

## PART II

‘Facilitating Settlement to a Large Extent’



## CHAPTER 9

# THE NATIVE LAND ACT 1909

All of the alterations made to the Maori land administration system after 1904 were embodied in the Native Land Act passed in December of 1909. On the face of it, this Act was principally a consolidation of the land administration legislation passed during the previous decade, from the Maori Lands Administration Act 1900 onwards. At some point in the process, however, a change of direction took place. Since 1900 the preferred method of dealing with the problem of 'idle' Maori land had been to vest it – whether voluntarily or by compulsion – in Maori Land Councils and boards. These institutions had been designed to act for the owners (in one capacity or other) to expedite the leasing of such lands to European farmers. The Crown had resumed purchasing Maori land in 1905, and in 1907 some vested lands had been earmarked for sale, but neither of these measures constituted a significant deviation from the basic policy.

In 1909 the experiment of vesting lands in the Maori Land Boards to make them more accessible to settlers came more or less to an end. By the time the Act came into force in 1910, the boards held almost three-quarters of a million acres in fee-simple under the various categories of vesting which derived from the 1900 Act and its amendments, the 1907 Act and special-purpose legislation. The administration of these lands was, and would continue to be one of the boards' principal concerns, but the acreage added to their holdings of vested lands after 1910 was small. With the 1909 Act the sale and leasing of Maori lands by their owners, under the supervision of the Maori Land Boards, became the preferred solution to the problem of 'idle' Maori lands. This legislation put in place new systems which simplified and expedited the alienation of both vested and non-vested Maori lands, and over the next two decades the Maori Land Boards oversaw the sale of more than 2.3 million acres. This was a far cry indeed from the role envisaged for the Maori Land Councils during the debates which led to the 1900 Act.

### 9.1 'Such an amount of contradiction'

During the latter years of the nineteenth century New Zealand's colonial parliamentarians produced legislation relating to Maori lands at a prodigious rate. A recent review of the statutory record shows that from 1865 to 1890, something like 360 Acts affecting Maori land to a greater or lesser extent were passed by the

central government and provinces – an average of more than 10 per year.<sup>1</sup> The Native Land Law Commission observed in 1891 that:

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.

The result of such proceedings was described as ‘a network of incongruous legislation . . . evoked piecemeal, out of which it is impossible to produce a certain law’. ‘In the history of Native-land legislation and administration since 1873’, Rees and Carroll concluded, ‘there is no redeeming feature save the inoperative Native Land Administration Act of 1886. It is a long period of unsatisfactory legislation’.<sup>2</sup> The commissioners recommended radical surgery to repair the damage, but their advice was largely ignored. New legislation continued to appear in wholesale quantities. Between 1891 to 1908, another 199 Acts bearing upon Maori lands were added by the New Zealand Parliament (110 of them between 1899 and 1909).

An effort to consolidate this legislation was reportedly attempted by the Statutes Compilation Commission, which was chaired by Sir Robert Stout, but the task was found to be:

quite beyond their powers, apparently because there was such an amount of contradiction, such a tangle, that consolidation in the proper sense of the term was impossible.<sup>3</sup>

The Native Affairs Department memorandum which in 1906 identified the need for an ‘inventory’ of Maori lands and foreshadowed the appointment of the Royal Commission on Native Lands and Native-Land Tenure, also noted that with respect to Maori land legislation that ‘a consolidating measure is needed, introducing improvements while retaining such provisions as have been found useful and workable’.<sup>4</sup> In the event Stout and Ngata were not specifically instructed to deal with this problem.<sup>5</sup> None the less the two men were ‘impressed from the first with the necessity of . . . consolidation’.<sup>6</sup>

By December of 1908 the commissioners had in fact done part of the work required, but reported with regret ‘that the time at our disposal – namely, to the end of this year – will not suffice to finish this important undertaking’.<sup>7</sup> One of the main

1. See the database version of *The Maori Land Legislation Manual*, Crown Forestry Rental Trust, Wellington, 1995, 2nd ed. Totals given here are my own calculations.
2. Report, AJHR, 1891, G-1, pp xi–xiii
3. NZPD, vol 148, p 1273 (Findlay). See also p 1100 (Carroll). They were presumably referring to the ‘Reprint of Statutes Act 1895’ commission, chaired by Stout, which reported annually from 1903 to 1908: see E Robertson et al (comps), *New Zealand Royal Commissions, Commissions and Committees of Inquiry 1864–1981: a checklist*, Wellington, 1982
4. Undated Memorandum [c 1906] on ‘Native Matters’: National Archives MA 16/1 (Native 2/5).
5. Or so they said in 1908. However, part 4 of their commission could easily be construed as an instruction to do so: see AJHR, 1907, G-1, p ii. The commissioners’ first general report (1907, G-1c, pp 1–7) shows that from the beginning they took great interest in the legislative situation.
6. ‘Final Report of 21 December 1908’, AJHR, 1909, G-1g, p 8
7. Ibid

