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Te tango whenua – Māori land alienation

by Richard Boast

Land has been alienated from Māori in a variety of ways. Some was sold to the government or other buyers, often for very low prices; other areas were confiscated after the New Zealand wars and used for Pākehā settlement. The Native Land Court converted customary title to freehold, often leading to further losses of land.

Land tenure and alienation

Māori land tenure and Pākehā law

Māori land tenure includes complex overlapping rights over both land and sea, with a number of methods of acquiring title. English common law recognises indigenous customary titles through aboriginal title, which means that customary tenures survive until the new sovereign power extinguishes them lawfully.

However, in New Zealand it was not clear whether the normal English law applied. Some judges and legal scholars believed that when the Crown gained sovereignty over New Zealand it also acquired full legal ownership of all land in the country – or of those areas regarded as 'waste'. However, the practice of the New Zealand government was that Māori title extended over the whole country, and had to be extinguished – usually by purchase – before it could be granted to new settlers.

Today New Zealand courts clearly accept that the common law of aboriginal title is also part of New Zealand law. This accords with government practice over the course of New Zealand history.

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Alienation of Māori land

Māori lost land to the Crown and private owners through a wide variety of methods. The dominant acquirer, by purchase or otherwise, was the Crown, even after the first Native Lands Acts were passed in 1862 and 1865, setting up the Native Land Court to investigate Māori land titles.

In the 2000s Māori land alienation is a central subject of investigation and reporting by the Waitangi Tribunal, and a major focus in the process of redressing historic grievances.

Pre-treaty transactions

Early transactions

Alienation of Māori land began before British sovereignty was proclaimed over New Zealand in 1840. Missionary organisations, private settlers and New South Wales land speculators all entered into various kinds of land transactions with Māori. For example, Te Rarawa chief Nōpera Pana-kareao arranged with the Church Missionary Society for 1,000 acres (405 hectares) to be set aside at Kaitāia for the mission. There were numerous similar arrangements wherever missions were located.

Commercial arrangements made land available for cutting timber or building wharves and jetties. Some Pākehā settlers, whalers and businessmen married to Māori women arranged with local chiefs to set land aside for their families. There were also many speculator transactions. New South Wales businessmen made all kinds of deals with Māori, probably in the hope of obtaining equitable (or 'weak') interests which could be converted into 'strong' legal or Crown-granted interests after British sovereignty was proclaimed.

Māori view of 'sales'

New Zealand was still governed by Māori customary law, and Māori would have viewed transactions within the framework of their own culture and expectations. They may have seen many deals as a part of entering into reciprocal or shared relationships – not really 'sales' as the term is understood today. Some chiefs allowed Europeans to settle on a piece of land in exchange for goods, but did not see this as granting them absolute ownership – they saw it as a transfer of particular rights which remained subject to Māori rights to the land.

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The New Zealand Company

The New Zealand Company was organising planned settlements in New Zealand. Shortly before the Treaty of Waitangi was signed in 1840, representatives of the Company – William Wakefield and others – entered into transactions with Māori at Port Nicholson (Wellington Harbour), Porirua and Queen Charlotte Sound. The Company was acting on its own behalf, with no official backing.

Investigating pre-treaty purchases

After British sovereignty was proclaimed in 1840 following the signing of te Tiriti o Waitangi, the government set up processes to investigate pre-treaty purchases. If they met certain requirements, pre-treaty 'purchasers' could get a grant from the government giving them legal title to at least some of the land they claimed to have acquired from Māori.

New Zealand Company purchases were all investigated by a special commissioner, William Spain. He accepted some of the company's claims to have purchased land (for example at Wellington and Nelson) and disallowed others (including at Porirua and in the Wairau Valley). Where a claim was allowed, the governor then issued the New Zealand Company with a Crown grant, allowing it to complete the many transactions it had embarked on with private settlers. Both the Nelson and Wellington grants exempted Māori cultivations, villages and burial places. Māori were also entitled to the 'tenths' reserves, reflecting Wakefield's earlier plans to set aside one-tenth of all the surveyed sections in New Zealand Company settlements for Māori.

