CHAPTER 8

RESERVES AND RESTRICTIONS ON ALIENATION TO 1900

8.1 Introduction

Formal equality of Maori with settler in the new nation state depended upon their having the free choice of which of their lands to retain both for their own residence and for farming and commercial development. However, 'free choice' is not a concept which easily applies in a situation where people without capital other than their land, and inexperienced in a money economy, encounter the enormous pressures of modernisation. Two major issues arise in respect of the Crown's responsibilities: firstly, at the very least, ensuring that Maori were able to retain the land which they did wish to retain; secondly, over and above that, whether the Crown had a duty to ensure that Maori retained adequate lands for their present and future needs, even when they were prone to sell it, for one reason or another. Official policy on reserves, and on the restrictions on alienation placed on the titles of Maori land which passed through the Native Land Court, bear heavily on this question. Rangahaua Whanui reports which deal with these issues include Ralph Johnson, A Report on Trust Administration of Maori Reserves, 1840–1913', and Jenny Murray 'Crown Policy on Maori Reserved Lands 1840–1865 and Lands Restricted From Alienation, 1865–1900'.

8.2 Early Reserves Policy

Lord Normanby, Secretary of State for the Colonies, made the first statements concerning land to be reserved for Maori in 1839. He instructed that no land should be purchased from Maori 'the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence'.[1] In 1841, Normanby's successor, Lord John Russell, instructed Hobson to identify Maori land before allowing purchases to take place:

1. Normanby to Hobson, 14 August 1939, BPP, vol 3, p 87 (cited in J E Murray, *Crown Policy on Maori Reserved Lands 1840 to 1865, and Lands Restricted from Alienation, 1865 to 1900*, Waitangi Tribunal Rangahaua Whanui Series (working paper: first release), 1997, p 1)

> the land of the aborigines should be defined, with all practicable and necessary provision on the general maps and surveys of the colony . . . the lands . . . should be regarded as inalienable.[2]

It should be noted that Russell subscribed to a version of the 'waste land theory', that Maori had valid title only to land they cultivated or used in a fairly intensive way.

Earl Grey was to later outline a slightly more definite reserves policy. He thought that reserves should be 'ample' but confined to providing 'real wants': settlement and cultivations should have priority over land for hunting and gathering. However, Maori were not to be deprived of land used for hunting and fishing without 'providing for them in some other way advantages fully equal to those they might lose'.[3]

The Crown was also influenced by the New Zealand Company 'tenths' scheme.[4] The allocation and administration of the 'tenths' reserves was an important part of the New Zealand Company's colonization scheme. Even before the Company had received Crown agreement for its activities in New Zealand, the Directors had appointed an official, Edmund Halswell, to oversee the allocation and administration of its reserves. In managing the reserves, Halswell was instructed to:

> take into consideration the existing wants of the Native race and to point out those objects to which in your judgement the revenues of the reserves may be most fitly appropriated to the end of promoting the moral and physical well-being of the Native chiefs, their families and followers . . . As the appropriation of land to purchasers proceeds it will become your specific duty to select an eleventh, or a quantity equal to one-tenth of the land appropriated from time to time to purchasers, as Native reserves.[5]

As the Company's acquisitions from Maori were yet to be investigated and confirmed, the Crown began also to watch over the allocation of reserves. In early 1841 Halswell was appointed a Government commissioner for native reserves and a Protector of Aborigines. But there were serious differences between Crown and Company policy and objectives. In 1841, the administration of reserves was removed from Halswell and placed in the care of three individuals: Chief Justice Sir William Martin, George Clarke, the Protector of Aborigines, and Bishop Selwyn. In each area a local agent was appointed to assist the trustees in their duties. Still, 'the administrative arrangements appear[s] to have been haphazard, owing to a general confusion among the trust members, and, . . . the uncertain status of the reserves titles themselves'.[6]

---

2. Russell to Hobson, 28 January 1841, BPP, vol 3, p 52 (cited in Murray, p 4)
3. Merivale (Under Secretary for Colonial Affairs) to Beecham (Secretary of the Wesleyan Methodist Missionary Society), 13 April 1848, BPP, vol 6, pp 154–155 (cited in Murray, p 4)
4. See above ch 3
5. New Zealand Company to Halswell, 10 October 1840, BPP, vol 2, p 668 (cited in R Johnson, 'A Report on Trust Administration of Maori Reserves, 1840–1913', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, 1996, ch 2, p 5
6. Johnson, ch 2, p 11

There was confusion too about whether the reserves were for Maori occupation and use, or to be retained in trust and leased to provide a fund for their benefit. Maori owners had their own preferences about allocation of lands. Sometimes they themselves placed land in trust for churches and schools and their preference for land for occupation and use generally included dwellings, cultivations, and sacred places such as burial grounds. However, land that Maori wished to retain was also the land most desired for settlement. Some of the 'tenths' in the Port Nicholson settlement were selected to coincide with Maori pa and cultivations but most were exchanged (with greater or lesser degrees of Maori concurrence) for reserves further out. The outcome was that, except to some extent in Nelson, little land was left for the trustees to raise revenue from for Maori welfare.

In land purchase policy generally there was no accepted standard of what was sufficient land for present or future needs. The Company had thought in terms of a one hundred acre country section and a one acre town section for each of the 'chiefly families. (Other Maori were expected to become labourers, like most of the British immigrants). European settlers in Auckland were being granted 40 or 50 acres per adult and 20 acres per child. Maori would not have been thought to require more. Even a sympathetic observer like Ernst Dieffenbach thought they would need only 10 acres per head.[7] In point of fact,once it became clear that the Crown could not assert a claim to 'waste' lands as Crown demesne, against Maori wishes, the view of settlers and officials was that Maori had land vastly in excess of their needs. The Crown's efforts were directed towards acquiring it, rather than protecting it in Maori hands. Murray states, '[h]ow far particular transactions conformed to Normanby's "fair and equal contracts" depended more on the relative strength of the parties at the time than to consistency of principle'.[8]

In 1844 the Native Trust Ordinance was passed under FitzRoy in an effort to improve reserves administration. A new group of trustees was appointed, in whom all reserves not required for Maori occupation (what few there were) were to be vested, together with the 'Crown tenths' FitzRoy reserved from the pre-emption waiver purchases in Auckland, and perhaps also a percentage of the profits of land sales which Lord John Russell had directed to be made over for Maori education and medical care. The trustees had the authority to lease or exchange land. However, although the ordinance was approved in London, Grey, anxious to control the reserves administration directly, did not gazette it in New Zealand. No further legislation dealing with the administration of reserves was introduced until 1856. Meanwhile Grey sold or took into the general pool of Crown land the 'Crown tenths' in Auckland and no fixed percentage of the land fund was made over for Maori purposes.

