CHAPTER 6

POLICIES, LAWS, AND COMMISSIONS – THE LATE 1880S TO THE 1900S

6.1 INTRODUCTION

Barton had limited his investigations as commissioner into cases where some sort of transaction was already under way. He had declined to report on applications where no negotiations existed, on the grounds that this would be tantamount to reporting on 'the expediency of the total removal of restrictions on sales from Natives to Europeans, a question I deem to be a purely political one, for the consideration of Government or Parliament, and quite outside my province.'[1]

Governments were more clearly becoming national ones, with coherent policies for the whole country. In 1888, a conservative administration passed a key act which answered Barton's question. Restrictions might now be removed in the Native Land Court without any prior arrangements to lease or sell. More significant were the steps by which fewer and fewer owners were required to agree to have the process of removal of restrictions initiated. The direction of legislation on restrictions did not change when the Liberals came to office in 1890, determined to help Pakeha farmers on to the land. The context for policy relating to restrictions in the 1890s and 1900s was dominated by the Crown's goal of closer settlement. Pressure was put on any land perceived by the Government as under-utilised.

Constant amending of the law eroded the concept of inalienability. Restrictions might be requested, and placed on titles by the court, but their removal might be as readily initiated by a minority of owners. Partitioning undermined attempts to retain larger areas intact through restrictions.

These years also saw two important commissions, the Rees–Carroll commission, appointed to inquire into the subject of Native Land Laws, and the Stout–Ngata Commission on Native Lands and Native Land Tenure, which reviewed the history of Crown policies with a critical eye. Both the 1891 and the 1907 commissions condemned past legislation. They did not halt the sale of Maori land. The process was, on the contrary, facilitated but on a more systematic basis. The object was, as in the past, to ensure that 'surplus' lands would be available for settlement, and in order to do this fairly, to identify what lands Maori used. The Crown's previous attempts had not been successful in providing an effective mechanism for assessing

1. Barton to Native Minister, 14 May 1886, 'Report on Removal of Restrictions on Sale of Native Lands', AJHR, 1886, G-11, p 3

what land Maori required. The Stout–Ngata commission in particular was concerned to establish how this might be done.

6.2 THE NATIVE LAND DISPOSITION BILL 1885

The Native Land Disposition Bill signalled a new determination by the Government to gain a wider control over the acquisition and use of land. It proposed the reassertion of Crown pre-emption not just for limited areas but as a general policy. This was an important shift, but the contentious clause to which both Maori and Pakeha objected was clause 62:

> The Governor in Council may from time to time make such orders and general regulations as may be deemed fit for prescribing and regulating—
> (a) The areas in, and the estate, term, or interest for, and the conditions upon, which land may be conveyed or leased under this Act;
> (b) The reservations, conditions, and limitations to be made or contained in any conveyance, lease, or contract made under this Act:
> also like orders or regulations to be special to any particular land, or to land in any prescribed district.[2]

In relation to such a comprehensive approach, the relatively narrow restrictions policy appears little more than small-scale tinkering. To Pakeha, clause 62 looked like land nationalisation; to Maori, it represented an unacceptable level of state power. All the recommendations of boards and committees on which Maori were represented, as well as those of the Native Land Court, were intended to be subject to Government approval.[3]

Although Ballance's Native Land Disposition Bill did not pass, it provoked a discussion of restrictions on alienation in the Native Affairs Committee in 1885. The exchange that follows is worth quoting at length because it shows that restricted lands had become a baffling category, even for this group. Among those present was John Bryce, until recently Native Minister himself.

Sir George Grey opened the topic by expressing concern about what would happen when restrictions were lifted from a block. Would there be open competition for purchase? Ballance answered that he was in favour of that approach, but the clauses the Bill contained were intended to meet cases where particular parties had a legal right to make purchases. He was proposing a new arrangement: that either a judge or commissioners would make inquiries and report to the Governor in Council:

> Bryce: I do not quite understand the new clause. Is it intended when restrictions are removed from a block, that the block shall come under this Act; or is it intended, as you suggested, that it shall be a means for the purpose of concluding transactions?

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2. 'Native Affairs Committee Report on the Native Land Disposition Bill, 1885', appendix, AJHR, 1885, I-2b, p 74
3. T McIvor, *The Rainmaker: A Biography of John Ballance, Journalist and Politician, 1839–1893*, Auckland, 1989, pp 142–143

Ballance: Yes: that is the intention.

Then, it is not set out under this head?
Ballance: No; I see it is not. There is an omission here: it is intended to validate such transactions.

Sir G Grey: I do not understand the meaning of the Native Minister's answer; for here it refers to everything.
Bryce: I am puzzled myself. Let us take a block of land on which there are restrictions: then, if these may be removed by the process set forth here, what is to become of that block? Is it to go under the general machinery of this Disposition Bill, and to be disposed of by the Land Board constituted under this Bill; or is it more correctly speaking, for the purpose of concluding private transactions which are now in progress to be concluded? Because in the latter case, that would be selling the land under a system not contemplated by this Act, or outside this Bill altogether: judging from what the Native Minister has said, I think it must be intended to do both things – first to enable transactions in progress to be concluded, then, after these are done with, to enable the restrictions to be removed from the blocks which would go under the ordinary provisions of this Bill, or this Act.[4]

In raising this last point, Bryce was going a step further than the Bill had intended, to lifting of restrictions in a completely new way:

Ballance: I would like to explain: the Governor now has power to remove these restrictions without enquiry, where it is desirable to allow transactions to be completed. Then, we assume that the Commissioner will report accordingly, and the Governor will give effect to that report. Then, with regard to other cases where restrictions might not be removed, the land will then remain in the same position as Native reserves, and will be dealt with as reserves would be for the benefit of the Natives beneficially interested. That is the position.
Bryce: But that will leave one class of lands unprovided for altogether. There are certain lands on which restrictions exist, that are much like other Native lands, but are not reserves under the Act we have at present, nor would they become so. What I want to know from the Native Minister is this: Is it intended to remove restrictions from all those lands where they are uncomplicated by private transactions?
Ballance: You mean where no private persons intervene?
Bryce: Yes

Ballance: But that class is not dealt with in this part of the Bill; this only applies to cases where individuals have been trying to acquire these reserves.

