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Trusteeship and Maori Commons

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Whatu ngarongaro te tangata.
Toitu te whenua.
People perish [but] the land is permanent.

Introduction

The 1840 Treaty of Waitangi set the broad blueprint for relationships between Maori and Pakeha (European) concerning ownership of land in New Zealand. It secured 'governance'[1] for the Crown, guaranteed Maori their *tino rangatiratanga* (autonomy) in the '...full exclusive and undisturbed possession of their Lands, Estates, Fisheries and other properties..' and citizenship for all (Wai 9,1987:131), and gave the Crown the right of pre-emption in the purchase of Maori land, to prevent the natives being 'swindled' (Sinclair 1957:50-53). But this protection was perverted. While still engaged in establishing New Zealand as a self-supporting colony, the Crown determined the rights of 'ownership' according to English property law and divested Maori of much land, a process continued by the successor colonial state (see Table 1).

Table 1. Maori Ownership of Land
(Source: Massey University 1995:14)

year	acres	hectares
1840	66 400 000	29 880 000
1852	34 000 000	15 300 000
1860	21 400 000	9 630 000
1891	11 079 486	4 985 000
1911	7 137 205	3 211 000
1920	4 787 686	2 154 000
1939	4 028 903	1 813 000
1975	3 000 000	1 350 000
1986	*2 626 000	*1 181 000

*1 million acres (nearly 40%) on long term leases are unlikely to return to Maori control

For some years after 1840, Maori continued to control the land and accommodate settler demands for it while embracing, with some success, the wealth, technology and possibilities for entrepreneurial activity which the settler community had introduced (Firth 1972; Kawharu 1977; Miller 1940; Owens,1981; Parsonson 1981).[2] By the mid-nineteenth century, however, Maori were hard pressed by the demands of a rapidly-increasing immigrant population for land. In less than two decades after the Treaty was signed, New Zealand's indigenous inhabitants had been reduced to a minority in their own land. A little over one hundred and fifty years later, European settlers and the New Zealand state had acquired all but four per cent of the 66 million acres of the originally tribal estate (cf. table 1) Maori today number 15.2 per cent of the total population of 3.5 million, having recovered from their mid-nineteenth century decline. They are however an almost landless proletariat, having been dispossessed of the material basis of their identity and *turangawaewae* (standing place for the feet) through war and 'legislative theft'

In 1975 the state responded to Maori protest and political action by founding the Waitangi Tribunal, which was ineffective in its first decade of operation because its jurisdiction was limited to state policies and practices after 1975. But in 1985 its jurisdiction

was extended to cover events from 1840. What claimants seek before this Tribunal is recognition of their historic claims to tribal commons, plus reparation and the restoration of land and other resources lost under the prejudicial actions and omissions of the British Crown and the New Zealand state Since its inception, some 431 claims have been registered with the Tribunal but only 96 (22 per cent) adjudicated (Te Manutukutuku 1994, 29.2). These claims, presented within and fuelled by government economic re-structuring, have encouraged a fresh ideology of Maori development and self-determination in renewed calls for 'Maori solutions to Maori problems' (Durie 1995:1).

The 'Commons Problem' on Maori Land

There are three minor forms of 'Maori Land' in New Zealand. Land in customary tenure,[3] reserved[4] and vested land[5] are thought to cover such small areas that they are of little practical import (Asher and Naulls 1987:49). In this discussion, therefore, we deal with the major category of Maori freehold land. This colonial creation resulted from imposing European concepts of property-holding on a quite different precolonial land-holding system. While settlers hold Maori principles of precolonial landholding responsible, in fact colonial legislation and administrative and judicial practice created the 'commons problem' today readily identifiable on this land. Successive governments alienated Maori land through a morass of legislation which, almost incidentally to its transformation of Maori title according to the canons of Pakeha property law in order to alienate the land, created the 'Maori commons problem'.[6] In the resulting legal complexity, each of 1,166 separate statutes enacted since 1841 has had some bearing on (some) Maori land (Bassett et al 1994:1). The results of this legislative history are a good example of 'the tragedy of the commons' resulting from 'the remorseless working of things' (Hardin 1968:1244)

We are not the first to recognise this situation. 'The effects of the title system, which was foisted upon Maori owners by successive governments and perpetuated by the Maori Land Court, have been to stymie both individual and collective enterprise' (Asher and Naulls 1987:58).

> The system of having split-up land shares owned by thousands of different Maori scattered throughout the country is actually a Pakeha device that has ended up destroying the unity of *iwi* [tribes] and *hapu* [lineages]... and has allowed individuals to do what they like, thereby setting relative against relative and dividing people as a whole' (Auckland District Maori Council 1981).

This commons problem resulted from 'simplfy[ing] Maori land rights in terms of idealised patterns of ownership' (Durie 1994:67) and

> convert[ing] use rights to the absolute ownership of defined parcels by individuals, expung[ing] symbolic, political and group rights, modify[ing] inchoate rights by substituting land shares for linkages and associations, and enforc[ing] bilateral inheritance without residential requirements so that individuals got more land interests than they would customarily have utilised. Share and title fragmentation was an inevitable consequence... [and] people did not regularly assume land rights until land shares were succeeded to, when they were past their most productive years (Durie 1994:81)
>
> Maori Land Court policy for the inheritance of land interests believed to follow Maori custom has had the effects of fragmenting ownership (to an extraordinary degree in some cases) and of creating absentee ownership. Children were and are able to inherit in equal shares the land interests of both their parents, with no requirement that they continue to live with the tribal group (Asher and Naulls 1987:58).
>
> *Ahi ka* (keeping residential fires burning) 'was changed from a principle to a rule, and was applied in inappropriate circumstances' (Durie 1994:96).

In this paper we attempt to trace the precise legal distortions by which the New Zealand state created a 'commons problem' in the name of Maori tradition, and generated forms of 'trusteeship' which were applied only to Maori and had no precedent in English

law. Such legislated 'trusteeship' has taken the form of 'incorporations', the 'Maori Trustee' as a state office, and two types of trust: large regional Trust Boards and small *hapu* descent group trusts. Though Maori generally[7] had little input into their creation, they have accepted all of these landholding and property-managing institutions and used some to rebuild the precolonial ideology of common property.