In 1848 the former trusts of Native reserves were dissolved in favour of newly constituted 'boards of management'. Behind this decision was the need to acquire some of the remaining tenths reserves for public purposes. As a result a number of these reserves were taken, particularly in Wellington. Claimant research suggests

7. Ernst Dieffenbach, *Travels in New Zealand*, London, John Murray, 1843, p 149
8. Murray, pp 5–6

that boards of management leased much of the Wellington reserved lands at below market rentals, and similar practices occured with the Nelson tenths reserves.[9]

Meanwhile, Crown purchases were proceeding quickly, including the huge purchases in the South Island. In 1847, Grey seemed to understand the need for large reserves for the hunter-gatherer economy.[10] By 1848 however, his stated expectation was that Maori would rapidly assimilate with European society and should be limited to well-defined reserves, principally used for cultivation.[11] The rapidity of Grey's shift of attitude made no allowance for the difficulties Maori might have in making the adjustment, and the time that that would require, or for possible Maori preferences to retain large areas for leasing or to become pastoralists themselves. The miserable allocations of reserves in the South Island are well known.

8.3 The 1850s

In 1850 Grey began to contemplate the issuing of Crown grants over reserves still in Maori hands (as distinct from those under trustees) with a view to their being leased. This was linked to the prohibition of direct lease or sale of land on customary title, debarred by the Native Land Purchase Ordinance 1846. Illegal leasing between Maori and runholders had developed in Wairarapa and Hawke's Bay and in 1850–51 Grey threatened prosecution of the runholders, to add pressure on Maori to sell the freehold to the Crown. But as an incentive to them to sell he envisaged their leasing smaller areas, reserved and Crown-granted after the sale.[12] In point of fact Crown grants were not generally issued to Maori and some direct leasing went on informally. In the case of the McCleverty reserves in Wellington this seems to have been with Crown approval.

Murray believes that the Governor may not have had the legal authority to make Crown grants to Maori but the Government's doubts about this may not have arisen until the 1860s. Some Crown grants were in fact made to Maori after Crown purchases, as in the case of Potatau Te Wherowhero's 'model village' at Mangere.[13] The delay appears to have resulted rather from the dilitoriness of the administrators and from a reluctance in the part of the Crown to make grants except to individuals. In 1854, with the Hua block purchase in Taranaki, McLean instituted the system of having Maori buy back, on Crown title, portions of the land they had just sold, using a portion of the purchase payment. This seems in part to have been a way round the legal difficulty, as well as preventing the vendors from squandering the money.[14] In 1858 McLean reported:

---

9. Dr Patricia Berwick, 'The Trusteeship and Administration of the Tangata Whenua Reserve Lands of Whanganui-a-Tara', Wai 145 rod, doc e10, p 13 (cited in Johnson, ch 2, p 24)
10. Grey to Earl Grey, 7 April 1847, BPP, vol 6, p 16
11. Grey to Earl Grey, 15 May 1848, BPP, vol 6, pp 24–25 (cited in Murray, p 10)
12. Grey to Colonial Secretary, 25 October 1850, ia 1/1851/509, NA Wellington (see above ch 5)
13. Murray, p 15
14. See above ch 5

> Individualization of title, and the securing of properties on chiefs, has also been attempted and carried out, in connection with the acquistion of native lands in different parts of the country; and about 200 valuable properties, varying from 20 to 2,000 acres in extent, have been secured to individual natives, to be held under Crown grants.[15]

Still the grants were not issued in many cases.

In 1856, with the advent of responsible government, Governor Gore Browne reviewed Native policy. Two of the key matters under review were whether grants of land should contain restrictions and whether there was a danger of Maori selling all their land and becoming paupers. There was a mixed response to the question of restrictions. Paora Tuhaere of Orakei felt that no restrictions were needed:

> The Crown grant should be unrestricted. The natives would not sell the lands granted to them; they would always retain sufficient lands for their own use; they would feel so degraded if they parted with all their land.[16]

Bishop Selwyn was a little more cautious:

> I think the native owners should get Crown Grants, with power to lease, but not to sell; but this I consider a temporary measure, preparatory to their admission to full and equal rights in all respects with ourselves.[17]

These comments are significant in that they reflect the widespread perception of that time, that Maori were very capable of looking after themselves, and did not need the paternalism of Crown-imposed restrictions on title.

The opinion of others consulted in this review, Murray notes, could be 'described, in terms of the Treaty, as shifting very cautiously towards Article 3 rights', that is that Maori grants should be of the same kind of title as settlers.[18]

Gore Browne subsequently outlined a policy whereby instead of relying on sales of land to define reserves (as Grey and McLean had done) the portion of land required by Maori for occupation and use would first be made inalienable under a Crown grant. Remaining land would be held on Crown title and would not be made inalienable. Gore Browne, along with almost all settlers, believed that Crown titles and individual tenure were crucial for Maori to advance in the modern world.

8.4 The Native Reserves Act 1856

The Native Reserves Act 1856 emerged from the struggle then being waged between the Governor the the settler ministry for control of 'Native affairs', and was a victory for the ministry. The Act 'represented an official recognition of

15. McLean memorandum, 13 October 1858, BPP, vol 11, p 65 (cited Murray p 14)
16. 'Report of the Board Appointed by . . . the Governor to Inquire into and Report upon the State of Native Affairs', 29 July 1856, BPP, vol 10, p 555 (cited in Murray, p 10)
17. Ibid, p 546, cited in Murray, p 10
18. Murray, p 10

prevailing inconsistencies and a need to remedy administrative practices' as regards the reserves.[19] The Act applied only to land over which Maori customary title had been extinguished. Title to the reserves was vested in the Governor, but in practice administrative authority over them rested with groups of three or four commissioners of native reserves appointed for each province. These commissioners were to have:

> full power of management and disposition, subject to the provisions of this act; and subject to such provisions may exchange absolutely, sell lease or otherwise dispose of such lands in such manner as they in their discretion shall think fit, with a view to the benefit of the aboriginal inhabitants for whom the same may have been set apart.

Of most significance was the provision to permit the permanent alienation of Maori reserve lands with the consent of the Governor-in-Council. Johnson comments that:

> it is difficult to reconcile the realities of permanent alienation with the professed intentions of beneficial administration of Maori reserves and the Government's fiduciary duty.[20]

The Act did not provide for any Maori input in the administration of reserves or in the allocation of funds received from rentals or sales of reserves. This was the subject of the complaint by chiefs at the Kohimarama conference of 1860.[21] Administration of reserves under the commissioners differed from region to region because of local factors, the very different personal capacities of the individual commissioners and the lack of any centralised supervisory authority. In Nelson, the commissioneer devoted some revenue from reserves towards medical expenses and policing; in Taranaki the commissioners had to be stopped from granting the Otumaikuku block to one of their own number (although it appears to have become Crown land).[22]

8.4.1 The Kaiapoi experiment

A significant experiment occurred at this time in relation to the Tuahiwi (Kaiapoi) reserve in Canterbury. About 2640 acres had been reserved here within the massive Kemp purchase of 1848. Troubled by division of the income from pasturage and sale of timber, and encouraged by the Resident Magistrate, Walter Buller, the Ngai Tahu owners of the reserve agreed to partition the reserve. The divisions were equal, rather than by rank or traditional right-holding, and amounted to only 14 acres per person. Buller, and the local missionary, the Reverend James Stack, and perhaps the Maori owners too, envisaged a series of small farms and individual

