will conclude with a summary of Smith's discussion and suggest certain problems and insights. It will lead into the following section, a discussion of pre-Maori Land Court writing by Pakeha about Maori land tenure.

7.2 The Question of Interpretation and Codification

Smith believed that Maori land tenure had not been a uniform system. He also believed that the operation of the Maori Land Court had itself affected the state of Maori tenure, and that in its earliest years the court had been known to make conflicting rulings:

> Notwithstanding the fact that the custom in relation to claims for *papatipu* land has become codified to a very great extent by the judgements of the Native Land Court, . . . it is nevertheless somewhat difficult to elaborate the rules governing that question in the same manner and to the same extent to which it has been done with respect to

3. Smith (1942) pp 24–25
4. Ibid, pp 24–25
5. Ibid, p 25

> European law. As the customs amongst European nations varied in different communities and localities, so it was with the ancient Maori people. It is also found that what may be termed generally recognised customs, more or less common to all tribes in New Zealand, were subject to gradual changes brought about principally by the influence of conditions and demands of advancing civilization and pakeha ideas. For those reasons, if for no other, the earliest Courts experienced considerable difficulty in ascertaining in particular cases what the ruling customs really were, and this difficulty has doubtless been responsible for an apparent, if not altogether a real conflict in some of the earlier judgements of the Native Land Court.[6]

As will be detailed later, Smith's comments appear to be accurate. Smith also conceded that:

> On occasions the customs as so defined and laid down by the Courts differed in some respects from the actual custom practiced by the Maoris prior to the coming of the law.

Here Smith believed that the court acted as best as it could, and with an eye to 'equity and good conscience'. This is also a point that we will return to:

> It can be said, however, that much of the original custom remained with a grafting upon it of such subsidiaries as were necessary to *meet the equities of each case* as well as the demands of a changing society. Where a custom was uncertain or appeared to be inapplicable then the Court had to make modifications to fit as nearly as the basic custom would permit, consistent of course with Maori idea and *the dictates of equity and good conscience***.** For instance individual ownership as we know it was practically unknown to the Maori, and his land customs certainly made no provision for the allocation of aliquot shares to the owners of tribal lands, nor *a fortiori*, laid down any definite principle upon which such an allocation might be based. [Emphasis added.][7]

Unfortunately though, Smith's recognition of the 'the influence of conditions and demands of advancing civilization and pakeha ideas', is not fully explored by him. With the exception of questions of succession (a question that is not discussed in this report), and the apportionment of 'relative interests', we are given little indication as to what these conditions and demands were in respect to customary tenure.[8] Nor are we given many examples of how customary tenure was modified by them.

Nonetheless, Smith argued that most of the court's inconsistent decisions had disappeared by 1895, when 'the rules of Native custom, with proper regard to any exceptions prevalent in different parts of the country became more or less clearly defined.'[9] This statement can, perhaps, serve as testimony to the effectiveness of the court in creating coherence where there allegedly was none.

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6. Ibid, pp 47–48
7. Ibid, p 48
8. Ibid, p 64; ch iv
9. Ibid, p 48

7.3 The 'Four Main Take' and the Question of Occupation

As noted immediately above, Smith believed that over time the operation of the Maori Land Court had itself affected the state of Maori tenure. However, Smith felt that a certain cohesion did exist in Maori land tenure. He believed that certain principles or structures could be perceived, and that these principles would apply across different tribal regions. Smith summarised these principles as follows:

> It is . . . possible to indicate clearly, the types and nature of the rights upon which the Natives relied, and still rely, in establishing their claims to *papatipu* land. These rights or *take* are, and always have been subject, if proved, to the further proof that they have been accompanied and strengthened by actual use and possession, generally called occupation, or the exercise of some acts or acts indicative of ownership in order that the claims made might be deemed well grounded and effectual. It would, however, be going too far to say that a claimant must be able to show continued and uninterrupted physical possession by himself and his ancestors though if he could do so his claim became much stronger. It would be sufficient if he could prove that he had *kept his fires burning on the land*, that is, protected his rights, by the exercise of some periodical or regular act of [use] consistent with ownership such as fishing, hunting, bird snaring, cultivation and so on, in addition of course to his ever readiness to safeguard it against intruders.[10]

The principle rights or 'take' were the following:

- discovery (such as when the first canoes arrived);
- ancestry or 'take tupuna';
- conquest or 'take raupatu'; and
- gift or 'take tuku'.

The situation as Smith saw it, therefore, was that Maori land tenure had a dual nature: rights to land were based upon certain 'take' or principles, which in turn were reinforced by possession or occupation. Occupation was, for Smith, 'the necessary ingredient, common to all *take*'.[11] However, Smith does not always draw a clear distinction between 'owning land' and 'owning rights in land'. This distinction is important. Briefly, under customary systems of land tenure Maori did not exercise absolute or exclusive forms of individual ownership. Rather Maori individuals or groups held different rights over land. Thus, the English term 'ownership', when applied to land, does not accurately describe Maori land tenure and should be treated with caution.

Smith's discussion of occupation will now be reviewed. It is important to note that Smith makes frequent reference to judgements made by the court, especially during the 1890s, and that his discussion should therefore give us a fair representation of the court's understanding of Maori tenure at around 1940.[12] His discussion,

10. Ibid, pp 48–49
11. Ibid, p 49
12. This observation may be of some use for a study of the role of the Maori Land Court in the twentieth century.

though, may not accurately reflect the court's understanding in, say, its first decade of operation.

Firstly, Smith argued that:

> Occupation was necessarily a question of degree which varied in different cases governed by changed circumstances, and the extent of the occupation necessary to support the right was a matter which the Court had to decide according to the particular case and without the assistance of any fixed rules.[13]

The Maori Land Court therefore 'laid down certain guiding principles of a general nature'.[14] For Smith, from these principles:

> appear to emerge the following gradations on the scale by which the testimony put forward in support of occupation might be weighed and the importance of such occupation measured.[15]

The different levels of occupation are as follows:

(a) Those who show complete and continuous occupation, for example, occupation commenced before 1840, and extending up to the time of investigation of title. Where the occupation is by virtue of ancestry it is usual to require that constructive possession was held for at least three generations. Where the occupation arises out of conquest it must be shown that the conquerors seized the land and reduced it into possession and retained it following, and by reason of, such conquest. Where the occupation is claimed under a gift, unbroken occupation by the various generations from the time of the gift should be shown.[16]
(b) Those who have never personally occupied but whose near antecedents had undisputed occupation or whose rights have been kept in existence by relatives.
(c) Those who have occupied at some former period but are not in present occupation.
(d) Those who are in occupation by right of ancestry but whose permanent occupation is recent in its origin.

Rather than being exclusive or hierarchical principles, where persons claiming under one rule would exclude persons claiming under another, 'all four rules should, where applicable, be utilised'. Smith's understanding on this question is supported by other material.[17] But how the court actually used these principles in cases where it was required to decide between competing claims is difficult to assess. It could be suggested that Smith was too sanguine, and that the court would

13. Smith (1942) p 50
14. Smith quoted at length from two judgements: Chief Judge Seth-Smith, 1891, chief judge's minute book, vol 2, p 71 – Omahu block; and Judges Mackay and Scannell, 1892, chief judge's minute book, Wellington district – Mangaohane block.
15. Ibid, pp 53–54
16. Ibid, p 54
17. As is discussed through section 2 and 3 below, rights to land could be made through a number of 'take' and how each particular set of rights were worked out could vary from case to case.

have preferred some rules over others (probably descending in order of priority from (a) to (c)). Moreover, Smith's rules of occupation do not include the common practice of including important rangatira on a title for aroha, regardless of the occupation of that land by that person.

It should also be noted that Smith emphasised the rights to land that were made through labour. This is a particularly English perception and may ignore various 'culturally-based' aspects of Maori land tenure.[18] Smith cited Judge Mackay:

> All the authorities agree on the main point and conclude that occupancy or appropriation by labour is the only primary foundation of the individual right to landed property. An important question, however, arises of what must the labour be, should it be actual labour, in other words, must the occupation be permanent or will it suffice to be only transient.[19]

Nonetheless, Mackay also recognised the strength of tribal or communal rights and made the point that while Maori retained individual rights these rights were subject to tribal rights. Mackay concluded that Maori did not have a conception of 'freehold' tenure as such:

> Individuals, by cultivating or erecting houses or appropriating portions of the tribal estate acquired an absolute right to the occupation and usufruct of such land as against any other individuals of their own tribe, but that was all, the portion so dealt with still remained tribal land subject to such right, but it is clear that such a thing as individual ownership of land was never in contemplation of the Native mind, and therefore there could never have been any 'usage' or 'custom' amongst them for regulating the reduction of a title a tenure of which they had no conception.

Commonly, the disposal of individual rights was particularly constrained. Individuals could dispose of their use rights within their whanau, and perhaps more widely, without other individuals necessarily becoming involved. But in the case of marriages or gifting between wider groups, entire hapu or iwi had to be consulted and certain high-ranking chiefs may have held a right to veto such actions. That this differentiation is not fully recognised by Smith will be discussed later.

For Smith, a straightforward distinction was made between 'permanent' (cultivations and kainga) and 'transient' ('waste' or uncultivated lands) areas of occupation. This distinction was based on both a difference in the kind of labour employed on the land, and the degree to which individual rights over the land were maintained:

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18. See Salmond (1991) for a discussion of a range of cultural principles. For example, Salmond lists the following: 'the unity of all phenomenal life through genealogical connection; the complementarity of male and female; the principle of primogeniture; all of which can yet be overcome by a fourth principle of competitive striving, expressed in a language of war', p 346 (1991). A number of other works could also be consulted. For example King (1989; 1992), Metge (1967). This is an area that should be further investigated, though.
19. Smith (1942) p 54. Judge Mackay, while cited at length, is not referenced.

> Cultivations and *kainga* were, as the words import, those areas of tribal land that were more closely settled and constituted the places where the Maoris actually resided, either permanently or casually, and grew their crops. In those cases the expenditure of labour on the land was the necessary accompaniment of the occupation. The labour and the occupation were mutually inclusive and proof of the one usually bore out the other.
>
> The waste lands were those more outlying areas not ordinarily used for cultivations or for residence, and where the Maoris hunted, fished, snared birds, dug fern root and so on for the purpose of food supplies and other necessities of life, many of which places were by solemn ceremony created *rahui* (reserves). Such places were rarely occupied to any great extent in the permanent physical sense for the principal reasons that the occupant could not be defended from attack, and that continued occupation would disturb the birds and other game. As the erection and care of devices for the catching of fish, birds and rats, however, involved the expenditure of some labour, such labour, coupled with the regular visits which hunting expeditions involved were sufficient, if proved, to denote occupation in the sense that there was an appropriation and use of the land by the relative tribe or *hapu*.

Thus, for Smith, rights under Maori land tenure were not restricted to land held in 'permanent' occupation, but could be held in the larger 'uninhabited' area of land. A further complication could occur, though. Smith may have overlooked the fact that use rights could overlap, and that individuals may, for example, have exercised rights on the recognised territory of hapu other than their own. This gave an added complexity to Maori land tenure, a complexity that the court did not readily identify.

Smith did, however, understand that different kinds of usage may exist in a given block of land and these rights may be both of different nature and value. Smith again referred to the court on this point:

> But where a person is entitled under the general right of the owners of the block, that person is entitled not merely to his actual occupation, but to some part of the unoccupied area which exists in every large block. . . . We must also remind parties that though persons who are in present occupation in continuation of their ancestral right, and occupation usually ought to get larger shares on that account, other things being equal, that the basis of right is ancestral occupation, and that persons who have ceased to occupy, even many years ago, if in *pakeha* times, may nevertheless have substantial rights.[20]

The important question of how these rights were maintained is also addressed. Again, it is worth citing Smith in full.[21] Many of the points raised here will be discussed immediately below:

> every right to land, whether it rested upon ancestry, conquest or gift was required to be kept alive by occupation or the exercise of some act indicative of ownership or use. . . . [A] Maori was required, according to Native custom, *to keep his fires*

20. Ibid, p 56, cited from Rotorua Appellate Court minute book 2, p 258, nd
21. Ibid, p 57

> *burning on the land*. If a Native left his tribe and went to live in another district either through marriage or otherwise, and he and his descendants remained away for three generations, they would forfeit all rights to the land so abandoned; their claims would become *ahi-mataotao*. The meaning of this term is *cold* or *extinguished fire* and, as applied to the instance just given, would signify that the rights of the claimants had become cold and their claims extinguished. The same rule applied to voluntary migrations of a whole family group or *hapu*. They may have allied themselves with some enemy and be forced to leave. If, however, the claimants who had voluntarily abandoned the land sent some of their children back at intervals to occupy the land, or to exercise some right of ownership, and there was no objection from the tribe, that would be sufficient to relight the flame and so keep their fires burning, and their rights alive. In the example just given, if the Natives remained away without exercising their rights continuously for one generation, their claims would not be materially affected, but absence for two generations would seriously weaken the claims and render them subject to some recognition by the tribe; they would not entirely cease until after an absence for three generations.
>
> Where a group of Natives had abandoned or lost their interest in the manner just referred to, it would be possible for those rights to be restored again upon their acceptance of an invitation from the tribe to which they belonged, to return and reoccupy the land. Such an invitation, however, must emanate from the tribe as a whole, and an overture from a individual member alone would, in most cases, hardly be sufficient to effectively bring about restoration of the lapsed rights unless it could be shown he acted with the concurrence of his tribe.[22] This would appear to be readily understandable having in mind the system of tribal ownership and community of interest and of right, which formed the background of ancient Maori life both in peace and in war. [Emphasis in original.]

Smith then explored the situation where one of the dual aspects of Maori land tenure – 'take' or occupation – are not properly fulfilled. Firstly, Smith noted that:

> There have been many instances where occupation has been proved, but the evidence has shown that the claimants occupied, and exercised quasi ownership with the consent, or at the invitation, or to the knowledge of, the true owners. In such circumstances, occupation, whether conclusively proved or not, is generally insufficient to affect adversely the interests of the true owners.[23]

Such examples would include the times when strangers living with a tribe were given rights to gather food on particular lands, or from particular trees or fish traps. Secondly, Smith noted that the Maori Land Court was extremely reluctant to support rights claimed by a 'take' that were not supported by occupation. Finally, Smith noted that the court encountered exceptional cases, cases which contradict the above rules. In such cases the court has been known to make allowances, but primarily for 'occupancy rights':

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22. Such an invitation would most probably have come from a chief whose mana was recognised by the wider group, rather than from the group itself. This is a moot point, however, as the powers of chiefs and the tribe were so interwoven.
23. Ibid, p 59

where, though the occupiers were unable to prove a *take*, yet their opponents could not prove that the occupation was only a permissive one and had no other source. The Court had presumed in such cases, that there must have been some sort of *take* and made an award accordingly.[24]

Again the emphasis on use or occupation is stressed.

7.4 'Take Tupuna' and the Right of 'Discovery'

In terms of the different 'take' listed above, Smith considered that the right to 'discovery' was closely associated with *take tupuna*, and could be used as 'a subsidiary of a claim under ancestry'.[25] 'Take tupuna', however, was a complex question, tied closely to Maori customs of descent and succession. Interestingly, Smith cited both William Martin and John White to explain the concept. While Martin will be discussed in the following section, two statements are of immediate interest:

(Martin) [In disputed cases each] of the claimants endeavours to prove some act of ownership exercised without opposition by one of his ancestors. Acts commonly alleged are cultivating, building a house, or catching rats on the land, setting an eel-weir, cutting down a totara tree in the forest for a canoe, etc. . . . The lands of a tribe do not form one unbroken district over which all members of the tribe may wander. On the contrary, they are divided into a number of districts appertaining to the several sub-tribes. Each sub-tribe consists of the descendants of a common ancestor (whose name it generally bears) who was, in former times, the conqueror, or in any other way the recognised owner of the district.[26]

(White) The claim [to hereditary tenure] was grounded on the right of the grand-father or grandmother, not of the father, mother, brother or other immediate kindred. There have been cases where a chief, on his deathbed, portioned out his land to each of his children. The son's claim is, in all instances, derived from the grandfather. . . . No matter how distant the relationship, they all, so long as they can trace their origin up to the same ancestor (provided a family war has not occurred and thereby divided the tribe) claim an equal right to the lands owned by that ancestor. The title in the female line does not expand to the same extent; the grand-daughter of a chief has an equal claim to the lands of her grandfather with that of her male cousins, and the claim continues good to her grandchild, but on the death of that grandchild the land reverts to the male line. This custom holds good for the following reason which is assigned as its origin, namely, that were it not upheld, the intermarriage of chief s daughters with members of other tribes would soon so complicate and curtail the tribal claims that an invitation would be held out to adjoining tribes to attempt by conquest to despoil them of their territory.[27]

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24. Ibid, p 61
25. Ibid, p 62
26. Ibid, p 63; Martin is cited from AJHR, 1890, g-1, p 3
27. Smith (1942), p 63–64. White is cited from AJHR, 1890, g-1, p 12. Note that White's comments may not apply to all tribal regions.

Two points must be immediately made. Firstly, Martin's suggestion that the land was divided into 'a number of districts' is too simple. While tribal 'regions' certainly existed, these could overlap or be intermixed. Secondly, White's comments about the limitations of descent through female lines appear to be simply wrong.

Smith was quick to point out that the Maori Land Court modified these principles. Firstly, in questions of succession, the court refused to draw a distinction between male and female lines, and gave entitlement to all of the descendants of a rightful ancestor. This was not strictly customary because marriage connections did not give the same rights as the descent line. Children, while being able to claim through both parents, typically retained strong rights from only one parent. This depended in part on how closely the parents were related and where the child typically resided. Secondly, 'relative interests' to individual blocks of land were also awarded by the court, the apportionment of which did not necessarily follow Maori custom. In both cases, Smith explained that 'This modification necessarily followed when it became desirable to transmute the Native customary title into one cognisable according to British law'. As will be discussed in the conclusion of this section, Smith's justification is somewhat problematic.

Smith also explained how the court evaluated competing claims based on 'take tupuna'. While Smith acknowledged the depth of Maori knowledge regarding ancestry, history, land boundaries, and so on, he disliked situations where competing claims were made:

> disputed whakapapa or genealogical tables are of frequent occurrence, and the credibility of the stories of traditional events brought as testimony to support an ancestral claim is often in doubt.[28]

Smith cited the court on the question. The significance placed on evidence of recent occupation over perhaps more complex questions of whakapapa is clear:

> A tradition generally accepted and acted on, and of which the several accounts do not materially differ from one another, may, with considerable confidence, be regarded as an authentic record of actual fact. A disputed tradition on the other hand will, in the majority of cases, be entitled to very slight authority. It would not be advisable, even if it were possible, which is open to question, to attempt to lay down rules of rigid definition as to what will not be regarded as sufficient evidence of truth of an alleged traditional event. Each case must be determined by its own circumstances and by the weight of evidence which, as Lord Blackburn has pointed out, 'depends on the rules of common sense. It seems to me, however, that one unequivocal act of ownership, and *a fortiori*, a series of such acts, is of far more importance in determining on which side the balance of testimony lies, than any amount of traditionary lore that may be brought forward for the purpose of leading the Court to a different conclusion.[29]

28. Ibid, p 65
29. Ibid, pp 65–66 (cited from Chief Judge Seth-Smith, 1891, Chief Judge's minute book, vol 2, p 71)

7.5 'Take Raupatu' – Title by Conquest

'Take raupatu', or title by conquest, involved a number of questions. Firstly, Smith explained that any victory in battle had to be followed by occupation 'to the exclusion of the vanquished'. Thus military victory supported by occupation appeared to be the only way that 'take raupatu' could confer rights to land. However:

> There have been many cases in which subjugation has not been complete, but where a partially vanquished tribe have been able to make peace on terms which allowed the successful tribe to acquire rights to a portion of their lands and compel the defeated tribe to join the other tribe in alliance, thereby increasing the power and fighting strength of the conquerors.[30]

Thus, a number of results were possible within 'take raupatu', depending upon the outcome of the conflict. These levels can be summarised as follows:

(a) A total conquest that involved the expulsion or extermination of the defeated and which is followed by occupation.

(b) A conquest followed by occupation but in which survivors of the defeated group were kept as 'slaves' or taurekareka.[31] Such taurekareka could be permitted to occupy various portions of their former lands.

(c) A conquest followed by occupation but in which the defeat was not total and the 'defeated' group remained on the land. Such a group may become tied to the victor's by marriage, alliance, or the like, thus protecting various interests of the defeated group. This might involve the rendering of some sort of service. In this situation 'absolute serfdom' did not necessarily exist.

(d) A conquest followed by occupation but in which survivors of the defeated party remained on part of the land, perhaps hiding in the bush. They would thus retain a portion of their rights through occupation rights or ahi kaa.

Interestingly, the Maori Land Court tended to support the rights of taurekareka or 'defeated' groups that had remained on the land. As Smith commented:

> Where these bond servants became numerous, the Court would usually make some special provision for them upon investigation of title, and it was not uncommon to see such concessions advocated by the conquerors or their descendants.[32]

Of course by the '1840 rule' the court declined to recognise rights of 'take raupatu' that were acquired after the introduction of British sovereignty in 1840 because that would be to condone breaches of the pax Britannia.[33] In this case the court clearly ruled on criteria other than those of Maori custom. The court thus felt it was necessary to assess the degree of occupation held by the conquerors. Again, the court stressed the need for possession:

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30. Ibid, p 66
31. The translation of taurekareka into 'slave' is not entirely accurate and should be treated with caution.
32. Ibid, p 67
33. As has been stated in the introduction, this report owes much to the discussion of the 1840 rule by Gilling, Gould and Phillipson. I will not endeavour to add further to this discussion.

> An allegation that *papatipu* land has been acquired by conquest invariably raises questions of degree of the relative conquest, and whether it had been followed up in such a manner as to justify a finding in favour of the persons who allege it, are questions of fact which, in addition to occupation, the Court has to determine according to the evidence and the peculiar circumstances.[34]

7.6 'Take Tuku' – Gift

The last 'principle' or 'take' of Maori land tenure was 'take tuku', or tenure through gift. This was perhaps the most complex of the 'take' that the court had to deal with, and Smith's discussion reflected this.

