

The Pouakani Report 1993

13 Commission on Native Land Laws 1891

13.1 Introduction

The Commission on Native Land Laws 1891 stated in its report that it considered the process of individualisation of title (which effectively began with the Native Land Act 1873), to be the source of the problems in Maori land legislation. The commission criticised the failure of the concept of tribal title which was possible under the Native Lands Act 1865 (which established the machinery of the Native Land Court) but in practice, the "10-owner system" was applied. The commission noted with approval that in 1868 Chief Judge Fenton had ruled in the Kaitorete case, "The Court cannot recognise individual ownership of Native Land. The strength of the tribe, before the arrival of British Government, was required to maintain the title of a tribe, and the land belonged to the tribe". The commission also considered that the intentions of Sir Donald McLean in the administration of the Native Land Act 1873 had not been to allow individual interests to be transferred:

While believing that the disposal of tribal title would be fettered by internal disputes, he was convinced that hapus or families would deal with their lands freely. His idea was to compel division of tribal estates into hapu or family holdings, and then push on to individual titles Districts were to be created; District Officers were to be appointed, whose duty it was to ascertain the tribal and hapu boundaries, being assisted by the Maori chiefs, and to report to the Native Land Court. It was the duty of the Court to see that reserves of at least 50 acres were made for each man, woman, and child of the Maori race in the district, which reserves should be strictly inalienable. He contemplated a Domesday Book of the New Zealand Native estates being compiled whilst yet the old chiefs remained who could bear testimony to their ancestral rights.

All this was vain. The tendency in the Act to individualise Native tenure was too strong to admit of any prudential check. Neither Parliament, nor Government, nor even the Court itself, paid attention to the above mentioned principles of the Act. No District Officers were appointed; no reports were made; no Domesday Book, rounded upon evidence fast dying out, was prepared; no reserves were set aside; no division of tribes into hapus before dealing was attended to: the desire to purchase Native estates overruled all other considerations

Having thus adopted a principle and a system so strongly condemned by all competent authorities, it is not surprising that evil effects followed. Thus the Legislature, by the Act of 1873 and all the amendments, repeals, and alterations thereto ... has ... for many years striven to establish, contrary to Native custom, a system of individual title to tribal lands For a quarter of a century the Native-land law

and the Native Land Courts have drifted from bad to worse. The old public and tribal method of purchase was finally discarded for private and individual dealings. Secrecy, which is ever a badge of fraud, was observed. All the power of the natural leaders of the Maori people was undermined. A slave or child was in reality placed on an equality with the noblest rangatira (chief) or the boldest warrior of a tribe. An easy entrance into the title of every block could be found for some paltry bribe. The charmed circle once broken, the European gradually pushed the Maori out and took possession. Sometimes the means used were fair, sometimes they were not.

The alienation of Native land under this law took its very worst form and its most disastrous tendency. It was obtained from a helpless people ... like a flock of sheep without a shepherd, a watch-dog, or leader ... suddenly possessed of a title to land which was a marketable commodity. The right to occupy and cultivate possessed by their fathers became in their hands an estate which could be sold. The strength which lies in union was taken from them. The authority of their natural rulers was destroyed. They were surrounded by temptations. Eager for money wherewith to buy clothes, food, and rum, they welcomed the paid agents, who plied them always with cash and often with spirits. Such alienations were generally against the public interest, so far as regards settlement of the people upon lands. In most of the leases and purchases effected the land was obtained in large areas by capitalists. The possession of wealth, or that credit which obtained it from financial institutions, was absolutely necessary to provide for Native agents, interpreters, and lawyers, as well as to distribute money broadcast among the Native proprietary. Not only was this contrary to public policy, it was very often done in defiance of the law.

Not that the men whose names were used and money expended were always to be personally blamed. Often ignorant of the means employed, they simply entered into the purchase of Native lands from a natural desire to become owners of beautiful or fertile estates. To their agents was committed the task, always disagreeable and sometimes disgraceful, of completing the title. It was, and is, the result of the bad system which Parliament determined to enforce, that it exercised a baneful influence on all those who had anything to do with it. Other mistakes in legislation have produced disasters, but it is difficult to find a parallel to the evil consequences which have resulted in New Zealand as the fruit of a mistaken system. {FNREF:0-86472-117-XA:13:1}

The commission also noted that continued "free-trade in Native lands" would mean Maori becoming landless in a few years. Individualisation of title also prevented productive Maori land development, as all owners had equal rights and therefore the leadership role of chiefs was curtailed. Nor could individuals safely develop land in multiple ownership. This was a theme taken up by Commissioner James Carroll in a

separate note to the report. He took a positive view of Maori potential for economic development:

A strong desire exists among them to become useful settlers, and contribute to the productive wealth of the country. I believe they are capable of doing so if unimpeded by obstructive legislation. Too long it has been the fashion to regard the Native race as one rapidly becoming extinct. This idea has permitted the sentimental nonsense to be indulged in that the duty of the Legislature was, as some one has expressed it, "to smooth down their dying-pillow"

But is it not a somewhat melancholy reflection that, during all the years the New Zealand Parliament has been legislating upon Native-land matters, no single bona fide attempt has been made to induce the Natives to become thoroughly useful settlers in the true sense of the word? No attempt has been made to educate them in acquiring industrial knowledge or direct their attention to industrial pursuits. Whatever progress they have achieved in that direction is owing entirely to their own innate wisdom and energy. In that respect they are essentially self-taught, and have had to rely entirely upon their own powers of observation. Parliament will add one more to its many blunders in administering Native affairs if, in its shortsightedness, it omits to devise means for encouraging and assisting the Natives to become useful settlers. {FNREF:0-86472-117-XA:13:2}

The commission in its main report also strongly criticised the negative impacts of the operation of the Native Land Court and complexities of land legislation:

The Natives, being compelled to enter the arena of the Court and contest the title to land, which they could with ease have settled in their own runangas, learned to look upon our method of getting land as merely another form of their old wars. Formerly they fought with guns, and spears, and clubs; now, to accomplish the same end, the defeat of opponents and the conquering of territory, they learned to fight with the brain and tongue

The pernicious consequences of Native-land legislation have not been confined to the Natives, nor to the Europeans more immediately concerned in dealing with them for land. The disputes thence arising have compelled the attention of the public at large, they have filled the Courts of the colony with litigation, they have flooded Parliament with petitions, given rise to continual debates of very great bitterness, engrossed the time of Committees, and, while entailing very heavy annual expenses upon the colony, have invariably produced an uneasy public feeling.

In one year - 1888 - there were eight Acts passed, and in 1889 nine, especially dealing with Maori lands and Courts, besides others partially touching them; and, again, others were introduced but thrown out or abandoned. There were in ten years, from 1880 to 1890, more than a

thousand Native petitions presented for consideration to the House of Representatives. {FNREF:0-86472-117-XA:13:3}

The commission reviewed numerous complaints about the operation of the Native Land Court, commenting on "the confusion both in law and practice" which created "a state of confusion and anarchy in Native-land titles". The main points of complaint about the court were listed:

- (a) Delay.
- (b) Expenses, fees, and duties.
- (c) Enforced attendance of claimants at distant places, inducing poverty, demoralisation, concerted perjury, injustice, false claims, uncertainty, and ruinous loss.
- (d) Rehearings, and applications for prohibition to Supreme Court.
- (e) Political, Government, and other interested influence, which is brought to bear upon decisions and proceedings.
- (f) The itinerant nature and non-local residence of the Judges.
- (g) Excessive cost of surveys, especially for subdivisions.
- (h) Insecurity of title after adjudication.