19. Johnson, ch 3, p 3
20. Ibid, p 5
21. Tamehana Te Rauparaha, quoted in *Te Karere Maori,* 30 November 1860 (cited in Bill Dacker, Michael Reilly and Leo Watson, 'Te Mamae me te Taumaha: A Report on Maori Representation and the Authority of Maori Bodies', Waitangi Tribunal Rangahaua Whanui Series unpublished draft, 1997, p 32)
22. Johnson, ch 3, pp 39–51

cottages. A decade later, however, all the timber had been sold and the land was let rather than farmed. But the area was far too small to yield an adequate income, and Kaiapoi Maori were experiencing real poverty. The whole ethos of small-holding which was a powerful current in New Zealand life, made for miserable conditions unless the holdings were in fact quite substantial. Murray draws the comparison with the Otago reserves, a considerable portion of which fell to H K Taiaroa, whose family then increased its holdings, while other Maori accepted waged employment or (like Taiaroa's brothers) migrated north.[23]

8.5 The Native Reserves Amendment Act 1862

Partly in consequence of maladministration, all existing commissions were cancelled by the 1862 Act and full authority restored to the Governor. In an effort to bring more land into the formal reserve system, section seven removed the need for Maori assent before including customary lands under the provisions of the Act. The Act again allowed for permanent alienation of vested lands. Johnson sees the amendment Act as a 'decisive shift in the direction of reserves administration – a shift precipitated by the context of continuing war in Taranaki'.[24] It also probably reflects Grey's style. While the Governor retained the ability to delegate authority, reserves administration was more firmly in his control.

8.6 Reserves Administration, 1862–70

The transition to reserves administration under the 1862 Act was uneven and the existing commissioners were not dismissed at one time. In some regions they remained as administrators, and in others Resident Magistrates assumed their authority.

In Wellington, George Swainson had the reserves surveyed and defined better than before and some progress was made in sorting out the categories of land which the commissioner administered, but revenue was swallowed by the costs of administration. Some Crown grants began to be issued, but Premier Fox instructed Swainson not to issue them to 'avowed Kingites'.[25] In Taranaki the number of reserves increased, a few being leased and others simply occupied (by Maori or European). In Hawke's Bay there were few reserves from the vast areas sold, but they included a 7397-acre estate for Te Aute College, most of which had been ceded by Maori under the 1856 Act for educational endowment. (By then, it was Maori who were making the endowment for their own education needs, in contrast to early Crown proposals to set aside lands for this and for other Maori purposes.) In Nelson, the redoubtable James Mackay took charge, abetted by his cousin

23. Murray, pp 15–18
24. Johnson, ch 3, p 21
25. Halse to Swainson, 17 October 1864, ma 4/6, p 441 (cited in Johnson, p 56)

Alexander at Greymouth. Johnson has concluded that the administration of reserves in Nelson and Greymouth was more effective than that in other regions, and that the compendium of documents compiled by Alex Mackay regarding reserves 'demonstrated a degree of efficacy and accountability unmatched in other areas'.[26] Profits from the Nelson reserves increased, supporting medical care and the 'native hostelry'. Mackay also demonstrated a strong commitment to obtaining Maori assent to bringing reserves under the operation of the various acts. In Greymouth, Alex Mackay successfully defended the Maori reserves in the face to the gold rush of 1865.[27]

8.7 The Native Land Court Period Begins

With the introduction of the Native Land Court, the issue of ensuring that Maori retained sufficient land became more complicated. The Native Land Act 1862 signalled the end of Crown pre-emption, at least for some time, although under that Act the Governor could make reserves in land passing through the court. However the Act was not generally brought into effect. The placing of restrictions on titles offered the more usual way for the Crown to continue to act protectively towards Maori land. Under the Native Lands Act 1865, the court could recommend that Crown grants contain the provision that the land was inalienable by sale, mortgage or lease for a longer period than 21 years except with the consent of the Governor. But Chief Judge Fenton was generally opposed to restricting titles. Indeed reserved lands which were not expressly in trust began to pass the court, without restrictions on title.

The Government began to address the issue in the Native Lands Act 1866. Section 5 restricted the title of all land in the formal reserves system. Section 11 required the court to hear evidence on whether or not any other lands passing through the court should be inalienable and attach a report on its decision to all certificates and grants. Fenton was opposed to this: 'I think the Maori will progress the better the more he is exempt from protection or interference to which other citizens are not subject'.[28] Whilst Fenton believed that all the other judges agreed with him on this matter, in practice, Murray argues, they in fact responded very differently to the restriction clause.

In 1867, E W Stafford, Colonial Secretary, outlined what he saw as being the Crown's policy on reserves. To him, reserves were public lands in trust specially set aside for the permanent benefit of Maori when lands were ceded to the Crown. He argued that Maori reserves should be seen as being the same as public reserves. On the other hand, J C Richmond, Native Minister, regarded reserves as a temporary expedient. The aim of the Government's policy, he believed, was to give:

---

26. Johnson, ch 3, p 30
27. Ibid, pp 55–65
28. Fenton to Richmond, 11 July 1867, AJHR, 1867, a-10, p 5 (cited in Murray, p 30)

a somewhat longer time and better chance for the adoption of European habits of mind before the Maori settles down to the poverty and necessity for labour to which he must in most cases come.[29]

Nevertheless, Richmond strengthened the provision for restrictions on the titles of land going through the court. Section 17 of the 1867 Act provided that:

no portion of the land . . . shall until it shall have been subdivided as hereinafter provided be alienated by sale gift mortgage lease or otherwise except by lease for a term not exceeding twenty-one years and no such lease shall contain or be made subject to any proviso agreement or condition for renewal thereof.

This proviso, repealed in the new Act of 1873, provided probably the greatest protection against hasty alienation of land passing through the court of any legislation in the nineteenth century, even though it was avoided in many instances by the judges.

In 1869 Charles Heaphy was appointed commissioner of native reserves, in addition to a range of other duties. He was responsible also for the administration of Native hostelries and for some land taken under the New Zealand Settlements Act 1863 and set apart for Maori. Apart from his jurisdiction in relation to reserves, but intersecting it, he was responsible for laying off roads and for setting aside of land for immigrants. As Johnson points out, underlying these tasks was ‘an uneasy combination between managing remaining Maori lands in reserve and opening New Zealand for European immigration’.[30]

Heaphy discovered that the ‘Crown tenths’ for Maori purposes reserved from the pre-emption purchases under Fitzroy’s penny-an-acre proclamation had all been sold by Grey to the private purchasers or included in the general Crown surplus.[31] He also noted the gradual individualisation of what Murray calls the ‘historical reserves’. Most South Island reserves and the Wellington tenths passed through the land court in 1868 to 1869. In 1872, Heaphy recorded that Maori in Wellington were rapidly getting the McCleverty reserves surveyed into individual sections in order to simplify the division of rents and sometimes, to obtain Crown grants.[32] Before long Heaphy was recommending the removal of the restrictions on these reserves because the rents were so low. He was also to report, however, that Maori were frequently anxious to ‘tie up’ their cultivations ‘from the risk of temptation to sell in times of pressure or emergency’.[33]