29. Then, where restrictions are now on lands uncomplicated by private transactions, these restrictions would then in effect amount to a positive entail?
Not necessarily; they might be dealt with in another way.

30. Under this Bill?
I assume that where these restrictions are placed on land it is in the position of a Native reserve.

31. You are not asserting that is the legal position?

4. Minutes of evidence, 'Native Affairs Committee Report on the Native Land Disposition Bill, 1885', AJHR, 1885, I-2b, p 3

> I am assuming that is the virtual position. In the first place I ask myself why there are restrictions on land at all but that the natives should not be allowed to alienate them.
>
> 32. Restrictions might be put on for various reason?
> That is the main reason.[5]

Bryce pressed on with his point, questioning the necessity for inalienable land, and the function of restrictions:

> Bryce: What we want to know is whether it is intended, in cases of lands outside those on which private transactions have existed, whether it is intended to remove restrictions: I would point out that these lands are not legally reserves at present, whatever they may be ultimately?
> Ballance: This clause will not interfere with the right of the Governor to remove restrictions where there had been no dealing, without any enquiry at all. The Governor's power will remain the same as before. If it was desirable to remove restrictions he could do so. The Governor will have the same power to do so here.
> Bryce: It would be so undoubtedly were it not for these sections: these sections are restrictive?
> Ballance: Yes.
> Bryce: Under what these sections prescribe this necessarily would take place?
> Ballance: I think you would find the preamble does limit it. 'Whereas it is desirable that the removal of restrictions should be dealt with only after due and formal inquiry.'
> Bryce: Then what I wish to point out is that he would cease to have the power; this land would not be a reserve, it would be entailed and remain in an unprofitable state?
> Ballance: I do not think so.[6]

Ballance was not ready for a radical assessment of the role of restrictions. He was contemplating at this point only the familiar pattern of private purchases leading to an inquiry and the piecemeal granting of applications for the removal of restrictions. His only new policy was to take the process out of the administration of the Native Office and place it permanently in either the Native Land Court or a commissioner's court.

The committee was to focus on yet another aspect of restrictions on alienation. When Colonel Trimble asked Ballance if he had paid attention to the Native Lands Division Act 1882 and the Reserves Act 1882, he was acting as spokesman for a particular point of view.[7] He believed those acts had put the removal of restrictions in the hands of the court, and the Governor in council had no power to interfere. His view that the removal of restrictions on inalienable lands should be taken out of the political arena. Already the land court offered an alternative route to the removal of restrictions through the partition of blocks. The responsibility for all cases was soon to pass to the judges of the Native Land Court.

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5. Ibid
6. Ibid, pp 3–4
7. Ibid, p 4

Though neither Wi Pere or Wahanui, the two Maori members of the committee, became involved in the discussion at this point, both suggested amendments. The Bill required that the chief judge of the Native Land Court should by the *Gazette* and *Kahiti* set down a time and place for inquiring into the removal of restrictions. Their amendments added that no such inquiry should take place unless all the owners were present or represented.[8] That they both thought that such a clause was necessary implied a very deep distrust of the conduct of the Native Land Court, whose role in this area was to be extended over the following years.

6.3 SIGNIFICANT ACTS – 1888 TO 1894

Ballance's attempt to reimpose a Crown monopoly over land transactions was a failure. Maori were not prepared to offer land to the Crown under its terms. With the Native Land Court Act 1886 Amendment Act 1888, the field was once again open to private purchasers. The precautions laid down in connection with this were the responsibility of the court, which was, under section 13 of the Act, directed to find out:

> as to each owner whether he has a sufficiency of inalienable land for his support, and shall, out of the land the subject of any such order, declare to be inalienable so much and such parts as shall be necessary for the support of any owner not shown to be possessed of such sufficiency, and such part or share shall be deemed inalienable accordingly.

The court had not shown itself in the past to have the capacity to carry out such extensive inquiries.

The single measure which had the most impact on the removal of restrictions was the Native Land Act 1888. Section 5 dealt with the whole range of limitations and restrictions on titles in one sentence:

> Existing restrictions on alienation may be removed or declared void by the Governor in Council on the application of a majority in number of the Native owners, and instruments containing such restrictions shall be hereafter be read and construed as if the words imposing or recommending restrictions had been omitted therefrom.

Wi Parata saw this section as:

> opening the door with a vengeance, and letting in all sorts of evil on the Native people . . . this provision must not be extended to the South Island, because the Natives in that Island have no surplus lands which they can afford to sell or lease.[9]

He argued that without restrictions, storekeepers would encourage Maori to go into debt. A number of members agreed with his view of its likely impact. But other

8. Ibid, pp 73–74
9. 11 July 1888, NZPD, vol 43, p 691

debaters showed considerable impatience, both with the tangled state of the laws, and with current Maori opposition to 'the colonisation of Native lands'.[10]

An order of the court might annul or vary any restrictions imposed by the court if the majority of owners applied. This process had previously been initiated only when there was a specific transaction to be considered. Irregularities had sometimes been detected in these in the process of being vetted by the department. Under the new legislation, owners could decide to free up inalienable land with no particular transaction in view.

The printed returns for the years from 1889 to 1891 show that section 5 was applied, with few exceptions, to many successful applications to remove restrictions on alienation.[11] After 1891, the returns of removal of restrictions were not printed until 1905, after the law had changed again.