Crown pre-emption

For most of the period from 1840 to 1865 land acquisition from Māori operated under the doctrine of Crown pre-emption – only the Crown could extinguish Māori customary title to their lands. Private individuals could not buy land directly from Māori. This was standard practice in all British colonies, and in New Zealand was set out in Article Two of te Tiriti o Waitangi and in section two of the Land Claims Ordinance 1841.

Some historians have noted that the pre-emption rule allowed the government to buy land cheaply from Māori and then on-sell it to settlers at a higher price, with the profits supporting the costs of immigration by British settlers. But probably pre-emption was introduced simply because it was standard practice. It was also intended, at least in part, to protect Māori from private European purchasers.

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Purchase under pre-emption

In this period about two-thirds of the entire land area of New Zealand was 'bought' from Māori, using deeds of sale. Māori would sign a deed (essentially a formal sale contract), usually written in both English and Māori. This would record that a certain area had been purchased by the Crown in exchange for a cash payment and the right to retain certain reserves or access to resources such as fish. Some of these deeds related to huge areas, sometimes thousands of square kilometres, while others were for small blocks of just a few hectares.

Using this method the government acquired virtually the whole South Island and substantial areas in the North Island, especially close to Auckland and Wellington. The land was then transferred to the various provincial governments, for sale and grant to private settlers. Ngāi Tahu of the South Island lost their very large landed estate to the Crown by a sequence of deeds between 1844 and 1864. Other important deed purchases were in the northern South Island, Porirua, parts of Hawke's Bay, the Rangitīkei region, Auckland and Northland.

Implications of selling land

Crown policy on these purchases was set by the colonial governors, especially George Grey and Thomas Gore Browne. The head of the Native Land Purchase Office, Donald McLean, persuaded many chiefs to sell land to the government at low prices by arguing that Māori would gain economic advantage from British settlement.

Whether Māori fully understood the implications of selling land to the Crown is unclear. In areas such as Hawke's Bay where Māori were unfamiliar with buying and selling land there was very little understanding. The situation may have been different in areas such as Auckland, where Māori were more accustomed to interaction with Pākehā.

Māori who sold land to the government usually did so on the basis that they would retain certain areas where the people could continue to live. The deeds were not always clear as to the size and location of these reserves, and many turned out to be very small, inaccessible, and insufficient to support local Māori. This was particularly the case with the Ngāi Tahu deeds, where the government's failure to set aside adequate reserves created a long-standing grievance which was not resolved until the Ngāi Tahu claim settlement in 1998.

Raupatu – confiscations

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Substantial areas of Māori land were confiscated by the government after the New Zealand wars of the early 1860s. On 5 May 1863, Premier Alfred Domett sent a memorandum to Governor George Grey proposing that Māori in a 'state of rebellion' have their lands confiscated as a punishment. At first confiscation was intended to be relatively restricted, but it gradually became more and more elaborate. Land was confiscated both from tribes who had rebelled against the government and from those who had fought as government allies. It was envisaged that military settlers would be placed on confiscated land.

Confiscations under the New Zealand Settlements Act 1863 and its amendments took place in South Auckland, Waikato, Tauranga, Ōpōtiki–Whakatāne, Taranaki, and the Mōhaka–Waikare district in Hawke's Bay. Confiscations also took place in Poverty Bay under separate legislation.

The biggest confiscations ('raupatu' in Māori) were in Waikato and Taranaki. The effects varied from region to region, but the consequences were very severe for Waikato–Tainui tribes; Taranaki tribes; Ngāi Te Rangi in Tauranga; and Ngāti Awa, Whakatōhea and Tūhoe in the eastern Bay of Plenty.

Widespread confiscation

Confiscation in New Zealand has affinities with British practice in other places, particularly 17th-century Ireland and the southern African colonies. Māori naturally resented the confiscations, and some prominent Pākehā criticised the process from the start. Sir William Martin, the former chief justice, published a paper in 1863 in which he argued that the history of Ireland showed 'how little is to be effected towards the quieting of a country by the confiscation of private land'. All that resulted was a 'brooding sense of wrong'. [1]

Some land returned

Not all confiscated land was retained by the Crown. Much was returned to Māori, although not always to its original owners. Some 'returned' areas were then purchased by the Crown. This happened at Tauranga, where a large part of the 'returned' area was purchased from a group of Ngāi Te Rangi chiefs and vested in the Crown shortly afterwards.

