

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

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

customs and usage', outside the 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

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.

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 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

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

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.

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

7. ‘Report of the Commission into the Native Land Laws’, AJHR, 1891, G-1, pp 170–171

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

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 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

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

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.’

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 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 . . .

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.

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

14. ‘Report of the Commission into the Native Land Laws’, AJHR, 1891, G-1, p 172

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

discussed²⁰ later. But as far as Fenton was concerned, sections 21 to 32 never operated. 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 Owahaoko 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

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 Owahaoko and Kaimanawa Native Lands Committee', AJHR, 1886, I-8 (minutes of evidence), p 16

21. Ibid, p 32

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.

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 sections, 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.

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

22. Ibid, p 67

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 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 possible²⁴ for individuals to claim a title, without acknowledging the rights of other owners. 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 uneconomic²⁵ segments, which they could choose to retain, or they could capitulate and sell, too.

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,

23. ‘Report of the Commission into Native Land Laws’, AJHR, 1891, G-1, p 82

24. ‘Report of the Owahaoko 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

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.

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 Court²⁶ he will be able to get a title – he should take the advice of his lawyer.

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 1873²⁷ which would prevent a purchaser acquiring a title under the clauses I have named.

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

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

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,³⁰ but they prefer to have their land left in their own hands, to deal with as they like.

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

28. Edger, NLC Auckland, 4 April 1883, note with MA 13/23, NO 82/3747

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

1873 Act.³¹ Almost all³² of these blocks still appear on a list of reserves compiled nearly 10 years later. 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 3620 acres at Maketu was made under section 24 of the Native Land Act 1873,³⁵ though not through the land court but by an Act of Parliament.

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 1867,³⁶ in both Wairoa and Cook Counties, and a small amount of land in trust.

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. 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 the³⁸ want of unanimity, the local jealousies, and the conflicting interests of the claimants.

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

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

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 point³⁹, arguing that no surveyor could go safely into the situation that Puckey described.

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 themselves⁴⁰ had reserved 171 acres per individual, though he does not state under what Act. R Parris, in Taranaki, had likewise dealt⁴¹ with confiscated lands, to which the duties of the district officer did not apply. 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 acres⁴², described as surveyed for permanent native reserves, or in the course of survey. (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

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

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

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 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,⁴⁶ that it should be of good quality, and sufficiently large to support the hapu'. 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

44. Otaki inalienable lands, 1882, MA W1369/185, NA Wellington

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

46. Ibid

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

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.

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. 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

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.

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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. In the course of the 1880s, pressure began to mount on inalienable land from governments which in turn were responding to pressure to find land for Pakeha farmers.

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.