reasons given was that the task went well beyond scissors-and-paste. ‘In our opinion’, Stout and Ngata commented:

the Native Land Acts cannot be consolidated in the proper sense. There are so many conflicting provisions, so many sections worded in a general way, yet passed for temporary and special purposes, that consolidation, properly so called, would be impossible . . . . What is required is an Act or a number of Acts repealing existing general enactments and re-enacting same with necessary amendments.

Simply drafting such new legislation would be difficult enough, but as well, they warned:

It will be found that at each step in the construction of the new measure or measures, questions of policy await the decision of the Government and of Parliament.

The commissioners realised, in other words, that any serious effort to consolidate Maori land legislation would invariably lead to something whose whole was larger than the sum of its parts, and which would inevitably require decisions on matters of policy.

How, exactly, the Native Land Bill of 1909 was actually put together is not as yet entirely clear. In January of 1909 the Royal Commission on Native Lands and Native-Land Tenure was reconstituted, with Jackson Palmer (the chief judge of the Native Land Court) replacing Ngata.<sup>8</sup> Ngata was in the same month appointed as the Native Minister’s Parliamentary Under-Secretary. According to Butterworth, his first task in the new position would be ‘to assist Carroll in changing the laws’.<sup>9</sup> At or about this time the Counsel to the Law Drafting Office, John Salmond, set to work on a new Bill.<sup>10</sup>

A recent biography of Salmond gives with the impression that the 1909 Act was largely his own work. The author quotes Sir John Findlay’s concession, upon introduced the Bill into the Legislative Council later in the year, that Salmond:

had very valuable assistance indeed from the Hon Mr Ngata, who has devoted nights and days to assistance in the direction I have indicated.

He also notes that Salmond ‘also attended’ two conferences of Native Land Court judges in 1909.<sup>11</sup> There was a good deal more to it than this.

It would appear that Salmond began work on the Bill early in 1909. Before putting pen to paper, according to one Parliamentary admirer, he:

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8. See AJHR, 1909, G-1h. Jackson Palmer was a lawyer and sometime politician who had been appointed to the Native Land Court in 1904, and became chief judge in 1906. See G H Scholefield, *A Dictionary of New Zealand Biography*, Department of Internal Affairs, Wellington, 1940, vol 2, p 146. Dates are taken from the list of ‘Judges of the Native/Maori Land Court to 1966’ in the National Archives’, Maori Land Court Inventory.
  9. G Butterworth, ‘Maori Land Legislation: The Work of Carroll and Ngata’, NZLJ, August 1985’, p 246.
  10. See Alex Frame, *Salmond: Southern Jurist*, Victoria University Press, Wellington, 1995, pp 113–114. Salmond had been counsel to the office since 1907. He was later Solicitor-General and chief justice.
  11. Frame, p 112

had . . . to master first the principles and the details of not less than a hundred statutes – not only those in existence, and they were very numerous, but a very great number that had been repealed – in order that he might understand . . . all the different features and peculiarities of this Native-land problem.<sup>12</sup>

Presumably he was able to draw upon the work of the Statutes Compilation Commission, and that of the commission on Native Lands and Native-Land Tenure. It would also be reasonable to suggest that much of Ngata's 'very valuable assistance' was rendered at this stage, when fundamental decisions had to be made concerning the format and contents of the proposed Bill. Carroll later noted that:

the greater portion of this Bill . . . [is] a consolidation, but in the process of consolidating and amending it was found necessary by the Counsel of the Law Drafting Office to recast the language of the repealed statutes, to alter the arrangement considerably, so that it is impossible to reveal at a glance what is new and what merely re-enacts existing law.<sup>13</sup>

This difficult exercise clearly reflected Stout and Ngata's earlier opinion that it would be impossible to consolidate the existing body of Maori land legislation 'in the proper sense'. It was found to be both necessary and advisable to re-write the lot. As W H Herries rightly observed in the House:

this is not a consolidation Act in the sense of a consolidation of the statutes. This is practically a new Bill, expressing what the Draftsman and those he has consulted think is the law affecting the Native race at present in force in New Zealand.<sup>14</sup>

The authorisation to adopt this strategy obviously came down to Salmond from Carroll through Ngata.