29. AJLC, 1867, p 41 (cited in Murray, p 29)
30. Johnson, ch 4, p 6
31. Heaphy, 10 September 1872, ms notes, McLean ms, micro ms 535/14, ATL (cited in Murray, p 32)
32. Report on Native Reserves, 16 August 1872, Turton, *Epitome*, vol 3, p 82 (cited in Murray, p 32)
33. Ibid

8.8 The Trust Commissioners

In 1870, a parliamentary committee became concerned about the abuses which were creeping into land dealings. Under the Native Lands Frauds Prevention Act 1870, therefore, trust commissioners were appointed whose duties were to include the prevention of landlessness. Their task was to investigate the circumstances of each land transaction and to issue certificates without which no deed could be issued. The trust commissioners had to be satisfied that, among other things, Maori had sufficient land left for their support. As Murray points out, however, the 'Crown's intention was to protect, but not to protect with much rigour'.[34] The commissioners were warned not to throw difficulties in the way of bona fide transactions and not to make their enquiries 'too minute'.[35] In 1885 the trust commissioners' duties were transferred to the judges of the Native Land Court. The 1891 Commission of Inquiry into the Native Land Laws concluded that the trust commissioners had offered very inadequate protection and were expensive to all concerned, including Maori.

The view from Maori witnesses at an 1871 Committee of Inquiry was that not enough land was being restricted from alienation by the Native Land Court. Wi Te Wheoro (assessor of the Native Land Court) and Paora Tuhaere (leading Ngati Whatua rangatira) believed that:

> Sufficient land has not hitherto been reserved by the Court as inalienable; in some cases the wishes of the owners have not been carried out in this respect . . . From 50 to 500 acres should be reserved for each Maori man, woman and child, according to the land they hold. They might be allowed to lease some of it but not to sell it on any account.[36]

This view was repeated by others. Hemi Tautari of the Bay of Islands was prepared to see five acres as adequate, as long as it was of good quality, while others' opinions of how much land should be secured ranged from 50 to 100 acres per individual. Murray notes though that experiences differed. Harawira Tatere from the Wairarapa had put around 3000 acres through the court and had all of it made inalienable. Much, it appears, depended upon the attitudes of the judges and the way in which Maori presented claims.[37] For the period from 1 January 1865 to 31 December 1870, 2,616,414 acres of land had had certificates of title ordered for them. Of this, 637,406 acres was in reserves or restricted from alienation.[38] There is no information regarding the quality of this land or its distribution among Maori.

---

34. Murray, p 34
35. Appendix to the report on council paper no 97, 'Being the Report of the Trusts Commissioner for the District of Hawke's Bay, under "The Native Lands Frauds Prevention Act 1870"', AJLC, 1871, p 162 (cited in Murray, p 34)
36. 'Papers Relative to the Working of the Native Land Court Acts', AJHR, 1871, a-2a, p 26 (cited in Murray, p 36)
37. Murray, p 37
38. AJHR, 1871, a-2a, p 50 (cited in Murray, p 37)

8.9 The Dual Commissionership, 1871–79

Johnson has termed this period the 'Dual Commissionership' due to the role of Charles Heaphy and Alexander Mackay. Mackay had retained the management of South Island Trust reserves, in particular Westland, Marlborough and Nelson. During the 1870s Heaphy reported on the reserves at Wellington, Auckland and Hawkes Bay. Other reserves, such as in Taranaki, were not regularly reported on.

Heaphy's 1873 report on the administration of Wellington and Auckland highlighted an earlier absence of active administration. In Wellington, the lack of a commissioner had led to a number of problems concerning lease arrangements, but as confidence increased in Heaphy's management, Maori chose to place a number of reserves in his hands. Similar actions took place in Hawkes Bay. Returns published in 1873 illustrate the benefits of Mackay's effective management. Nelson reserve leases returned relatively high rentals.

Details of the administration of the 'endowment' reserves in the various provinces or districts in the 1870s are provided by Johnson. Broadly they show increasing efficiencies under Mackay and Heaphy, and increasing revenue from leasing of reserves. But later evidence revealed that they were still below the economic rentals that Pakeha landlords expected, or indeed were getting by subletting reserves.[39] The cost of administration continued to swallow a considerable proportion of the revenue and there were indications of mounting pressure from the lessees (at Greymouth for example) that they wanted better terms. Heaphy and Mackay supported their getting longer terms but not perpetual leases. They tried also to retain regular rent reviews but tenants in arrears in rental payments plagued their administration.[40] Portions of some reserves continued to be sold, usually because the trustees hoped for higher capital gains. Consultation with Maori appears to have been erratic, at best.

At the beginning of the 1880s Mackay was administering some 53,762 acres: 39,435 acres in the South Island (of which half were in Marlborough), and 14, 327 acres in the North Island (of which most were in Wellington district) some ceded land in Poverty Bay, about 3552 acres in Taranaki and about 180 acres of special purpose reserves in Auckland.[41]

8.9.1 The Native Reserves Act 1873

The Native Reserves Act 1873 was passed, according to the preamble, because of mismanagement, and lack of definition of the trusts intended to be created. It cancelled existing commissions and provided for the appointment of a 'board of direction' for each district, comprising a reserves commissioner as chairman (Mackay and Heaphy in fact) and three local Maori 'assistant commissioners'. But

39. Debate on Native Reserves Bill, NZPD, 1881, vol 40, p 102 (cited in Johnson, ch 5, p 14)
40. Johnson, ch 4. Johnson also discusses various committees of inquiry, amendment Acts and failed bills intended to improve reserves administration.
41. Alexander Mackay, 'Report on the State and Condition of Native Reserves in the Colony', AJHR, 1883, g-7

the two reserves commissioners did not want to work with Maori assistants. In 1876 Mackay complained that they impeded the flow of customary land into the reserves administration (how is not clear) but failed to provide effective representation for Maori owners. He did appoint two at Nelson and they apparently drew salary until 1883 when Mackay recommended that they be dismissed, 'their services never having been needed'. Their appointment he said 'was the result of popular opinion then prevailing that the Natives should have a voice in the management of their own affairs, but the practical effect of the office has been nil'.[42]

8.10 The Native Land Act 1873

In 1873 McLean oversaw the enactment of a new Native Land Act and a related Native Reserves Act. The preamble of the former declared the purpose of the Act to be the preparation of a 'roll' of Maori land throughout the colony 'with a view to assuring to the Natives without any doubt whatever a sufficiency of their land for their support and maintenance, as also for the purpose of establishing endowments for their permanent general benefit from out of such land'. Sections 21 to 32 of the Act were to give effect to the policy.