The Nature of the Maori Commons Pre-contact

At the beginning of the nineteenth century the whole[8] of New Zealand was held by autonomous aggregations of kin called *hapu* (literally meaning pregnant). Membership depended on descent from a common ancestor no more than four to five generations back **and** upon sustained occupation and defence of *hapu* territory. *Hapu* were sometimes called *whanau* (to give birth), although this term generally applied to *hapu* members who did not co-reside within its territory, or were distributed among related *hapu*. *Hapu* sharing common ancestors formed *iwi* (bone), a term later used for the territorial unit composed of related *hapu,* although *iwi* seem not to have functioned as political units in the pre- or early contact period. But the settler influx and a burgeoning economy caused *hapu* to compete among themselves, utilising kin and descent relationships to form larger kin and affinal alliances in the competitive new order, during which process - with statutory help - *iwi* seem to have grown at the expense of *hapu.* Overarching *iwi* was the *waka* (canoe) describing the symbolic association of *iwi* claiming descent from founding voyagers.

On the ground, *hapu* were the basic units of Maori society. Semi-nomadic, they possessed clearly defined areas of districts shared with others. Their distribution across a district or region was the result of growth, internal dissension and/or planned migration. On the basis of shared descent and kinship ties, some *hapu* might co-operate in times of war, famine or in the exploitation of food resources. Conversely, they might conflict with one another over territorial boundaries, slights to chiefly or group *mana* and so on. *'Hapu* waxed, waned, divided, fused, restructured [to form new identities] and relocated in various combinations over time' (Durie 1993: 17; Wai 38:5). This fluidity of social groupings also reflected the flexibility in determining residence and land use rights. An individual could claim descent through both parents, but inherited usufructuary rights to land only in *hapu* territory where s/he lived most continuously. Rights to land through the other parent lay dormant without residence to maintain *ahi ka* or 'burning fires'. Equal shares were **not** inherited from both parents and the dormant rights of absentees were usually lost after three generations.

Although custom relating to land tenure varied in different parts of the country, there were some generally agreed principles. Maori title was held in common by *hapu.* 'All land was held tribally; there was no general right of private or individual ownership except the right of Maori to occupy, use or cultivate certain portions of the tribal lands subject to the paramount right of the tribe' (Salmond 1909/1931:Vol 6:87). Each *hapu* member had a right in common with the whole *hapu* over the disposal of land and an individual right, subject to the *hapu* rights, to use land and 'specific resources: garden plots, fishing stands, rat-run sections, trees attractive to birds, clumps of flax and shellfish beds' (Metge 1976:121). *Hapu* rights were those of possession (without contesting claims) and use over several generations; of conquest *(raupatu)* and subsequent occupation; or of gift and subsequent occupation. Conquest without occupation did not confer a title. The mere possession of land, even for years, did not confer a right unless occupation was founded on some previous *take (ie. root or basis of title)* of which current occupation could be regarded as a consequence. *Take taunaha* (discovery) involved the claim to occupy and cultivate previously unoccupied land. *Take tupuna* or ancestral right was based on genealogical *(whakapapa)* proof of unbroken descent from an ancestor whose right was recognised. *Take ahi ka,* the fundamental criterion, stressed continuous occupation and use through diligent labour and was expressed in the aphorism, 'I ka tonu taku ahi, i runga i toku whenua' (My fire has always been kept alight upon my people's land). *Take tuku* (gifting) required the donor to have both right to the land and the consent of the populace

to make the transfer. The recipients had, in turn, to occupy and use the gifted land. Gifts made by an individual close to death *(take ohaki)* were a common example of this type of transaction. *Rangatira* (chiefs) frequently donated land: to meet their obligations to individuals or groups who aided them, to cement alliances and make dynastic marriages, and to seal a peace.

The *rangatira* (chief) held his position by double entitlement: descent and selection. Thus he represented *mana tangata* or the territorial rights of the *hapu* on account of his personal qualifications and influence as well as his descent, and was recognised as guardian of and spokesman for the rights of the *hapu. Rangatira* were rarely divorced from their people; they were not autocrats but the facilitators of consensus. Kawharu notes that 'a chief who persistently flouted majority opinion committed political suicide' (1977:58). The *rangatira* as *hapu* representative had the right of veto over the disposal of *hapu* land, but as an individual held only usufructuary rights like the rest of his people. He could not dispose of any except his own land without the concurrence of those to whom it belonged (Metge 1976:121; Walker 1982:69; Royal Commission 1980:9). No fixed law existed in regard to tenure except the law of might, depending on collective *hapu* strength and the precedence of the group over the individual: 'a house that stands alone will be consumed by fire' (Walker 1990:70), especially where *hapu* boundaries were disputed and the same territory claimed by two or more groups in the not-infrequent feuding and warfare.

Settlement and Land Transfers

Serious disagreements between early settlers and Maori over land were among the reasons for British intervention in New Zealand. Early transfers of land from Maori to Pakeha through the New Zealand Company had involved some 46,000 acres, including settlements in Wellington, Nelson, New Plymouth and Wanganui (Wright 1959:196; cf Wards 1968:214ff). In its complex battle with the NZC to protect Maori in the ownership of their land, to control colonisation, and to insist on its own 'right' of pre-emption, the British Crown in 1841 declared most prior land sales null and void. Later, the Native Lands Purchase Ordinance of 1846 made it an offence for settlers to make any private, even lease, deals with Maori (Bassett et al 1994:5). Some Maori resented and even defied Crown control, which forced them to sell land at sixpence an acre to the Crown which sold it on for a pound (Sinclair 1957:48). A waiver of the Crown's self-declared pre-emption right permitted private sales over the period 1844 to 1846 and generated revenue to run the colony, but pre-emption was re-instated in 1846 after Sir George Grey became Governor. Cheap land was the life-blood of European economic development in New Zealand. By 1853, in the complex arrangements to keep the now-bankrupt NZC at bay, Grey had acquired 32 million acres, mostly in the South Island, for £50,000 (Gardner, 1981:61-62). The Crown (following New Zealand Company practice) sold these lands to settlers at a huge profit and bought more Maori land with the proceeds, as well as financing a stronger government and public works.

This success in purchasing land can be attributed to Grey's adoption of methods which incorporated customary practice, including negotiations at tribal *hui* (meetings) and mass signings of the deeds of sale, as well as unscrupulous methods of purchase (Sinclair, 1980:81). Secret deals with chiefs or with only part of the *hapu* and internal disputes were encouraged as a means of stimulating land sales.

> Tribes were divided into land selling *(tuku whenua)* [9] and land holding *(pupuri whenua)* factions. Government purchasing agents negotiated a deal in secret with the *tuku whenua* and ignored the claims of the *pupuri whenua,* sometimes leading to war (Sorrenson 1965:23).