The Law Drafting Office had produced a preliminary Bill by September of 1909, if not before. In that month the Native Minister invited the judges of the Native Land Court and the Presidents of the Maori Land Boards to Wellington for a conference.<sup>15</sup> For three weeks those in attendance 'exhaustively scrutinised and criticized the measure as it first left the hands of the law Draughtsman'. Soon afterwards a second conference was held to consider the revised draft.<sup>16</sup> This presumably led to further revisions before the Bill was tabled in the House, where it was subjected to the scrutiny of the Native Affairs Committee.<sup>17</sup>

Sir John Findlay later commented that:

I take leave to think that the combination of the Hon Mr Ngata, the Hon Mr Carroll, these Native Land Court judges, the Presidents of the Native Land Boards, and the

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12. NZPD, vol 148, p 1273 (Findlay)

13. Ibid, p 1100 (Carroll); as Findlay succinctly put it (NZPD, vol 148, p 1273), 'there is no slavish paste-and-scissors performance in the Bill'.

14. NZPD, vol 148, p 1103 (Herries)

15. Ibid, p 1100 (Carroll). Carroll refers only to the judges, noting that some of them were also presidents, but Findlay p 1273 states explicitly that 'all' of the presidents were also invited.

16. Ibid, p 1100 (Carroll), and p 1273 (Findlay)

17. Ibid, p 1106 (Herries)

Counsel to the Law Drafting Office . . . is a combination whose work this Council will accept on authority as far as it is justifiable to accept any work on authority. It is, in large measure, a work of experts.<sup>18</sup>

James Carroll had argued along similar lines when introducing the Bill to the House. The Native Minister complimented Salmond his excellent work, and noted that ‘from the original draft down to this copy of the Bill the measure has been thoroughly considered, reconsidered, and overhauled from every standpoint’.<sup>19</sup> He had been echoed by the principal spokesman for the Opposition, who joined Carroll in giving ‘a word of hearty praise to the Counsel to the Law Drafting Office and the Law Draftsman for the way in which they have accomplished this stupendous work’.<sup>20</sup> Herries observed that:

The Bill has undergone the utmost scrutiny by people who know what they are talking about – by the Judges of the Native Land Court and other experts outside the House. It has also undergone the scrutiny of the Native Affairs Committee, and any imperfections that might have existed in the Bill would probably have been unearthed in the course of the scrutiny.

Properly administered, he believed, the proposed legislation would be ‘of great benefit to the country’.<sup>21</sup> With such bipartisan support the Bill passed through the House and the Legislative Council without delay or significant debate.<sup>22</sup> It received Royal assent on 24 December 1909, and would come into effect on 31 March 1910.

A recent history of the New Zealand legal system describes the Native Land Act 1909 as ‘a triumph of legislative codification and clarification’ which ‘consolidated and clarified the statutory framework of Maori land law, providing the main framework for the later consolidations of 1931, 1953, and 1993’.<sup>23</sup> John Salmond clearly made a very important contribution in this respect. Nonetheless, he had a good deal of help, and the key decisions which had shaped the legislation were made elsewhere. As Carroll acknowledged when introducing the Bill in the House on 15 December:

For the policy of the measure, of course, the Government alone is responsible, and where departures have been made from the principles of past legislation the Government assumes full responsibility.<sup>24</sup>

These ‘departures’, while relatively few in number, say a great deal about the policy which Carroll was seeking to advance with the 1909 Act.

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18. Ibid, p 1273 (Findlay). He subsequently compared the Native Land Bill to the Supreme Court Act of 1882 and its attached ‘Code’, asking that the work of experts be passed ‘without any unreasonable debate’ (p 1280).

19. Ibid, p 1100 (Carroll)

20. Ibid, p 1103 (Herries)

21. Ibid, p 1106 (Herries)

22. See Butterworth, p 248, who suggests that the Bill pushed through by Carroll against the Prime Minister’s wishes.

23. P Spiller, et al, *A New Zealand Legal History*, Brooker’s, Wellington, 1995, p 159

24. NZPD, vol 148, p 1100 (Carroll)

## 9.2 The Act

As far as the Maori Land Boards were concerned, ‘the policy of the measure’ which was laid before the House in December of 1909 was to consolidate and enhance the powers which the boards had come to exercise over the alienation, administration and settlement of Maori lands as a result of the changes which had been made during the period 1904 to 1908. The ‘Maori District Land Boards’ were, as Carroll put it, to remain the ‘dominant factors’ with respect to ‘the alienation, administration and settlement of Native lands’ in the North Island.<sup>25</sup>