Some elementary points on gifting should be made. In terms of the anthropology of Maori society, gifting was one of the main ways that different groups interacted. Many things could be gifted. For example, food, or material items such as canoes, or the right of passage through a particular territory, or at times, land. These gifts in part formed the material expression of complex webs of reciprocity and competition. They were a means through which alliances were forged and peace made, in which mana could be gained or lost, and how the tribal landscape retained its dynamism and fluidity. Indeed, gifts were not one-way or absolute, they were tied to obligations, perhaps other gifts, and could be rejected by the group accepting the gift, for example in the case where obligations tied to the gift could not be met (although there would be implications to such a rejection).

Despite this complexity the Maori Land Court was, as Smith explained, able to distil a list of 'the ingredients necessary to constitute a complete gift of land according to Native custom'. They are as follows:

(a) the donor must have sufficient right to make it
(b) the gift must have been widely-known and publicly assented to, or tacitly acquiesced in, by the tribe; and
(c) the donee or his direct descendants must have continued to occupy the portion gifted.

Thus, a piece of gifted land had certain conditions attached to it, and if those conditions were not met by the donee, the land would revert to the donors. Note again, however, the court's emphasis on continued occupation. Indeed, while occupation of gifted land was often a condition of that gift, it appears that the court made this an absolute condition.[35]

Furthermore, the court appeared aware of the extremely public nature of the gift:

> A gift is a form of a claim easily made but it should be proved by clear and strong evidence if the fact be challenged; and this agrees more especially with Maori custom which requires publicity in matters affecting titles to land. If a chief gave land he did so as the mouthpiece and representative of the tribe, all of whom, in fact as well as in

34. Ibid, p 68
35. This is a difficult question, and further work should be done to see how far the court pushed this requirement for occupation.

> theory, had rights in the general land. Should disputes arise as to the facts of a gift, it is open to grave suspicion that these elements were wanting and that no gift passed or was made.[36]

Smith also explained that the court had to take particular care to understand the conditions of the gift, especially in disputed cases:

> Where, therefore, a gift of land is in question, the Court has to ascertain by reference to the evidence and the particular circumstances in each case, whether or not any specific conditions were attached to the gift, and to determine the rights of the parties under it accordingly.

Similarly, Smith was aware of the many different conditions under which gifts were made, or the many different reasons for such gifts. For example, Smith mentioned that land could be obtained as 'muru', for assistance in times of war, as satisfaction for the death suffered by a chief, or as part of a pronouncement made on an individual's deathbed. Indeed, Smith commented that 'These instances where gifts may have been made as shown above are by no means exhaustive; there are many other examples of the custom'.[37]

7.7 'Relative Interests'

Smith concluded his discussion of the Maori Land Court's interpretation of Maori land tenure and its subsequent conversion into freehold title with an examination of 'relative interests', that is, the process by which exact portions, 'shares', or parts of a block of land to which the title had been investigated, are awarded to individual Maori.

It is here that Smith believed the court has most radically departed from Maori custom.[38] Smith, though, did not believe that the court made this departure with malicious intent, rather he believed that such a departure was a necessary part of the conversion of Maori tenure into freehold title. Smith's analysis was extremely candid, if somewhat optimistic:

> While the statute provides that every title to, and interest in, customary land shall be determined according to the ancient custom and usage of the Maori people so far as it can be ascertained, it is quite evident that no known custom existed to aid the court in defining the relative shares of the owners of 'papatipu' land, except that they were not always entitled equally. Ancient Maori custom did not contemplate or provide for an individual title to land, or the conversion of ownership of tribal lands to a share or monetary value in the manner practised according to British law. In the application of the principles of British law, which requires for tenants in common a measurement of interests, to the extinguishment of native customary titles to land, the

36. Ibid, p 70 (cited Judges O Brien and Von Sturmer, with no additional reference)
37. Ibid, p 72
38. Smith (1942) also believed that questions of succession constitute such a departure.

> Native Land Court was faced with the necessity of dealing with the question of reducing ownership to a share value upon the basis of the estimated extent of the occupationary rights as near as could be ascertained. The court, for want of a set system, endeavoured to follow the analogies of native custom so far as such custom indicated the value and extent of individual interests according to the circumstances of each case and in the light of equity and justice.[39]

Comments made by Judge Seth-Smith and cited by Smith are also pertinent:

> It is doubtless considered that there is some secret rule of Native custom that can be ascertained by the Court and applied to each case as it comes forward for adjudication. Such a view of the matter is not supported by the facts, for nothing could have been further from the mind of a Native in former days than the idea of attaching an exact quantitative value to his interest in tribal property, and as the necessity was never felt, it is not surprising that no customary rule was ever established. The determination, in the absence of any rule either of law or custom, although some of the analogies of custom may be followed, must be arbitrary, and the result must necessarily be a greater or less degree of inconsistency in different decisions.[40]

More specifically, Smith argued that in the early period (c1865–1880?) the court tended to leave the distribution of interests to the Maori themselves – the not uncommon practice of asking claimants who had 'proven' their claim to present the court with a list of the individuals who were to appear on the title. It should be noted, though, that such lists were a simplification of existing rights, collapsing differentiated and perhaps unequal rights into a list of names with no reference to specific rights or shares. Smith also believed that as Maori 'became more litigious'[41] the court adopted three 'general principles' of apportionment:[42]

(a) ancestry, where parcels of shares were allotted to the representatives 'according to the strength of their occupation as disclosed by the evidence, those living at the present day sharing to a certain extent equally, with special treatment where the group was very numerous or the reverse'.[43]
(b) the apportionment of shares to the heads of families 'on the assumption that it was those owners who had saved the land for their descendants benefit';[44] and
(c) 'to measure the value according to the occupation as under the numerals 1, 2, 3, and 4, allotting those owners without a break in their occupation 4 shares, and so on in a descending scale for those entitled to 3, 2, or 1'.[45]

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39. Ibid, p 75
40. Ibid, p 76 (Seth-Smith is cited but not referenced)
41. Or, as land became a rare commodity.
42. A discussion of both the 10-owner rule and the changes introduced by the Native Land Act 1873 are conspicuous by their absence. Smith does not reflect on the effects that the arbitrary inclusion of 'trustees' in title. It does appear, however, that Smith was aware of the massive problems the court faced at the point which Maori land tenure was transformed into individual title.
43. Ibid, p 76
44. Ibid, p 76
45. Ibid, p 76

Smith noted that the second two systems were objectionable because large families may get a larger share than the sole child of a 'true' occupier. Smith in part suggests that these variations in court practice were regional. For example, there was a 'heads of families rule' commonly practiced in Hawke's Bay, while the 'per capita rule' was practiced north of Auckland.

Other matters compounded the problem: was the court to take note of rank, descent, or mana? Did a claim through two or more ancestors entitle the claimant to double rights? Should those rights be measured by occupation alone, or would occupation strengthen those rights? Should recent occupation increase a claim founded on a long-standing 'take'?

Indeed, the question of the rights of chiefs is extremely problematic.[46] The court generally understood that while chiefs could exercise a power of veto over the disposal of land, and while they articulated or embodied the welfare of a group, they did not have exclusive rights to a larger portion of the group's estate. In the same manner, Smith noted:

> None of the earlier authorities on Native custom recognise *mana* as conferring an interest in land as of right and by virtue of the *mana* alone. . . . [T]hey were of opinion that *mana* was personal and that if unaccompanied by a right founded upon one of the recognised *take* gave the person having *mana* no interest.[47]

However, as Smith also noted:

> the position of rangatira carried with it certain benefits and personal tributes from the tribe which those members of the tribe occupying lower rank would not enjoy. It would seem hardly just, therefore, that the coming of British law and the changes it brought with it, should operate to take away altogether without some compensation, any of the rights and privileges which a chief formerly held and enjoyed.

For Smith, there was no easy answer to these problems.

7.8 Concluding Comments

Smith's discussion of the apportionment of 'relative interests' is important insomuch as it illustrated an awareness of the Maori Land Court's relationship with Maori custom. Smith was quite certain that the apportionment of interests (and the determination of succession) were the point at which the Maori Land Court radically departed from Maori custom, although he was not critical of this move.

At the same time, though, Smith appeared unaware of a radical departure by the court in terms of its assessment of the 'principles' of Maori land tenure. He did mention a certain process of codification, the reduction of regional variation, and the like, but he did not give many concrete examples of this. And while it is easy to

46. The term 'chief' is used in an undifferentiated manner to refer to any individual of rank, or an individual who had acquired status as a rangatira, perhaps without a good genealogy.
47. Ibid, p 80

recognise the court's continual preference for claims that emphasised facts of occupation, it is also clear that the court recognised a duality in the way that Maori claimed to land – that occupation had to be supported by proof of either 'take tupuna', 'take raupatu', or 'take tuku'.

With an optimistic outlook, therefore, it could be suggested that the court, as Smith perceived it, in many ways followed 'customary' Maori land tenure when it assessed evidence and ruled on the general ownership of land (but not when it apportioned individual shares).[48] Other evidence perhaps supports this idea. For example, the court's recognition of local variation, the court's recognition that exceptions to the main 'take' or 'principles' of tenure could be found, or the fact that the court preferred to treat each case individually.

In this respect, it may be a mistake to over-emphasise the Anglocentricism of the court. While the court was in the business of eradicating 'communal' behaviour in Maori society, it was also designed to find the correct 'owners' or right-holders to the land. Moreover, the judges were not entirely ignorant. We should perhaps recognise that many individual judges had a long association with Maori communities, that these judges understood (even if they condemned) certain aspects of Maori culture, and that they took these aspects into account when the ruled on who the general owners of the land were. That is, we should be open to the possibility that the court was at least partially equipped to make some kind of 'interpretation' of Maori land tenure. We should, therefore, take seriously the potential accuracy of at least some of the court's rulings, especially in respect to the land over which a hapu or whanau held strong rights, such as cultivations, settlement sites, and so on. How this potential accuracy should be approached will be discussed in the conclusion of this report.

It should be again stressed, though, that such general awards of the court typically occurred before the 'apportionment of relative interests', and that this apportionment was a truly arbitrary arrangement. In this case, serious thought should be given to the way that the court dealt with a question to which it believed it could find no easy answer from within the parameters of Maori custom. In part, this problem reflects the fundamentally ill-conceived role of the Maori Land Court – the way that Maori land tenure could only fit English tenure through an arbitrary and imperious processes. Indeed, it appears that the court was in many areas unable to rule on the basis of Maori custom without taking a radical departure from Maori custom. Thus the court's need to find, as Smith explained, 'analogies of Native custom so far as such custom indicated the value and extent of individual interests' may reflect a fundamental deficiency in the legislation that established the Maori Land Court.

48. With a word of caution, though, it can be argued that Smith is characteristic of the later judges of the court (from about 1880). These later judges were typically trained as lawyers, did not always speak Maori, and probably had less local knowledge than the initial judges.

CHAPTER 8

NINETEENTH-CENTURY DISCUSSIONS OF MAORI LAND TENURE

8.1 Introductory Notes

This section reviews examples from writings about Maori society by the nineteenth-century Pakeha commentators Edward Shortland, George Clarke, and William Martin. An anthropological study of Maori economics by Raymond Firth will be also be commented on, albeit in a cursory manner.

There are a number of reasons for this review. Firstly, it can be argued that the early nineteenth-century commentators formed an intellectual background for the judges of the Maori Land Court (we have already seen how Smith later makes frequent use of certain texts) and in various ways influenced the judges work in both individual cases and with the formulation of court practice and legal precedent. Maning and Fenton were themselves prolific scribes, and their comments have been published in collections of 'learned' texts on Maori land tenure.[1]

Secondly, nineteenth-century Pakeha writers are an important source from which we can construct an understanding of mid-nineteenth-century Maori land tenure.[2] As such, they provided a point from which the decisions of the Maori Land Court can be assessed. Indeed, it will be useful to see if the court's understanding of the main 'take' or 'principles' of Maori land tenure, as illustrated in Smith's work, differed greatly from the understanding evidenced by these writers.

Writings of the three authors – Shortland, Clarke and Martin – have been selected from material published in the *Appendices to the Journals of the House of Representatives* and from collections assembled by H Turton. The writers are commonly acknowledged for their sympathetic view of Maori interests. It is felt that this sympathy is likely to strengthen their observations – they were keenly interested in the nature of Maori society and spent much time talking to Maori, not obscuring them. Nevertheless, due to the limitations of time only certain aspects of Maori land tenure have been commented on. These are as follows:

(a) the question of individual rights and communal rights;

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1. See, among others, the collection of texts in AJHR, 1890, g-1
2. It should be expected that various Maori language sources such as Newspapers can also provide such data. However, the author lacks the qualifications to use these sources and, as yet, there is no comprehensive work that has both made use of these sources and has commented extensively upon questions of Maori land tenure. Of course the minute book record of the Maori Land Court is itself a vital source, and some of these minutes have been examined in section 3 of this report.

(b) how rights were claimed or maintained; and
(c) boundaries, conflicting rights, and the resolution of disputes over rights.

As will be shown, the texts appear to display quite a degree of consistency on aspects of these three points, although some key differences will be noted. These texts will then be compared to Raymond Firth's work on Maori economics. A further comparison will be made between all these texts, Smith's account of the 'principles' of Maori land tenure discussed in the previous section, and the way that the Maori Land Court interpreted that tenure. A number of issues will be raised.

It should also be noted that a sharp distinction appears between writing completed prior to 1860 and those published in the period from 1860 to 1880.[3] The earlier writings were generally written as a contribution to the debate over early land sales or the very existence of Maori rights, whereas many of the later writings are influenced in some way or another by escalating conflicts between Maori and the Crown, particularly in Taranaki. There is, therefore, a political context to these writings.

8.2 The Cultural Prejudice of Nineteenth-Century Pakeha Writers – Some Main Points

It is well understood that nineteenth-century Europeans operated within a cultural framework and that to a great extent their world was viewed through a 'cultural lens'. This framework simultaneously included ideas of Christianity, 'Enlightenment' ideas of objectivity, a concern for material wealth, a moral emphasis on the goodness of labour (the Protestant work ethic), and a belief in the superiority of western civilisation. It was a framework that influenced much of New Zealand's colonial history, such as the operation of Government officials, the types of agriculture that were practiced, and the establishment of the Maori Land Court.

As a specific example, Brian Gilling has argued convincingly that the 1840 rule used by the Maori Land Court has an intellectual genealogy – that its genesis can be found in official correspondence and practice prior to the establishment of the Maori Land Court.[4] Indeed, Gilling has shown how widespread concerns among colonial officialdom in relation to ideas about 'Pax Britannica', or the sovereignty of the Crown, foreshadowed the court's formulation of the rule. Similarly, Gilling has argued that the court was preoccupied with ideas of force, conquest, and the like, and that this preoccupation coloured its decisions. This preoccupation has been illustrated immediately above in Smith in relation to the court's predisposition towards more material rights such as those based on occupation or labour. Clear historical examples exist, therefore, of a cultural 'bias' in the work of the Maori Land Court.

Nonetheless, many of the writers discussed below exhibit a strong sense of empirical observation. That is, Enlightenment ideals of 'scientific' observation

3. See the substantial collection of texts in AJHR, 1890, g-1
4. See Gilling, pp 5–20

were often practiced which may mean that many of the 'facts' (as distinct from analysis) recorded by these writers is of considerable value to modern analysis. Furthermore, it should be stressed that a number of these writers were at least capable Maori speakers, spent a significant amount of time with Maori communities, and had contact with various influential Maori leaders. While it may be argued that Maori did not give away their knowledge freely, it should also be noted that many of the writers discussed below retained a certain confidence among their 'informers'. Finally, it should be assumed that the participation of these writers in Maori society (as distinct from our observation of it 120 years later) gives certain credence to their work. Thus while we should acknowledge the strong criticisms that can be made of these texts, a positive perspective can be taken of many of their writings, and a degree of accuracy may be assumed.[5]

8.3 Edward Shortland (1843, 1847, and 1882)

Edward Shortland toured the Waikato in 1842 and, as one biographer comments, 'in a mere 28 days [he] acquired an unusually mature grasp of tribal politics and an affection for Maori people which set the tone of his subsequent career'.[6] Shortland was appointed sub-protector of aborigines in the 'Eastern District' later that year. In 1843, he toured the South Island, and it was from Akaroa that he submitted a summary of what he considered to be the nature of land tenure. In it Shortland outlined how various areas of population in the Maori tribal landscape were separated from one another by their connection to different waka, or original voyaging canoes. Shortland also wrote that within these districts smaller distinctions between different hapu and families could be found:

> The territory claimed by a *waka* is subdivided again into districts, each of which is claimed by an *iwi*. These are again variously apportioned among the different hapu and families of chiefs.[7]

Shortland's schema, although convenient, is partly back to front. The treatment of waka as primary social organisations, rather than being derived from hapu is problematic. Hapu and iwi formations do not appear to have worked this way.

On the subject of land tenure, however, Shortland believed that the 'chiefs are the principal landholders' (note that he did not say 'landowners').[8] He commented:

5. See, for example, Layton, pp 429–432
6. Atholl Anderson in Oliver, ed., *The New Zealand Dictionary of Biography*, vol 1, pp 395
7. 'On the Tenure of Native Lands: Edward Shortland, Sub-Protector to the Chief Protector', 15 August 1843, in H H Turton, *An Epitome of Official Documents relative to Native Affairs and Land Purchases in the North Island*, Wellington, 1883, f-1
8. This passage is also printed in AJHR, 1890, g-1, p 11, with the footnote 'That is not in accordance with facts' placed immediately after. In this respect, Shortland may have confused the right to veto the disposal of land held by chiefs with individual interests. He may also have been influenced by the important social role that chiefs played in organising labour. Alternatively, Shortland may have been closer to the truth, and the 1890 footnote may reflect the history of the Maori Land Court and the prejudice in Government circles against the name of rangatira being significant for the ownership of land.

> that [every] individual person, so far as I have been able to learn, has his own estate which he has inherited from his branch of the family, and which he cultivates as he pleases.

This statement reflected the fact that individuals held 'interests' in land which were other than freehold. Similarly, Shortland observed that:

> In the immediate vicinity of a pa the land is more minutely subdivided amongst its inmates, nearly every person having his own small cultivation-ground or holding some spot in common with other members of his family.[9]

Maori land tenure, Shortland informed us, was established by a reference either to ancestry or conquest:

> A chief, when speaking of the title by which he holds his lands, never fails to make a distinction between those which he has inherited from his ancestors and those which he or his ancestors have obtained by conquest. Over the former his right is universally recognised. The latter appear to be tenable only so long as the party in possession is the more powerful. The claim which he advances is, however, quite characteristic of the people – viz, that they are the *utu*, or compensation for the death of his relatives who perished in the fight.[10]

It would appear, therefore, that Shortland recognised the importance of chiefs, but perhaps overestimated their individual use rights to land. Indeed, he saw the strength of rights that were maintained by individual members of the tribe.

His further observation of conflicts over land are worth noting. Firstly, Shortland felt that it was :

> from purchasing lands the right to which is thus contested by two hostile parties, either of whom will gladly avail himself of an opportunity to sell independently of the other, that Europeans have unwarily fallen into so many difficulties.[11]

Secondly, he made a distinction between lands which were extensively cultivated and in which the title was clearly determined, as mentioned above, and lands that formed borders between groups:

> Besides the lands thus held there are large districts on the borders of different tribes which remain uncultivated. These 'kaianga [kainga] tautohe', or debatable lands, are a never-failing cause of war till one party has lost its principal men. The remnant then cease to have any political importance, and are reduced to the condition of mere cultivators of the soil, being contemptuously styled 'toenga-kai,' or offal.