By 1850 it was evident that Maori and settlers were rivals for the possession of land, and the New Zealand Constitution Act 1852 excluded Maori from the franchise in the newly-self-governing state because their landholding system was not recognised as allowing them to meet the franchise property qualification (Bassett et al 1994:10). As a

result Maori had no part in framing the laws by which the Pakeha governed them, and, not surprisingly, found that in disputes with Pakeha over land they had no legal protection at all (Miller 1966:xxv). In the late 1850s, Maori opposition to the sale of land crystallized into the political King Movement *(kingitanga)* among the most disaffected tribes of the central North Island and Potatau Te Wherowhero was elected paramount chief of the Waikato (Sinclair 1957:74). While few beyond his own Waikato people regarded themselves as his subjects, many drew strength from a major King Movement principle, the retention of land. But from 1852, when settlers took control of the legislature, ongoing Maori political protests over the loss of their land were, to varying degrees, ineffectual until very recently. By the 1860s, the land wars (Belich 1986) had begun in Taranaki, spreading quickly to the Waikato, where *hapu* refused to sell land at all, and to other parts of the North Island.

Although land was the focus of the wars, the real contest was about who would control the developing multi-racial colony. Maori had vigorously entered a competitive market economy and had proved a rather unexpected success. As Sorrenson (1956:175-76) put it:

> The rivalry that developed between the races was more than a naked contest for land, important thought this was. It was also a contest for authority ... over the land and the men and women it sustained. Above all, there was the question of whose authority, whose law was to prevail...

By 1863, the settler government had introduced the New Zealand Settlement Act to confiscate the fertile lands of 'rebels' in Taranaki, Waikato and the Bay of Plenty. These tribes lost 3.25 million acres to the business interests of Auckland and although some of the lands were eventually returned[10] not all was restored to its original defenders. Considered the single greatest injustice in New Zealand history, 'the confiscation of lands would provide the worst possible precedent for future government acquisition of Maori land whether for public works or other activities in the "national interest"' (Asher and Naulls 1980:28). Land was confiscated by declaring a district, and all land within it automatically became Crown Land and free from Maori claims. Thus lands were confiscated not just from the 'rebels' but also from *kupapa* (loyalists/'sell-outs') who had fought alongside the Crown. But they were permitted to seek compensation through the Compensation Court also established under the 1863 Act. War and confiscation, so prominent in the history of New Zealand's race relations, in fact touched few tribes south of the central North Island volcanic plateau and fewer still north of Auckland. But all Maori were affected by the establishment in 1862 of the Native Land Court which became a veritable engine of destruction for any *iwi* land tenure anywhere.

Land Acts and the Maori Land Court: Defining Legal Ownership

The settler government assumed that it 'would greatly promote the peaceful settlement of the Colony and the advancement and civilization of the Natives if their rights to land were ascertained defined and declared and if the ownership of such lands ... were assimilated as nearly as possible to ownership of land according to British law' (Wai 1987:30). Beginning with the Native Land Act 1862, the next forty years saw the piecemeal imposition of a system of individual land tenure upon a communal one, at the end of which, nonetheless, the titles to many tracts of Maori land remained unregistered. By 1909, the individualisation of Maori land was essentially completed.

Under the Native Lands Act 1862, the Native Land Court was established, to bring onto the market the great bulk of Maori lands in the North Island which had remained *extra commercium* and to destroy, if possible, 'the principle of communism which ran through the whole of [Maori] institutions, upon which their social system was based' (Sewell, quoted in Smith, 1960:12) in the interests of assimilationist settler policy. The Act allowed for local chiefs in each district to work under the chairmanship of a European magistrate, to investigate and ascertain Native title, and, gesturing toward Maori custom, to grant freehold titles in favour of the relevant *hapu* community, prior to their sale of land. The

Native Land Court was initially rarely used, possibly because the Government was planning to end the war through the New Zealand Settlement Act 1863.

However, under the Native Lands Act 1865, the Native (later Maori) Land Court was re-activated and over the ensuing decades fragmented the newly-created Maori freehold and created the commons problem that still bedevills Maori development today. The architect of the 1865 Act, Francis Dart Fenton, became the NLC's long-serving first Chief Judge, whose views structured the policies and workings of the Court. Fenton abolished local chiefs as district assessors and instead created a 'tribunal along the lines of the Supreme Court, whereby a roving judge could sit in any centre, summon witnesses, hear evidence and hand down a judgement' (Ward 1974:180). The preamble to the 1865 Act explicitly encouraged 'the extinction of [Maori] proprietary rights and ... the conversion of such modes of ownership into titles derived from the Crown' in order to regulate the inheritance of landed property among Maori (Royal Commission on the Maori Land Courts 1980:7). And the following year, Fenton (1879:10) laid down the principle which set the precedent for all Native Land Court Judgements, namely that 1840 would be used as the fixed point to determine which Maori actually owned what land that was subsequently sold to settlers or became the subject of dispute among Maori. The Native Land Court had four functions which, over time were not entirely fulfilled: to settle and define the proprietary rights of Maori in the lands held by them under Maori custom; to transmute Maori customary title into one that was understood in English law; to facilitate dealings in Maori lands and the peaceful settlement of the colony; and to remedy the invidious position occupied by the Crown under its pre-emptive right (Prichard and Waetford 1965:16).

Section 23 of the 1865 Act introduced the 'ten only' rule, which specified that ten be the maximum number of individuals listed on the title deed of any block of Maori Land. The NLC often required Maori owners to choose ten or fewer from among their number to be named on the Certificate of Title (CT). It was generally believed by the Maori people that the persons so named were 'trustees' for the *hapu.* Thus title would be determined on a *hapu* rather than on an individual basis, or so it seemed. However, the CTs and Crown grants made those named absolute owners, for the Land Transfer Act did not permit the notation of trusts on the register (Royal Commission 1980:11; Walker 1990), and Section 48 of the Act provided the named 'trustees' with a Crown grant once the CT had been issued. This effectively barred all other interests and secured, for many 'tens', a privileged position. Under Section 17 of the Native Lands Act 1867, CTs were still issued to a maximum of ten owners, but the names of all other owners were to be registered with the Court and endorsed on the back of the certificate. The land could be neither sold nor mortgaged until it had been partitioned or sub-divided, thus preventing large tracts of land from being sold without the knowledge of *hapu,* but could be leased for a term not exceeding 21 years by the ten persons named on the face of the certificate. However, not only were Maori not told about section 17, Fenton refused to implement this policy and continued to issue CTs to only ten named individuals right up to his retirement in 1891 (Ward 1974:213-216).