How many applications were refused in the years after 1888, and how this rate compared with the previous pattern, are questions which would require more research to answer. The completed forms from the court passed through the office in Wellington on to the minister, in cases where the wording of the original restriction made this necessary, for the Governor's signature. The wording of the original restrictions meant that there were still cases where it was possible for the minister to intervene. The staffing of the Native Department was reduced and in 1893 it became part of the Justice Department. It was less likely that there would be significant administrative input.

It is true that the standard requirements were still in place. But it was now the court which had to be satisfied that owners had a good title to other land, or shares in other land, 'sufficient for their maintenance and occupation', and that all other owners concurred in the proposed removal. How far these were reliable safeguards depended, as in the past, on what agencies were available to police them.

The removal of restrictions was, indeed, subject to the provisions of the Native Lands Frauds Prevention Act 1881. The commissioners were charged with the familiar duty of ascertaining whether sellers had enough land left for their support. They had to be satisfied that the transaction was not invalid, that payment had been made, and that all the formalities associated with signing the deed had been followed.

Barton had detected a number of very serious irregularities in land dealing in the course of his inquiries into the removal of restrictions. Purchasers and agents had been paying over money and collecting signatures for transfers before boundaries and ownership were defined, or any reserves had been chosen for Maori occupation and use. The excuse for this 'universal and unavoidable practice' was that:

> early transactions had been conducted in a similar manner, and had nevertheless passed the Frauds Prevention Commissioner, as well as the Government, and finally it was urged that all the cases before me in which I might report favourably would at a later stage have to pass the Frauds Prevention Commissioner, who might be safely trusted to protect the interests of the natives.[12]

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10. Ibid, p 676
11. AJLC, 1889, no 5; AJHR, 1890, G-3; AJHR, 1891, G-9
12. G E Barton, 'Report on Removal of Restrictions on Sale of Native Lands', AJHR, 1886, G-11, p 2

These remarks were made in relation to Tauranga, but he encountered cases elsewhere. In the Wairarapa in 1882, the 29-acre Matapuka block had been declared inalienable land by Judge Brookfield when awarding the grant to three owners. These three were already in debt to a local storekeeper, to whom they had signed a transfer of this land at some point (left blank on the document). They had also signed three sworn declarations – form Cs – before a local justice of the peace. Commissioner Barton was angry enough to name the magistrate who was prepared to sign forms which were 'absolutely untrustworthy' as evidence of what had taken place in front of him.

The deed is in these documents represented as a deed to blank (person) the lands are blank (lands) and the date when the declaration is made before the magistrate is also a blank (date) and by these declarations these three natives are made to swear that they each 'perfectly understand the nature of the said deed and have no complaint to make concerning the said transaction'.[13]

Barton thought the owners had probably received some money on account of land they had an intention to sell, and had been required to sign the documents before that money was paid. He added that:

> 'Forms C' seldom if ever signify more than that fact, and the sooner they are abolished as evidence of anything whatever, the better. I have now in my possession forms C actually filled in with facts which did not occur till two months after the date when they were sworn, and I look on them as mere cloaks for fraud and dishonesty.[14]

The Barton commission may well have been a catalyst for an overdue reform of the way the trust commissioner's role was conducted. The independent office was phased out. After 1 July 1885, the chief judge and the judges of the Native Land Court were to be the only trust commissioners. According to a notice in the *Gazette*, deeds requiring to be certified, or caveats against the granting of any certificate, were to be forwarded to the registrar of the Native Land Court of the district within which the land being alienated was situated.[15] The Native Lands Frauds Prevention Act 1881 Amendment Act 1888 laid down that the investigation of the points required by the Frauds Prevention Act should take place in an open court. The role was absorbed into the Native Land Court's responsibilities. In 1894, the post was abolished.

Other important changes placed a greater burden of responsibilities on the Native Land Court. From 1889, the Native Land Court was to deal with all investigations of applications for the removal of restrictions. Recommendations from the court would go forward for the Governor's consent. Without extra staff, it is hard to see how the court could carry out these duties.

Barton had expressed enormous frustration at the delays he had faced as special commissioner in 1885. He had tried to insist that witnesses attend hearings to investigate details of transactions involving inalienable lands. He had not always had success. As a Native Land Court judge, he apparently refused to carry out the

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13. G E Barton, report, 10 November 1886, NO 86/3674, MA 13/28, NA Wellington
14. Ibid
15. 'Native Lands Frauds Prevention Act 1881', 9 June 1885, *New Zealand Gazette*, 1885, no 38, p 760

requirements of the current Act, the Native Land Court Act 1886 Amendment Act 1888, because he saw them as impossible. His reasons were practical ones. There are no grounds for believing that Barton had doctrinaire objections of the sort which had been the source of Fenton's refusal to carry out sections of the 1873 Act.

At the Waipiro Court in 1889, an appeal was made against absolute restrictions which Judge Scannell had placed over land in the previous year. The applicant's lawyer argued that the judge had omitted to follow the 1888 Act, which provided that the land court inquire into the sufficiency of the land holding of the owners. Barton and Von Sturmer decided the 1888 Act was unworkable and granted the application:

> The rehearing Judges of the Native Land Court cannot be expected to close their Court and occupy themselves in making active enquiries all over the country respecting the other lands (if any) owned by these 173 Natives and respecting the restrictions (if any) imposed upon such other lands.[16]

The implication from this passage was a radical one. By this interpretation the onus was now on the court to prove that Maori had no other land before a restriction might be placed on alienability. Without further research, it is difficult to say whether practice was changing generally. I have not found evidence that courts were generally following this course. On the other hand, minute books often record little beyond the details required to furnish a title.