Many of the abuses referred to by the commission involved private purchases by land speculators. But the system of purchase was similar, whether it was Crown or private. Many of the "Native Agents" worked for both private and government interests, sometimes at the same time.

Waitangi Tribunal, Department of Justice, Wellington.

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13.2 Submissions of Maniapoto and Tuwharetoa Leaders

In the Rohe Potae the Crown right of pre-emption was reimposed in the Native Land Alienation Restriction Act 1884, but this did not prevent the same problems created by the process of individualisation of title through the Native Land Court or the debts resulting from survey charges and other costs. This was made very clear in submissions by leaders of Ngati Maniapoto and Ngati Tuwharetoa.

The native land commissioners met with Ngati Maniapoto at Otorohanga on 15 April 1891. After a long explanation by the chairman, W L Rees, of the terms of reference of the commission, and an address in Maori (not recorded) by Mr Carroll, Taonui expressed his pleasure that the commissioners had come to the King Country:

What has been stated is very good. The first thing that I wish to say to you is with regard to the land that is subject to restrictions placed upon it by the Government. It is, that the Ngatimaniapoto wish the restrictions removed from that land. The reason why we wish this done is, because what we desire to do with the land we cannot do while the Government impose restrictions upon it. Should the restrictions be taken off, I am not one who is in favour of land-selling, but I am in favour of leasing the land. If the restrictions of the Government are removed, I should be in favour of leasing; but I ought to have in my own hands the making of the arrangements with respect to the leasing of my land - that is, the land of which I am the owner. I should have the fixing of the conditions for leasing that land The question of surveys has not been clearly laid down yet. I think that the two years at present allowed the Natives for paying for the surveys should be extended beyond that period. The third subject ... was that consent should not be given to individual sales, but that the hapu or the tribe should consent. {FNREF:0-86472-117-XA:13:4}

The commissioners questioned Taonui and others on what system should be in place if the restrictions on dealing only with the Crown should be lifted. The Ngati Maniapoto response was to request removal of restrictions and they would deal with the lands themselves. The message was a clear one of wanting control of their lands. The commissioners did not think parliament would agree unless an alternative proposal was offered. A suggestion of a government officer to receive rents and otherwise assist in land transactions was turned down. Whitinui summed up the problem:

If the restriction imposed by the Government had been against selling, but had allowed leasing, we would never have applied as we do now for the removal of the restriction. Our hardship, as the Commissioners

are already aware, is that we cannot lease or sell, except we sell to the Government. Now, under the plan which has been adopted by the Government no benefit whatever results to us, although we put our lands through the Court. The only person who comes out right is the person who sells his share. To a man like myself, who does not sell, it is simply a waste of time attending the Court, for no benefit results. That is the reason why we request urgently that the restriction may be removed, so that we may be enabled to lease our land - that we, the owners of the land, may be enabled to make terms with the lessee, whether it be the Government or any one else. {FNREF:0-86472-117-XA:13:5}

Whitinui also commented "that when we made our application to the Native Minister to remove the restriction he replied, 'It is you who asked that the restriction should be imposed'". The original request in the 1883 petition was for Ngati Maniapoto to arrange matters concerning their lands themselves, and not to have the Native Land Court in the Rohe Potae. This 1891 appeal to the commissioners to remove restrictions was similar, to allow Ngati Maniapoto to control land transactions themselves, to allow leasing of some land to European settlers, and to manage their lands and living places in their own way.

A similar message of self determination had been conveyed to the commissioners when they met with Ngati Tuwharetoa leaders in Cambridge on 25 March 1891. The commission did not visit the Taupo district. Tureiti Te Heuheu spoke first, on the matter of a committee suggested by the commissioners to manage Maori lands:

I approve of it in the sense that it would be better if it were a tribal Committee, not merely small hapu Committees. For instance, there should be a Committee, say, for the Ngatituwharetoa, a Committee for the Ngatiraukawa, and a Committee for the Ngatimaniapoto. The Committees, of course, would manage all matters connected with the land belonging to the tribe, and other matters affecting the Maoris. But the Committee, to be effective, would require the support of the Government but with regard to such matters as the Committee could not settle or decide they should have the opportunity of referring these to the Native Land Court, or to any other tribunal that the Government might appoint. As for the Commissioner who has been spoken about, I myself regard him with a certain amount of suspicion. My fears are in the direction of costs, meaning thereby that perhaps the Natives would be saddled with more expense on that account than they could control or reckon for. That is why I think it would be better for the Committee to entirely manage matters, and only to refer those things to the law which they were unable themselves to settle We take, for instance, a block of land with a hundred owners in it. For the sake of argument we will say that this block has been subdivided, and that perhaps each man's share would come to, say, two acres. Perhaps the cost of subdivision very nearly exhausts the value of each share. In the case of such blocks I would be in favour of leaving them entirely to the Maoris to manage I am quite sure that the Native Committee, composed of able men, would never have any difficulty in arriving at

the proportionate shares in the block I will now refer to the question of surveys, for there are some surveys in the Taupo district, for instance, through which the Natives there have suffered a good deal; and this remark applies to other parts of the Island besides Taupo. These difficulties arise mainly from the fact of the Crown being the only purchaser within the district referred to. Owing to that restriction on purchase which the Crown has imposed, the Natives are deprived of any other means of saving money to pay for the incidental expenses of land-dealings. There is no doubt that the system of the Government keeping up the fees to pay for the surveys has been the cause of a great deal of hardship to the Natives. If the land is not very good land there is nothing to stop the Government fixing the price of any sum they like - say 1s or 1s 6d an acre. That, of course, comes about through the market being restricted to only one purchaser, and that one the Government themselves. No matter how hard the Natives fight for a larger price, they are unable to alter the Government's intention. But, on the other hand, if the public market were open to the Natives there is no doubt that they would obtain competitive prices for their land, and thus would very often get more than the Government chose to offer. If the market were open to them in that way, I am quite sure the Maoris would not suffer as they do at present, but would obtain a better price, and therefore less land would go to pay for the survey. Now, there are some blocks in Taupouiatia West that were surveyed in 1886 but up to the present we have been unable to cut off any portion of this land to pay for these surveys, owing to the difficulty I have just mentioned. Therefore, for four and a half years these surveys have remained unpaid, and of course interest has accumulated. I have heard that a fixed rate of interest is chargeable on the costs of these surveys from that time until now. Then, as these restrictions on the land are the cause of the surveys not being paid, they have at the same time had the effect of increasing the amount of the expense with which the Natives are saddled. Now, the owners of those blocks have long wished to have the matter settled -that is to say, to have portions cut off to pay for the subdivision - but they have been unable to do so owing to the restricted market; and the owners have repeatedly requested the Government to settle this matter, but up to date nothing has been done. This delay, of course has raised the amount of interest they will have to pay ... the delay in that payment has not been their fault, but that it is rather the fault of the Government and the laws. {FNREF:0-86472-117-XA:13:6}

