RANGAHAUA WHANUI NATIONAL THEME L

CROWN POLICY ON MAORI RESERVED LANDS, 1840 TO 1865, AND LANDS RESTRICTED FROM ALIENATION, 1865 TO 1900

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LIST OF ABBREVIATIONS

AJHR	*Appendices to the Journals of the House of Representatives*
BPP	*British Parliamentary Papers: Colonies New Zealand* (17 vols, Shannon, Irish University Press, 1968–69)
CFRT	Crown Forest Rental Trust
DNZB	*Dictionary of New Zealand Biography*
doc	document
MA-MLP	Maori Affairs–Maori Land Purchase Department
NLC	Native Land Court
no	number
NZJH	*New Zealand Journal of History*
NZPD	*New Zealand Parliamentary Debates*
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)
Wai	Waitangi Tribunal claim

INTRODUCTION

An outline of the survey

The scope of this report is wide, both in terms of its subject and the period it covers. It falls into two sections for the purposes of organisation. The first part discusses the nature of reserves from Crown purchases between 1840 and 1865, the way the Government defined reserves and the development of official thinking about their purpose and legal status. The second section deals with the period from 1865 to 1900. This involves a consideration of the policies of colonial governments as well as the conduct of the Native Land Court relating to restrictions on the alienation of Maori land.

The first section begins by examining the general principles British statesmen set down for governors to follow in New Zealand. The Crown accepted responsibility for ensuring Maori retained land they needed. Reserves were intended to be 'ample' or 'sufficient'. These terms were too vague to be practical guidelines. In the 1850s, the administration made an effort to define reserves more systematically. The question of how much land Maori needed was closely connected with ideas about how this land should be owned and used. The report discusses contemporary opinions on these questions, and briefly examines some new departures in Maori land-holding.

The focus of the report widens in the second section to include lands restricted from alienation. In the early 1860s, the British Government withdrew from responsibility for Maori affairs, Crown pre-emption was abolished, and the Native Land Court, under the Native Land Act 1865, took on its established form. It had been the Governor's duty to impose restrictions on the alienation of Maori land. By a series of Acts, from 1865 on, the Native Land Court was to award titles with restrictions placed on alienability. The standard wording withheld land from sale, from mortgage, or from leases longer than a specified period, usually 21 years. There were variations on this. Some land was absolutely restricted from alienation, for example, urupa (burial grounds). Lands excepted from sales to the Crown continued to be classed as reserves, as were lands set aside by a range of legislative measures, such as those dealing with confiscated districts. Many of the lands designated 'reserves' were also inalienable.

The report outlines the purpose of restrictions and how they were imposed. It then examines how governments responded to pressure for consent to the removal of restrictions. Although large areas of land became alienable, many individual requests were declined. Changes in legislation in the 1880s and 1890s moved the process into the sphere of the Native Land Court and facilitated the removal of restrictions.

A separate set of laws and Crown responsibilities developed for lands held in trust for Maori benefit. Trust lands form a topic of their own and are dealt with in a separate report.

Other restrictions came into existence in the years when Crown pre-emption was not generally in force. Restrictions might be placed by the Native Land Court on the sale of sites required for public purposes, for example, for lighthouses. Governments also had the power to place special restrictions on blocks or districts to exclude private purchasers. This is a separate aspect of Crown policy from the one that is the subject of this report.[1]

I was asked to do a brief survey for the first part, and to concentrate research on the period after 1865. My commission was initially for five months, some weeks of which were spent at National Archives, Wellington, going through the files of documents on the removal of restrictions. Sampling the Maori Land Court minute books, as my commission directed, gave too little information about why decisions were made to lead to any general conclusions. The material was useful, however, in reinforcing other evidence about differences in the approaches of the judges.

The major sources of printed information were the *Appendices to the Journals of the House of Representatives*. There is little secondary literature dealing directly with the subject, and none that is recent. Invaluable aid, however, in identifying legislation relevant to this topic has been given by the *Maori Land Legislation Manual*.[2] The *Manual* lists key Acts to provide a legal framework, but it is not intended to be a connected narrative. The existence of the *Manual* has shaped my work. My object has been a complementary one, to write a historical survey of the principles and policies from which laws emerged.

The Treaty of Waitangi and reserved lands – some general points

The question of reserves belongs with the wider question of land rights because reserves were linked to sales. The Treaty required that Maori should be protected in the possession of their lands and other resources for as long as they wished to retain them. This was not a static thing. It envisaged Maori selling land they did not themselves require, though there should be no compulsion to sell. Under article 2 of the Treaty the Crown was required to act paternalistically. Initially, Crown pre-emption and, later, special laws were put in place to ensure that Maori did not become landless through the process of land transactions. In this respect there was conflict with article 3. Paternalism exercised by the Crown encroached on the full legal privileges to which Maori were entitled as British subjects.

Most Pakeha in the period under survey believed that the Maori's best hope for security and progress was rapid amalgamation with European civilisation. The basis for this appeared to be in reforming Maori land tenure. This meant replacing communal ownership with individual titles. This is in line with the usual

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1. A recent legal history draws attention to statutory restrictions on Maori land alienation., and suggests that these often meant, in effect, 'restricted to the Crown'. The writer gives as examples the Thermal Springs Districts Acts of 1881 and 1883, where the limitation was on other purchasers rather than on the titles. R Boast, 'The Law and the Maori', in P Spiller, J Finn, and R Boast, *A New Zealand Legal History*, Wellington, 1995, p 152. The form of restriction was quite different when, as here, the object was the partial reimposition of Crown pre-emption.
2. Written and compiled by H Bassett, R Steel, and D W Williams, Crown Forestry Rental Trust, Wellington, 1994.

construction of article 3 of the Treaty. The 'rights and privileges of British subjects' were generally considered as a conferring of rights on 'the individual'.

The historical context changed, but there were tensions that were present throughout the period. Regardless of the Treaty, most Europeans believed that Maori had rights of ownership to lands in 'occupation and use', but ought to be ready to dispose of the remainder. Governments wanted land for development. However, the desire to be fair towards Maori was generally present. Accordingly, the Crown's policies even at the centre were a mixture of principle and expediency. The Native Land Acts which were passed by Parliament in the second part of the period were awkward vehicles for these conflicting elements.

There never was a point in this period when restrictions were completely abandoned, though humanitarian ideals receded. Protection appeared increasingly inappropriate. The intention to preserve Maori self-sufficiency was balanced uneasily against pressure to use land productively. At the end of the period, the Liberal government pressed ahead with measures to promote the development and prosperity of the wider constituency while weakening the measures restricting the alienation of Maori land. This was a policy with serious limitations, in that the assistance offered to Pakeha farmers was not extended to Maori.

Though what follows is a primarily a study of Crown principles and practice, contemporary records used in this survey showed a wide diversity among Maori. The need, or wish, to retain land as a traditional base often had to be reconciled with the desire to participate in the cash economy. Maori spokesmen, both in and outside parliament, argued that Maori should have a greater degree of control over their lands, of which reserves and inalienable lands were a part. Beyond this general position, Maori opinion too was divided on how to make the best use of land. This inevitably complicated the issue.

PART I

1840 TO 1865

CHAPTER 1

PRINCIPLES AND POLICIES

1.1 INITIAL APPROACHES TO RESERVING LAND BY THE CROWN

IThe following passages, from three British statesmen, are instructing the Crown's representatives in New Zealand in the mid-nineteenth century. It is standard to quote Lord Normanby in connection with the Treaty of Waitangi, as a basic statement of paternalism. A passage from Lord John Russell illustrates an approach to defining reserves which remained an ideal. Though less often cited than Normanby or Russell, the views expressed by Earl Grey in the third passage show what the Crown's principles had become by 1848. The principles which Normanby, Russell, and Grey set down in these early statements of policy continued to be invoked throughout the period under survey.

A policy for reserves was drawn up in Britain in 1839 by Lord Normanby, the Secretary of State for the Colonies. All dealings with Maori for their land should be by 'fair and equal contracts' conducted with 'sincerity, justice and good faith'. This can be taken to include arrangements for reserves. More specifically in relation to reserves, the Crown should act in a paternal or trustee role:

> [Maori] must not be permitted to enter into any contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence. The acquisition of land by the Crown for the future settlement of British subjects must be confined to such districts as the natives can alienate, without distress or serious inconvenience to themselves. To secure the observance of this will be one of the first duties of their official protector.[1]

As an expression of humanitarian concern for Maori, Normanby's ideas were theoretical. The basic question of how much land Maori owned had to be confronted by lawyers and politicians in Britain, and administrators in New Zealand. While the English text of the Treaty of Waitangi confirmed and guaranteed the ownership of their lands and other properties to the chiefs and tribes for as long as they wanted to retain them, British statesmen believed the Crown had guaranteed Maori rights only to those lands which they occupied and used.

Lord John Russell's instructions to Governor Hobson show that in 1841 he did not see 'the lands of the aborigines' as co-extensive with the whole of New Zealand.

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1. Normanby to Hobson, 14 August 1839, BPP, vol 3, p 87

But the point of the following passage is the sequence which it laid down. To protect Maori rights in land, it was essential to establish what land was required for their welfare before permitting purchases:

> the lands of the aborigines should be defined, with all practicable and necessary precision on the general maps and surveys of the colony. The surveyor-general should also be required from time to time, to report what particular tract of land it would be desirable that the natives should permanently retain for their own use and occupation . . . the lands indicated in them [the surveyor's reports], or pointed out by the protector as essential to the well-being of the natives, should be regarded as inalienable, even in favour of local government, after the governor with the advice of the executive council, shall have ratified and approved the surveyor's reports, and the suggestions of the protector.[2]

The practical implications of Russell's approach look very different if you believed, as he did at that point, that Maori did not own land on a very extensive scale. By 1847, not only Russell but also Earl Grey, 'the most ideologically committed of all the heads of the Colonial Office to a narrow interpretation of the land guarantee',[3] had to concede that the Crown had recognised in the Treaty that Maori owned the whole of New Zealand. Grey's ideas, as expressed in a letter written by the Permanent Under-Secretary for the Colonies, Herman Melville, are important because they continued to be held by many Europeans:

> It is true that in the absence of any such stipulations as those contained in the treaty the right to all the waste lands in New Zealand would have been claimed for the Crown from the moment British sovereignty was established. But it is only as trustee for the whole community that the Crown would have claimed this right, and acting in that capacity it would have been the first duty of the Crown's representative, to take care that the native inhabitants of New Zealand were secured in the enjoyment of an ample extent of land to meet all their real wants. In taking measures for this purpose their habits would have been considered; and though it would certainly not have been held that the cultivation and appropriation of tracts of land capable of supporting a large population must be forborne, because an inconsiderable number of natives had been accustomed to derive some part of their subsistence from hunting and fishing on them, on the other hand the settlement of such lands would not have been allowed to deprive the natives even of those resources, without providing for them in some other way advantages fully equal to those which they might lose.[4]

The view that the Crown would naturally act as 'trustee for the whole community' was clearly stated. In that capacity, the Crown would protect Maori interests, regardless of the Treaty. Although Earl Grey still thought that policy in New Zealand had been misguided, he accepted that the only way for the Crown to acquire land was to buy it from Maori. The letter outlined what he thought should

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2. Russell to Hobson, 28 January 1841, BPP, vol 3, p 52
3. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847*, Auckland University Press–Oxford University Press, Auckland, 1977, p 188
4. Merivale (Under-Secretary for Colonial Affairs) to Beecham (Secretary of the Wesleyan Methodist Missionary Society), 13 April 1848, BPP, vol 6, pp 154–155

follow. Reserves should be 'ample', though confined to providing 'real wants'. Settlement and cultivation should have priority over hunting and gathering. But Maori were not to be deprived of land used for hunting and fishing without 'providing for them in some other way advantages fully equal to those they might lose'. Compared to Normanby and Russell, Earl Grey provided a more definite shape to policy although it was still being stated in general terms.

These principles remained current throughout the period. The idea that Maori should be secured in the ownership of land they needed before the rest was alienated persisted, though the Crown's commitment to this idea was uneven. Governments continued to claim that they were acting paternalistically, in the best interests of Maori. The question is how far this was in fact the case. As will emerge, the Crown's approach to reserving or restricting land from alienation was sensitive to changing political and economic circumstances.

1.2 RESERVES: CATEGORIES AND LEGAL STATUS

From 1840 on, from the Crown's perspective, there were categories of reserves. In principle, there were two broad groups. The first group was for occupation and use by Maori. The second was intended to provide a fund for the benefit of Maori. Wording very generally used in later Acts implied that the first group was chosen by Maori and the second group was set apart for Maori. But Maori owners themselves placed lands in trust for churches and schools, as distinct from those lands which had been reserved for Maori purposes by other parties, for example, the New Zealand Company. Confusion over who had been responsible for bestowing lands for endowments was to some extent deliberate. Not only the New Zealand Company but also the Crown liked to give the impression of generosity.[5]

Land for occupation and use generally contained, at the very least, dwellings, cultivations, and sacred places including burial grounds. In addition, there might be pieces of land and other resources that Maori wished to keep within blocks ceded to the Crown. This did not necessarily mean that all the land that sellers wanted to retain would end up as reserves. As with the price, reserves were in theory negotiable. Either party might refuse to go ahead with a sale if agreement could not be reached over reserves.

It is very difficult to make any unqualified generalisation about a standard reserve, even for occupation and use. Burial sites might be included in sales, sometimes after bones had been removed. In many cases scattered cultivations were 'rationalised' into blocks, as a requirement of the buyer. There was no generally accepted standard of what was sufficient land for present or future needs. How far particular transactions conformed to Normanby's 'fair and equal contracts'

5. 'Grants of land were made to the principal industrial schools, so they might have farms both as a means of agricultural instruction and as a source of income, intended in time to make them self-supporting. It might appear from the despatches that these lands were Government contributions, but what in fact happened was that the Maoris were induced to give up portions of their own land as an educational endowment.' J Rutherford, *Sir George Grey: A Study in Colonial Government*, Cassell, London, 1961, p 219.

depended more on the relative strength of the parties at the time than to consistency of principle.

The neat distinction between land chosen by Maori and that chosen for Maori, noted above, did not hold in practice. This has been recently examined in detail in relation to the Wellington 'tenths'.[6] Trust lands as a set percentage of a total transaction were not the Crown's preferred option for funding institutions for Maori welfare, though Governor FitzRoy adopted this policy during the brief period of the pre-emption waiver. Nevertheless, the Crown succeeded to the New Zealand Company's scheme of 'tenths', and was caught up in all its inconsistencies.

To give one example, Charles Heaphy, as Commissioner for Native Reserves, in 1870 noted with amazement the early history of land at Motueka. This case involved more than simply confusion over whether land was intended for residence or endowment, though this element was present. According to the New Zealand Company's original undertaking, these reserves had not been intended:

> merely for the maintenance of the Natives, but as an estate that should conduce to their improvement socially and materially. Owing, however, to its being discovered on investigation of the New Zealand Company's title, that several of the Motueka Natives had received little or no payment for their lands, a series of sections at that place were awarded, in 1844, by Mr Commissioner Spain, to the local natives, thus making the payment to them for their land in *reserves which already belonged to their tribe*. [Emphasis in original.][7]

In this exercise both the company and the Crown officials appear to have been using reserves as a medium of exchange. The value would probably have been represented to Maori as the official award. As Heaphy pointed out, the land itself did not change hands, except by an illusion.

It remained unclear whether any change took place in the status of land set apart in deeds, other than having their boundaries defined and owners named. Governor Grey gave the impression that native title would be extinguished over all reserved land in blocks ceded to the Crown. Land purchase commissioners were instructed by the Government to provide plans for the local people as soon as reserves were surveyed. The registration of the reserves as the only lands that Maori owned was intended to serve as a form of Domesday Book. Copies of the deeds were meant to be available for Maori. Grey described these documents were 'somewhat in the nature of a Crown title to their lands'.[8] Whatever this was intended to mean, it stopped short of granting Crown title. The Native Land Purchase Ordinance 1846, which prohibited the occupation of Maori land without a licence, made no exception for reserves. In practice the legal status of reserves remained unchanged until further steps were taken. Most reserves continued under customary title until the Native Land Court was established.

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6. D Moore, 'The Origins of the Crown's Demesne at Port Nicholson, 1839–1846', report in the matter of the Wellington Tenths, August 1995 (Wai 145, docs E3, E4, E5)
7. Heaphy to the Native Minister, 26 July 1870, 'Report from the Commissioner of Native Reserves', AJHR, 1870, D-16, p 37
8. Governor Grey to Earl Grey, 15 May 1848, BPP, vol 6 [1120], pp 24-25

1.3 THE BROADER QUESTION OF TRUSTEESHIP - SOME EARLY PRESSURES

The early governors, Hobson and FitzRoy, could be described as sympathetic to the principles of protection. An early test of these principles took place under circumstances which the Crown had not sought. Peter Adams has described a series of concessions made by administrators and officials to accommodate the New Zealand Company which are hard to reconcile with the promises of positive trusteeship. Hobson offered to sanction 'any equitable agreement' for persuading Maori to give up their pa and cultivations in Port Nicholson. Commissioner Spain beat down the 'exorbitant demands' made by local Maori to £1500 as compensation for their claims. Even George Clarke junior, officer for the Protectorate Department, told them, as Adams writes:

> that they had no choice but to accept compensation, as they could not be allowed to resume lands built on by settlers, even though they had not been validly purchased. FitzRoy exerted considerable pressure on the Te Aro Maori to accept £300 for valuable land which they had never sold and which happened to be right in the middle of the town of Wellington, by stressing the valueless nature of Maori lands.[9]

The experience at Port Nicholson and other settlements associated with the New Zealand Company contributed to a hardening in attitude of Government officials towards the location and size of reserves. Government agents in the later 1840s argued against Maori retaining sites which might interfere with the progress of European settlement. This applied not only to valued food gathering resources but also to scattered cultivations. But any particular outcome depended on the relative strength of the parties in negotiations. There is no single transaction which can be taken as typical, when looking at the history of reserves.

Governor Grey developed the Crown's approach further in an important dispatch to Earl Grey in 1848. His policy was linked to an expectation that Maori would assimilate very rapidly with European society and economy. Maori would no doubt continue for some time to hold ill-defined regions but as settlement progressed traditional Maori in tribal society would be limited to well-defined reserves: 'small portions of land, for the purposes of cultivation' would be reserved for each tribe.[10] Grey was aware that Maori traditionally needed wide land areas for hunting and gathering. Far less land was needed for the European-style farming which was envisaged by this policy.

1.4 CONCLUSION

Later in the century, inconsistencies from the 1840s about the status and purpose of reserves were to re-emerge. Successive governments responded by attempting to define reserves systematically in legislation. As late as the 1880s the reports of the

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9. Adams, pp 191–192
10. Governor Grey to Earl Grey, 15 May 1848, BPP, vol 6 [1120], pp 24–25

reserves commissioner show confusion persisting. As well as confusion over the purpose of particular reserves, the outstanding question of how much land should properly be reserved was not satisfactorily settled.

Outside the concept of reserves created by sales was all the other land Maori still held on traditional title. It is not clear that Maori themselves made any distinction initially between lands reserved within a block and lands held back altogether from the sale process. It could be suggested that neither did the Crown. Some lands were, indeed, preserved for the sellers and their children for ever, according to the agreements. Other reserves were purchased by the Crown within a few years of the original transactions.

The impact of the Crown's policies in these early years was very uneven. It must be remembered that in the Crown colony period much of the North Island remained outside any sort of formal settlement.

CHAPTER 2

OPINIONS AND EXPERIMENTS – THE LATE 1850s

2.1 INTRODUCTION

There were recurrent themes in the development of the Crown's approach to reserving land for Maori or restricting it from alienation. Official thinking about reserves was bound up with the questions of changes in land use and land tenure. Europeans assumed that Maori would rapidly assimilate to the European economy, for which European land tenure was appropriate. Pressure to acquire land from Maori was generally an element in this approach, though principles of trusteeship were also present.

It is important to understand what options were considered by the Government before it embarked on policies. Governors and officials debated questions of principle, particularly after 1856, when Europeans had already gained self-government. A major question was how to reconcile the protection given to Maori traditional landownership under article 2 of the Treaty with the changes which were already taking place. The outbreak of the wars tends to overshadow other developments in the later 1850s and early 1860s. New measures were already under consideration when imperial responsibility for Maori came to an end. The Native Land Court and the lifting of Crown pre-emption emerge from the debates of this period.

2.2 GORE BROWNE AND THE 1856 OPINIONS

With the advent of responsible government for European settlers in 1856, native policy was reviewed by the Governor, Sir Thomas Gore Browne. The decision was made that Maori affairs would continue to be an imperial responsibility. The principles on which native policy was based were restated by the circle of advisers around the Governor. In the process, the Treaty was revisited, and some new promises were made about Maori landownership.

The Governor set up a board of inquiry, which called on a wide range of people, Maori and Pakeha, for opinions on land questions. The focus was on how Maori might in the future hold land, rather than the use made of what could be termed 'traditional reserves', that is, land held communally under customary title. There was a shift in the debate to the related but wider issue of whether Maori should be

restricted from alienating land once it was Crown granted. Two key questions for this subject were:

> Should such grants [of land on Crown title to individuals] contain a restriction, to the effect that it should not be sold or let to Europeans until after the grant has been in the possession of the native proprietor for a given term of years?
>
> Would there be any danger of their selling all their lands, and becoming paupers?[1]

There was a mixed response to the question about restricting titles. Paora Tuhaere of Orakei was confident that no restrictions were needed:

> Many individuals would like to get their land set out and surveyed, with the view of obtaining Crown grants; but I think the chiefs would oppose it. . . . The Crown grant should be unrestricted. The natives would not sell the lands granted to them; they would always retain sufficient lands for their own use; they would feel so degraded if they parted with all their land.[2]

The Anglican Bishop, G A Selwyn, was more cautious, but even so thought that in the long run there should be no distinction:

> I think the native owners should get Crown Grants, with power to lease, but not to sell; but this I consider a temporary measure, preparatory to their admission to full and equal rights in all respects with ourselves. Some have repurchased portions of the land sold by their tribe for the purpose of getting Crown grants.
>
> My reason for wishing that the power to sell should not at present be given by Crown grant is, that if they unfortunately took to drink they would sell their land and become paupers.
>
> I think the land of the principal chiefs should be entailed, at least for some years to come, to secure the family in its hereditary influence and respectability.[3]

The balance of opinion about titles among those consulted in this survey could be described, in terms of the Treaty, as shifting very cautiously towards article 3 rights. The report recommended that titles, when issued, should be the same as those for Pakeha. The general opinion was that though the issue of Crown grants was very desirable where ownership could be established, practical difficulties made this policy in the meantime impossible on any extended scale.[4]

Both the Governor and the board of inquiry believed that, independent of the question of land sales, Crown titles would enhance Maori security and that individual tenure was essential for their advance in material civilisation. This course was represented as serving their 'real interests'. Instead of relying simply on sales to define reserves, Gore Browne moved forward. He outlined a policy where the portion of land required by its owners for occupation and use would be made inalienable under a Crown grant. Endowment reserves for education and other

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1. 'Report of Board appointed by . . . the Governor to inquire into and report upon the State of Native Affairs', 29 July 1856, BPP, vol 10, p 520
2. Ibid, p 555
3. Ibid, p 546
4. Ibid, p 520

Maori purposes would be set aside. The remainder of the land would then, where possible, be held on Crown title and alienable in the usual way. He also suggested a plan for the Government accepting land for auction. Once these points were settled, 'every exertion should be made to acquire all remaining lands which are at present not only useless but harmful to the aborigines'.[5] The first step in this policy was to secure, as inalienable reserves, those lands which Maori occupied and used, which had been the intention of British statesmen and governors in New Zealand since the beginning of the colony.

2.3 HOW MUCH LAND WAS 'AMPLE', OR AT LEAST 'SUFFICIENT FOR NEEDS'?

Reserves and restrictions on alienation had a protective function, though they were also promoted in relation to selling land. It has been explained that a major concern of the Governor and his advisers in this period was the Crown's responsibility for setting aside land for Maori before pressing ahead with the purchase of the rest.

How much land should be set aside? Comparative figures for Europeans give some indication of contemporary ideas. The New Zealand Company's figure for the original Port Nicholson settlement of 100 country acres and one town acre reflects what the scheme's promoters thought would attract capital, and support a rentier class. This land was for the wealthy minority. By far the larger group in the scheme, the assisted immigrants, would be landless in order to supply a labouring class. This was represented as being for their own good and for the wider good of society. Most Maori were assumed to belong naturally to the landless labouring class, but in the New Zealand Company's scheme of things, chiefs were to be among the propertied gentry.

A parallel French company, the Nanto–Bordelaise Company, was more generous to immigrants in the lower social group. Five acres were offered to French male immigrants at Akaroa, with the prospect of gaining more if they could clear land. For their sons, the amount was two and a half acres.[6] For German immigrants, who paid their passage back over three years to the organiser, the prospect of 20 acres, with a village lot of an acre, was quoted as reasonable in 1862.[7] The Auckland provincial government offered 40 acres to each adult immigrant, 20 to each child.[8] Military settlers were treated more generously by the New Zealand Government. A private received 50 acres farmland (and, at Tauranga at least, a quarter-acre town section). Higher ranks were awarded more.

The cases are quoted only to give an impression of contemporary thinking. As parallels they were borne in mind.[9] There is no evidence that any of these examples was used directly as a model for setting reserves for Maori. Few of them proved

5. Gore Browne to Newcastle, 20 September 1859, BPP, vol 11, p 96
6. Peter Tremewan, *French Akaroa: An Attempt to Colonise Southern New Zealand*, University of Canterbury Press, Christchurch, 1990, p 50
7. 'Papers relative to the Introduction of German Immigrants into New Zealand', AJHR, 1862, D-1, p 3
8. C Heaphy, 31 July 1871, 'Report on Native Reserves in the Province of Hawke's Bay', AJHR, 1871, F-4, p 61

realistic for the Pakeha for whom they were intended. The New Zealand Company's projections, in particular, are seen by historians now as completely unsuitable for the New Zealand environment, and for Maori society. Yet Wakefield's notions of social order based on inequality of landed property was a pervasive one. These ideas were seldom explicitly stated, but they were very widely held.[10]

An elaborate plan allocating land for Maori according to notions of social structure was outlined by T H Smith, the Assistant Native Secretary, in a memorandum for Governor Browne in 1859.[11] First, reserves were to be a proportion of the land ceded, on a regular system. Three-tenths would be adequate, Smith thought, for the wants of the owners. This should include 'villages, cultivations, sacred places, and lands in actual occupation.' One-tenth would be reserved for public purposes and endowments. Two-tenths would then be available to be reconveyed on a grant from the Crown. This was a far higher proportion of the total conveyed than the New Zealand Company had calculated, and also a great deal more than in many Crown purchases that had taken place. Smith proposed that a certain proportion should be inalienable, or alienable only by consent of the Governor. The names of every interested individual were to be placed on a register, with the object of issuing individual grants in due course.

Grantees would then make selections of town and country land under regulations, according to rank. Smith suggested four classes: the first class, the principal chiefs, were to have one-fifth of land; the second class, the younger chiefs, would also one-fifth; the third class, comprising the wives and children of chiefs as well as 'freemen' would have two-fifths, leaving for the fourth class, the wives and children of freemen, another fifth.

The Maori population in the North Island was estimated at 50,000 to 60,000. There would be in round numbers nearly 500 acres to each individual if it was divided equally. In Auckland, where population was greater, Smith thought the figure would be nearer 400 acres each, or 125 people to every 50,000 acres. He then went ahead to calculate how land would be divided, out of 10,000 acres, two-tenths of a block of 50,000 acres. He estimated that for every 125 of the Maori population, there would be three in the first class, seven in the second class, 55 in the third class, and 60 in the fourth class. Social distinctions were quite strongly marked in his proposal for allotting land. Each individual of first class would have 666 acres; the second class significantly less, with 286 acres; the third class would have 73 acres; and the fourth class only 33. These were not necessarily inalienable, though as noted, he proposed 'a proportion' should be.

This scheme was endorsed by Gore Browne, who was anxious to find a system which 'would ensure such advantages to the natives, as might induce them to sell

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9. Ibid. Heaphy, for example, cited the Auckland figures to indicate that the amount of land available for each Maori individual in Hawke's Bay in 1871, averaging the remaining land, was still relatively reasonable.
10. It was not explained how far chiefs were expected to support wider groups of dependants from their estates. Writing rather later, F D Fenton, the first chief judge of the Native Land Court, took a hard line on the prospects of those at the bottom of the social scale, linking the allocation of land with social engineering, 'to create among them those two classes without which civilization cannot exist, gentlemen and labourers; one class to labour, and the other with leisure to devote to mental culture.' 30 July 1869, NZPD, vol 6, p 167.
11. Smith, Assistant Native Secretary, to Governor Browne, 20 September 1859, BPP, vol 11, pp 101–103

their lands more freely to the Government.'[12] The figures suggested were not intended to be an inflexible rule, but they were meant to indicate 'the proportions existing between the numbers of the native population, the territory they hold, and the portion of it which should be secured to them.'[13] It is significant that although greater recognition was given to chiefs, provision was made for ordinary people and they were not seen as the equivalent of landless labourers. In this respect, it was unlike the New Zealand Company's plan for Maori society, which in other ways it resembled. How far it was indeed a reflection of the contemporary Maori world is another question, but the emphasis on social rank which this proposal embodied shows the way officials were thinking.