The composition of the boards, as modified in 1905, was retained. Each one was to consist of an appointed President (a European) and two appointed members. At least one of the latter had to be a Maori (s 64). The seven existing Maori Land Boards – Tokerau, Waikato, Waiariki, Tairāwhiti, Ikaroa, Aotea, and Maniapoto–Tuwharetoa – with their existing presidents and members, were to continue for the time being (s 62). In June of 1910, however, an Order in Council would be issued which re-defined the boundaries of the Maori Land Districts in the North Island, and made major changes.<sup>26</sup> The Maniapoto–Tuwharetoa District was abolished. A large portion of its territory was grafted onto the Waikato District, which became the ‘Waikato–Maniapoto’ District, and the balance was inherited by the Aotea and Waiariki Districts. This left six Maori Land Districts in the North Island, each of which was administered by a Maori Land Board. Four years later a seventh unit was formed to cover all the parts of New Zealand which previously had not been included in a Maori Land District. This ‘South Island Maori Land District’ encompassed the ‘Middle’ (South) and Stewart Island plus the Chathams and all offshore islands not appended to one of the other Districts.<sup>27</sup> These new territorial divisions remained in effect, with minor alterations, until the boards disappeared altogether in 1952.

The various Acts through which Maori freehold lands had been vested in the land boards were incorporated in the 1909 Act within Parts XIV, XV, and XVI. According to the Native Minister these portions of the Bill served to ‘consolidate the policy of the Government from 1900 up to the completion of the Native Land Commission, and saves all that work’. ‘No material alterations’, he claimed, had been made to this body of legislation.<sup>28</sup>

Part XV of the Act dealt with lands vested in the Maori Land Councils and Boards under the Maori Lands Administration Act 1900 and its various amendments from 1901 to 1906.<sup>29</sup> Some of these lands had been vested voluntarily

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25. Ibid, p 1101 (Carroll). The Native Land Court would exercise control elsewhere. As noted in Part I, the powers given to the land councils in 1900 to determine the title to customary lands were not re-enacted in 1909, the overlap with the jurisdiction being deemed unsatisfactory.

26. *New Zealand Gazette*, 13 June 1910, no 58, pp 1713–1714

27. See *New Zealand Gazette*, 27 March 1914, vol 2, no 29, pp 1211–1212, ‘Native Land Court Districts and Maori Land Districts’. Kapiti Island, for example, was named as part of the Aotea Maori Land District, and White Island as part of Waiariki.

28. NZPD, vol 148, p 1102 (Carroll)

29. Part XV, s 287–289. Lands vested in a board under s 95 of the Rating Act 1908 were also included, and provisions for vesting lands infested with noxious weeds were revised.

and some compulsorily, but all had been vested for leasing only: under the original legislation the lands in question could not be permanently alienated by the Maori Land Boards. This protection continued under the 1909 Act. Although all lands vested under Parts XIV and XV were to be held under the same type of trust,<sup>30</sup> a clear distinction was made as to the kind of alienation allowable. Lands vested under Part XV could not be permanently alienated (s 291).<sup>31</sup> The special provision made in 1905, though, whereby ‘unused’ Maori lands in the Tokerau and Tairāwhiti Maori Land Districts could be compulsorily vested in these land boards, was discarded. ‘In future’, Carroll told the House, ‘the Government will depend on the initiative of the assembled owners to bring further areas under these Boards for settlement by the general public’.<sup>32</sup>

Part XIV of the 1909 Act dealt with lands which had been vested in the Maori Land Boards under Part I of the Native Land Settlement Act 1907, as a result of recommendations made by the Stout–Ngata commission. The 1907 Act had required that half of the lands so vested were to be made available for sale, and half for leasing. A 1908 amendment allowed the boards a certain latitude in varying these proportions for individual blocks, as long as the prescribed ratio was maintained for the whole of a boards’ Part I lands on an annual basis.<sup>33</sup> Salmond commented in his explanatory memorandum that:

No material alterations have been made with respect to this class of land. It is to be disposed of by public auction or tender by way of lease and sale in equal proportions.<sup>34</sup>

As Stout and Ngata had pointed out at the time, there was a distinct possibility that Part I of the 1907 Act might discriminate against some Maori landowners by forcing unwanted sales. An opportunity to eliminate this feature in 1909 was not taken. Presumably the political costs of attempting to do so were considered to be too high.

Lands reserved for ‘Native occupation’ under Part II of the Native Land Settlement Act 1907 (also as a result of recommendations made by the Stout–Ngata commission) came under Part XVI of the 1909 Act. This was administered by the Boards as agents for the owners, who could not themselves alienate it. The land

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30. See Part XIV, s 237 and Part XV, s 290. One question connected with this provision may bear further examination. When lands were voluntarily vested under s 28 of the 1900 Act the trust so created was to consist of ‘such terms as to leasing, cutting up, managing, improving, and raising money upon the same as may be set forth in writing between the owners and the Council’. Section 287, Part XV of the 1909 Act, however, cancelled ‘any trusts existing in respect of this land’ and substituted ‘the trusts imposed by this Part of this Act’. It would appear that voluntary agreements between the owners and the boards were thereby unilaterally eliminated by the Crown.