For both maintenance and endowment reserves combined, a minimum of not less than 50 acres was to be retained for each man woman and child. District Officers were to be appointed throughout the country to work with the chiefs in the compilation of a 'reference book' of all tribal lands, their boundaries and estimated areas, and to select the reserved lands. These would be inalienable, exempt from the operation of the rest of the Act. This policy was set out in *Te Waka Maori*, which stated:

> 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.[43]

Fenton and his fellow judges bitterly attacked the provisions regarding District Officers as a gross infringement of the powers of the court. He also attacked the purpose of the legislation. McLean had envisaged that the reserves could remain under a form of collective hapu title. Fenton railed at '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'.[44] Since

42. AJHR, 1876, g-3a, pp 1–2 (cited in Johnson, ch 4, pp 37–38); Mackay to Hamerton, 20 March 1883, pt 83/82, ma mt 1/1b (cited in Johnson, ch 5, p 33)
43. *Te Waka Maori on Niu Tirani*, vol 9, no 16, 29 Oketopa 1873, pp 140–141 (cited in Murray, p 42)
44. 'Remarks by the Judges of the Native Land Court on the Native Land Act, 1873', AJLC, 1874, no 1 (cited in Murray, p 41)

the District Officers were essentially to be assisting the court, Fenton's opposition meant that sections 21 to 32 were largely inoperative.[45] Judge Rogan, at McLean's urging, and Samuel Locke as district officer for the East Coast, did reserve 31,500 acres in the Cook County under section 21 of the Act, but this was exceptional.[46]

Some of the District Officers tried to carry out the Act's requirements while others did not. Locke listed 39,223 acres as the reserves he had recommended under the Act by 1877.[47] In much of his district he thought it was impossible to make reserves since so much land in Hawke's Bay and the neighbouring part of Poverty Bay had gone through the court before 1873. In the far north William Webster reported:

> 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 inalieneable reserve for themselves and their families as provided by the Act, have uniformly said that the provisions of the Act are very good, but they prefer to have their land left in their own hands, to deal with as they like.[48]

From the Kaipara district, H T Kemp felt that Maori owned sufficient land and that additional reserves were unnecessary. He calculated that 12,632 acres had been reserved which worked out at approximately 216 acres per person.[49] The amount of reserves held by each hapu was not given, nor an analysis of the quality and value of the land. E W Puckey in Thames found it impossible to obtain accurate information about who owned land and to persuade Maori 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, owning to the want of unanimity jealousies, and the conflicting interests of claimants.[50]

These comments indicate that it was not only opposition from the court that frustrated the scheme. Maori too, with reason, were highly distrustful of what appeared to be bureaucratic control of their lands. In Hawke's Bay it Heaphy also found it difficult to have them put land under trust, after he discovered that the court was not placing restrictions on titles.

In addition to the sections dealing with District Officers and their powers, section 48 of the 1873 Act required a restriction to be recorded on each 'Memorial of Ownership' issued by the court, limiting alienation to 21-year lease. Yet section 49 permitted sale if all owners agreed, and other clauses allowed for purchasers as well as Maori to apply for partition of blocks so that the non-sellers portion was cut out.

45. See Fenton's own opinion to that effect, AJHR, 1886, i-8, p 16
46. See Murray, p 44
47. Locke to Clarke, 16 October 1877, AJLC, 1877, no 19, p 4 (cited in Murray, p 49)
48. Webster to Clarke, 29 September 1873, AJLC, 1877, no 19, p 1 (cited in Murray, p 49)
49. Kemp to Clarke, 25 September 1877, AJLC, 1877, no 19, p 2 (cited in Murray, p 50)
50. Puckey to Clarke, 27 September 1877, AJLC, 1877, no 19, (cited in Murray, p 50)

Section 48 was regarded as an 'anomaly' by the officials and was not applied.[51] Arguments over the requirements of the law contiued, however, and eventually went to the superior courts. It was then held, in the case of the Puhatikotiko block near Gisborne, that the general conditions restraining alienation on every memorial of ownership could not properly be called a restriction on title. They were brought to an end by the issue of a Crown grant on partition.[52]

Not until 1878 was the want of a regular system of putting restrictions on title again addressed legislatively, when the court was empowered to make recommendations to the Governor to that effect. This unwieldy system was replaced in 1880 when the court was required to consider the need for restrictions in respect of all land before it and to enter the restrictions on the certificate of title.

Official statistics give only incomplete indications of how frequently restrictions were applied. Of 2,616,414 acres for which certificates of title had been ordered between 1865 and 1870, 637,406 acres was under restriction or reserved.[53] A 1886 return shows that a further 1,230,000 acres had been restricted, including very large blocks in Taupo, Rotorua and Poverty Bay. But that was out of about 12 million acres which had passed throught the court, showing that the rate at which restrictions were imposed had slowed markedly since 1870.[54]

8.11 The 1880s

In the 1880s, political attention fixed on restrictions as a barrier to development and prosperity. Settlers and politicians believed that their districts were being held back and that farmers would not develop the land until they had acquired the freehold. Following the request in 1882 of Robert Hart, a member of the Legislative Council, for a return of all cases in which restrictions on alienation in grants to Maori had been removed by the Governor, printed returns were presented to the General Assembly annually from 1883 to 1891.

These returns provide a range of information about the process of restricting land from alienation. First, the Native Land Court was not the only source of restrictions. Land carried restricted title from Government decisions made outside the court, such as areas of land confiscated and returned. Secondly, it was often Maori who had taken the initiative to have restrictions placed on the titles. Thirdly, as noted above, the attitudes of individual judges differed. Some believed that some form of protection should be exercised over Maori land; others did not. Fourthly, there is evidence of carelessness in the process of recording the court's decisions and transmitting them correctly onto titles. It was claimed on occasions, that clerks had made errors in entering restrictions that no one wanted.[55]

51. This completely puzzled a later Native Minister, John Bryce. See his exchange with Under-Secretary Lewis about it in 1882 (cited in Murray, p 48), and also the discussion in the 'Report of the Owhaoko and Kaimanawa Native Lands Committee', AJHR, 1886, I-8
52. Judgement in the Court of Appeal, 19 October 1993, j-1, 94/173, NA Wellington (cited in Murray, p 94)
53. 'Report on the Working of the Native Land Acts', AHJR, 1871, a-2a, p 50 (cited in Murray, p 37)
54. 'Land Possessed by North Island Maoris', AJHR, 1886, g-15, pp 16–17 (cited in Murray, p 53)

8.11.1 The West Coast Settlement Reserves Act 1881

The West Coast Settlement Reserves Act 1881, drafted by the West Coast Commission investigating the confiscated lands in south Taranaki, vested the West Coast Settlement Reserves, as they were called, in the Public Trustee. Some were to be reserved for Maori occupation and most leased to settlers. Their administration has been reported on at length by the Waitangi Tribunal. The *Taranaki Report* comments that the requirement upon the Trustee to administer the land for the benefit 'of the natives to whom such reserves belong' and at the same time, for 'the promotion of settlement' are 'inherently in conflict'.[56] This is not strictly the case. Leasehold systems can be and are administered by trustees for the mutual benefit of both parties. But there is certainly a tension between the needs and wishes of beneficial owners and of tenants; framing equitable leasehold terms and providing a satisfactory process for keeping them equitable is difficult. The record of the adminisration of the West Coast Settlement Reserves is that it moved increasingly in favour of the settler tenants, as much because of legislation as of maladministration by the Public Trustee.