Furthermore, Shortland outlined the kinds of evidence presented to secure contested rights. His comments are strongly reminiscent of Smith's exposition of the

9. 'On the Tenure of Native Lands: Edward Shortland, Sub-Protector to the Chief Protector', 15 August 1843', in Turton, 1883, f-1
10. Ibid
11. Ibid

principal 'take' and the need for occupation, although he appears to have exaggerated the importance of occupation alone:

> When a dispute arises between members of the same tribe as to who is the rightful owner of a piece of land, the principal persons on both sides meet together to discuss the affair. Their pedigrees are traced, and the ancestor from whom either party claims is declared. Any proof that an act of ownership (such as cultivating, building a house, setting pit-falls for rats, or erecting eel-weirs) was once exercised without opposition by one of these ancestors, is considered sufficient evidence of the right of his descendants to the land.[12]

In another text, written in 1847, Shortland again talked of the specificity of certain rights. It is clear that Shortland observed a process of negotiation or general consensus through which groups awarded more individual rights:

> In considering the modes by which land becomes distributed amongst the different members of a tribe, it must not be imagined that an individual is at liberty to cultivate at his pleasure any unappropriated spot within the limits of the district claimed by his tribe. He must confine himself to those parts of that district to which he and other members of his family have a joint right, and then his selection should be made with the consent of those interested. The non-compliance with this usage by turbulent fellows is a frequent cause of dispute.[13]

Later in his life, Shortland published a number of books on Maori subjects. One such work, *Maori Religion and Mythology*, included a section on land tenure. Here Shortland responded to the question of communal ownership with the following observation:

> It has been affirmed by many, on presumed good authority, that no member of a tribe has an individual right in any portion of the land included within the boundaries of his tribe. Such, however, is not the case, for individuals do sometimes possess exclusive rights to land, though more generally members of families more or less numerous have rights in common, to the exclusion of the tribe, over those portions of land which have been appropriated to their ancestors. Their proverbs touching those who wrongfully remove boundary-marks show this if other evidence were wanting.[14]

While Shortland may have confused the difference between an exclusive right (in the full English sense), an exclusive use-right, and the right of the tribe to control the disposal of the land, his point is interesting as it stresses the clarity with which various portions of the tribal estate were divided. A final observation is similarly valuable as it follows the distinction mentioned above between lands that were held by specific groups and lands that retained a more 'tribal' title:

> The lands of a tribe in respect to the title by which they are held may be conveniently distinguished under two comprehensive divisions – (1) Those portions which

12. Ibid
13. AJHR, 1890, g-1, p 23
14. AJHR, 1890, g-1, p 15, note that *Maori Religion and Mythology* was published in 1882.

have been appropriated from time to time to individuals and families; (2) the tribal land remaining unappropriated.[15]

8.4 George Clarke (1843 and 1844)

George Clarke, gunsmith and Christian Missionary Society missionary, arrived in the Bay of Islands in 1824. There he had a long association with local Maori, farming, working as a missionary, and eventually taking the post of chief protector of aborigines in 1840. Later in life, in 1861, he was appointed civil commissioner in the Bay of Islands, and in 1865 he became a judge of the Native (Maori) Land Court. In 1843 and 1844, Clarke reported to the Colonial Secretary on the question of Maori land tenure. A biographer has commented that Clarke's 'descriptions of Maori landholding are authoritative and cogently expressed'.[16]

Like Shortland, Clarke observed the existence of tribal districts, and the precise way in which these districts were defined by Maori. Unfortunately, Clarke paints too neat a picture of the tribal landscape, and gives the impression of nation-state like boundaries between tribal groups. It may be, of course, that certain boundaries could be accurately defined at any one time, but these were likely to change. Similarly, Clarke over-estimated the powers of chiefs, powers which typically waxed and waned:

> From a very early period the whole of New Zealand seems to have been divided into districts accurately defined generally by mountain-ranges or rivers, and must have been well known by the accurate description they have given to every little creek, valley, promontory, and bay throughout the Island, the names of which have been handed down by tradition from generation to generation, and which will continue to define the territorial rights of the chiefs descended from the early proprietors.[17]

However, Clarke was well aware that within these tribal regions smaller groups held rights to particular areas. Moreover, Clarke was quite adamant that Maori had a thorough understanding of property rights, and he gave numerous examples of such rights. Like Shortland, Clarke believed that the degree to which individuals could maintain rights varied in Maori culture, and that this variation depended on whether the rights in question were for labour-intensive cultivations or more general tribal lands. The following passage relating to particular rights is extremely cogent:

> It is then, I think, evident that the chiefs of every tribe and hapu, as well as the head of every family belonging to the tribe or hapu, have distinct claims and titles to lands within their respective districts. At the same time it must be remembered that they have joint interests in many of the lands. The particular claims of the chiefs, hapus,

15. AJHR, 1890, g-1, p 15
16. Oliver (ed), *The New Zealand Dictionary of Biography*, vol 1, p 83
17. Ibid, p 2

> and families are to lands either subdued or brought into cultivation, or upon which they have exercised some act of ownership – lands where they been (sic) accustomed to procure flax or erect their weirs for catching eels, or where they have built a substantial house: in such cases they claim a particular property; none but the person so claiming can give a title to the land, nor can he be dispossessed thereof. He may forfeit his right by accidentally killing a neighbour, by adultery, or by migrating to a different tribe or district. In either of the former cases the land is taken possession of by the injured party, whose title is recognised as good by the tribe in general; in the latter case the possession reverts to the relatives of the emigrant.[18]

In contrast to these areas where particular rights are granted are the lands that are held by the wider group:

> In other respects their claims and titles become more general, the hapus and families claiming in common with the principal chiefs what may very properly be termed their waste lands;[19] but even here they must be able to substantiate some sort of title which is considered equitable such as having been the first discovers, having kindled their ovens, built canoes, or exercised some such other act of ownership which gives them the preference over these lands. The families have, in common with the chiefs, the right of keeping pigs, gathering flax, shooting or snaring pigeons, catching rats, ducks, kiwi, digging fern-root, &c, or of gathering the natural productions of the woods and open country for the purpose of food, &c; every individual of the tribe having and exercising these privileges in common, but still acknowledging the rights of some family, or chief of the tribe or hapu, to make the first proposal for such an alienation – yet they would not consider the purchase valid without the consent of the majority of the principal men of the tribe and of the payment for the same every individual would expect to receive his appropriate share. Lands that are thus possessed in common, involving the interests of so many claimants, are exceedingly difficult to purchase, and may be reckoned as among the most fruitful sources of quarrels and disturbances. It frequently happens that two Natives, equally interested in the same lands, disagree on the question of its disposal: one is willing and anxious to sell, the other is not, and numberless animosities originate from this source.[20]

Three aspects of Maori tenure have thus been expressed. Firstly, there is the expression of a 'take' or principle of ownership, as in the case of being the first discoverers, in combination with proof of acts of occupation. Indeed, Clarke recorded that:

> To obtain a specific title to lands which are held in common, there must be . . . some additional circumstances to support such pretensions, as subduing and appropriating, or exercising any particular act of ownership upon the land in question: the first

18. Ibid, p 3
19. In fact, they may very properly not be termed 'wastelands'. The idea of wastelands follows very much from the perception that lands which were not directly cultivated or used as pasture were wasted. This was an English and not Maori perception.
20. Ibid, p 3

> discovery of a tree, the shooting of a pigeon . . . making a Native path or foot road, the accidental loss of a friend on such spot.

Secondly, there are the range of different uses that such lands could be put to, and thus the range of different rights that could be distributed across such lands. Thirdly, there is the role of chiefs who, as Clarke described, had the power to administer the disposal of that land, yet simultaneously were reliant on a relationship with the wider group to maintain and sustain that power.

Other 'take', such as 'take tuku', the gifting of land under certain conditions and with particular limitations, were observed by Clarke. In the following example, Clarke comments on the way that tribes who reside in 'border' areas sometimes intermarry with both neighbours. Such tribes may be treated as neutral in disputes, perhaps acting as negotiators or sheltering refugees from either side. Then:

> in gratitude for services performed, a piece of land might be presented by such parties to their protectors, who would thenceforth claim in virtue of the gift; but, on the other hand, land allotted by the protectors to those who fled to them for protection for the purposes of cultivation would not be considered as alienated . . . In the event of such cultivation being abandoned it would revert to the person who granted it, unless he married and resumed it as the dowry of his wife; it would then be hers and descend to her lawful heirs, but in default of issue of her body it would revert to his family. . . . Possession of land, even for a number of years, does not give a right to alienate such property to Europeans without consent of the original donor of the land; but it may be continued in the possession of the descendants of the grantee to the latest generation.[21]

Clarke also explains that 'common' rights extend to chattels:

> A canoe generally belongs to a family, and sometimes to a hapu, in consequence of each individual assisting in its formation or advancing a portion of his property for its payment . . . A blanket, bought with the proceeds of a child's farm, would be recognised as the property of the child, although appropriated to the use of the parents, and any attempt to alienate such property without the concurrence of all concerned would be resisted as unjust and oppressive; and the buyer, even supposing him to have given double the value of the property, would be considered equally culpable with the other.[22]

In many ways, Clarke appeared surprised to discover such vigorously maintained rights. He had, perhaps, found that the reality of Maori social and economic organisation contradicted popular European ideas about the absence of property in 'primitive' society. To further strengthen his argument, however, Clarke discussed the demarcation of boundaries. This is an issue that we will return to:

> No people in the world are more particular than the Natives on these subjects, and more especially in regard to their lands; and, in order to avoid quarrelling, furrows or

21. Ibid, p 4
22. Ibid

> watercourses are usually formed in their family cultivations, in order to divide and designate particular property; and on the same principle, and for the same reason, if a little more distantly related, and these cultivations are adjacent to each other, a dividing lot of uncultivated land will be left, or a small patch of wooded land, to which both parties have an equal claim, but which neither dare destroy for fear of exciting suspicion of encroachment, and thereby generating a quarrel. Between distant tribes there is universally a much larger space of common unoccupied property left for the same purpose, and but very few tribes are neighbourly enough to venture to cultivate on the opposite banks of the same river unless they are desirous of collision . . . it is no uncommon thing to find a space of some miles of uninhabited and uncultivated country forming the grand division of the district.

Finally, Clarke stressed the enduring nature of these rights:

> A tribe never ceases to maintain its claim to the land of its fathers, nor could a purchase be considered complete and valid without the concurrence of the original proprietors. If a conqueror spare the lives of the conquered, and they thenceforth become amalgamated with his own tribe, he infallibly secures his own title, uniting the claims of the original possessors with his own.[23]

8.5 William Martin (1846 and 1862)

William Martin was New Zealand's first chief justice and a close friend of George Selwyn, the first Anglican Bishop of New Zealand. In 1846, he criticised the British Government's disregard of the Treaty of Waitangi, and in 1860, he published a strong attack on the New Zealand Government's behaviour in Taranaki. Both of the texts discussed below thus come from a context of criticism. A later work by Martin in 1871 is of some interest also.[24]

Like Shortland and Clarke, Martin was impressed with the breadth and complexity of Maori land tenure. Moreover, his legal training led him to compare Maori and English tenure, and, in 1846, he stated that:

> In this Northern Island, at least, it may now be regarded as absolutely certain that, with the exception of lands already purchased from the Natives, there is not an acre of land available for purposes of colonisation but has an owner amongst the Natives according to their own customs.[25]

The title to old cultivations were, Martin reminds us, 'remembered and maintained by their descendants'. If an area was contested:

> [each] of the claimants endeavours to prove some act of ownership exercised without opposition by one of his ancestors. Acts commonly alleged are cultivating, building a

23. Ibid, p 5
24. Sir William Martin, 'Memorandum on the Operation of the Native Lands Court', AJHR, 1871, a-2
25. AJHR, 1890, g-1, p 3

> house or catching rats on the land, . . . cutting down a totara tree in the forest for a canoe, &c.[26]

Here Martin appeared to have referred to a combination of 'take tupuna', or rights that are derived from ancestors, and rights based on occupation. Moreover, Martin observed that:

> These claims in the ordinary course of things become sufficiently complicated, but are rendered much more so by the introduction of another set of claims which arise out of rights of conquest, enforced in very different degrees in different cases.[27]

In a later text, published in 1861 at the height of the conflict in Taranaki, Martin listed a number of characteristics of Maori land tenure.[28] Some of these are summarised below (others repeat comments already made or matters outside of the scope of this report):

(a) That land is held communally but individual rights can be exercised over particular parts of the communal land, especially when such parts are cultivated. For Martin the community thus has 'a right like what we should call a reversionary right over every part of the land of the community' ('community' including iwi, hapu, or whanau). This means that every 'cultivator' is a member of the community, and is 'not free to deal with his land independently of that community or society'.[29]

(b) That chiefs, while holding personal interests, represent the interests of their people. This representation is conducted in consultation with the members of the tribe.

(c) That land could be gifted from one tribe to another for a number of reasons.

(d) That 'The holdings of individual cultivators are their own as against other individuals of the community. No other individual – not even the chief – can lawfully occupy or use any part of such holding without the permission of the owner; but they are not their own as against the community'.

(e) That force was used in many instances, but that this did not mean that 'rules' did not exist: 'the Natives have no difficulty in distinguishing between the cases in which the land passed according to their custom and those in which it was taken by mere force'.[30]

(f) That because of common ancestry shared in Maori groups all could claim an interest in matters that concerned the whole tribe.

Many of Martin's later comments appear to reply to a suggestion that Maori held their land without recourse to a coherent system or that the only law in Maori society was that of force. Of course such comments were being made at that particular time, and Martin's exposition constitutes a damning refutation of these

26. Ibid
27. Ibid
28. The debate that was conducted at this time was quite complex. Suffice it to say that this report is not able to offer a sufficient background to Martin's comments.
29. Ibid, p 4
30. Ibid, p 5

suggestions. However, Martin also saw Maori tenure as being part of an evolutionary process. He referred to Irish and ancient German forms of tenure, and argued that English tenure arose from the 'earlier to the more advanced state of things – from clanship to nationality'. Finally, Martin stressed that the 'Treaty of Waitangi carefully reserved to the Natives all then existing rights of property. It recognised the existence of tribes and chiefs, and dealt with them as such'.[31]

8.6 Raymond Firth (1929 and 1959)

Raymond Firth remains perhaps the most capable writer on the question of Maori economics. Although his theoretical perspective is somewhat dated the sheer breadth and detail of his work has not yet been seriously matched. It is thus important to summarise Firth's analysis and compare this to the writers discussed previously.

The principal conclusion that can be drawn is that Firth's work shares many insights with the writers cited immediately above. Of course Firth, like Smith, made good use of such nineteenth-century proto-anthropologists, drawing extensively on the work of Elsdon Best, John White, George Clarke, and the like. Nonetheless, Firth came to his own conclusions, measuring different accounts against each other and conducting independent field work. Indeed, he should be treated as an independent thinker of remarkable aptitude.

A number of points about Firth's view of Maori land tenure can be made. For convenience they are listed below.

- Firth stressed the strong 'sentimental attachment'[32] held by Maori to their land, and 'the fundamental place which it occupied in the Maori scheme of things'.[33] Firth concluded that 'a real value attaches to such a record of the affection of the natives for their land, since it reveals the emotional background against which economic privileges are exercised'.[34] Moreover, Firth was critical of the view that the only form of Maori tenure was force:

  > To state as Busby does, that the native knew no law but that of the strongest is incorrect. Even when meditating the acquisition of land by force a tribe was usually careful to justify its action by uncovering some old 'take' or cause which gave them claim to it. . . . Among the Maori, conquest takes place as but one among a number of possible major grounds of ownership.

  Firth was well aware of the different levels to which rights operated in Maori society. He believed the idea of totally communal ownership in Maori society was too simplistic:

31. Ibid
32. Firth (1959), pp 368–370
33. Ibid, p 368
34. Ibid, p 372

> there is much more to be said on this point. The tribal territory was in reality made up of the lands of the various *hapu*, each jealously and exclusively maintained, while further segmentation gave private rights of many kinds to family groups and individuals.[35]

Indeed, 'the partition of the tribal land was no empty form, but . . . the rights of the various *hapu* were maintained with exclusiveness and vigour'. We will return to this question presently.

- Like Clarke, Shortland, and Martin, Firth believed that chiefs had a special role as leaders, spokespersons, advocates, and trustees. Firth makes a clear distinction between a chief's right to areas that he claimed individually 'from his ancestors, from occupation or from some other cause', and a chief's interest in the remainder of the tribal territory which 'was of a socio-political rather than of an economic nature, ie, he exercised great influence over it in major matters of control, but received no material benefit therefrom'.[36] Here Firth explained that the right to dispose of land was a tribal right, that 'no action of any moment affecting it was valid unless ratified by the tribal opinion'.[37] Indeed, the:

> same principle of tribal over-right held good for the lands of families or even *hapu*. It was only when a *hapu* was of great strength and felt itself to be practically independent of the parent tribe that it would make arrangements for any disposal of its landed property without consulting the general wishes. Conversely, any invasion of the land of a *hapu* by an extra-tribal enemy would at once bring up the remainder of the tribe to its assistance. The *hapu* sometimes fought among themselves, but a threat to the tribal land from outside closed all domestic quarrels for the time being.[38]

- Firth lists the 'modes by which rights to land were acquired and retained'. With some important differences, this list to a great extent parallels both the comments made immediately above and the 'principles' or 'take' of Maori land tenure set out by Smith. For example, Firth places conquest and discovery under a single heading, explaining that:

> When the territory was left entirely open for occupation the method of *taunaha whenua*, bespeaking of land, was sometimes followed as a means of acquiring title among the conquerors, this being a custom of the same type as the *tapatapa*.[39]

The act of traversing and naming the land, Firth explained, was known as 'takahi'. The other main aspect of title was the ancestral right or 'take

35. Ibid, p 378
36. Ibid, p 377
37. Ibid, p 374
38. Ibid, p 375
39. Firth describes tapatapa as 'ritually bespeaking property'. Such an act would involve the naming of an item, or in this case a part of the land, by someone with great mana. See also ibid, pp 345–346.

tipuna'.[40] Such a right derived through inheritance from an ancestor (the various aspects of which will not be discussed) and were tied to the original rights established by an ancestral figure.[41] Occupation acted as the shared element of tenure. Here Firth's exposition is remarkably similar to that proposed by Smith. Note also the distinction Firth made between different levels of occupation and the way that 'conquered' hapu could maintain rights:

> For a title to land obtained by conquest or discovery to be valid, occupation had to be effective. If one tribe were defeated by another and their lands occupied, the original owners, if thoroughly dispossessed or enslaved, had no further claim to the land, unless in future years they could win back their territory again by intermarriage or force of arms. But invasion and driving out of the inhabitants was not sufficient to establish a title if the land were not permanently occupied. Again, even if the land were settled for a time by invaders but the dispossessed tribe still managed to maintain itself in freedom within its own borders, scattered in the forest or in hiding in the mountains, their title to the whole of the land still held good. . . . The proof of this continuity was sufficient to establish ownership in later years.[42]

Firth also commented on the practice whereby groups made 'periodical visits' to various areas of their territory in order to keep their rights alive. Firth cited a famous Hauraki chief, Horeta te Taniwha, to illustrate this:

> Our tribe was living there at that time. We did not live there as our permanent home, but were there according to our custom of living for some time on each of our blocks of land to keep our claim to each, and that our fire might be kept alight on each block so that it might not be taken from us by some other tribe.

However, title was not always clearly held. Firth explained that certain lands, especially those areas lying on the borders between two tribes, could be 'hotly contested, each party endeavouring to establish ownership, though not actually occupying the land'.[43] For lands that were contested among members of a smaller group a public debate was commonly held. The different arguments advanced in these debates illustrates the different basis of tenure:

> The question was generally thrashed out in open assembly of the people, each party endeavouring to prove his claim by the recitation of his *whakapapa* or genealogy, substantiating it by citing acts of ownership or occupation performed without opposition by his ancestors, such as cultivation, taking of game, putting a mark upon a tree or rock, or some similar deed by which priority was established. A mark or sign of this kind was termed *tohu whenua* (land token). To provide evidence of ownership sometimes the *iho* or umbilical cord of a newly born child of rank was hidden together with a small stone on the land or

40. The difference in spelling is a regional variation.
41. Firth, pp 384–385
42. Ibid, pp 384–385
43. Ibid, p 385

> the boundary thereof, so that in future years it could be referred to in case of dispute.[44]

Corresponding with Smith's recognition of regional variation and exceptions to the general 'take', Firth stressed that:

> conquest, occupation, and ancestral right are not mutually exclusive grounds of ownership, but may be concurrent or supplementary. In addition to these main bases of claims to land, there are a number of others, depending on special circumstances, and very often simply of individual concern.[45]

- Finally, rights to land tenure could come from gifting. Again, Smith and Firth agree that such gifts could be made on a number of different occasions. However, Firth does not stress the necessity for a public presentation of the gift, although he does comment that:

> In general the cession of land to another tribe seems to have been regarded as one of the most valuable of gifts, to be made only on occasions of great significance.[46]

An important aspect of Firth's analysis, partially lacking in the works detailed above, is his understanding of the different levels of Maori social, political, and economic organisation and the way these relate to tenure. That is, the importance of, and distinctions that can be drawn between, the economic and political functions of and rights held by whanau, hapu, and iwi. To cite Firth at length:

> The whanau functioned as the unit for ordinary social and economic affairs. . . . In matters of organisation each whanau was fairly self-reliant, the direction being taken by the head man of the group in consultation with other responsible people. As a rule it maintained its own affairs without interference, except in such cases as came within the sphere of village or tribal policy. . . .
>
> The whanau held group ownership of certain types of property, and also as a body exercised rights to land and its products. Tasks requiring a small body of workers and co-operation of a not very complex order were performed by the whanau, and the apportionment of food was largely managed on this basis. Each family group was a cohesive, self-contained unit, managing its own affairs, both social and economic, except as these affected village or tribal policy. Members of a whanau, on the whole, worked, ate, and dwelt together in a distinct group.
>
> The more inclusive kinship group, the *hapu*, was correlated with the major village activities. More important species of property, such as a war-canoe, a meeting-house, a large eel weir, were regarded as the property of the whole *hapu* and were used by the members as a body. All the land surrounding the village, incorporating, of course, the rights of individuals and of whanau, was under the ownership of this group, while important tasks involving considerable labour power saw a muster of all its members.

44. Ibid, pp 386–387
45. Ibid, p 387
46. Ibid, p 390

> At large tribal feasts, too, and on similar occasions of ceremony the *hapu* functioned as a united body.
>
> The economic functions of the tribe (*iwi*) were confined almost to participation in huge feasts and to an all-embracing over-right to the land within its borders; the latter was made manifest in the rallying of *hapu* to defend the tribal land at any point invaded. The *waka* was a loose political aggregation of tribes, and had no economic function.[47]

Firth concluded that:

> in Maori society the economic structure is to a large extent coincident with the kinship grouping; there are, for instance, no economic associations of any importance which are not based upon it.[48]

There are, of course, many aspects of Firth's work not discussed here. In particular, Firth has made valuable comments as to the nature of Maori economic structures, Maori attitudes toward work, the motivations and organisation behind work, the distribution of goods, reciprocity, gifting, and feasting. Any comprehensive analysis of Maori land tenure would, of course, need to take these into consideration – it is impossible to separate, say, wider systems of reciprocity from our understanding of 'take tuku'. Unfortunately, the immediate problem addressed in this report – the interpretation of Maori land tenure by the Maori Land Court – has restricted the question of tenure to its more material, or social and political aspects.

8.7 Smith, Shortland, Clarke, Martin, Firth, and the Maori Land Court – A Discussion

When placed side by side, the works of Smith, Shortland, Clarke, Martin, and Firth reveal a number of similarities and differences. These works also relate to the problem of the Maori Land Court's interpretation of Maori land tenure and some of the issues already raised in connection with Smith.

For the sake of clarity the following discussion is made in points. As well as offering a comparison between the above writers, points (d), (e), and (f) include a discussion of the role of the Maori Land Court:

(a) All writers agree that Maori had a system of property and land rights. Martin placed this understanding in a legalistic frame work. For Smith and others, this fact was taken almost as granted.

(b) All writers share an understanding of the basic ways that Maori claimed rights to land. All distinguished between rights that were based on force, and those rights that derived from ancestral discovery, occupation, or gift. Most made the point that conquest had to be followed up by occupation, and

47. Ibid, pp 111, 139
48. Ibid, p 139

all acknowledged the importance of ancestry. There is, therefore, a general agreement on the existence of certain 'principles' of claim, or 'take', of Maori land tenure. Moreover, there is a general consensus over what Smith believed was the dual nature of Maori land tenure – the necessity of deploying both a 'take' and maintaining some connection through the occupation or use of that claim. At a finer level, most writers observed that rights over land could remain after a long absence, or, in the situation where a conquest occurred, that the conquered could continue to retain rights by partial occupation (perhaps remaining hidden from the conquerors).