The 'ten only' rule was a major cause of grievance to Maori. Ward (1974:213) considered 'the worst consequence of the new system was probably the marked decline in responsibility and trust between members of a kinship group formerly bound by reciprocities' as the NLC favoured one witness over another and did not so much enquire into as act upon such evidence as was presented to it irrespective of the deponent's tribal status. The consequences for tenure were far-reaching. The 1871 report to the Native Secretary noted that, from 1865 to 1870, the Native Land Court heard 3,489 applications for investigation of title in the North Island and ordered CTs or Crown grants in 2,619 cases for an area of more than 2,400,000 acres (JHR 1871-2:24).

To ameliorate the effect of the 'ten only' rule, the NLC was empowered, if the claimaints agreed, to divide the land into several allotments and award each lot to no more than ten.[11] In practice, the claimaints did not agree; and while such division admitted more

people to land title, it also further fragmented the tribal estate and added substantially to the survey costs the Maori claimaints were obliged to bear. Individualisation of title was further speeded up by permitting any person to approach the Court to investigate title.[12] Investigation required all interested claimaints to go to court if they wanted their rights recognised, led to inter-group arguments, and opened the way for unscrupulous buyers to find just one Maori willing to sell or be bribed into approaching the Court.

The Native Land Act 1873 was a response to the numerous petitions and complaints about the way in which the Native Land Court dealt with land transactions under the 'ten only' rule. Among its changes, Memorials of Ownership were to replace the CTs which had been open to abuse by the ten persons named on the document. The names of all owners (that is, every member of a *hapu)* had to be listed on a Memorial, including their proportion of shares. Before any sale could be completed, all their signatures had to be obtained. According to Ward (1974:255), it was simple for agents to begin to purchase a title but hard to complete a transaction and 'in fact slowed down the rate of alienation'. Conceived as a way of protecting *hapu* interests by ensuring that every party was represented, this process in practice accelerated the individualisation of tenure, because the owners were named as individuals rather than as members of a *hapu*.

Paradoxically, given the intent to destroy 'communism', once the investigation and determination of titles had been accomplished, the 1865 Native Lands Act allowed land to be declared the property of a tribe if it exceeded 5,000 acres. '[H]ad this been done the difficulties, the frauds and the sufferings, with their attendant loss and litigation, which have brought about a state of confusion regarding the titles to land, would never have occurred' (Commission of Inquiry 1891: NZ Parliamentary Papers 1891:G1, pvii). However, very few CTs were issued in the name of *hapu* or *iwi* (Bassett et al 1994:35; Royal Commission 1980:11).

After 1865, inheritance issues were decided by the Native Land Court. Since inheritance to Maori real estate was to be regulated by English law, it was held to be the duty of the Court 'to cause as rapid an introduction amongst Maori, not only of English tenures, but of English rules of descent as can be secured without violently shocking Maori prejudice' (TNZG 1867:158). But in the Papakura Claim of Succession, rather than following English intestacy law, Fenton as Chief Judge of the NLC arbitrarily created a new precedent totally contradicting Maori traditions: 'all living children of the deceased were to succeed equally to Maori freehold land' (Bassett et al 1994:36-37). The Native Succession Act 1881 extended the NLC's jurisdiction over the estates of deceased Natives, by enabling the Court to appoint heirs. The Act seemingly assumed that once Maori held land under a title derived from the state, they would accept New Zealand (English) laws in other matters as well (Bassett et al 1995:108).

The Effects of Legislated Individualism

The cumulative effects of these travesties of custom have been profound in many different spheres.

> The trend towards individualisation of title through partition, together with bilineal inheritance, has contributed much to the cultural hiatus in which Maori now finds himself. It has brought diffusion of control over tribal estates, a reduction in the incentive to live in a given locality, and a dissipation of resources through fragmentation. When, added to this, there is a right to alienate interests, regardless of kin obligations in general and (tribal) community authority in particular, an individual's judgement is bound to be vulnerable to whim and passing circumstances. Accordingly, in a milieu of rewards not fully understood and of customary sanctions felt to be of little account, unity of purpose in community and sub-tribal organisations has been slow to appear and difficult to maintain (Kawharu 1977:108).

Thus individuals assumed unaccustomed authority through their claims and individual ownership exacerbated family disputes always present but formerly controlled through the influence of chiefs and elders. Critics recommended that lawyers be barred from the NLC because they were ignorant of Maori custom and an unnecessary expense. Whether claimaints were trying to sell or hold land, the social, economic and financial[13] costs of going to the NLC were devastating.

The administrative consequences of individualising title and partitioning inheritance through both parents have recurrently impeded the efficient use and control of Maori freehold land. An interesting 'solution' to these administrative problems was proposed in the Native Land Alienation Restriction Act 1884, whereby Maori could pay half of their rental income to the government to administer their complicated lands, with the other half going to infrastructural development! Not surprisingly, Maori Parliamentarians opposed this, suggesting instead that their lands be administered by Committees and Land Boards. Possibly the major problem created by the State and its agencies was insecurity of title to Maori freehold land, causing difficulties in maintaining ownership as well as getting loan finance, for no single institution holds a reliable record of Maori freehold land titles. This situation arose in the following way.

Certificates of Title must be lodged with the Land Transfer Office to record the legal interest of an individual owner. In terms of the Native Land Court Act of 1894, procedures were put in place to ensure that all Orders creating title would be registered with the Land Transfer Office, but in practice this never occurred, for reasons worth noting. Titles had first to be surveyed and the costs met by the owners. Many Maori could not afford to pay for this process, but also were reluctant to permit a survey to be conducted. In terms of the Native Land Court Act 1880, the state did the survey and levied the land to cover costs, which only made Maori all the more suspicious of surveys. Where a block had multiple owners, the problem of who would pay these charges was frequently raised and not resolved. The net result was that vast tracts of Maori freehold land were and still are **not** registered with the Land Transfer Office. Consequently many Maori do not have legal ownership under the New Zealand transfer system. The Maori Land Court therefore kept records of unsurveyed titles which could not be registered with the Land Transfer Office. But its title records are no substitute for Land Transfer titles (Durie 1980 No.11:66,67).

Moreover, the Maori Land Court often complicated matters by creating Title Orders without ensuring that the plots had actually been surveyed. For example, in the partitioning out of an owner's share from the parent title, surveys appear not to have been necessary. As a result, in some districts as many as half of all partitions have never been surveyed. Where they have been surveyed, multiple inheritance over time has exceeded ten individuals. In numerous cases the number has risen to several hundred, so disqualifying the land from registration.