2.4 EXPERIMENTS

There was plenty of theorising about what changes in Maori land tenure would achieve. Some of the plans put forward by Government officials have been described. Others put forward by settler politicians were characteristically less protective. As Donald McLean, who was Native Secretary in the later 1850s as well as chief land purchase officer, pointed out, 'until time shall have tested their real merits, they must be regarded simply as an experiment.'[14]

An experiment McLean himself was promoting was already under way. His instructions to Robert Parris, district commissioner at Taranaki, provide some insight into McLean's ideas about the nature and purpose of reserves. He too saw them as a form of social engineering:

> If you find it necessary to make purchases subject to the condition of large reserves for the Natives; I should prefer that you should follow the system adopted in the Hua purchase; that, namely, of allowing to the Natives, (subject to certain limitation), a pre-emptive right over such portions as they may desire to repurchase: such land to be thenceforth held by them under individual Crown Grants, instead of having large reserves held in common.[15]

McLean's ideas were not new. They were part of the common stock held by many Europeans: Maori were unable to use all the land they owned, and a change in tenure was all that was needed for Maori to become part of the 'modern' economy. The group that he was particularly interested in attracting to this programme were:

> the young and intelligent Natives . . . in order that their present system of communism may be gradually dissolved, and that they may be led to appreciate the great advantage of holding their land under a tenure, more defined, and more secure for

12. Gore Browne to the Duke of Newcastle, 20 September 1859, BPP, vol 11, p 96
13. Smith, Assistant Native Secretary, to Governor Browne, 20 September 1859, BPP, vol 11, pp 101–103
14. Memorandum by Native Secretary, 13 October 1858, BPP, vol 11, p 65
15. McLean to Parris, 26 August 1857 (original in New Plymouth Public Library, copy filed with MT New Plymouth Series 1), MA register, vol 3, NA Wellington

> themselves and their posterity, than they can possibly enjoy under their present intricate and complicated mode of holding property.[16]

The outbreak of war at Taranaki overshadowed the continuity of certain aspects of Crown policy. Where there was tension over land, the introduction of new principles of Crown legitimisation of land tenure was politically very provocative. This was not the case everywhere. However, in practice it was increasingly discouraged by provincial governments, whose control over the disposal of land gave them the power to repeal the special legislation which had given Maori the opportunity to repurchase land at a set rate.[17]

As well as promoting the repurchase of lands in the 1850s, the Government was also encouraging chiefs to accept land as their personal property by singling them out for the ownership of individual blocks of land. In 1862, a list of native reserves had a column for ownership with the heading 'Tribe, Section, or Name'.[18] In some districts, many reserves were listed under the names of individuals though it is questionable how far those lands were regarded by Maori as the exclusive property of that person.

The list of individuals to whom either a Crown grant had been promised or one had been already issued is probably more significant in this respect. In Wellington and Auckland, many of these were not directly connected with the cession of land, in contrast with Hawke's Bay, where all the cases were 'part of the consideration in deeds of cession'. Hawke's Bay properties were of 100 acres or more, while those in Taranaki were quite modest, many around 10 acres. Almost all these lands were described as 'individualized'. Details were also given of the grants already issued and it was entered where Maori owners had paid for their land.[19]

Although the Crown promised grants to lands, many of these were not issued until special legislation in the 1860s. It appears that the Governor had no legal power to issue Crown Grants to Maori in the 1850s. However, as McLean pointed out, grants could 'be indirectly attained through "The New Zealand Native Reserves Act 1856" if the Natives will agree to hand over the reserves to the Commissioners . . . appointed under the aforesaid Act for this purpose.'[20] Clause 15 of the Native Reserves Act 1856, was used by the Crown to issue grants some in this period. McLean reported in 1858:

> Individualization of title, and the securing of properties on chiefs, has also been attempted and carried out, in connexion with the acquisition of native lands in different parts of the country; and about 200 valuable properties, varying from 20 to 2000 acres in extent, have been secured to individual natives, to be held under Crown grants.[21]

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16. Ibid
17. James Mackay reported a specific case at Wairau, in Marlborough, where Maori with scrip were frustrated by local officials from acquiring land, adding: 'Many Natives consider it a breach of faith on the part of the Government in permitting the regulation, allowing them to purchase land at ten shillings an acre to be repealed.' J Mackay to Native Secretary, 3 October 1863, Makay, 'Compendium', vol 2, p 138.
18. 'Return of Native Reserves made in the cession of Native Territory to the Crown: also of Crown Grants to be issued to Natives, and of Crown grants already issued', AJHR, 1862, E-10
19. Ibid, pp 22–30
20. McLean to Searancke, 22 August 1858, Turton, *Epitome*, D, p 30

Although most lived on traditionally held land, Maori too were experimenting in these years with new ways of settlement, independent of any Government pressure. Early model villages with houses and streets were established by Maori leaders. For example, Wiremu Tamehana Tarapipipi Te Waharoa's model village at Peria, built in 1846.[22] Potatau Te Wherowhero had a settlement at Mangere on a Crown grant, in exchange for a block of land at Waikato.[23] Several other model villages were associated with mission stations.

The proposal put forward in 1860 by F D Fenton, later to be the first chief judge of the Native Land Court, was in some ways a development of these, but its principal aim was rather different. His plan was for a model farm, where methods of agriculture would be taught. This was linked quite explicitly to the view that intensive farming would mean that Maori would require less land.[24]

2.5 THE KAIAPOI EXPERIMENT

One such model scheme will be discussed in some detail, because it was put forward as a prototype for the use of reserves. Its promoter, Walter Buller, wrote:

> As I have been led to regard the individualization of the Kaiapoi reserve as an experiment, the success of which would go far to determine the Government in some general and comprehensive scheme for the partition of Native lands and the individualization of title, I consider it my duty to furnish a full and particular account of my proceedings and the results which attended them.[25]

The partition of the reserve at Kaiapoi, near Christchurch, is a well-documented example of the realisation of an orderly plan. It was an area where the amount of land available for occupation and use had already been determined before the Native Land Court era. With the encouragement of Walter Buller, as resident magistrate, the residents of this reserve pressed ahead with partitions and individual titles in 1859. By runanga decision, though again with Buller's encouragement, the land was divided equally, rather than according to rank. The sections worked out at 14 acres for each male head of a family. According to Buller, this was to be a demonstration of the results of fixity of residence and individualisation of title, and serve as a prototype for the Crown's policies generally. He believed that change in tenure was about to transform Maori society:

> Communism in this land is generally admitted to be the great obstacle to the social and material advancement of the Maori people. . . . So long as their lands are held in common they have, properly speaking, no individual interest in improvements, and consequently there is little or no encouragement to industry or incentive to ambition.

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21. Memorandum by Native Secretary, 13 October 1858, BPP, vol 11, p 65
22. E Stokes, 'Te Waharoa', in DNZB, vol 1, W H Oliver (ed), Wellington, 1990, p 516
23. *Te Karere Maori*, vol 1, no 2, p 9
24. AJHR, 1860, F-3, pp 133–138
25. W Buller to the Native Minister, 1 March 1862, 'Final Report on the Partition and Individualization of the Kaiapoi Reserve', AJHR, 1862, E-5, p 4

> On the other hand, it may be safely argued that nothing would tend more powerfully to call forth their industrial energies, and promote their desire for worldly improvement than the possession, in severalty, of an exclusive title to a piece of land, however small in extent.[26]

Buller's views seem little more than hypocrisy in the light of his later career as a lawyer who made a great deal of money out of Maori land. But his ideas have to be taken seriously, because they were held by many others at the time, including those who had nothing to gain from them. Among these was the Reverend J W Stack, the Maori Missioner for the Church of England in Canterbury and agent for the Native Department from 1861 until the Government closed down his post in 1881. Stack had been born in New Zealand, was fluent in Maori, and lived in the Kaiapoi reserve in this period. He was initially convinced that individualisation of tenure held the key to rapid amalgamation. Stack supported the arrangement made by the central government for the equal division of Kaiapoi reserve, believing this would lead to a permanent increase in population and have many other beneficial results:

> better houses, better fences and cultivated farms. Many are impatient to begin these improvements. We hope that their morals will be improved. Instead of crowding together in a few houses, each man will then have his own cottage situated on his own little farm.[27]

These were the predictions, but what were the results? In little over a decade, Stack was reporting that poverty was on the increase. The timber which had been the source of wealth in earlier years (rather than the partition of the reserve) was all gone. Instead of cultivating the land, Maori were leasing it to Europeans, but the area owned by each family was too small to maintain them as rentiers. Stack wrote that one good result of their poverty was they were compelled to seek employment, but he recorded that only about half the population were able to work.

Because of poverty, Maori in Canterbury were assimilating to European life in ways that Stack deplored. Commodities had become necessities, and without ready money from timber, people were running up credit and going further into debt. Because of the rapid growth of European settlement in Canterbury, Maori no longer had wide access to traditional resources. Their cash income was principally from leasing. Maori at Kaiapoi were not able to cultivate their land intensively themselves. They became rentiers at a low economic level.

Stack's report shows how radical the Kaiapoi partition was, in terms of current European ideas, and probably of Maori ones, too. It suggests that the normal pattern elsewhere was one of marked inequality:

> The Maoris would probably have sooner become reconciled to their altered condition if some method could have been devised to prevent the chiefs from being reduced to the level of their slaves. These men, accustomed before the colonization of the country to ease and plenty, cannot submit without murmuring to their altered

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26. Ibid, p 11
27. J W Stack, 'Home Maori Mission', Church quarterly paper, Diocese of Christchurch, no 1, October 1861, p 7, Diocesan Archives, Christchurch

condition, and their complaints are echoed by their inferiors. If the largest share of the reserved land had been assigned to the chiefs, they would have been spared much humiliation, and the inferior Maoris would have been more willing to adopt some regular calling.

If it is objected to this view of the case, that Native custom would have obliged the chiefs to maintain their dependants on the land, I need only point to the controversy now being carried on here between grantees and allottees to show that no feelings of common kindred would prevent the former from expelling the latter from the reserves whenever it suited their interests provided the law gave them the power to do so.[28]

Some people, at least, had shares in land elsewhere through marriage and other family connections, and social and economic levelling was not complete. Certain families were relatively comfortable, but there was not the great economic and social range that is a feature of Maori society in the nineteenth century in parts of the North Island. There was a contrast even with Otago, where the property of the Taiaroa family kept on increasing during a period when many were becoming landless.

What quantity of land was required? In 1879, under examination at the Smith Nairn commission, Sir George Grey fell back on the vague term 'ample'. He was clear that it should have been more than 14 acres a head.

What should have been the function of these reserves? Grey replied:

> Of course I imagined that Native Gentlemen would arise in the country – men living with comfort – I did not imagine setting up a servile race with 14 acres a head.[29] . . . the impression on my mind was, that each Chief would have as much property kept for him as would enable him hereafter to live comfortably as a European gentleman, and that every native farmer should have a farm kept for him, with sufficient land to run their stock on besides. That was decidedly my conception of what should be done, at the least.[30]

Henry Tacey Kemp had already stated that he had understood that as well as places of residence and 'mahinga kai', Maori who ceded land in the Ngai Tahu sale of 1848 were to receive 'ample Reserves from which in the course of time, they might derive considerable rents as a means towards their securing permanently the comforts and necessaries of civilized life.'[31] Grey and Kemp both indicate that 'ample reserves' would mean estates for chiefs, land for farmers, and also land to lease for a good cash income.

Close to home, 'ample' was as minimal a view as it had ever been. Before a joint committee in 1888, Rolleston insisted on a version of the sale that presumably was the standard one for European settlers in Canterbury, where he had been a provincial leader:

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28. Report to Hon the Native Minister, 30 April 1873, 'Reports from Officers in Native Districts', AJHR, 1873, G-1, 21
29. Middle Island Native Land Purchases Commission, no 32, 6 December 1879; (photocopy) Wai 27, doc 3/10, pp 29–30
30. Ibid, pp 31–32
31. Middle Island Native Land Purchases Commission, no 5, 25 August 1879, (photocopy) Wai 27, doc 3/8, p 2

Captain Russell: Have you had any means of knowing whether the Natives realised what ten acres of land were when they parted with Ngaitahu how really little it represented? Do you think, in other words, they would have accepted such a reserve if they had known what it meant?

Rolleston: I think they knew. It was pointed out on the ground what it meant, because the boundaries were marked, and that area represented all the land that they had in cultivation – that is, that they bestowed labour upon, and really had any title to.[32]

Rolleston stated what he believed, though it was not what had happened. Russell's questions are also relevant, reflecting a change in attitudes and in policies:

Russell: But it is . . . provided that the Native shall not be allowed to alienate their land unless a certain amount remains – sufficient to insure their having ample land left to prevent them becoming paupers?

Yes

Do you remember what this amount is?

No, not at this moment.

My object is to inquire whether you would not think the Natives of the Middle Island should have secured to them an amount such as has been declared as necessary for the Natives in the North Island?

I think this purchase must go upon its own merits. A provision of that kind respecting the North Island, or any particular part of the colony, would not necessarily apply and I think that what was done in respect of this purchase was much more ample and satisfactory than in any other purchases in the colony. I think that it would be most mischievous to do what Mr Mackay urges – that is, to reopen the question as to what area should be given to these Natives, seeing that the question has been finally decided.[33]

Rolleston's view was that small annuities would be more appropriate than awards of land to relieve poverty. Indeed, in the 1870s, Government relief – food and blankets – was already being distributed to the elderly and sick among the Maori population in Canterbury.[34] Kaiapoi had led the way into the future, not as Buller had envisaged it, but with inadequate reserves, visible poverty, and the early appearance of landlessness. Rather than being used as a instructive example, Kaiapoi's brief role as a model project for reserves was forgotten.

2.6 CONCLUSION

There was continuity as well as change with the movement into the Native Land Court period. This has bearing on ideas that were held about the provision of land for reserves.

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32. 'Report of Joint Committee on Middle Island Land Claims', 22 August 1888, AJHR, 1888, I-8, p 81
33. Ibid
34. Stack to Native Minister, 21 May 1874, AJHR, 1874, G-2, p 23

There was already great diversity between various regions. By far the greater part of the North Island remained under customary ownership.[35] Where sales had proceeded, reserves were also on the whole, held communally and under traditional title. Some individualisation had already taken place. Crown grants had been issued to a few Maori, and more had been promised. The reserve at Kaiapoi in Canterbury came the closest to complete individualisation of a reserve in this period, though it was some years before the survey was properly completed and grants issued. A very positive account of Canterbury Maori's attainment of higher living standards was given in *Te Karere Maori*, as an inducement for others to follow.[36]

There is a great deal of evidence that the situation was a fluid one. Some of the new ways of owning and using land were celebrated in the pages of *Te Karere Maori*. As the Government paper, it was bound to emphasise opinions favourable to official policies, but its editors were unlikely to have invented the speeches recorded at the meeting of chiefs at Kohimarama in 1860. In fact, a number criticised Government policies. Several spoke about new ways of holding land, and were optimistic about material progress.

Different individuals brought different emphases to the question. Hukiki, from Ngatiraukawa at Otaki, supported an egalitarian approach:

> According to my opinion the land should be marked. Because the Chiefs are grasping at great quantities of land, leaving none for the poorer people. The Governor has now offered it to us. Now therefore I say we have indeed become children of the Governor.[37]

But the words of Ihakara, another Ngatiraukawa chief from the Manawatu, sounded a warning bell to this assembly:

> Hearken my Pakeha and Maori kinsman. I will point you out two tribes of low standing in this Assembly of influential men. The reason why I say these two tribes are of low standing is because we are floating about on the earth. We have no land. The influential men in this Assembly do not derive their influence from anything in themselves, but from their land.[38]

With pre-emption, the Crown had the power to secure adequate reserves. Where these had not been made, it had been through a failure to respect the principle of 'fair and equal contracts' laid down in Normanby's instructions to Hobson. There was an element of temporising in the Crown's approach to transactions. Some hapu had emerged from selling land with large 'reserves'. These were seen by the Crown as waste lands in disguise, to be purchased when the opportunity arose.

It has already been noted that most was held as reserve under customary tenure, but they were in certain respects differentiated from land which had not been sold.

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35. For the situation in 1859 see 'Map of New Zealand shewing approx the extent of land acquired from the Natives', with Gore Browne to the Duke of Newcastle, 20 September 1859, BPP, vol 11, p 96
36. This account was almost certainly provided by Walter Buller, who had been instrumental in setting up the project: vol 7, no 3, 15 February 1860, p 4.
37. *Te Karere Maori*, 31 July 1860, new series, vol 7, no 14, p 38; *Te Karere Maori*, 15 February 1860, vol 7, no 3, p 38
38. Ibid

The external boundaries were those specified on deeds, which were usually signed by leaders, though sometimes the whole group signed. The deed gave recognition of a right to exclusive ownership to whomever was named in it, as against other parties, though the legal status of the reserve was not otherwise changed.

Some reserves were held by individuals as rewards for service, sometimes in connection with a sale, but not necessarily. There was also land which had been purchased by Maori. Though the arrangements to do this varied, the land was usually selected from a block in the course of a transaction. By 1865, a relatively small amount of land was individualised, and Crown grants had been promised, though not all had been issued.

It is an over-simplification to see the pressure for change in Maori land-holding as coming only from Pakeha land hunger. It is true that settler politicians were impatient to gain control over land policies. But those whose opinions influenced the Crown believed that Maori were being offered not only security against other Maori, but an increased prospect of material prosperity. This approach was almost invariably linked with the idea that Maori would require a relatively smaller amount of land than they currently held. Central to this was ensuring that Maori retained sufficient land to support themselves; 'ample' if they were of higher social rank. This was to be achieved by inalienable reserves and, progressively, by individual titles with restrictions on alienability.

The Government was also obliged to pursue the interests of Pakeha settlers, which it believed could be reconciled with the best interests of Maori. It is this blend of apparent self-interest with trusteeship that produces some of the tensions of these early years. As an extension of trusteeship, the Crown took the view that because Maori might not know what was in their own best interests, Maori ought not to be allowed to retain land when it was not strictly required for their well-being. What might be termed hard-line paternalism led to an argument that persisted throughout the period under review: too much land under customary title impeded Maori progress. They would be better off on less land on a Crown grant and best of all if that land was held on an individual title.

The Governor was under constant pressure to acquire more land in the North Island. His response to a deputation of Auckland provincial politicians in 1859 contained a statement of two key issues in relation to reserves. He was not able to resolve them, and neither did any other Government with much success in the nineteenth century:

> It is very desirable for the interests of both races that the extinction of native title over all land not required for the use and occupation of the Maories, should be effected as rapidly as it can with justice. . . .
>
> My own opinion is that it is desirable to provide means for enabling tribes families and particular individuals to define and individualise their property, and that it would be just and proper to confirm well-ascertained rights by a Crown title; that in adopting such a system it would be necessary to make safe provision against individual improvidence, and to guard society against the consequences to which it would be exposed if natives were permitted to pauperise themselves . . .[39]

39. T Gore Browne, memorandum, 9 June 1859, BPP, vol 11, p 148

Regardless of other events in these years, the Crown was trying to find a more systematic way of regulating land holding and land transactions. It was hoped that changes could be made that would benefit both Maori and Pakeha. The board in 1856 had reviewed the whole sale process. Among their proposals was the idea of identifying each person's claim on a local district sketch or survey. The object was to compile a complete registry of all Maori land. This was seen as essential, whether a sale was immediate or not.[40] This idea, projected as early as 1840, with Russell's instructions to Hobson, seems an impossible undertaking. Other considerations apart, Government resources were too limited for such an ambitious project. Yet the idea was never quite abandoned in this period. Its attraction was that it was seen to resolve the key problem of defining land that Maori should retain, leaving 'surplus lands' for disposal.

This period culminated in the establishment of the Native Land Court. The gradual and ad hoc process of individualisation of 'reserves' of various sorts on to Crown title in the earlier years was extended very greatly by the court. Though there were great changes after 1865, this discussion has pointed to some of the continuities. Crown policy in relation to reserves in this period was still essentially experimental.

40. 'Report of Board appointed by ... the Governor to inquire into and report upon the State of Native Affairs', 29 July 1856, BPP, vol 10, pp 514–515

PART II

1865 TO 1900

CHAPTER 3

RESTRICTED LANDS AND RESERVES

3.1 INTRODUCTION

After the introduction of the Native Land Court, the question of ensuring that Maori retained sufficient land became more complicated. In the earlier period, the rights of Maori to dispose of their land had been restricted by pre-emption. One of the justifications for pre-emption had been the grounds that it was the Crown's duty to act protectively. When the Government no longer had the exclusive right to buy Maori land, placing restrictions on titles offered a means of continuing to act protectively.

This chapter will discuss the Crown's approach to restricting the alienation of land. The role of Government, that is, the legislature and the administration, and that of the Native Land Court overlapped. The measures proposed in the Native Land Act 1873 will be the subject of the following chapter. There will then be a chapter examining the Government's approach to the removal of restrictions on inalienable lands in the 1880s. The final chapter is a review of changing policies and laws towards the end of the century.

3.2 DEFINITIONS

Reserves had generally been made in the course of sales. Restricting the alienation of defined blocks of land took place at the point when titles were awarded, and lands came before the Native Land Court whether or not a sale was contemplated. In practice, it appears that restrictions also offered Maori themselves a way to preserve landownership. Most restrictions were conditional. They could be removed with the consent of the Governor in council, which meant, in effect, the ministry of the day.

How were restricted lands different from reserves? They had different origins, and varying legal definitions, but it is not clear that they had different functions. Reserves continued to be made in the course of sales, when land was held back by the owners from blocks sold to private buyers or to the Government. These remained the property of the owners. Reserves from private sales did not necessarily have legal status as reserves. The owners might at a later point sell this land.

On the other hand, land which was legally categorised as 'reserve' was to be made inalienable by the Native Lands Act 1866, and subsequent Acts. Under

section 3 of the Native Lands Act, or the purposes of the Act, the words 'Native Reserve' meant:

> 1. All lands vested in the Governor under and by virtue of 'The New Zealand Native Reserves Act 1856' and 'The Native Reserves Amendment Act 1862'
> 2. All lands reserved by Aboriginal natives from sale on the cession of lands to the Crown where such lands are specified as reserved in the deeds of sale
> 3. All lands comprised in blocks set apart for the benefit of Aboriginal Natives upon the sale by them of any lands
> 4. All lands comprised in blocks set apart for the benefit of Aboriginal Natives according to the directions of any Commissioner appointed to investigate purchases of land made from the Aboriginal Natives by the New Zealand Company and
> 5. All lands reserved for the benefit of Aboriginal Natives by the New Zealand Land Company or the New Zealand Company.

Section 11 of the Native Lands Act 1867 placed classes 2 and 3 together, and added:

> 5. Lands appropriated by the Governor for the use or benefit of any Aboriginal Natives.

Once these Acts came into force, Crown grants for land in native reserves had to contain the provision that the land was inalienable except with the consent of the Governor by sale, mortgage, or lease for a longer period than 21 years.

From the 1860s, governments had ways of making reserves other than through sales, such as the allocation of land by compensation courts in confiscated districts. In 1883, one million acres of reserves were described as inalienable. It would be possible to think of these inalienable reserves as a sub-category of restricted lands. Yet there were also nearly half a million acres of reserves listed as alienable. This apparently paradoxical status 'alienable reserve' can be explained by the range of circumstances in which reserves had been created.[1]

In 1885 the House of Representatives called for information on reserves and restricted lands. The following broad headings give a guide to the different categories:

> a return showing . . . the number and acreage of each respectively of reserves gazetted in accordance with the various Native Reserves Acts, or by special grants, or by awards of Commissioners, or by Compensation Courts, or by Acts of Parliament, or otherwise reserved, in what county situated, the number of them leased, to whom leased, and amount of rent in each case; also the acreage of land that has passed the Native Land Courts in each county, held by the Maoris as inalienable, with the name and acreage of each block.[2]

This important return showed a very wide range of measures by which lands might be reserved. The final category in the list above –'land that has passed the

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1. This can be deduced from comments on the removal of restrictions from lands in Taranaki, awards of the Compensation Court, which the West Coast Commissioner, William Fox, described as 'of a class which the Natives have always been able to sell without restriction.' AJLC, 1883, no 6, p 1.
2. 'Land Possessed by North Island Maoris', AJHR, 1886, G-15, p 1

Native Land Court . . . held by the Maoris as inalienable' – was seen as distinct. A very substantial total of 1,870,000 acres had been made inalienable in the North Island by 1886.[3]

3.3 RESTRICTIONS IN THE 1860s: SOME EARLY DEBATES

By the end of 1864, the abolition of Crown pre-emption had been proclaimed for all districts in New Zealand. This ended the period of monopoly in which the Crown had automatically had a direct role in all legal transactions to do with Maori land. Neither the Government nor its officials were very clear about the effect that private land purchasing would have on Maori society. As discussed in the previous sections of this survey, there was no accepted standard of how much land Maori ought to retain. Nor was there an agreed definition of reserves.

Initially there was no protection for existing reserves intended for occupation and use, if the Native Land Court did not choose to recognise that protection was needed. The chief judge, F D Fenton and his fellow judges took the view that if land was not legally in a trust, it was 'subject to the jurisdiction of the Native Land Court, and capable of being used or alienated for the private benefit of the owners at their pleasure'.[4] In 1865, the Native Land Court began to award individual titles to lands which had previously been regarded as reserves. While governments experimented with policies, the Native Land Court forged ahead, creating a new order which embodied the inconsistencies which were already present in this area.

The Government responded with a law that existing and future reserves should be made inalienable. The Native Lands Act 1866, as outlined above, was intended to protect not only the various lands in trusts but also the much wider group reserved in deeds of sale to the Crown. Reserves were not to be sold, mortgaged, or leased for more than 21 years without the consent of the Governor. It had been optional initially for the court to take evidence on the propriety of placing restrictions on any land that came before it. By section 11 of the 1866 Act, the court was required in every case to take evidence on whether or not lands should be alienable, and attach a report of the decision to all certificates and grants.

In many districts the Native Land Court had made little inroad in its first two years of operation, because of lack of surveys. It had a major impact, however, in Hawke's Bay where both Government and private buyers were vigorously 'opening up' the district. As G S Cooper, the resident magistrate at Napier, pointed out, it was unfortunate for the rising generation that so many reserves had passed through the Native Land Court already in 1866, and so had missed coming under the Native Lands Act 1866. (The Act did not come into operation until 30 December 1866, nor did it affect the Crown's incomplete purchases.) Cooper urged the Government not to relax in any case 'the wise and salutary' restrictions upon the alienability of reserves imposed by the Act of 1866.[5]

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3. Ibid, p 13
4. This phrase was used by William Martin, differentiating classes of land; 'Memorandum on the Operation of the Native Lands Court', AJHR, 1871, A-2, p 20.
5. Cooper to Richmond, 26 August 1867, Turton, *Epitome*, section D, p 66

The Auckland provincial council took the opposite view. It attacked the central government for bringing in measures which would hamper access to valuable land, as 'contrary to good policy, and opposed to the best interests of both Natives and Europeans in this Province'.[6] Some of the confusion surrounding restrictions, even in Government circles, appeared in a paper printed for the Legislative Council where two members gave different explanations of these measures. The point at issue was the function of reserves and inalienable lands: did they have a long-term purpose or were they merely a temporary expedient?

E W Stafford, the Colonial Secretary, outlined in response what he saw as the basis of the Crown's policy towards reserves. He does not seem to have distinguished between categories of reserves. As he understood them, reserves were public lands in trust, specially set apart for the permanent benefit of Maori when lands were ceded to the Crown. In his view it was hardly reasonable to treat reserved lands in the same way as lands held by individual or tribal rights. (By the latter he meant land still on traditional title.) He argued that Maori reserves should be seen in the same light as public reserves in England and in New Zealand itself.

In England, as he pointed out a special Act of Parliament was needed to alienate any public reserve permanently. In New Zealand, the Public Reserves Act 1854 expressly protected land under the Act from alienation for longer than three years, and the Public Reserves Amendment Act 1862 had imposed additional restrictions. The Native Lands Act 1866 could therefore not be seen as unusual or unreasonable.

Stafford does not seem to have understood the status of these lands. Either land known as 'Maori reserve' was a form of public reserve, secured by law for the community, or it was not. Even with the new restrictions, Maori reserves, once vested by the Native Land Court in individuals, continued to be more vulnerable than their 'public' counterparts in the European tradition.

Stafford defended the further obligation placed on the court, to append a report on every case as to whether or not there should be alienation restrictions, as an extension of the Crown's policy towards reserves. Stafford made it clear that he saw the recommendation on alienability to be altogether dependent on the court. It was the court which would decide whether it was proper to place any restriction; 'in other words, to state, after hearing evidence, whether it is advisable that public Native Reserves should be made in such land. It cannot, with any reason, be argued that such a provision is unwise or unjust.'[7]

Stafford presented the issue not as one involving trusteeship or protection, but as a question of equity, asserting that Maori, alike with Europeans, were entitled to the permanent preservation of their public lands. It was in this light that he viewed reserves already made and the lands which in future would be declared inalienable.