The history of each confiscation became very confused and often generated large quantities of amending legislation, petitions, and litigation in the courts. In 1869 Donald McLean, by that time native minister in the Fox–Vogel government, concluded that the confiscations were nothing but an expensive mistake.

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Footnotes

- William Martin, 'Observations on the proposal to take native lands under an Act of the Assembly', reprinted in Appendix to the Journals of the House of Representatives, 1864, E-2, pp. 7–8. › Back

Establishing the Native Land Court

Native Land Court, 1865

The Native Land Court was established by the Native Lands Acts of 1862 and 1865 to investigate titles to Māori land. As the Māori Land Court, it is still in operation in the 2000s, and its functions and jurisdiction are set out in the Te Ture Whenua Maori/Maori Land Act 1993.

The 1862 act provided for the governor to set up a court or courts, consisting of a panel of Māori jurors or assessors presided over by the local resident magistrate. This first act only operated in a few places, mainly Northland, because of the turmoil elsewhere caused by the New Zealand wars. It was replaced by the much more comprehensive 1865 act, drafted by Francis Dart Fenton, the first chief judge of the court. This established a formal court of record, with salaried specialist judges who would be assisted by Māori assessors.

Abolishing pre-emption

The Native Lands Acts also abolished the doctrine of Crown pre-emption, which had governed the system of Māori land alienation up till then. The preamble to the Native Lands Act 1862 stated explicitly:

> AND WHEREAS ... Her Majesty may be pleased to waive in favour of the Natives so much of the said Treaty of Waitangi as reserves to Her Majesty the right of pre-emption of their lands.

Māori were now free to sell land to private buyers on the open market, provided that the land had first been investigated by the Native Land Court.

Individualising land

The legislation also set up a process by which Māori could convert their land from customary or 'native' title to Crown-granted or freehold title, making Māori land legally analogous to ordinary private land owned by Europeans. The process involved three separate steps:

- First, the Native Land Court would conduct an 'investigation of title' to a particular block of land and determine its owners. This could often be a very lengthy and contested process.
- Once it had made its decision, the Court would issue a certificate of title to the owners.
- The owners then produced their certificate of title to the governor, who would issue a Crown grant for the land. The owners now had a freehold title. They could sell the block, lease it, try to raise money on it, or simply farm it and live there themselves.

End of customary title

The court began investigating titles to Māori land at a rapid rate. In 1872 Chief Judge Fenton reported that between November 1865 and June 1872 the court had issued titles to 5,013,839 acres (more than 2 million hectares), most in the provinces of Auckland, Wellington, and Hawke's Bay.

It was not compulsory for Māori to bring their land before the Native Land Court – they were theoretically free to leave their lands in customary title if they wanted to. In practice, however, virtually all land still in Māori ownership in 1865 was brought before the court and converted to freehold title. Very little land remained held purely on customary title.

The Native Land Court in practice

The operation of the Native Lands Acts and the Native Land Court caused numerous problems, particularly in Hawke's Bay.

Ten owners rule

One problem was the '10 owners rule' of the 1865 act, which limited the number of owners on a certificate of title to 10. The 10 may have been intended as representatives who held the land as trustees for the other owners, but in practice, once they received

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Crown grants they became legal owners.

In Hawke's Bay, many chiefs exchanged their interests in lands for goods such as building materials, fencing wire, cigars, brandy and suits. Some became entangled in debt. In 1867 G. S. Cooper, a government official, reported that Hawke's Bay rangatira (chiefs) were 'allowed, and are indeed sometimes tempted' to take credit 'to an extent almost incredible', and then 'seeing no other means of raising the money, they have begun to sell their lands in every direction'. [1]

A land commission

As a result of pressure from both Māori and concerned Pākehā, a commission of enquiry into Hawke's Bay lands was established by Native Minister Donald McLean in 1873. The commission had two Māori and two Pākehā members and was chaired by Supreme Court Judge C. W. Richmond. He wrote the main report, rejecting Māori claims of fraudulent dealings by Pākehā settlers in Hawke's Bay but strongly criticising the actions of the Native Land Court.