All the other 11 speakers supported Te Heuheu's remarks. Among them, Tokena Kerehi stated:

I want the Government to allow us to lease our lands, because if we are not allowed to lease how can we pay the expenses incidental to subdividing the land and the surveys? It is because these sources of revenue are closed to us that we are compelled to cut off portions of the land, and give them to the Government. Some blocks contain, say,

40,000 acres, and we have to cut off as much as 20,000 acres to pay the expenses of the surveys. {FNREF:0-86472-117-XA:13:7}

Tokena Kerehi went on to describe the government laws as "murdering the Maoris" and asked the commissioners "to use their influence to stop this kohuru (murdering)". He complained about the low prices government offered them for land when private purchasers offered more. Waraki Kapu complained about "the delay on the part of Government in opening the [Native Land] Court" which had prevented him getting his father's "will proved". He also raised the issue of subdivisions of Tauponuiatia West stating he believed "that adjudication was wrong" on Hauhungaroa and Waihaha blocks. With respect to Pouakani, which was then before the court:

the 20,000 acres cut off by the Government ... for survey-charges, I say that was wrong and should not have been done. These 20,000 acres ought to be held in suspense lie until the court rehearing was completed. Regarding Te Hoi [Tihoi block] I have the same complaint to make. {FNREF:0-86472-117-XA:13:8}

Ngakuru Te Rangikaiwhiria supported previous speakers and commented on the concept of a Maori committee, "I agree that if it were given full mana (authority) by the Government it would be able to work out much benefit to the Maoris". Te Rangikaripiripia said, "I stand up to support the Committee's idea, provided the Government will allow the Ngatituwharetoa to have such a Committee, and will recognise it". Hitiri Te Paerata stated, "The Ngatituwharetoa have been praying the Government for a long time to give them a Committee, but without success". He then asked for "a separate and independent Committee, not one mixed up with another tribe. And let it be clothed with the same power as that which the Land Court possesses". Wiari Ngatai explained that in 1889 Ngati Tuwharetoa had unanimously decided at a tribal hui that all the hapu should appoint a committee. He sought government recognition of a Tuwharetoa committee to manage their tribal affairs.

He also complained about the variation in survey charges, seeking a standard rate of one farthing per acre:

The prices now charged by surveyors are very heavy. I do not know whether the Government sanction those charges or not, or whether the surveyors make them up themselves. At any rate, the effect is that large areas of Maori land pass from them in payment of survey charges. {FNREF:0-86472-117-XA:13:9}

The remaining speakers, Hemopo Hikarahui, Takiwa Te Momo, Te Roera Herua, Hauraki Tonganui and Wereta Hoani, echoed the theme of Tuwharetoa wanting to manage their own affairs by means of a committee with real authority recognised by government, negotiate their own land transactions, and curb the loss of land by survey charges and other debts. Hemopo Hikarahui also raised the issue of taxes, objecting to these as discouraging productive activities which "supply the people with wealth and food". What these leaders of Ngati Tuwharetoa were seeking was a programme for tribal economic development, which included European settlement on leasehold lands, but most importantly, recognised tribal rangatiratanga, or authority to control their own affairs.

The complaints of Ngati Tuwharetoa were also separately corroborated in the evidence to the commission given on 11 March 1891 by L M Grace:

Mr Rees] In relation to the Native-land laws, can you give any idea as to whether there is any certainty in their operation at the present time - whether Natives or Europeans generally are acquainted with these Native-land laws? - I may say that only a very few people thoroughly understand them. I think that the Maoris [in Taupo district] know this one fact: that they are barred from any dealings except with the Crown. Beyond that I do not think they know very much about the subject.

The prevailing impression, then, in the Maori mind is that they are shut out from any dealings except with the Crown? - Yes.

Do they consider that fair, or are they pleased with it? - No; they do not consider it fair. They consider it hard in this particular direction, for instance: It has been necessary in the King-country and in the Taupo country to have surveys made for their hapu subdivisions extending down to the Waimarino country - that is on the Rangitikei side - and the result has been in most instances that they have had to give land for these costs. They have not been in a position to try and get a better price, being restricted to the Government one. This proves that these laws have not affected the Maoris beneficially. In many instances the Maoris have given away larger areas of land than would have been the case had the market been open to them, and in every case I think they would have obtained a better price than that allowed by the Crown.

Then you consider the operation of these laws to be oppressive to the Natives? - Yes, I think so. In fact, I have heard them complain in some instances. I might add that had the [Native Land] Administration Act been worked, which it never was, it would have tended to prevent this system of which I have spoken - paying for surveys with land - particularly in the year 1888, and in 1889 perhaps. The Act was passed in 1886, and I think it was in 1887 or 1888 that it was repealed. It never had an opportunity of being worked. It would have afforded a better opportunity to the Natives of getting fairer prices for their land. {FNREF:0-86472-117-XA:13:10}

The commission noted in its report some modifications of the laws in 1883 and 1884. These measures followed the petition of the Maniapoto, Raukawa, Tuwharetoa and Whanganui tribes presented to parliament on 26 June 1883. {FNREF:0-86472-117-XA:13:11} There had been numerous other petitions and complaints in the early 1880s:

In 1883 and 1884 Parliament seemed doubtful of the individual and free-trade policy. By "The Native Committees Act, 1883," Maori Committees were formed which could make inquiries as to owners, successors to owners, and boundaries of lands, and report; but the report was not binding. By "The Native Land Laws Amendment Act, 1883," counsel, solicitors, and all agents were banished from the Court;

and by "The Native Land Alienation Restriction Act, 1884," the centre of the North Island - the so-called King-country - was absolutely shut up from purchase or lease save by or on behalf of the Crown. Fine and imprisonment were the penalties for the infringement of the provisions of this Act.

The Native Committees Act is a hollow shell, the object of which it is difficult to see. It mocked and still mocks the Natives with a semblance of authority. They wish it to be turned into a living Act, giving them power to do something for themselves. {FNREF:0-86472-117-XA:13:12}

This theme of Crown failure to allow Maori to manage their own affairs was repeated in the commission's comments on later legislation:

"The Native Land Administration Act, 1886," is the one effort made by the Legislature to stay the individual dealing with Native Lands. That Act was misunderstood because no action was taken to clearly explain its object to the Natives, so as to counteract other influences that militated against its favourable reception by them. No lands were brought under its jurisdiction. In consequence of this, after two years of quiescence, it was repealed.

The Native Land Administration Act of 1886 was inoperative owing to two reasons, the first being that the total control of their lands was taken away from the Maoris and placed in the hands of persons not in any way responsible to them; the second, that the Act was made optional and not imperative. The Natives objected to being totally deprived of all authority and management of their ancestral lands, and therefore they refused to bring those lands under the Administration Act.

