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

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

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.

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]

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.

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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