Native Lands Act 1873

In 1873 McLean oversaw the enactment of a new Native Lands Act, with a number of changes. Most importantly, it abolished the '10 owner rule' and replaced it with a new system of a memorial of title, whereby all the owners of a block were entered into the court records. Chief Judge Fenton thought that the 1873 Act was intended 'to do celestial justice, which I always believe to be impossible in this wicked world'. [2]

However, the new law created a new problem. A block with many owners could become difficult to administer, especially as owners' interests passed to their children and grandchildren over the years. This problem has become worse over time and today some blocks of Māori freehold land have many thousands of owners.

The Native Land Court continued investigating titles on a large scale until about 1900. By then it was running out of land to investigate – apart from regions such as the Urewera which had been set aside under special legislation.

Footnotes

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- G. S. Cooper, 'Report on the subject of native lands in the province of Hawke's Bay.' Appendix to the Journals of the House of Representatives, 1867, A-15. › Back
- 'Evidence given by Chief Judge Fenton to the Royal Commission on Native Lands and Native Land Tenure.' Appendix to the Journals of the House of Representatives, 1891, G-1, p. 47. › Back

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Problems with the Land Court

Historians have been critical of the Native Land Court and the Native Lands Acts for a number of reasons. Firstly, land was easily sold to private purchasers, leading to very rapid Māori land loss and consequential impoverishment. Secondly, the court process was very expensive for Māori. Thirdly, the new system of individualised titles had serious impacts on Māori social organisation.

An expensive process

The Native Land Court process was expensive for Māori, both in terms of directly related costs (especially for surveys and court fees) and indirect costs like food and accommodation in the 'court towns' (Cambridge, Hastings, Marton and others) while the cases were heard. According to Wī Pere, a prominent chief from the Gisborne region:

> The expense the Natives are put to is very great. I am aware of instances where the Natives have had to come a long distance to attend the sittings of the Native Land Court held in the neighbourhood of European settlements. In the case of the Native Land Court sitting at Cambridge, the Natives had to come from Taupo and Rotorua, and other distant places. The expenses were so great that the value of the land was absorbed in the outlay incurred in attending the sittings of the Court. A company that supplied the Natives with provisions charged for it, and the amount they had to pay equalled the value of the land. There was nothing left for the Natives. [1]

This situation was an extreme example, but the process was certainly costly. The cost of surveys alone could easily come to 20–25% of the value of a block. At various times the law was changed to allow the court to proceed with a compiled or sketch plan instead of a full-scale survey plan, but this could create other problems (for example, mistakes about the size of the block).

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Attendance

It was a requirement that Māori with interest in land attend the hearings. The law required cases to be notified in advance, but Māori were nevertheless sometimes unaware that cases were being heard involving land blocks in which they had an interest. The court sometimes granted adjournments when certain owners could not attend a hearing, or because people needed time to prepare their cases or to return to their cultivations.

An agent of the state?

The Native Land Court has been accused of being merely an agency of the state and lacking proper judicial independence, but there were sometimes serious clashes between the court and government officials. At Tauranga, for instance, the government told the court that it should not hear and determine cases within the confiscated area. The court heard the cases anyway, and special legislation was eventually passed to keep it out of the Tauranga region. There were also clashes between the Native Land Court and the government in the Gisborne area. Chief Judge Francis Fenton certainly had a strong sense of the independence of his court.

Footnotes

- 'Evidence given by Wī Pere to the Royal Commission on Native Lands and Native Land Tenure.' Appendix to the Journals of the House of Representatives, 1891, G-1, p. 9. › Back

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Crown and private purchasing to the 1920s

The largest purchaser

Although the Native Land Court was set up to encourage Māori to sell land directly to private purchasers, the Crown remained the biggest purchaser of Māori land. From 1870 to 1928 the Crown acquired about 4 million hectares in the North Island, mainly in the King Country, the central North Island, the Urewera, and on the East Coast from East Cape to Napier.

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Private purchasing is much more difficult to quantify, but may have been 1.5 to 2 million hectares in the same period. Much of the land bought by the government was then sold to European settlers, although some areas have stayed in Crown ownership.

Purchase and partition

Land was acquired by the Crown buying up shares in blocks. Once a block had been targeted for purchase, government land-purchase officers would buy as many individual interests as they could, and the block would then be partitioned by the Native Land Court into portions owned by the Crown and portions with Māori owners. Often the process was repeated several times on a single block until virtually nothing remained in the hands of the original owners.