8.11.2 The Native Land Division Act 1882

The Native Land Division Act 1882 empowered the Native Land Court to impose or remove any restrictions on the new grant issued with the partition of title. The court could issue new grants without restrictions even though they were on the original grant. As Murray states 'This measure has the character of being a deliberate loophole, as it offered an indirect and relatively easy way of having restrictions removed without further scrutiny'.[57]

8.11.3 The Native Reserves Act 1882

With the death of Charles Heaphy in 1881, the reserves dating from 1840 were administered by Mackay alone. A review was already pending and in 1882 a new Native Reserves Act was passed. Not surprisingly it placed the reserves under the Public Trustee. This was in keeping with John Bryce's long-standing objectives to 'end the system of personal government which obtains in the Native Department'.[58]

The advisory Public Trust Office board was widened to include two Maori. They were not salaried officers with actual administrative authority, and consultation with them appears to have been perfunctory.[59] Mackay remained as commissioner assisting the Public Trustee, until his appointment as a judge of the Native Land Court in 1884.

---

55. See Murray, pp 55–57
56. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi*, Wellington, GP Publications, 1996, p 258
57. Murray, p 77
58. NZPD, 1879, vol 32, pp 350–60
59. Johnson, ch 5, p 18

The new Act abandoned previous efforts to bring Maori customary land under trust; the Public Trustee administered only land over which native title had been extinguished. A very promising feature of the act, however, was that the leases were to be granted by public auction or tender, at 'the best improved rent available at the time' – a provision which was soon to attract the criticism of the tenants.

Whatever the merits and demerits of the act, the Maori members opposed it unanimously and vehemently. From their perpective it removed land from Maori control and denied them the revenue. Hone Mohi Tawhai proposed an alternative model, that of the Orakei Trust, created by private bill which empowered Paora Tuhaere to lease (but not sell) on behalf of his co-owners.[60] Their views, as usual, did not prevail.

The debate is noteworthy for another reason, however. Native Minister John Bryce joined other speakers in expressing the view that the Maori population had ceased to decline and might soon increase. He congratulated himself that the 1882 Bill would go a long way to 'maintain an inheritance of land for them in the country which at one time had solely belonged to them.'[61] An increase did not show on the official census until the 1890s, but in the light of Bryce's statement, the intensification of governments' efforts to buy Maori land in the 1890s and the twentieth century looks all the more irresponsible.

8.12 The Removal of Restrictions

Under the 1882 Act, reserves commissioners or the Public Trustee could apply to the Native Land Court to have restrictions placed on land going before it, 'so as to prevent Natives from so far divesting themselves of their land as to retain insufficient for their support and maintenance'. They, or Maori owners, could also apply to have restrictions removed.[62] The responsibility had thus moved away from the Native Department and the Government to the Public Trustee and the court. Butterworth and Butterworth note that MacKay's departure 'had the unfortunate result of removing the one man who had a larger vision of how the Public Trust Office might have administered the reserves' and gave the Public Trustee 'unfettered discretion in his administration of the reserves'.[63] It was to prove unfortunate for Maori.

Removals of restrictions on land other than reserves (and formally in respect of reserved land also) still lay with the Governor in Council and were usually considered in the first instance by officers of the Native Department. Requests to have a restriction removed were supposed to come from the Maori owners, however it often became apparent that a lawyer had been involved and that some form of alienation had already taken place. A list of guidelines was drawn up in the Native

60. NZPD, 1882, vol 43, pp 504–10, 650–54
61. NZPD, 1882, vol 42, p 652
62. Section 29(3) of the Native Reserves Act 1882
63. G V Butterworth and S M Butterworth, *The Maori Trustee*, Wellington, 1991, p 19

Land Court in 1882 to advise Native Minister John Bryce. Before advising removal of restrictions the officials had to be satisfied that the Maori concerned had:

> amply sufficient other land for the maintenance of themselves and their successors, or that from the unsuitability of the land to be alienated, for native occupation, or other considerations, if it is to their interest to dispose of it.

The owners of the land proposed to be alienated were to be unanimous in their desire to sell, and that the price was to be '*prima facie* fair and reasonable'.[64]

While there was no common understanding of how much land was 'sufficient' for an individual's needs, there were cases, according to Murray, where it was recognised that any remaining land should be strictly inalienable because so little was left in Maori hands, but increasing fragmentation and numbers of owners in the title made this almost impossible to assess. The Native Office relied on the Government agents in the field for information. Murray has concluded that the system:

> seems to have been at its least protective when very large areas were involved . . . When it came down to individuals, with clearly defined property, officials held the line, insisting that land must be retained.[65]

Decisions about whether land was unsuitable for Maori occupation also rested on advice from officials in the field. 'Unsuitable' lands might include areas which owners could not cultivate because they were located some distance from where the owners lived. It was thought to be better to sell swampy land and rugged bush covered areas which the owners could not develop. In rural areas, land surrounded by European owned properties was sometimes seen to be unsuitable for Maori, and this was occasionally argued by the Maori owners themselves. On the matter of ownership, there was again a reliance on officials in the field. Some applications for removal, launched by a section of the owners, came to a halt when the owners of more substantial interests objected.

T W Lewis, Secretary of the Native Department, described the approach that he believed was being taken by the Native Department:

> It has always and I think fairly been presumed by the Native Department that when restrictions are imposed it is not intended that the land should be alienated unless very good reason is shown. It is difficult to make the purchasers and even the natives see the question from this point of view, the former simply looking at it from the standpoint that they desire to obtain the land and the natives that they want to satisfy their present desire for money or what it will procure. The latter never I think considering the requirements of succeeding generations in view of which the restrictions are no doubt specially imposed.[66]

Murray believes that the officials themselves did not have 'a very extended sense of the "requirements of succeeding generations"' and that this was one of the major

64. Lewis to Bryce, 9 December 1882, RDB, vol 126, p 48,638 (cited in Murray, p 58)
65. Murray, pp 58–59
66. Lewis to Bryce, 9 December 1882, RDB, vol 126, p 48,638 (cited in Murray, p 60)

weaknesses in the criteria they used: 'Questions were seldom asked about the long-term interests of Maori as a social and economic community when restrictions were removed from large blocks'.[67]

Murray provides some case histories which illuminate the process of the removal of restrictions. The most straightforward removals involved individuals and families who were economically secure. 'I do not think that we need to maintain the restriction on this. The Nicholls family are quite able to take care of themselves,' was the comment written on one such application.[68] With this type of application the usual reason given for wanting to alienate land was to invest the funds in another property. Similarly, Maori soldiers who had served with the Crown's forces were likely to have their applications recommended. Refusals to allow people to exchange land they had been awarded for more suitable land were, Murray states, more difficult to understand. Although they were occasionally permitted, exchanges were generally regarded as being troublesome and inexpedient. Applications from Canterbury Maori to alienate land reserved from the sales of the 1840s and 1850s usually received a firm rejection, highlighting the general recognition that no further land could be alienated in Canterbury. Applications for mortgages were usually turned down too.