While it could create title, the Maori Land Court could not create a legal interest in land. Maori owners were thus often denied the legal protection which their land transfer system normally afforded settlers (Royal Commission 1980:38). The flow-on effects of insecure title prevented individuals from obtaining loans for development of their land because the Native Land Amendment Act (No 2) 1878 made it unlawful for any Maori on a Memorial of Ownership or Crown grant to obtain a loan for development purposes. The official view was that it was better for Maori to obtain funds for agricultural production by selling land rather than mortgaging it! Which was one way of reducing - both temporarily and permanently - Maori competitiveness in the rapidly-developing food markets. Maori land in multiple ownership could not legally be used as collateral security; and today banks and finance companies will not lend money against unsecured title. For many years, therefore, the only source of development funding was the now-defunct Department of Maori Affairs.

Corruption and fraud relating to insecurely-owned Maori land and its transfer were also rife.[14] In the Hawkes Bay for instance, the Heretaunga block was obtained by speculators advancing credit, fostering debts, suborning chiefs with bribes and threatening lawsuits for non-payment. The block was reputedly sold for £21,000, but only £3,000 were ever paid to the owners in cash. The rest went to storekeepers who had supplied clothing, food and liquor on credit against the sale of land. Other Hawkes Bay cases would generate so much odium that a commission was appointed to look into the matter in 1872, but resolved nothing (Sorrenson 1965:40).

Recollectivising Responsibility

All of these problems resulting from the individualisation of land created a legacy of Maori suspicion and the view that Maori land grievances could only be settled, if at all, in the legislature (Kawharu 1977:18). Parliament, in response to petitions from a number of tribes between 1879 and 1881, conceded the need for Maori to form committees to act as land tribunals. These committees were one attempt at self-determination by *iwi* struggling to remedy, on their own initiative, the outcomes of the Native Land Court, but had no legal authority. In the end, their main function was to supplement the work of the NLC which they wanted abolished (Kawharu 1977:19). Yet many tribes did form committees, and, where chiefly *mana* was still a social force, these were moderately effective, often going beyond deliberating over titles for the NLC to confirm, to adjudicate in community disputes and, as among the Ngati Porou, to assume responsibility for the management of incorporated holdings on behalf of the owners (Ngati 1940:140; cf. Belshaw 1940:204). Their greatest operational difficulty was their lack of legal authority. *Iwi* with committees tried repeatedly to have this handicap removed, but only in 1894 did the Native Land Court Act permit vesting 'incorporations' (see later) in *iwi*.

Following the 1891 Rees Commission's severely critical recommendations and a Maori petition to Parliament, the Native Land Court Act 1894, while continuing to establish title to Maori customary land, also created Maori freehold subject to the provisions of the Land Transfer Act,[15] and provided for the formation of 'incorporations' (see later) and the exchange of land for consolidation. It also made extensive changes to the Native Land Court and resumed state pre-emption rights. The Native Equitable Owners Act 1886 also resulted from Maori petitions, and attempted to make all beneficial owners of Native land tenants in common, but succeeded only in including more individuals in the individualisation process (Bassett et al 1994:144).

The Tuhoe provided a new model for control over *iwi* lands. In the remote fastness of their Urewera mountains, individualisation and alienation of the land had nonetheless occurred. The Urewera District Reserve Act 1896 empowered a Commission of five Tuhoe and two Pakeha to individualise titles and elect committee members of owners to administer group holdings. For the first time, investigation of tribal land rights was coupled with the use of them by their owners. This radical initiative was received with mixed feelings by Tuhoe, but was extended to other tribes by the Native Lands Administration Act 1900, which replaced the Native Land Court by Maori Land Councils (later Boards). However, each council or board, while responsible for all Maori land in a district, comprised a majority of Pakeha. Unlike Urewera, this was not tribal but Pakeha control and alienation, removing any assurance that Maori would control the management of their own lands. Maori retaliated by withholding land from council jurisdiction. In turn, Pakeha trotted out the usual stereotypes[16] of Maori 'absentee landlordism, idle estate, unpaid rates, noxious weeds, rabbit plagues' (Kawharu 1977:25), triggering a series of Bills between 1905 and 1908 which removed many of the protective measures on alienation and accelerated state monopolistic purchasing of tribal land. The Native Land Act 1909 codified and consolidated previous laws relating to Maori land, amending no less than sixty-nine statutes. It stood for more than twenty years as the principal Act relating to Maori land. While it encouraged a fresh wave of prodigal land sales, it also empowered

elected management committees to develop incorporated estates on behalf of shareholders.

A breakthrough occurred in 1929 when Parliament decided to place Maori land on the same footing as Crown land for purposes of production. After almost forty years of advocacy on the part of Maori Parliamentarians, the government assumed financial and supervisory responsibility for helping Maori to become efficient farmers notwithstanding their title deficiencies. This policy change enabled Apirana Ngata[17] to embark upon a state-funded programme of land settlement as the basis for a revival of Maori corporate life (Butterworth 1968:27). The East Coast schemes experienced problems, but Ngata used incorporation to manage effectively land held in multiple ownership.

Trusteeship

(a) Incorporations

> Whatever else it may appear to be, an incorporation is certainly kin-based. Individuals are recruited to it only be through the accident of birth ... [B]orn out of legislation, [i]t is now more category of kin than local community, since individuals can succeed to interests without having as in former times, to keep the 'fire burning' alight. Indeed the operations of farming an incorporation are usually dependent upon there being no actual occupation of the land (by the owners as a group). Finally while an individual can contract in or out of an incorporation ... the right to do so is determined by prior membership in the owner kin group. Kinship status not a contract is the critical factor (Kawharu 1977:194)

The early efforts of Maori to deal with the problems created by State policies relating to Maori land had involved committees acting as land tribunals on title issues. Some became quite effective, especially among the Ngati-Porou on the East Coast, who by the beginning of the twentieth century had cleared extensive lands to go into pastoral farming on a commercial scale.