The Native Land Act of 1888, Section 4, repealed "The Administration Act, 1886" and revived free trade in individual interests in Native lands. {FNREF:0-86472-117-XA:13:13}

In 1907 the Stout-Ngata Commission had the following comments to make on legislation governing "Native Lands in the Rohe Potae (King Country) District" and the impact of Crown pre-emptive provisions:

"The Native Land Alienation Restriction Act, 1884", was repealed by "The Native Land Alienation Administration Act, 1888". The latter Act gave the Natives power to dispose of or alienate their lands as they might think fit. The Ngati Maniapoto and kindred tribes could not, however, avail themselves of the liberty thus accorded by Parliament, seeing that as yet they had no titles to alienate. It seemed that this general removal of restrictions endangered the railway-construction policy of the colony, for in 1889, by section 5 of "The North Island Main Trunk Railway Loan Application Act Amendment Act, 1889", the King-country lands were again placed under restriction, saving the

rights of the Crown, for a term of two years until January, 1892, extended to January, 1894, by the Amendment Act of 1892. "The Native Land Purchases Act, 1892" and "The Native Land Court Act, 1894", continued the restrictions against private dealings until "The Maori Lands Administration Act, 1900", provided a system of leasing, on terms and conditions, however, that rendered it extremely difficult to obtain the leasehold of Native lands in the district under consideration. Broadly speaking, it may be said that from 1884, when Parliament first legislated directly in respect of the Rohe-Potae lands, until 1900, these lands were absolutely restricted, except as against the Crown: the owners could not sell, lease or otherwise render their lands available for settlement, except by selling to the Crown practically on the latter's own terms. {FNREF:0-86472-117-XA:13:14}

It is relevant to note that throughout this period, the government land purchase officers were actively buying up individual interests in lands in the Taupo district and in 1890 a similar process was begun in Ngati Maniapoto lands. Because of the legislative restrictions, only Crown purchases were allowed, and the Crown could therefore set the price. This, as we have seen, was considered unjust by leaders of Ngati Maniapoto and Ngati Tuwharetoa, because, it was believed, better prices could be obtained on the open market. This issue is difficult to prove one way or the other, as the 1880s was a time of national recession, which combined with a general slowing down of European settlement and land development. Many of the blocks in West Taupo and the King Country remained undeveloped until the mid twentieth century. Whether development would have occurred earlier with private purchase is impossible to say. There was no attempt by the Crown to encourage Maori to develop productive farms on their lands in the Rohe Potae.

Waitangi Tribunal, Department of Justice, Wellington.

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13.3 Crown Pre-emption in the Rohe Potae

The central issue raised by the Native Land Alienation Restriction Act 1884 is the reimposition of the Crown right of pre-emption of article 2 of the Treaty of Waitangi. The Commission on Native Land Laws 1891 commented, "The opinions of some of the most experienced witnesses are identical on the point that the abandonment of the Crown's pre-emptive right was a grave and serious error". {FNREF:0-86472-117-XA:13:15} The commission noted the failure of attempts in the 1840s to relegate Maori land rights to only those areas which were actually cultivated and regard the remainder as "waste" lands of the Crown:

The right of Parliament to legislate for the lands of the Natives cannot be doubted. By the Treaty of Waitangi the Natives were guaranteed the full possession of all their rights in the soil of New Zealand

The Constitution Act of 1852 followed the Treaty of Waitangi, and tacitly acknowledged the rights of the Maoris in all their territories, while it set out the pre-emptive right of the Crown. This right, abandoned by the [Native Lands] Act of 1862, was partially resumed by Parliament in 1884. So far as the King-country is concerned, the pre-emptive right of the Crown was reasserted by the Restriction Act of 1884, and still prevails.

There are four parties to be considered - the Natives, the Crown, the Parliament, and the people. So far as the Natives are concerned, it is clear that the rights assured to them are contained in the Treaty of Waitangi and the Constitution Act. In both these the pre-emptive right of the Crown to purchase the lands of the Maori is absolute. The Natives can in no sense claim the abandonment by Parliament of this right as abrogating the provisions of the Treaty and the Constitution. The same power which enacted the abandonment can again place pre-emption upon the statute-book. The question is beyond dispute. In the King-country it has already been done.

The Crown, believing that it was consenting to legislation for the benefit of the colony, waived its right. If the Parliament of the colony, seeing that the new system has broken down, legislates upon the old lines, and returns to the pre-emptive right, the Crown can undoubtedly consent. The Maoris have no claim to bar the Crown from purchase. Parliament may prohibit private subjects from purchase; but the Maori, in the presence of the Treaty of Waitangi and Constitution Act, cannot prohibit the Crown. Free use and enjoyment of their lands, only controlled by just laws - this the Natives can indeed claim. The right to

sell to whom they please is contrary to the treaty by which New Zealand became part of the Empire. The right to lease still under wise laws they may urge as proper. Upon this middle ground between occupation and sale Parliament may well act.

In the interest of the Natives, of the Crown, and of the whole people, for the fulfilment of the Treaty and the Constitution [Act], the right of purchase should still be vested in the Crown, and in the Crown only.

In the case of *Wi Parata v the Bishop of Wellington*, N.Z. Jur., N.S. 3 S.C. 72, it was decided by the Supreme Court that all Maori lands were waste lands of the Crown, subject to the rights of the Natives. That judgement is clear, but the facts and the law warrant even a broader utterance. By the law of nations, English occupation vested the ultimate title to all lands in the Crown. The Maoris at the moment of annexation became tenants; but they did not hold the highest form of tenancy -that of a simple fee. The Maori title is that of occupation, but occupation by an indefeasible right.

Parliament can legislate regarding the future administration of the Maori lands and the resumption by the Crown of the pre-emptive right. Parliament has both claimed and exercised extensive powers. It has confiscated Native lands. It has vested them in trust. It has prescribed ways and methods of alienation. It has appointed Commissioners, created Courts, and decided titles. There are no limits to its jurisdiction. In truth the Maoris were never the owners of the legal estate since the Treaty of Waitangi: they were the beneficiaries and could not deal with their lands without the consent of the Crown and Parliament. {FNREF:0-86472-117-XA:13:16}

This is the nub of the problem. What is the nature of Maori rangatiratanga purported to be guaranteed in article 2 of the Treaty of Waitangi, "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties"? What is the nature of the Crown obligation, and that of parliament which passed legislation creating agencies and institutions such as the Native Land Court, the Land Purchase Office and other administrative structures, the regulations governing survey, and provisions for costs to be charged upon the land, and so on? Article 1 of the Treaty sets out this obligation as the assumption by "Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty," described in the Maori version of the Treaty as "te Kawanatanga katoa o o ratou wenua".