(c) All writers acknowledge the existence of regional variation or the fact that exceptions could be found to the general principles. Unfortunately, while this is frequently stated it is rarely demonstrated, although Firth is better than the others.

(d) All writers saw that occupation was a matter of degree – that it could range from close and long-standing occupation to the distinct occupation or use of land by an ancestor only. Similarly, all writers saw some kind of difference between the degree to which rights were exercised in the occupation of cultivated lands or kaainga and the use of, say, areas of bush for hunting or gathering. For Smith, this was the difference between 'permanent' or 'transient' areas of occupation. Smith, Shortland, Clarke, and Martin understood that a whanau may hold an exclusive right over their cultivations, but they tend to assume that the right to 'wastelands' was communal.

However, it was with Firth that the differences in these kinds of occupation are clearly tied to Maori social structure. Firth had been able to show that different types of economic activity mobilised different levels of the social structure. For example, while cultivation may involve only a whanau, the construction of a canoe would involve the entire hapu. In this case, the hapu could claim rights over the canoe, while the whanau would maintain an exclusive right to the produce of their cultivations.

This is an important insight and, as will be discussed, is something that the Maori Land Court did not properly appreciate. We should, furthermore, be critical of the view that rights to non-cultivated areas were only held communally. Both Firth and Clarke have noted that rights to, say, rat runs, or the right to hunt birds in a particular area, could be held by whanau or even individuals. However, these rights would typically be worked out in relation to the wider community.

So, if we accept Firth's comments about the differential rights held by whanau, hapu, and iwi, it may be important to understand that because the Maori Land Court dealt with blocks of widely different sizes (from a few acres to thousands of acres) it therefore dealt not merely with one set of rights, but with different rights held by different levels of Maori social organisation. A large block may have simultaneously included the cultivation site 'belonging' exclusively to a whanau, a wider area where members

of a hapu held rights to gather resources, and perhaps a grove of kauri, where members of an iwi could gain a right to take timber.

But rather than properly understanding these interconnected rights, it appears that the court typically set out to find the 'communal owners' of a block, collapsing these differentiated rights in land into a general right of tribal ownership. In some cases, of course, either the court or Maori responded to this tendency by subdividing large blocks into smaller blocks that they themselves correlated to, say, hapu or whanau divisions. However, even these subdivisions would not have adequately represented the complexity of the tribal landscape. In other cases, if the block was small enough and positioned accurately, the rights of a particular whanau may have been accurately represented.

Another solution for Maori would be to acquiesce to an arbitrary division among themselves, where rights were given up in some areas and strengthened in others. This situation will be discussed further in chapter 3. Whatever the case, in the court environment the onus was placed on Maori to take blocks of land to the court that in some possibly arbitrary way fitted with the tribal landscape. But as has been extremely well-documented, partitioning land, conducting surveys, and various court costs were prohibitively high. In fact, it is probable that these costs encouraged Maori to present blocks of a large size. Of course this presented a double bind as large blocks, especially under the 10-owner system, were vulnerable to being alienated by the legally-recognised 'owners'.

(e) All writers appeared to accept that while exclusive rights could be held over particular areas of land, or the use of certain resources, the disposal of these rights depended upon the consent of the wider tribal group. As Martin explained, the community had 'a right like what we should call a reversionary right over every part of the land of the community'. Moreover, all writers agreed that chiefs expressed this reversionary right with a power of veto over the disposal of lands. Indeed, it has been explained that while a chief may have great influence over the general use of land, he or she could only claim an exclusive right to a particular part of the community estate. This is, of course, a point that Smith also recognises.

However, in our current academic arena, the thorny and complex question of communal or 'tribal' rights, and the right to dispose land (sometimes by 'sale') has not yet been settled (and this report does not attempt to do so either). In a comparatively recent debate, Brent Layton argued that we should make a distinction between an individual or small group's right to use a resource, and their right to dispose of it. He suggests that:

> the individual or group that possessed the right to use a resource, also possessed the power to decide on whether to dispose of that right voluntarily to another individual or group.[49]

49. Layton, p 437

Layton's hypothesis rests on the assumption that the European understanding of Maori land tenure was gained at a time when early sales were made. Because these sales involved blocks of land over which any number of use-rights existed, a large number of Maori were subsequently involved, and the impression was given that alienation was a question dealt with communally. Layton also suggests that the Maori Land Court mirrored this situation, with hearings drawing any number of right-holders into consideration. So, for Layton, European impact in part created a 'communal' right.

Alan Ward rejected this position. Ward acknowledged that 'a multiplicity of individual rights do not, ipso facto, amount to a collective or communal right – that indeed each individual right would normally need to be negotiated for'.[50] But Ward then argued that when rights are disposed of we must consider questions such as – 'for how long, to whom, and under what conditions?' In this case, Ward makes an important distinction between a 'sale' – as the disposal of all rights in freehold land – and a gift where the gift involved a relationship and obligation.

In light of the observation made above under point 4 – that land tenure was tied to different levels of Maori social structure – it could also be said that the right to dispose of or 'gift' rights in land, and the communal right to veto such a move, depended on the relative position of the donor and donee. To explain further, there appears to be a fundamental difference between the gifting of rights to land between two whanau of the same hapu, and the gift of the same rights by a whanau to a distantly related hapu, or, in the case of pakeha, to a group that had no kinship connection to the whanau at all. A chief or hapu may not be able to veto a gift between whanau because of the specific nature of their rights in relation to the wider group. But by political, social, and perhaps economic implication, the relationship formed by the gift of land to a distant or non-related group necessarily involves the wider community. Such a relationship, while ostensibly initiated by a whanau, would involve the wider group because that whanau is connected by kinship and reciprocal rights to the wider group.

A part of Layton's argument may therefore be correct. We can not escape from the historical fact that some rights were strongly, almost exclusively maintained by whanau or even individuals. But where the disposal of such rights would affect the politics of the wider kin group, the power of a community or chiefly veto would arise.

This of course raises the further consideration of the transformation (or eradication) of such rights when individuals were given individual freehold title to land by the Maori Land Court, title that may be 'legally' disposed of without reference to, and thus circumventing the wider group's right to veto. Indeed, it can be argued that the individualisation institutionalised by the Maori Land Court fragmented wider tribal relations – where the dis-

50. Ward, p 259

posal of a block of land through gift may have involved all members of the tribal group and a set of obligations and rights for the donee, a sale under English law negated any ongoing relationship between vendor and purchaser.

Some additional comments may be made. Firstly, the court process appears to have conflated into a single concept of 'ownership' the question of the right to use land, often held by distinct groups in an exclusive manner, with the right of the wider group to dispose of the land. This, secondly, raises the question of the court's statutory right to enforce such a transformation, as it clearly went against Maori custom.

(f) All writers saw that various areas of land were contested. Indeed, Smith, with his experience as a judge, witnessed this first hand. However, it can be argued that Smith saw such contestation as a straightforward 'working out' of different competing claims made under various 'take' and degrees of occupation. While this is certainly true, Shortland, Clarke, and Firth observed that the tribal landscape included various 'border' areas, 'contested' lands, or 'neutral' grounds. According to Clarke, these could be as small as a patch of bush that divided different cultivations, to tracts of uninhabited land between large tribal groupings. Thus a picture evolves of the tribal landscape containing different levels of 'right-clusters' that ranged from more central clusters, for example at the heart of a hapu's territory and cultivations, to the contested clusters at the boundaries between hapu.

What is important here is that these areas existed as a part of the ongoing interrelationship between different levels of Maori social organisation. There is, therefore, a connection between inter-whanau, or inter-hapu, or inter-iwi politics, and the relative exclusiveness, security or certainty of tenure in specific parts of the tribal landscape. Indeed, the tribal landscape was covered by different claims that were at once political, social, and economic. Claims made under various 'take' and the exposition of historical and kin-based use of these lands would therefore be resolved in this context.

Smith (and probably other judges of the Maori Land Court) appears, therefore, to have a simplified understanding of Maori land tenure, an understanding that separates political and social aspects of that tenure from its public expression or essentialisation. That is, Smith appears to have grasped certain abstract principles of Maori land tenure (as perhaps expressed by Maori before the court), but does not link these principles to the lived experience of Maori communities.

The implications of this move are considerable. As has been argued in the previous section, we should distinguish between the court's ability to accurately locate the group(s) who claimed rights to an area, and the court's subsequent apportionment of 'relative interests' to that group. As has also been argued, Smith's clear understanding and exposition of the 'principles' of Maori land tenure (and the clarity of this exposition has in part been supported by Shortland, Clarke, Martin, and Firth) may mean that the court was able to 'get it right' with regard to the 'ownership' of a general group, provided one 'take' was not pitted against another exclusively.

However, if we take into consideration the connection between Smith's principles and the actual experience of the Maori communities from which these principles are distilled, the court's understanding appears somewhat crude.

We should understand, therefore, that in the process of interpreting Maori land tenure, the Maori Land Court was not simply met by a number of 'principles' (even if regional variations were understood), but that it was confronted with an entire spectrum or sliding-scale of Maori rights and social inter-relationships, within which claims could be made at different levels of certainty and different degrees of exclusivity. Indeed, in light of our discussion of Smith it would appear that the court did not appreciate (or perhaps ignored) the complexity of this system.

So, as the court appeared to understand the different 'principles' under which claims could be made (and while it believed that it could cope with regional variation) it did not take into account the degree to which these claims could be exercised in relation to other claims. In other words, the court was not able to distinguish between the different levels of ownership that existed between, say, a whanau right to cultivations and a hapu right to, for example, fish in a particular river. Indeed, the court's declared role of social engineer did not require an accurate understanding of Maori land tenure: when the investigation process was completed and the ownership of the 'general group' was determined any subtle distinctions that existed between different levels of rights were automatically collapsed into individual shares of freehold tenure.

Nonetheless, a further point could be made. If, for example, the court was to determine the title to an area of land that was located firmly at the centre of a hapu's territory – an area had been securely held for a number of generations – it is quite possible that the court could 'get it right' when determining the 'ownership' of that land. In such a case, the award may be given to a number of individual members of a tribe who may or may not act as trustees, but such an award would be to the correct group. Of course, the block itself would include a number of more finely distinguished rights, say of whanau, and these rights would be conflated into a single legal title.

If, however, the court was to determine the title to lands that formed one of the 'boundaries' between hapu, or one that had been recently occupied, or any number of other situations that created cross-claims of differentiated rights, then the court's likelihood of obtaining a successful transformation of native title into English title would be much lower. Indeed, its award is likely to have been arbitrary. In such cases the court would have required a very good understanding of Maori land tenure and would probably face problems understanding the complexities of the different interests at hand. Indeed, those interests would be tied to an ongoing political process, and the court's very presence would have an effect on the politics of that process. A further possibility existed, though: when Maori groups were willing, and were allowed by the court, to negotiate or 'exchange' on divisions between block boundaries, such conflicts may, in part, have been resolved. This problem will be further addressed in the following section.

CHAPTER 9

THE MAORI LAND COURT IN HAURAKI, 1865–71 – A CASE STUDY

9.1 Introductory Notes

This section provides a case study of investigations of title by the Maori Land Court in the Hauraki region, from 1865 to 1871.[1] The points that have been raised in the previous two sections will be further illustrated and discussed. Other issues or points of interest will also be made.

The Hauraki region has been chosen simply because the author has a general understanding of the history of this area.[2] It is, moreover, a region with an extremely vital and dynamic Maori history and it has a complex history throughout the colonial period. A brief review of the region's background will shortly be provided.

The minute books of the Maori Land Court provide one of the most important sources of information on the question of Maori land tenure and the way the court investigated that tenure. They contain a wealth of statements by Maori well-versed in their cultural practices (it should be stressed that most court sittings heard evidence in Maori, which was then translated). These statements are often accompanied by whakapapa – histories that had been passed down through the generations, deliberations on more recent events, and indications of land usage and occupation. They also contain explanations or discussions on the 'general rules' of tenure. The reader's attention should be directed to a recent collection of references to such statements.[3]

In terms of the evidence presented before the Maori Land Court, it can be argued that despite obvious differences of culture, the court was an environment not

1. The transcription of the minute books has been done as accurately as possible. However, mistakes may exist. These could either be the result of poor handwriting, bad spelling in the original text, or entirely the author's fault. Moreover, the research done in these minute books has been at best cursory (three weeks), and comments or arguments about the material discussed in the minute books should be treated with caution. Material has been selected to provide examples – interesting cases that illustrate certain points, show the use of particular types of evidence, the existence of certain contradictions or conflicts, and so on. This report does not in any way claim to have the authority to support particular interests, and the discussions in this report should not be used to do so. It is the operation of the court, the institutional culture if you like, that is under scrutiny, not the 'truth' of particular tribal claims to rights.
2. See Hutton (1995).
3. 'Customary Maori Land and Sea Tenure: Nga Tikanga Tiaki Taonga O Nehera', Wellington, Ministry of Maori Affairs, 1991

unfamiliar to Maori. It has been well-documented that disputes over tenure were traditionally resolved in a public venue (that is, the marae), that issues were debated, that different rights were demonstrated, that each side took turns in debate, replying to the case of the other. This is not to say that Maori confused the court with their own marae (that would be foolish), but that the Maori cultural milieu lent itself to debate and contestation, the recitation of history and genealogy, and the striving through argument to assert superior rights. It was perhaps no wonder that a common objection to the court was the employment of Pakeha legal expertise:

> The Natives are almost universally opposed to the employment of English counsel in contested cases. They say that these know nothing of Maori law and custom, and only protract the sittings and increase the expenses of the court. If one side employs them, the other must do the same; but they would like to see them altogether excluded from practising in the Court.[4]

This would suggest that at times Maori captured the expression of evidence in the court environment, presenting what they considered valid arguments and contesting what was considered false. Indeed, as will be detailed, a close reading of the early minute books of the court shows a wide range of evidence, stories, and the like, many of which appear to reply to distinctly Maori concerns.

Furthermore, the minute books reveal an interactive aspect of the court environment. The judge sometimes asked for evidence or comment from the floor, individuals spoke as representatives of wider groups, interjections occurred, and sometimes the evidence of individual speakers was harshly criticised. Indeed, it would be rash to suggest that Maori only said what the judges wanted to hear (although there is certainly a case for this position after approximately the first decade of the court's operation).

Therefore, we should take very seriously statements made in early court sittings as illustrative of more general principles of Maori land tenure. However, this should not be confused with the weight that the court may have given to such evidence.

Moreover, the presentation and reception of evidence may have been the only part of the court process that reflected Maori practice. As Smith pointed out, the court took a radical departure from Maori custom when apportioning 'relative interests' in land and when determining succession. Indeed, as commented in the previous section, when the court procedures were completed and a number of Maori had received individual title to fee-simple land, the legal nature of their relationship to that land was changed fundamentally, as was their economic and political relationship with members of their community.

What follows, therefore, is the product of a close reading and analysis of the first four minute books of both the Hauraki and Coromandel Maori Land Court (while broadly speaking the entire region was known as 'Hauraki', the court kept separate records for sittings around Coromandel). A selection of cases have been taken to

4. Colonel Haultain to McLean, 'Papers Relative to the Working of the Native Land Court Acts, and appendices relating thereto', 18 July, 1871, AJHR, 1871, **a**-2a, p 7

illustrate what the author felt were discernible trends in the minutes. Unfortunately, these cases have been taken somewhat out of context (although some comments on context will be made).

The trends are as follows:

(a) the correspondence between the types of evidence used in early sittings and that which has been discussed in the previous two sections as the 'principles or 'take' of Maori land tenure;
(b) the court's acceptance of relatively thin evidence if the land did not appear to be disputed;
(c) the resolution of differences, disputes, overlapping rights, and the like, prior to or during the investigation of title;
(d) the difference in treatment by the court of land that was disputed and land that was not disputed, and the court's general inability to deal with disputed land; and
(e) the fostering of individualistic tendencies in Maori society and the simplification of the tribal landscape.

9.2 The Tribal Landscape in Hauraki – A Brief Background

The Hauraki tribal landscape was, from some point in the eighteenth century, dominated by the Marutuahu confederation, within which were four iwi: Ngati Maru, Ngati Paoa, Ngati Tama-te-ra, and Ngati Whanaunga. All iwi traced ancestry to an apical ancestor, Marutuahu, son of Hotunui, who was of Tainui descent. However, there were a number of other tribal groups who were either defeated in battle, driven out, or subdued, or alternatively, married into, and thus retained a presence in the region. At times, hybridised communities appear to have been created. Among these were Ngati Huarere, Ngati Hei, Ngati Koi, Uri o Pou, and Ngati Hako.

By the nineteenth century, the Hauraki tribal landscape was enormously complicated as a result of these numerous conflicts and migrations, and the enormous value of the Hauraki region in fisheries, waterways, timber, and similar assets. Different hapu retained rights to a number of lands, fisheries, and tribal highways, the boundaries of which sometimes overlapped. James Mackay commented that Hauraki:

> was held by four divisions . . . the holdings of these divisions of people were all interlaced, here a strip, there another strip, and perhaps a long patch belonging to another tribe.[5]

Drummond Hay, a land purchase commissioner, wrote in the late 1850s that:

> the numerous small lands into which the land is sub-divided, and which frequently have to be treated for separately; the irregular boundaries, which bring lands strag-

5. AJHR, 1891, g-1, p 39

> gling into each other, often entailing the necessity of dealing with two tribes at once, a proceeding always hazardous, and not unfrequently fatal to the success of a negotiation: all tend to increase the difficulties, and render negotiations unusually tedious.[6]

Indeed, multiple and overlapping rights were also exercised over the sea. As has been noted, the subject of rights to the sea and fisheries is not discussed in this report. However, the following statement by James Mackay about the nature of Maori rights over the Thames tidal flats illustrates the wider complexity of Maori land tenure in the Thames region:

> The Natives occasionally exercise certain privileges or rights over tidal lands.[7] They are not considered as the common property of all Natives in the Colony; but certain hapus or tribes have the right to fish over one mud flat and other Natives over another. Sometimes even this goes so far as to give certain rights out at sea. For instance, at Katikati Harbour, one tribe of Natives have a right to fish within the line of tide-rip; another tribe of Natives have the right to fish outside the tide-rip. The lands contained in the schedule of the [Thames Sea Beach] Bill are probably the most famous patiki (flat fish) ground in New Zealand, and have been the subject of fighting between various hapus of the Thames Natives. At the present time the right to fish there is vested almost exclusively in the Ngatirautao hapu of the Ngatimaru Tribe. I may also mention, as showing the curiosities of Native custom, that some three or four years ago a European was brought up before me charged with shooting curlew on this mud flat. I told the Natives that there was no law for that. 'Why', they said, 'this is a preserve (rahui) of ours, and the right to shoot these birds is only given to two or three members of the tribe, and they can only shoot them at certain seasons of the year.' The Natives probably consider that they have the right to fish over these flats, and to get pipis from them. As to pipis, any person might gather them, although as to other fish there would be an exclusive right. That is how it originally stood in 1864. There were a number of fishing stakes there, in different places on the flat.[8]

Here we can see a range of use rights – rights that may be held by the tribe, or rights that are limited to particular individuals. Moreover, Mackay appears to have been aware of the changing and historical nature of these rights. He was quite particular in stating that '*At the present time* the right to fish there is vested almost exclusively in the Ngatirautao hapu . . . ' (emphasis added).

With initial European contact, Hauraki suffered badly. Ngapuhi and other Northland iwi first acquired muskets, and a series of raids launched by Ngapuhi in the early 1820s caused an almost total evacuation of the Hauraki people into the Waikato region. Because of kinship between Hauraki iwi and Ngati Haua, the refugees were allowed to settle on lands around Maungatautari. However, inter-iwi relations quickly soured and after the battle of Taumatawiwi (c1825), the Hauraki

6. Ibid, p 145
7. 'Occasionally' is perhaps an understatement. Indeed, Mackay's subsequent comments appear to contradict this perception.
8. James Mackay, under examination by the Select Committee on the Thames Sea Beach Bill, AJHR, 1869, f-7, p 7

tribes returned to their lands. This meant a new reassertion of tenure over the old landscape, and some of the tribal landscape was redrawn.

Continuous contact with Europeans through the 1830s (missionaries, traders, and the spar trading vessels) saw the growth of various small settlements, especially in areas where resources were being worked by Maori for Europeans. Hapu shifted to Coromandel Harbour, the Waiheke Channel, and Mercury Bay to take advantage of new opportunities and gain access to European shipping. However, when Auckland was founded in 1840, these settlements again changed. Agricultural use of the few flat areas of land in the region flourished to support the produce trade into Auckland. By the 1850s, European economic activity in the region had expanded. Timber mills were built at Kapanga and the Waiau, and the Government attempted to purchase land, albeit with limited success. In 1852, gold was discovered at Coromandel and a short but energetic gold rush followed. Political tensions between Hauraki and the Crown consequentially increased during the 1850s, and many Hauraki hapu participated in the newly-founded King movement.

However, by 1863, Hauraki was divided in its reaction to the Government's invasion of the Waikato. Some hapu fought with the Kingites, others remained in Hauraki as neutrals, a few supported the Government. After the war an uneasy peace settled over the region. European economic interests slowly moved back into the north of the region, causing new changes and further altering the tribal landscape. By 1865, the time of the first title investigations of the Maori Land Court, Maori residing in the area known as the Upper Thames had established a Kingite aukati, or boundary, seeking to keep European interests at bay. Here the complications of hapu rights could mean, for example, that land of hapu or even whanau residing in the north of the Coromandel Peninsula could border lands of those residing many miles distant.

This overlapping of social, political, and economic concerns, and the intermingled rights to land from earlier times created complications for the Maori Land Court.

9.3 The Correspondence between the Types of Evidence Used in Early Sittings and the 'Principles' or Main 'Take' of Maori Land Tenure

It is interesting to note the style of evidence presented in the very early cases of the court, cases where it might be assumed that Maori had not yet tailored evidence to reply to judicial preferences. A number of cases, if taken together, showed a distinctly similar format. In the Hauraki and Coromandel minute books, mention was often made of the conquest or initial acquisition of the land from one of the 'original' inhabitants. A whakapapa was then recited, showing the descent from an apical ancestor and other facts of occupation would be mentioned. These latter facts might have included aspects of more recent history. This indicates, as suggested in the previous two sections, a strong correlation between the codified 'principles' of

Maori land tenure and the deployment of the understanding of that tenure by Maori in the court.