A common reason given by owners for wanting to alienate restricted lands was that funding was required for the development of other lands. These applications were likely to be approved; it was argued in reports from local officers that some land should be alienated because the development of the whole block was beyond the financial resources available to Maori. Murray notes that the most complicated applications came from Maori who were in debt and wanted to draw on their inalienable lands. Often in these cases, some pre-arrangement would be detected: settlers who had already invested in the land or storekeepers with lists of debts.[69]

The major concern of the 1880s, Murray highlights, is that while the Government had the final word on the removal of restrictions, it was the Native Land Court's duty to impose restrictions upon titles. The court thus controlled the process at the outset. As far as removal of restrictions is concerned, while the Native Office had limited resources it had, according to Murray, a tradition of checking applications. The court, however, had no extra staff to take on the role of checking applications. Furthermore, 'concern for the wider consequences of land alienation was limited by its [the court's] preoccupation with the interpretation of the law'. The question of how thorough the court could be in establishing that all owners had sufficient land elsewhere before agreeing to remove restrictions is a serious one. Judge Alexander Mackay for example, required documentary evidence of ownership of other land from applicants. Other judges did not seem to be concerned about with this requirement. Such inconsistencies call in to question the Crown's exercise of its obligations of protection under the Treaty of Waitangi.[70]

67. Murray, p 60
68. Head Office memo, 13 June 1877, ma 13/22, no 77/4384, NA Wellington (cited in Murray, p 61)
69. See Murray, pp 60–67
70. Murray, p 67

8.12.1 The Barton commission, 1885–86

In 1885, G E Barton was commissioned to investigate pending applications for the removal of restrictions. His brief was to determine whether the Maori concerned would be left with sufficient land, if the intended buyers were acting in good faith and if the price to be paid was fair. Some 85 blocks were involved, in a number of areas. Barton's appointment seems to have been the result of Government disquiet about some recent transactions at Tauranga, and he was apparently asked to give priority to eight applications concerning land in this district.[71] Eventually Barton recommended in favour of four of these particular applications, but only 'with great hesitation', since he found himself 'unable to say . . . in any of these cases' that they had been dealt with properly.[72]

Barton, however, did more than make particular recommendations – his report was critical in the extreme of the general way in which the private purchase of Maori land was being conducted in the Tauranga district. The land agents were defrauding both their Pakeha employers and the Maori owners. Restrictions had been lifted in favour of land speculators. There were irregularities in the payment of purchase money and the obtaining of signatures. All in all, what the Barton commission showed about Tauranga was that the Crown, having made the land inalienable, had then relaxed the restriction. When it very belatedly took action, this amounted to investigation of only a handful of cases.[73]

Barton held inquiries at a number of other North Island locations besides Tauranga, and investigated many applications to lift restrictions. According to Murray, there was no single reason why Maori sought to sell restricted land. Some wanted to raise capital, to develop other properties. Those in debt had creditors to pay. Others wanted to use their land as kind of cash cow, to provide their daily living expenses. In many cases, had the Crown rigidly upheld the restrictions on the alienation of land, it would have been 'against the apparent wishes of . . . owners'.[74] Nonetheless, the cumulative effect, whether the result of Pakeha pressure, or Maori choice, was land alienation.[75]

8.13 The Shift to Perpetual Leases

The Government at first tried to maintain the tradition of fixed term leases and rent revision. The South Island Native Reserves Act 1883, for example, fixed all leases at 21 years. Tenants protested vigorously and lobbied for the freehold. With the economic depression deepening, they began to default on rental payments, putting

71. V O'Malley and Alan Ward, 'Draft Historical Report on Tauranga Moana Lands', CCJWP, 1993, pp 83–84
72. 'Report of Commissioner Barton on the Removal of Restrictions on Sale of Native Lands', AJHR, 1886, g-11a, p 4
73. O'Malley and Ward, pp 88
74. Murray, p 74
75. Ibid, p 76

more pressure on the trustees and the Maori owners. The Kenrick commission which followed, was highly sympathetic to the tenants and, though it stopped short of recommending that they get the freehold, did recommend a right to perpetually renew their 21-year terms. This was granted under the Westland and Nelson Native Reserves Act 1887. Although initial leases were still auctioned, collusion among the Greymouth tenants apparently led to fair rents not being offered.[76]

A similar story unfolded with regard to the West Coast Settlement Reserves. Various committees and commissions had been critical of the cost and inefficiency of the Public Trustee's administration. Returns to Maori had come down to an annuity computed for 30-year periods based on the unimproved value of the land. But rather than improve the lease terms for Maori, the Liberal Government in 1892 passed a West Coast Settlement Reserves Act granting the perpetual lease to the tenants. Criticisms by Maori members focused less on the revenue aspect of the system than on the failure to made adequate provision to return land to Maori owners' control when they wished. (Taranaki Maori had been petitioning for some time for the return of the land.)[77] Boasting the success of the 1892 measure, however, the Liberals extended the principle to all administered reserves.

A case had been argued for the perpetual lease, as providing a tenure which would satisfy the market and provide for a secure flow of revenue to the owners ir the trustees.[78] The need for this might be true in periods of sustained economic stagnation. But it is a self-defeating argument from the point of view of owners; when normal growth resumes they are locked out of getting economic rentals, unless frequent rent revisions are also provided for. This was not the case with the reserves under the Public Trustee, with revisions only at 21-year intervals at best. For further discussion of the administration of the Public Trustee and Maori Trustee see below, chapter 18.

8.14 Further Legislation, 1880s and 1890s

By the late 1880s, the law relating to Maori land had become extremely complex and the correct procedures for removal of restrictions very difficult to determine and to follow. About 1.8 million acres of about 14 million that had gone through the court were under restricted titles, some 700,000 acres of them in Auckland and 500,000 acres in the Gisborne/East Coast district.[79] Governments' efforts from the this time focused on trying to sort out the confusion and on 'validating' titles that were technically flawed but were considered (on somewhat dubious bases) to be equitable (see ch 9).

76. A Ward, 'Report on the Historical Evidence in the Ngai Tahu Claim', Wai 27, t-1, pp 326–327
77. Johnson, ch 5, pp 41–49
78. Don Loveridge, 'The Adoption of the Perpetually-Renewable Leases for Maori Reserved Lands, 1887–1896', Wai 145, rod, doc c-2; Johnson, ch 5, pp 40ff
79. 'Return of Lands Possessed by Maoris, North Island', AJHR, 1885, g-15

The Native Land Act 1888 had a huge impact on the removal of restrictions. It provided for an order of the Native Land Court to annul or vary any restrictions imposed by the court if the majority of owners applied. Previously this process could only be initiated if there was a specific transaction to be considered, but under this Act owners could decide to free up inalienable land with no transaction in mind. Returns for 1889 to 1891 show that this provision led to many successful applications to remove restrictions on alienation.[80]

This effectively placed more responsibility on the Native Land Court along with measures such as the provision that after 1 July 1885 the judges of the court were to be the only trust commissioners, and that from 1889 the court was to deal with *all* investigations of applications for the removal of restrictions.