It is not surprising that the Maori member of the Commission on Native Land Laws, James Carroll, dissented from the passage in the report quoted above. His comments, influenced by the impact of the resumption of Crown pre-emption in the Rohe Potae, reveal a Maori perspective on the relationship between the Crown, Maori and Maori lands:

Upon the question of the Crown resuming the right of pre-emption over lands owned by the Maoris ... I cannot help feeling that such a

step would be unwise and impolitic, while the legality itself of such a proceeding is, I believe, open to grave doubt. The Crown bases its title to land in New Zealand not on the right of discovery or conquest, but on the Treaty of Waitangi. By that treaty the exclusive right of pre-emption over such lands as the Native proprietors might be disposed to alienate was yielded to Her Majesty from the period of signing the Treaty of Waitangi until the sanction of Her Majesty was obtained to "The Native Lands Act, 1862": over twenty years that right remained in full force. Thus it will be seen that ample opportunity was afforded for testing the efficacy, wisdom and justice of the prerogative so assured. In some vague way the Europeans have always regarded themselves as having an undefined reversionary interest in Maori lands; the Natives, on the other hand, have always failed to cordially acquiesce in the administration of their territorial estates by the various Governments that have from time to time controlled the destinies of New Zealand. And so, for the long stretch of time the Government retained the right of pre-emption over the Native lands, the period was one fraught with many acts of injustice to the Natives. They called to mind the words used to them by Captain Hobson when the Treaty was signed - that the two races had become united under one sovereign; but, in strange contradiction to this harmonious union, they saw millions of acres of their land passing from them

Parliament at length was no longer able to conceal from itself that great wrongs upon the Native race were being perpetrated. It saw, as it expressed itself in the preamble to the Native Land Act passed at the time, that it would greatly promote the peaceful settlement of the colony and advancement of the civilisation of the Natives if their rights to land were ascertained, and defined, and declared, and if the ownership of such lands when so defined and declared was assimilated as nearly as possible to the ownership according to British law. With a view to giving effect to the foregoing objects Her Majesty waived in favour of the Natives so much of the Treaty of Waitangi as reserved to Her the right of pre-emption over their lands.

I entirely fail to understand how, as set forth in the preamble to the Act of 1862, the Government of New Zealand, having renounced the right of pre-emption over Native lands, can again acquire that prerogative without the assent of the Natives. Upon equitable grounds alone the Parliament should not attempt to regain the prerogative it abandoned about thirty years ago. Such a proceeding on the part of the Legislature would in my opinion intensify the mistrust the Native population too long have had in Colonial Governments. {FNREF:0-86472-117-XA:13:17}

Carroll went on to argue that Maori, "unversed in the subtleties of the law", would regard such legislation as a form of confiscation, which would hinder their ability to develop their own lands for agricultural and pastoral purposes for their own benefit. That some lands would still be made available for sale, Carroll suggested, was because these would be surplus to Maori requirements, and would provide revenue to

finance Maori development. Carroll's comments were then directed at the experience of tribes within the Rohe Potae:

Evidence adduced before the Commission proved conclusively that, where the Government interposed with its pre-emptive right, as was the case in the King-country, the Natives could not obtain a fair price for their land. The Government offered 3s an acre: at the same time private purchasers were in constant communication with the owners, and willing to pay them £ 1 an acre.

Need one wonder that a deadlock in Native-land transactions in that part of the country occurred. The inevitable result arising from such a condition of things is that, if the Natives cannot sell to the purchaser prepared to give them a larger sum than the Government, they will not sell at all; and it will be observed that not even the Treaty of Waitangi itself, or any law passed by Parliament, assumed the power of compelling the Natives to alienate their land. {FNREF:0-86472-117-XA:13:18}

Waitangi Tribunal, Department of Justice, Wellington.

The Pouakani Report 1993

13 Commission on Native Land Laws 1891

13.4 The Impact of the Native Land Court

Many Maori in the 1880s and 1890s argued that the government land legislation compelled them to alienate lands in order to settle their mounting debts. The government did this by passing laws that: required title to lands to be investigated by a Native Land Court; that charged considerable fees; that forced other expenses on them by hearing cases in distant towns; that required surveys, the cost of which was charged on their lands; and that charged interest on unpaid survey liens. The land legislation of the 1870s and 1880s set up a system which was imposed on Maori with little consultation and no general consent. Carroll quoted a comment by Mr Alfred Domerr:

In governing masses of men we must look upon a wrong really felt as a real wrong. It mattered not that on abstract principles of justice or theories it ought not to be considered a wrong - if it was really felt by them, then it must be treated as a real wrong. And this was the case with the Maoris, and their feelings about the Crown's right of pre-emption. {FNREF:0-86472-117-XA:13:19}

Carroll also criticised government administration of Maori affairs, and the "utmost suspicion" of Maori toward the "Native Office" operations:

Scarcely is there a portion of the North Island where the Natives have any experience of the Native Office but they remember it with feelings of regret. Everywhere one hears complaints of its deceitful practices, over-reaching, unfulfilled promises, and treachery, in all of which the Natives are, of course, the helpless victims

Partly in despair and partly in hope they have now sought a way out of the difficulty. The mysteries of the Native Office they cannot penetrate; the policy of past Governments they have learned to mistrust: their only hope and outlook is centred in the prospect of the Legislature granting them the power they ask for to control their own affairs. After all, what they ask for is only a species of local self-government, exercised in a manifold degree by their European neighbours. {FNREF:0-86472-117-XA:13:20}

The whole process of Native Land Court determination of Maori titles, survey and Crown land purchase was inextricably intertwined. The evidence of Thomas William Lewis to the 1891 commission made this clear. Lewis had joined the Native Department as private secretary to Sir Donald McLean, when McLean became Native Minister in 1869. In 1879 Lewis was appointed Under-Secretary of the Native

Department, and remained in that post until his death in December 1891. In 1885, responsibility for the Land Purchase Department had been added to his duties:

I would premise my statement by saying that the position I have occupied enables me to look at the matter from several different standpoints. For example, the Natives, when they have complaints to make in connection with the Native Land Court, or, indeed, in respect of other matters, generally do so through the Native Office. All the petitions to Parliament relating to Native affairs I have to report upon, and many of these petitions also relate to Native Land Court questions. Then, my official connection with the Native Land Court, and my intimacy with the Judges, enable me likewise to look at the matter from their point of view. There is, moreover, what may be called the Government point of view, which is distinct from both of those, and in regard to which also my departmental position compels me to look at these questions from. Another point of view which assists me in arriving at conclusions on this matter has been that of land-purchaser, and in that position I may be said to take the view of the general public on the question - in this way: It is my duty as officer in charge of the Land Purchase Department to purchase land from the Natives, and the first question that arises in connection with such purchases is as to the certainty of the title

In the first place, my opinion is that the whole object of appointing a Court for the ascertainment of Native title was to enable alienation for settlement. Unless this object is attained the Court serves no good purpose, and the Natives would be better without it, as, in my opinion, fairer Native occupation would be had under the Maoris' own customs and usages without any intervention whatever from outside. Therefore, in speaking of the Native Land Court, this test to it must, I consider, be applied - viz., that there should be a final and definite ascertainment of the Native title in such a way as to enable either the Government or private individuals to purchase Native land

Bearing in mind that the foundation of all settlement in the country is the ascertainment of title, in my opinion the Natives should not be allowed to keep their lands out of Court. In large districts - as, for instance, the Wanganui district - it is a long time since the Natives have brought before the Court any cases for original investigation of title. And I think that, if applications for hearing of blocks required for settlement are not sent in, the Court should, on application of the Governor, ascertain the ownership of any such lands after due notification. And if the Natives refused to attend the Court to give evidence as to the ownership the Court should give its decision upon such evidence as it could obtain, and award the land to the Natives whom it could best ascertain were the owners, and especially it should declare the relative interests of each. All surveys of Native lands for purposes of first investigation, and such subsequent partitions as may be approved by the Native Minister, should be paid for by the Crown out of funds provided for the purchase of Native lands. I suggest that

because I would give the Natives every possible facility for bringing their lands into the Court, so that Natives without means should not be debarred from bringing land into the Court. The surveys and any other incidental expenses should therefore be paid for by the Crown, and the amount should form a lien upon the land, to be recovered on the application of the Crown. The Court should award land to cover all these costs, on the valuation of, say, the Surveyor-General. The Crown should also take precedence of all suitors before the Native Land Court
....