For example, at the title investigation for the Kapanga block, the very first case recorded in the Coromandel minute books (held on 18 July 1865) Pita Taurua, after reciting a whakapapa, stated:

> These ancestors that I have named have held undisputed possession of this land ever since it was conquered from the Ngatihuarere, no one ever attempted to dispossess them. I have lived on this land since my childhood. My title is undisputed. It was I who first gave the Pakehas permission to dig gold on this land. A half caste named Mr Gregor has a claim upon this block, which he derives from his mother, but to settle the matter I have arranged to give him two pieces of land which will [?] be surveyed, one piece is at Huaroa, the other at Taumatawahine. My tribe have an interest in this land but they leave me to deal with it. The Certificate of title is to be issued in my name.[9]

Three other witnesses appeared in court and simply stated that Taurua was correct. H Monro, the presiding judge, issued a certificate of title for Taurua. The minutes suggest that a number of witnesses were present, the court asking 'Are you all agreed that the Certificate for this piece of land shall be in the name of Pita Taurua only? Reply – We are.'

The title investigation of the Mangatangi block, one of the first cases recorded in the Hauraki minute book, illustrates both a range of evidence and a claim by Maori who had subsidiary rights to those of the dominant group.[10] The hearing began with the statement of Hauai. Hauai listed the different claimants but stated that 'These are the only claimants. Tapiati has no claim'. It should be assumed that Tapiati was in court. Hauai then stated that:

> I belong to the Urikaraka, a section of the Ngatipaoa. . . . The ancestor from whom I derive my claim is Putohi. [Whakapapa given.] The land belonged in former times to the Waikua [sp?] tribe, Putohi obtained it by conquest. I have lived and cultivated on the land, and my father lived there before me. The old settlement marked on the plan is one of ours. It is called Ahipupu. No one else ever lived on, or cultivated this land. Tapiata never lived upon it, or any of his ancestors. His father was a Ngatipaoa.[11]

Hauai was then cross-examined by Tapiata. The questions that Tapiata asked are not revealed in the minutes. Hauai stated that:

> Te Rako built the first house at te Ahipupu. He died not long ago. He was one of my matuas. Your relations live at te Ahipupu as retainers (Tangata) of Te Raki. They had no right to the land.

Hatara Ngakete then spoke. He repeated what Hauai stated and corroborated the whakapapa. He then stated with certain force that:

9. Coromandel minute book 1, pp 1–3
10. Hauraki minute book 1, 19 December 1865, pp 2–9
11. Ibid

> No one has ever disputed their claim. We have always lived and cultivated on this land, we have never been interfered with. Tapiata's matuas resided on the land, they were bought out of the bush by our father Te Pukeroa to work for him. No one has any claim upon this land except those whose names are on the application.

A picture is therefore built of a dominant group that held strong title to the land. This group claimed to have let others reside on the land, but as 'labourers' only. This view is supported by Riria, who stated that 'Tapiata lived on the land by permission of Hatara Ngakete, as a labourer of his'.[12] However, Tapiata then spoke. While acknowledging Harata's claim, he refuted the statement that he did not have a claim, and cited the actions of his ancestors. Tapiata concluded his claim with an emotional plea. Again, note the series of criteria under which the claim is made:

> Tapiata on oath said, I have a claim upon this land which I derive from my ancestor Rewha, a chief of the Ngatipou, a section of the Waiohua. Rewha begat Rangiheihie, who was the mother of Irakehu and Te Painga . . . Hinepopo was the mother of Haia who was my mother: my father was Ihaka, a Ngatiporou. My ancestors [were] not killed or driven away when the slaughter of the Waiohua took place. They saved themselves by taking to the bush (rekereke). They have resided on this land. Rangiheihie, my ancestor first lived at Te Koheroa, she afterwards came to Te Wairotoroto and lived there some time, Wairotoroto is not far from Mangatangi; at this time they were living in the bush in concealment because of the slaughter of the Waihoua, the tribe having nearly been exterminated. When the fear of death was over they came to live on Mangatangi. The residence of the Ngatipou was at Ouiarangi in Waikato. They owned all the land from Tauaki to this place, including their land Mangatangi. Rangiheihei did not reside on this land by permission of the conquerors, they resided there by her permission. The Urikarako people found her one day, gathering pipis, and asked her where she lived, she told them at Mangatangi. They went to see her place, and found that she had great cultivations there. They decided to occupy the place themselves, and thereupon apportioned land to Rangiheihei to cultivate, and also marked off places for themselves. The place marked off for Rangiheihei was Te Waka, a place on the Mangatangi stream. The Urikaraka marked off the boundaries. The land was marked off for a place for Rangiheihei to cultivate upon. I do not claim Waka alone. I claim over the whole of Mangatangi. The Ngaiwi were conquered but not wholly exterminated. Te Waka has only been deserted lately. I lived there myself. I was born there. I have no other land except this. I am living now at Harataunga, my wife is a Ngatiporou and it is on her account that I live there. If I lose this land I shall have no land of my own whatever. When I say that I claim over the whole of Mangatangi, I mean I claim a strip along the western boundary from the sea to the Kirikiri range.

Another counter-claimant, Waata Haungata, spoke. Stating a membership of Ngatipaoa, Waata claimed that:

12. The term 'labourer' is most probably a poor translation of a Maori word, perhaps rahi, a term commonly used in Hauraki.

> I do not dispute Ngakete's title but I also have a claim. Tapiata will give my genealogy. Ngakete and I are descended from the same ancestors. I reside at Waiheke. My claim is the same at Tapiata's, that is to say a strip along the Western boundary from the sea to Kiukiu. The men who laid down this boundary were Tuia and Karaipu. They are both dead, they died lately. They belonged to the Ngatirewha, Tapiata's tribe. The Urikaraka did not agree to this boundary. The boundaries were merely perambulated and pointed out by them to Tapiata and me, they were not marked off on the ground in any way. I have never resided on Mangatangi. I have never cultivated upon it. [Nukurewa] begat Te Whiringa who begat Hangata who begat Waatu Hangata (myself).

This claim appears to have been questioned as the court recorded in the minutes that 'The witness failed to connect Nukurewa with the ancestors of the Urikaraka who owned the land'.

Mata Ngapuhi then spoke, supporting Tapiata's claim as 'My claim to this land is derived from the same source as his', but explaining that this claim was not to the land in question. A further witness, Aihipene, informed the court that his claim had been waived because 'I have come to an arrangement with Ngakete about it'.

An unusual development then took place. Hoterene Taipari, a leading chief of Ngati Maru, attempted to lay a claim to the land. However, his claim was not supported by the other claimants, and indeed the court appears to have ignored it. As his statement indicates, his claim was made on a very general basis, that is, having claimed descent from the original tipuna of the entire Marutuahu confederation. He had not resided on the land, nor had his immediate ancestors. It could be argued that Taipari's claim had been made to test the court in some way, to see how far the court would accept ancestral rights. Taipari's recitation is, however, quite erudite. As the minutes record:

> Hoterene Taipari, said, I have a claim upon Mangatangi. This is how I derive my claim. Hotu[nui] was our ancestor. He was one of those who came to New Zealand in the Tainui canoe. He went to the West Coast and took up his residence there, after a time he quarrelled with his people, and left. He came over to Whakatiwai, there he found the Ngaiwi and Ngatipou tribes. Ruahiore was the name of their chief. He invited Hotu to stay and gave him Whakatiwai as a place of residence. Moving himself to Wharekawa. When Hotu came he brought his tribe with him but left his wife and son behind. the land given to him were Waitakururu, Pukuokoro, Ohinumia, Te Hape, Koi Maine, Rangipo, Hauraki and Whakatiwai. After a time the Ngaiwi turned against Hotu and annoyed him in many ways. When Hotu's son Marutuahu grew up to manhood he came and joined his father, and subsequently took Ruahiore's two daughters to wife. Their names were Hinemoehau and Hineunnunga. By the latter Marutuahu had two sons, Te Ngako and Taurikapakapa . . . [whakapapa]. I have never lived upon Mangatangi, nor cultivated there. My father never lived upon it or used it in any way, nor my grandfather, nor my great grandfather. I cannot state the nature of my claim to this particular Block. (Further questions elicited no further information).

The court adjourned, and, when convened the next day, the counter-claim by Tapiata had been resolved. Tapiata informed the court that 'I have come to a

friendly understanding with Nagkete. I now withdraw my opposition. There will be no further disputing hereafter on my part'. Similarly, Maata Hangata withdrew his opposition – 'I have arranged with Ngakete, we are now friends. I withdraw my opposition. There will be no further dispute as far as I am concerned'. Hatara Ngakete then produced a list of the names that he wished to be placed in the Crown grant. The list included Tapiata and Waata Hangata. This case further illustrates the points made in section 3.5 below.

9.4 The Court's Acceptance of Relatively Thin Evidence If the Land Did Not Appear to be Disputed

In many cases the minutes indicate that the court was not presented with what we might now consider sufficient evidence to make a ruling. Indeed, the minute books are filled with cases that take only a page or two to conclude. On the face of it, this may suggest that the court had a lax approach to what was a serious matter. It may also suggest that individuals or groups who were interested in the land and who could present different evidence were not aware of the court hearings. Furthermore, it may suggest that a 'prior arrangement' had been made, and the court process was only a way to verify a sale or other agreement.

While any of these scenarios are possible, two facts make them less probable. Firstly, in contrast to the brief evidence presented in many cases, a large number of cases were strongly contested and the evidence presented in them could fill entire minute books. Secondly, a close reading of the minute books reveals that these two types of cases were frequently interspersed with one another. This would indicate something other than judicial lassitude, claimant dishonesty, or the absence of interested parties. Indeed, it could be that the reason that these cases were not disputed was exactly that – that their tenure was clear, and that the group advancing a claim did so with the knowledge of other groups. Moreover, because of the intermingling of different cases it could be suggested that the many individuals who attended disputed cases were also present in court for non-contentious ones. Such individuals would generally be assumed to have countered false or poorly-grounded claims.

This interpretation coincides with one of the conclusions drawn in the previous section – that some parts of the tribal landscape were covered by very strong, almost exclusive rights, and that these should be differentiated from other more contested parts of the landscape. The disposal of such rights may, of course, be subject to a group right of veto, but this would not necessarily be reflected in the proceedings of the Maori Land Court. However, a further question could be asked – if rights were securely held by a group, and if those rights were recognised by the wider community, was it necessary for the court to fully investigate the basis under which such rights were created? Given the possibility of misrepresentation by claimants and the security of certain rights, this is a difficult question to satisfactorily answer.

Many cases illustrate these cursory investigations. For example, at the title investigation of the Te Ana block, the total evidence presented is as follows:

> Maana Pereheireti (sworn): I belong to the Rapupo tribe, a hapu of the Ngatipaoa and Ngatihura. I reside at Whitianga. I own this land. Tarapa is a tamaiti of mine, Kaea is dead. Tarapa claims with me. The land is situated at Whitianga. The names of the persons we wish to be in the Crown Grant are: Maaka Pereheireti; Tarapa; Maihi Te Hiuaki; Te Kaokao; Hera Puna. They are all adults. Our title to the land is not disputed that I am aware of. This land was obtained by conquest by our ancestors in former times. We used to live on the land some time ago but have not resided there lately. We used also to cultivate there. The block has water frontage on three sides. On the fourth side the line has been cut on the ground.
>
> Maihi Te Hinaki (sworn): I belong to the Rapupo tribe. This land was surveyed with my sanction. I am one of the claimants. The names proposed by Maaka as grantees are correct. Harata declined to have her name put in the Grant.[13]

In this case, no strong evidence of occupation was given by the claimants, only a statement that the land was occupied in the past. Of course, Maana may have told the truth, and it could be that the main right-holders had interests in other land that had demanded their attention in more recent years. Moreover, with widescale reductions in population lands that may have been visited regularly by hapu members could lie unused. On the other hand, the above statement appears to have offered little direct 'proof' to the judge that the land in fact belonged to the Rapupo tribe under Maori custom, except for the fact that no one contested the claim.

9.5 The Resolution of Differences, Disputes, Overlapping Rights, and so on, prior to, or during, the Investigation of Title

It would be entirely wrong to suggest that Maori were helpless victims of the Maori Land Court during title investigations. Many of the court minutes reveal a process of ongoing negotiation and arrangement among Maori outside of the court environment. The subject or background of these negotiations is, unfortunately, something that is extremely difficult to ascertain. Similarly, the exact nature or conditions of the negotiations are likely to have varied enormously from group to group.

Nonetheless, it is clear that in many cases the court received but a small part of the potential information available. Here the court was tied to the dynamics of a wider, albeit localised, historical process – it was a ground on which the political strategies of different levels and parts of Maori society were played out. Interestingly, the minutes reveal that in the early period (and often in later sittings) the court was quite prepared to let these 'outside' arrangements stand.[14] In a way the court was pleased that complex problems had been 'resolved', however arbitrarily or

13. Coromandel minute book 1, 16 October 1866, pp 49–50
14. Further study will be required in the later period (after c1879) to see if this practice was followed consistently.

quickly. Indeed, the court often directed competing claimants to come to their own arrangements. This practice also reflects the way that the court was willing to accept a wide range of evidence, or an almost total lack of convincing evidence, of rights to land, if those rights were not disputed.

These comments do not detract from the fact that the court changed irreparably the legal conception of Maori land, but they do show that the court was unaware of many 'behind the scenes' facts. That it was unaware of these facts (or simply did not care about them) further supports the argument that the court did not properly take into consideration, let alone respect, the dynamic nature of Maori society.

A number of cases taken from the Hauraki and Coromandel minute books illustrate these points. Firstly, the minutes of a title investigation to a block of land at Whangapoua called Opera show such an 'outside' agreement:

> Mohi Mangakahia (sworn): I applied to have my title to Whangapoua investigated by the Court. This is the plan now produced. The large name of the land is Whangapoua, but the name of this particular block is Opera. The land has been a subject of dispute for some years past between us and Pita Taurua and party. Our dispute is now at an end. We have come to an amicable arrangement among ourselves, and have agreed upon the names that are to be in the Crown grant. They are there Mohi Mangakahia, Pita Taurua and Peneamene Tauui. We derive our claim to this land from our ancestor. It was owned formerly by the Ngatihuarere. The name of this ancestor from whom we claim was Ruawano. We are his descendants. We have always possessed this land, have built houses, lived and cultivated upon it. The three names which I have given represent all the parties interested in it.[15]

Secondly, the title investigation for the Matapaia block in Tairua shows the resolution of a dispute and the involvement of the civil commissioner, James Mackay. The minutes indicate how Mackay acted as an advocate, facilitating a negotiation, and later how he ensured that the dispute remained resolved. Again, this illustrates an extremely interactive dimension of the court process:

> James Mackay (sworn): This land, Matapaia, has been in dispute for some time between Riwai Kiore, Pehimana Taira, Tautoro and Te Urumihia, and Miriama and Tikaokao. They have now agreed to sell the land and have come to an agreement among themselves as to the division of the money. The understanding is that the Crown Grant is [put] in the name of Miriama, and I am [unclear text] and retain it until the agreement which has been entered into have been carried out.
>
> Miriama (sworn): The map produced is the map of Matapaia. This land has been in dispute for some time past between Te Kaukau and me on the one side, and Riwai Kiore and party on the other. We have now arranged the dispute. It is agreed that the Crown Grant shall be in my name, but that it shall be delivered to Mr James Mackay until the arrangement which we have entered into among ourselves will have been carried out. There is not another dispute about this land than the one I have named. It was I who pointed out the boundaries to the Surveyor. The lines have been cut on the ground and the [angles] pegged. It is bounded on the north and east by the Tairua

15. Coromandel minute book 1, 16 October 1866, pp 43–44

harbour, on the South by the Pukauroharoha creek and by Native land, on the East by Native land and by the Pepe creek. This land has been in the possession of the tribe for generations. We have lived upon and cultivated it. No one has ever attempted to dispossess us.[16]

Moreover, this is an extremely clear case of a court award which bore no relationship to the actual fact of competing and overlapping customary claims. Mackay's role as broker, and the purely pragmatic agreement that ensued, served as a quick and sure way to prepare the land for sale.

The title investigation of Whakahau, an island at Tairua, was a further case in which Mackay participated and in which a negotiation outside of the court took place. The case can be understood using a number of these points. As detailed in section 3.3, the evidence presented illustrates a number of different forms – usage, ancestral occupation, the naming of a house, whakapapa, tribal history (defeat by Ngapuhi), and burial sites. The land had not been fully occupied by any of the claimants, although all stated that they had visited the land periodically. Most importantly, though, the minutes record what appears to be an impromptu cross-examination of a counter-claimant by one of the original claimants. The questions asked are extremely revealing, and certainly emphasise the importance of ancestral occupation. The full minutes of the case are as follows:

Ti Kaokao (affirmed): I put in the application to have the title to the island investigated. The owners are Miriama, Wikitoria, and me. We belong to the Ngatiwhakauku tribe, a hapu of Ngtatituhukea. The residence of these tribes is at Tairua. The island lies off Tairua. We derive our claim to the island from our ancestor and also to Matuhoa. The name of the ancestor was Te Whakaruku. He was the proprietor of these islands.[17] Miriama had better give our genealogy as I am unwell and she is better able to do so.[18]

Miriama Pukukauri: Te Whakaruku was the owner of these islands in former times. (The witness gave his genealogy). The descendants of Te Whakauku according to her were Wikitoria, Tikaukau, Miriama, Kauhau and Karauna Whakaui. Te Whakaiuku lived on Whakahau and cultivated upon it. His descendants have continued to reside upon it. I lived there when a child and also since I have grown up. I also lived at Motuhoa. Our title to both islands is the same. I don't know Motukoura. There are no other owners to these islands than these I have named and whose genealogy I have traced from the original owner Te Whakaiku.

[Cross-examined by] Hamiora Tu – This land never belonged to Haniu, nor to Waihao, nor to Te Whakakatiu.

Hamiora Tu (sworn) I have a claim upon Whakahau and upon Motuhoa, also upon Motuwharo. There is no such island as Motukuia. It has been a mistake of the person who wrote the application. Motuwharo is the proper name. I claim from my ancestor Tikauaitua. He lived at Tairua, and on Whakahau. He belonged to Ngatituhukea. This tribe is extinct as a tribe. They used to reside at Tairua and Whakahau. I do not know of Te Whakaiku, the ancestor named by Miriama. My ancestor lived there up to the

16. Coromandel minute book 1, 17 October 1866, pp 54–56
17. Unfortunately the Maori word for 'proprietor' was not recorded.
18. Coromandel minute book 1, 18 October 1866, pp 57–61

time of Waihino. While Waihino lived on the land wahine visited the [poor text] [hapu]. . . . was mentioned as residing on Whakahau. Te Whakakahu also resided on the island with his tribe and on Tairua. The tribe was exterminated by Ngapuhi. At the time of the Ngapuhi invasion Te Whakakahu also resided on the island. The Ngapuhi killed some of the tribe on the island. Te Whakakahu died of natural death, after the Ngapuhi invasion. After the invasion some of the survivors went back to the island. Tutaumata went back. He was a [son] of Te Whakakahu and a teina of Tapu. He died at Te Raupuha, Whitianga, and was buried there. Rangiawhia lived on the island also. [Tihaka] never resided on it. He died young. Rangiawhia died at his pa, Tangoio, on Whakahau and was buried there. He was afterwards taken up and removed to Tauranga. It was fear of Ngapuhi which caused my tribe to leave the islands. I have been in the habit of visiting the islands for the purpose of fishing, but have never cultivated on them or on the mainland opposite. Rangiaohia and Tutaimata were the last of my tribe who lived and cultivated on the mainland. I was born during the flight from Ngapuhi. Mehaka was born at Tairua. He fled from Ngapuhi and was afterwards killed in battle at Tauranga. I have visited the islands constantly for the last twenty years and have built houses upon it.

[Cross-examined by] Tikaokao – I never cultivated on the island. I only used it as a fishing station.

Q – If you used Rangapuka as a fishing station would you claim it on that account?

A – That island is also mine.

Q – Did you ever build houses on the island?

A – I did.

Q – Did your mother ever live there?

A – My mother is a Ngatirangi. My father did.

Q – Did your father ever live there?

A – He did.

Q – Name the houses of your Tupunas?

A – The great house which stood at Taupiro was called Te Hore o te Wario.

[Cross-examined by] Miriama. – My work on Whakahau, being a tamariki was fishing for Hapuku. – My father lived at Taupoio. My mother did not belong to that place. I lived on the island after the death of my parents. I tuturu au ki reira.

[Cross-examined by] Peneamine Tairua – I was not born on the island but my fathers were.

Peneamine Tairua (sworn) – I have a claim upon Whakahau and [. . . hoa]. Our title is the same to both islands. I claim from my ancestor Te Wakamuku. Wikitoria is my mother. I am living now at Tairua, on the mainland opposite the islands. I have always heard that my father lived on the islands. We have never cultivated there. Our father did. The land is not fit to cultivate. We go there to get fish and shell fish. I never heard that any of the parties named by Hamiora Tu ever lived on the islands.

Court adjourned (resumed at 2 o'clock)

Mr James Mackay (sworn) – In the case of the islands Whakahau and Motuhou it has first been arranged out of court that Tekaokao, Miriama Pukukauri, Wikitoria Pututu, Peneamene Tairua, Kareao, Karauria Whakairi and Hamiora Tu are to be the grantees and that Hamiora Tu relinquishes his claim to Tairua.

Miriama stated that she was satisfied with the arrangement.

Hamiora Tu stated that he agreed to the arrangement.

> Court inquired if any one had anything further to say or objection to make. Proclamation made and no objector appeared.