In contrast, the position taken by J C Richmond as Native Minister was markedly unsympathetic to the view that Maori would hold on to restricted lands on any significant scale. Richmond was also responding to criticism of the Government's move towards protecting land for Maori. In his view, the Native Lands Act 1866

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6. 'Papers relative to the Native Lands Act, 1866, and the East Coast Land Titles Investigation Act, 1866', encl 1, AJLC, 1867, p 39
7. E W Stafford, Colonial Secretary's Office, 7 January 1867, AJLC, 1867, pp 39–40

was not intended to make much difference to the 1865 Act, nor was it expected that it would 'substantially interfere with the process of converting Maori into Crown title'.[8] Richmond made very little of the Crown's direction to the land court to inquire whether there should be any restrictions on alienation made on grants or certificates. He did, however, think it was worth justifying the Act, even as a short-term measure:

> Cases are already coming to the knowledge of the Government in which Natives have divested themselves of all their land, and it is with a view to protect the public generally, and the Natives themselves, from the curse of pauperism; to prevent the establishment of a sort of gipsy race, homeless, destitute, and idle, as well as to secure the permanent good working of the original Act by securing its popularity among the Natives against the revulsion of feeling that might otherwise have ensued, that the responsibility of reporting in every case has been thrown on the Court, instead of the mere permission to enquire and report when the Court thinks fit, which the original act contains.[9]

This very weak sense of trusteeship was expressed by a Native Minister who had never identified himself with the old Crown Colony administration. Nevertheless, under attack, Richmond stuck to his policy. He also passed the Maori Real Estate Management Act 1867, which put similar restrictions on the lands held in trust for minors.[10] Yet, in contrast to what Stafford had written, Richmond indicated that neither restricting nor reserving land would permanently prevent its alienation. These measures would merely retard the sale of the small part of Maori property to which they were applied.

The object of the Government's policy, according to Richmond, was 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'.[11] He went on to point out that the executive Government had no power to say what land should be restricted. It was the land court that had the authority to apply the law to the country at large.

Stafford seems to have believed that all reserves and restricted lands were a form of trust, which should be as permanent, and as jealously guarded, as public reserves were for the Pakeha. Richmond dismissed them as a temporary expedient, unlikely to impede significantly the alienation of Maori land. Nor did Richmond think that the law would delay for long what he accepted as inevitable: the future for most Maori would not be greater material prosperity, but landlessness. He was also clear that the executive Government could not direct what land should be inalienable. That task had been given by legislation to the court.

Neither Stafford's nor Richmond's ideas became completely dominant in the Crown's policy over the next decades. Richmond had distinguished very clearly between the executive, the legislative and the judicial branches of Government.

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8. J C Richmond, Native Secretary's Office, to J H Burslem, 15 January 1867, AJLC, 1867, p 41
9. Ibid
10. Ward, p 215
11. 'Papers relative to the Native Lands Act 1866, and the East Coast Land Titles Investigation Act 1866', AJLC, 1867, p 41

Once laws were passed, in principle it was up to the land court how they were applied. In fact, much remained experimental. Ministries of the day – what we would normally call governments – continued to hold inquiries and to change the laws, often in reaction to the working of the Native Land Court. In spite of Richmond's disclaimer, the 1866 Act was evidence that the intention of trusteeship persisted.

3.4 THE NATIVE LAND COURT JUDGES AND THE INTRODUCTION OF RESTRICTIONS

The chief judge of the Native Land Court, F D Fenton, made his own position clear in a report on the working of the Native Lands Acts. He was opposed to the provision of the 1866 Act which required the court to report on every title whether land should be restricted from alienation:

> The Act of 1866 should, I think, be entirely repealed; . . . I think the Maori will progress the better the more he is exempt from protection or interference to which other citizens are not subject.[12]

He wrote that he believed all the judges concurred in that opinion, but in practice they responded to the restrictions clause very differently. F E Maning was among those who agreed with Fenton. Nevertheless, he reported from Hokianga that a large proportion of the land which had come before his court had been 'secured to the Native owners inalienably'.[13] The report suggests that it was the Maori owners who had made the choice to which Maning had given the court's approval. Figures for 1865 to 1870 show that of some 1,307,627 acres that went through the Native Land Court in the Auckland district, 420,328 acres had restrictions recommended, which is nearly one-third.[14] (The figures are not sufficiently broken down to be able to compare Maning's contribution to this total with that of Fenton.)

H H Munro, who had been hearing claims in Waikato, Coromandel, Hauraki, and Hawke's Bay, stated his understanding of the provision:

> 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.[15]

As the same names were on many titles in Hawke's Bay, the individuals who appeared in the court would indeed seem well-endowed with land. It was later claimed that he had refused requests for restrictions.[16] Although this was Munro's

12. Fenton to Richmond, 11 July 1867, 'Report of the Working of "The Native Lands Act 1865"', AJHR, 1867, A-10, p 5
13. Maning to Fenton, 24 June 1867, AJHR, 1867, A-10, p 7
14. 'Report on the Working of the Native Land Acts', AJHR, 1871, A-2A, p 50
15. Munro to Fenton, 27 June 1867, 'Report of the Working of "The Native Lands Act 1865"', AJHR, 1867, A-10, p 10
16. Evidence of Henare Tomoana, 'Report of Hawke's Bay Native Land Alienation Commission', AJHR, 1873, G-7, p 24

attitude, the number of acres restricted in the Hawke's Bay district for the period 1865 to 1870 was 134,414 out of a total of 616,717, which was roughly a fifth.[17]

3.5 RESERVES AND GOVERNMENT OFFICIALS

3.5.1 The Commissioner of Native Reserves

Politicians and officials were concerned about reserves, and particularly about the proper administration of properties which were intended to provide a fund for 'civilising'. They also believed that lands where there was a trust component – because they were held for the benefit of wider community – might be brought under the Reserve Acts for the Government to administer.

When Charles Heaphy was appointed Commissioner of Native Reserves in 1869, his work was not confined to those reserves which were already in legal trusts. McLean listed his duties in the margin of his letter of appointment:

> The administration of Native reserves held in trust by the Government, and other lands set apart for the benefit of the natives.
>
> The supervision of Native hostelries.
>
> The supervision of the payment to the Natives of the proportionate amount due to them on sale of certain blocks at Remuera and elsewhere.
>
> The supervision of lands taken under 'The New Zealand Settlements Act 1863', and 'The New Zealand Settlements Amendment Act'.
>
> The recommendation to the Government of lands proper to be rendered inalienable by the Native owners, through the operation of the Native Lands Court, and generally the duties devolving on the 'Trustee' contemplated in the provisions of the Native Reserves Act, which passed the Legislative Council last session.
>
> A general supervision over the laying off of the main lines of road through the North Island, and setting apart of districts of land suitable for immigration from Europe.[18]

A further letter from the Colonial Secretary went into some of these tasks in more detail, pointing out the importance:

> in all cases of alienation . . . of proper provision being made, if such does not exist already, for inalienable reserves, for the support of the Native owners of the land going through the Court and of their descendants.[19]

The appointment of sub-inspector of telegraphs was then added to his 'rag-bag of duties, some of which would render him suspect in Maori eyes, . . . perhaps not surprisingly, Heaphy was not a great success as Commissioner of Native Reserves.'[20]

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17. 'Report on the Working of the Native Land Acts', AJHR, 1871, A-2A, p 50
18. McLean to Heaphy, 13 October 1869, 'Papers relating to Major Heaphy's Appointment as Commissioner of Native Reserves; and Reports . . .', AJHR, 1870, D-16, p 3
19. Gisborne to Heaphy, 6 November 1869, 'Papers relating to Major Heaphy's Appointment as Commissioner of Native Reserves; and Reports . . .', AJHR, 1870, D-16
20. G V and S M Butterworth, *The Maori Trustee*, Wellington, 1991, p 14

Although there were occasions when Heaphy suggested that land should be restricted or urged its owners to put land in trusts, his investigation of reserves was probably his most valuable work. His reports throw some light on the confused state of records, and the poor grasp that provincial governments, now in control of land revenues and development, had of reserves. He discovered a reserve in Otago of which the local government had been entirely ignorant. He reported that in Southland 'matters had been so neglected that steps were only just being taken at the present time, to survey the reserves with respect to purchases effected so far back as 1853 and 1861.'[21]

While reserves like these were rescued from neglect, if not oblivion, the following case was presumably irretrievable:

> The Native Reserves, so called, cut off the pre[-e]mption purchases under the penny-an-acre proclamation of Govr FitzRoy have all disappeared from the list, having been from time to time sold by the Genl Govt for cash.[22]

Heaphy's reports also throw light on the gradual individualisation of what might be called the historical reserves. For example, he noted in 1872 that Maori in the Wellington district were rapidly getting the reserves awarded to them by Colonel McLeverty surveyed into individual sections in order to simplify the division of rents, and in some cases, with a view to obtaining Crown grants.[23] Reserved lands, once held by a hapu or tribe, then became a form of private property. The chief justice, James Prendergast, took a more cautious view than Heaphy's of the status of reserves in Wellington:

> I do not agree with Major Heaphy in his suggestion that Grants should be made to individuals of lands undoubtedly intended as Reserves for the support and advancement and general benefit of a number. This seems to me much worse than granting the lands for the support of Public institutions. What is the result? the lands are granted and forthwith sold to others and the fund dissipated. It seems to me that until the question can be deliberately considered and dealt with no Grants should be issued of New Zealand Company's tenths.
>
> Whether or not it is politic to include Col McLeverty's reserves I am unable to say. I have never been able to ascertain anything like accurate information of the intent with which and the authority under which the Reserves were made, I should think they ought to be dealt with under the Native Reserves Acts and not granted.[24]

Though these reserves were held on grants with restrictions, it was not long before Heaphy was recommending that the Governor consent to the removal of restrictions to allow a sale, since the rents were so low. By the time his successor, Alexander Mackay, came to report on these lands, the cumulative effect of this process, that a very small proportion of the original estate was left for the purposes originally envisaged.[25]

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21. 'Report on the Native Reserves Bill', AJLC, 1870, p 9
22. Heaphy, 10 September 1872, ms notes, McLean ms, micro ms 535/14, Alexander Turnbull Library
23. 'Report on Native Reserves, . . . Wellington', 16 August 1872, Turton, *Epitome*, section D, vol 3, p 82
24. Prendergast, memo, 21 September 1872 (copy) with MA 13/29B, NO 87/397

Detailed lists of lands reserved under various categories contain material for research in greater depth into particular districts.[26] Heaphy also estimated the amount of land available per person in each of the provinces, and noted the quality of the land. This now appears to be an exercise with very limited usefulness, since the figures were not broken down to the landownership by hapu. He occasionally alerted the Government to the danger of a particular chief or tribal group becoming landless.

His general comments suggest that leasing was not always a straightforward option for Maori landowners. For example, Karaitiana, a prominent figure among those 'owners' of tribal land in Hawke's Bay which had gone through the Native Land Court, told him:

> We mortgaged our grants, but not to an extent beyond what we had the means to pay the interest of, and more, from rents receivable from land let to white men. But the time of low prices came, and the white men did not pay the rents agreed upon – one owing three years rent – and while we could not get in the money owing, we were called upon periodically for the interest on the mortgages; and so our debts increased, and we had to mortgage other lands, or to sell to keep off legal proceedings.[27]

As Heaphy observed, some 'simple form of settlement' was required, as he found Maori were frequently 'anxious to "tie up" as they term it, their cultivation lands from the risk of temptation to sell in times of pressure or emergency.'[28] On the other hand, owners were reluctant to hand over the control of their land to the Crown. Some land was even retrieved by people who said they had not been aware of the effect of the trust. Only a minority of the reserves were under the administration of the commissioner absolutely, as lands under the Native Reserves Act 1856. The rest were in the management of their Maori owners. The Government might exercise some degree of supervision at the owners' request, and could veto alienation.

3.5.2 The trust commissioners

There were limits to what a single officer, such as Heaphy, could be expected to achieve. In the meantime, it was becoming clear to the Government that further steps were needed to prevent the completion of land transactions that would leave Maori with insufficient land. A number of relevant issues were raised in 1870 by a parliamentary committee on the Native Reserves Bill, which had been put forward by F D Fenton. This had passed the Legislative Council, but was not in the end proceeded with by the House.

The committee saw the need for further intervention in land dealings between Europeans and Maori to prevent the frauds and abuses which were growing up, and generally expressed anxiety about Maori land rights. They were concerned that the

25. 'Report on the State and Condition of Native Reserves in the Colony', Mackay to Public Trustee, 18 May 1883, AJHR, G-7, p 2
26. AJHR, 1870–1877; Turton, *Epitome*, section D, pp 72–106, passim
27. AJHR, 1870, D-16, p 12
28. 'Report on Native Reserves', Province of Wellington, 16 August 1872, Turton, *Epitome*, section D, p 82

Government should appoint officers not only to give some protection in land-dealings, but also to assist with the administration of reserves. The committee did not agree with the idea proposed in the Bill that this was an area where the Native Land Court should be the controlling authority. It was stated explicitly that this was an area of Government responsibility.

The committee was principally concerned with breaches of trust, that is, 'the alienation of land held by Native grantees upon trusts either expressed or implied', and with fraudulent dealings and improper considerations (when liquor or firearms formed part of the payment). Though these were seriously affecting the retention of land, the issue of sufficient land for occupation and use was not raised directly. However, when trust commissioners were appointed under the Native Lands Frauds Prevention Act 1870, their duties included the prevention of landlessness.

These officers were quite separate from the court and involved in a separate process from placing restrictions on titles. They come into this survey because they were intended to have a role in preventing landlessness. They entered the sequence of land alienation after a transaction had been carried out, but before it could be registered. Their task was to investigate the circumstances of each transaction and to issue certificates without which no deed could proceed. All transactions were from now on to be submitted to the trust commissioner who had to be satisfied that, among other points, Maori had sufficient land left for their support.

Appointments were made in 1872 and 1873 to positions in Auckland, Poverty Bay, Hawke's Bay, Taranaki, and Wellington, and instructions were issued.[29] These positions were held in conjunction with other offices. In the case of the Wellington district, the role of trust commissioner under the Native Lands Frauds Prevention Act was added to a long list of tasks already being performed by Charles Heaphy.

It is difficult not to read a certain ambivalence, indeed, a half-heartedness, in the general instructions to trust commissioners.[30] The Crown's intention was to protect, but not to protect with much rigour. The opening section warned officers not to throw difficulties in the way of bona fide transactions. They were told to give certificates as a matter of course unless there was reason to believe illegality was present. Their inquiries need not be, in ordinary cases, 'too minute'.[31] The commissioners were, in effect, cautioned against showing too much enthusiasm.

The inquiry into whether selling would leave Maori with sufficient other lands was the fifth and last duty on the list. In the elaboration of these instructions, at a point to do with price, the commissioners were told that they should refuse certificates if it appeared to them 'that the transaction was so improvident on the part of the Natives, as to be likely to reduce them to a state of pauperism'.[32]

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29. *Gazette*, 1871–73, for notices of appointments.
30. 'Evidence of the Select Committee upon Council Paper no 97, being the Report of the Trusts Commissioner for the District of Hawke's Bay, under "The Native Lands Frauds Prevention Act 1870"', appendix, AJLC, 1871, p 162. 'The Circular to Trust Commissioners', 18 March 1871, required transactions to be equitable and not in contravention of trusts, but did not explicitly raise the point of what other lands the owner had. AJHR, 1871, G-7A.
31. 'Evidence of the Select Committee upon Council Paper no 97, being the Report of the Trusts Commissioner for the District of Hawke's Bay, under "The Native Lands Frauds Prevention Act 1870"', AJLC, 1871, p 162
32. Ibid

The commissioners were instructed to take their inquiries about the existence of trusts a certain distance in but no further. If the title granted by the court disclosed no trust, none was to be implied. Even when it was known that there were other interested parties, this was not to be taken as evidence of a constructive trust if it had been arranged that the court issue a certificate to the grantees and not to others. In effect, people with rank who had their names on a great number of certificates or titles could put through numerous transactions, and still be able to show their other resources were ample. This was no safeguard for ordinary people, who might be then landless.

The only printed account of the initial working of the Act comes from Turton's report of 1871, followed by evidence taken by a commission. Turton recorded whether Maori stated they had other land for their support, but his report and the subsequent inquiry focused on fraudulent dealings rather than landlessness. Unless further evidence turns up in the reports from the trust commissioners (which they were instructed to furnish every six months), information about the working of the Act remains rather indirect.[33] It was not considered necessary that the effect of the Act should be given any public notice.[34] T M Haultain's report from Auckland in the late 1870s indicated the level of concern was very low; he had refused only five of the 125 deeds submitted in the past year. None of these cases involved the question of insufficient land.[35]

It is not surprising if the trust commissioners were ineffective, given the tenor of their instructions. Though all transactions required their approval, Sewell told them to guard against overscrupulous anxiety.[36] After the publicity over Turton's exercise of his role in 1871, which ended in a Commission of Inquiry, no commissioner entered the public gaze as 'overscrupulous' in connection with issuing the requisite certificates. The Government meant to spend as little money as possible, and instructed the commissioners accordingly. To avoid travelling, they were to depute their duties to others; resident magistrates, where possible, but otherwise to 'some person'.[37]

This measure had been in response to the effects of first years of private land purchasing, when the Native Land Court was issuing titles to 10 or fewer owners. In the duty of ensuring that Maori retained sufficient land, the trust commissioners were given a task of key importance, but neither the directions nor the means to carry it out adequately. Investigations of irregularities in land transactions in the 1880s, to be discussed at a later point, show that reliance on the trust commissioner to guard Maori interests was misplaced.

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33. MA 19/1, NA Wellington (I have not been able to consult these records through lack of time.)
34. Instructions in appendix to 'Evidence of the Select Committee upon Council Paper no 97', AJLC, 1871, p 162
35. 'Report by the Trust Commissioner, Auckland, of Lands Alienated in the Auckland Provincial District', AJHR, 1877, G-6
36. 'Circular to Trust Commissioners', 18 March 1871, AJHR, 1871, G-7A
37. Instructions in appendix to 'Evidence of the Select Committee upon Council Paper no 97', AJLC, 1871, p 162

3.6 THE SITUATION IN 1871

In spite of laws to impose restrictions on the alienability of land needed by Maori for their support, and further measures taken to administer reserves, there was still lack of clarity over the status and purpose of these lands in the early 1870s. Sir William Martin, the former chief justice, made a division of Maori land into separate categories in connection with a new Native Reserves Bill in 1871. He observed that the term 'Native Reserve' was sometimes applied to lands which had been kept by owners who were unwilling to join a sale. He appeared to consider that the Government had no business to be involved any further with these lands:

> They remain after such exemption just what they were before – namely, Native lands subject to the jurisdiction of the Native Land Court, and capable of being used or alienated for the private benefit of the owners at their pleasure. They are subject to no trust for the general benefit of any body of Natives. With those lands we have here no concern.[38]

In Martin's view, the native reserves 'properly so-called' were the endowment reserves. But, as Heaphy had discovered, Maori landowners did not want to hand over the control of their lands. Moreover, since the trustee had the power not only to lease, but to sell lands, placing lands in trust was no guarantee that they would be retained in Maori ownership. The holding of land in implied or constructive trusts by a few grantees was also not turning out to be in the interests of the community. There were too many loopholes in both laws relating to titles and those governing the conduct of transactions.

Martin was also aware that 'If the Native people are to be quiet and contented subjects, they must have assured possession of settled homes, and of a sufficient quantity of land for cultivation.' It was important as well to protect the class of land which was neither land for endowment nor open for alienation. This was the familiar category, of reserves for occupation and use, which remained the most difficult to define by law. It was not clear that the judges of the Native Land Court could be relied on to be systematic in the application of restrictions on alienability. This was this category of land for which a comprehensive and determined approach was required from the Government to protect.

Comments made by Maori spokesmen on the working of the Native Land Court Acts are evidence that further provision was required. To quote from the joint evidence of Wi Te Wheoro and Paora Tuhaere:

> Sufficient land has not hitherto been reserved by the Court as inalienable; in some cases the wishes of the owners have not been carried out in this respect. . . . From 50 to 500 acres should be reserved for each Maori man, woman and child, according to the land they hold. They might be allowed to lease some of it but not to sell it on any account.[39]

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38. 'Memorandum on the Operation of the Native Land Court', AJHR, 1871, A-2, p 22
39. 'Papers relative to the Working of the Native Land Court Acts', AJHR, 1871, A-2A, p 26

The view that sufficient land was not being restricted from alienation by the Native Land Court was repeated by others.[40] Though Hemi Tautari, from the Bay of Islands, was prepared to see 5 acres of land as adequate, provided it was of good quality, several others gave opinions of how much land should be secured for each individual, ranging from 50 to 100 acres.

It was evident that experiences differed widely. Harawira Tatere, a chief living in the Wairarapa, stated he had put three blocks – probably over 3000 acres – through the court and had all of it made inalienable.[41] The judge presiding in the Wairarapa, T H Smith, was also responsive to requests for restrictions when his court sat at Otaki.[42] Much depended on the attitudes of individual judges and the way in which Maori presented claims.

The process of reserving land continued to be one in which the Maori owners and the Government were involved, as well as the court. It was a piecemeal and uneven process, looking at New Zealand as a whole. For all of New Zealand, including the Chathams, the total amount of land for which certificates of title had been ordered, between 1 January 1865 and 31 December 1870, was 2,616,414 acres. Even though Fenton did not approve of protective policies, 637,406 acres of land was in reserves or restricted from alienation in this period.[43] These figures tell us nothing about the quality of the land or how it was distributed among hapu, but they show that, over all, a reasonably high proportion of land was being restricted from alienability.

40. See, for example, the opinions of Eru Nehua, AJHR, 1871, A-2A, p 34; and W Pomare, p 36
41. Ibid, p 39
42. Wairarapa Native Land Court minute book 1, Otaki Native Land court minute book 1
43. 'Report on the Working of the Native Land Acts', AJHR, 1871, A-2A, p 50

CHAPTER 4

THE NATIVE LAND ACT 1873, RESERVES, AND RESTRICTIONS

4.1 THE NATIVE LAND ACT 1873

The Native Land Act 1873 might be seen as protective reaction by the Government to the conduct of the Native Land Court. This chapter draws attention to what was promised in the Native Land Act 1873, though these promises were not realised. In moving the second reading of the Bill, McLean said:

> the chief object of the Government should be to settle upon the natives themselves in the first instance, a certain sufficient quantity of land which would be a permanent home for them, on which they would feel safe and secure against subsequent changes or removal; land, in fact, to be held as an ancestral patrimony, accessible for occupation to the different hapus of the tribe; to give them places which they could not dispose of, and upon which they would settle down and live peaceably . . .[1]

McLean drew a picture of a gradual and optional process towards individual landownership, co-existing with traditional life on the communally-owned reserves. While this is a matter of interpretation, the provisions for reserves in the Act seem to be based on McLean's view of Maori society in the 1850s. Groups might well decide to sell or lease land, but if there was dissent, partitioning would be available under the new law. The 'progressive' element would have an opportunity to apply for freehold title in the form of Crown grants. There would, however, be ample, or at least sufficient, provision for others who did not wish to take that course. The latter group would probably be in the majority for many years. The movement from one economy to the other was, to his mind, desirable – it was perhaps inevitable – but the pace would not be forced.

The keystone was the section making provision for adequate reserves, not less than a minimum of 50 acres per head, to be set apart by Government-appointed district officers with the agreement of Maori. After these arrangements had been approved by the Governor in council, and the land had been surveyed, the district officer was then to apply to have ownership investigated by the Native Land Court. The names of all owners and their proportionate shares would be entered on the memorial of ownership of the reserve. Reserves created by this preliminary exercise were intended to be inalienable and held in accordance with 'Native customs and usage', outside the

1. 25 August 1873, NZPD, vol 14, p 604

operation of the land court, though these conditions could be altered with the prior consent of the Governor in council.

Once this land had been set aside for communal use, other lands might go before the court, where memorials of ownership with the names of all the owners were issued, again with restrictions. This land, however, could be alienated if all owners agreed, or partitioned by the court if they did not. It might also be commuted to a Crown grant, if partitioned to a point where the owners were 10 or fewer. This Act was presented to Parliament and to Maori readers of the official paper, *Te Waka Maori o Niu Tirani*, as the Government's response to the loss of communal lands following the awarding of Crown grants to individuals by the Native Land Court.[2]

Under the arrangements provided in the Act, the court had no role in restricting titles, and consequently was given no power to do so. When sections of the Act failed to come into operation, there was a vacuum which required an amendment. The Act to amend the Native Land Act 1873, which reintroduced the power of the court to impose restrictions, was not passed until 1878. Nevertheless, in the intervening years, there were districts where Maori continued to request that lands should be restricted from alienation, and the court recorded this for entry on titles. Either the legal deficiency was not initially realised, or judges simply continued as if the previous Acts had not been repealed. The attitude of the judges to the 1873 Act – which was not so much 'interpreted' by them, as partially adopted, adapted, or even ignored – is well-known. As the provisions for reserving land and restricting titles virtually disappeared, it is easy to lose sight of the ideas on which they were based.

These ideas will be briefly analysed because they throw light on issues which were not resolved. There are, however, two major points to make at the outset: firstly, the provisions for reserves and restrictions were part of a policy which acknowledged that the Native Land Court was harming Maori society; and secondly, that although the Government's intention to curb the court was serious enough to pass this Act, it failed to ensure that key provisions were carried out. This failure reflects badly on the Government's political will when Maori interests were at stake.

The preamble contained concepts which were central to the whole question of restricting land from alienation:

> Whereas it is highly desirable to establish a system by which the Natives shall be enabled at a less cost to have their *surplus land* surveyed, their titles thereto ascertained and recorded, and the transfer and dealings related thereto facilitated: And whereas it is of the highest importance that a roll should be prepared of the Native land throughout the colony, showing as accurately as possible the extent and ownership thereof, with a view to *assuring the Natives without any doubt whatever a sufficiency of their land for their support and maintenance*, and also for the purpose of establishing endowments for their permanent general benefit from out of such land. [Emphasis added.]

The concept of surplus land in this context is inseparable from the notion of sufficient land for support and maintenance; each limits the other. Why did it appear

2. *Te Waka Maori o Niu Tirani*, vol 9, nos 15–17. In debates, the Hawke's Bay Native Lands Alienation Commission was mentioned by McLean and other speakers. Its report (AJHR, 1873, G-7) had provided dramatic evidence of the impact of awarding land to a few 'owners', and strengthened the Government's plans to change the law and curb the court: NZPD, 25 August 1873; 25 September 1873, vol 14.

in this preamble and what did it signify? It was an approach to Maori land-holding which had a long history. McLean had, among his papers, pages from an early draft of the Treaty of Waitangi, in which Maori yielded to the Crown pre-emption over their 'waste lands'.[3] This wording did not survive into the Treaty itself, and pre-emption was no longer in place, but it may have influenced McLean's approach to the question in 1873. The preamble drew a line between categories of land. It is hard to tell how seriously McLean himself took this distinction. No land was to be made absolutely inalienable, and indeed, all land was intended to be surveyed for lists of owners. Nevertheless, the Government made a declaration of principle: land which was essential for the support and maintenance of Maori should be protected.

F D Fenton, chief judge of the Native Land Court, took issue with this aspect of the Act. His reaction to the preamble was particularly hostile:

> The great change is the contraction of the scope of the Act to the *surplus* land of the Natives and the omission of all reference to the expediency of extinguishing or converting Maori customary title to land, or to the advantage of clothing these lands with titles derived from the Crown. On the contrary, it is the Native title which is to be ascertained and recorded. [Emphasis in original.][4]

McLean noted in the margin of Fenton's document:

> The Act 1873 preserves native rights from encroachment until they choose to alienate their land, and differs from past acts in that respect.[5]

It is not surprising that Fenton found the Act objectionable. It was not only because of the shift in policy, reflected in the preamble.[6] As McLean had stated in the House, the executive Government intended to regain the initiative by way of giving firmer direction to the court, and by the use of district officers. Many years later, McLean's general intentions were explained by John Curnin, the legal draftsman who had been working with him at the time that the 1873 Act was drawn up. Its administration related to Native Land Court districts and it was the duty of the court to see that the new policy for reserving land was carried out. Each court district would have a 'Local Reference Book', in which the district officers entered existing reserves. The officer, with Maori agreement, was to select additional reserves. To be accepted as 'sufficient', there had to be not less than 50 acres aggregate per head for every man, woman, and child. I have drawn attention to 'aggregate', because the intention was that these blocks would be communal land, at least initially.[7] In the Native Land Act 1873, for the first time, the minimum amount of land to be retained for each man, woman, and child was set down by law.