The object of the Native Land Court is to ascertain the Native titles for the purposes of settlement. It is a duty of the Government to provide land for settlement. It acts in the interest of the whole of the people of the country, Natives and Europeans together. Consequently, for the purpose of acquiring land for settlement, the Crown should take precedence of all suitors. {FNREF:0-86472-117-XA:13:21}

The Constitution Act 1852 which granted a "Representative Constitution to the Colony of New Zealand" had made provision at s71 for "Native districts", and was used as the basis for pleas by Tawhiao and others to allow Maori to control their own affairs within the Rohe Potae:

And whereas it may be expedient that the laws, customs, and usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed

This provision remained in the New Zealand Constitution Act 1852 for over a century until the remnants of that United Kingdom statute were declared by the New Zealand Parliament in the Constitution Act 1986 to cease to have effect in New Zealand. But s71 was never used for the King Country or anywhere else in New Zealand, and was repealed in the Constitution Act 1986. Section 73 of the Constitution Act 1852 confirmed the Crown right of pre-emption, and was repealed by s4 of the Native Land Act 1873.

The waiving of the Crown right of pre-emption in the Native Lands Act 1862 which established the Native Land Court, and its operation under the Native Lands Act 1865, were imposed by a parliament which had no Maori representation. The concept of four Maori seats was not introduced until 1867. We are not aware of any evidence of consultation, still less of Maori consent, to the imposition of the institution called the Native Land Court. There were numerous complaints about its operation. It served the purposes of the parliament of the day to provide a court to control the process of land alienation. In the same way, one can view the reimposition of the Crown right of pre-emption in the Rohe Potae as also serving the purposes of the parliament of the day. In a separate posthumous report (edited by Judge Alexander Mackay), one of the members of the Commission on Native Land Laws 1891, Thomas Mackay, stated:

Lands in the King-country should be restricted, as they will be very much enhanced in value by the Central Railway, and Government should have some benefit from the construction of the line. {FNREF:0-86472-117-XA:13:22}

The Crown right of pre-emption in the Rohe Potae was confirmed in the Native Land Court Act 1894. The system of Crown purchase of individual interests in land by government land purchase officers continued with little modification. The machinery of the Native Land Court rolled inexorably through the Rohe Potae in the 1890s as, block by block, the titles were investigated, lists of owners compiled, surveys authorised and some of them done, Court orders issued, individual interests purchased, Crown interests partitioned out, and other lands acquired by the Crown in payment of survey and other costs. What we have outlined in detail of transactions on Maraeroa and Pouakani blocks seems to have been repeated on many other blocks throughout the Rohe Potae.

We have quoted at length from the report of the Commission on Native Land Laws because the problems for Maori people created by complex land legislation, the machinery of the Native Land Court, the Crown role as sole purchaser and controller of land transactions, including requirements for survey, were clearly identified in 1891. Parliament saw its role as promoting settlement and economic development of the nation. There was scant attention given to a Maori role in this development, or the desire of Maori to manage their own affairs, control their own resources, or in other words, assert their rangatiratanga.

Waitangi Tribunal, Department of Justice, Wellington.

The Pouakani Report 1993

13 Commission on Native Land Laws 1891

13.5 Findings and Recommendations

The Commission on Native Land Laws 1891 set out very clearly the grievances created by the operation of the Native Land Court, the requirements for survey, and the high costs involved. The only way for Maori to establish title to lands in the Rohe Potae was to embark on this costly process, or be caught up in it by other kin who had lodged an application in the Native Land Court for investigation of title. Wahanui and others tried to keep the Native Land Court out of the Rohe Potae, to establish "Native Committees" which would undertake the task of identifying lands to be made available for Pakeha settlement. Under the Native Land Alienation Restriction Act 1884 a Crown right of pre-emption was reimposed on the Rohe Potae. Maniapoto and Tuwharetoa leaders argued that this undermined their power to negotiate a price on the open market. The native committees set up by statute in 1883 were given no real authority.

The role of the government land purchase officers requires scrutiny. It seems that there was a good deal of negotiating outside the Native Land Court which was not recorded in the minute books. But the court had the jurisdiction to accept agreed arrangements. The Native Land Court Act 1880, at s56:

It shall be lawful for the Court, in carrying into effect this Act, to record in its proceedings any arrangements voluntarily come to amongst the Natives themselves, and to give effect to such arrangements in the determination of any case between the same parties.

In the Native Land Court Act 1886 this provision was strengthened at s59:

It shall be lawful for the Court, in any proceeding under this Act, to give effect to any arrangement voluntarily come to by the Natives or by the Natives and Europeans concerned therein, and to decide such proceedings in accordance with such arrangement.

Such decision shall be as effectual and binding as arrived at on evidence taken.

The role of the court was to ensure that there was agreement. If objections were called for in court, and there was none, then the court could and usually did conjure the agreed arrangement. The Native Land Court did not, in the early decades of its existence, exercise an inquisitorial role to any degree. It decided on the basis of evidence presented in court including a statement of an agreed arrangement made outside the court.

The correspondence of land purchase officers with their superiors in Wellington was often full and frank. The actions of W H Grace were called into account by the Tauponuiatia Royal Commission. That commission found nothing that required further investigation and only queried, "Whether Mr Grace, a Government officer, should have mixed himself up in any way with matters in dispute between the Natives themselves may be a question for the Government to determine". {FNREF:0-86472-117-XA:13:23} There was no further investigation, and Grace was subsequently re-employed to assist another purchase officer, G T Wilkinson. No evidence was presented to us which suggested Grace acted illegally or fraudulently. Other contemporary sources suggest that the land purchase methods employed by Grace were regarded as normal practice for the time.

We have reviewed a large number of contemporary documents, and traced the transactions on the Maraeroa and Pouakani blocks in detail through the period from the early 1880s to early 1900s. No evidence has been found to suggest that the actions of the Native Land Court, government land purchase officers or other officials were illegal, fraudulent or unacceptable in terms of contemporary practice and procedures. We noted the failure of the Survey Office in Auckland to comply fully with the survey regulations in allowing the addition of survey data on existing plans, failing to produce separate plans for each block, and using the system of "scaling and protracting" to calculate boundary lines on a plan. In mitigation, we accept (but do not condone) that the practice became general, as a means of saving the unnecessary expense to Maori owners of a survey on the ground which might not be needed if and when the Crown purchased the land. In the next chapter we deal specifically with this problem on Pouakani B9B block.

