

Rangahaua Whanui National Theme c

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

HAZEL RISEBOROUGH
and JOHN HUTTON

July 1997

First Release

WAITANGI TRIBUNAL
RANGAHAUA WHANUI SERIES

Other Rangahaua Whanui reports

District reports

District 1: *Auckland* (pt i), R Daamen, P Hamer, and Dr B Rigby; (pt ii), M Belgrave

District 5b: *Gisborne*, S Daly

District 7: *The Volcanic Plateau*, B Bargh

District 8: *The Alienation of Maori Land in the Rohe Potae*, C Marr

District 9: *The Whanganui District*, S Cross and B Bargh

District 11a: *Wairarapa*, P Goldsmith

District 11b: *Hawke's Bay*, D Cowie

District 11c: *Wairoa*, J Hippolite

District 12: *Wellington District*, Dr R Anderson and K Pickens

District 13: *The Northern South Island* (pts 1, ii), Dr G A Phillipson

National theme reports

National Theme A: *Old Land Claims*, D Moore, Dr B Rigby, and M Russell

National Theme I: *Maori and Rating Law*, T Bennion

National Theme G: *Public Works Takings of Maori Land, 1840–1981*, C Marr

National Theme K: *Maori Land Councils and Maori Land Boards*, D Loveridge

National Theme L: *Crown Policy on Maori Reserved Lands and Lands Restricted from Alienation*, J E Murray

National Theme N: *Goldmining: Policy, Legislation, and Administration*, Dr R Anderson

National Theme P: *The Maori Land Court and Land Boards, 1909 to 1952*, T Bennion

National Theme P: *Succession to Maori Land, 1900–52*, T Bennion and J Boyd

National Theme Q: *The Foreshore*, R Boast

National Theme S: *The Native Townships Act 1895*, S Woodley

National Theme U: *The Land with All Woods and Waters*, W Pond

LIST OF CONTENTS

Note: Part i was written by Hazel Riseborough and part ii was written by John Hutton.

Part i: The Crown And Customary Tenure, 1839–94

Chapter 1: The 1840s Debate on the ‘Waste’ Lands	7
Chapter 2: Grey’s Land Purchase Policies	19
South Island 19; Taranaki 22; Rangitikei 26; Wairarapa and Hawke’s Bay 27	
Chapter 3: Inquiries and Debates on Customary Tenure in the 1850s	33
Chapter 4: The Native Lands Act and the Native Land Court	49
The Native Lands Act 1862 52; The Native Lands Act 1865 57; The Native Lands Act 1866 65; The Native Lands Act 1867 66; The Native Land Act 1873 68; The Native Land Administration Act 1886 71; The Native Land Act 1888 73; Land legislation of the early 1890s 74; The Native Land Court Act 1894 77	
Chapter 5: Confiscations, Courts, and Commissions	81
Confiscation 81; The Compensation Court 84; Tauranga Moana 93; The East Coast 100	
Chapter 6: Conclusion	109
Bibliography	113

Part ii: The Interpretation of Customary Maori Land Tenure by the Native (Maori) Land Court

Chapter 7: Smith’s General Principles of Maori Land Tenure	123
Introductory notes 123; The question of interpretation and codification 124; The ‘four main take’ and the question of occupation 126; Take tupuna and the right of ‘discovery’ 131; Take raupatu – title by conquest 133; Take tuku – gift 134; ‘Relative interests’ 135; Concluding comments 137	
Chapter 8: Nineteenth-Century Discussions of Maori Land Tenure	139
Introductory notes 139; The cultural prejudice of nineteenth-century Pakeha writers – some main points 140; Edward Shortland 141; George Clarke 144; William Martin 147; Raymond Firth 149; Smith, Shortland, Clarke, Martin, Firth, and the Maori Land Court – a discussion 153	

Contents

Chapter 9: The Maori Land Court in Hauraki, 1865–71 – A Brief Background . .	159
Introductory notes 159; The tribal landscape in Hauraki – a brief background 161; The correspondence between the types of evidence used in early sittings and the principles of Maori land tenure 163; The court’s acceptance of relatively thin evidence if the land did not appear to be disputed 167; The resolution of differences, disputes, overlapping rights, and the like, prior to, or during, the investigation of title 168; The difference between land that was disputed and land that was not disputed, and the court’s general inability to deal with disputed land 173; The fostering of individualistic tendencies in Maori society and the simplification of the tribal landscape both by Maori and by the court 179	
Chapter 10: Fenton, the 10-Owner Rule, and the Theory and Practice of the Early Court, 1865–79	183
Introductory notes 183; Judicial statements of intent 183; The formulation of principles 186; Provision for ‘tribal’ title in the early Native Lands Acts and the 10-owner rule 188; The Native Land Act 1873 and the continuation of the general principles of court practice 194	
Chapter 11: Conclusion	199
Bibliography	201
Appendix: Practice Note	205

LIST OF ABBREVIATIONS

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

THE AUTHORS

Hazel Riseborough

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

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

John Hutton

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

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

PART I

The Crown and Customary Tenure, 1839–94

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

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

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

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

SUMMARY

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

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

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

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

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

Summary

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

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

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

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

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

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

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

Summary

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