In reference to the partitioning of land held on memorials of ownership, and the subsequent issue of Crown Grants, the Supreme Court gave the opinion that restrictions were only to be imposed if owners had not already a sufficiency of inalienable land for their support. The judgment in this case went against Wi Pere, who was in a minority of owners trying to keep part of a block inalienable.[17] Richmond cited section 13 of the Native Land Court Act 1886 Amendment Act 1888:

> The Court, on making an order under sections twenty, twenty-one, thirty-one, or thirty-three of the said Act, [the Native Land Court Act 1886] is hereby empowered and directed to ascertain as to each owner whether he has a sufficiency of inalienable land for his support, and shall, out of the land the subject of any such order, declare to be inalienable so much and such parts as shall be necessary for the support of any owner not shown to be possessed of such sufficiency, and such part or share shall be inalienable accordingly.

It was a confusing situation, with the judgment arising out of particular circumstances, but the implication seems to be that restrictions in general would be imposed only when the court considered the owners had not already a sufficiency of inalienable land for their support. If this was so, the 1888 Act was indeed a turning point. There had always been uncertainty about sufficiency of other inalienable land held by owners, but since the days of Judge Munro in Hawke's Bay

16. G Dallimore, 'The Land Court at Matakoa', MA thesis, University of Auckland, 1983, p 151
17. *Re Puhatikotiko Block*, Court of Appeal, 19 October 1893, typed copy, J 1, 1894/173

in the later 1860s, that had not prevented restriction orders if owners had requested them.

The situation does not however appear to have been completely under control. Inconsistency had always been an element in the removal of restrictions, even when the Crown had attempted to apply rules to the assessment of applications as they passed through the Native Department. This inconsistency was to be compounded by the diverse approaches of the judges of the Native Land Court. The law by now was hopelessly tangled.

In 1890, by section 3 of the Native Land Laws Amendment Act 1890, it became no longer necessary for all the owners to agree to the removal of restrictions under section 6 of the Native Land Court 1886 Amendment Act 1888. This was followed by Acts in 1892 and 1893, making 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 which had occurred in the removal of restrictions. All these undermined the principle of inalienability.

From 1894 onwards, section 52 of the Native Land Court Act 1894 had a major effect on the pace of the removal of restrictions. The Native Land Court's jurisdiction included placing restrictions on alienation, and varying them or removing them. The court was now able to remove restrictions on alienation if at least one-third of the owners agreed, replacing the requirement that it should be with the decision of the majority. The requirement that every owner have sufficient other land for their support could be met, as before, by partitioning.

After the Native Land Act 1888, even an absolute restriction had been removed by section 5.[18] Restrictions were removed on a larger scale after the 1894 Act.[19] It is impossible to tell what was behind this. The pressure from the Crown to buy lands for Pakeha farmers has already been mentioned but, as in the past, the applicants' particular circumstances were also relevant. By this time, the state was giving financial assistance to Pakeha farmers. Maori farmers were not able to draw on cheap capital to develop land. It is at least worth considering whether some the owners of previously inalienable lands were realising on this property in order to gain funds to develop other lands. For the first time, Maori Land Councils were bringing blocks forward for the removal of restrictions.

A large number of small sections were being made alienable. These were both urban and rural. What were the options for their owners? Possibly there was a clue in the account Wi Pere gave in 1898 of the sales of small pieces, arguing that such sales should be prohibited, even if the land was held on individual titles under fee simple. He stated:

> this system of selling and buying Maori lands is the thing that makes us cry out as we continually do. A man sells all his land and then comes crying to the Government to give him some more. Why, there are some old Maoris in the Waikato who at the

18. There appears to be only one case involving the removal of restrictions from absolutely inalienable land. 'Return of Cases in which Restrictions on Alienation . . . have been removed by the Governor, from 1 April 1888 to 31 March 1889', AJLC, 1889, no 5, p 2
19. 'Applications respecting Native Land since thepassing of "The Native Land Court Act 1904"', AJHR, 1905, G-4

> present time have actually sold their land – divested themselves of their interest in their land – so that it will be competent for them to become applicants for the old-age pension. Those are the kind of people whose actions annoy me very much.[20]

This was not a new pattern for old people whose land was on long-term leases or who had no heirs, though eligibility for the pension was a new consideration. Evidently, these old people did not rely on being supported by the community around them. Although according to the law no seller was supposed to be left landless, the pension might be seen to replace land as the source of a 'sufficient' income.

An immensely long and detailed return was prepared at the request of W F Massey, showing the working of the 1894 Act up until 1905.[21] Although most of the 690 applications that had been considered in that 10-year period were passed, 126 of the applications were turned down, which was about one-fifth. As far as acreages went, 452,453 acres became alienable, but 95,372 retained their restrictions, representing one-fifth also of the total acreage. Also, the process itself was a slow one through the court, and there was a long list under the heading 'Applications not yet dealt with'.

These Acts marked a turning point. As restrictions were progressively eroded, there was a shift in emphasis. Other approaches emerge from Maori initiatives as more likely to protect Maori landownership.

6.4 THE NATIVE LAND COURT JUDGES AND THE LAW

'The law as to removal of restrictions is in dire confusion and should be amended.' These words are written on the outside of a file containing a number of awkward problems which had arisen out of judges' experiences with the removal of restrictions on alienability from 1890 to 1894.[22] Some light is thrown on the court itself, in the course of discussing the law. One particular query led to the conclusion that a number of the applications granted by the court in the first three years of the operation of the Act of 1888 were not technically in order.

A sequence of notes on the removal of a set of restrictions gives a glimpse into the extent to which confusion had set in. Judge Mackay had expressed some scruples about the court's ability to deal with Tutaehaohao 5, for which restricted titles had recently been issued on partition.[23] All the owners now requested the removal of restrictions. The original block had been made inalienable in 1888, and according to the wording of the law, the consent of the majority of the owners of the original block was required. Though the court could deal with titles that existed in

20. AJHR, 1898, I-3a, p 17
21. 'Applications respecting Native Land since the passing of "The Native Land Court Act 1904"', AJHR, 1905, G-4
22. C J Haseldean, memo on cover of file, 24 February 1894, 'Removal of Restrictions', J 1, 1894/f173, NA Wellington. My attention was drawn to these papers by the generosity of a fellow researcher, Suzanne Woodley
23. A MacKay to the Under Secretary, Native Department, 27 December 1892. A copy of the original memo of 11 November 1890 is with the attached papers. J 1, 94/173, NA Wellington

1888, Mackay did not believe that it had authority to proceed with the removal of restrictions on titles recently issued by the registrar.