The court thus encouraged Maori to put aside differences or conflicting claims to land and come to 'agreements'. In a way this reflects the court's inability to deal with complex cross-claims and overlapping rights. It also shows a pragmatic approach by the court to the problem of 'interpreting' Maori land tenure. In such cases it appears that the court was not fully interested in the different ways that tenure operated: it simply wanted a solution. Unfortunately, the minutes of the above case make no mention of what deal Mackay arranged with Hamiora Tu. Indeed, if Hamiora's evidence was not fraudulent then the court's ruling did not reflect Maori custom at all – a 'solution' had been reached that was certainly convenient for the court, and perhaps convenient for Hamiora, but which did not follow any of the 'take' of Maori land tenure.

However, the court's encouragement of such settlements could also provide a way for Maori groups to 'work out' their tenure without the arbitration of European law. In many cases, this could be a preferable solution to a bad situation. Indeed, large blocks with multiple owners could have continued to function as they had done prior to the investigation of title, or at least until the process of partitioning, the further apportionment of 'interests', succession cases, and the like, fragmented the land into uneconomic shares.

In other cases, such a 'resolution' may only have been a preparation for a sale. For example, the investigation of title to the Whakanewha block on Waiheke Island was contested between a group of claimants led by Hoterene Taipari and another led by Mohi Te Hararei. After a number of statements by Taipari and others, Mohi replied:

> This land belongs to me. This land was formerly in dispute, we fought for it, and they were driven away. I lived on the land. The people who lived on it formerly went to Hauraki. When we returned from Waikato in Gordon Brown's [Gore Browne's] time. I drove away the people who occupied the land and I lived on the land. . . . My fire is now burning on the land, my dead is buried there. I recollect the sale of the land formerly to the whiteman. The opposite party sold it to the whiteman the first time. Nikouina sold it. It is only lately that I have left the land, since the disturbance with the Government. I then left and came to Hauraki. The persons who own the land are myself and Ngatirakina of Ngatipaoa. Hoterene has not lived or cultivated or planted vines on this land, but on Kaiwhakarau. I rest my clam on this land from occupation and my strength (auaaua). I do not recognise Hoterene's claim.[19]

The opposing parties then left the court to try and settle the matter. After some time they returned, with the court minutes recording the following:

> Mr Mackay stated that the opposing claimants had agreed out of Court that a Crown Grant be issued to Hoterene Taipari and Mohi Te Hararei and that the Crown

19. Hauraki minute book 1, 13 December 1866, pp 37–40

> Grant be delivered to Mr Mackay that he might see that all claimants be satisfied when the land is sold.
>
> The opposing claimants were asked by the Court if they agreed to this and they each answered yes.

Again, a solution had certainly been reached, but this solution did not reflect any of the principles, or 'take', of Maori land tenure.

9.6 The Difference between Land that Was Disputed and Land that Was Not Disputed, and the Court's General Inability to Deal with Disputed Land

Disputes to land could, of course, be of many kinds. They may be as small as between whanau, or as large as those between iwi. Whatever the case, disputed land was where the court encountered the greatest difficulty when determining title. The minute books reveal a number of different types of disputes. There is no single way, however, that the court reacted to these disputes. It does not, at least in the first decade of operation, appear to have found a unified way of ruling on disputed land.

Firstly, the court may have been unaware that a dispute was in fact being settled. This included the well-recognised situation where particular parties to a dispute did not attend the court hearing, and whose potential claim was thus ignored. For example, in the title investigation of the Torehina block, the following minutes were recorded:

> Hera Putea, on oath said, I claim Torehina. It belongs to me alone. Makoare merely sent in the application. I derive my claim from my ancestors from Whatihua. He was the owner of this land in former times. Whatihuia begat Tapa, who begat Raukurai, who begat Mauu, Mauu was my father. No one else has any claim upon this land. Whatihua was a chief of the Ngatitamatera. The land originally belonged to the Ngatihuarere tribe, the same that owned Kapanga. The piece of land now under investigation was ceded to Whatihua by Hikatiki, a chief of Ngatihuarere. The land has been held by the descendants of Whatihua ever since. Tapa, Te Raukura and Mauu have all in time occupied the land and cultivated upon it. Hohipoua has no claim upon this land, neither has Te Hira. They are both Paimariries and are at present up the Thames with the rebels. Hopihoua asserts that the land was given to him by Hori Te Waipare who is dead. I never sanctioned any such gift. Hori Te Waipare had no right to give away my land. Hopihoua now acknowledges my right. He told me this himself at Waihou. His words were that he gave back to me my land. Te Hira has no claim whatever.[20]

The court did not hear evidence from Te Hira, who may have presented another side to the argument, and it subsequently awarded the title to Hera Putea and others. But as Hera Putea had stated, Te Hira resided in the Upper Thames with 'the rebels' and was not in court that day. It may have been that Hera Putea's claim to the land was

20. Coromandel minute book 1, 11 December 1865, pp 27–30

secure, but that Te Hira, as a Kingite and an important rangatira, exercised some kind of control over the land, perhaps in working to prevent the sale of the land. Whatever the case, it appears that evidence on land that may have had been disputed was uncritically accepted by the court.

Other disputes could be extremely complicated, with the court hearing a wide range of evidence. In these cases, it appears that the court tended to make arbitrary rulings, supporting only one party, or insisting that the land should be divided into a number of separate blocks, each representing a collection of minimised rights. In these latter cases, the court appears to have believed in a process of 'equitable' resolution. A sign of such arbitrary behaviour comes when the court complains (often in judgements) of the contradictory evidence with which it was presented. While Maori were quite capable of presenting such evidence, such a situation may illustrate the court's inability to comprehend some of the meanings attached to such evidence, rather than a problem with the evidence per se.

Only one lengthy and contested case will be used to illustrate these points. This is not due to a shortage of such cases, but to the massive depth and complexity of the evidence that must be reviewed in order to comprehend the issues.

In the case of the title investigation of a block called Tangiaro (situated on the north west coast of the Coromandel Peninsula above what is now known as Cabbage Bay), initial inquiries by the court suggested that problems would develop. Because the hearing was one of the initial cases of dispute for the Hauraki court, the judge, Rogan, felt it necessary to make the following comments (they in part reflect how the judge saw his role):

> On the occasion of the hearing of Tangiaro the Court informed the Natives that there was no plan of survey for its guidance, that a number of the Claimants had absented themselves but the Court had determined to proceed with the investigation, the case having been adjourned from Kapanga. It appears that the Tangiaro has been in dispute for many years, the opposing tribes being the Ngatimaru, the Ngatinaunau, on the one side, and the Ngatipaoa and the Ngatitamatera on the other. In order that disputes about land might be justly settled wise men of the European race framed the Native Lands Act. It has been asserted that the Government introduced the Native Land Act for the purpose of acquiring Maori territory. This is a mistake, for it [has been] brought into operation for the express purpose of putting down fighting amongst the Natives in respect to land disputes. In the present instance whatever the decision of the Court may be it is hoped that all parties will be satisfied, as this long [standing] difficulty will be settled according to law.[21]

A very rough summary of the different arguments can be made. It should be explained, however, that this case ran for a number of days, and approximately 40 pages of the second Hauraki minute book were filled with evidence, much of which is particularly detailed. What follows is thus a general synthesis of the main points. In particular comments made regarding conflict, and the history of this conflict have been studied.[22]

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21. The Tangiaro case was adjourned from Kapanga on 16 July 1867, see Hauraki minute book 1, p 89

The Ngatinaunau claim derived from their ancestor Tarawaikato. They argued that a number of their dead had been buried on the land, but only one member of the current hapu had been born there. Ngatinaunau also argued that they had held possession of the land before the Ngapuhi raids. Various events had taken place, perhaps the most important being the construction of two canoes from timber on the land, one of which was given to people on Great Barrier Island. A pa had also been built on the land. At the time of the Ngapuhi raids, the Ngatinaunau fled to Great Barrier Island where they received protection. When they returned they maintained a partial occupation of the land, cultivating patches (the majority of the hapu resided at Manaia, Coromandel Harbour, and other places). A lot of evidence of different times at which the land was visited or occupied was given. For example, Ngatinaunau elders stated that the land had been occupied at the time of Hobson, but that it was left at the time of FitzRoy. Others stated that they had built houses on the land and planted and cultivated there. Some time during the 1840s or early 1850s (although the dates are unclear), a group of Pakeha sawmillers and boat builders were invited onto the land by Ngatinaunau. Ngatinaunau argued that this was the first dispute that they had with Ngatipare, and that Ngatipare drove the Pakeha from the land and plundered their cultivations. The Ngatinaunau conceded that the Ngatipare had lived on the land for a period after the sawmillers were driven away. They also conceded that the dispute had gone on for some time since then. For example, Hohepa Paraone recalled that:

> I used to live on it. Ten of us went there from Hauraki and took up our residence at the creek of Tangiaro. This was in the time of Mangakiekie. We went there because we heard that Ngatitamatera had gone there to plant seed potatoes. We went to pull them up and plant ourselves. We pulled up their seed potatoes. The Ngatipare in return pulled up ours.

However, their occupation had not been continuous, and in the late 1850s, the Ngatipare appear to have invited an itinerant group of Tuhourangi to reside on the land. This they did until the Ngatinaunau found out and drove all the Tuhourangi, but one family who was related to them, out. In all these cases the dispute drew in wider kinship connections. For example, Ngatipare had mobilised other members of Ngati Tama-te-ra, including the important rangatira Taraia, when they drove the sawmillers off the land, whereas Ngatinaunau mobilised other hapu of Ngati Whanaunga when they drove Tuhourangi away.

More contemporary aspects of the dispute were also detailed. It appeared that the Ngatipare had recently leased the kauri timber to the land in 1864, without consulting the Ngatinaunau, and thus a new confrontation was imminent. However, in this case, James Mackay, the civil commissioner of the region, suggested that the court 'decide on the matter'. As Paraone recalled:

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22. See Hauraki minute book 2, principally pp 55–81. It should also be noted that the vast majority of the evidence presented in the court related to events that had taken place after 1840. If the court was following the 1840 rule almost all of this evidence would be considered irrelevant.

> We heard that Ngatipare had sold the kauri on this land to the Pakehas. We objected and complained to Mr Mackay. We asked Mr Mackay to stop the cutting of the trees because they were ours and did not belong to Ngatipare.

A good summary of the occupation of Ngatinaunau and the recent history of the land is found in the following evidence by Pineha Pumiko (the minute book should be read for the full evidence):

> [Under cross-examination by C O T Davis]. I belong to Ngatinaunau and reside at Manaia. I know Tangiaro. I recognise it as shewn on this plan. I am a claimant from my ancestor Tuawhakarere. I heard that in the first governors time my tupunas and people were living at Tangiaro. Afterwards I resided there myself in 1854. Forty of the Ngatinaunau lived on this piece at that time. I am quite certain they lived there at that time. For after Christianity we had the Prayer Books and knew dates. We remained at Tangiaro from 1854 to 1857 and then came to Manaia. It was about the year before the Tuhourangi were placed there. There were none of the Ngatipare on the land from 1854 to 1857, The Ngatipare were planting potatoes, kumaras and corn during those years. We never gave the Ngatipare any of the produce, neither did they take any. After we came away in 1859 the Tuhourangi were placed there. When the Tuhourangi were put in possession we were at Manaia. They were placed there by Ngatitamatera and Ngatipare. The piece which belongs to Tamatera is Okahutai. That piece is theirs. [Hanuwera] and Karauria are tika on their piece Parakete. When we heard that Tuhourangi were on Tangiaro in 1859 we expelled them. All left except Pare and his children. We allowed them to stay because they were related to Reweti. Pare is now present, he will corroborate what I now say. When Tuhourangi left in 1860 we went, some of us, to Cape Colville, the rest of us remained at Tangiaro, on the piece now before the Court. Thirty stayed on Tangiaro, twenty went to Porhatu (Cape Colville). I was one of those who went. I had a house and cultivation at Tangiaro and used to live permanently there. . . . We were living on the land from 1860 to 1862. Ngatipare never appeared in that time. They were then at Cabbage Bay. They never appeared or sent messages. We left Tangiaro in 1863 when the war broke out. We came to Manaia to reside. We left through fear. No one was left to [kai]tiaki Tangiaro. In 1864 Honana took the Pakeha on the land. Those who are on it now. When we heard of it we proposed to drive them off but Mr Mackay and [Kitahi Te] Taniwha prevented us and proposed that the Tine [Court] should now settle it. By the Tine I mean the NLCourt. . . . [Cross-examined] by Preece . . . The quarrel was about some pakeha that Mangakiekie took on to the land. The Ngatitamatera were under the impression that Mangakiekie had sold Okahuteia to them. . . . The Ngatipare never occupied the land after the quarrel about the Pakehas.

In contrast, the Ngatipare claimed the land through occupation before the time of Mangakiekie and prior to the Ngapuhi raids. Their principal spokesperson, Tahana te Tiaka gave the following evidence. Note, though, his concession that both parties had occupied the land in more recent times:

> I have seen the map of Tangiaro. I have a claim on it. I derive my title from Toarauawhea not connected with the ancestor [of] Ngatinaunau. The land belonged in former times to Ngatihuarere. The whole peninsula. Mahunga conquered the land

from them and took possession. Mahanga was from the West Coast. He took a wife a woman of Ngatitamatera named Te Akatawhia, their son was Toarauawhea. [whakapapa] Mahanga occupied Tangiaro and grew kumaras and Taro. His descendants lived on it up to the time of Tupaea and Potiki. I never lived on it. We left at the time Motukahakaha pa was taken. It was taken by Ngatitamatera. It was occupied by Ngatinaunau. It was taken in Tupaea s time. Both Ngatinaunau and our people left at that time. Potiki did not live on this land. The land remained uncultivated until Mangakiekie came from the Barrier to Manaia and shortly after placed some pakehas on it who were driven off by us. We saw no natives there. Had there been any there would have been a fight. After ejecting the pakehas we came back to near Manaia. After the time of the quarrel each party went on it for two years and cultivated small pieces to take possession and then left. The land remained unoccupied till the time of the quarrel between Te Waka and Moananui when we located the Tuhorangi on it. The Tuhourangi remained 3 years on the land. That is they planted 3 seasons. They left the place on account of one of the people having shot himself accidentally at Cabbage Bay. Some of their people persuaded them to go. They were not expelled by Ngatinaunau. I have heard what the other side said. I know nothing of Pene. He is not one of those we placed on the land.

Tahana te Tiaka also disputed the Ngatinaunau argument that they had occupied the land both during the early 1860s and previously, after the expulsion of the sawmillers:

No one lived on the land besides Pene. None of the Ngatinaunau lived on it. The statement they have made about living on the land from 1860 to 1863 are incorrect. They only did as we did – went on to the land planting a little and then came away. There was no one on the land after that till we let it to the Pakehas. We are living on it now. . . . When Mangakiekie planted food after placing the pakehas on the land we pulled the food up and planted in turn. The Ngatinaunau pulled that up. The next time we planted was when we placed Tuhourangi on the ground. It would have taken an hour to have gone from where we lived to Tangiaro. It is correct that Okuhutai belongs to Ngatitamatera and Parakite belongs to Hamuera and others. This piece of land belongs to us not to Ngatinaunau. When the Ngatinaunau returned from the Barrier they did not reside at Tangiaro or Poihakeru. They never occupied it. I was waiting for them to do so, to fight them.

This case gives, therefore, a very good indication of tribal mobility through the first part of the nineteenth century. In such a situation, tenure was particularly problematic, and rights appear to have been maintained in a number of fashions. In the case of Tangiaro, both sides of the disputes placed non-hapu groups on the land, and both sides disputed this placement, driving the occupiers away. Much of the conflict appears to have been quite dangerous, although no one was killed. Indeed, Riwai Te Kiore conceded that:

Then we and our party went to Tangiaro. We found none of the Ngatipare there. Our party made a clearing and planted seed and came away. They stayed two weeks felling and two weeks planting. We left no one behind least the Ngatitamatera should kill them. . . . When Ngatinaunau went the Ngatitamatera kept out of [the] way. When

Ngatitamatera went, Ngatinaunau kept out of the way. Had they met there would have been a fight.

This suggests that neither side was able to enforce their claim by 'take raupatu', or that if a claim under 'take raupatu' were made, a bloody confrontation would have occurred and one hapu would have been defeated.

Perhaps the most poignant comments of the conflict came from Te Moananui. Although he was connected to Ngati Tama-te-ra, he was of sufficiently high standing to be able to take a somewhat distant perspective. The minutes record the following:

Tamumeha Moananui affirmed. I belong to the Ngatitamatera and reside at Matariki. I know Tangiaro. It belongs to Ngatinaunau and Ngatipare. The land is disputed. It is an old ancestral dispute. I know of Mangakiekie having located some Pakehas on the land. The Ngatipare objected and the pakehas were expelled. I went with the party who ejected them. The pakehas left. The Ngatipare demanded payment for the timber the pakehas had cut. The pakehas paid in guns. They were living at Oneura. After the pakehas left the land there were disputed between the two tribes. The land was not occupied after that until the time of the quarrel between Te Waka and me when it was occupied alternately by both tribes – neither party resided permanently. Both parties resided with the Tuhourangi at different times. They never met. The Tuhorangi asked Ngatitamatera for some land. They gave them leave to live on this to dig gum, etc. They were located there during the time of the Taranaki war. I lived at Waiaro Moehau from the Taranaki war till the Waikato war (1860–63). Waiaro is about four hours walk from Tangiaro. The Ngatinaunau did reside at Tangiaru. Ko te noho ki Tangairo he noho haere. Ko to Kainga tuturu ko Poihakura. They built houses on Tangairo and cultivated land during the period that they were living on it. The Ngatipare did the same. The Ngatipare were residing at Cabbage Bay and used to go to Tangiaro and cultivate with the Tuhourangi. The Tuhourangi left after the Waikato war with the Ngatimaru, Ngatinaunau and Ngatitamatera. The Tuhourangi left the land in possession of Ngatipare.

[Cross-examined by] Davis. I remember when you were at Wairo. When I made peace with waka. When Enoka of Ngatinaunau said aloud that he and his people would go back to Tangiaro. Pana te Putu objected to it till the Waiaro dispute was settled. At the same time Taraia gave the Tuhourangi permission to go to Tangiaro to [her] part of it to Okahutai and to range about Moehau and elsewhere to dig gum. I have heard that the Rahui was disputed. Hata Paka belongs to Ngatipare. Parakete belongs to him and Karauria. Parakete is another place altogether. I have always heard that Tangiaro belonged to Ngatipare. I heard from the old people. E tika awa Tarawaikato Katahi ano au Ka rongo kua hokona a Toarauawhea. Both Ngatinaunau and Ngatipare cultivated on the part occupied by the Tuhourangi – titiro atu titiro mai – but both parties lived in dread of fighting. When Tuhourangi left Tangiaro at the time we all left. Penetamahiki and one or two remained there. The Ngatipare remained at Umangawha and afterwards went on to Tangiaro and placed pakehas there. There was subsequently a dispute about the timber. No 'ope' went – i korekotia kautia – Mr Mackay said that the dispute should be decided by the Ture.[23]

23. See Hauraki minute book 2, pp 75–76

From Te Moananui's evidence we can see that the tenure over the land was in fact a long-standing problem. If Te Moananui was right, neither side had a clear claim, although both had claims.

How, then, was the court to deal with this problem? The court simply awarded the land to Ngatinaunau. No detailed explanation was given. In the minutes it appears that the Ngatinaunau were able to mobilise more individuals to speak on their behalf, but they were also described as a small tribe. The court's decision appears, therefore, to have been quite arbitrary. Indeed, two later investigations of blocks bordering on Tangiaro saw Ngatinaunau and Ngatipare put aside their differences, neither wishing to endure a long court battle.[24] Each took possession of different blocks, thus sharing the land.

9.7 The Fostering of Individualistic Tendencies in Maori Society and the Simplification of the Tribal Landscape, Both by Maori and by the Court

As has been suggested in the previous section, some Maori rights to land were held with a strong degree of exclusivity, even if those rights were subject to a group right of veto against a transfer to outsiders. The minute books of the Maori Land Court suggest, however, that particular individual or family rights were, at times, advanced in the court environment at the expense of the tribal or group right. Of course this kind of 'individualism' is exactly what the court was designed to foster, and it could be argued that the court made possible the expression of an already existing tension within Maori social structures. But, at least in the Coromandel region, there is also room to argue that changing conditions of the colonial environment created a situation in which these rights could be advanced.

More specifically, it can be argued that hapu were able to use the court to 'secure' their control over various parts of the tribal landscape, overriding lesser or older use-rights that existed in the land, and perhaps circumventing wider tribal powers of veto. This is not individualism in a European sense – hapu or whanau identity remained strong – but it is a departure from some of the wider kin-group functions of earlier years. In Hauraki at least, such structural changes corresponded to the increase in large-scale extractive industries such as goldmining and kauri milling, where the importance of hapu control over resources grew.[25] Of course, hapu typically worked in closely-related clusters which were themselves difficult to separate, but under the colonial economy, when say rents were distributed, the exclusivity of particular hapu appears to have been strengthened (it remains to be seen if an even greater degree of individualism occurred after about 1880). Evidence would suggest that it did because land scarcity increased and succession cases in the Maori Land Court further divided 'relative interests'.

24. See Coromandel minute book 2, 5–6 June 1871, pp 57–59, 67 for title investigations of Tangiaro 2 and Tangiaronui blocks.
25. See Monin (1995)

Another point should be made. The explanation for such changes does not appear to rest solely with an 'assertion of mana'.[26] Rather, such changes can be associated with wider structural changes and the effects these had on different levels of Maori social organisation. Indeed, through the late 1860s and early 1870s, Hauraki Maori were strongly divided over the question of how they should deal with the opening of land for goldmining, and in other relationships they had with the Crown. Many hapu kept their lands closed, while other lands were opened. This division did not happen purely as a result of inter-Maori conflict (the Crown played an important part in fostering division) but such divisions were reflected in hearings of the Native Land Court. For those hapu who embraced rather than detached themselves from the colonial economy, the association with highly-capitalised extractive industry opened up a new set of economic and social relationships.[27] These relationships enabled a certain rearrangement of the tribal landscape and thus a reinterpretation of tenure.