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3. McLean ms, Micro ms 353/reel 35, Alexander Turnbull Library, National Library, Wellington
4. MA 18/2, 74,3522; printed as 'Remarks by the Judges of the Native Land Court on the Native Land Act 1873', AJLC, 1874, no 1
5. McLean wrote only on the first page of the ms above, and his notes were not included when it was printed.
6. For a useful discussion of the purposes of the Native Land Act 1865, see B 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, pp 124–125
7. 'Report of the Commission into the Native Land Laws', AJHR, 1891, G-1, pp 170–171

The new policy was explained in very positive terms to Maori. The Government paper, *Te Waka Maori*, printed a lengthy exposition of the Act, in Maori and English, working through the sections one by one. It described how the district officer, with Maori assistance, would set apart a sufficient amount of land for everyone to cultivate:

> E kore tetahi tangata e ahei te hoko i taua whenua kua wehea peratia; e kore hoki e taea i te takiwa e takoto ake nei e tetahi rangatira Maori te hoko i te whenua katoa a te iwi a ka waiho te iwi kia noho whenua kore ana; engari ki te tikanga katoa korero ai, a ka waiho ano hoki tetahi whenua rahi mo ratou katoa (kei te tokomahatanga a ratou te tikanga) hei nohoanga mo ratou hei matenga mo ratou – no te mea e kore e tika kia hokoa taua whenua o te tangata, kia tangohia atu ranei i a ratou, kia panaia ranei ratou i taua whenua hei mahinga ma ratou.
>
> No man will be able to sell the land so set apart and henceforward it will not be in the power of the chief to sell all the land of the tribe and leave the tribe without any land; but by the new law every man, woman, and child will be counted, and a large piece of land for the whole of them, in proportion to their numbers, will be kept for them; where they can live, and where they may die, for it will not be lawful for any one to sell that land, or take it from them, or prevent them from living on that land and cultivating it.[8]

With these words an unqualified promise was made that a large piece of land – tetahi whenua rahi – would be kept for the whole of the people, according to their numbers, where they could live and die. (McLean had described these same reserves in the House as 'small blocks of land for occupation by the Natives'.[9])

Parata spoke in support of the Act in the House of Representatives in the following year, when minor amendments were passed. No objections had been raised by the people in his district. Takamoana opposed it, not on the grounds of policy, but because of all the petitions he had received objecting to the court. The position he expressed was, 'If any evil were to happen through the Native Lands Court not being in existence, let it be as the Maoris wished.'[10]

In mid-1874, Richard Woon, the resident magistrate in Upper Whanganui, commented favourably on its provisions in connection with the 'paramount importance' of the land question to local Maori. He reported that the spread of European settlement and Government spending had made them more conscious of the value and importance of their lands. They were anxious about how they might best administer their estate, to 'secure in perpetuity a large portion of their landed property for the benefit of themselves and their descendants.' Some wanted only to lease, but Woon encouraged the idea of selling at a fair price, choosing reserves in both town and country, and then sharing in increasing prosperity as landlords:

> a further source of income would be secured to them, and ample means provided to support them in ease and affluence for all time. Thanks to the Government, the Acts more immediately affecting their interests, viz. the Native Reserves Act and the Native

8. *Te Waka Maori o Niu Tirani*, vol 9, no 16, 29 Oketopa, pp 140–141
9. 25 August 1873, NZPD, vol 14, p 621
10. 25 August 1874, NZPD, vol 16, pp 938–939

> Lands Court Act of 1873, have been translated and widely circulated amongst them; and those that have taken the trouble to read them for themselves cannot but admit that their interests are in every way protected by such measures; and it now remains for them to take advantage of such wise and liberal legislation for the purpose of getting their titles definitely settled, and their lands so apportioned as to do ample justice to all, and of realizing their estates to their best advantage, by leasing or otherwise, as circumstances may point out.[11]

This approach seemed to Woon not to be impossible. The Native Reserves Act 1873, mentioned by Woon, related to trust reserves. It also was not brought into operation. Alexander Mackay reported that this Act was thought 'altogether too cumbrous in its operation for the practical and satisfactory administration of Native reserve property throughout the colony.'[12] But all legislation was experimental. Amendments could be passed to deal with anomalies and loopholes. The basic issue with the 1873 Act is not so much the weaknesses of any single piece of legislation, but the principles or objects of the policy.

The Government abandoned the provisions of the Act to restrict land from alienation in the face of opposition from Fenton, with fellow judges of the Native Land Court. A very long memorandum, criticising the Act in general and specific sections in particular, was presented by the judges to the Governor in council. In the margin beside their statement that they had encountered difficulties in the performance of their task, McLean wrote, 'No practical trial of the act had been yet made, this is only conjecture.'[13]

Without further research it cannot be said how far McLean's Cabinet colleagues were convinced by the judges' protest. It does not appear that the Government issued a formal statement about abandoning key provisions. The Act itself, including those provisions, was not repealed until 1886, though other sections had been replaced at earlier points. Its fate can be traced through subsequent reports of parliamentary committees.

The reserves were part of a larger design. McLean had planned to map all the tribal districts and hapu areas. The intention was that this record could be consulted at land court hearings. This was not only to avoid disputes; it was also part of McLean's general effort to compel the court to recognise the rights of all owners. McLean's Domesday Book was also in some respects a resumption of Governor Grey's 1846 project of registering all tribal property, though it was more fully developed. Like Grey's plan, it was intended to facilitate the purchase of surplus lands, but the provision for retaining a specified minimum of land in Maori ownership was written into the law. As John Curnin, the parliamentary draftsman who had worked in association with McLean, said to the Rees–Carroll commission in 1891: 'That was a great scheme if it had been worked.'[14]

Rees and Carroll emphasised different aspects of the Act in the course of examining Curnin. While Rees returned to the consequences of excessive individualisation after

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11. Woon to Native Department, 16 June 1874, AJHR, 1874, G-4, p 14
12. Mackay to Native Department, 16 August 1876, Turton, *Epitome*, vol 3, section D, p 99
13. Fenton et al, MA, 18/2, 74/3522, NA Wellington
14. 'Report of the Commission into the Native Land Laws', AJHR, 1891, G-1, p 172

1873, Carroll was more interested in the intentions of the framers. Historians have predominantly followed Rees in condemning the Act. It would be difficult to defend its effects in the form in which it was adopted. Carroll's approach is more relevant to the topic of this report because it drew attention to an option which had been present since 1840, and was to reappear repeatedly. In 1908, it was the approach recommended by the Stout–Ngata commission, in almost identical words:

> During our inquiry in the different districts we felt the need of something in the nature of a Domesday Book, which would reveal after a brief search the extent of ascertained land owned by each Maori in a district. Such a record is absolutely necessary in view of any legislation based upon the assumption of surplus lands for sale . . .[15]

Carroll repeated the section of the Act which provided the means for protecting Maori land, by securing reserves before any other land went before the court:

> Carroll: 'Section 24: It shall also be the duty of every District Officer to select, with the concurrence of the Natives interested, and to set apart, a sufficient quantity of land, in as many blocks as he shall deem necessary , for the benefit of the natives of the district: Provided always that no land reserved for the support and maintenance of the Natives, as also for endowments for their benefit, shall be considered a sufficiency for such purposes unless the reserves so made for these objects added together shall be equal to an aggregate amount of not less than fifty acres per head for every Native man, woman, and child resident in the district. In each case of land so set apart as aforesaid the District Officer shall transmit a report of the particulars of each such reserve for the approval of the Governor in Council.' Well, that has never been done?
> Curnin: No.[16]

The history of the Act is in itself an example of the inconsistency of the Native Land Court. In one district, in fact, the relevant sections of the Act were applied. A combination of Judge Rogan in the Native Land Court and Samuel Locke as district officer put through a total of 31,500 acres as reserves under section 21 of the Act in Cook County.[17] (At Maketu, a reserve of 3640 acres was made, under section 24 of the Act, but through Parliament, not the court.[18]) While Rogan was inconsistent in his approach – he was certainly capable of neglecting owners who did not appear in court – he was responsive to those who asked to have land made inalienable. In the mid-1870s, he placed restrictions on titles of lands at Otaki, and in Hawke's Bay, at the request of owners.[19] Elsewhere, the policy had some influence, as will be discussed later. But as far as Fenton was concerned, sections 21 to 32 never operated.[20] There is little evidence that he felt that the court was under an obligation to carry out the policy embodied in the Act. During the hearings of the Owhaoko

15. AJHR, 1907, G-1c, p 19
16. 'Report of the Commission into the Native Land Laws', AJHR, 1891, G-1, p 172
17. 'Land possessed by North Island Maori', AJHR, 1886, G-15, p 12
18. Ibid, p 13
19. Otaki inalienable lands, 1882 return, MA W1369/185, NA Wellington; Napier Native Land Court minute book 4, 11 October 1875, pp 62–63
20. 'Report of the Owhaoko and Kaimanawa Native Lands Committee', AJHR, 1886, I-8 (minutes of evidence), p 16

and Kaimanawa Native Lands Committee in 1886, Fenton came under attack for his cavalier procedures. Sir Robert Stout was clearly puzzled that it was still possible for the court to award title to two or three chiefs without protecting a wider community who lived on, or used, the land. He raised the issue of inalienability when questioning William Bridson, registrar of the Native Land Court at Wellington, who had been registering clerk in Auckland when the 1873 Act was passed:

> Stout: Was it the practice of the Court to make blocks inalienable after 1873?
> Bridson: Under the Act of 1873 there was a clause which made all lands under the memorial of ownership inalienable except with the consent of the owners entered on the memorial.
>
> Was no land made inalienable after 1873 at all?
> Yes; but I think it was only after the Court was specially empowered to make it inalienable.
>
> By what Act?
> I think by a later Act that is the case.
>
> Then, suppose the Natives came and said a certain piece of land was to be reserved, did the Court make it a reserve?
> I think so. That was after the Act of 1873.
>
> I am asking after the act of 1873. Suppose the Natives came to the Court and said 'We have made arrangements that this shall be voluntarily reserved,' would the Court join with the arrangement?
> After special powers were given to the Court; but I do not think much attention was given to inalienability until then.
>
> I am leaving that alone; I am going to reserves?
> I do not think so.
>
> Do you know of any case where reserves were made to the Natives except upon their own recommendation?
> I do not. After 1873 I do not remember a case.
>
> Then do I understand that you do not remember a case of land being made inalienable after 1873?
> Yes, I am certain there were several cases in which land was made inalienable.[21]

The evidence T W Lewis gave before the same committee uncovered an area of administration for which no one had been prepared to take responsibility. Lewis had been a clerk in the Native Office in 1873. He considered that district officers in relation to the prescribed duties would have been acting under the court. In response to questioning about who provided the money, Lewis stated that the court had no funds of its own. It relied on appropriations from Parliament, which were spent under the control of the Native Department. The matter of very considerable extra expense had been emphasised by the judges in their objection to the new policy in 1874, which was likely to have weighed with the Government.

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21. Ibid, p 32

H D Bell (counsel) questioned Lewis:

> You were in the Native Office, therefore when the Act of 1873 was passed, and during the whole time that the Act of 1873 was in operation?
> Yes.
>
> Did you know, in the Native Office, whether the provisions of the Act of 1873 were adhered to by the Native Land court?
> The Native Department was aware that the Act of 1873 was not carried out in all of its provisions.
>
> Did you ever form any idea as to the cost of carrying out the provisions of the Act of 1873 strictly?
> I never went into any calculations upon the subject; but I know that it would have cost a considerable sum to have carried out all the provisions in regard to District Officers and their duties as laid down by the Act.
>
> I want to call your attention to the sections of the Act from section 21 to section 32, which provide for the duties of the District Officers. [these are the key clauses, which included setting aside inalienable reserves]
> I believe those duties were ever carried out by the District Officers.
>
> Do you know whether the Government ever called on them to do so?
> My recollection is that a correspondence ensued shortly after the passing of the Act with regard to the question of the duties of the District Officers; and the difficulty of carrying out those duties, as laid down by the Act, was pointed out by the Chief Judge. The duties of the District Officers ultimately – in fact shortly afterwards, I think – resolved themselves into stating whether the surveys could be safely carried out.[22]

Quite apart from what this account tells us about the selective attitude of the court when it came to 'working' the law, there are broader issues involved. McLean's Act was in response to perceived flaws in the land laws and the working of the Native Land Court. The Government failed to ensure that important sections of an Act, which were meant to remedy these flaws, were put into operation. The Government did not regain the initiative from the court by specifying the minimum amount of land for each person until the Native Land Purchase and Acquisition Act 1893. To note very briefly a point which will be taken up later, minimum provisions became more complicated in 1893: at least 25 acres of first class land per head, or 50 acres second class land per head, or 100 acres third class land per head. In 1900, the Maori Lands Administration Act made a much less rigid attempt to reserve papakainga land for each individual through Maori district councils. It has already been pointed out that some of the policies of 1873 re-appeared in the report of the Stout–Ngata commission.

Commissions of inquiry into Maori land questions provide evidence of the confusion caused by the partial working of the Act. Thomas MacKay, in the course of the 1891 Commission into Native Land Laws, asked about the point in the 1873 Act concerned with setting apart and making reserves; that every man, woman, and child in a hapu should have 50 acres. 'Has that not led to the number of names being very much added to, and, in fact, to spurious names being put in?'[23] His question had

22. Ibid, p 67

nothing to do directly with reserves, though possibly the ghost of that provision was present in people's minds. Neither did the answer given by E T Dufaur, an Auckland solicitor with years of experience in dealing with Maori land, relate to reserves; he spoke about the practice of choosing names that would suit either gender, so that unborn children might be put on memorials of ownership. An environment had been created where both buyers and sellers were in the habit of working the law.

The memorials of ownership brought in by the 1873 Act required that all tribal owners be recorded. In practice, it was still possible for individuals to claim a title, without acknowledging the rights of other owners.[24] The general effects of the Act on titles and transactions have been succinctly described by Gilling:

> This did slow the alienation process as so many signatures now had to be acquired for a purchase, but later led to further problems, such as the fragmentation of land ownership, compounded as the descendants of each of the many grantees multiplied. Then again, shares could be committed in advance by the owners' acceptance of takoha or tamana, a payment which effectively bound the recipient to the giver. As a result, the partition order soon became a favoured device of both Government and private purchasers. This placed non-sellers in a difficult position; they were often left with small, fragmented and uneconomic segments, which they could choose to retain, or they could capitulate and sell, too.[25]

This pattern applied to restricted lands as well. Payments were advanced regardless of inalienability, and became the thin edge of the wedge, as would-be owners pressed for the removal of restrictions.

This was not what McLean had intended. He had wanted to reinforce hapu rights over land, so that when the option of partitioning was taken, it would be made by a group of owners. The object of reserves, with restrictions on alienability, was to enforce fairness to the class of people who had lost land through the previous Acts. The Government, by accepting defeat over an important principle, was responsible for the outcome.

Laws relating to Maori land were essentially experimental. However, adjustments, amendments, and interpretations should have been consistent with a clearly understood policy. In the years immediately after 1873, there is little direction from the Crown on the questions of reserves and restricted lands. When, in the 1880s, Native Ministers turned their attention to these questions, the environment had changed. While governments intended to act fairly towards Maori, policies for the retention of land in Maori ownership were narrowly conceived. The overriding concern of the Crown was to acquire land for development.

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23. 'Report of the Commission into Native Land Laws', AJHR, 1891, G-1, p 82
24. 'Report of the Owhaoko and Kaimanawa Native Lands Committee', AJHR, 1886, I-8
25. Gilling, 'Engine of Destruction? An Introduction to the History of the Maori Land Court', *Victoria University of Wellington Law Review*, vol 24, no 2, p 131

4.2 RESTRICTIONS ON MEMORIALS OF OWNERSHIP AFTER 1873

The Act was 'worked' by Native Land Court judges, and by sellers and buyers, but it was not well understood by everyone. Nearly 10 years after the passage of the 1873 Act, John Bryce, as Native Minister, was puzzled by advice from the Native Office on how to deal with an application for the removal of restrictions. The land in question, 120 acres in the Wairarapa, had been leased with pre-emptive rights to a farmer who had fenced the land and worked on it. As the owners were running up debts with a storekeeper for a rival buyer, their tenant was anxious to secure the property. Lewis noted that the land was held on a memorial of ownership:

> If he obtains a transfer from the Natives in the form prescribed by the Act of 1873 and applies to the Native Land Court he will be able to get a title – he should take the advice of his lawyer.[26]

Bryce was unable to see how it was possible for someone to get a title in the face of the restrictions on the memorial:

> And it is hereby ordered that the above-named owners under this Memorial may not sell or make any disposition of the said land, except that they may lease the same for any term not exceeding twenty-one years in possession and not in reversion, without fine premium or foregift, and without agreement or covenant for renewal, or for purchase at a future time.

It is not surprising that Bryce understood this to prohibit sales and that an arrangement to purchase at some future point would also be illegal. Lewis explained that this was not the case.

> The clause in the memorial to which you refer is in my opinion an anomaly and your minute shows how misleading it is. Every memorial contains that clause and yet clause 59 of the Act of 1873 provides for the sale of land and we are continually passing such sales – and you are frequently advising H[is] E[xcellency] under clause 61 to issue a crown grant to the purchaser. I am not aware of any absolute restriction under the Act of 1873 which would prevent a purchaser acquiring a title under the clauses I have named.[27]

Although policy behind the Act had been to make land more secure, there was apparently no clear provision for restricting alienability on titles issued between 1873 and 1878. Although section 48 required the annexing of the restrictions which had puzzled Bryce, according to section 49, a sale could take place if all the owners agreed. As Judge Edger, of the Native Land Court, wrote:

> There are no restrictions other than those imposed by section 48 of the Act of 1873 which are held to be inoperative.[28]

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26. T W Lewis to Bryce, 26 July 1882, memo on S Smith to Bryce, 22 June 1882, MA 13/23, NO 82/1914, NA Wellington
27. Lewis to Bryce, memo, MA 13/23, NO 82/1914, NA Wellington
28. Edger, NLC Auckland, 4 April 1883, note with MA 13/23, NO 82/3747

Restrictions imposed under previous Acts were not affected. The situation was clarified by passing the Native Land Act 1873 Amendment Act 1878 (No 2). Section 3 restored to the judge the power to recommend restrictions on alienability of lands, 'if, in his opinion, it is necessary that the same should be reserved for the use or occupation of any of the persons entitled to the same'. In 1880, it became once again, the duty of the court to inquire in every case whether or not to place restrictions on alienability of the land before it, or any part of it.[29]

4.3 DISTRICT OFFICERS AND RESERVES

Under the Native Lands Act 1873, district officers were appointed as agents for the Government in the field. The general impression from the evidence given by Lewis from the Native Department and Fenton, chief judge of the Native Land Court, to commissions, was that the reserve provisions of the 1873 Act did not work and could not work. The district officers' reports show that this was not entirely the case. In 1877, when the Legislative Council called for information on the specific question of how far they carried out their duties under the Act, their replies ranged from a complete failure to secure any reserves to an apparently straightforward and successful application of the Act's requirements. The reports are also a useful reminder that regional differences were very marked in this period.

William Webster, in the northern district, reported that he had been unable to overcome the reluctance which Heaphy had encountered earlier with trust arrangements. People were unwilling to limit their own freedom as owners to do as they thought best with their land:

> The Natives have all objected to allow any of their lands to be reserved in the manner required by the Act, and, when strongly advised to secure an inalienable reserve for themselves and their families as provided by the Act, have uniformly said that the provisions of the Act are very good, but they prefer to have their land left in their own hands, to deal with as they like.[30]

In contrast, the report from Samuel Locke, from the East Coast district, listed 25 blocks totalling 39,223 acres as the reserves he had recommended under the 1873 Act.[31] Almost all of these blocks still appear on a list of reserves compiled nearly 10 years later.[32] One large block, Te Arai Matawai, containing over 4000 acres, had in the meantime been brought under the management of the Native Trustee by 1883.[33] The impressive result reported by Locke could hardly have been achieved without the co-operation of the owners, but it had also depended on the attitude of Judge Rogan, in the Native Land Court.[34] In 1877, a further reserve of

29. Section 36, Native Land Court Act 1880
30. Webster to Clarke, 29 September 1873, 'Return of ... District Officers under "The Native Lands Act 1873"', AJLC, 1877, no 19, p 1
31. Locke to Clarke, 16 October 1877, 'Return of ... District Officers under "The Native Lands Act 1873"', AJLC, 1877, no 19, p 4
32. 'Land Possessed by Maoris, North Island', AJHR, 1886, G-15, p 12
33. Mackay to Public Trustee, 18 May 1883, 'Native Reserves in the Colony', AJHR, G-7, p 2

3620 acres at Maketu was made under section 24 of the Native Land Act 1873, though not through the land court but by an Act of Parliament.[35]

Elsewhere in the East Coast District, Locke thought it impossible to make reserves either in the letter or the spirit of the Act itself, since so much land in Hawke's Bay and in the neighbouring part of Poverty Bay had gone through the land court before 1873. But other possibilities were available. Reserves in the wider district included 3668 acres at Poukawa, which the chief Te Hapuka had been persuaded by Locke to put into trust in 1872, under the Native Reserves Act. As well as about 5000 acres in the Wairoa County reserved out of a Government purchase, and therefore inalienable, there was what Locke described as 'a large extent' of inalienable land under section 17 of the Native Lands Act 1867, in both Wairoa and Cook Counties, and a small amount of land in trust.[36]

Regions differed very much. H T Kemp reported that Maori owned sufficient land in the Kaipara district to make additional reserves, in his opinion, unnecessary. The figures he provided were totals and averages per head for the whole district; 12,632 acres of land 'set apart for Native Purposes in purchased Blocks' which worked out at approximately 216 acres per person.[37] Averages per head often looked reassuring; the crucial point was not only the amount of land held by each hapu, a figure which was not provided, but also the quality, value, and usefulness of such land.

E W Puckey in Thames found it impossible to establish any accurate information about who owned land, and equally impossible to persuade people to think about inalienable reserves:

> I have repeatedly urged upon the Natives in my district the extreme necessity which exists of land being set apart for reserves for their future use and maintenance, but so far without avail, owing to the want of unanimity, the local jealousies, and the conflicting interests of the claimants.[38]

Would it have been possible to enforce reserve provisions in the sequence laid down by the 1873 Act? Could the Government have held the line, and made the setting aside of a sufficient quantity of inalienable land an essential condition to be met before any other land could be brought before the Native Land Court? Fenton and some of his colleagues had seen insuperable difficulties at this point, arguing that no surveyor could go safely into the situation that Puckey described.[39]

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34. Fenton told a parliamentary committee that McLean had placed Rogan on the East Coast in 1875, saying 'I will show you how to work the Act'. 'Owhaoko and Kaimanawa Native Lands Committee Report', AJHR, 1886, I-8, evidence, p 1
35. 'Land Possessed by North Island Maoris', AJHR, 1886, G-15, p 13–21
36. Locke to Clarke, 16 October 1877, 'Return of . . . District Officers under "The Native Lands Act 1873"', AJLC, 1877, no 19, p 4. Locke might have been mistaken, however, because the effect of the Native Land Act 1873 was supposed to have been a cancellation of all restrictions under section 17 of the 1867 Act: see sections 4 and 98 of the 1873 Act.
37. Kemp to Clarke, 25 September 1877, 'Return of . . . District Officers under "The Native Lands Act 1873"', AJLC, 1877, no 19, p 2
38. Puckey to Clarke, 27 September 1877, 'Return of . . . District Officers under "The Native Lands Act 1873"', AJLC, 1877, no 19
39. MA 18/2, 74/3522; printed as 'Remarks by the Judges of the Native Land Court on the Native Land Act 1873', AJLC, 1874, no 1

There were districts where the Crown was in a position to make decisions about land, whether or not there were local objections to restrictions on alienability. In the Waikato, confiscation had led to a sequence where land had been allocated by a commissioner and much of it was made inalienable at the time by the Government. In 1877, the district officer reported that the owners themselves had reserved 171 acres per individual, though he does not state under what Act.[40] R Parris, in Taranaki, had likewise dealt with confiscated lands, to which the duties of the district officer did not apply.[41] He gave no report on reserves, which had been set apart by other arrangements.

Gilbert Mair reported from the Bay of Plenty where the jurisdiction of the Native Land Court had been suspended because of Government land purchase negotiations, so that he had not made much progress with sections 21 to 24 of the 1873 Act. The court had just resumed. He reported many unfinished negotiations, with proposed reserves which could not yet be taken into consideration. However, he listed blocks with a total of over 32,000 acres, described as surveyed for permanent native reserves, or in the course of survey.[42] (Presumably these reserves were made in connection with the Government purchases.)

Elsewhere, in the Wellington and Wanganui districts, Maori owners had themselves set aside land as inalienable, in the spirit of the Act. James Booth was doubtful about the future of those which had not been reserved by law:

> they are not, properly speaking, reserves under the Act of 1873, but in the majority of instances they were put through the Court with the intention on the part of the Natives, and with my knowledge and consent, to reserve them from sale altogether. Unless, therefore (which is rather doubtful) the Native owners can be induced to make these lands, so reserved, reserves under the Act, there is nothing to prevent them, on receiving their certificates of title, from disposing of this property to the highest bidder.[43]

There is evidence that some lands in the Manuwatu and Otaki had been made inalienable, though it is not clear whether these were reserves made out of blocks sold or restrictions placed in the Native Land Court.[44]

At the end of the return came Alexander Mackay's report. The Act had no application in the South Island, because no land worth noting was held on traditional tenure. His words are a reminder that this vast territory had passed out of Maori ownership. The inadequate reserves of the Kemp block predated the Native Land Court and the era of private land purchasing with all its attendant abuses.

A slightly later report from J A Wilson, the commissioner in the Tauranga district, can be added to those of the district officers. His report shows that the influence of the

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40. Marshall to Clarke, 2 October 1877, 'Return of . . . District Officers under "The Native Lands Act 1873"', AJLC, 1877, no 19, p 2
41. Parris to Clarke, 24 September 1877, 'Return of . . . District Officers under "The Native Lands Act 1873"', AJLC, 1877, no 19
42. Mair to Clarke, 16 October 1877, 'Return of . . . District Officers under "The Native Lands Act 1873"', AJLC, 1877, no 19
43. Booth to Clarke, 24 October 1877, 'Return of . . . District Officers under "The Native Lands Act 1873"', AJLC, 1877, no 19
44. Otaki inalienable lands, 1882, MA W1369/185, NA Wellington

1873 Act lingered on. Wilson referred to the view of his predecessor as commissioner, H T Clarke:

> Mr Clarke is of opinion that the provision in the 24th section of 'The Native Lands Act 1873', requiring reserves to be made to the extent of 50 acres per head upon the Native population for every man, woman, and child, should be adopted in the administration of Tauranga lands.
>
> As to this, I would remark that the enactments under which Tauranga lands are administered contain no such provision, nor would it be possible to borrow the clause and apply it here in any way other than very partially, for the reason that the natives in their hapus and tribes, as well as individually do not own the land equally. A number of Natives at Tauranga own several hundreds each, while many other Natives in the district have not a dozen acres apiece. The rule, if adopted, would not operate among small landowners, having less than 50 acres; while among the large owners it would have the effect of rendering many thousands of acres eligible for sale.[45]

This was not the usual interpretation of the 50-acre minimum per head guideline. Reserve provisions were made in the Act not so much to inhibit the well-endowed if they chose to alienate land, but to ensure that there was enough communal land for the relatively poorly off to support themselves. The information that many Maori at Tauranga owned less than 12 acres each should have sounded warning bells. He himself wrote, 'I think the reserve of each hapu should, if possible, be separate, that it should be of good quality, and sufficiently large to support the hapu'.[46] This was the approach intended by the 1873 Act. What mattered was how 'sufficiently large to support the hapu' was defined, and how firmly restrictions on alienability of lands were upheld.

4.4 RESTRICTIONS ON ALIENABILITY – DEVELOPMENTS IN THE LATE 1870s AND THE 1880s

The 1873 Act had been intended to overcome the unfairness of a court process which had awarded titles to the few, while ignoring the many who had not only a right to land, but also required it for economic and social well-being. The provisions made in that Act for defining reserves and restricting alienability had been part of an attempt to ensure that no matter what happened in the court, a measure of protection would be in place for ordinary people. Memorials of ownership were intended to keep the control of land within the hapu. However, there were no requirements under the 1873 Act to place restrictions on Crown grants. In effect, all land then became alienable.

Placing restrictions on alienability became once again one of the statutory duties of the Native Land Court, in 1880. From the earliest years, there had been inconsistency in how individual judges had perceived this duty and carried it out. As the chief judge himself observed, in responding to a request from the Government for information

45. Wilson to Sheehan, 8 July 1879, 'Lands returned . . . under Tauranga District Land Acts', AJHR, 1886, G-10, p 2
46. Ibid

about the court's approach to awarding titles, 'It is remarkable how the practice seems to vary in different districts.'[47]

A sample of Native Land Court minute books shows differences between individual judges. Of the judges in the early period, there is evidence that Judge Rogan was prepared to order restrictions on titles under the 1873 Act. There are no such orders in the minute books sampled from hearings presided over by other judges in the mid-1870s.