31. But see chapter 10 and Table II.11

32. NZPD, vol 148, pp 1102–1103 (Carroll)

33. See Statutes, 1907, no 62, s 52, and Statutes, 1908, no 253, s 17. That is, 50 percent of all of a board’s Part I alienations within any given fiscal year (by acreage) had to be sales, and the other 50 percent leased.

34. Salmond, ‘Native Land Bill 1909 Memorandum: Notes on the History of Native-Land Legislation’. This is Salmond’s original explanatory memorandum, which was made available to MPs when the Bill was introduced. It is reproduced in the Crown Forestry Rental Trust’s *Maori Land Legislation Manual*.

could be leased for a total of up to 50 years. Carroll commented that ‘The machinery clauses have been amended and improved, but the principle is not altered, except in one important particular’. This involved a provision enabling the owners of the land to have it ‘taken out’ of Part XVI. He hastened to add, however, that there was:

ample protection throughout the Bill against the improvidence of the average Maori. The experience of the past shows that, though the Maori has made great strides towards civilisation, and is in many respects quite able to fulfil the ordinary duties of citizenship, in providing for the future he is grossly wanting.

Among other things, when lands were alienated the Maori Land Boards were ‘compelled to see that he [the vendor] does not part with all his Native land, though . . . this condition may be relaxed in certain cases’.<sup>35</sup>

The principal omissions in this consolidation, as far as the Maori Land Boards were concerned, were lands which came within their orbit as a result of special-purpose legislation. Neither the legislation affecting Thermal Springs Districts nor that concerning Native Townships – both of which imposed responsibilities on the Maori Land Boards – was incorporated in the new Act.<sup>36</sup> There were, Carroll noted, ‘good and special reasons’ for their omission. He did not explain what they were, but promised that these matters would be dealt with in the next session of Parliament.<sup>37</sup>

The most significant changes brought about by the 1909 Act related to the alienation of Maori land. A deft mixture of statutory consolidation and innovation paved the way for the sale and lease of more than four million acres of Maori freehold land over the next 20 years. As noted earlier, in 1905 all restrictions on leasing had been replaced by a uniform set of statutory restrictions administered by the Maori Land Boards.<sup>38</sup> The 1908 Amendment Act made land boards solely responsible for the confirmation of all alienations of Maori freehold land in the North Island. The 1909 Act went one step further with a sweeping provision which invalidated all existing restrictions on the alienation of Maori freehold land, whether imposed by ‘any Crown grant, certificate of title, order of the Native Land Court, or other instrument of title, or by any Act’. The stated intention and effect of section 207 was that:

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35. NZPD, vol 148, pp 1102–1103 (Carroll). Under s 425 the Governor, acting on a recommendation of a Maori Land Board, could confirm alienations of land which caused the owner to become landless if the latter was ‘able to maintain himself by his own means or labour’.

36. Nor were the various Native Reserves Acts, or the East Coast Native Trust Lands Act. See Salmond memorandum, ‘Extent of Application of this Bill’.

37. NZPD, vol 148, p 1103 (Carroll). An earlier statement by Ward indicates that there simply had not been time to deal with these aspects of Maori land legislation: see ‘Native Lands’, AJHR, 1909, B-6, pp xxi. Among the legislation passed in 1910 was the Native Townships Act 1910, the Rating Amendment Act 1910, and the Thermal Springs Districts Act 1910, all of which contained provisions affecting the powers of the boards.

38. Section 16 of the 1905 Act. See Part I, above.

a Native may alienate or dispose of any land or any interest therein in the same manner as a European, and Native land or any interest therein may be alienated or disposed of in the same manner as if it was European land.<sup>39</sup>

When presenting the Bill to the Legislative Council, Findlay observed that ‘Restrictions cover our Native-land titles like a cobweb’, impeding alienation at every turn by creating uncertainty. The new legislation, he stated, would put an end to this. A prospective lessee or purchaser now had only to:

find the land, and, instead of searching through from twenty to forty Acts and having to weigh what the special effect of what some words is [sic], you take it that the title is clear and can be alienated unless you can find a restriction in the Bill of 1909.<sup>40</sup>

As this remark suggests, the old restrictions were not so much eliminated as replaced by a standard set of statutory restrictions.<sup>41</sup>