One example (among many) will illustrate this point. In the 1870 title investigation to a block called Waitekuri, an individual called Hoani Te Kiripakeke 'made a claim to be put in the Grant'.[28] The main claimants all objected to this counterclaim. They had already given their whakapapa to the court and stated a history of occupation. However, from the minutes it appears that Hoani had attempted to advance an older and valid, but less secure right to the land. Moreover, it appears that Honai acted contrary to a relatively recent arrangement among the different owners. The latter part of the minutes record the following:

> Hoani Te Riripakeke on oath stated. I live at Kapanga. I am a Patukirikiri. I claim from an ancestor. Our joint ancestor is Kapetaua [whakapapa given showing joint ancestry] . . . My ancestors and parents lived on this land and I am living on the land at the present time, myself and all the Patukirikiri have cultivated on this land. Our elders are dead and we remain. My residence is at Matariki. We have ceased to cultivate on Waitekuri about 2 years. The only one of our hapu who has stopped to cultivate there is Paora Matutaera and he is at Opitonui. I have no witnesses to call as they have all objected to my claim.
>
> Kapanga Te Arakuri stated that Hoani Kieipakeke's claim was merely as a member of the tribe of Patukirikiri.
>
> Pita Taurua stated [that] Hoani had no claim to Waitekuri but merely from relationship to us. His places at Whangapoua is at Otanguroa. He sold the timber. Opitonui was Paora's piece. Waitekuri is our piece. The land has been divided among the members of the tribe, it remains with us if Hoani receives any of the payment for the timber or not.
>
> The Court stated that Hoani's evidence was not supported by any other person and in fact he was opposed by every other person who had a claim, and therefore the claim would be disallowed.

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26. See Parsonson (1981)
27. Neither alternative was entirely autonomous. Kingite regions retained economic, if not political, relationships with colonial society, while non-Kingites often functioned within their own economic systems.
28. Coromandel minute book 2, 25 January 1870, pp 5–7

In 'traditional' terms Hoani's claim appears quite strong. He was a member of the same hapu, his parents lived on the land and he also cultivated the land. However, his claim was rejected by the other claimants with the comment 'The land has been divided among the members of the tribe, it remains with us if Hoani receives any of the payment for the timber or not'. This could be, therefore, an example of a process whereby Maori simplified or adjusted their tenure, or simply made pragmatic arrangements, because of the presence of the Maori Land Court and other economic factors. That is, there were a number of agreements made prior to the existence of the court, agreements in which secondary rights were traded off or neutralised, leaving only those with strong and obvious rights to claim the land. The result was a kind of fragmentation or realignment of rights.

The reference to timber sales is important. When receiving rentals for kauri timber, hapu appear to have divided their interests into de facto 'blocks', perhaps easing the problem of apportioning rentals. In this case the court's investigation of title was clearly influenced by such an arrangement. Hoani was criticised for receiving rentals for another block and also claiming to Waitekuri. Indeed, Hoani himself stated that 'I have no witnesses to call as they have all objected to my claim'.

The problem, therefore, was the coexistence of a current arrangement and a long-term right. Hoani, however, was not supported by his close kin, and the court clearly believed that the group right outweighed Hoani's individual right. But did it? Hoani was no doubt aware that his rights could be changed at a later date, at least under Maori systems of tenure. But the court's award of freehold tenure would exclude him from making such a reassertion of rights.

In a way this case shows that Maori tenure was itself evolving, adjusting to circumstance and necessity. In such a situation, Maori would themselves have debated the constitution and reconstitution of their tenure as social and political realignments occurred. This made the position of the Maori Land Court doubly problematic. Maori tenure was not just an expression of idealised 'principles' or 'take', but a system that Maori themselves contested. In any case, the transformation of this tenure into freehold title under English law would have halted such an evolution.

CHAPTER 10

FENTON, THE 10-OWNER RULE, AND THE THEORY AND PRACTICE OF THE EARLY MAORI LAND COURT, 1865–79

10.1 Introductory Notes

This section further discusses the practices of the Maori Land Court in its initial years of operation. As has been shown in the previous sections, the interpretation of Maori land tenure by the Maori Land Court was a problematic exercise. A number of variables came into play, not the least of which was the complexity of Maori land tenure and the court's desire to find 'owners' to land. This section will therefore critically connect a number of the points raised in the sections above to statements made by Chief Judge Fenton, some of the early judges of the Maori Land Court, and the legislation under which the court was established. The texts referred to are taken primarily from 'official' reviews of the Maori Land Court published in 1867, 1871, 1884, and 1893 respectively.

This section is divided into four parts, each covering a separate but related issue. Firstly, statements that indicated the general intent of the Maori Land Court will be reviewed. These statements help explain the overall direction taken by the Maori Land Court. Secondly, the problem of establishing precedents or principles will be briefly examined. Here it will be argued that while Fenton was concerned to develop a body of 'common law', the court's desire to individualise Maori land tenure and the practice of making out-of-court arrangements overrode any comprehensive understanding of Maori land tenure that may have been developed. Thirdly, the 10-Owner Rule will be examined in light of the legislation under which the Maori Land Court was formed. A number of 'problems' that were recognised by the court will be discussed. Fourthly, the reforms of the Maori Land Court under the Native Land Act 1873, will be examined. It will be argued that despite these reforms, the court appeared to continue with the practices established under earlier legislation.

10.2 Judicial Statements of Intent

The judges initially appointed to the Maori Land Court (for example Fenton, Clarke, Rogan, Maning, Mackay, White, and Monro) all had some prior knowledge

of Maori custom. All could speak Maori, and most had been involved in the purchase of Maori land or had in some way acted as agents for the Crown. Fenton, for example, had acted as resident magistrate in the Waikato region, while James Mackay was the civil commissioner for Auckland.[1] Indeed, in 1891 James Mackay was asked, 'Do you consider that the Native Land Court since its commencement has improved in efficiency in the discharge of its duties?'.[2] He replied:

> I do not think it has improved. A great many appointments that have been made to it of late years have been of men who knew nothing at all about Native custom, and who could not speak Maori, whereas the original Judges were men who had been engaged in Native-land transactions for the Government, and were well acquainted with the Maori language and customs. I am not reflecting upon anybody in what I now say. I am simply speaking of the practice.

This prior knowledge and the experience gained by individuals 'in the field' was therefore taken into, and in many ways created, the Maori Land Court. In 1860 Fenton commented that:

> No system of government that the world ever saw can be more democratic than that of the Maoris. The chief alone has no power. The whole tribe deliberate on every subject, not only politically on such as are of public interest, but even publicly they hold their 'komitis' on every private quarrel. In ordinary times the *vox populi* determines every matter, both internal and external. The system is a pure pantocracy, and no individual enjoys influence or exercises power, unless it originates with the mass and is expressly or tacitly conferred by them.[3]

This understanding of the communalistic nature of Maori society was shared by other judges (on the whole it was an accurate albeit limited view). However, Fenton's understanding did not translate into sympathy. 'Communalism' was considered to be 'primitive' and, ultimately, based on violence. It was an aspect of Maori society that British colonists commonly sought to change. Furthermore, in a paternalistic manner the early judges appear to have believed that their work was of benefit to Maori – that the court was designed to exchange a faulty or imprecise system for one that provided security and precision.

A number of statements made by Maning and Monro in a report on the workings of the Native Lands Act 1865, further illustrate these points. For Maning:

> the 'Native Lands Act, 1865', satisfies a great want and vital necessity of the Maori people, by offering them a means of extricating themselves from the Maori tenure, and obtaining individual and exclusive titles for land. That most of the middle-aged and younger Natives take this view of the matter is beyond doubt, as is proved by many circumstances . . .
>
> That disputes, and even cases of violence, may occur about the division of lands is not at all unlikely amongst a people who value land now more than ever, and who,

1. AJHR, 1860, e-1c
2. AJHR, 1891, g-1, p 43
3. AJHR, 1860, e-1c, p 11

like the Ngapuhi, are ready to take arms on a small occasion. Every Court, however, which is held, and every block of land which is adjudicated upon, will render the recurrence of these land disputes more and more unlikely, merely by defining precisely and finally the boundaries of the lands of tribes and individuals, and thereby removing the causes for contention . . .

it is scarcely to be expected that in that time [fifteen months] any very great progress would appear in a movement, the success of which would create to a certainty a completely new set of circumstances with regard to the Maori people – a revolution in fact – which must of necessity displace barbarism and bring civilisation in its stead, for the difference between a people holding their country as commonage and holding it as individualised real property is, in effect, the difference between civilisation and barbarism.[4]

In 1867, Monro reported that:

The Natives, wherever I have been, have repeatedly expressed their satisfaction at the mode of procedure, and appear to have the utmost confidence in the Court. Questions which a few years ago used to be decided by an appeal to arms, they are now content to leave to peaceful arbitration.

In the majority of cases no restriction on alienability was imposed, the grantee having abundance of other land. Where such was found not to be the case, the land was made inalienable. Several long standing disputes have been settled, which on more than one occasion had nearly led to bloodshed, and the bitter feeling engendered by such disputes is gradually dying out, by the removal, through the action of the court, of the causes which gave rise to it.[5]

Likewise, in 1871, Monro further commented that:

but inasmuch as it was plain that many of the rights of citizenship are inseparable from an individual tenure of property, and that land is one of the most important species of property . . . an instrument for the conversion of the Native communal [title] into an English proprietary tenure, which would confer upon its possessors of either race, not only the rights of owners of the soil, but those also of freeholders – in a word, of citizens.

so far from being averse to seeing large tracts of land alienated from their aboriginal occupants and passing into the hands of the European colonists, I have always looked upon the wide extent of the uncultivated holdings of the Maori as a curse to them rather than a blessing; and I maintain that every legitimate encouragement should be held out to them to part with their surplus lands to those who can make the use of them for which they were intended, care being taken that each Native has ample land secured to him for his own maintenance.[6]

This, therefore, was the court's overriding purpose – to extinguish Maori customary tenure and transform Maori society. Moreover, the understanding of the nature of Maori society had by Fenton and his fellow judges enhanced the court's power –

4. AJHR, 1867, a-10, pp 7–8
5. AJHR, 1867, a-10, pp 8–9
6. AJHR, 1871, a-2a, p 41

the early judges saw, albeit in a limited fashion, how Maori society functioned, and thus they were the individuals most able to orchestrate its transformation.[7]

10.3 The Formulation of Principles

From the outset, Fenton, with his legal training, was concerned to establish the principles of law under which the court operated. The Rees commission of 1891 recorded the following statements:

> [Fenton] . . . I made an attempt, after I found that the men who acted as Judges disregarded precedents, to have men appointed who had had a legal education, and who therefore, of course, would have a religious regard for precedent . . .
>
> Another point I have to speak upon was a question as to whether I desired an appeal to the Supreme Court . . . I have been thinking it over, and my idea is that the less you have to do with the Supreme Court the better. All the principles which guide the one tribunal [the Maori Land Court], and which are founded on the original principles of equity, are entirely absent from the Supreme Court. The Supreme Court has the advantage of being guided by a long series of decisions from the learned men who have gone before us; and I say with all respect, men whose minds have been trained in that direction are almost incapable, at first at any rate, of beginning at the beginning and asking themselves, 'How did this principle arise?' They find it, and apply it; but when they are forced into the position they make one for themselves, and go to first principles. I think that is about as unfit a tribunal as can be to deal with Native matters.
>
> [Mr Rees] You consider that in dealing with these Native lands, and attempting to apply our system of administration to Native customs, we must resort to first principles?
>
> [Fenton] Yes, until you have established a common law. The Native Land Court must respect its own precedents, or you will never build up a system of common law.[8]

Likewise, under the 1871 review of the court, Heale identified:

> The want of settled rules as to Native title and evidence; that is, some outlines, at least, of a code of received Native custom and usage and a settled and simple law for the guidance of the Court.[9]

Heale was primarily concerned that the court had started out without a clear definition of what constituted Maori title to land:

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7. One problem that these early judges may have had, however, was to confuse exclusive use-rights that were held by individuals or whanau and the wider rights of the hapu, particularly with regard to the disposal of rights. Indeed, comments about the communalistic nature of Maori society often miss these finer distinctions.
8. AJHR, 1891, g-1
9. See Heale to Fenton, 7 March 1871, AJHR, 1871, a-2, p 19

> whether conquest absolutely extinguished the rights of the conquered? What right remained to conquered or submitting tribes suffered to remain on land in some subject capacity? (Rahi) rules of inheritance, &c.[10]

Various other commentators have seen the need for the court to attain a clear understanding of Maori custom. William Martin, in his memorandum of 1871, noted that the question of succession was particularly vague.[11] However, the court does not appear to have responded to this challenge until Fenton published *Important Judgements*, prefering to rely on the background knowledge of its judges. From the text of *Important Judgements* a number of 'principles' can be deduced. But these often appear to be 'common-sense principles' and, moreover, are not set out in a systematic manner. Nonetheless, it is possible that judges of the Maori Land Court used this work as a body of case law, however limited it may have been. For example, in the judgement for the Tiritirimatangi block, Fenton elucidated the 'rules of evidence'. He believed that the Native Land Court had 'relaxed these rules in matters of pedigree as to allow parties to have recourse to traditional evidence, often the sole species of proof that can be obtained'.[12] Fenton later stated that in situations where evidence was contradictory, the court 'has had to trust to the evidence of a few apparently uninterested witnesses'.[13] In the Orakei hearing, Fenton appears to have distinguished between the 'take' of 'descent, conquest, and possession and occupation' and stated that:

> No modern occupation can avail anything in establishing a title that has not for its foundation or authority either conquest or descent from previous owners, except of course in the case of gifts or voluntary concessions by the existing owners.[14]

This ruling in many ways follows the discussion of 'take' detailed in sections 2 and 3 above. Three other cases, for Owharo, Waihi, and Te Aroha, gave Fenton an opportunity to discuss the rights held in cases of conquest. The well-accepted principle that conquest had to be followed by occupation was made clear, and the court also took the position that conquered peoples who remained on the land could be awarded title to their cultivations. In all these cases, however, it would appear that the residual rights of other groups remained, or that certain rights were still being contested (see sec 3.6), and that the court thus came to a somewhat arbitrary decision. Nonetheless, *Important Judgements* is a significant text, and should be further consulted for questions of court policy and practice.[15]

But it is only with Smith that a comprehensive collection of the 'principles' of the court and of Maori land tenure is composed.[16] This is, of course, many years

10. Ibid
11. AJHR, 1871, a-2, p 4
12. Fenton (1879): 25
13. Ibid, p 123
14. Ibid, pp 86–89
15. This report has not attempted to make a thorough study of *Important Judgements*, although such a study may be of future use.
16. Norman Smith, *Native Custom and Law Affecting Maori Land*, Wellington, 1942

after the majority of title investigations were completed. Moreover, from evidence contained in minute books it would appear that matters other than questions of law influenced the early court. As has been detailed (sec 3.4), the court often let Maori resolve their own disputes over tenure. As a further example, Wi Te Wheoro wrote that:

> My opinion with regard to the Land Court is, that proper decisions are not arrived at. I may state that Mr. Rogan is the man whose proceedings are wise so far as this, that he allows the Maoris to come to some arrangement themselves, and that is why the disputes respecting land in that district have been amicably settled.[17]

It would appear, therefore, that a distinction could be made between the early judges, who tended to work perhaps on a case-by-case basis, trusting to their ability to rule equitably, or leaving difficult questions to the claimants themselves to work out, and later judges, who came from a legal background, and who may have worked more with precedent and principles.[18] Further investigation would be required, however, to draw a firm conclusion on this question.

In other respects, it can be argued that the political and social agenda of the court as discussed in the preceding section came to the fore, creating an environment in which investigations of title were dominated by the court's concern to create an individualised system of tenure above and against an accurate interpretation of Maori land tenure. In this case, the court's desire to individualise Maori land tenure, and the constraints imposed by such a move, overrode any comprehensive understanding of Maori land tenure that the court may have developed. We shall now discuss this problem.

10.4 Provision for 'Tribal' Title in the Early Native Lands Acts and the 10-Owner Rule

A close reading of the initial statutes under which the Maori Land Court was established suggests that a degree of flexibility was provided for the manner in which Maori land tenure was to be transmuted into legal title. Indeed, it appears that the court was given the discretion not to enforce a strict individualisation of tenure. For example, under the Native Lands Act 1862, applications for an investigation of title could be made by any 'Tribe Community or Individuals of the Native Race', and the court was required to:

> sign and issue a Certificate of Title in favour of the *Tribe Community* or *Individuals* whose title shall have been ascertained defined and registered as aforesaid. [Emphasis added.][19]

17. Wi Te Wheoro to Colonel Haultain, 23 May 1870, AJHR, 1871, a-2a, p 29
18. See also Mackay's evidence to the Rees commission, AJHR, 1891, g-1
19. V26, no 42, s 7

Likewise, applications for an investigation of title under the Native Lands Act 1865, were to be made by an individual, but such an application was required to state the name of 'the tribe or the names of the persons' who claimed an interest. Moreover, the Native Lands Act 1865, provided an option under which a certificate of title could be issued to a 'tribe' in blocks over 5000 acres:

> the Court shall order a certificate of title to be made and issued which certificate shall specify the names of the persons *or of the tribe* who according to Native custom own or are interested in the land describing the nature of such estate or interest and describing the land comprised in such certificate or the Court may in its discretion refuse to order a certificate to issue to the claimant or any other person Provided always that no certificate shall be ordered to more than ten persons Provided further that if the piece of land adjudicated upon shall not exceed five thousand acres such certificate may not be made in favour of *a tribe by name*. [Emphasis added.][20]

This section thus provided for the creation of a quasi-communal title (perhaps akin to 'tenants in common') under the rubric of 'tribe'. In many respects such a provision responded to Maori practice. Maori could, conceivably, have continued to manage their own tenure and social relations within such tribal blocks.

But such provisions stood in stark contrast to the preambles of both the 1862 and 1865 Acts, that is, the declared intention of the Acts to transform Maori land tenure and thus transform Maori society ('to encourage the extinction of such modes of ownership into titles derived from the Crown').[21] In other words, the provision for the creation of title held in common appears to contradict the court's stated purpose of changing the 'communistic' nature of Maori land tenure.

Suffice it to say, in practice the court did not make use of these provisions, preferring instead to place up to 10 owners on the title and thus following the general aims of the Act set out in the preamble.[22] Indeed, the fact that such options existed in the statute, and the fact that the court clearly took one option over the other, points strongly to the court's preference for procedures that would convert Maori land tenure into individual ownership, and not, for example, a legalised communalism of 'tribe by name'.

Yet again, however, the court faced a contradiction. The Native Lands Acts clearly stated that the court was to 'ascertain by such evidence as it shall think fit the right title estate or interest of the applicant and of *all other claimants to or in the land*'(emphasis added).[23] But if the court declined to award title to a 'tribe by name', the only option left was to place up to 10 owners on a certificate of title.

Given the complexity of Maori land tenure, such restrictions were certain to cause problems, and many early critiques of the Maori Land Court focused on this issue.[24] For example, William Martin launched a sustained attack on the 10-owner

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20. 29v, no 71, s 23
21. 29v, no 71, preamble
22. Fenton later stated that to his knowledge title was awarded to a 'tribe' twice. See Fenton's evidence in AJHR, 1891, g-1. Such 'tribes' were typically a long list of names, including individuals from a number of different hapu.
23. 29v, no 71, s 23

rule in a memorandum on the operation of the Native Land Court. His criticism is worth citing in full:

> The original enactment was so framed as to secure the object of the Act as stated in the preamble, 'the ascertainment of the owners' meaning, doubtless, all the owners. But upon that enactment a proviso was grafted, out of which these troubles have arisen, namely, 'That no certificate shall be ordered to more than ten persons.' This was added, no doubt, for the purpose of avoiding the inconvenience which would, in many cases, lie in the way of a persons desiring to rent or buy land, if it were necessary for him to deal directly with all the owners. It was therefore provided that such intending lessee or purchaser should have a limited numbers of persons to deal with, and that the names of these persons should appear on the face of the document. That was a very reasonable object, and capable of being attained, as we shall see presently, without any unjust or injurious consequences. It could not be intended that the convenience of the purchaser was to be secured by ignoring or sacrificing the rights of any of the owners.
>
> The grievance of which we now hear is this: that the proviso and the original enactment have not been reconciled, but that the proviso has been allowed to overrule and defeat the substantive enactment to which it is appended; that, although the land comprised in the Certificate may belong to more than ten persons, a Certificate is granted which names only ten of the owners, and gives no indication of the existence of other owners; that the ten persons named in the Certificate or the Grant have not, on the face of the Certificate or the Grant, been made to appear as only joint owners with others unnamed and trustees or agents for those others, but have appeared on the face of those instruments as the sole and absolute owners; that, as such, they have, either of their own motion, or being induced by other parties, conveyed the land to purchasers; and that in this way many persons have been deprived of their rights.[25]

Martin also argued that the 10 owners were not often equal owners: 'the interests, even of the several grantees themselves, however diverse and unequal, are not defined'.[26]

Of course, the Native Land Act 1867,[27] significantly changed the requirements of the 1865 Act by requiring the court to ascertain the:

> right title estate or interest of the applicant and of all other claimants . . and that the Court shall order a certificate of title to be made and issued which certificate shall specify the names of the persons or of the tribe who according to Native custom own or are interested in the land . . . [and] that a certificate in favour of persons should be ordered to issue to certain of the persons interested therein not exceeding ten in number in such case . . . and the Court shall *cause to be registered in the court the names of all the persons interested in such land* including those named in such certificate and the particulars of the interests of all such persons . . . [Emphasis added.][28]

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24. Maori often complained about this restriction. See the various submissions included in the Appendix of AJHR, 1871, a-2a.
25. AJHR, 1871, a-2, p 3
26. Ibid
27. See also the Native Lands Act 1869

In other words, the court was required to keep a record of all individuals interested in the land, while up to 10 individuals were to be placed on the certificate of title. This provision was something of a mix-and-match, retaining the restriction of 10 owners but recording all who were interested.