In the early 1880s, Judge Brookfield was particularly sympathetic to requests for restrictions. Given the Native Land Court's unfortunate general reputation, it is worth quoting the final note at the end of Brookfield's sitting at Masterton in 1881, during which a number of blocks had been made inalienable:

> Court complimented the natives on their orderly conduct, the agents on their able conduct of their cases and encouraged them to continue and to study to improve.
>
> Hamuera said he not only expressed his own but the opinion of the whole of the people that the Court had given the greatest satisfaction.[48]

It is also evident that in the 1870s and 1880s large blocks were brought forward to the court to be made inalienable. Without further research into the wider context, it is difficult to explain why this was happening, after the apparent resistance to making land inalienable noted in the earlier period. The minute books are sparse on details about how decisions were made, but it was a reasonably common practice for a large block to be divided, so that parts of it might end up with a restricted title, while the rest was alienable. There were various sorts of arrangements; the same owners might have their names on at least one block in each category. Or when partitions were taking place, some owners requested to have their title inalienable, while others did not.[49] It appears that the process was well understood by those who brought land before the court in the later 1870s and the 1880s.

Beyond this general impression, there was a detailed return made in 1886 of lands which had been made inalienable in the Native Land Court, broken down to totals for counties, with acreages and names of blocks.[50] The total for the entire North Island was 1,872,605 acres. Over 1,230,000 acres had been added since the 1870 return, during which there had been virtually a hiatus over restricting titles as they were awarded in the courts between 1874 and 1878. Again it is difficult how to assess what these figures mean and how far, in each case, they represent ample or sufficient land for the support of individuals. But the total amount was very considerable. It included some very large blocks containing thousands of acres in Taupo, Rotorua, and Gisborne.[51] In the course of the 1880s, pressure began to mount on inalienable land

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47. Fenton to Richmond, 22 July 1867, 'Return of the Certificates issued by the Native Land Court, 1865 to 1867, showing the number of owners and the acreage', AJHR, 1867, A-10c, p 3
48. Wairarapa NLC minute book 3, 16 June 1881
49. There are examples of all of these approaches in the Whakatane NLC minute book 1, when the court sat in 1881 under Judge Brookfield. Other minute books sampled for the early 1880s included Rotorua nos 2 and 3, Coromandel no 3, and Wairarapa no 3.
50. 'Land Possessed by North Island Maoris', AJHR, 1886, G-15, pp 13–21
51. Mangatu no 1 Block in Gisborne with 100,000 acres is probably the largest, followed by Tauhara Middle Block in East Taupo.

from governments which in turn were responding to pressure to find land for Pakeha farmers.

CHAPTER 5

THE REMOVAL OF RESTRICTIONS

5.1 POLITICS AND RECORDS IN THE 1880s

Restricted grants for Maori landowners came into the political limelight in the course of the 1880s. There were several reasons why this happened. These were not primarily concerned with protecting Maori interests, though this was generally one of the reasons. The Pakeha settler population generally distrusted speculators and their political allies. Their spokesmen could be expected to express suspicion of an area which offered so many legal loopholes as the purchase of Maori lands, and particularly of those aspects of land purchase where governments had a flexible policy.

Some members of the General Assembly had axes to grind. They believed their own districts were being held back by needlessly complicated laws. They argued that without the security of a Crown grant, Pakeha farmers would not develop lands they had acquired in all but legal title. These spokesmen saw restrictions as small print to be dispensed with by some sort of validation process. The wider context was an economic depression, which did not lift until the next decade. In these circumstances, political attention fixed on restrictions as a barrier to development and prosperity.

There were other areas of contention, where critics in Parliament saw the Crown as acting restrictively. For example, the Government Native Land Purchases Act 1877 allowed the prohibition of private purchasing of a block in which the Crown had taken an interest. Proclaiming restrictions over whole districts, as with the Thermal Springs Districts Acts 1881 and 1883, and later legislation for the Rohe Potae and the Urewera, gave the Crown a monopoly of purchase. This policy was different in scope and purpose from that of imposing restrictions on titles. The partial and then full re-adoption of Crown pre-emption is a separate issue from the subject of this report, though this development contributed to the general level of criticism governments faced over questions to do with land purchases in the 1880s.

In 1882, Robert Hart, a member of the Legislative Council, made a speech linking the removal of restrictions on alienation with the improper use of political power. He spoke about the two principles which he believed had guided the Legislature in dealing with the land Maori possessed under the Treaty of Waitangi. One had been to facilitate its transfer to European settlers, under peaceful conditions and with a legal title. The other had been to prevent Maori from pauperising themselves by improvidently selling land and becoming a burden on the State. Having entered briefly into the reason for imposing restrictions on alienation, he came to the point. He believed that private interests had been involved in their removal. Hart then called for

a return of all cases in which restrictions on alienation in grants of land to Maori had been removed by the Governor prior to the end of March 1882. He asked that the return should be an annual one.[1]

There was little further discussion. The Premier, Frederick Whitaker, thought that it would take a great deal of time and money to extend the survey back to the earliest years. Hart amended his motion, proposing March, 1880, as a starting point. Dr Pollen, who had held office as Native Minister for 10 months during 1876 and 1877, did not agree that it would be difficult to table the information because he believed the Governor had been called on to remove restrictions in very few cases. 'During the time in regard to which he could speak of his own knowledge, the power was exercised not more than half-a-dozen times.'[2]

Printed returns of cases where restrictions had been removed from grants of land to Maori were presented to the General Assembly annually from 1883 to 1891. In order to provide this information, the Native Office for a number of years set aside the files of applications for the Governor's consent to the removal of restrictions. There are, then, two levels of information available to historians: the printed tables of returns which are readily accessible, and the documents from which they were drawn. The printed tables alone, though they give information about particular cases, are misleading as a guide to general policy. From archival records, it is clear that the Government turned down far more cases in the 1880s than it accepted.

The Native Office assembled material on this subject, which has been kept in a special series. Some files contain records that go back 20 or more years. After 1886, the applications were no longer kept together. To trace all those which came before or after the special series, through registers and indexes to the records of the Maori Affairs and the Justice Departments, would take weeks, if not months. What the special series has made possible is a relatively rapid investigation of departmental practice and Government policy for a limited number of years.

What do these records tell us about how restrictions had been put on a grant in the first place? What was the background of the restrictions on grants which turned up for the consideration of the Native Office? First, the Native Land Court was not the only source of restrictions. Whole categories of land automatically carried a restricted title from Government decisions that had been made outside the court. A large class of lands carrying restrictions on their grants were those in the special districts where confiscation had been carried out. Lands in Waikato, on the West Coast (Taranaki), and the East Coast had been dealt with through commissioners. Lands were awarded to individuals and groups, and these grants generally carried restrictions. Again, there were exceptions, particularly in Taranaki. Some of this restricted land, in the Tauranga district, had been awarded to Maori soldiers who had served with the Government. These sections were automatically inalienable because of the location and because the grants were to Maori, but as the owners had served under the same conditions as the European militia, the restrictions were seen as anomalous.[3]

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1. 31 May 1882, NZPD, vol 43, p 195
2. Ibid

By the Native Reserves Act 1882, all lands defined as reserves were supposed to go under the administration of the Public Trustee. The complicated history of reserved lands, particularly in Wellington, meant that a number of them dating from the pre-land court era escaped categorisation as 'reserves'. These were presented as cases for the Native Office to consider, as the property of individuals who were prevented from alienating them.

Secondly, even when restrictions on grants had arisen from a hearing in the Native Land Court, it was often not the judges who had taken the initiative. Inquiries were made to judges about why particular grants had been restricted. In a number of cases, their replies indicate that this had little or nothing to do with them. Nor could they give a reason, beyond stating that restrictions had been placed at the request of the owners. Judges apparently did as they were told. There was even a case where Fenton replied that restrictions had been reluctantly imposed by the court at the unanimous request of the owners.[4] These answers reinforce an impression gained from sketchy records in the Native Land Court minute books that it was often because of Maori input in the court that land was restricted from alienation.

Individual judges differed. Some were quite clear about why decisions had been made, having themselves taken an active part. They intended that some form of protection should continue to be exercised. Brookfield, for example, showed that he knew something about whether owners had inadequate resources. He suggested in several cases that if land was sold, the proceeds should be invested for financial security.[5]

There is evidence of carelessness in the process of making records in the court and transmitting them correctly on to the titles. Parties appealed to the Native Office to sort out problems which had come about when one thing was decided in the court, and another appeared on the grant. Sometimes it was claimed that the clerk had made an error in entering restrictions that nobody wanted in the minute book.

5.2 THE REMOVAL OF RESTRICTIONS – THE PROCESS

The Native Minister was responsible for recommending that the Governor assent to the removal of restrictions. A new grant free of limitations would then be signed. It depended on the wording on the original grants whether it was the Governor alone or the Governor in council whose consent was required. If it was the latter, the Native Minister would presumably have to carry his Cabinet colleagues with him. Cases which were turned down at the ministerial level got no further.

The Native Office had an advisory role only. None the less, the advice officials offered was generally taken by the minister. There were exceptions to this. John

3. Brabant, resident magistrate, Tauranga, to Native Minister, 4 July 1882, gives this as the first of a number of reasons for granting the request for removal of restrictions. 'Return of Cases of Removal of Restrictions on Alienation of Maori Lands, 1883 to 1884', AJHR, G-5, 1884, p 2.
4. 15 September 1882, MA 13/27, NO 86/1539
5. For example, 11 December 1882, MA 13/23, NO 82/3343

Bryce, as Native Minister, refused some applications which his staff had been prepared to accept. He was increasingly intolerant of legal irregularities which they had perhaps come to regard as normal.

In theory, the first request to have a restriction on a grant altered or removed was supposed to come from the owners. There are a number of Maori letters in the files. Almost all have contemporary translations. Some are very brief, but others go into considerable detail. They offer insight into a great range of economic conditions.

There was no guarantee that because the first letter appeared to have come from Maori owners, that this was indeed the beginning of the sequence. All too often, several layers down, it became apparent that a lawyer had been involved from a very early point, and a form of alienation had already taken place. The Native Office and the minister had to decide what the merits were of each individual case.

How was each application approached? It was often thought advisable to inquire from the local resident magistrate or district officer. As noted earlier, there were rules, and a list of guidelines exists. It was drawn up in 1882 to advise John Bryce on how to answer a request from H W Brabant. As district commissioner in Tauranga, he was unclear about what sort of points were required in these cases. T W Lewis wrote a memo to the Native Minister, which Bryce initialled for transmitting to Brabant:

> The points on which you require to be satisfied before advising His Exc[ellenc]y to consent to alienation are generally these.
>
> 1. That the Natives have amply sufficient other land for the maintenance of themselves and their successors, or that from the unsuitability of the land to be alienated, for native occupation, or other considerations, if it is to their interest to dispose of it
>
> 2. That the owners of the land proposed to be alienated are *unanimous* in their desire to sell
>
> 3. That the price proposed is prima facie fair and reasonable. [Emphasis in original.][6]

This basic set of rules is very like those which were given to the fraud commissioners. It was, on the whole, more tightly administered. Lewis had been in the Native Office long enough to be giving a reasonably accurate account of its conduct. Even so, there was room in these rules for interpretation.

As far as having land for support, it has already been pointed out that there was no common understanding of how much land was 'amply sufficient' for an individual's needs. There were cases where it was recognised that there was so little left that all remaining land was strictly inalienable, as in Canterbury. In many cases, this criterion was becoming almost impossible to assess because of increasing fragmentation of holdings, with numerous owners. The Native Office relied for information on the Government agents in the field. The system seems to have been at its least protective when very large areas were involved. This is very clear from

6. Lewis to Bryce, 9 December 1882. This note was forwarded to Brabant, who headed it 'The Native Minister's Instructions as to reporting on applications from Natives to be allowed to sell reserved lands'; Waitangi Tribunal, RDB, vol 126, p 48638.

the pattern of the printed returns. When it came down to individuals, with clearly defined property, officials held the line, insisting that land must be retained.

Decisions about whether land was unsuitable for Maori occupation also rested on the advice of officers in the field. In the case of Wellington urban land at Te Aro and Pipitea, Charles Heaphy's advice seems extraordinarily short-sighted. He wrote that 'the pas in the Town form an exception to the rule of conserving for the natives the reserves in this district. The Te Aro Pa is a perfect centre of immorality'.[7]

In rural areas, land surrounded by European properties was sometimes seen to be no longer suitable for Maori. This was on occasion argued by the Maori owners themselves. Otherwise, 'unsuitable' land might include pieces which owners could not cultivate, because they were located a long way from where the owners lived. Swampy lands and rugged, bush-covered blocks which the owners themselves could not 'develop' were also thought to be better sold. Their value as a food source was not seriously considered, indeed, it was explicitly dismissed. Lands were described as not required by Maori for their support, not being used except for pig hunting and shooting birds.[8] In these cases, it was always stated by the local officers that the Maori owners had plenty of other land for their support.

The Native Department made inquiries about ownership. Here again they had to rely on the officers in the field, not all of whom were habitually careful. Some applications came to an abrupt halt when the real owners wrote objecting to having to make any change in the status of the grant. To make the process more visible, after the passage of the Native Laws Amendment Act 1883 it was not lawful to remove restrictions upon the alienability of land owned by Maori, unless at least 60 days' notice had been given in the *Kahiti* or *Gazette*. The department was responsible for inserting the notices.

A 'fair price' required local officers to have an idea of relative land values. Sometimes a private valuer was consulted. A 'good price' was a recommendation; a 'fair enough price' seems to have been officially acceptable.

Pakeha, disappointed when applications were turned down, often argued that the rules had been broken for other people. If this had happened, it is more likely to have been a political decision, out of the hands of the office, or a case of mistaken identity, involving the trust commissioner. There was a great deal of questionable activity going on round the edges of land purchasing which the Crown seemed unable, perhaps unwilling, to control. One example of this was the readiness to remove restrictions in the Tauranga district, which was being 'opened up' in the later 1870s and early 1880s. The most difficult area was where decisions had to be made about transactions that were very far advanced before they came to official notice. The system was not foolproof, but the department itself seems to have tried to keep to the rules as they were understood.

Lewis characterised the general approach he believed was being taken by the department:

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7. Heaphy to Clarke, 11 December 1877, MA 13/22, NO 78/929, NA Wellington
8. 'Return of Alienations of Native Lands, 1880 to 1883', AJHR, 1883, G-4, pp 3–4

> It has always and I think fairly been presumed by the Native Department that when restrictions are imposed it is not intended that the land should be alienated unless very good reason is shown.
>
> It is difficult to make the purchasers and even the natives see the question from this point of view, the former simply looking at it from the standpoint that they desire to obtain the land and the natives that they want to satisfy their present desire for money or what it will procure. The latter never I think considering the requirements of succeeding generations in view of which the restrictions are no doubt specially imposed.[9]

There is a certain amount of unjustified complacency in the paternalism expressed here. The officials themselves did not have a very extended sense of 'the requirements of succeeding generations'. This was one of the major weaknesses in the criteria which they applied. Questions were seldom asked about the long-term interests of Maori as a social and economic community when restrictions were removed from large blocks.

In this, Native Ministers and officials reflected contemporary Pakeha opinion. The involvement of such prominent public figures as Whitaker and Russell in purchasing inalienable lands raised questions in Parliament about political interests. Though there were differences of opinion about whether the Crown or private speculators should purchase large blocks, the reasons given for recommending the removal of restrictions were consistent with the views of most Pakeha. They were convincing ones for the authorities, however short-sighted they seem from a late-twentieth century perspective.

5.3 THE REMOVAL OF RESTRICTIONS – CASE HISTORIES

In some cases, the Native Office's role was paternalistic, or protective. There was a great range of different circumstances among the applicants. Some required little more than the completion of formalities. But there were also cases of almost inextricable confusion where both parties, Maori and Pakeha, intended to stretch or break the law. As inquiries progressed through the hierarchy, more and more notes were scribbled on files. Difficult cases provoked lengthy consultation. There were also straightforward cases, those of people whose applications were most likely to be approved, and those whose applications were most likely to be turned down.

There are two important qualifications to make at the outset. First, what follows is intended to show a broad pattern. It is not an exhaustive list. Examples which appear to illustrate a general point have been selected from a rapid reading of the complete MA13/22 to MA13/29B files. Brief details of the cases for which assent was given were noted in annual returns which were printed either in the *Appendices to the Journals of the House of Representatives* or the *Appendices to the Journals of the Legislative Council*. There is no printed information about cases that failed to gain consent. These have been drawn on relatively heavily in the discussion that follows. Principles tended to emerge more clearly from applications which were

9. Lewis to Bryce, 9 December 1882, Waitangi Tribunal, RDB, vol 126, p 48638

refused. Secondly, beneath the surface of the documents, all may well not have been what it seemed. Other researchers will bring more detailed knowledge to particular cases. The intention here has been to deal with general policy.

Individuals and families who were economically secure were the most straightforward group. This sort of case was usually checked for the standard requirements: whether the applicants were the only parties involved in the title, and their other principal land-holding.

'I do not think we need to maintain the restriction on this. The Nicholls family are quite able to take care of themselves', was the Native Office memorandum on one such application. The background was a claim through a Maori mother to 100 acres at Tauranga. Almost immediately, her family began negotiations to sell it.[10] There were families and individuals who were recognised as not requiring any paternalism or protection from the Crown. The usual reason given for wanting to sell land was in order to invest the funds in some other property.

The name of Mrs Jane Brown, of Taranaki, cropped up in the course of evidence before the 1891 commission. She was described as thoroughly conversant with business and more able to manage her own affairs than any European woman in the colony. She arranged to have restrictions lifted from some of her property.[11] The Native Office received a very stiff letter from a young woman, Mere Tarawhiti, who wrote in English and explicitly stated there was no need for the Crown to intervene in her case.[12] Mrs Forsythe, the sole inheritor of her Maori mother's land at Wanganui, lived in England. She used an agent to gain permission to have restrictions removed from her land and arranged for its sale.[13]

Another group who were likely to have their applications recommended were those Maori soldiers who had served with the Crown's forces. Like their Pakeha counterparts in the ranks, they had been paid partly in land. Like their Pakeha counterparts, very few found that they were ready, without further instruction, to become farmers on 20 acres. The parcels of land they were paid with at Tauranga held no traditional associations for them. The Native Office might vet the bargains they made. It would not otherwise intervene as ex-soldiers turned land into ready cash.[14]

Ex-soldiers were permitted to sell 'inalienable' land; ex-rebels were not. It was not intended to return confiscated land for people to make a financial profit. There was a degree of political or social control in the policy towards this category of titles. Rebels were to 'come in', settle on land, and demonstrate the benefits of civilisation to those who were still holding back. Restrictions prevented ex-rebels from making a temporary return for the sake of a quick sale.

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10. Head office memo, 13 June 1877; MA 13/22, NO 77/4384, NA Wellington
11. 'Report of the Commission . . . into the Native Land Laws', AJHR, 1891, G-I, p 93; MA 13/22, NO 77/4384, NA Wellington. Heni te Rau o te Rangi was always referred to as Mrs Jane Brown in official circles.
12. MA 13/23, NO 82/1109, NA Wellington
13. MA 13/22, NO 82/2613, NA Wellington
14. Apparently these had been promised without restrictions, but other arguments for the removal were also given by Brabant, resident magistrate, Tauranga. 'Return of Cases in which Restrictions on Alienation . . . have been Removed', AJHR, 1884, G-5, pp 2–3.

It is more difficult to understand what was behind the Native Office's customary refusal to allow people to exchange the land they had been awarded for more suitable pieces. The land in question might be described as useless, with the applicant residing elsewhere but no matter how sensible the applications appeared, they were often turned down without giving a reason. Though exchanges were not unknown, they were considered 'very troublesome', or 'not expedient'.[15]

A straightforward rejection was the response to applications from Canterbury Maori to alienate in any way the land reserved from the sales of the 1840s and 1850s. Why was this so? Requests were initially directed by the Native Office to Alexander Mackay for comment. [16] As an official, he was particularly cautious. But regardless of Mackay, there seemed to be a general recognition that no further land could be alienated in Canterbury.

Did this help Canterbury Maori? It probably did in the long run, though it did not prevent poverty at the time. Possibly it obstructed the way in which individuals might have used their property to improve their economic circumstances. The period of early prosperity from timber, when the Maori community at Kaiapoi had been able to hire Europeans to work their land, had long passed by the 1880s. Maori landowners in Canterbury, and no doubt elsewhere where people held individual titles, often raised cash by leasing their land for years in advance. The land was restricted from sale, mortgage, or lease for more than 21 years, but no one could prevent the owners from leasing for shorter periods on whatever terms they chose. They arranged to purchase goods or borrow cash against future rents.

These arrangements kept them poor. Anticipating rentals several years in advance was the recognised practice in 1887.[17] But the Government was unable to give encouragement to individuals in Canterbury who tried to improve their economic situation. For example, one very worthy applicant, Hamiora Tini from Wairewa or Little River, on Banks Peninsula, sought permission in 1884 to mortgage his land in order to raise capital and become a contractor. He needed £100 to buy a dray and two horses. His 14 acres at Kaiapoi were leased for a term of several years at £17 10s per annum. As the European writing on his behalf pointed out, Hamiora Tini could go to a money lender but that was not a desirable course of action. He hoped to raise the money by mortgage in the ordinary way at a reasonable rate of interest and to repay the loan in the course of three years.[18]

The Native Office gave no recognition to his record as a hard-working man, of respectable character, who had been in steady employment with a local settler for 26 years. He was turned down on the basis of clause 4 of the Native Land Act 1878, which stated 'that it shall not be lawful for any person to pay any sum of money by way of mortgage on any land held by a native under memorial of ownership or

15. For example, Morpeth, minute, with Bryce, 4 July 1883, MA 13/24, NO 83/2970, NA Wellington
16. 'Report of the Commission . . . into the Native Land Laws', AJHR, 1891, G-1, p 93
17. Mackay, 'Reports by Commissioners under the Native Land Administration Act 1886', AJHR, 1887, G-8, p 2
18. M Hart, Sydenham, to the Native Minister, 29 September 1884, MA 13/25-26, NO 84/2944, NA Wellington

Crown grant.'[19] It is not clear that the office was bound by this Act. This was paternalism of a particularly unhelpful kind, given the individual context.

Mackay had cited the same clause in another case, only to say that the clause was ambiguous and required interpretation. Once again, the land was at Kaiapoi, and though the applicant was a person of standing, with other property, personal circumstances were not taken into account. Mackay wrote:

> This is the first application as far as I know to be allowed to mortgage these lands, and irrespective of any law there may be to the contrary, I am of opinion that it would be very improvident to sanction a procedure of this nature as it is impossible to predict the ultimate effect it would have.[20]

Applications for mortgages were a difficult category for the Native Office to assess. Officials tended to turn them down. This was hard on people like Hamiora Tini who required capital to start a business.

A long and complicated case in which the Crown became involved began in 1874 with a plan to raise capital on the Ngati Tamainu block of around 14,000 acres at Waipa. As this was land the Crown had awarded to the hapu after the wars of the 1860s, it came into a category for which alienation was restricted. The applicants already had £200, but more money was needed to buy a coastal vessel and build a store. While they could have gone to private lenders, they preferred to deal with the Crown.[21]

The Government responded – on the advice of H T Kemp – by providing £350 at 5 percent for three years. It was set down that all the owners had to agree, not just the names on the mortgage, that all the block was under mortgage, and that no sale could take place in that time except to the Crown. A long series of complications followed. The capital was slow to turn up, and there was consequently an objection to paying the interest. But worse: the vessel was lost and the store burned down. The tribe lost close to £600, was unable to meet interest payments, and drifted deeper into debt.

The administration refused to allow the owners to retrieve their situation by 42-year leases or by trying to re-finance through private lenders. Private parties with offers were standing in the wings, but quite apart from other consequences, these sorts of arrangements would have put the Crown's own security at risk. The Native Office contemplated selling off part of the block itself.[22]

The hapu's case was put by Wiremu Patene and others in a letter to Bryce. (The original is in Maori.) It was pointed out that the money had not been spent foolishly, but in a 'pakeha speculation':

> Therefore it is that we appeal to you the Guardian of the Maori people, to shew your consideration for us in the same manner that you would if you were our father,

19. T W Lewis, memo to Native Minister, 13 October 1884, MA 13/25-26, NO 84/2944, NA Wellington
20. A Mackay, Commissioner Native Reserves Office, to Under Secretary, Native Department, 30 July 1883, MA 13/24, NO 83/2336, NA Wellington
21. Anaru Patene (The Reverend Andrew Barton), Auckland, to T Kemp, Civil Commissioner, Auckland, 22 June 1872, MA 13/25, NO 84/488, NA Wellington
22. Memos and correspondence in MA 13/25, NO 84/488, NA Wellington

> and wipe off the mortgages upon the lands before mentioned. It is a matter of great grief to us that we have no means whatever to pay off this heavy debt, and these lands are our only means of subsistence, we have no other lands. If the Government will forgive us this debt we will never incur another.[23]

In the end, the whole thing was resolved by the Crown writing off the debt, by the Special Powers and Contracts Act 1882, and sending the deed of reconveyance to Wi Patene. Though there may be other examples elsewhere, this is the sole case of its kind found in these files. It shows that the Crown had the capacity to act protectively and positively, to invest in an enterprising venture, and when this failed, to save the land for the Maori owners.

Funding required for the development of other lands was often presented by applicants as a reason for wanting to alienate restricted lands. There were several cases in this period, particularly from the Wairarapa, where groups of owners requested the lifting of restrictions so that they could use the cash to develop farms on other land. The Native Office, after checking that all parties were acting in good faith, were inclined to approve these applications.

Conversely, it was argued that some land should be alienated because it was beyond the financial resources available to Maori to develop. It might be described either in applications or reports from the local officers as unsuitable for 'Maori use'. This description, for example, was applied by the district officer to rough and swampy land at Taupo, which would require capital to make productive. Small pieces of land surrounded by the properties of Europeans were also occasionally seen, by Maori and Pakeha, as not suited for Maori use. The impression one gains is that this argument alone would not sway the Native Office.

Urban land in Wellington was going out of Maori ownership in these years, with the encouragement of Heaphy, the trust commissioner, who was always consulted. Heaphy wrote variants on the following theme on a number of occasions:

> It is desirable for moral and sanitary reasons to let the Maoris leave the Pas in the Town. These people have country land sufficient for their requirements . . . this sale should be permitted, but on condition that the £200 now paid should be invested on mortgage for vendors' benefit.[24]

In the 1880s, others as well as Heaphy saw Pipitea as an area of run-down buildings, which was not likely to improve. Maori were absentee owners and the land was leased. An effort was made to ensure that buyers paid market prices, and that the sellers had other land, but there was no attempt to suggest other options. Rolleston, as Native Minister, from January to October 1881, was one of the few who did not accept Heaphy's view:

> I have again and again stated my disapproval of the alienation of these Reserves and will take no steps in advance of the N R Commissioner's Report in this matter. In

23. Wiremu Patene and others, Karakariki, to J Bryce, Native Minister, February, 1882, MA 13/25, NO 84/488, NA Wellington
24. Heaphy, 27 February 1880, MA 13/23, NO 82/2490

> view of the N R Bill before the Houses I don't propose to take any action till it is known whether that will pass.[25]

Alexander Mackay, who was to report on these sites, has been praised by historians for his administration of the South Island West Coast Reserves, particularly his role in retaining urban land in Greymouth in Maori ownership. He evidently did not regard Wellington land in the same light; it would be interesting to understand more about why he handled it differently. He reported that the site at Te Aro, which Rolleston had seen as a reserve and therefore worth preserving in Maori ownership, was badly placed, that it had been used as a gravel pit, and that the price at £400 for 20 perches worked out at over £2800 an acre. On this advice, Bryce went ahead and advised assent.[26]

In several of these Wellington cases, Walter Buller was involved as lawyer for one or other of the parties, the owner or the would-be buyer. On one occasion, when the Native Office had turned down a transaction on the grounds that the price was inadequate, the sum of £200 was advanced to an owner in circumstances which caused Rolleston, then Native Minister, to write:

> I cannot see why these Natives should be divested of the only thing which stands between them and the lowest pauperism.[27]

Rolleston was exceptional in expressing concern for the long-term consequences of selling restricted or reserved land. Preserving Maori ownership for its own sake was not Crown policy. Good reason had to be shown for withholding consent from Maori applicants who were able to show that they had other means of support and that they would receive a good price for land.

The most complicated applications came from those who were not managing well, needed to have cash and wanted to draw on their inalienable lands. On inquiry, some sort of pre-arrangement might be detected. There were determined would-be settlers who had already invested in the land; storekeepers appeared with lists of debts; or, more often, there were lawyers who had already acquired some sort of hold over the land, and could prove it with signed documents. These were cases in which Maori, either as individuals or groups, had become part of the cash economy whether they liked it or not, as in the following case. Miria Ani wrote that she wanted to fence in her other land to keep stock from ruining her crops, that she also wanted to fence the graves of her children, and that she wanted to improve her lands by purchasing clover seed. 'I have no money that is why I wish to sell my share.' In response, the local agent wrote:[28]

> Miria has not plenty of other lands in fact she belongs to a tribe called Ngatikoi which is almost landless within the Hauraki district, and will depend upon what Reserves they get out of the Ohinemuri Goldfield, for land to settle upon and cultivate

25. Rolleston, 2 September 1881, MA 13/23, NO 82/2490
26. MA 13/23, NO 81/4185
27. Rolleston, 14 June 1881, MA 13/23, NO 82/2490
28. Miria Ani, Owaroa, 17 February 1882, MA 13/23, NO 82/2490

> – I do not know what price Mr Reid is offering for the land – There are two other owners besides Miria, but their names do not appear on Miria's application . . .[29]

As can be seen, the local agent objected to virtually every point in the original application.