The chief judge, H G Seth-Smith, thought these questions were:

> more for the Governor and the Land Registry Department than the Court. The Court is not empowered to make any recommendation, but only to inquire and report whether the provisions of Section 6 of 'The Native Land Court Act, 1886, Amendment Act 1888', so far as they are applicable are complied with. These provisions since the amendment made in 1890 seem to have narrowed down to the question of sufficiency of other land.[24]

The very experienced T W Lewis, now Under-Secretary of the Native Office, thought the points raised by Mackay should be dealt with by the Solicitor General. The advice given was that the Governor could not be asked to do anything with restrictions imposed recently by the court. It was suggested that as the court had imposed them, it should be able to vary or annul them. This case 'certainly illustrates the uncertain state of the law in respect of consents to removal of restrictions'.[25]

As Mackay then pointed out, it was not the court itself, but the Registrar General who had issued the new title from the parent title. The Registrar held that the court had no power to interfere. The only way a new title could be issued would be after the removal of restrictions by an Order in Council. The first phase of the sequence ends with the chief judge writing:

> It is quite clear to my mind that the Court has no jurisdiction in this matter. If therefore the Governor cannot remove them, they cannot be removed at all.

Lewis noted on this 'File till the question comes up again.'[26]

Mackay continued to feel that it was not right for the court to confine itself to finding out what other land the applicants had. He commented:

> I would beg to point out that the law is both faulty and misleading, faulty because it places the Court in an anomalous and helpless position, by making it a party to the performance of informal acts, and misleading because it is supposed that a reference to the Court is the only requisite to put matters in trim for the removal of the restrictions, whereas the Court is not empowered to make any recommendation, or draw attention to any informality in the applications referred to it.[27]

The question was passed on to the Solicitor General. The answer he gave was complicated and full of contingencies. His final suggestion was that the question, in itself a simple one, should be settled by further legislation.[28] At the same time, G B Davy, who had replaced Seth-Smith as chief judge of the Native Land Court, gave a conflicting opinion.[29] As he wrote to the Department of Justice:

24. H G Seth-Smith to A Mackay, 9 December 1890, J 1, 94/173, NA Wellington
25. W S Reid, 5 January 1891, (copy) in minutes attached to J 1, 94/173, NA Wellington
26. Seth-Smith, 28 January 1891 (copy), T W Lewis, 6 February 1891 (copy), J 1, 94/173, NA Wellington
27. A Mackay to the Under Secretary, Native Department, 27 December 1892, J 1, 94/173, NA Wellington
28. Memo, 22 March 1893, J 1, 94/173, NA Wellington

> This question of removal of restrictions is an important one as affecting the validity of titles. It is also one in which the public has a right to expect consistency of action. It will not do for applicants to be bandied about between your department and the Native Land Court.[30]

The public included the owners, who had been waiting two years for a decision.

There were other possible complications which were not discussed. How thorough could the Native Land Court be in establishing that all owners had other land sufficient for their support before agreeing to remove restrictions? In law, this question had the potential to invalidate a transaction. It did not appear to concern judges or officials. There were serious consequences if a title was not valid. But the consequences were also serious if Maori alienated land they needed. From the point of view of the Crown's responsibility to protect, this is the major issue.

Further research is needed, perhaps into the papers of individual judges, to establish whether this aspect of the question was discussed at any length elsewhere. It was not raised as a problem in this set of documents. Yet, looking back, the court's ability to establish whether or not a Maori owner had adequate property elsewhere appears to be the major weakness in the process. A conscientious judge such as Alexander Mackay required documentary evidence of ownership of land and shares in land from applicants for the removal of restrictions.

Differences among Maori owners led to the next major case in the file. The Puhatikotiko block in Gisborne, to which 70 owners had been awarded a memorial of title, was at the centre of a dispute over alienability.[31] (This case has been noted above, in connection with its interpretation of section 13 of the Native Land Court Act 1866 Amendment Act 1888.) Some of the interests had been acquired by a European, who applied under the Native Land Validation of Titles Act 1892 for a title. Judge Barton decided that partition would be required. In mid-1893 the block was divided, with an agreed section going to the buyer, while the owners who had not sold arranged their individual shares among themselves.

After the partition had been made, the counsel for Wi Pere applied to have restrictions contained in the memorial of ownership continued on the land of the non-sellers. He argued that the Validation Act gave the court no power to alter restrictions. A large number of other owners objected to these restrictions, and offered to show the court through their counsel that they had other inalienable lands sufficient for their support.[32]

The case went to the Supreme Court. It was decided that the conditions restraining alienation on every Memorial of Ownership could not properly be called restrictions. They were brought to an end by the issue of a Crown Grant on partition. It was then declared that a partition under section 7 of the Native Land Validation of Titles Act 1892 was a partition under the Native Land Court Act 1886. At this point, Judge Richmond made it clear that restrictions were to be

29. G B Davy memo to C J Haseldean, 5 April 1893 (copy), J 1, 94/173, NA Wellington
30. G B Davy note to C J Haseldean, 25 April 1893, J 1, 94/173, NA Wellington
31. G E Barton, 20 July 1893, J 1, 94/173, NA Wellington
32. Ibid

imposed only if the court considered that owners had not already enough inalienable land for their support.[33]

Was there no longer any legal path for Wi Pere as an owner among a minority who wished to retain restrictions? In another context, a little later, Paratene Ngata appears to be saying that this was the case for him.[34] Did the law mean in effect that there was no way in which limitations could be placed on alienability if owners had a sufficiency of other land? It does indeed seem to be further evidence that restrictions had been greatly weakened. Restrictions had been requested in the Native Land Court and placed over communal or tribal lands in some districts. There was no longer protection for those owners who wished to retain such land in economically viable blocks.