But Fenton did not agree with Martin's criticism of the 10-owner rule or section 17 of the Native Lands Act 1867. Fenton stated that the effect of section 17 'would be to make perpetual the communal holdings of the Natives'.[29] Moreover, he questioned whether the section had lost sight of the overall aim of the Acts and argued that the court would continue nonetheless:

> I think the discretion is still left with us; and, believing that the great object of this system of legislation is the abolition of communal ownership of land, and the substitution of titles known to the law in lieu thereof, the inclination of my mind will be so to exercise the discretion with which the Court is still, in my view, entrusted, as to refuse to issue a certificate of title, which will not on the face of it disclose the names of all the persons who are shown to the Court by evidence to be the owners, according to Native custom, of the lands described therein; or, in other words, to order subdivisions until the names in the grant are brought within the legal number, and display the whole of the persons interested in the property.[30]

The problem with Fenton's position was, as will be detailed immediately below, the subdivision of land. Given the multiplicity of Maori rights in larger blocks, something that Fenton no doubt recognised, a vast number of surveys were required if such blocks were to be given 10 or fewer owners. Such surveys were extremely expensive, and it should be assumed that Maori, when faced with Fenton's insistence on 10-owner titles or the simple need to pay for survey costs, would have continued to appoint de facto trustees.[31] Interestingly, Fenton appears to have recognised this contradiction. In a letter to Donald McLean of August 1871, Fenton argued that:

> As early as 1866 I stated my views, that where counter-claimants, claimants, and proposed lessees had all a direct pecuniary interest in preventing the minute subdivision of lands, it would be impossible for any Court to discover the ownership of these lands beyond such a point as would suffice to terminate all contest amongst the claimants themselves. I therefore never expected that the Act of 1866 or 1867 would stop the mischief to which they were directed, as they threw upon the Court *a duty which it was quite incapable of performing*; and so it has proved. Having once decided the class of claimants to which an estate belonged, the Court became powerless to discover more than these recognised claimants chose to disclose, as all opposition ceased.[32]

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28. 31v, no 43, s 17
29. Opinion of the chief judge on 17th clause of Act 1867; Letters, 7 April 1868, AJHR, 1871, a-2a, p 41
30. Ibid
31. The question of survey costs has not been detailed in full in this report. It is, however, an extremely important problem.
32. Fenton to McLean, 28 August 1871, AJHR, 1871, a-2a, p 10

Fenton's statement is extremely revealing. Firstly, he clearly acknowledged that the court worked to 'decide the class of claimants to which an estate belonged' while being unable to properly apportion individual interests. Fenton thus admitted that the court would ascertain the general group who held the strongest use-rights in a particular blocks, but that the court failed to execute its primary purpose – the ascertainment and apportionment of individual title in a European sense. Indeed, it appears that under the 10-owner rule, the court manufactured a pseudo-individualistic tenure of 'joint tenants, but one in which the tenants acted as individual owners, and not as trustees for the other right holders under Maori land tenure.

Secondly, Fenton appeared to suggest that the 10-owner rule was the product of a Maori reluctance to subdivide their land. This argument is quite problematic. As has been discussed, the court ignored provisions provided by the Native Lands Act 1865, for the award of title to a 'tribe by name', wishing instead to encourage individualisation of title. Moreover, Maori were clearly unwilling or unable to pay for the costs of extensive surveys. Fenton himself stated:

> The fact is that now Maori are fully aware of the frightful expenses of the present system of surveying – a system which, in some cases almost consuming the entire proceeds of the land when sold, is still burdensome and unremunerative to the surveyor himself.[33]

We can therefore ask, why did the Maori Land Court continue to operate if the chief judge himself believed that the court was unable to satisfy its statutory requirements?

The opinions of other early judges on this subject are also of interest. On the whole they did not present a radical critique of the 10-owner rule and, while being aware of difficulties, supported the continued operation of the court. In 1867, Monro commented that:

> Apart from the question of surveys, I cannot say that I have experienced any difficulty in the practical working of the Native Lands Act of 1865, except what may have arisen from clause twenty three limiting the number of grantees to ten persons, but this difficulty has in each instance been easily overcome; and as one great object is to induce the Natives to individualise their titles as far as possible, I think it would be inadvisable to alter it.
>
> Monro's comments about the ease with which arrangements were made appears extremely optimistic. White, in contrast, stated that 'the Natives have shown anxiety to place as many names on the grant as possible, which, of course, adds considerably to the expense when they are required to go to a distance to transfer their property.'[34] But White tempered this criticism with reassurance. He did not believe that the Court should be abolished. As a final example, in 1871 Monro commented extensively on the 'ten owner rule'. His comments provide a good outline of Court practice. For Monro:

33. Ibid, p 11
34. AJHR, 1867, a-10, p 10

> Defects in the working of so entirely new a system are, of course, to be expected; and perhaps the most prominent of these is to be found in the difficulty arising from the number of claimants interested in particular blocks. Although the entire lands of any tribe were owned by the whole of it, in its widest extent, yet sections of that tribe had their several portions of territory restricted to them by the same condition of occupancy by which the larger tribe held the larger area.[35]
>
> In bringing the Native Lands Court Acts into operation, it was trusted that the Maoris would see the wisdom of practically allowing such subdivisions of the territory to take undisputed effect, and such has been to a great extent the case, each sub-tribe or family waiving their rights over the lands occupied by others, on the condition of being allowed undisputed ownership of their own particular holdings. Thus, one much-desired result, the individualisation of land title, has been advanced a great step towards its accomplishment. With a view to that end, it was decided that not more than ten names should be inserted in any Crown grant . . the Legislature having in further view, when making this provision, the great practical inconvenience certain to result, in any subsequent transactions, from having any larger number to deal with where unanimity in action would have become essential.[36]

Monro then argued that these arrangements had been carried out satisfactorily, with the exception of the large run holdings in Hawke's Bay:

> These runs therefore were passed, in accordance with the proviso, in the names of ten claimants, in reality and equitably, trustees for the benefit of themselves and of their co-proprietors; but in appearance and at strict law, absolute owners of these tracts. I need not enlarge upon the abuses to which such a state of things has opened the door.
>
> The question, how this evil may best be remedied, is a difficult one. The insertion in the grant of the name of each individual interested in it is, in practice, in many cases so evidently impossible that it may at once be dismissed. The most effectual remedy, a more complete subdivision of the land, so that no more persons should be interested in a single grant than could practically be dealt with, is in the hands of the Maoris themselves . . . The registration of the names of the claimants in the Court, under the 17th section of the Act of 1867, and the issue of a certificate only to determine the proper parties to be dealt with, is the only remedy as yet discovered for this acknowledged difficulty.[37]

But contrary to Monro's assertion, there is little suggestion in the early Native Lands Acts that the Crown expected Maori to 'waive their rights over the lands occupied by others'. The text of all the Acts is quite clear: the court was to ascertain all the owners of any block of land according to Maori custom. Monro's comments are, therefore, an indication of the practice adopted by the judges of the court, rather than the policy prescribed by statute. That the Crown acquiesced to this departure from statute is of serious concern.

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35. Monro to Fenton, 12 May 1871, AJHR, 1871, a-2, pp 15–16
36. AJHR, 1867, a-10, p 10
37. Ibid

It is also clear from the above comments that the court believed that it faced a number of problems when it translated multiple rights under Maori land tenure into freehold titles. Indeed, it may be a mistake to use the term 'translation', as this implies a degree of compatibility and no compatibility was intended. And, as Fenton and Monro explained, the court appears to have acknowledged that it was not able to make a comprehensive assessment of that tenure. To turn the problem upside down, however, the court did know enough about Maori land tenure to see that it had a problem.

This observation supports the discussion presented in sections 1 to 3 above: that the court believed it was able to assess the general ownership of land with some degree of certainty (when that land was not 'contested'), but that lesser use-rights or overlapping rights were passed over. What is important here, though, is that these lesser rights were not passed over because they were entirely invisible to the court, but because the court believed that to acknowledge them was tantamount to supporting the continuation of communistic forms of tenure. Thus two main limiting factors appear to have operated during an investigation of title:

(a) how well the court (or individual judges) understood the evidence presented to the court; and
(b) to what degree the court deliberately distorted this evidence in order to make rights under Maori land tenure fit the limitations of the 10-owner rule or later restrictions.

10.5 The Native Land Act 1873 and the Continuation of the General Principles of Court Practice

It can be argued, therefore, that the early judges of the Maori Land Court personally acknowledged the complexity of Maori rights to land but generally chose to ignore this complexity so as to facilitate the individualisation of title. Indeed, given the early judges wide experience, language skills and their stated recognition of the communal rights of tribal groups (although this understanding may have been limited), the restrictions enforced by the 10-owner rule appear not to be a mistake or a misinterpretation, but a conscious strategy contrived to transform Maori social organisation and make Maori land available for European settlement.

In this case, the court supported the perceived objective of the Native Land Acts (the destruction of Maori land tenure) over and above the just and accurate translation of Maori land tenure into a form cognisable in English law. Indeed, one of the most ardent nineteenth-century Pakeha critics of the 10-owner rule, William Rees, observed that:

> The gentlemen who were appointed Judges of the Native Land Court very likely knew enough of Maori customs to decide who were the rightful owners of any block brought before them; but they seem, as their successors have often since seemed, quite unable to understand the meaning of the English law which they had to apply.[38]

Likewise, the Hawke's Bay Native Lands Alienation Commission of 1872 presented a strong criticism of the 10-owner rule:

> No one can doubt the expediency of legislation to promote the breaking up of tribal property. But, in effecting this, justice or at least good policy, requires two things: first, that the Native ownership be ascertained; secondly, that the general consent of the Native owners to the extinction of the Native tenure be given. Simple as are these requirements, they have been disregarded in the existing law as practically administered. . . . The Court is thus put in a false position of certifying, that the Natives chosen by the body are 'owners according to native custom' of the land in question – this plainly importing that they are exclusive owners. Such a certificate is necessarily false; for, if the native title is to be considered as subsisting, the persons are not exclusive owners; if the Native title is to be considered as extinguished in their favour, they are not owners according to Native custom.[39]

Of course it could also be argued, as Rees did, that the entire project of individualising Maori land tenure was 'a very gross act of cruelty and bad faith as well as folly'.[40]

However, criticisms of the 10-owner rule made in the late 1860s and early 1870s, contributed to a reform of the Maori Land Court under the Native Land Act 1873. Section 47 of this Act stated that memorials of ownership were to be issued to all individual persons interested in the land (any number of individuals could be included):

> After the inquiry shall have been completed, the Court shall cause to be inscribed on a separate folium on the Court Rolls a Memorial of ownership . . . giving the name and description of the land adjudicated upon, and declaring the names of all the persons who have been found to be the owners thereof, or who are thenceforward to be regarded as the owners thereof under any voluntary arrangement . . . and of their respective hapu, and in each case (when so required by the majority in number of the owners), the amount of the proportionate share of each owner.[41]

Nonetheless, this provision had serious problems too, and it should not be assumed that the defects of the earlier Native Lands Acts were remedied by the 1873 Act. Firstly, evidence suggests that the court did not change its basic practice of determining the 'general group' to which the land belonged, and awarding the title to such a group. In this case, overlapping or secondary rights were still passed over, but the group who 'won' the title investigation was typically asked to provide a list of all the owners. Indeed, the Native Land Act 1873, recognised 'voluntary arrangements', and thus sanctioned the practice informally adopted (and encouraged by the court) whereby Maori had 'exchanged' rights to various areas of land so as to fit into the restrictions of the 10-owner rule:

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38. AJHR, 1884, sess ii, g-2, p 1
39. Hawke's Bay Native Lands Alienation Commission Act 1872; Reports by Chairman of Commission, Mr Justice Richmond, AJHR, 1873, g-7, pp 6–7
40. AJHR, 1884, sess ii, g-2, p 4
41. 37v, no 59, 1873

> In carrying into effect the preceding sections [relating to the investigation of titles], or any of the sections hereinafter contained regarding partitions, the Court may adopt and enter a record in its proceedings of any arrangements voluntarily come to amongst themselves by the claimants and counter-claimants, and may make such arrangement an element in its determination of any case concurrently or subsequently pending between the same parties.

In part this provision appears to contradict the court's duty under section 41 to 'ascertain . . . not only the title of the applicants, but also the title of all other claimants to the land'.[42]

Secondly, the list of names presented on a memorial of ownership were typically given equal shares. This meant that a chief could hold as large a right to the land as did a child. While the ownership of the land was partly protected (because all owners were required to agree to a sale), such an apportionment facilitated further individualisation and fragmentation, particularly with later cases of succession and subdivision.[43]

Further measures that were intended to 'protect' Maori had dubious success. Survey charges were advanced by the Government, removing one of the difficulties in bringing the land to the court. But the 'owners' of the land remained liable for these charges, and the Government was able to take land in lieu of payment. District officers were required to make preliminary investigations into the title of the land in order to ensure that no interested parties would be ignored. Likewise, the judges of the court were required to make preliminary inquires so that they did not have to rely on evidence provided in court. In practice, neither of these provisions were followed.

Fenton himself later commented that 'The intention [of the 1873 Act] was to do celestial justice, which I always believe to be impossible in this wicked world'.[44] With regard to the provisions of the Native Land Act 1869, Fenton was asked the following question:

> Do you think it was deemed necessary to place the names of all the people interested on the back of the certificate because it was found that the ten persons whose names had hitherto been used in each of a number of cases were appropriating the land for themselves?

He answered:

> No doubt. I thought at the time what a very bad remedy it was. The true remedy was to compel the tribe to subdivide. Supposing the number still limited to ten, to subdivide amongst themselves until each ten of the tribe had got his share. That was the true remedy, instead of endorsing these names on the certificate, which, to my knowledge, was productive of very great confusion afterwards. The objection to the scheme of subdivision was the expense of the survey, which of course was a real

42. Ibid
43. Sections 65 and 66 provided, however, for the partition of land in the case where individuals objected to a sale.
44. AJHR, 1891, g-1, p 47

> objection; but you cannot subdivide millions of acres without hardship and difficulty in some cases. The true remedy, however, would have been the refusing to do anything until they had marked off for each ten men their own share.[45]

We can assume, therefore, that the practice of ascertaining all the owners and apportioning an interest to these owners under the 1873 Act was attempted by the court in only a cursory or arbitrary manner. Indeed, Fenton was quite clear on this point with regard to earlier legislation:

> Under the Act of 1869, which was mine, provision was made requiring the assent to a sale of the majority in value; but the Court in administering that Act found it to be practically impossible to discriminate between the values of individual Natives; and the shares of the owners were practically treated as equal, not because it was right, but because the Court could not do anything else.[46]

Again, the court appears to have been faced with a series of contradictions. It was designed to abolish Maori land tenure, but was obliged to do so on the basis of such tenure. While under the 10-owner rule blocks were often awarded to individuals as de facto trustees, when further individualisation and subdivision occurred under the Native Land Act 1873, say when a number of individuals wished to sell their 'interests', nothing within Maori customary tenure could provide a basis for such a subdivision. As Edward Puckey was asked:

> So far as you have any knowledge of Maori custom, is it in accordance with Maori custom to cut up the land between men, women, and children of the hapu? – Certainly not. They have no idea of it at all.[47]

To conclude this section, while the Native Land Act 1873, officially abolished the 10-owner rule and other dubious measures of the early Native Lands Acts, the informal principles of practice adopted by the court through the period from 1865 to 1873 appears to have remained. While these 'informal principles' were never codified or officially recognised, they can be usefully summarised as follows. Further study should be done to see if these principles were practiced in the court after about 1880. As can also be seen, most of these practices have been alluded to in the preceding sections:

- to allow and encourage Maori to come to their own arrangements outside of court, and thus to simplify the overlapping rights to land and questions of title;
- to decide on disputed cases with reference to a wide range of 'take' but to stress the strength of rights supported by occupation over and above rights based on other factors, and, where such a process does not result in a clear title, to rule according to loosely defined principles of equity;

45. Ibid
46. Ibid, p 48
47. Ibid, p 66

- to award the title to a single group while ignoring lesser rights of other groups, with the exception that particular sections of a block may be partitioned off to satisfy such lesser rights; and
- to apportion individual interests on an equal basis, with the occasional exception where circumstance demands (such as the inclusion of an important rangatira, who may receive a number of shares rather than one).

CHAPTER 11

CONCLUSION

There is no quick or easy answer to the problem of how the Maori Land Court interpreted customary Maori land tenure. On the one hand, individual judges of the court appear to have understood the basic 'principles' of Maori land tenure. The court also appears to have tried to use this understanding to find the correct right-holders or 'owners' to particular blocks of land, remaining open to the possibility of regional variation or cases that went against the commonly-held principles.

However, the discussion presented in this report suggests that the process by which the Maori Land Court investigated the title to Maori land, and subsequent actions of the court should be separated into a number of distinct stages:

(a) the investigative stage whereby a general group was awarded 'title' to the land;
(b) the apportionment of individual interests in a block of land; and
(c) the subsequent history of the land (for example, successions, survey liens, mortgages, reservation status, partitions, perhaps alienation by sale, or the inclusion in development schemes).

Points made under (c) have not been dealt with at all by this report. When considering (a) above, the probability that the court could 'get it right' when determining the general ownership of Maori land appears to have depended upon a number of variables:

- the thoroughness of the understanding of Maori land tenure held by individual judges;
- the fact that Maori did have a strong system of tenure which recognised a number of exclusive use-rights (although not the right of the individual to alienate land permanently);
- the position of the land in question in the wider tribal region (whether the land was disputed, or whether it was held securely by the group in question);
- any 'out-of-court' arrangements that may have been made; and
- any number of procedural conditions such as the publication of notices relating to different cases, the attendance in court of interested parties, the influence of European legal advice, the effects of indebtedness, and so on.

These latter variables have not been commented on in this report, except in passing.[1]

1. See, for example, A Ballara, 'The Pursuit of Mana? A Re-evaluation of the Process of Land Alienation by Maori, 1840–1890', *Journal of the Polynesian Society*, vol 91, no 4, for further discussion. Many recent critiques have given much attention to these procedural questions. See also Geiringer (Wai 45, doc f10).

There is, of course, another level to the Maori Land Court – the intention(s) behind the legislation that established the court and any subsequent changes to this legislation. These intentions have been outlined in section 4 above and can be summarised as follows: the court sought to destroy what was considered to be the 'communistic' nature of Maori social organisation by transforming complex use–rights into freehold title. In practice, though, the majority of title investigations created a quasi-individualism in which a number of owners were placed on a single certificate of title or memorial of ownership. Nonetheless, it appears that the imperative of destroying 'communalistic' tenure necessitated, in the court's mind at least, the simplification of a complex and communally-administered set of rights in the process of investigating and awarding title.

Furthermore, in practice, the court appears to have varied its approach to the question of tenure depending on the level to which the land was disputed. The court did not appear to be overly concerned with the nature of evidence on nondisputed land. This is perhaps understandable: the court could do little else if nobody challenged the evidence presented. But when disputes arose, the court tended to stress rights based on occupation and conquest, or make some entirely arbitrary ruling on other criteria. Moreover, such disputes often involved groups who held rights at different levels, and lesser right-holders often appear to have objected not to the rights held by the other group, but to their own rights being extinguished by the court. In some cases the court acknowledged the problem and insisted that the land was subdivided. In other cases, the court simply awarded disputed land to a single group.

Likewise, the court actively encouraged (and even directed) the settlement of differences outside of the court environment. Thus the court would typically collapse the ongoing history of any particular area of land into a once-off arrangement by which title was frozen in a legally-binding form. This in part reflected the court's inability to differentiate between different rights within single blocks of land. Indeed, the court freely admitted that it did not apportion individual interests (or rule in cases of succession) according to Maori custom.

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APPENDIX

PRACTICE NOTE

WAITANGI TRIBUNAL

CONCERNING the Treaty of Waitangi Act 1975

AND Rangahaua Whanui and the claims as a whole

PRACTICE NOTE

This practice note follows extensive Tribunal inquiries into a number of claims in addition to those formally reported on.

It is now clear that the complaints concerning specified lands in many small claims, relate to Crown policy that affected numerous other lands as well, and that the Crown actions complained of in certain tribal claims, likewise affected all or several tribes, (although not necessarily to the same degree).

It further appears the claims as a whole require an historical review of relevant Crown policy and action in which both single issue and major claims can be properly contextalised.

The several, successive and seriatim hearing of claims has not facilitated the efficient despatch of long outstanding grievances and is duplicating the research of common issues. Findings in one case may also affect others still to be heard who may hold competing views and for that and other reasons, the current process may unfairly advantage those cases first dealt with in the long claimant queue.

To alleviate these problems and to further assist the prioritising, grouping, marshalling and hearing of claims, a national review of claims is now proposed.

Pursuant to Second Schedule clause 5A of the Treaty of Waitangi Act 1975 therefore, the Tribunal is commissioning research to advance the inquiry into the claims as a whole, and to provide a national overview of the claims grouped by districts within a broad historical context. For convenience, research commissions in this area are grouped under the name of Rangahaua Whanui.

In the interim, claims in hearing, claims ready to proceed, or urgent claims, will continue to be heard as before.

Rangahaua Whanui research commissions will issue in standard form to provide an even methodology and approach. A Tribunal mentor unit will review the comprehensiveness of the commission terms, the design of the overall programme, monitor progress and prioritise additional tasks. It will comprise Tribunal members with historical, Maori cultural and

legal skills. To avoid research duplication, to maintain liaison with interested groups and to ensure open process:

(a) claimants and Crown will be advised of the research work proposed;
(b) commissioned researchers will liaise with claimant groups, Crown agencies and others involved in treaty research; and
(c) Crown Law Office, Treaty of Waitangi Policy Unit, Crown Forestry Rental Trust and a representative of a national Maori body with iwi and hapu affiliations will be invited to join the mentor unit meetings.

It is hoped that claimants and other agencies will be able to undertake a part of the proposed work.

Basic data will be sought on comparative iwi resource losses, the impact of loss and alleged causes within an historical context and to identify in advance where possible, the wide ranging additional issues and further interest groups that invariably emerge at particular claim hearings.

As required by the Act, the resultant reports, which will represent no more than the opinions of its authors, will be accessible to parties; and the authors will be available for cross-examination if required. The reports are expected to be broad surveys however. More in-depth claimant studies will be needed before specific cases can proceed to hearing; but it is expected the reports will isolate issues and enable claimant, Crown and other parties to advise on the areas they seek to oppose, support or augment.

Claimants are requested to inform the Director of work proposed or in progress in their districts.

The Director is to append a copy hereof to the appropriate research commissions and to give such further notice of it as he considers necessary.

Dated at Wellington this 23rd day of September 1993

Chairperson
WAITANGI TRIBUNAL