Apirana Ngata, in the 1930s, is often credited with the formulation and introduction of the incorporated form of Maori land tenure, but McHugh (1980:36), following Ward (1958), notes its genesis in a much earlier scheme on the East Coast in the 1890s, initiated by W.L.Rees, which managed Maori land by a tribal committee of block owners (McHugh 1980:37). These 'block committees' were an essential part of communal ownership, replacing chiefly rule in guiding and directing the family or *hapu*. The block committees of late nineteenth-century legislation[18] were parallelled by those formed by Maori owners in a block joining themselves in a body corporate. This 'incorporation' system was the Maori answer to the difficulty of organising many, often absentee, owners in a communally-owned block of land. The popularity of the incorporation on the East Coast, McHugh believes to have arisen from the Ngati Porou resentment of the East Coast Maori Trust, which administered a good deal of East Coast Maori Land without assisting Maori to farm and administer it themselves. Ngata was therefore right in describing the incorporation system as having been 'evolved by Maori to suit Maori needs', in order 'to stabilize corporate action and legal decisions and ... to secure legislative recognition of the title... [T]he incorporation of Native land owners ... is in effect an adaptation of the tribal system, the hierarchy of chiefs being represented by the Committee of Management' (Ngata 1940:139-40). A management committee elected by a group of owners to act on their behalf found ready acceptance in Maori society, as it approximated a feature of precolonial Maori politics, insofar as rights of administration over a tribal group's estate were vested in the leaders and spokesmen of the group. The reciprocity between managing 'trustee' and owning beneficiary, the majority of whom are also kin to one another, remains the moral and political basis of incorporations (Kawharu 1977:202). Thus the structure, organisation and values of incorporations mirrored the

essential character of the traditional system of Maori land tenure, based on the dichotomous rights of administration and of use.

The incorporation became increasingly popular as a method of dealing with land fragmentation and enabling Maori to offer an uncluttered title to land as security to borrow money for its development. By 1965 in the North Island 'incorporation' lands totalled some 72,000 hectares (Royal Commission 1980:26).

In structure and operations, incorporations were 'hybrid, somewhere between a private limited liability company and trust' (McHugh 1980:40). Beneficial ownership rested on shares in the land rather than shares in the corporate body.

> An incorporation is not quite the same thing ... as an ordinary company. A company is in law distinct from its shareholders. Its assets are the property of the company and its shareholders are not trust beneficiaries in it. On the other hand, a corporate body is an actual trustee for the owners, who have distinct rights in the trust property, rights which can be enforced by them individually without reference to the views of the other beneficiaries. Each owner is entitled to have the conditions on which the land is vested in the corporation put into effect, and if the corporation is guilty of a breach of trust, each owner has his own legal remedy against it. Moreover, while a committeee of management acts as the mind and executive hand of the incorporation to discharge its corporate and trust duties, the owners of the land are not trustees of the land. The trustee is the incorporation, distinguished from its members and from the committee of management (some of whom may or may not, in fact, be owners of the land). Thus a member of a committee is disqualified from purchasing or taking a lease of the trust estate on the grounds of conflict of duty and interest (Kawharu 1977:195).

But if pre-1967 legislation incorporations were more like trusts than private companies, not dealing in their shares on the open market (Kawharu 1977:196), when the 1967 Maori Affairs Amendment Act was passed, incorporations came more to resemble private companies. Section 41 made open market trading possible: kin were to be given priority to buy, but if they were unable or unwilling to do so, the shares could be traded within two years (McHugh 1980:42). And to avoid fragmentation of beneficial interests on the death of a shareholder, section 34 (1) of the 1967 amendment allowed an incorporation to set a 'minimum share unit' at a general meeting.

McHugh notes other significant changes under the 1967 Act. Shares in an incorporation changed from being a beneficial interest in the land to interests expressed by the order of incorporation, which cancelled all prior interests of the former owners. On winding up an incorporation, the 1953 priority on returning the interest in land to those beneficially entitled to it, was replaced by an amendment empowering the liquidator, subject of course to the directions of the Maori Land Court, to realise an incorporation's assets. Reinvestment of interests in the land ceased to be of primary importance, as reflected in the changed nature of shareholdings and the disposal of assets, which might be vested (in the Maori Trustee) if they could not be returned to shareholders.[19]

Despite this commercialisation of incorporations, their regard for group welfare and solidarity continued to be reflected in their distribution of profits. By means of donations, the demands of the local community and the body corporate are minimally reconciled with individual economic self-interest. And under the new Te Ture Whenua Maori Act 1993, incorporations can revive at least something of their former communal character while expanding their commercial operations. Owners will hold a direct interest in the land. Persons who have contributed land to an incorporation will own shares in the incorporation **and** retain their interest in the land. From 1993, incorporations are no longer restricted in their commercial activities. They can now treat different categories of land differently, become involved in new ventures and operate in the best interests of shareholders. When land is bought by an incorporation, it can be retained as an investment not affected by the

restrictions in the Act, or incorporated. Land which does form part of the incorporation is called Maori freehold land and the Act imposes restrictions on how and to whom it can be sold. Old-style incorporations may be brought into line with the new legislation.

(b) The 'Maori Trustee'

The Native Trustee Act 1920 created a Native/Maori Trustee and Trust Office separate from the Public Trustee, which office had held native reserves in trust since 1892[20] and later assumed other trusts over Maori land. Initially the office of Maori Trustee administered native reserve land and could not lend money for the development of land held in common. This act therefore continued to encourage sub-division and individualisation in order to take advantage of this new source of loan finance, which was distributed through newly-created Native Trust Boards. Amendments in 1922, 1924 and 1926 appointed the Maori Trustee to administer Maori deceased estates (with his fees as a first charge on these estates); enabled the Trustee to dispose (with ministerial approval) of native reserves 'for the benefit of the the beneficial owners'; exempted the Trustee from inconvenient provisions of the 1909 Native Land Act; generally expanded the role of this office in ongoing land alienation; and extended the fiscal duties of the office to include banking for Maori Land Boards.[21] By the 1930 amendment, the office of Maori Trustee was beginning to look like a catch-all for managing Maori land of all types and in the 1953 amendment it was legally incorporated, perhaps in order to take on a wide range of new 'philanthropic' or welfare functions in towns.