Dr David Williams has listed a over 15 legislative provisions in the late 1880s and 1890s generally making it easier to vary or remove restrictions on alienation. This was part of their drive to a streamline the land-purchase system and eliminate many of the technicalities which had led to titles becoming extremely confused. The effect all the same was to remove many of the protections intended to slow or stop the alienation of land.[81] Among these provisions the Native Land Court Act 1886 Amendment Act 1888 provided for restrictions to be applied only when the court considered that owners had not already a sufficiency of inalienable land for their support. Under section 3 of the Native Land Laws Amendment Act 1890 it was no longer necessary for all the owners to agree to the removal of restrictions under section 6 of the aforementioned Act. Acts in 1892 and 1893 made special provision for removing restrictions on land for sale to the Crown. In 1893 the Native Land (Validation of Titles) Act gave the court the power to validate any informalities that had arisen in the removal of restrictions. As Murray concludes, 'All these undermined the principle of inalienability'.[82]

Section 52 of the Native Land Court Act 1894 had a major effect on the pace of the removal of restrictions. The court was able to remove restrictions if at least one third of owners agreed, replacing the requirement that it should be with the decision of the majority. A 1905 return showed the working of this Act until that date; of the 690 applications considered, all but 126 were approved. This represented 95,372 acres remaining inalienable and 452,453 acres becoming alienable.[83]

Other legislation tightened state control over reserves such as the remaining Wellington Tenths. An example of the extraordinary limits to which settlers and governments would go was the inclusion in the Native Reserves Amendment Act 1896 of authority to compulsorily vest the 10-acre burial reserve at Taupo (Porirua) in the Public Trustee and to allow him to disinter the dead and rebury them within one acre of the reserve. Rentals from the letting of the remaining nine acres would fund the disinterments and the beautification of the acre 'in the European style'.[84]

---

80. AJLC, 1889, no 5; AJHR, 1890, g-3; AJHR, 1891, g-9 (cited in Murray, p 88)
81. D Williams,(comp), The Maori Land Legislation Manual, CFRT< Wellington, (not dated) pp 26–28
82. Murray, p 91
83. AJHR, 1905, g-4 (cited in Murray, p 92)
84. Native Reserves Amendment Act, 1896, ss 2, 7, 8 (cited in Johnson, ch 5, p 52)

Even the Maori dead were not to be left in peace if more land could be taken over and 'used' in Pakeha terms.

8.15 The Twentieth Century

The 20th century saw the introduction of an entirely new legislative regime, removing all restrictions on title and relying on the Maori land boards to check on Maori landlessness before approving transactions. About four million more acres were alienated before the Second World War (see ch 15).

8.16 Conclusion

The Rees–Carroll commission, reporting in 1891, revealed the enormous confusion in the land law, including provisions relating to removal of restrictions on alienation. Murray has shown that, notwithstanding the Liberals' efforts to simplify the law, confusion continued, notably between the role of the land court and that of the minister. There was considerable variation in the experience of different districts too, according to when the land passed through the court and under which judge. In general though, the trend was steadily towards easier removal of restrictions and the alienation of more Maori land.

The dilemma noted at the beginning of this chapter ran through the whole period. Formal equality with settlers implies that Maori should be free to deal with their land as they saw fit, including sell it. The trusteeship responsibility of the Crown, however, suggests that a substantial proportion of the land should remain locked up against sale – that it should be alienable by renewable lease at most, and some not alienable at all. The Crown's position was made the more difficult because Maori owners themselves constantly pressed for removal of restrictions and for the right of sections of owners (usually majorities) to partition off and sell their share of a block. Maori would state before the court that they were agreed and that they had interests in land elsewhere. It was difficult for the court to enquire behind such statements. Responsible officials sometimes agonised over whether to refuse a request of someone who wanted to sell a portion in order to develop the remainder, or to pay debts to the doctor and hospital, for medicine for sick children or for tangi expenses and coffins when family members died, for rent, for butchers' and bakers' bills, for a headstone for a grave.[85] Ordinary human needs, including cultural obligations, created strong pressures on Maori to sell.

When this was coupled with the incessant settler clamour for more Maori land, it is perhaps not surprising that governments increasingly veered towards removal of restrictions on title. In view of John Bryce's 1882 statement to the contrary, they

85. Murray, sec 6.7

cannot easily plead, however, that they still believed Maori to be dying out, and hence needed less and less land.

The prevailing attitude throughout the period (even amongst Maori leaders like Carroll and Ngata, by the early 20th century) was that Maori land which was unoccupied and undeveloped was of no benefit to anyone, including the Maori themselves, and that it might as well be alienated to settlers, some by lease and some by sale. The notion that some land would be retained by Maori, as industrious settlers, and the rest alienated, underlay the work of the Stout–Ngata commission 1906–08. As Murray points out, little had changed since 1840. The 'use it or lose it' philosophy was dominant.

Two approaches to the reserved lands and restrictions on title never did make much headway. One was to make some areas absolutely inalienable. McLean's 1873 proposal to leave 50 acres per person under customary tenure, or the provision for papakainga (or papatupu) lands in the Maori Councils Act 1900, approached this goal, but were never seriously implemented.[86] The other approach was to tie up land in trusts administered by the hapu leadership, rather than by officials. Constant Maori districts of putting lands under officials was quite understandable, since they usually saw little money from the administered reserves, and on the contrary saw them sold or put under perpetual lease at peppercorn rental. But Government made little effort to foster Maori trustee administration under tribal control. The desire to break up tribal title was too strong, either from the paternalistic belief that Maori would only advance in the modern world through individual title or because settlers wanted the land too much. The system of 'incorporated owners', commenced on the East Coast in 1893 and very grudgingly recognised by the settler parliament, came closer to recognising a customary king of trusteeship. Although in the 20th century the law facilitated dealing with incorporations for lease or freehold, the limitations on the management committees to deal with the land, without the approval of a general meeting, meant that land under incorporated owners was usually retained.

The whole question of reserves and restrictions on title reflects the ambivalence between the view of Maori as individuals having full control over their property (including the right to sell it) and that of Maori as inheritors of a tribal patrimony, much of which (at least) should have been preserved under article 2 of the Treaty for future generations. Maori themselves were not entirely consistent in their thinking or their actions on this most fundamental issue, but the Crown overwhelmingly favoured the former view (and took full advantage of the land-selling propensities of individual Maori), while the Maori leadership, through the Kotahitanga and other movements, strongly supported tribal control. The preferred Maori model, as expressed by leaders on the East Coast from the late 1870s the Rohe Potae leaders in the 1880s and by the Kotahitanga and related organisations in the 1890s, was not to create titles based on individual owners in the first place (and then try to restrict them) but rather to create a tribal title with individual rights of

86. See evidence of T W Lewis, AJHR, 1891, g-1, p 156 (cited in Murray, ch 7)

occupation or lease for Maori villagers or farmers, and leases and joint ventures with settlers by tribe (hapu) as a body corporate.

It is also relevant to note that several witnesses to the Commission of Inquiry into Native Land Laws in 1890 (T W Porter, E Harris, Wi Pere, Hamiona Mangakahia) expressed the view that simply setting apart reserves was of little benefit to Maori; they should be assisted with the use of the land, which meant assistance with tile questions, grants or loans for fencing and stocking, and technical advice.[87] This was not in fact seriously attempted until the 1920s.

87. AJHR, 1891, g-1, pp 12ff