These were laid down in the Act in section 220, which stipulated that in order for any alienation of Maori freehold land to be valid:

- (a) the instrument of alienation had to be properly executed;
- (b) the alienation could not be ‘contrary to equity or good faith or to the interests of the Natives alienating’;
- (c) no Native could be made landless (‘within the meaning of this Act’<sup>42</sup>) by the alienation;
- (d) the payment had to be ‘adequate’;<sup>43</sup>
- (e) in the case of a sale the purchase money had to have been ‘either paid or sufficiently secured’;
- (f) the person obtaining the interest had to be able to do so under Part XII of the Act (relating to limitations on area);
- (g) the alienation could not result in any breach of any trust; and
- (h) it could not be ‘otherwise prohibited by law’.

The Maori Land Boards were responsible for ensuring that these rules were complied with. Section 217 provided that ‘No alienation of Native land by a Native’ in the North Island ‘shall have any force or effect until and unless it has been confirmed by a Maori Land Board’. The land boards were not empowered to confirm any alienation unless ‘first satisfied’ that the criteria laid down in section 220 had been met.<sup>44</sup>

39. Section 207

40. NZPD, 1909, p 1276 (Findlay)

41. This change, it should be noted, also applied to the ‘papakainga’ lands created under the 1900 Act. The requirement to identify a specific piece of land which an individual Maori needed ‘for his or her maintenance and support and to grow food upon’ was abandoned. Instead, at the time of a purchase the Maori Land Boards had to be satisfied that the sale would not render the vendor ‘landless’ (see below).

42. Section 2 defined a ‘landless Native’ whose ‘total beneficial interests in Native freehold land . . . are insufficient for his adequate maintenance’.

43. Section 223 provided that ‘adequacy’ was to be estimated ‘by reference’ to a valuation carried out under the terms of the Valuation of Land Act 1908.

In essence, the 1905 system for the regulation of leasing by the land boards was extended in 1909 to cover all alienations of Maori land, including sales. Given that large areas of hitherto unavailable land had been opened up for use by Europeans as a direct result of eliminating restrictions on leasing in 1905 (see above, Part I), it must be assumed that a similar effect on sale and leasing was anticipated from the new system. And indeed, many other changes were made to streamline the process of alienation. The most important of these were found in Part XVIII. James Carroll noted that:

Where the owners exceed ten the Bill proposes a new method of dealing with the land, which is practically a resuscitation of the old rununga system, under which from time immemorial the Maori communities transacted their business.<sup>45</sup>

As he described it, the purpose of Part XVIII was ‘to enable the majority of owners in communal blocks to draft their lands into the various compartments of the Bill’.<sup>46</sup>

What the Native Minister meant was that the owners were empowered to do certain specific things within the framework of the Act. The ‘Assembled Owners’ could:

- 1) Vest the land in the [Maori Land] Board for sale or lease:
- 2) Agree to incorporation by the Native Land Court:
- 3) Carry into effect any proposed alienation – eg, a sale or lease to a particular individual:
- 4) Sell the land to the Crown.<sup>47</sup>

No other measures were possible. A procedure for putting up resolutions, calling meetings and voting were set down by the Act. All meetings had to be called by the relevant Maori Land Board, and chaired by the president of the board or his representative. A resolution was deemed to be carried if the owners who voted in favour of it (in person or by proxy) owned ‘a larger aggregate share of the land’ than those who voted against it (s 343).<sup>48</sup> Such resolutions, however, had to be confirmed by the Maori Land Board before they took effect, having due regard ‘to

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44. Herries commented that ‘while you are taking off restrictions, the conditions imposed on alienation make almost greater restrictions than those that are taken off’. Specifically, he claimed, ‘it is almost impossible in certain cases to prove that the Native has other land . . .’ NZPD, 1909, p 1105 (Herries).

45. Spiller et al, comment p 161 that ‘Returning control of alienation to an owners’ meeting can be seen as an attempt, to a degree at least, of reversing the policy of individualization and of returning control to Maori collective bodies, the collectivity here being, however, not any of the natural units of Maori society but the accidental and artificial one of block owners . . .’