In reaching the conclusion that we find nothing illegal or unacceptable in terms of late nineteenth century practice in these transactions, we are still left with the broader problem of a form of administration of Maori lands which was imposed on the tribes by the Crown. There is plenty of evidence that tribal leaders wanted to avoid the worst problems of land dealings by keeping out the Native Land Court and administering their own lands in the Rohe Potae. There is also plenty of evidence that government intentions were that Crown sovereignty would be imposed on the Rohe Potae, that existing institutions would be extended into the region, and lands opened up for settlement. The Crown also sought to protect its investment in the North Island main trunk line by preserving a right of pre-emption in the hope of paying off its substantial debts by the sale of land. There was nothing new in this policy. In his instructions to Hobson in 1839, Lord Normanby stated:

it will be your duty to obtain, by fair and equal contracts with the Natives the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to New Zealand The resales of the first purchases that may be made will provide the funds necessary for future acquisitions, and beyond the original investment of a comparatively small sum of money, no other resource would be necessary for this purpose. I thus assume that the price to be paid to the natives by the local Government will bear an exceedingly small proportion to the price for which the same lands will be resold by the Government to the settlers; nor is there any real injustice in this inequality. To the natives, or their chiefs, much of the

land of the country is of no actual use, and in their hands it possesses scarcely any exchangeable value. Much of it must long remain useless, even in the hands of the British Government also, but its value in exchange will be first created, and then progressively increased by the introduction of capital and of settlers from this country. In the benefits of that increase the natives themselves will gradually participate. {FNREF:0-86472-117-XA:13:24}

The problem with this argument is that Maori today feel they have not fully participated in the benefits from the introduction of capital and settlers. We repeat the comments of James Carroll quoted above, that in all the legislation on Maori land up to 1891, not a single attempt had been made by government to encourage Maori to become "useful settlers".

There are many issues raised in this report which relate to Crown transactions in the whole of the Rohe Potae. We are aware that proceedings have begun for the Waitangi Tribunal to hear some 12 other claims involving lands, the Native Land Court, surveys, Crown purchase and railways in the Rohe Potae. {FNREF:0-86472-117-XA:13:25} We have reviewed enough historical evidence to suggest that the transactions on Maraeroa and Pouakani blocks were not atypical, that there was a great deal of mistrust of the operations of the Native Land Court and government purchase officers. There were disputes between tribal leaders over issues of mana whenua, and dissension created by the system of allocation of individual interests in land.

Some of this dissension was expressed in disputes over survey of boundaries. Some of these survey lines have stood the test of time. Indeed, the system of survey using co-ordinates based on major and minor triangulation established in the Department of Lands and Survey by the late 1870s was among the best in the world. It was a good deal more accurate than the "metes and bounds" system of boundary descriptions by landmarks and compass directions still in use in Britain. Given the conditions in which New Zealand surveyors worked, their achievements were commendable. However, we also recognise that some of these boundary disputes need not have occurred. If the survey of the land had not been so closely tied to the operation of the Native Land Court, then perhaps the court at Taupo in 1886 could have had a properly surveyed plan before it, and the tribes could have resolved their differences in talking through to reach a consensus. Sufficient time and opportunity was not allowed and the first determination of the western boundary of Tauponuiatia block by the Native Land Court was unacceptable to the tribes concerned. The surveyors were given instructions that turned out to be wrong when the whole matter was investigated by the Tauponuiatia Royal Commission in 1889. Not only did Maori have to pay for a survey that had to be done again, and paid for again, but they also had to pay for the costs of the original Native Land Court hearings, proceedings in the Supreme Court, petitions to parliament, appearance at the Tauponuiatia Royal Commission in 1889, and finally, rehearing of Pouakani and Maraeroa blocks investigation of title by the Native Land Court in 1890-91. The wider issues will need to be considered by the tribunal when hearing Rohe Potae claims. {FNREF:0-86472-117-XA:13:26}

We have a particular concern about the way large areas of land were acquired by the Crown in payment of survey costs, including minor triangulation. The Pouakani No 1

block of 20,000 acres was only one of many blocks acquired to pay off survey liens. Provision for charging unpaid survey costs against the land was well established in Maori land legislation by the 1880s. We accept the need for survey, in order to establish identifiable boundaries for the purposes of issuing a title which could be registered under the Torrens system. We question why Maori were required to pay so substantially for the whole cost of surveys, whether they sold land or not. Some of the boundaries surveyed were not needed. Some were in the wrong place. All had to be paid for. It is accepted that if land is to be sold, then a surveyed boundary is required and the cost deducted from the proceeds of sale. If the Crown had accepted Maori proposals to work out the areas to be sold and administer their lands themselves, then there would not have been a need for so many surveys of subdivisions. The practice of charging interest compounded the problem, especially when the Crown as sole purchaser delayed some transactions when finances were short. This important issue will need to be investigated further in hearing of the Rohe Potae claims. {FNREF:0-86472-117-XA:13:27}

We conclude that, in paying for surveys in land, Maori in the Rohe Potae carried a disproportionate amount of the cost of Pakeha settlement in the Rohe Potae. Just how much cost was carried requires a more detailed accounting than we have been able to undertake for this report. Maori were also forced into the position of having to pay other costs in the process of establishing a title to their own lands, and to engage in expensive litigation when disputes occurred. In article 2 of the Treaty of Waitangi the Crown confirmed and guaranteed:

the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess as long as it is their wish and desire to retain the same in their possession

By imposing requirements of survey, fees for investigation of title in the Native Land Court, and other costs such as food and accommodation away from home during hearings, many Maori were forced into debt. Maori were satisfied with their established forms of tenure of land. There is nothing in the Treaty which required the transmuting of this tenure into one cognisable in British law. Why could the law not recognise Maori custom and usage? That there had to be a fair system of establishing ownership when a sale was contemplated is accepted. The legislation under which the Native Land Court operated went much further than that and required that all Maori land be passed through the court, with all the attendant costs of that process. When the debts were called in, Maori paid in land.

We consider that there is a prima facie case based on the evidence reviewed so far to suggest that the Crown acquired large areas of land in payment of survey costs and other charges in the Rohe Potae. We consider that redress for Maori may well be negotiated in the form of the return of Crown lands to the tribes concerned. We are also aware that large areas of Crown lands have been transferred to state-owned enterprises, in particular Forestry Corporation and Land Corporation. An interim report of the Waitangi Tribunal in respect of the land at Kaimaamau, part of the Muriwhenua lands claim, dated 30 October 1991, is relevant:

We are of opinion that the resumption scheme represented in the Treaty of Waitangi (State Enterprises) Act 1988 does not provide a complete discharge of the Crown's Treaty obligations, nor does it cover all situations. This might be assumed from the manner in which the settlement itself was effected, and in particular the enactment of the resumption clauses in the 1988 Act without relieving the Crown from the general provision in section 9 to act consistently with the Treaty in the disposal of land assets. There is further support for the view that the scheme is not comprehensive, from previous cases. The Court of Appeal saw the need for a further protective arrangement on the sale of surplus Crown land in *Tainui Maori Trust Board v Attorney-General* (1989) 2 NZLR 513 (Coal Sales). Richardson J questioned the efficacy of buy-back arrangements in *Runanga o Muriwhenua v Attorney-General (No 2) (Fish Quota Sales)* CA 110/90, 28.6.90, though there with reference to fishing ITQ. The Waitangi Tribunal on the Ngai Tahu claim urged that surplus Crown land be not sold in the South Island pending its final report and recommendations resulting in an early-warning system being introduced (*Ngai Tahu Report* (1991) 4 WTR 693). In *NZ Maori Council v Attorney-General (Airwaves Sale)* Wellington CP 942/88, 3.5.91, McGechan J considered specifically that the State enterprise claw-back scheme in particular "does not foreclose other protective approaches where warranted". Finally the Government itself has entertained alternative schemes for the alienation of Crown assets, first by a reservation of land and capital in the Crown Forest Assets Act 1989 and secondly by a consultative process in a settlement with the National Maori Congress of October 1991. While only the comments of McGechan J refer specifically to the State Enterprise claw-back scheme, each case illustrates the need for alternative arrangements to accommodate the claim resolution process within the Crown's assets sale programme as new situations present themselves.