Cases which passed the Native Office sometimes met with a blank refusal at the ministerial level. One example was initiated by a most elaborate petition drawn up in English, in legal language, and certified as interpreted to the Maori signatories. According to this document, the land in question was never intended by them to have been restricted, it was useless to them, let at a nominal sum, surrounded by European lands, and moreover they possessed ample other lands for their support.

The Native Office asked for a report on the circumstances of the restriction from the Native Land Court. The usual response to this sort of inquiry from the court was that the restriction had been put on at the owners' request, there was no particular reason for it, and that it might as well be removed. This case was exceptional. Judge Brookfield minuted that he had made inquiries during the hearing under section 36 of the Native Land Court Act 1880. He had learned that the owners had parted with nearly all their land and had not sufficient for their support. He had therefore recommended that the block be inalienable without the consent of the Governor. He had also told them that if they gained such consent, he would require that any transaction was properly conducted. It was specified that if they sold the land, the money must be invested for them by the Public Trustee or some fit and proper person, and the owners would be paid the annual proceeds.[30]

At this point, the opinion of J E Macdonald, the chief judge of the Native Land Court, was also sought. Without further research, it is not possible to say how many of Brookfield's fellow judges shared his respect for laws which protected Maori interests, or whether they followed the chief judge's interpretation. The only phrase Macdonald thought worth emphasising in the restrictions on the grant was the one that provided for the Governor's consent to exemption. Macdonald's reply gives a glimpse of the gulf that existed between the attitudes of the various judges. He wrote:

> I think it desirable that the restriction should be removed but cannot concur in Judge Brookfield's idea of investing the proceeds and etc. We would be undertaking a new and troublesome duty. The money is said in the petition to be wanted for the purchase of farming stock. If that is true they should be allowed to have it. If not true the purchase money may just as well be squandered at once as piecemeal when the rental on any lease was paid.[31]

He does not seem to have taken the trouble to read the original petition very carefully, since he misses some points in it and adds others. However, T W Lewis in the Native Office was prepared to follow the opinion of the chief judge, even though it showed a complete disregard for Maori well-being, or any sense of a

29. G S Wilkinson, Native Agent, Thames, to Lewis, Native Office, 9 March 1882, MA 13/23, NO 82/568, NA Wellington
30. Brookfield memo, 11 December 1882, MA 13/23, NO 82/3343
31. 19 December 1882, MA 13/23, NO 82/3343

wider responsibility. Bryce, as Native Minister, was not similarly impressed. He noted:

> Judge Brookfield says above, 'I learned that the Natives had parted with nearly all their land and had not sufficient for their support.' If this be true then alienation cannot be permitted.[32]

One of the interesting points to emerge from this survey is the number of occasions when Bryce, as Native Minister from October 1879 to January 1881, and again from October 1881 to August 1884, held the line on restrictions against Maori and Pakeha alike. The more pressure Bryce was put under from Europeans, who had already convinced themselves they owned the land and only required an unimpeded title, the tougher he became.

The disquieting thing is that while the Government had the final word in this period over the removal of restrictions, it was the Native Land Court which had the duty to impose conditions of restricted alienability upon titles. While the Native Office's resources were limited, it had something of a tradition of checking applications. The court, on the other hand, had no extra staff to take on this role. Also, concern for the wider consequences of land alienation was limited by its preoccupation with the interpretation of the law. The political current was moving in the direction of having responsibility for recommending the removal of restrictions taken away from the administration, that is the Native Minister and the Native Office, and shifted into the sphere of the Native Land Court. And by the end of the 1880s, although safeguards in principle remained in place, changes in the law made the removal of restrictions easier.

5.4 THE LIMITS OF THE CROWN'S RESTRICTIONS POLICY – TAURANGA

Political difficulties arose in the later 1870s over where the line was to be drawn between Government land purchasing and the activities of private speculators – many of whom were themselves politicians. A Government headed by Sir George Grey was replaced in 1879 by one that was made up of an alliance of conservatives and Auckland speculators in Maori land. This was the background to the apparent inconsistency in the Crown's handling of lands returned to Maori in the Tauranga district. Discussion of the restrictions applied to land transactions in Tauranga will help to define the purposes and limitations of the Crown's policy.

The Native Land Court had not sat in Tauranga. Legally the whole district had been under the same sort of arrangements which had been made in other confiscated areas by the New Zealand Settlements Act 1863. In 1878 the Government instructed the Commissioner of Tauranga Lands that grants should be issued to Maori with the limitation that 'the said land hereby granted shall be inalienable by sale or by mortgage or by lease except with the consent of the Governor'.

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32. Bryce, 6 January 1883, MA 13/23, NO 82/3343

Though aware of the restrictions, Europeans had entered into negotiations for these lands, spent money, and obtained deeds signed by some of the grantees. Their next step was to get the consent of the Governor to the conveyance.

Vincent O'Malley has provided a clear account of the sequence of land alienation in the Tauranga district in this period.[33] As he points out, between 1 April 1880 and 31 March 1885 restrictions were removed in respect of 33,033 acres of Maori land there.[34] The record of successive governments in recommending the Governor's consent to the removal of restrictions led him to conclude that:

> the Crown, after purporting to make all the lands returned to the Tauranga tribes inalienable, subsequently failed to enforce this policy for a number of years.[35]

The imposition of restrictions over lands in the Tauranga district, and their removal, took place at the same time as a political struggle between the Grey government and its opponents. This coloured the question at the time and has made it difficult to assess it solely as a test of the restrictions policy. Grey's determination that the Government should be the purchaser on behalf of the small settler was opposed by a group of wealthy Auckland speculators in Maori land. As Russell Stone has explained, this latter group allied itself with Atkinson and other conservatives, who were alarmed both by Grey's radicalism and by what they regarded as Government extravagance. The new Government's policy of retrenchment was basically responsible for its decision to withdraw from proclaimed blocks and to surrender the field to private buyers.[36] Although inalienable lands were in a different category from Government proclaimed lands, among the private buyers who benefited from the removal of restrictions in Tauranga were Frederick Whitaker and Thomas Russell, notable Auckland speculators and opponents of Grey.

Although the political struggle about the role of the state in land purchasing provided the wider background, Tauranga was something of a special case. Grey had been concerned that too much land was being alienated and that measures should be taken in Tauranga to ensure that individual Maori kept sufficient land for their own support. It must be pointed out, though, that the way in which a blanket restriction had been placed over lands in Tauranga was unlike the standard procedures for placing restrictions on titles through the Native Land Court. It appears that the Native Ministers were readier to leave matters to the judgement of the local commissioner than they were in cases where restrictions had been imposed in the Native Land Court.

O'Malley, with a focus on Tauranga, criticised the Crown's consent to these transactions as failure to protect Maori interests, thus falling short of its own stated principles on restricting the alienation of land. The question, however, needs to be

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33. *The Aftermath of the Tauranga Raupatu, 1864–1981*, an overview report commissioned by the Crown Forestry Rental Trust, 1995
34. Ibid, pp 221–222
35. Ibid, p 90. In fact, Tauranga applications went through the Native Office in the usual manner in the late 1870s and early 1880s. Their records are throughout the MA 13/22 to 13/28 files.
36. R C J Stone, 'The Maori Lands Question and the Fall of the Grey Government, 1879', NZJH, vol 1, no 1, 1967, p 72

seen in terms of the policy itself. As an issue it was quite distinct from other aspects of the Crown's responsibilities in the Tauranga district – for example, failure to control the illegal activities of Government and private land agents. As far as the specific issue of the removal of restrictions is concerned, the Crown's approach was not inconsistent with its broad policy. There had never, since 1840, been a policy which undertook to preserve Maori ownership of large areas of land. On the contrary, the very notion of entail, tying up land in an utterly inalienable estate, was regarded with horror by those who had come from Britain. These ideas are basic to an understanding of the restrictions policy, and help to explain its limitations.

When the commissioner, H W Brabant, supported applications for the removal of restrictions from blocks of land which were to his mind used only for sporting purposes, and too rough and bush-covered for Maori to be able to develop, these points were in line with the standard criteria for removing restrictions (though hunting pigs and catching birds were an important part of the Maori economy). Also, the Crown would not prevent alienation unless it was clear that individuals would be left landless. The figure of 50 acres as a minimum for each individual had been quoted as a guideline. But in general, little attempt was made to assess individual holdings when owners were numerous. The Commissioner at Tauranga reported of the groups of vendors that they had ample other land.

As long as the Government accepted advice from its agents in the field that owners could not use the lands 'productively' themselves, and that they had other property, and provided all agreed and the price was fair, then restrictions would be taken off. This is the point at which the Crown's practice should be assessed by those who are doing detailed studies of particular regions: how seriously did it take the responsibility of ensuring that Maori held on to sufficient land, when the owners were numerous? With large blocks, such as those at Tauranga, owners were undifferentiated in reports from the local officers, and the Native Office accepted blanket assurances that 'owners had other lands'. This contrasted with the approach towards applications from individuals to alienate small pieces of land, which were often refused.[37] This was a weakness in both principles and procedure, giving an impression of a policy that strained at gnats and swallowed camels.

Where governments were sensitive to criticism was not over the policy itself, that is, the degree of protection given to Maori landownership, but whether or not the law was operating fairly. Reviewing certain Tauranga cases some years later, the chief judge of the Native Land Court, E R Macdonald, wrote:

> jealousies arose some declaring that restrictions ought to be removed in every case others in none – while whether restrictions were or were not removed the moving cause was set down as favor or spite in someone.[38]

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37. There are parallels with the approach of the Commissioner for Crown Lands in Taranaki at the same period, who wrote '. . . though I think it would be detrimental to the interests of settlement and civilization if large tracts of country were to be vested in aboriginal natives tribally, yet, in cases of small and medium holdings individualized, every well-wisher of the Maori race must, I think, recognize the desirability of absolutely vesting the land comprised in the grant in the aboriginal grantee and his descendants.' Whitcombe, 3 May 1880, West Coast Commission, AJHR, 1880, G-2, app B.
38. Memorandum,13 March 1888, MA 11/3, NO 88/487, NA Wellington

Steps were taken to make the whole process more open to scrutiny. 'I think these cases had better perhaps stand over pending legislation on the subject of removal of restrictions'.[39] Lewis's minute was followed a few weeks later by the passage of the Native Land Laws Amendment Act 1883. From now on, 60 days' notice of the removal of any restrictions in the *New Zealand Gazette* was required, but the process otherwise remained the same. Yet, in spite of the penalties in other provisions of that Act against dealing in Maori land before it had gone through the land court, the system as a whole was not preventing Europeans from gaining land in everything but title. Bryce, as Native Minister, minuted one such case from the Tauranga district:

> Withhold action for further enquiry. I don't like the way this purchase has been pushed to near completion without ascertaining whether the restriction would be removed. Moreover application should be made through the owner direct and not through the purchaser.[40]

John Ballance, the Native Minister in 1884, described the problem as more general:

> I have found, during my short experience of the Native Department, that there are reserves all over the country, some of which have restrictions upon them, and some of which have no restrictions upon them. In my opinion these reserves are in process of being alienated from the Native people. Day after day applications come in to the Native Department from people who desire to have the restrictions removed from the Maori lands, and they come in with the strongest recommendations from officers of the department in the various districts, to the effect that the restrictions ought to be removed because the Natives have sufficient land otherwise to live upon. I say that the removal of the restrictions is an improper use of power, and ought to be stopped at once; and with the exception of carrying out previous engagements, I have determined . . . not to consent to the removal of any more restrictions until the Legislature has laid down some definite policy on the subject.[41]

Ballance gave the impression that the law was being stretched in favour of land purchasers employing underhand methods:

> Those who are desirous of acquiring these reserves are not always content to wait until the restrictions are removed before commencing negotiations for obtaining them. In the great majority of instances the work is done, the purchase is completed, before the removal of restrictions, and even the money has been paid: and the purchasers wait until a favourable moment comes when they can bring sufficient influence or pressure to bear upon the Government, so as to have the restrictions removed.[42]

It was the Native Trust Commissioner whom he identified as responsible for giving an official stamp to gross abuses. In fact, the trust commissioner had no direct role

39. T W Lewis to Native Minister, 17 August 1883, MA 11/3, 83/2421, NA Wellington
40. 18 April 1884, MA 11/3, 84/1158, NA Wellington
41. 1 November 1884, NZPD, vol 50, p 314
42. Ibid

in the process of the removal of restrictions. He was, however, occasionally invoked by Pakeha applicants pressing for the removal of restrictions. They claimed that since their plans would still have to pass the trust commissioner, they could safely be allowed to go ahead.

Ballance said that he was not reflecting on previous Native Ministers. Nor did he single out the Native Office for criticism. But he was not prepared to continue with the system as it was. He appointed a commissioner as an attempt to take the removal of restrictions out of the political arena.

5.5 THE BARTON COMMISSION ON THE REMOVAL OF RESTRICTIONS ON THE SALE OF NATIVE LANDS, 1885 TO 1886

Ballance appointed as special commissioner G E Barton, a lawyer who had been a member of the House of Representatives for Wellington City from 1878 to 1879. Barton held the commission for just over a year, from 30 November 1885 until the end of 1886. This commission was limited to investigating cases where negotiations had already been entered into by Europeans for the sale or lease of restricted lands, pending further policy decisions by the Government. Barton was to take evidence and report on applications which had been made for the consent of the Governor to the alienation of these lands, as 'it was desirable that such consent should only be given after due and formal enquiry'.[43] The backlog amounted to 83 blocks of land, from Southland to North Auckland.

The inquiry was held at various places in the North Island. Barton went to great efforts to have all the parties appear before him to give evidence. The evidence of Maori witnesses was recorded by an interpreter and signed, with the translation, given at the time, written down by the commissioner. Even so, he found it difficult to establish whether negotiations for land had been carried out in good faith. He himself described his inquiries at Tauranga as 'one-sided'. This was partly because a number of Maori with interests in land had left for the gumfields, and partly, he suspected, because of intimidation:

> The Natives whom I examined seemed to be actuated by a vague fear that they might lay themselves open to criminal proceedings, ending in imprisonment and loss of character. I have been informed that threats of such proceedings have been actually made, but cannot vouch for the truth of the statement, not having judicially enquired into it. Such being the attitude of the natives, the only chance I had of reaching the facts where misconduct had taken place was through the quarrels of rival purchasers or from the intrinsic evidence afforded by the accounts kept and receipts taken during the negotiations of purchasers, and upon the documents of transfer.[44]

43. The terms of the commission are described in the 'Report by Mr Commissioner Barton on the Removal of Restrictions on Sale of Native Lands', AJHR, 1886, G-11, p 1.
44. 'Report . . . on Removal of Restrictions on Sale of Native Lands', AJHR, 1886, G-11, p 2

Cases were dismissed if Europeans did not appear or have their agents at the hearings. A number of cases were withdrawn, presumably because they would not have stood up to inquiry.

Barton was prepared to take sworn evidence from people who had embarked on purchases in Tauranga in 1878, 1879, and 1880, and who claimed that they were behaving no differently from others whose transactions had been approved by the Crown. The commissioner did not investigate these earlier cases himself, and where his criticism of the Crown's record is based on these statements it should be treated with caution. Records of interviews with Native Ministers or other members of the Government, in the general files on applications, show that this was a fairly common line to take. Claims to be following common practice, rather than the law, and statements that everybody else had 'got away with it', carried no weight with officials or ministers. The importance of the commission does not rest on how far Barton's comments about previous governments were justified. Its usefulness comes from his own investigations on the cases before him, and from the files of background material assembled for the commission. As well as providing evidence about the working of the restrictions policy, this material records a great range of Maori economic circumstances in the late-nineteenth century.

The points he had to decide on were in line with current policy, and had the same limits. The commission did not ask whether Maori should be encouraged to use their land themselves, nor where the line should be drawn so that Maori retained 'sufficient' land for the future. Barton took evidence only on the following questions: Had the natives sufficient other lands for their own use and that of their children? Was the bargain with the natives a proper one to be carried to completion, and was the price a sufficient price? Did any objection exist as to the legality of the bargain, or arising out of special legislation prohibiting transactions in native lands before the ownership and area were fully settled? Had the native vendors been treated fairly throughout the transactions?[45]

Within the limits of the commission, Barton was conscientious. In his approach to Maori rights, he seems himself to be motivated not by a sense that Maori should keep land, but that they should have a fair deal. Accordingly, he was rigorous about questions which could be reasonably clearly established, such as fair prices. He showed exceptional energy in criticising practices which he saw as illegal or harmful. Barton drew attention to weaknesses in the system, such as the trust commission, but he did not question the system itself. Nor was he out of sympathy with the object of the whole exercise which was, by and large, to confirm the alienation of lands which had been restricted from leases longer than 21 years or from sale, provided that arrangements met the criteria set down.

Bona fide Pakeha settlers, who had put time or money into land, were looked on favourably. Some sales were validated, but extended leases, too, were investigated. As a consequence some informal leasing arrangements were regularised in the interest of the Maori owners. He commented particularly on a case in Whakatane where he advised consent to a lease of 33 years. The lessee had improved 15,000 acres and was employing Maori workers.[46] But elsewhere he questioned the

45. Ibid, p 3

value to Maori of leasing. He wrote in a set of notes headed 'Memorandum for my own guidance':

> I have noticed throughout the course of my enquiries into native land purchases that the course is usually first to lease then to buy at a very low price and then to urge before me that the price is low because of the existence of the existing lease to the purchaser himself.[47]

He was able to insist on proper valuations. Barton trusted some of the purchasers so little that he required payments to be made in front of reliable authorities as a condition of consent. But his brief was a limited one, reflecting current policy. It did not extend to suggesting that owners lease rather than sell.

Problems with leases and sales emerge from a Wellington case. The Taranaki-based owners of Pakuao 1, 1 acre and 19 perches on Tinakori Road, in Wellington, had negotiated the sale of their land in 1877 for a price well under its market value. The transaction was certified by Robert Parris, the resident magistrate in Taranaki, as satisfying the requirements of the trust commission. The Government, however, refused to lift restrictions, on the grounds that the procedure was unsatisfactory, but also because the tenant had already offered to buy the land and would have paid much more than the owners had received.

In his defence the purchaser, William Halse, had given an account of the circumstances in which he had paid for the land. It had come to his notice through the principal owner, Raniera te Poka, offering it around for sale in Taranaki. Raniera was known to hold a large amount of land locally, as well as other interests in Wellington, and his fellow-owners also had property elsewhere. The land was on a 14-year lease at £8 per year and Halse wrote that he had advised them to invest the sum of £150, and receive £15 per year. He added that they were intent on selling, 'one of the reasons being that they would be dead before the lease expired'.[48]

Although the Crown steadily refused to remove the restrictions, the owners equally steadily refused to accept any rent from that point on. A letter in 1881 stated that they wished to carry out the word of their chief, Raniera, and the rent would be paid to Halse. Rather inconsistently, in 1885, they granted a new lease for another 21 years to the tenant, who was still anxious to purchase the property.

The two parties who contended the case before Barton were the lawyers for the two European sides, who reached a compromise. The arrangement which the Maori owners had insisted on was confirmed, in spite of the inadequate price, because the land had been burdened with a new lease. Barton commented, recommending with some reluctance that restrictions be removed:

> The Maori owners notwithstanding the opposition of the Government, insisted upon the sale to Halse and Humphries being treated as a proper sale, and although by granting the new lease they have exercised an act of ownership they have not communicated with the Hon the Native Minister or in any way claimed that the property shall be retained for their benefit.[49]

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46. Ibid
47. 16 October 1886, MA 13/29A, NO 87/721, NA Wellington
48. Halse to Samuel, 21 December 1880, with MA 13/29B, NO 87/397, NA Wellington

The owners did not appear at the hearing. Given the opportunity, they refused to repudiate arrangements which the Crown considered illegal and which Barton thought were not in their best interests. Pakuoa had initially been a McLeverty grant. A neighbouring block had been sold more than 10 years earlier on much the same grounds, that the rent was so low that investing money from a sale would bring in a better annual return. The owners in this case exercised their right to lease for up to 21 years, though the arrangement they made was not a good one. Though any deal involving a lawyer and a merchant (Halse and Humphries) raises questions, the owners seemed equally determined to exercise the right to sell on terms of their own arrangement.

Barton was faced with a dilemma which he felt unable to resolve satisfactorily. He commented:

> It is one of those cases, unfortunately too numerous, in which the natives themselves throw obstacles in the way of protecting them without doing injustice to those who have dealt with them, and they thus compel the Government to make a choice between evils.[50]

What were his options? It was not contemporary policy to look for more imaginative solutions that would have kept the land in Maori ownership against the apparent wishes of its current owners. The most he could have done would have been to insist on their receiving a better price. Once the land came before the commissioner whose business it was to settle outstanding cases, the criteria under which Barton was working made it difficult for him to reach any other decision.

Where it is possible to get a glimpse of what was behind the pressure to sell, debt was often involved. Europeans often turned out to be in financial difficulties as well, which added urgency to their representations, but for some Maori there was the added difficulty of meeting traditional obligations in a cash economy. An applicant from Hauraki, heir to the property of an important relative, had incurred such heavy liabilities for the tangi that after two years he was £187 1s 7d in debt to Europeans. To raise this sum, he needed to sell the land he had been left.[51] Barton, who was not inclined to let this go without investigation, intended to find out who the Europeans were at the back of this application. He was furious to learn that the Government had stepped in and purchased the land after he had gone to Thames for the hearing.[52] The Governor's consent had been obtained 'on account of the Government having entered into negotiation' for the purchase.

This draws attention to a whole area which time has prevented me from entering into, that is, cases where the Crown itself was involved. The Crown's own patterns of purchase left almost no trace in the departmental records which I have consulted.[53] Nor did cases where restrictions were removed for the alienation of land to the Crown appear in the printed Parliamentary returns. If an answer is to be

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49. Report, 23 December 1886, MA 13/29B, NO 87/397, NA Wellington
50. Ibid
51. Hohepa Hikairo to Native Office, 6 February 1885, MA 13/27, NO 86/2817
52. Barton to Native Office, 21 August 1886, MA 13/27, NO 86/2817

found it will presumably be in the records of the Native Land Purchase Office. This aspect of the subject requires further research.

The debt described above had arisen as a consequence of meeting traditional obligations, in an area where cash was needed. A final illustration of how inalienable land might be used as a source of income concerns an elderly woman Mere Pawa (also known as Mere Parata) living in a predominantly Pakeha environment. Her land, Pipitea reserve, lot 4, had been the subject of an application earlier in the 1880s and turned down by the Native Office on the grounds of the extravagant habits of her daughter, Ani. But Ani was now dead, and Mere, with her son who was unmarried and also described as elderly, had run up an account, month after month, with a Lower Hutt storekeeper. His record shows that their tastes were modest; common items were bread, sugar, and candles, and occasionally lollies or buns, a hat, or a pair of boots. The most costly purchases were coats. She had spent £148 in two years and two months.[54] Mere was regarded as the principal operator of the account, and she was not buying for others on any scale nor for any sort of display.

Mere appeared at Barton's hearing, with a cousin who was her spokesman. He stated that she had other property and listed shares in a number of properties all over the lower part of the North Island from which she was receiving small amounts of rent, and the sale of Pipitea, from which she was receiving only her third of £9 annually would make little difference. Her son and her daughter's niece had similar scattered shares, and supported Mere's wishes. The price that she had arranged was £268. Her spokesman explained that when Mere got goods she always asked what the balance was, and the storekeeper told her, so she knew how much was still due to her and how much she had spent.[55]

The only objection was raised by the tenant, who was running a boarding house on the site. Neither Barton nor Alexander Mackay, who later handled the matter seem to have been impressed by his claim that he would have paid more than the sum that was accepted. Both the valuers consulted gave very negative reports of the Pipitea property; 'very objectionable neighbourhood', wrote one, and 'poor prospect of better class', wrote the other. There was no sign of recognition by any Pakeha that this was a site that might be valuable in the future. As for Maori, Mere had disregarded restrictions, and proceeded to make her own arrangements. The land provided her with the cash required to live in modest comfort as an elderly woman in an urban environment, but the consequence was further loss of Maori patrimony. She continued to make use of land in this way. That this was a dilemma was not apparent to any of the parties at the time.

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53. Papers relating to the purchase of Moehau 4 block, at Hauraki, are filed with the general applications for removal of restrictions, though the issue of restrictions was not raised specifically. The documents certainly show the Crown behaving as shabbily as many private buyers. The Government's lease of the goldfields, which had existed since 1862, was unilaterally terminated in the mid-1880s; the warden of the goldfield held on to money belonging to the owners to induce them to sell; and requests to have lands reserved were ignored. Freehold passed to the Crown in 1889. MA 13/29B, NO 89/853.
54. MA 13/28, NO 86/4091
55. Ibid

Circumstances differed so widely, that any single generalisation about the reasons why Maori applied to have restrictions removed from land in this period would be misleading. People who were managing well wanted to sell restricted land so they could invest money in developing other properties. People who were trapped in debt and threatened by creditors saw the sale of restricted land as a way out of their difficulties (and financial traps were sometimes set to bring about this result). Less dramatic than accounts of success or failure were the lives of people with moderate resources, like Mere Pawa, who saw no reason why they should not use land to pay for ordinary everyday expenses. If the Crown was persuaded that certain conditions were met, the cumulative effect of choices, as well as pressures, was that land was alienated.

My survey has tended to focus on individual applicants because they were the ones who argued their cases with the Native Office. The process was aimed at assessing needs and resources at the individual level. Where there were many owners and large blocks of land, decisions were often made in effect outside the office, and there is not the same background material in these files. When the law changed in 1888, applications for the removal of restrictions increasingly went through the Native Land Court. The detailed documentation which has made this discussion possible was no longer required.

5.6 NEW ROLES FOR THE NATIVE LAND COURT IN THE 1880s – THE NATIVE LAND DIVISION ACT 1882 AND THE NATIVE RESERVES ACT 1882

From 1882 on, there were parallel paths for the removal of restrictions. The Native Land Court was empowered to remove restrictions when partitioning inalienable land, and restrictions might be removed from reserves by the court, without reference to the Governor in council. The judges of the Native Land Court also took over the trust commissioner's role in the course of the 1880s.

These two measures – the Native Land Division Act 1882 and the Native Reserves Act 1882 – facilitated the removal of restrictions. They arose in part from a distrust in the power of Native Ministers and a conviction that land questions would be settled more openly by decisions made in the Native Land Court alone. The point is made clearly in the following exchange:

> Colonel Trimble: Are you aware that in the provisions of these Acts great care was taken to place the taking off restrictions in the hands of the Court only, and that no power was given to the Governor in Council in regard to taking off restrictions or interfering with the judgement of the Court?
>
> Ballance [Native Minister]: I am aware that that is one way of removing restrictions – by subdivision.
>
> Trimble: But the point of my question was this: Not that it was one way of getting rid of restrictions, but did not the Court deal with the matter absolutely without referring its decision to the Governor in Council?

Ballance: Yes; the Act of subdivision removes restrictions.

Trimble: Are you not aware that the policy of Parliament for some years past has been to take power from the Governor in Council and place that power in the Courts of law?[56]

Ballance denied that this was the general tendency of policy, but nevertheless, it applied to the two Acts under consideration. The Native Land Division Act 1882 empowered the Native Land Court to impose or remove any conditions, restrictions or limitations on the new grant issued with the division of land. Europeans who wanted free trade in Maori land supported the idea of subdividing as far as possible, to allow the individual owners to dispose of land as they pleased. If an owner or the majority of owners applied to the court for the division of land, the court could order a division and issue new grants. The court might indeed impose conditions, restrictions or limitations on this grant where none had been on the original, but there was nothing novel about the court having power to place restrictions.

The significant development was that new grants could now be issued by the court without any conditions, restrictions, or limitations, although they might have been on the original grant. This measure has the character of being a deliberate loophole, as it offered an indirect and relatively easy way of having restrictions removed without further scrutiny. As responsibility for maintaining restrictions passed from the administration to the court, the function of restrictions was undermined.

The second of these two measures, the Native Reserves Act 1882, widened the definition of reserves to include all lands excepted or reserved by Maori in sales, cession, or surrender to the Crown, and all lands excepted or reserved for the Maori by the Crown. Although only those already vested in the Governor, or a commissioner, or any public officer, would automatically go under the management of the Public Trustee, there was a sense in the debates that this was a radical measure.