In addition, to prevent further uneconomic fragmentation of land in deceased estates, the Maori Trustee Amendment Act 1953 created a 'conversion fund' to allow the Maori Trustee to buy up 'uneconomic interests' not exceeding 50 pounds in value. The need to change the law of inheritance and limit partitioning had long been recognised, but making the purchasing of uneconomic interests compulsory was anathema. Maori objections centred on fears that many would be left completely landless, with consequent loss of their *mana* and *turangawaewae* including the loss of access to and speaking rights on the *marae* (ceremonial plaza) which interests in land, however small, allowed. In practice compulsion was generally avoided in favour of 'promoting family arrangements' in which interests were not divided (Bassett et al 1994:418). However, the *Report on Laws Affecting Maori Land and Powers of the Maori Land Court* (Prichard and Waetford 1965) 'outraged the whole of Maori opinion and engendered vehement nation-wide opposition' (Bassett et al 1994:443) in recommending that compulsory acquisition of uneconomic interests should include all land interests under the value of £100 (legislatively set at £50). The Government argued that urban Maori would prefer to encash their interests in 'idle' farming land to buy homes or furnishings in town. The statutes by this time allowed the Secretary of Maori Affairs to declare that no tribal rights to land existed, only individual irights, and to ask 'to what extent should the rights of the individual owner to realise his interest to the best advantage to him be subordinated to the interests of the group wishing to hold property to the exclusion of outsiders?' (Bassett et al 1994:444). Yet if in the Maori Affairs Amendment Act 1967 the commons were killed off, they subsequently refused to remain dead.

By 1974, another Maori Affairs Amendment Act had shifted basic philosophical ground to recognise (perhaps because there was so little Maori land left: see table 1) that 'the continued alienation of Maori land to non-Maori ought not to be facilitated'. The focus of this legislation ostensibly 'repairs the invasion of the rights of the Maori people brought about by the legislation of 1967' (Bassett et al 1994:460) by amalgamating land held under separate titles which could be more conveniently dealt with as one block, and vesting it in the owners **without** cancelling the original titles. One Maori Land Court judge considered that the increasing use of this provision, together with vesting interests in land in trustees, might permit Maori to resume control of their land no matter how fragmented (Royal Commission 1980:14).

(c) Trusts 438

The trust concept was and continues to be a popular and effective means of administering Maori land in multiple ownership. The '438 trusts' originated in the Maori Affairs Act 1953, section 438. In general this section has been used to deal with small, localised pieces of land, though there are exceptions, such as the Tuwharetoa District around Lake Taupo.[22]

> When it appears that the block of land involved is not under proper management, is neglected, or is being used in a manner that is unfair to owners or any section of them, the Court became concerned to ensure that some form of management is eventually settled upon and established. Sometimes if the individual block is not an economic unit by itself, the Court will endeavour to establish several blocks in the vicinity under the one system of management. And so there is a variety of trusts, from the small family ones to larger and more tribal concerns (Durie 1979:37).

There are, of course, differences of opinion among Maori with respect to corporate trust management,[23] as to whether it should avoid fragmentation or accommodate all interests, however small (Durie 1979:27); but notwithstanding disputes among owners and the lack of technical and management skills of some trustees, the success of many 438 trusts has shown that, contrary to a view widely held in the early 1960's, multiple ownership need not be a bar to the economic use of the land - though in practice it often is.

Under Durie as its Chief Judge, the Maori Land Court became a 'people's court', committed to restoring uneconomically-fragmented Maori freehold land as a communal resource that could again be worked collectively through incorporations, trusts, tribal trusts and similar 'modernised' forms of management. The Court's early role as an agent of alienation has more recently turned into commons management, committed to helping Maori retain and develop their remaining lands. There is a new potential for recommunalising both fragmented and individualised holdings and tribal lands restored under state reparations.

(d) Trust Boards

In contrast to incorporations and 438 or *ahu whenua* trusts, Trust Boards were established (the first in 1922) by the state on a tribal basis for the purpose of receiving compensation monies in settlement of tribal grievances against the Crown's past dealings in Maori land. Nineteen Maori Trust Boards now operate under the Maori Trust Board Act 1955. The Act states that Board members must be elected by ballot, while its functions are directed towards 'the general benefit of its beneficiaries'.[24] Trust Boards may become involved in activities ranging from health to education and vocational training. And unlike incorporations, in matters relating to land Trust Boards are not constrained. The 1955 Act permits that 'with prior consent of the Minister' a Trust Board 'may acquire any land or interest in land, whether by way of purchase, lease or otherwise and, with prior consent, may sell, lease, sublease or otherwise dispose of any such interest...'.[25]

Attempts of Trust Boards to meet the social and developmental objectives spelled out in their Act, have had mixed results. Boards have often ignored the statutory ballot requirement, instead holding a customary *hui-a-iwi* (meeting of the people) to elect members. As a result, *kaumatua* (elders) are elected who are skilled in *tikanga* (customary lore) but not always in the administration of programmes or assets. Trust Board elections thus tend to be based on status rather than ability, sometimes creating and perpetuating tribal oligarchies remote from, deaf to and unaccountable to those they were elected to represent (Mason 1994:66). But dissatisfed voices from the flax-roots commons have recently raised matters of financial accountability, consultation, leadership, decision-making, report-back and information sharing.

Notwithstanding the compensation monies received (never adequate and rarely adjusted to inflation[26]), Trust Boards have simply not had the capital asset base to meet their social and developmental responsibilities specified in the Act. Some Boards have

also felt shackled by the wide powers, some mandatory and some discretionary, of the Governor General and Minister of Maori Affairs over certain of their activities. That Boards with ready funds in their coffers could not purchase land without the prior consent of the Minister, is one example of continuing paternalism.

Most Trust Boards are now responsible for administering substantially-increased resources as the settlement of tribal claims proceeds. Their functioning and accountability have recently been reviewed and a range of views expressed. For some, like the Tainui Maori Trust Board, the 'trust' concept itself is seen as problematic and 'a more diverse approach to organisational form and the development of efficient structures' for undertaking commercial operations is seen as desirable (Mason 1994:53). Those who perceive existing Trust Boards to be state agents reject the past 'top down' approach and hold that whatever replaces the Trust Board should be truly representative of the *iwi*. Ngai Tahu of the South Island have prepared a Charter which became law early in 1996. Called Te Runanga o Ngai Tahu, it incorporates itself while dissolving the Ngai Tahu Maori Trust Board. The politics of the Ngai Tahu Charter are unclear (though undoubtedly related to recent disputes over control of the fisheries returned to Maori as a new pan-tribal 'commons') and this innovation may well provide a blueprint for other *iwi* seeking collective and accountable management of massive new 'tribal commons' resources.

Maori Commons in the Future?