46. NZPD, vol 148, p 1102 (Carroll)

47. Quoting from Salmond’s summary in his memorandum of s 346.

48. According to Spiller et al, p 161 offers to sell could be accepted subject to modifications, which ‘in practice . . . meant that the offer could be accepted subject to having the interests of dissentient non-sellers cut out’. Part XVIII, however, does not seem to contain such a provision. It did, however, allow owners objecting to a resolution to file a ‘memorial of dissent’ with the board, and the board was empowered to postpone consideration of a passed resolution ‘in order to afford to the owners who have not consented to the resolution an opportunity of applying to the Native Land Court for a partition of their shares’: see s 344(2) and s 348.

the public interest and to the interests of the owners' (s 348). Owners could thus vote to 'draft their lands into a different compartment of the Act', but the final decision on such matters lay with the Crown-appointed Maori Land Boards. 'Self-management', a recent commentator has noted, 'clearly had its limits'.<sup>49</sup>

The 1909 Act greatly simplified the private purchase or lease of Maori lands. Where the land in question had fewer than 10 owners, the prospective purchaser or lessee could negotiate an agreement directly with the owners, then take it to the relevant board for approval. Where a block had more than 10 owners, the formula laid down in Part XVIII could be used. The process of alienation was thus reduced to a clearly-defined set of procedures, in the operation of which the Maori Land Boards provided safeguards for both parties. In the cases of purchases by the Crown the procedures involved were even more straightforward.<sup>50</sup>

Where a piece of land had more than 10 owners, the Crown had to carry out its purchasing by way of Part XVIII and the assembled-owners process, and resolutions to sell the land had to be approved in the normal way by the relevant Maori Land Board (s 368).<sup>51</sup> Where the land had fewer than 10 owners, though, the Crown could purchase directly from the owners 'as if the land was European land' (s 369 (1)). The transaction did not have to be confirmed by a Maori Land Board (or by the Native Land Court, outside of the North Island), and once the instrument of alienation was properly registered the Crown's title could not be 'questioned or invalidated on the ground of any error, irregularity, or defect in the mode of execution thereof' (s 369 (2)). The Crown could also purchase partial interests where blocks had less than 10 owners (s 371), and could buy vested lands direct from land boards (s 366) and incorporated lands direct from their owners (Part XVII, s 330). In these cases its operations were not subject to the restrictions imposed by section 220<sup>52</sup> – although the Crown imposed a similar set of restrictions upon itself in Part XIX.<sup>53</sup>

The Crown also gave itself one major advantage over other purchasers. Under section 363, whenever negotiations for a given piece of land were either

49. Spiller et al, p 159

50. Herries suggested in the House in 1913 that 'The pakeha purchaser under the 1909 Act . . . in fact . . . was given greater advantages than the Crown. The Crown under that Act could only purchase by a meeting of assembled owners. [whereas] The pakeha if he got the precedent consent of the [Maori Land] Board could purchase the individual interest of every Native, or purchase by meetings of assembled owners': NZPD, 1913, vol 167, p 385. He was referring to the rather convoluted terms of s 209 of the 1909 Act. Such provisions for the purchase of individual interests, however, were deleted under 1912, no 34, s 8, and so were only effect for a relatively short time. I have seen no evidence to suggest that much use was made of them.

51. Section 370 stated explicitly that in such cases individual owners could not sell their interests to the Crown except through the Part XVIII process.

52. The first section of Part XIX (covering 'Purchases of Native Land by the Crown') specified that 'Save so far as otherwise expressly provided in this Act, none of the restrictions, prohibitions, conditions or requirements imposed by this Act upon the alienation of Native land or the acquisition of interests therein shall apply to the alienation of such land, or the acquisition of such interests, by the Crown' (s 360).

53. This specified that the Crown could not purchase Maori land for less than the assessed value (s 372), and could not purchase land unless the Native Land Purchase Board was 'satisfied that no Native will become landless within the meaning of this Act by reason of that purchase' (s 373). Procedures to ensure the proper payment of purchase-money by the Crown were also laid down (s 376).

‘contemplated or in progress’, the Governor could be requested to prohibit for one year ‘all alienations of that lands other than alienations in favour of the Crown’. As Richard Boast points out:

This may seem innocuous enough until it is grasped that ‘alienation’ as far as the statute was concerned meant a range of land dispositions not ordinarily thought of as alienations – in fact any ‘transfer, sale, gift, lease, licence, easement, profit, mortgage, charge, encumbrance, trust or other disposition’.<sup>54</sup>

‘Once such a proclamation was in force’, he concludes, ‘there was virtually nothing the owners could do with their land’. This amounted to a selective re-introduction of the Crown’s pre-emptive right in a manner likely to be highly inconvenient (to say the least) for owners who did not wish to sell their land.