The policy on restrictions was a new departure. It applied to all reserves, whether or not they were controlled by the Public Trustee:

Where any Native reserve vested in the Public Trustee, or under his control, or held by any natives under Crown grant, memorial of ownership, or certificate of title, is subject to any restrictions, limitations, or conditions, such Trustee or Natives respectively may apply to the Court to have the same or any of them annulled and removed.[57]

The Native Land Court would make the decision about an application, rather than the Native Department. The court, too, was now charged with an additional, extremely important duty:

Before altering or removing any restrictions, limitations, or conditions attached to any Native reserve, the Court shall be satisfied that a final reservation has been made,

56. 'The Native Land Disposition Bill, 1885; Minutes of Evidence', AJHR, 1885, I-2B, p 4
57. Section 22, Native Reserves Act 1882

> or is about to be made, amply sufficient for the future wants and maintenance of the tribe, hapu, or persons to whom the reserve wholly or in part belongs.[58]

It only needed a judge to sign and seal an order removing restrictions, wholly or partly, to make the land alienable.[59] The approval of the Governor in council was no longer required for freeing up reserves.

During the debates Bryce, as Native Minister, spoke about the two sorts of objections which this provision in the Native Reserves Bill had raised, which were two of the most commonly expressed positions when Maori land was discussed. First, the Maori members argued that Maori themselves should be managing their own property. Taiaroa wanted to be in complete control of his own land, and emerged the following year with a special Act by which he became legally a European in respect of land. Te Wheoro thought the law should make reserves completely and absolutely inalienable. Tawhai objected to giving the Public Trustee control over Maori land, observing that the owners should manage the restrictions on reserves. European sympathisers gave qualified support, by proposing Maori representation on boards of management.[60] Bryce agreed that a Maori board member might give valuable advice on the management of reserves, though he was very firm that this would not be an official post, nor would it be salaried.[61]

He then moved on to the second major objection, that this Bill might bring a large amount of land under it, 'to the injury of the productive power of the colony':

> However, ample provision has been made in regard to this matter of unlocking land which has been locked up, except with regard to final reserves – reserves which the Court has determined are absolutely necessary for the maintenance of the Maoris.[62]

There was an apparent confusion of goals. While making it easier for Maori to sell land and Pakeha to buy it, the Government still apparently believed that it was capable of protecting Maori land better than the owners could. Bryce went on in his speech to connect the freeing up of Maori land with views about the future of the Maori population. While he did not share the belief that the race was dying out, he also rejected the recent estimate as exaggerated:

> We are told that the Maori population is about forty-four thousand. I believe there is nothing like that number in the colony. I do not believe there are more than thirty thousand . . . I believe the Maori population in this Island is not as great as has been supposed from the census.[63]

He did not explain why he thought the census figures were wrong, though he stated that his opinion was based on recent experiences. Bryce's view was that the rapid decrease had been halted, and that the Maori population could well take a turn

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58. Ibid
59. Section 23, Native Reserves Act 1882
60. The Bill was debated at considerable length. NZPD, 1882, vol 41, pp 306–315, 518–529; vol 42, pp 650–662; vol 43, pp 503–512.
61. 28 July 1882, NZPD, vol 42, p 651
62. Ibid
63. Ibid, p 652

and increase. This theme was relevant to the policy of restricting land from alienation:

> Now if honourable gentleman were in my position, or knew the number of applications I have received from Natives who wish to sell their property, they would know there is a considerable desire at times amongst the Natives to denude themselves of their lands, and it is not always from the Maoris who have the most land that these applications come. On the contrary, it seems to me that those having little land are not less eager to sell than those who are more plentifully supplied.[64]

He then spoke about the importance of maintaining an inheritance for the race, which he believed was the object of the Native Reserves Act. If by this Bryce meant something more than the passing on of enough land to support one's immediate family, it was not an intention that Pakeha ministers often stated.

A native reserve commissioner was appointed under the Act to carry out the duties of the Public Trustee relating to Maori reserves. The commissioner, or his agent, was to apply to the Native Land Court to have restrictions placed on land going before it, 'so as to prevent Natives from so far divesting themselves of their land as to retain insufficient for their support and maintenance'. Alexander Mackay was appointed as commissioner, but when he became a judge of the Native Land Court, in 1884, the post was not again filled.

5.7 CHIEF JUDGE J E MACDONALD AND 'A VERY DANGEROUS POWER'

At the same time as the Native Office and the Native Minister were giving reasonably serious consideration to requests for the removal of restrictions, and Barton, as commissioner, was hearing witnesses and sifting through documents, the judges of the Native Land Court also had the power to remove restrictions.

Did it make any difference which path was taken? There is some indication of the court's approach in a set of papers arising from the repercussions of Barton's decisions in Tauranga. The chief judge of the Native Land Court, Judge J E Macdonald, was asked for advice about cases where there had been petitions against the decisions.[65] His reply outlines some of the principles involved. It also indicates the danger that a shift in responsibility for the removal of restrictions from the department to the court would result in a very limited view of the Crown's duty. In this case, although the chief judge's advice had been sought with the express intention of following his recommendations, the Government did not find his opinion on the incomplete transactions acceptable, and upheld Barton.[66]

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64. Ibid
65. Macdonald, memorandum, 13 March 1888, MA 11/3
66. Hislop wrote in this document that he had come to a conclusion, having perused a number of papers including Judge Macdonald's statement. Memorandum re Commr Barton's report on Native Lands at Tauranga, 9 March 1888. Macdonald's lengthy statement was dated 13 March 1888, apparently post-dating Hislop's conclusion. The discrepancy is more likely to be explained by an error in dating than by the existence of a further set of opinions.

Macdonald showed from his review of the cases that he was aware that serious irregularities had occurred in the transactions. It was these that had caused Barton to turn them down, rather than any of the other criteria, that is, whether owners had sufficient other land, whether the bargain was of a class sanctioned by the Governor, and whether the bargain itself was not illegal (that is, neither alcohol nor weapons had been offered as payment).[67]

Barton had given a qualified approval in one of the cases, though he excepted the interests of three owners who had not transferred their title to the land. Without inquiring any further, Macdonald could see no grounds why those three owners 'should be precluded from the measure of emancipation accorded to their fellows'. He then adopted 'the apparently obvious view': if the three had ample interests in other lands, any restriction on their right to sell should be removed and that to do otherwise 'certainly seems hard on the purchase' who had acquired all the other shares in inalienable land.

But this was the least questionable case on which to propose to reverse Barton's judgment. The others all involved gross dishonesty: money put on account by an agent which was never paid to the owners, the altering of the name in a deed from one block to another, and the purchase of land which had been made an absolutely inalienable reserve at the owners' request in an open court.

Macdonald noted that these circumstances rather weighed against recommendations. On the other hand, he pointed out that it was not the buyer who had committed fraud, only his agent, and that 'the natives seemed to be satisfied with the transaction'. In the case of the reserve, the words 'absolutely inalienable' had not appeared on the Crown Grant. Since that was the case, Macdonald explained that the restrictions were merely conditional. The land was alienable with the consent of the Governor. He made no reference to Barton's evidence that the majority of owners wished to retain it.

Macdonald agreed that these transactions had not been conducted in good faith. But he believed Barton had missed the point. In his opinion, the conduct of would-be purchasers was irrelevant. The object to be attained was the removal of restrictions:

> Making lands inalienable in the hands of natives has exactly the effect of entails which have had practically to be abolished because against the public welfare. Indeed such restriction is only to be justified on the plea that it prevents natives denuding themselves of all land before they have learned to maintain themselves by work and, some would add, so becoming a burthen on the state . . .[68]

He recommended removal of restrictions in all cases. This was qualified by the words 'inasmuch as the proposed native vendors have ample other estates' (a point which was generally difficult to establish when numbers of owners were involved, but this was not a subject into which he was called on to inquire). The only point which he believed was relevant was the one outlined above: 'the state in which natives would, as to their possessions, be left after alienation'.[69] As for the deeds

67. Macdonald, memorandum, 13 March 1888, MA 11/3
68. Ibid

previously executed, he felt this was not a question which needed discussion here, and nor was it one where ministers would incur responsibility. At this point, the Colonial Secretary, T W Hislop, wrote in the margin: 'I don't understand this style of argument. It looks to me morally unhealthy.'[70]

The chief judge added in conclusion that the proposed Native Land Court Bill continued a clause by which the court would be empowered to remove restrictions. The responsibility of dealing with the matter under discussion might, therefore, be left with the court if the Bill became law. As Hislop noted, 'If this is an indication of the p[rinci]ples upon which the court will act I think this will be a very dangerous power.'[71]

After 1888, a series of Acts made it increasingly easy to apply to the court for recommendations to get rid of restrictions on any inalienable land. Many applications went through the court as a consequence. Those imposed in earlier years still required the Governor's assent, but the recommendation came from the court.

Macdonald was to retire later that year. His successors, Seth-Smith and Davy, had a more serious approach to the law. Nevertheless, the court was not under obligation to go outside the narrow question of whether the owner had sufficient other land. The Native Office had on occasion shown a grasp of personal circumstances, and sometimes had sensed when either of the parties to a transaction had something to hide. The Native Land Court was not obliged to ask any question beyond sufficiency of land, for the removal of restrictions. It was also supposed to sift out invidious purchases, having inherited the trust commissioner's role. The court could hear sworn evidence but it was not equipped to carry out extensive inquiries. In principle, the law would give protection; the Native Office had exercised a degree of paternalism that was not always welcomed but in some cases acted to keep land in Maori ownership.

69. Ibid
70. Note initialled T W H, on Macdonald, memorandum, 13 March 1888, MA 11/3
71. Ibid

CHAPTER 6

POLICIES, LAWS, AND COMMISSIONS – THE LATE 1880s TO THE 1900s

6.1 INTRODUCTION

Barton had limited his investigations as commissioner into cases where some sort of transaction was already under way. He had declined to report on applications where no negotiations existed, on the grounds that this would be tantamount to reporting on 'the expediency of the total removal of restrictions on sales from Natives to Europeans, a question I deem to be a purely political one, for the consideration of Government or Parliament, and quite outside my province.'[1]

Governments were more clearly becoming national ones, with coherent policies for the whole country. In 1888, a conservative administration passed a key act which answered Barton's question. Restrictions might now be removed in the Native Land Court without any prior arrangements to lease or sell. More significant were the steps by which fewer and fewer owners were required to agree to have the process of removal of restrictions initiated. The direction of legislation on restrictions did not change when the Liberals came to office in 1890, determined to help Pakeha farmers on to the land. The context for policy relating to restrictions in the 1890s and 1900s was dominated by the Crown's goal of closer settlement. Pressure was put on any land perceived by the Government as under-utilised.

Constant amending of the law eroded the concept of inalienability. Restrictions might be requested, and placed on titles by the court, but their removal might be as readily initiated by a minority of owners. Partitioning undermined attempts to retain larger areas intact through restrictions.

These years also saw two important commissions, the Rees–Carroll commission, appointed to inquire into the subject of Native Land Laws, and the Stout–Ngata Commission on Native Lands and Native Land Tenure, which reviewed the history of Crown policies with a critical eye. Both the 1891 and the 1907 commissions condemned past legislation. They did not halt the sale of Maori land. The process was, on the contrary, facilitated but on a more systematic basis. The object was, as in the past, to ensure that 'surplus' lands would be available for settlement, and in order to do this fairly, to identify what lands Maori used. The Crown's previous attempts had not been successful in providing an effective mechanism for assessing

1. Barton to Native Minister, 14 May 1886, 'Report on Removal of Restrictions on Sale of Native Lands', AJHR, 1886, G-11, p 3

what land Maori required. The Stout–Ngata commission in particular was concerned to establish how this might be done.

6.2 THE NATIVE LAND DISPOSITION BILL 1885

The Native Land Disposition Bill signalled a new determination by the Government to gain a wider control over the acquisition and use of land. It proposed the reassertion of Crown pre-emption not just for limited areas but as a general policy. This was an important shift, but the contentious clause to which both Maori and Pakeha objected was clause 62:

> The Governor in Council may from time to time make such orders and general regulations as may be deemed fit for prescribing and regulating—
>
> (a) The areas in, and the estate, term, or interest for, and the conditions upon, which land may be conveyed or leased under this Act;
>
> (b) The reservations, conditions, and limitations to be made or contained in any conveyance, lease, or contract made under this Act:
>
> also like orders or regulations to be special to any particular land, or to land in any prescribed district.[2]

In relation to such a comprehensive approach, the relatively narrow restrictions policy appears little more than small-scale tinkering. To Pakeha, clause 62 looked like land nationalisation; to Maori, it represented an unacceptable level of state power. All the recommendations of boards and committees on which Maori were represented, as well as those of the Native Land Court, were intended to be subject to Government approval.[3]

Although Ballance's Native Land Disposition Bill did not pass, it provoked a discussion of restrictions on alienation in the Native Affairs Committee in 1885. The exchange that follows is worth quoting at length because it shows that restricted lands had become a baffling category, even for this group. Among those present was John Bryce, until recently Native Minister himself.

Sir George Grey opened the topic by expressing concern about what would happen when restrictions were lifted from a block. Would there be open competition for purchase? Ballance answered that he was in favour of that approach, but the clauses the Bill contained were intended to meet cases where particular parties had a legal right to make purchases. He was proposing a new arrangement: that either a judge or commissioners would make inquiries and report to the Governor in Council:

> Bryce: I do not quite understand the new clause. Is it intended when restrictions are removed from a block, that the block shall come under this Act; or is it intended, as you suggested, that it shall be a means for the purpose of concluding transactions?

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2. 'Native Affairs Committee Report on the Native Land Disposition Bill, 1885', appendix, AJHR, 1885, I-2B, p 74
3. T McIvor, *The Rainmaker: A Biography of John Ballance, Journalist and Politician, 1839–1893*, Auckland, 1989, pp 142–143

Ballance: Yes: that is the intention.

Then, it is not set out under this head?
Ballance: No; I see it is not. There is an omission here: it is intended to validate such transactions.

Sir G Grey: I do not understand the meaning of the Native Minister's answer; for here it refers to everything.
Bryce: I am puzzled myself. Let us take a block of land on which there are restrictions: then, if these may be removed by the process set forth here, what is to become of that block? Is it to go under the general machinery of this Disposition Bill, and to be disposed of by the Land Board constituted under this Bill; or is it more correctly speaking, for the purpose of concluding private transactions which are now in progress to be concluded? Because in the latter case, that would be selling the land under a system not contemplated by this Act, or outside this Bill altogether: judging from what the Native Minister has said, I think it must be intended to do both things – first to enable transactions in progress to be concluded, then, after these are done with, to enable the restrictions to be removed from the blocks which would go under the ordinary provisions of this Bill, or this Act.[4]

In raising this last point, Bryce was going a step further than the Bill had intended, to lifting of restrictions in a completely new way:

Ballance: I would like to explain: the Governor now has power to remove these restrictions without enquiry, where it is desirable to allow transactions to be completed. Then, we assume that the Commissioner will report accordingly, and the Governor will give effect to that report. Then, with regard to other cases where restrictions might not be removed, the land will then remain in the same position as Native reserves, and will be dealt with as reserves would be for the benefit of the Natives beneficially interested. That is the position.
Bryce: But that will leave one class of lands unprovided for altogether. There are certain lands on which restrictions exist, that are much like other Native lands, but are not reserves under the Act we have at present, nor would they become so. What I want to know from the Native Minister is this: Is it intended to remove restrictions from all those lands where they are uncomplicated by private transactions?
Ballance: You mean where no private persons intervene?
Bryce: Yes

Ballance: But that class is not dealt with in this part of the Bill; this only applies to cases where individuals have been trying to acquire these reserves.

29. Then, where restrictions are now on lands uncomplicated by private transactions, these restrictions would then in effect amount to a positive entail?
Not necessarily; they might be dealt with in another way.

30. Under this Bill?
I assume that where these restrictions are placed on land it is in the position of a Native reserve.

31. You are not asserting that is the legal position?

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4. Minutes of evidence, 'Native Affairs Committee Report on the Native Land Disposition Bill, 1885', AJHR, 1885, I-2B, p 3

I am assuming that is the virtual position. In the first place I ask myself why there are restrictions on land at all but that the natives should not be allowed to alienate them.

32. Restrictions might be put on for various reason?
That is the main reason.[5]

Bryce pressed on with his point, questioning the necessity for inalienable land, and the function of restrictions:

Bryce: What we want to know is whether it is intended, in cases of lands outside those on which private transactions have existed, whether it is intended to remove restrictions: I would point out that these lands are not legally reserves at present, whatever they may be ultimately?

Ballance: This clause will not interfere with the right of the Governor to remove restrictions where there had been no dealing, without any enquiry at all. The Governor's power will remain the same as before. If it was desirable to remove restrictions he could do so. The Governor will have the same power to do so here.

Bryce: It would be so undoubtedly were it not for these sections: these sections are restrictive?

Ballance: Yes.

Bryce: Under what these sections prescribe this necessarily would take place?

Ballance: I think you would find the preamble does limit it. 'Whereas it is desirable that the removal of restrictions should be dealt with only after due and formal inquiry.'

Bryce: Then what I wish to point out is that he would cease to have the power; this land would not be a reserve, it would be entailed and remain in an unprofitable state?

Ballance: I do not think so.[6]

Ballance was not ready for a radical assessment of the role of restrictions. He was contemplating at this point only the familiar pattern of private purchases leading to an inquiry and the piecemeal granting of applications for the removal of restrictions. His only new policy was to take the process out of the administration of the Native Office and place it permanently in either the Native Land Court or a commissioner's court.

The committee was to focus on yet another aspect of restrictions on alienation. When Colonel Trimble asked Ballance if he had paid attention to the Native Lands Division Act 1882 and the Reserves Act 1882, he was acting as spokesman for a particular point of view.[7] He believed those acts had put the removal of restrictions in the hands of the court, and the Governor in council had no power to interfere. His view that the removal of restrictions on inalienable lands should be taken out of the political arena. Already the land court offered an alternative route to the removal of restrictions through the partition of blocks. The responsibility for all cases was soon to pass to the judges of the Native Land Court.

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5. Ibid
6. Ibid, pp 3–4
7. Ibid, p 4

Though neither Wi Pere or Wahanui, the two Maori members of the committee, became involved in the discussion at this point, both suggested amendments. The Bill required that the chief judge of the Native Land Court should by the *Gazette* and *Kahiti* set down a time and place for inquiring into the removal of restrictions. Their amendments added that no such inquiry should take place unless all the owners were present or represented.[8] That they both thought that such a clause was necessary implied a very deep distrust of the conduct of the Native Land Court, whose role in this area was to be extended over the following years.

6.3 SIGNIFICANT ACTS – 1888 TO 1894

Ballance's attempt to reimpose a Crown monopoly over land transactions was a failure. Maori were not prepared to offer land to the Crown under its terms. With the Native Land Court Act 1886 Amendment Act 1888, the field was once again open to private purchasers. The precautions laid down in connection with this were the responsibility of the court, which was, under section 13 of the Act, directed to find out:

> as to each owner whether he has a sufficiency of inalienable land for his support, and shall, out of the land the subject of any such order, declare to be inalienable so much and such parts as shall be necessary for the support of any owner not shown to be possessed of such sufficiency, and such part or share shall be deemed inalienable accordingly.

The court had not shown itself in the past to have the capacity to carry out such extensive inquiries.

The single measure which had the most impact on the removal of restrictions was the Native Land Act 1888. Section 5 dealt with the whole range of limitations and restrictions on titles in one sentence:

> Existing restrictions on alienation may be removed or declared void by the Governor in Council on the application of a majority in number of the Native owners, and instruments containing such restrictions shall be hereafter be read and construed as if the words imposing or recommending restrictions had been omitted therefrom.

Wi Parata saw this section as:

> opening the door with a vengeance, and letting in all sorts of evil on the Native people . . . this provision must not be extended to the South Island, because the Natives in that Island have no surplus lands which they can afford to sell or lease.[9]

He argued that without restrictions, storekeepers would encourage Maori to go into debt. A number of members agreed with his view of its likely impact. But other

8. Ibid, pp 73–74
9. 11 July 1888, NZPD, vol 43, p 691

debaters showed considerable impatience, both with the tangled state of the laws, and with current Maori opposition to 'the colonisation of Native lands'.[10]

An order of the court might annul or vary any restrictions imposed by the court if the majority of owners applied. This process had previously been initiated only when there was a specific transaction to be considered. Irregularities had sometimes been detected in these in the process of being vetted by the department. Under the new legislation, owners could decide to free up inalienable land with no particular transaction in view.

The printed returns for the years from 1889 to 1891 show that section 5 was applied, with few exceptions, to many successful applications to remove restrictions on alienation.[11] After 1891, the returns of removal of restrictions were not printed until 1905, after the law had changed again.

How many applications were refused in the years after 1888, and how this rate compared with the previous pattern, are questions which would require more research to answer. The completed forms from the court passed through the office in Wellington on to the minister, in cases where the wording of the original restriction made this necessary, for the Governor's signature. The wording of the original restrictions meant that there were still cases where it was possible for the minister to intervene. The staffing of the Native Department was reduced and in 1893 it became part of the Justice Department. It was less likely that there would be significant administrative input.

It is true that the standard requirements were still in place. But it was now the court which had to be satisfied that owners had a good title to other land, or shares in other land, 'sufficient for their maintenance and occupation', and that all other owners concurred in the proposed removal. How far these were reliable safeguards depended, as in the past, on what agencies were available to police them.

The removal of restrictions was, indeed, subject to the provisions of the Native Lands Frauds Prevention Act 1881. The commissioners were charged with the familiar duty of ascertaining whether sellers had enough land left for their support. They had to be satisfied that the transaction was not invalid, that payment had been made, and that all the formalities associated with signing the deed had been followed.

Barton had detected a number of very serious irregularities in land dealing in the course of his inquiries into the removal of restrictions. Purchasers and agents had been paying over money and collecting signatures for transfers before boundaries and ownership were defined, or any reserves had been chosen for Maori occupation and use. The excuse for this 'universal and unavoidable practice' was that:

> early transactions had been conducted in a similar manner, and had nevertheless passed the Frauds Prevention Commissioner, as well as the Government, and finally it was urged that all the cases before me in which I might report favourably would at a later stage have to pass the Frauds Prevention Commissioner, who might be safely trusted to protect the interests of the natives.[12]

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10. Ibid, p 676
11. AJLC, 1889, no 5; AJHR, 1890, G-3; AJHR, 1891, G-9
12. G E Barton, 'Report on Removal of Restrictions on Sale of Native Lands', AJHR, 1886, G-11, p 2

These remarks were made in relation to Tauranga, but he encountered cases elsewhere. In the Wairarapa in 1882, the 29-acre Matapuka block had been declared inalienable land by Judge Brookfield when awarding the grant to three owners. These three were already in debt to a local storekeeper, to whom they had signed a transfer of this land at some point (left blank on the document). They had also signed three sworn declarations – form Cs – before a local justice of the peace. Commissioner Barton was angry enough to name the magistrate who was prepared to sign forms which were 'absolutely untrustworthy' as evidence of what had taken place in front of him.

The deed is in these documents represented as a deed to blank (person) the lands are blank (lands) and the date when the declaration is made before the magistrate is also a blank (date) and by these declarations these three natives are made to swear that they each 'perfectly understand the nature of the said deed and have no complaint to make concerning the said transaction'.[13]

Barton thought the owners had probably received some money on account of land they had an intention to sell, and had been required to sign the documents before that money was paid. He added that:

> 'Forms C' seldom if ever signify more than that fact, and the sooner they are abolished as evidence of anything whatever, the better. I have now in my possession forms C actually filled in with facts which did not occur till two months after the date when they were sworn, and I look on them as mere cloaks for fraud and dishonesty.[14]

The Barton commission may well have been a catalyst for an overdue reform of the way the trust commissioner's role was conducted. The independent office was phased out. After 1 July 1885, the chief judge and the judges of the Native Land Court were to be the only trust commissioners. According to a notice in the *Gazette*, deeds requiring to be certified, or caveats against the granting of any certificate, were to be forwarded to the registrar of the Native Land Court of the district within which the land being alienated was situated.[15] The Native Lands Frauds Prevention Act 1881 Amendment Act 1888 laid down that the investigation of the points required by the Frauds Prevention Act should take place in an open court. The role was absorbed into the Native Land Court's responsibilities. In 1894, the post was abolished.

Other important changes placed a greater burden of responsibilities on the Native Land Court. From 1889, the Native Land Court was to deal with all investigations of applications for the removal of restrictions. Recommendations from the court would go forward for the Governor's consent. Without extra staff, it is hard to see how the court could carry out these duties.

Barton had expressed enormous frustration at the delays he had faced as special commissioner in 1885. He had tried to insist that witnesses attend hearings to investigate details of transactions involving inalienable lands. He had not always had success. As a Native Land Court judge, he apparently refused to carry out the

13. G E Barton, report, 10 November 1886, NO 86/3674, MA 13/28, NA Wellington
14. Ibid
15. 'Native Lands Frauds Prevention Act 1881', 9 June 1885, *New Zealand Gazette*, 1885, no 38, p 760

requirements of the current Act, the Native Land Court Act 1886 Amendment Act 1888, because he saw them as impossible. His reasons were practical ones. There are no grounds for believing that Barton had doctrinaire objections of the sort which had been the source of Fenton's refusal to carry out sections of the 1873 Act.

At the Waipiro Court in 1889, an appeal was made against absolute restrictions which Judge Scannell had placed over land in the previous year. The applicant's lawyer argued that the judge had omitted to follow the 1888 Act, which provided that the land court inquire into the sufficiency of the land holding of the owners. Barton and Von Sturmer decided the 1888 Act was unworkable and granted the application:

> The rehearing Judges of the Native Land Court cannot be expected to close their Court and occupy themselves in making active enquiries all over the country respecting the other lands (if any) owned by these 173 Natives and respecting the restrictions (if any) imposed upon such other lands.[16]

The implication from this passage was a radical one. By this interpretation the onus was now on the court to prove that Maori had no other land before a restriction might be placed on alienability. Without further research, it is difficult to say whether practice was changing generally. I have not found evidence that courts were generally following this course. On the other hand, minute books often record little beyond the details required to furnish a title.

In reference to the partitioning of land held on memorials of ownership, and the subsequent issue of Crown Grants, the Supreme Court gave the opinion that restrictions were only to be imposed if owners had not already a sufficiency of inalienable land for their support. The judgment in this case went against Wi Pere, who was in a minority of owners trying to keep part of a block inalienable.[17] Richmond cited section 13 of the Native Land Court Act 1886 Amendment Act 1888:

> The Court, on making an order under sections twenty, twenty-one, thirty-one, or thirty-three of the said Act, [the Native Land Court Act 1886] is hereby empowered and directed to ascertain as to each owner whether he has a sufficiency of inalienable land for his support, and shall, out of the land the subject of any such order, declare to be inalienable so much and such parts as shall be necessary for the support of any owner not shown to be possessed of such sufficiency, and such part or share shall be inalienable accordingly.

It was a confusing situation, with the judgment arising out of particular circumstances, but the implication seems to be that restrictions in general would be imposed only when the court considered the owners had not already a sufficiency of inalienable land for their support. If this was so, the 1888 Act was indeed a turning point. There had always been uncertainty about sufficiency of other inalienable land held by owners, but since the days of Judge Munro in Hawke's Bay

16. G Dallimore, 'The Land Court at Matakoa', MA thesis, University of Auckland, 1983, p 151
17. *Re Puhatikotiko Block*, Court of Appeal, 19 October 1893, typed copy, J 1, 1894/173

in the later 1860s, that had not prevented restriction orders if owners had requested them.

The situation does not however appear to have been completely under control. Inconsistency had always been an element in the removal of restrictions, even when the Crown had attempted to apply rules to the assessment of applications as they passed through the Native Department. This inconsistency was to be compounded by the diverse approaches of the judges of the Native Land Court. The law by now was hopelessly tangled.

In 1890, by section 3 of the Native Land Laws Amendment Act 1890, it became no longer necessary for all the owners to agree to the removal of restrictions under section 6 of the Native Land Court 1886 Amendment Act 1888. This was followed by Acts in 1892 and 1893, making special provision for removing restrictions on land for sale to the Crown. In 1893, the Native Land (Validation of Titles) Act gave the court the power to validate any informalities which had occurred in the removal of restrictions. All these undermined the principle of inalienability.

From 1894 onwards, section 52 of the Native Land Court Act 1894 had a major effect on the pace of the removal of restrictions. The Native Land Court's jurisdiction included placing restrictions on alienation, and varying them or removing them. The court was now able to remove restrictions on alienation if at least one-third of the owners agreed, replacing the requirement that it should be with the decision of the majority. The requirement that every owner have sufficient other land for their support could be met, as before, by partitioning.

After the Native Land Act 1888, even an absolute restriction had been removed by section 5.[18] Restrictions were removed on a larger scale after the 1894 Act.[19] It is impossible to tell what was behind this. The pressure from the Crown to buy lands for Pakeha farmers has already been mentioned but, as in the past, the applicants' particular circumstances were also relevant. By this time, the state was giving financial assistance to Pakeha farmers. Maori farmers were not able to draw on cheap capital to develop land. It is at least worth considering whether some the owners of previously inalienable lands were realising on this property in order to gain funds to develop other lands. For the first time, Maori Land Councils were bringing blocks forward for the removal of restrictions.