The third case, that of Aotea 5, was about a hair-splitting definition of the word 'land' rather than a matter of either principle or policy. It was sufficiently significant to cast doubt on whether or not the court could act. It is worth quoting from a memorandum written by H G Seth-Smith, who was serving again for a short term as chief judge. He both begins and ends this document by stating that there was utmost confusion over who could remove restrictions. His opinion was that there were cases where it was doubtful that any authority existed that was capable of removing them:

> In the Aotea no 5 case the restriction was in the common form prohibiting certain alienations without the consent of the Governor, and the Chief Justice expressed his opinion, that, although the Governor had power to remove restrictions by Order in Council under Section 5, the safer course would be for him to give his consent to the particular alienation, to effect which the removal of the restrictions was necessary. So far, therefore as land held under Memorial of Ownership or Native Land Court Certificate is concerned, where the restriction is one of the same class as that imposed on Aotea no 5, it seems that the Governor should be advised to give his consent to the particular transaction and not to exercise the power conferred on him by Section 5.
>
> Where the restriction, contained in a Memorial of Ownership or Native Land Court Certificate is absolute, that is to say does not reserve the power of consent to the Governor, the effect of the decision in Aotea 5 is that the Governor may remove restrictions under Section 5.[35]

This document is an illustration of how layer upon layer of laws with amendments had been put in place to facilitate a process or to close a loophole. It is a document primarily concerned with points of law, not policy. Nevertheless, many of these laws had initially been intended to protect Maori interests. The more recent ones while still intending to be fair, were aimed at removing or limiting the degree of protection given to Maori land owners by 'reforming' the category of inalienability.

33. Puhatikotiko Block judgment in the Court of Appeal, 19 October 1893, (typed record) J 1, 94/173, NA Wellington
34. At the Native Affairs Committee in 1898, Paratene Ngata described plans for the development of communally owned land. he said that the lack of legal prtection was the 'present principal grievance' of Maori. 'There is no law which will enable them to have their lands made inalienable.' 'Report on the Native Lands Settlement and Administration Bill', AJHR, 1898, I-3a, pp 59–60
35. H G Seth-Smith, 'Memorandum for the Under Secretary', Justice Department, 29 January 1894, AJHR, 1898, I-3a, pp 59–60

6.5 THE REES–CARROLL COMMISSION OF 1891

In evidence given to the Commission into the Native Land Laws, 1891, not a great deal is said about restrictions, but what is said is enough to suggest that inalienability had by then become a contentious issue. In the course of making a general case that the Crown should be privileged as a purchaser, T W Lewis drew the attention of the commission (and all those members of Parliament who read the printed evidence placed before them) to the question of restrictions:

> Another matter is the difficulty the Crown, in common with private parties, is placed in by the existing legislation with regard to the restrictions upon the alienation of native lands. The Crown stands in exactly the same position as private individuals in respect of these restrictions. The principle that the Crown is not affected when it is not especially named does not apply, because the restriction is not upon the Crown purchasing, but upon the individual selling: and provision should be made by the Legislature that land under restriction may be sold to the Crown.[36]

Lewis argued that what made the Crown unique as a purchaser was that it never got away from its responsibility. If the purchase was made improperly, if there was any hardship or grievance, then complaints could always be brought to the Crown. For that reason, he argued that restrictions that were reasonable in any other case were not reasonable against the Crown:

> Carroll: Even if the Crown is, you say, the evil-doer, the Native will always look to the Crown for relief?
>
> Lewis: Undoubtedly. The Crown is always amenable to Parliament. . . . But, apart from that argument, seeing that it is a very common thing now for lands to be placed under restriction – as I shall illustrate presently by returns I shall show the Commission – it follows that, if the Crown is buying a large block subject to these restrictions, the purchaser is practically compelled to break the law, and buy in defiance of the restriction, and consequently with an unsatisfactory title, or is prevented from purchasing at all, which is extremely unsatisfactory where the land is required for settlement.[37]

Lewis's evidence is important, for several reasons. He stated that placing land under restrictions had become 'a very common thing now'. The emphatic position of the adverb 'now' indicates that this has been a recent development, rather than a slow and cumulative one. But however that phrase is read, the use of restrictions was perceived as having a significant impact on the Crown's access to Maori land. Did restrictions have the capacity to 'lock up Maori land'? In these years, the merest suggestion that this was happening was enough to trigger alarm among Pakeha politicians, with their constituencies of farmers and would-be farmers.

Lewis's statement contained a strong suggestion that in order to buy land, the Crown was currently acting illegally. His conclusion was not that the Crown should keep to the law, but that the law should be changed. In the following year this was

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36. 'Report of the Commission appointed to enquire into the subject of the Native Land Laws', AJHR, 1891, G-1, p 146
37. Ibid

done. By the Native Land Purchase Act 1892, a restriction on the alienation of any native land could be wholly or partly removed by the Governor, a provision which operated only in favour of the Crown.[38]

Lewis had a number of other interesting things to say. Like Mackay, he thought the Lands Frauds Prevention Act a waste of time, counter-productive and costly to Maori. Its inquiries could be made in the Native Land Court.[39] This suggestion was taken up in 1894. This saved time and money, but it could hardly have overcome the flaws in the procedure. He stated that the Crown could be trusted to make reserves and to ensure that Maori had plenty of other land before making a purchase. This was an historically ill-founded statement. He was aware that, in practice, making reserves was a haphazard business:

> Rees: Has the Crown any fixed areas on which to gauge what the Maori should remain possessed of?
>
> Lewis: No; there as been no particular area fixed as a standard, but I should certainly say that if a Maori was reduced to 50 or 100 or even more acres, and it was known that that was all the land he had, assuming that it was land of fair quality, he should not be allowed to dispose of any of it.[40]

In spite of making a point of attacking restrictions on alienability, as hampering the Crown, he volunteered the information that under the present law there was no such thing as absolute inalienability.[41]

On what scale was Maori land tied up by restrictions? A search in National Archives for the figures which Lewis took to the commission has not so far been successful. The return presented to Parliament in 1886 showed that the total acreage that had passed through the Native Land Court and was held by Maori as inalienable was 1,872,605 acres. Even without any further increase, this was an indication that a significant amount of land was affected, enough to pose a barrier to acquiring lands for Pakeha settlement. The Auckland district had just over 700,000 acres of the total, and the Gisborne district's share was nearly 500,000 acres.[42]

Though other witnesses do not make lengthy statements on this topic, several mention restrictions. Lawyers complained that they were too prevalent, but were divided on their views about the difficulty of having them removed. E H Williams, in Napier, complained about the legal complications of dealing with older titles, rather than the extended use of restrictions to which Lewis had drawn attention:

> Williams: . . . there are a great many blocks especially under the old titles that are restricted.
>
> Rees: Under the Act of 1865?
>
> Williams: I suppose so. The machinery for getting the restrictions removed is, I think, too cumbrous. You have to get a majority of the Native owners, you have to

38. Section 14, Native Land Purchase Act 1892
39. Ibid, pp 156–157
40. Ibid, p 158
41. Ibid, p 156
42. 'Return of Land Possessed by Maoris, North Island', AJHR, 1886, G-15

> apply to the Native Land Court, and you have to supply the Government with a copy of the succession order for every deceased Native. These regulations are all laid down in the *New Zealand Gazette*, but I am putting it simply on the ground that the expense is too much.
>
> Rees: The expense, and trouble, and delay?[43]
> Williams: Yes.

What he described were the standard safeguards for removing restrictions placed on certain titles issued before 1888. Rees thought they were a residue from the 1865 Act, under which there was no obligation to impose any restrictions. Rees himself believed that the existing Maori land law had become an accretion of layer upon layer of pointless and crippling rules. He dismissed a relatively recently introduced law as one of those antiquated rules. James Mackay, on the other hand, while commenting that restrictions were too readily put on, thought that they were also being dispensed with too readily, and saw this as a recent development.

Mackay was then in Auckland, but he had nearly 40 years experience of Maori land purchasing in a number of districts, as well as a term as a land court judge. He knew that some people wished to sell land, but that they needed to be confident that they could retain land, too. He held a familiar view. All would proceed smoothly once 'sufficient' reserves were set aside and made secure. Maori then would sell the rest of their land. His opinion on inalienability is worth quoting:

> Formerly, under the Native Land Acts restrictions could be put in the certificate of title. There is now no such safeguard now under the Act. The Natives ask for a piece of land to be made inalienable, and it is done. But a few persons wish to get this restriction taken off and it is done. It only requires them to make the application and to state that all are agreed. The application was formerly made to the Governor, but is now made to the Native Land Court. There is no safeguard against fraud, except when the Natives go before the Trust Commissioner. He would ask them if all the parties interested had other lands, and in nine cases out of ten, they would lie and say they had lands elsewhere. Many an old Native who has no children will say, 'I am sick now: I am going to eat this land, and I am not going to leave it to the rest of the tribe.' Of course, it was to provide against this sort of thing that it was tried to impose restrictions.[44]

There are points here which relate to other aspects of the topic, for example his opinion of the role of the trust commissioner. His concluding remarks about the object of restrictions are debatable. If old people had no direct heirs, income from shares in other lands, and no other means of support, the Crown accepted that they would 'eat the land'. Though this meant the total land stock of a hapu would shrink, it was not the primary concern of Crown policy to prevent this happening. Unless there were special reasons (for example, the land was an absolutely inalienable reserve, or the transaction was grossly unfair, or it was suspected that other people would take the money), restrictions would probably have been removed at any point in the period under survey.

43. 'Report of the Commission . . .', 1891, p 119
44. Ibid, p 43

6.6 THE LATE 1890S

Two major changes which influenced the handling of the inalienable lands were the re-imposition of Crown pre-emption and the growing recognition of Maori councils and land boards in the legislative programme. The character of politics was changing too. The corruption of former years was being replaced by a Government which was more efficient and fairly ruthless in its policies for 'opening up' Maori land.[45]

The other important change was in response to Maori wishes for greater control over their lands. Though the thrust of policy was in the same direction as ever – to identify the land that Maori needed and regard the rest as surplus – laws were passed to provide for greater participation by Maori bodies.

This was reflected in the terms which now came into the law. By the Maori Lands Administration Act 1900, 'papakainga land' was defined as inalienable reserves to be set aside for the occupation and support of Maori (see section 21). In each Maori Land District, there was to be a Maori Land Council, with the duty of working out the amount of land needed by each man, woman, and child. Papakainga was to be absolutely inalienable. The consent of the council was needed if an owner wished to exchange their land, or if sold, the council might use the purchase money to buy land to replace it. No sale of other land could take place unless the owner could produce a papakainga certificate, to show that he or she had sufficient land left for their support. In fact, this requirement was watered down almost at once, and various documents from other sources, such as the land court, were accepted.

It is significant, though, that in this sequence inalienable land sufficient for each individual was to be identified before the owner was allowed to sell other land. Though now far further down the road to complete individualisation, these provisions recall the sequence which McLean had envisaged in 1873, to set aside inalienable land for each community member before any sale occurred:

> The Act was supported by all Maori members as a better system of administration than that provided under the Native Land Court Act 1894, however in operation it turned out to be largely unpopular with Maori who did not want to delegate control of their lands and it was substantially modified by the Maori Land Settlement Act 1905.[46]

Though this law seemed to come closer to achieving what had been attempted since the beginning of the colony, it was no more successful than its predecessors in fulfilling the hopes of its framers.