The government wanted to buy more land in the North Island, to pursue a programme of 'close settlement' – smaller farms, so more people could own land. Practically all New Zealand politicians were believers in close settlement, but the Liberal government of 1891–1912 pursued this programme most assiduously. Very large areas were purchased in the 1890s.

Safeguarding the land

Some politicians wanted to safeguard at least some land in Māori ownership. Those who experimented with various reform proposals included John Ballance, William Rees, and the Māori politicians James Carroll and Apirana Ngata. In 1900 the Liberal government passed the Maori Land Administration Act. This was designed to give control of Māori land alienation to district Maori Land Boards, whose members would be elected by local Māori. The project was well-intentioned, but failed for a number of reasons.

In 1907 the Crown purchasing system was reactivated, and large areas continued to be purchased up to about 1920. The Native Lands Act 1909 introduced a very important reform, by which decisions over Māori land alienation had to be made at publicly notified meetings of owners. The government exempted itself from this requirement in 1913. During the First World War large areas of land were bought so they could be granted to returned servicemen.

20th-century developments

The rate of Māori land acquisition began to slow markedly after Gordon Coates replaced W. H. Herries as native minister in 1921. Coates had grown up with Māori in Northland and was generally sympathetic to Māori complaints that they had insufficient

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remaining land. He worked closely with Apirana Ngata, member of Parliament for Eastern Māori (even though Ngata was in opposition until 1928).

From 1920 the government began to focus more on overcoming the problems of multiple ownership of Māori land. Large-scale acquisition of Māori land by the government was at an end. In 1928 Ngata became native minister, and in 1929 legislation was passed that provided for government loans to assist with Māori land development. Numerous development schemes were begun in the 1930s, although not all were successful.

Public works

Māori land was often taken for public works in preference to other land. Māori were less able to put political pressure on local and central government. Also, various provisions meant that in many cases no compensation was payable for Māori land. Even when compensation was required, the land was often undeveloped and had a relatively low valuation. It was not until the 1970s that compensation improved due to a change in public opinion and pressure from Māori leaders.

Conversion

What proved to be a highly problematic type of land alienation, known as conversion, came about as a solution to the problem of multiple ownership of land. Under the Maori Affairs Act 1953, Māori owners whose shares in land were worth less than £25 were forced to sell them to the Maori Trustee, who would sell to a preferred class of alienees (usually Māori who had greater shares in the same land).

In the 1960s, the Hunn and Prichard–Waetford reports suggested that this process be intensified. Despite opposition from prominent Māori this was implemented in a 1967 amendment to the Maori Affairs Act. Land interests less than $50 were compulsorily purchased, and it was easier for the Maori Trustee to sell this land to the Crown. This amendment was unpopular and ignored the importance of Māori land as tūrangawaewae (a place to stand, or home), regardless of economics.

The practice was abolished by the Maori Affairs Amendment Act 1974, led by Minister of Māori Affairs Matiu Rata. The preamble of the Te Ture Whenua Maori/Maori Land Act 1993 read, '[I]t is desirable to recognise that land is a taonga tuku iho [treasure handed down] of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu [sacred places].'

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The Waitangi Tribunal

The Waitangi Tribunal was originally set up in 1975 to look at breaches of the Treaty of Waitangi. However, it could not consider historical claims, so its use was limited in addressing tribal grievances about alienated land. In the same year, a hīkoi, or land march, was undertaken from the far north to Wellington to highlight land grievances. Additionally, a number of Māori began occupying land which had been taken from them to highlight these grievances. Most well-known are the occupations at Bastion Point (Takaparawhā) and Raglan (Whāingaroa).

In 1985 the Waitangi Tribunal was empowered to consider historical grievances back to 1840.

Treaty of Waitangi settlements

There have been a number of historical claims to the Waitangi Tribunal relating to land alienation. Settlements have included land as part of the compensation package in different ways, including:

- return of land, often areas that are culturally significant to iwi (tribes), such as wāhi tapu (sacred sites), including urupā (burial grounds) and pā sites
- access to land areas as nohoanga (camping grounds) for cultural purposes
- negotiation of protocols relating to Crown-owned land that has special significance to iwi
- the right to purchase certain land from the Crown at market value over a set period.

External links and sources

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