The 1909 Act clearly placed the Crown in an advantageous position for purchasing Maori land. The effect of these provisions was greatly magnified by the adoption of a new system for carrying out such purchases. In 1905, as a result of the same pressures which had led to the compulsory vesting of ‘unused’ Maori lands in two Maori Land Districts, the Crown had resumed purchasing Maori lands in the other five. The Maori Land Settlement Act 1905 contained new safeguards for vendors, but for the most part these sales represented a continuation of the purchase system employed in the 1890s. Stout and Ngata recommended in 1907 that it be discontinued.<sup>55</sup> The aforementioned Native Land Purchase Board was the focal point of the scheme created by the 1909 Act to replace it. The Native Land Purchase Board had sole responsibility for the purchase of Maori land by the Crown. Made up of the Native Minister, the Under-Secretary for Crown Lands, the Under-Secretary of the Native Department and the Valuer-General, it was authorised:

to undertake, control, and carry out all negotiations for the purchase of Native land by the Crown and the performance and completion of all contracts of purchase so entered into by the Crown.<sup>56</sup>

To support the purchase and settlement of Maori land, the Minister of Finance was empowered to borrow up to £500,000 per year, which went into a ‘Native Land Settlement Account’. (In the event, the amount actually spent per year on land purchase would work out at about half this figure: the average annual expenditure up to 31 March 1922, for example, was £246,000).<sup>57</sup> The Native Land Purchase Board could draw upon these funds to purchase Maori land, to survey it in preparation for settlement, or to make loans to Maori Land Boards to assist them in preparing lands under their control for settlement.<sup>58</sup>

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54. Spiller et al, p 161

55. AJHR, 1907, G-1c, p 16. Ngata commented in 1913 that the purchases in 1906–07 had been ‘carried on . . . on the temporary resumption of the old system’: NZPD, 1913, p 402 (Ngata).

56. Part XIX, s 362–363

57. See AJHR, 1922, G-9, p 2

A well-organised, well-funded Crown purchase operation, making full use of a Maori Land Board system wielding extensive powers over Maori freehold lands, was placed in an excellent position to make serious inroads on the stock of land remaining in Maori hands a decade after the passage of the Maori Land Administration Act of 1900. And the Government's intention was to do exactly that. 'It is proposed', Prime Minister Ward stated in November of 1909 with respect to the forthcoming Native Lands Bill, 'to purchase from the Natives as large an area as possible'.<sup>59</sup>

### 9.3 Walking a Tightrope?

The Native Land Act 1909 was drawn up, and pushed through Parliament, under James Carroll's direct supervision. The new Act retained most of the safeguards relating to Maori land which had been put in place during the first decade of the century, and added a few new ones. The sale of land, in particular, was hedged in with restrictions which sought to ensure (among other things) that Maori vendors knew what was in the contracts they were signing, that they received an 'adequate' price for their land, and that they were not left destitute by the transaction. Carroll himself declared that 'ample protection' had been provided 'against the improvidence of the average Maori'. 'I am satisfied', he stated:

that the settlement of Native lands will be facilitated and furthered by these proposals, and that the interests of the Native owners will be well conserved.<sup>60</sup>

None the less, it was an Act which more than anything else facilitated further sales of Maori land. The provisions for Crown purchasing alone ensured this, but the those for private purchasing were also made simpler and easier.

Graham Butterworth has commented that:

So far as alienations were concerned the [1909] act walked a tightrope between Carroll and Ngata's desire to hold onto the land, and pressure from Maoris to sell and the desire of the Government to satisfy pakeha demands by a flow of cheap Maori land.<sup>61</sup>

It is certainly true that compromises were inevitable when it came to drawing up the 1909 Act. It is open to question, though, whether Carroll and Ngata had any particular objection at this point in time to the sale of a portion of the land remaining in Maori hands (much of it unused) which was not already protected from permanent alienation under the Act. Ngata, for example, when criticising the

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58. See Statutes, 1909, no 15, Part XIX, s 377, and Part XXIII, and T W Fisher, 'The Native Land Act 1909', in *New Zealand Official Year-Book 1910*, Wellington, Government Printer, 1910, p 715.

59. 'Financial Statement', AJHR, 1910, B-6, p xxii

60. NZPD, vol 148, p 1103 (Carroll)

61. Butterworth, p 247

Reform government's amendments to the Native Land Act in 1913, commented that:

If the proposals of the Native Minister had been concentrated upon the acknowledgedly large remnant of surplus Native land, we on this side of the House could not have legitimately objected . . .<sup>62</sup>

The lands protected from sale in 1909 included those vested in the Maori Land Boards under the 1900 Act and its amendments (now under Part XV) and half of the lands vested in the boards under Part I of the 1907 Act (Part XIV), plus all of those placed under the protection of the boards by virtue of Part II of the 1907 Act (Part XVI). These vested and 'administered' lands together amounted to almost one million acres by 1910. As well, further lands would be protected from sale by the requirement – imposed upon the Crown as well as private purchases – that no Maori be made landless by a sale.

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62. NZPD, 1913, p 400 (Ngata)