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45. For the historical context, see R C J Stone, 'The Maori Lands Question and the Fall of the Grey Government, 1879', NZJH, vol 1, no 1, 1967, pp 51–74; T Brooking, '"Busting Up" The Greatest Estate of All: Liberal Maori Land Policy, 1891–1911', NZJH, vol 26, no 1, 1992, pp 78–98
46. H Bassett, R Steel, and D Williams, *The Maori Land Legislation Manual*, CFRT, Wellington, 1994

6.7 THE LIMITS OF PROTECTION

Time has not permitted a fuller inquiry into records for the 1890s at National Archives. Applications continued to pass through the Native Office, since the consent of the Governor in council were still required to remove certain categories of restrictions on alienation. A sample of one box in the Justice Department records in 1894 suggest that there were still great differences in the background of the applications.

One file contains an example of how an apparently straightforward case proceeded. Printed forms filled in and signed had been forwarded from the court, stating that a public inquiry had been made, and that the court was:

> satisfied that, apart from the said land, the owners thereof have and each of them has other land or shares in other land, (the title whereto has been determined by the Court,) belonging to them in their own right and sufficient for their maintenance and occupation.[47]

With this procedure, there were problems which were to do with the Native Land Court, notably that all owners should be notified and that the case should be heard at a convenient location. These were not specific to the removal of restrictions.

Was it always easy and straightforward? A file in the same box suggests not. Applications could still give rise to long and complicated inquiries, and end up with the Crown exercising a paternalistic role by refusing both would-be sellers and pressing buyers. One example was a very lengthy case which did not come before Barton as commissioner in 1886 because the Government had no intention of allowing it to proceed. The file went back to 1883, when Kahui Kararehe, writing from Taranaki, wanted to sell restricted land in order to develop other property. He asked for help as well with food. Bryce grumbled about people wasting time and money at Parihaka, but ended up writing, 'I will consent to supply him with half a ton of potatoes for seed, but he cannot be permitted to sell Reserves.'[48]

After the illness and death of his two sons, the applications became more pressing. With bills for the doctor, the hospital, medicine, bakers, butchers, house rent in New Plymouth, food for the tangi, and coffins for his children, his debts amounted to £153 4s 4d. He proposed to sell 99 acres of land to pay £99 for a vault. Restrictions were removed on a small section of which he was sole owner, with the proviso that it could be sold only if the price was raised. In response to further urgent applications to sell a reserve, the Public Trustee noted that he had written to Kahui Kararehe to explain the 'the best interests of the Native owners require the preservation of this reserve from alienation as the law also requires'.[49] Were there more helpful options available? Did the Public Trustee have the power to advance funds, had he chosen to do so? The Government, with great reluctance, allowed a part of the applicant's property to be sold to meet debts only after a very long series of letters and interviews.

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47. R Ward, Native Land Court, Opunake, 2 December 1893, J 1 479, NA Wellington
48. 12 October 1883, J 1 1894/550
49. 17 May 1894, J 1 1894/550

The two authorities – the Native Minister and the judges of the Native Land Court – could still be seen in some sort of opposition in the later period. Although forms from the court were addressed to His Excellency the Governor of New Zealand, applications might still be deflected by the Government.

One of these cases appeared as a printed parliamentary paper in 1898.[50] John McKenzie, as Acting Native Minister, refused to forward an application for the Governor's consent from a fellow member of the House of Representatives. It involved the removal of restrictions from a section in Patea for which the offer of £140 was well below the land-tax value of £365.

As far as the applicant was concerned, land-tax values had little bearing on this case. McKenzie's interception was an act of 'contemptible revenge':

> You seem not to have been advised that the exercise of discretion which is vested in the Governor in such a matter should not be determined by the caprice of ministers; still less should it be made the ground for the display of unworthy motives . . . apart from the suggestion of any real or imagined inadequacy of the consideration that might have struck you, there was the plain line of duty on your part, as Minister, to refer the application for the report of the Native Land Court.[51]

Hutchison then went on to quote the exact words of section 52 of the Native Land Court Act 1894, where it was stated that restrictions might be removed or varied only by the Governor on the recommendation of the court. McKenzie did not agree that the minister's duty was merely to refer applications to the court and act on the court's recommendations.

The applicant countered by arguing that he knew this was not the usual practice from his own experience with other applications. Hutchison claimed that the normal procedure was an inquiry in open court upon sworn testimony.[52] McKenzie responded by indicating that he preferred to rely upon his own knowledge of the practice of the department.[53] Hutchison could hardly have supported his case under any testing scrutiny, and he had apparently counted on the accommodating system with which he was familiar.

Mackenzie wrote:

> so long as I continue to act for my colleague the Native Minister, I shall require to be furnished with the fullest particulars regarding any proposed transaction in Native lands that may be brought before me to deal with . . . the utmost caution is needed to protect the interests of the Native owners of restricted lands.[54]

Mackenzie's approach showed that the Crown was prepared to intervene protectively, in the case of an individual owner, with a section of 280 acres. What this case also illustrated was the limited level at which protection was seen as appropriate.

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50. 'Removal of Restrictions upon the Alienation of section 569, Patea District', AJHR, 1898, G-9
51. G Hutchison, MHR to the Hon the Acting Native Ministoer, 9 August 1887, 'Removal of Restrictions upon the Alienation fo section 569, Patea District', AJHR, 1898, G-9
52. Hutchison to McKenzie, 16 August 1897, AJHR, 1898, G-9
53. Mackenzie to Hutchison, 17 August 1897, AJHR, 1898, G-9
54. Mackenzie to Hutchison, 17 August, AJHR, 1898, G-9