In the particular case of land sales through state enterprises, a distinction must be made between claims awaiting hearing with which the 1988 action and settlement was concerned, and those substantially heard and researched. There must come a point at which the Crown should ask whether it is sufficient or appropriate to rely upon the claw-back provisions or whether, having regard to the state of any inquiry, it would be proper to proceed at all. In all fairness the Crown should consider not only the Maori party, but would-be purchasers whose own plans may thus be set aside, and also the general tax-paying public, since the compensation paid to purchasers will likely exceed the price they originally paid.

Accordingly in our view the 1988 settlement serves to justify alienations in many, perhaps most cases where claims have yet to be heard, but not in all cases, and most especially, not in those situations where a prima facie case is apparent. We think it incumbent on the Crown not to rely upon the letter of the 1988 settlement, but to consider constantly the propriety of decisions having regard to its

overall obligations, recognised in the Court of Appeal, to seek the fair and just settlement of valid claims. {FNREF:0-86472-117-XA:13:28}

In two other recent reports of the Waitangi Tribunal on the matter of disposal of Crown assets, the need for prior consultation with iwi was addressed. In the case of the Auckland Hospital Endowments claim it was recommended that the Minister of Health, through the appropriate agency:

consult with an appropriate national Maori organisation for a general policy concerning the disposal of Health Board properties when Maori have or may claim a particular interest {FNREF:0-86472-117-XA:13:29}

It was also recommended that the Minister of Health provide funding "for the early research of prospective Maori claims to hospital lands" in consultation with the Waitangi Tribunal. In this case, the sale of the property was effected but the funds from sale were to be held in an Auckland Area Health Board Trust fund "until either the claim is determined or agreement reached with local iwi".

In the second case, the *Interim Report on Sylvia Park and Auckland Crown Asset Disposals*, a sale of Crown property was negotiated through the Department of Survey and Land Information. {FNREF:0-86472-117-XA:13:30} The Waitangi Tribunal recommended the holding of the proceeds of the sale "in a separate interest bearing trust pending determination of the claims in respect of that particular property, or a prior resolution of the asset sales question". {FNREF:0-86472-117-XA:13:31} The tribunal also recommended that government negotiate with local tribal representatives "for a separate settlement and arrangement for the disposal of Crown or State Enterprise assets in Auckland". {FNREF:0-86472-117-XA:13:32} The tribunal in this report emphasised the obligations of the Crown when disposing of assets to take into account possible resolution of Maori claims:

There are earlier opinions of this Tribunal that the duty on the Crown, in the Treaty of Waitangi, to protect Maori in the ownership of their lands, becomes in our time a duty to restore Maori to ownership where practicable, where past wrongful dispossessions are established, and not to alienate lands so as to prejudice Maori claims to them. That principle is nothing novel. It is a fraud by any fair law to so dispose of assets as to defeat a creditor's right of recovery. That principle has general application. It is not a principle peculiar to the State Enterprise circumstance. It follows in our view that the Crown ought not to dispose of properties without first being satisfied either that there are no claims to them, or that the claimants consent, or in the further alternative, that a scheme protective of the claimants' interests is first in place. {FNREF:0-86472-117-XA:13:33}

We conclude that in the Rohe Potae in the 1880s and 1890s there was an intricate interrelationship between the operations of the Native Land Court in determining titles, and the activities of government land purchase officers and surveyors commissioned by the surveyor general. However, in this Pouakani claim we have heard from one small group of claimants in respect of their grievances on Pouakani

block and the boundary with Maraeroa block. They raised these general issues but at the hearings counsel for both the claimants and the Crown were primarily concerned with what had happened within and on the boundaries of Pouakani block. It was not until after the hearings had ended when we reviewed the evidence and did further research that it became obvious that what had happened on Pouakani had also happened throughout the Rohe Potae. The claimants' real grievance was not just what the apparatus of Native land laws, Native Land Court, government land purchase officers and survey had done on Pouakani, but the system itself. We have not had the benefit of submissions from tribal representatives elsewhere in the Rohe Potae. We consider that these broader issues should be investigated further by the tribunal hearing other claims in the Rohe Potae so that other claimants' views may be aired before framing firm recommendations. {FNREF:0-86472-117-XA:13:34} We consider that there is sufficient evidence to suggest that there may well be a basis for redress, but that such matters should be addressed on an iwi and/or hapu basis.

Accordingly, we recommend that no Crown land or land of state-owned enterprises, such as Land Corporation or Forestry Corporation in the Rohe Potae be transferred to a third party without either investigation by the Waitangi Tribunal, or the agreement of the tribal authorities within whose territories such lands may lie. We do not consider in the case of the Rohe Potae lands that the memorial provided for in the amendments to the State-Owned Enterprises Act 1986 made by the Treaty of Waitangi (State Enterprises) Act 1988 is adequate protection. We are mindful of the considerable cost to the tax payer that may be incurred if such lands are alienated, but on subsequent investigation the Waitangi Tribunal sees fit to recommend Crown resumption of title.

References

1. AJHR 1891 Session II G-1
2. ibid
3. ibid
4. ibid
5. ibid
6. ibid
7. ibid
8. ibid
9. ibid
10. ibid
11. AJHR 1883 J-1; see appendix 6
12. AJHR 1891 Session II G-1
13. ibid
14. AJHR 1907 G-1B
15. AJHR 1891 Session II G-I
16. ibid
17. ibid
18. ibid
19. ibid
20. ibid
21. ibid
22. AJHR 1891 Session II G-IA

23. AJHR 1889 G-7
24. In McNab 1908 vol 1 p 734
25. Wai 48 etc
26. *ibid*
27. *ibid*
28. Wai 45 *Interim Report of the Waitangi Tribunal on Kaimaumau* 30 October 1991 pp 6-7
29. Wai 261 *Interim Report of the Waitangi Tribunal to the Ministers of Maori' Affairs, Health and Justice* 6 December 1991 p 6
30. Wai 276, 72 and 121 *Interim Report on Sylvia Park and Auckland Crown Asset Disposals* 22 April 1992
31. *ibid* p 4
32. *ibid*
33. *ibid* p 3
34. Wai 48 etc

Waitangi Tribunal, Department of Justice, Wellington.