A large number of small sections were being made alienable. These were both urban and rural. What were the options for their owners? Possibly there was a clue in the account Wi Pere gave in 1898 of the sales of small pieces, arguing that such sales should be prohibited, even if the land was held on individual titles under fee simple. He stated:

> this system of selling and buying Maori lands is the thing that makes us cry out as we continually do. A man sells all his land and then comes crying to the Government to give him some more. Why, there are some old Maoris in the Waikato who at the

18. There appears to be only one case involving the removal of restrictions from absolutely inalienable land. 'Return of Cases in which Restrictions on Alienation . . . have been removed by the Governor, from 1 April 1888 to 31 March 1889', AJLC, 1889, no 5, p 2
19. 'Applications respecting Native Land since thepassing of "The Native Land Court Act 1904"', AJHR, 1905, G-4

present time have actually sold their land – divested themselves of their interest in their land – so that it will be competent for them to become applicants for the old-age pension. Those are the kind of people whose actions annoy me very much.[20]

This was not a new pattern for old people whose land was on long-term leases or who had no heirs, though eligibility for the pension was a new consideration. Evidently, these old people did not rely on being supported by the community around them. Although according to the law no seller was supposed to be left landless, the pension might be seen to replace land as the source of a 'sufficient' income.

An immensely long and detailed return was prepared at the request of W F Massey, showing the working of the 1894 Act up until 1905.[21] Although most of the 690 applications that had been considered in that 10-year period were passed, 126 of the applications were turned down, which was about one-fifth. As far as acreages went, 452,453 acres became alienable, but 95,372 retained their restrictions, representing one-fifth also of the total acreage. Also, the process itself was a slow one through the court, and there was a long list under the heading 'Applications not yet dealt with'.

These Acts marked a turning point. As restrictions were progressively eroded, there was a shift in emphasis. Other approaches emerge from Maori initiatives as more likely to protect Maori landownership.

6.4 THE NATIVE LAND COURT JUDGES AND THE LAW

'The law as to removal of restrictions is in dire confusion and should be amended.' These words are written on the outside of a file containing a number of awkward problems which had arisen out of judges' experiences with the removal of restrictions on alienability from 1890 to 1894.[22] Some light is thrown on the court itself, in the course of discussing the law. One particular query led to the conclusion that a number of the applications granted by the court in the first three years of the operation of the Act of 1888 were not technically in order.

A sequence of notes on the removal of a set of restrictions gives a glimpse into the extent to which confusion had set in. Judge Mackay had expressed some scruples about the court's ability to deal with Tutaehaohao 5, for which restricted titles had recently been issued on partition.[23] All the owners now requested the removal of restrictions. The original block had been made inalienable in 1888, and according to the wording of the law, the consent of the majority of the owners of the original block was required. Though the court could deal with titles that existed in

20. AJHR, 1898, I-3A, p 17
21. 'Applications respecting Native Land since the passing of "The Native Land Court Act 1904"', AJHR, 1905, G-4
22. C J Haseldean, memo on cover of file, 24 February 1894, 'Removal of Restrictions', J 1, 1894/f173, NA Wellington. My attention was drawn to these papers by the generosity of a fellow researcher, Suzanne Woodley
23. A MacKay to the Under Secretary, Native Department, 27 December 1892. A copy of the original memo of 11 November 1890 is with the attached papers. J 1, 94/173, NA Wellington

1888, Mackay did not believe that it had authority to proceed with the removal of restrictions on titles recently issued by the registrar.

The chief judge, H G Seth-Smith, thought these questions were:

> more for the Governor and the Land Registry Department than the Court. The Court is not empowered to make any recommendation, but only to inquire and report whether the provisions of Section 6 of 'The Native Land Court Act, 1886, Amendment Act 1888', so far as they are applicable are complied with. These provisions since the amendment made in 1890 seem to have narrowed down to the question of sufficiency of other land.[24]

The very experienced T W Lewis, now Under-Secretary of the Native Office, thought the points raised by Mackay should be dealt with by the Solicitor General. The advice given was that the Governor could not be asked to do anything with restrictions imposed recently by the court. It was suggested that as the court had imposed them, it should be able to vary or annul them. This case 'certainly illustrates the uncertain state of the law in respect of consents to removal of restrictions'.[25]

As Mackay then pointed out, it was not the court itself, but the Registrar General who had issued the new title from the parent title. The Registrar held that the court had no power to interfere. The only way a new title could be issued would be after the removal of restrictions by an Order in Council. The first phase of the sequence ends with the chief judge writing:

> It is quite clear to my mind that the Court has no jurisdiction in this matter. If therefore the Governor cannot remove them, they cannot be removed at all.

Lewis noted on this 'File till the question comes up again.'[26]

Mackay continued to feel that it was not right for the court to confine itself to finding out what other land the applicants had. He commented:

> I would beg to point out that the law is both faulty and misleading, faulty because it places the Court in an anomalous and helpless position, by making it a party to the performance of informal acts, and misleading because it is supposed that a reference to the Court is the only requisite to put matters in trim for the removal of the restrictions, whereas the Court is not empowered to make any recommendation, or draw attention to any informality in the applications referred to it.[27]

The question was passed on to the Solicitor General. The answer he gave was complicated and full of contingencies. His final suggestion was that the question, in itself a simple one, should be settled by further legislation.[28] At the same time, G B Davy, who had replaced Seth-Smith as chief judge of the Native Land Court, gave a conflicting opinion.[29] As he wrote to the Department of Justice:

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24. H G Seth-Smith to A Mackay, 9 December 1890, J 1, 94/173, NA Wellington
25. W S Reid, 5 January 1891, (copy) in minutes attached to J 1, 94/173, NA Wellington
26. Seth-Smith, 28 January 1891 (copy), T W Lewis, 6 February 1891 (copy), J 1, 94/173, NA Wellington
27. A Mackay to the Under Secretary, Native Department, 27 December 1892, J 1, 94/173, NA Wellington
28. Memo, 22 March 1893, J 1, 94/173, NA Wellington

> This question of removal of restrictions is an important one as affecting the validity of titles. It is also one in which the public has a right to expect consistency of action. It will not do for applicants to be bandied about between your department and the Native Land Court.[30]

The public included the owners, who had been waiting two years for a decision.

There were other possible complications which were not discussed. How thorough could the Native Land Court be in establishing that all owners had other land sufficient for their support before agreeing to remove restrictions? In law, this question had the potential to invalidate a transaction. It did not appear to concern judges or officials. There were serious consequences if a title was not valid. But the consequences were also serious if Maori alienated land they needed. From the point of view of the Crown's responsibility to protect, this is the major issue.

Further research is needed, perhaps into the papers of individual judges, to establish whether this aspect of the question was discussed at any length elsewhere. It was not raised as a problem in this set of documents. Yet, looking back, the court's ability to establish whether or not a Maori owner had adequate property elsewhere appears to be the major weakness in the process. A conscientious judge such as Alexander Mackay required documentary evidence of ownership of land and shares in land from applicants for the removal of restrictions.

Differences among Maori owners led to the next major case in the file. The Puhatikotiko block in Gisborne, to which 70 owners had been awarded a memorial of title, was at the centre of a dispute over alienability.[31] (This case has been noted above, in connection with its interpretation of section 13 of the Native Land Court Act 1866 Amendment Act 1888.) Some of the interests had been acquired by a European, who applied under the Native Land Validation of Titles Act 1892 for a title. Judge Barton decided that partition would be required. In mid-1893 the block was divided, with an agreed section going to the buyer, while the owners who had not sold arranged their individual shares among themselves.

After the partition had been made, the counsel for Wi Pere applied to have restrictions contained in the memorial of ownership continued on the land of the non-sellers. He argued that the Validation Act gave the court no power to alter restrictions. A large number of other owners objected to these restrictions, and offered to show the court through their counsel that they had other inalienable lands sufficient for their support.[32]

The case went to the Supreme Court. It was decided that the conditions restraining alienation on every Memorial of Ownership could not properly be called restrictions. They were brought to an end by the issue of a Crown Grant on partition. It was then declared that a partition under section 7 of the Native Land Validation of Titles Act 1892 was a partition under the Native Land Court Act 1886. At this point, Judge Richmond made it clear that restrictions were to be

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29. G B Davy memo to C J Haseldean, 5 April 1893 (copy), J 1, 94/173, NA Wellington
30. G B Davy note to C J Haseldean, 25 April 1893, J 1, 94/173, NA Wellington
31. G E Barton, 20 July 1893, J 1, 94/173, NA Wellington
32. Ibid

imposed only if the court considered that owners had not already enough inalienable land for their support.[33]

Was there no longer any legal path for Wi Pere as an owner among a minority who wished to retain restrictions? In another context, a little later, Paratene Ngata appears to be saying that this was the case for him.[34] Did the law mean in effect that there was no way in which limitations could be placed on alienability if owners had a sufficiency of other land? It does indeed seem to be further evidence that restrictions had been greatly weakened. Restrictions had been requested in the Native Land Court and placed over communal or tribal lands in some districts. There was no longer protection for those owners who wished to retain such land in economically viable blocks.

The third case, that of Aotea 5, was about a hair-splitting definition of the word 'land' rather than a matter of either principle or policy. It was sufficiently significant to cast doubt on whether or not the court could act. It is worth quoting from a memorandum written by H G Seth-Smith, who was serving again for a short term as chief judge. He both begins and ends this document by stating that there was utmost confusion over who could remove restrictions. His opinion was that there were cases where it was doubtful that any authority existed that was capable of removing them:

> In the Aotea no 5 case the restriction was in the common form prohibiting certain alienations without the consent of the Governor, and the Chief Justice expressed his opinion, that, although the Governor had power to remove restrictions by Order in Council under Section 5, the safer course would be for him to give his consent to the particular alienation, to effect which the removal of the restrictions was necessary. So far, therefore as land held under Memorial of Ownership or Native Land Court Certificate is concerned, where the restriction is one of the same class as that imposed on Aotea no 5, it seems that the Governor should be advised to give his consent to the particular transaction and not to exercise the power conferred on him by Section 5.
>
> Where the restriction, contained in a Memorial of Ownership or Native Land Court Certificate is absolute, that is to say does not reserve the power of consent to the Governor, the effect of the decision in Aotea 5 is that the Governor may remove restrictions under Section 5.[35]

This document is an illustration of how layer upon layer of laws with amendments had been put in place to facilitate a process or to close a loophole. It is a document primarily concerned with points of law, not policy. Nevertheless, many of these laws had initially been intended to protect Maori interests. The more recent ones while still intending to be fair, were aimed at removing or limiting the degree of protection given to Maori land owners by 'reforming' the category of inalienability.

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33. Puhatikotiko Block judgment in the Court of Appeal, 19 October 1893, (typed record) J 1, 94/173, NA Wellington
34. At the Native Affairs Committee in 1898, Paratene Ngata described plans for the development of communally owned land. he said that the lack of legal prtection was the 'present principal grievance' of Maori. 'There is no law which will enable them to have their lands made inalienable.' 'Report on the Native Lands Settlement and Administration Bill', AJHR, 1898, I-3A, pp 59–60
35. H G Seth-Smith, 'Memorandum for the Under Secretary', Justice Department, 29 January 1894, AJHR, 1898, I-3A, pp 59–60

6.5 THE REES-CARROLL COMMISSION OF 1891

In evidence given to the Commission into the Native Land Laws, 1891, not a great deal is said about restrictions, but what is said is enough to suggest that inalienability had by then become a contentious issue. In the course of making a general case that the Crown should be privileged as a purchaser, T W Lewis drew the attention of the commission (and all those members of Parliament who read the printed evidence placed before them) to the question of restrictions:

> Another matter is the difficulty the Crown, in common with private parties, is placed in by the existing legislation with regard to the restrictions upon the alienation of native lands. The Crown stands in exactly the same position as private individuals in respect of these restrictions. The principle that the Crown is not affected when it is not especially named does not apply, because the restriction is not upon the Crown purchasing, but upon the individual selling: and provision should be made by the Legislature that land under restriction may be sold to the Crown.[36]

Lewis argued that what made the Crown unique as a purchaser was that it never got away from its responsibility. If the purchase was made improperly, if there was any hardship or grievance, then complaints could always be brought to the Crown. For that reason, he argued that restrictions that were reasonable in any other case were not reasonable against the Crown:

> Carroll: Even if the Crown is, you say, the evil-doer, the Native will always look to the Crown for relief?
>
> Lewis: Undoubtedly. The Crown is always amenable to Parliament. . . . But, apart from that argument, seeing that it is a very common thing now for lands to be placed under restriction – as I shall illustrate presently by returns I shall show the Commission – it follows that, if the Crown is buying a large block subject to these restrictions, the purchaser is practically compelled to break the law, and buy in defiance of the restriction, and consequently with an unsatisfactory title, or is prevented from purchasing at all, which is extremely unsatisfactory where the land is required for settlement.[37]

Lewis's evidence is important, for several reasons. He stated that placing land under restrictions had become 'a very common thing now'. The emphatic position of the adverb 'now' indicates that this has been a recent development, rather than a slow and cumulative one. But however that phrase is read, the use of restrictions was perceived as having a significant impact on the Crown's access to Maori land. Did restrictions have the capacity to 'lock up Maori land'? In these years, the merest suggestion that this was happening was enough to trigger alarm among Pakeha politicians, with their constituencies of farmers and would-be farmers.

Lewis's statement contained a strong suggestion that in order to buy land, the Crown was currently acting illegally. His conclusion was not that the Crown should keep to the law, but that the law should be changed. In the following year this was

36. 'Report of the Commission appointed to enquire into the subject of the Native Land Laws', AJHR, 1891, G-1, p 146
37. Ibid

done. By the Native Land Purchase Act 1892, a restriction on the alienation of any native land could be wholly or partly removed by the Governor, a provision which operated only in favour of the Crown.[38]

Lewis had a number of other interesting things to say. Like Mackay, he thought the Lands Frauds Prevention Act a waste of time, counter-productive and costly to Maori. Its inquiries could be made in the Native Land Court.[39] This suggestion was taken up in 1894. This saved time and money, but it could hardly have overcome the flaws in the procedure. He stated that the Crown could be trusted to make reserves and to ensure that Maori had plenty of other land before making a purchase. This was an historically ill-founded statement. He was aware that, in practice, making reserves was a haphazard business:

> Rees: Has the Crown any fixed areas on which to gauge what the Maori should remain possessed of?
>
> Lewis: No; there as been no particular area fixed as a standard, but I should certainly say that if a Maori was reduced to 50 or 100 or even more acres, and it was known that that was all the land he had, assuming that it was land of fair quality, he should not be allowed to dispose of any of it.[40]

In spite of making a point of attacking restrictions on alienability, as hampering the Crown, he volunteered the information that under the present law there was no such thing as absolute inalienability.[41]

On what scale was Maori land tied up by restrictions? A search in National Archives for the figures which Lewis took to the commission has not so far been successful. The return presented to Parliament in 1886 showed that the total acreage that had passed through the Native Land Court and was held by Maori as inalienable was 1,872,605 acres. Even without any further increase, this was an indication that a significant amount of land was affected, enough to pose a barrier to acquiring lands for Pakeha settlement. The Auckland district had just over 700,000 acres of the total, and the Gisborne district's share was nearly 500,000 acres.[42]

Though other witnesses do not make lengthy statements on this topic, several mention restrictions. Lawyers complained that they were too prevalent, but were divided on their views about the difficulty of having them removed. E H Williams, in Napier, complained about the legal complications of dealing with older titles, rather than the extended use of restrictions to which Lewis had drawn attention:

> Williams: . . . there are a great many blocks especially under the old titles that are restricted.
>
> Rees: Under the Act of 1865?
>
> Williams: I suppose so. The machinery for getting the restrictions removed is, I think, too cumbrous. You have to get a majority of the Native owners, you have to

38. Section 14, Native Land Purchase Act 1892
39. Ibid, pp 156–157
40. Ibid, p 158
41. Ibid, p 156
42. 'Return of Land Possessed by Maoris, North Island', AJHR, 1886, G-15

apply to the Native Land Court, and you have to supply the Government with a copy of the succession order for every deceased Native. These regulations are all laid down in the *New Zealand Gazette*, but I am putting it simply on the ground that the expense is too much.

Rees: The expense, and trouble, and delay?
Williams: Yes.[43]

What he described were the standard safeguards for removing restrictions placed on certain titles issued before 1888. Rees thought they were a residue from the 1865 Act, under which there was no obligation to impose any restrictions. Rees himself believed that the existing Maori land law had become an accretion of layer upon layer of pointless and crippling rules. He dismissed a relatively recently introduced law as one of those antiquated rules. James Mackay, on the other hand, while commenting that restrictions were too readily put on, thought that they were also being dispensed with too readily, and saw this as a recent development.

Mackay was then in Auckland, but he had nearly 40 years experience of Maori land purchasing in a number of districts, as well as a term as a land court judge. He knew that some people wished to sell land, but that they needed to be confident that they could retain land, too. He held a familiar view. All would proceed smoothly once 'sufficient' reserves were set aside and made secure. Maori then would sell the rest of their land. His opinion on inalienability is worth quoting:

Formerly, under the Native Land Acts restrictions could be put in the certificate of title. There is now no such safeguard now under the Act. The Natives ask for a piece of land to be made inalienable, and it is done. But a few persons wish to get this restriction taken off and it is done. It only requires them to make the application and to state that all are agreed. The application was formerly made to the Governor, but is now made to the Native Land Court. There is no safeguard against fraud, except when the Natives go before the Trust Commissioner. He would ask them if all the parties interested had other lands, and in nine cases out of ten, they would lie and say they had lands elsewhere. Many an old Native who has no children will say, 'I am sick now: I am going to eat this land, and I am not going to leave it to the rest of the tribe.' Of course, it was to provide against this sort of thing that it was tried to impose restrictions.[44]

There are points here which relate to other aspects of the topic, for example his opinion of the role of the trust commissioner. His concluding remarks about the object of restrictions are debatable. If old people had no direct heirs, income from shares in other lands, and no other means of support, the Crown accepted that they would 'eat the land'. Though this meant the total land stock of a hapu would shrink, it was not the primary concern of Crown policy to prevent this happening. Unless there were special reasons (for example, the land was an absolutely inalienable reserve, or the transaction was grossly unfair, or it was suspected that other people would take the money), restrictions would probably have been removed at any point in the period under survey.

43. 'Report of the Commission . . .', 1891, p 119
44. Ibid, p 43

6.6 THE LATE 1890s

Two major changes which influenced the handling of the inalienable lands were the re-imposition of Crown pre-emption and the growing recognition of Maori councils and land boards in the legislative programme. The character of politics was changing too. The corruption of former years was being replaced by a Government which was more efficient and fairly ruthless in its policies for 'opening up' Maori land.[45]

The other important change was in response to Maori wishes for greater control over their lands. Though the thrust of policy was in the same direction as ever – to identify the land that Maori needed and regard the rest as surplus – laws were passed to provide for greater participation by Maori bodies.

This was reflected in the terms which now came into the law. By the Maori Lands Administration Act 1900, 'papakainga land' was defined as inalienable reserves to be set aside for the occupation and support of Maori (see section 21). In each Maori Land District, there was to be a Maori Land Council, with the duty of working out the amount of land needed by each man, woman, and child. Papakainga was to be absolutely inalienable. The consent of the council was needed if an owner wished to exchange their land, or if sold, the council might use the purchase money to buy land to replace it. No sale of other land could take place unless the owner could produce a papakainga certificate, to show that he or she had sufficient land left for their support. In fact, this requirement was watered down almost at once, and various documents from other sources, such as the land court, were accepted.

It is significant, though, that in this sequence inalienable land sufficient for each individual was to be identified before the owner was allowed to sell other land. Though now far further down the road to complete individualisation, these provisions recall the sequence which McLean had envisaged in 1873, to set aside inalienable land for each community member before any sale occurred:

> The Act was supported by all Maori members as a better system of administration than that provided under the Native Land Court Act 1894, however in operation it turned out to be largely unpopular with Maori who did not want to delegate control of their lands and it was substantially modified by the Maori Land Settlement Act 1905.[46]

Though this law seemed to come closer to achieving what had been attempted since the beginning of the colony, it was no more successful than its predecessors in fulfilling the hopes of its framers.

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45. For the historical context, see R C J Stone, 'The Maori Lands Question and the Fall of the Grey Government, 1879', NZJH, vol 1, no 1, 1967, pp 51–74; T Brooking, '"Busting Up" The Greatest Estate of All: Liberal Maori Land Policy, 1891–1911', NZJH, vol 26, no 1, 1992, pp 78–98
46. H Bassett, R Steel, and D Williams, *The Maori Land Legislation Manual*, CFRT, Wellington, 1994

6.7 THE LIMITS OF PROTECTION

Time has not permitted a fuller inquiry into records for the 1890s at National Archives. Applications continued to pass through the Native Office, since the consent of the Governor in council were still required to remove certain categories of restrictions on alienation. A sample of one box in the Justice Department records in 1894 suggest that there were still great differences in the background of the applications.

One file contains an example of how an apparently straightforward case proceeded. Printed forms filled in and signed had been forwarded from the court, stating that a public inquiry had been made, and that the court was:

> satisfied that, apart from the said land, the owners thereof have and each of them has other land or shares in other land, (the title whereto has been determined by the Court,) belonging to them in their own right and sufficient for their maintenance and occupation.[47]

With this procedure, there were problems which were to do with the Native Land Court, notably that all owners should be notified and that the case should be heard at a convenient location. These were not specific to the removal of restrictions.

Was it always easy and straightforward? A file in the same box suggests not. Applications could still give rise to long and complicated inquiries, and end up with the Crown exercising a paternalistic role by refusing both would-be sellers and pressing buyers. One example was a very lengthy case which did not come before Barton as commissioner in 1886 because the Government had no intention of allowing it to proceed. The file went back to 1883, when Kahui Kararehe, writing from Taranaki, wanted to sell restricted land in order to develop other property. He asked for help as well with food. Bryce grumbled about people wasting time and money at Parihaka, but ended up writing, 'I will consent to supply him with half a ton of potatoes for seed, but he cannot be permitted to sell Reserves.'[48]

After the illness and death of his two sons, the applications became more pressing. With bills for the doctor, the hospital, medicine, bakers, butchers, house rent in New Plymouth, food for the tangi, and coffins for his children, his debts amounted to £153 4s 4d. He proposed to sell 99 acres of land to pay £99 for a vault. Restrictions were removed on a small section of which he was sole owner, with the proviso that it could be sold only if the price was raised. In response to further urgent applications to sell a reserve, the Public Trustee noted that he had written to Kahui Kararehe to explain the 'the best interests of the Native owners require the preservation of this reserve from alienation as the law also requires'.[49] Were there more helpful options available? Did the Public Trustee have the power to advance funds, had he chosen to do so? The Government, with great reluctance, allowed a part of the applicant's property to be sold to meet debts only after a very long series of letters and interviews.

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47. R Ward, Native Land Court, Opunake, 2 December 1893, J 1 479, NA Wellington
48. 12 October 1883, J 1 1894/550
49. 17 May 1894, J 1 1894/550

The two authorities – the Native Minister and the judges of the Native Land Court – could still be seen in some sort of opposition in the later period. Although forms from the court were addressed to His Excellency the Governor of New Zealand, applications might still be deflected by the Government.

One of these cases appeared as a printed parliamentary paper in 1898.[50] John McKenzie, as Acting Native Minister, refused to forward an application for the Governor's consent from a fellow member of the House of Representatives. It involved the removal of restrictions from a section in Patea for which the offer of £140 was well below the land-tax value of £365.

As far as the applicant was concerned, land-tax values had little bearing on this case. McKenzie's interception was an act of 'contemptible revenge':

> You seem not to have been advised that the exercise of discretion which is vested in the Governor in such a matter should not be determined by the caprice of ministers; still less should it be made the ground for the display of unworthy motives . . . apart from the suggestion of any real or imagined inadequacy of the consideration that might have struck you, there was the plain line of duty on your part, as Minister, to refer the application for the report of the Native Land Court.[51]

Hutchison then went on to quote the exact words of section 52 of the Native Land Court Act 1894, where it was stated that restrictions might be removed or varied only by the Governor on the recommendation of the court. McKenzie did not agree that the minister's duty was merely to refer applications to the court and act on the court's recommendations.

The applicant countered by arguing that he knew this was not the usual practice from his own experience with other applications. Hutchison claimed that the normal procedure was an inquiry in open court upon sworn testimony.[52] McKenzie responded by indicating that he preferred to rely upon his own knowledge of the practice of the department.[53] Hutchison could hardly have supported his case under any testing scrutiny, and he had apparently counted on the accommodating system with which he was familiar.

Mackenzie wrote:

> so long as I continue to act for my colleague the Native Minister, I shall require to be furnished with the fullest particulars regarding any proposed transaction in Native lands that may be brought before me to deal with . . . the utmost caution is needed to protect the interests of the Native owners of restricted lands.[54]

Mackenzie's approach showed that the Crown was prepared to intervene protectively, in the case of an individual owner, with a section of 280 acres. What this case also illustrated was the limited level at which protection was seen as appropriate.

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50. 'Removal of Restrictions upon the Alienation of section 569, Patea District', AJHR, 1898, G-9
51. G Hutchison, MHR to the Hon the Acting Native Ministoer, 9 August 1887, 'Removal of Restrictions upon the Alienation fo section 569, Patea District', AJHR, 1898, G-9
52. Hutchison to McKenzie, 16 August 1897, AJHR, 1898, G-9
53. Mackenzie to Hutchison, 17 August 1897, AJHR, 1898, G-9
54. Mackenzie to Hutchison, 17 August, AJHR, 1898, G-9

CHAPTER 7

CONCLUSION

This report has surveyed at a general level the development of Crown policy towards reserves and lands restricted from alienation. It has dealt in some detail with the administration of the removal of restrictions on the alienability of land. The limits of this policy have been explained.

From an early point, the Crown's pressing concern was to register Maori landownership, to identify and protect from alienation the land that Maori needed, and to acquire the rest for disposal. These objectives are restated in official correspondence, parliamentary debates, preambles to Acts, and reports by committees:

> Whereas there are large areas of Native lands of which some are unoccupied and others partially and unprofitably occupied: And whereas it would be to the benefit of the Natives themselves and to the advantage of European settlement if prompt and effective provision were made whereby such lands should be profitably occupied, cultivated, and improved . . .

The ideas expressed in those phrases could have been written at almost any time in the period under consideration. The passage comes from the terms of the Inquiry into the question of Native Lands and Native Land Tenure, undertaken by Sir Robert Stout and Apirana Turupa Ngata in 1907.[1]

The statement that 'only those lands which the Maoris themselves will usefully occupy, will remain or be allowed to remain to them' expresses a characteristic attitude. Again, it comes from the end of the period, and it was a slogan of the Young Maori Party.[2] Though adopted in their case to encourage the development and farming of lands by the Maori owners, the view was one that was widely held in these years by Pakeha politicians. With this we are back at the opening question, which is central to an inquiry into the Crown's policy on reserves and restricted lands. What lands do Maori need?

In the inquiries which the Stout–Ngata commission was directed to make, some old patterns reappear. Maori interests in land were to be reconciled with 'the public good.' The notion of occupation and use was behind questions about setting aside land for Maori. In the charge given to the commission, there was another familiar note:

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1. AJHR, 1907, G-1, p i
2. I L G Sutherland (ed), *The Maori People Today*, Wellington, 1940, p 138

> And you are directed so to frame your reports as to facilitate prompt action being taken thereon, and in particular to furnish in such reports such details as to the lands available for European settlement as will enable Parliament, if it deem fit, to give immediate legislative effect to such parts of your reports.[3]

The Stout–Ngata commission was in some respects yet another exercise in the Crown's effort to establish what lands were in occupation and use. What was new in the Stout–Ngata report was the emphasis placed on the encouragement and training of Maori to become, in the words of the commissioners, 'industrious settlers'.[4] They scathingly reviewed the failure in the past of the legislature to do anything positive to help Maori with the development of their land. The proliferation of laws had, on the contrary, infinitely complicated land tenure. For Maori, the consequence of not fulfilling expectations had been that they were 'not deemed worthy to own any land except the vague undefined area reserved for "use and occupation".'[5]

The test for the imposition and removal of restrictions had been 'sufficiency of land.' This had not served to protect Maori patrimony in land on any significant scale. The point where the Crown was prepared to intervene protectively was at the individual level. The Native Land Act of 1873 represented an intention to secure communal land as long as it was required, but that Act largely failed. Thereafter, much depended on how the Native Land Court, as well as the Government, was prepared to view restrictions on titles.

In 1891, T W Lewis, a long-serving member of the Native Department, pointed to a major contradiction in the restriction process. He stated that it was a very common thing for land to be put under restriction. But he also pointed out that under the current law there was no such thing as absolute inalienability.[6]

The Crown's policy on removal of restrictions from inalienable lands, including reserves, was administered paternalistically in many cases by the Native Office. The files on the removal of restrictions in the early 1880s show there was a great diversity of economic circumstances. No single policy could have dealt adequately with the range of situations. Mistakes were made, but there was an effort to deal with each case on its merits. Quite apart from any irregularities or flaws in the process, the policy itself was narrowly conceived. It was not intended to preserve substantial areas of land in Maori ownership.

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3. AJHR, 1907, G-1, p ii
4. AJHR, 1907, G-1c, p 15
5. Ibid
6. 'Report of the Commission appointed to enquire into the subject of the Native Land Laws', AJHR, 1891, G-1, p 156

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