We have argued, thus far, that colonial distortions of precolonial Maori practices created the 'Maori commons problem', which led to a Maori political response forcing the state first to modify legislation and recently to enact new laws based on Maori ideas. Ideas and legislation both acknowledge the problem and attempt to address it by rebuilding a commons ideology using basic Maori principles in colonial institutions offerring scope for their own transformation. In response to Maori political pressure, the 1953 Maori Affairs Act and many of its amendments were consolidated in what is thought to be the longest running Bill in any Commonwealth Parliament, which became law only in 1993 as Te Ture Whenua Maori Act. This Act has its foundation in the Treaty of Waitangi and is framed according to what Maori have said they need. Its *kaupapa* (purpose) turns away from further alienation in recognising Maori land as *taonga tuku iho* (lit: something valuable that is passed down) which its owners must devolve to later generations. The main focus is on the owners and managers of the little remaining Maori freehold land and developing it. 'Preferred alienees' restrict those to whom land may be sold. Multiple owners are recognised as tenants in common and Maori incorporations as bodies corporate with perpetual succession and shares as undivided interests in Maori land. The Maori Land Court is given exclusive powers to constitute any of five types of land-owning trusts, including some that have been revamped, whose management may be conducted by any of the following: individuals; Trust Boards or any other body corporate; Maori Incorporations; the Maori Trustee; the Public Trustee; or trustee companies. These different types of trust and trust management offer greater flexibility than existed before, but whether they will restore a Maori tribal commons is less certain.

Putea trusts can be established to administer landed interests impractical to deal with separately or whose owners cannot be identified or located. Any income earned by the trust is pooled for common benefit. Further fragmentation of the title to the land is avoided by preventing future inheritance to that interest.

Whanau trusts aim to preserve the *turangawaewae* of a *whanau* while extinguishing individual interests in the land (along with inheritance of those interests). The land can be vested in a named *tupuna* (alive or dead) and pooled income from the land is used for promoting the owners' interests as a whole.

Ahu whenua trusts rename the 438 trusts and facilitate the use of land in the beneficial owners' interests. Future inheritance of the land itself is unaffected by the establishment of such trusts.

Whenua topu trusts may generally be described as *'iwi'* trusts over the whole or a substantial part of the total land holdings of an *iwi* or *hapu.* Trust income is used for the benefit of the kin group concerned and inheritance rights are restricted.

Kai tiaki trusts provide an updated means by which the affairs of minors or persons affected by disability can be managed in the best interests of those persons.

One disturbing feature of such neo-traditional 'commons' solutions to the shambolic state of multiply-owned Maori land, is that they provide opportunities for less-than-transparent tribal centralisation to replace the New Zealand state's past opacity and duplicity. The NZ$180 million Tainui settlement, for example, is vested in a tribal ancestor as a *whenua topu* trust, which has effectively removed from *hapu* control returned land which was both gifted and confiscated, in order to deliver generalised benefits to the Trust Board's listed beneficiaries, without giving the Board control over these assets either. Instead, they are controlled by trustees who have vested political interests in the *kingitanga* as the inherited property of one kin group. Receipt of Trust Board benefits will depend on support for the *kingitanga.* Such neo-traditional commons, like the revised incorporations, seem to us to be more 'corporate' than 'commons' - the take-off point for our as-yet-unwritten second paper - and in desperate need of some checks over and rules of accountability for their controllers.

Notes

[1] There has been a great deal of debate over whether Maori understood the significance of government by the Queen of England as conveyed in the word 'kawanatanga' (Wai 38:29-30, Kawharu, 1977:5-6).

[2] After 1840 Maori farmers were 'supplying most of the foodstuffs for the European population and were even exporting a surplus to the new Australian goldfields. By 1855 they were supplying half the total exports of the colony' (Parsonson 1940:84) 'In 1857 the Bay of Plenty, Taupo and Rotorua Natives - being about 8,000 people - had 43 coastal vessels averaging nearly 20 tons each, and upwards of 900 canoes' (Swainson 1856:?) In the course of the same year the Ngati Porou from the East Cape to Tauranga supplied 46,000 bushels of wheat to the English traders, to the value of £13,000... In a single year, 1,792 Native canoes entered Auckland harbour, bringing to market by this means alone 200 tons of potatoes, 1,400 baskets of onions, 1,700 baskets of maize, 1,200 baskets of peaches, besides many tons of firewood, fish, pigs and kauri gum (Firth 1972:449).

[3] Customary land included virtually all land in New Zealand before 1840, the date chosen by Fenton from which to determine possession. Most customary land has been converted into freehold title or ceded to the state.

[4] During the nineteenth century, the state created reserves for Maori so that they would not become landless Reserves were eventually sold, used for public institutions, or perpetually leased. Continuing into the present, these perpetual leases have greatly limited development options for Maori

[5] A commission of inquiry into Maori Reserved Lands in 1974-75 resulted in special legislation allowing most remaining reserves to be vested in Maori land corporations and trusts.

[6] Often seemingly enacted in haste, and made retrospective, this legislation required frequent amendment. From 1865 there were almost annual amendments to the various land acts and those affecting the jurisdiction and constitution of the Native (later Maori) Land Court

[7] 'Incorporations' are an exception see later

[8] Even though some parts of the country were not occupied by *hapu,* there were no unclaimed 'waste lands' In 1846, Sir William Martin, the first Chief Justice in New Zealand, wrote:

'So far as yet appears, the whole surface of these islands, or as much of it as is of any value to man, has been appropriated by the Natives and, with the exception of the part which has been sold is held by them as property Nowhere was any piece of land discovered or heard of by the Commissioners which was not owned by some person or set of persons' (NZ Parliamentary Papers 1890, G1:3).

[9] *Hoko whenua* would be a more accurate, because more specific, description of land selling than is *tuku whenua* (meaning to let go), but the two phrases have been used interchangeably

[10] After receiving back nearly a quarter of a million acres in the 1940s, in 1989 the Waikato/Tainui negotiators entered into direct negotiations with the Crown for the remaining state-owned land that had been confiscated. In May 1995 a Deed of Settlement was signed and in the same year legislation passed to put the settlement into effect

[11] Native Lands Act 1865, Section 24.
[12] Native Lands Act 1865, Section 21.
[13] Once a Court hearing was forced, then the charges against the land began to accumulate. They included credit advanced to support the claimants while attending court, hearings in towns away from their villages, court costs, lawyer's fees and, when partition orders were granted, survey costs, as well as interest at 5% pa on those unpaid.
[14] Some attempts to prohibit fraud and abuse by Trustees was provided in the Native Lands Frauds Prevention Act 1870. It appointed a Commissioner to prevent land from being alienated unfairly but Commissioners were only part-time appointments, making the monitoring of every transaction impossible The same situation occurred eleven years later under the Native Lands Fraud Prevention Act 1881 (Bassett et al, 1995:109).
[15] The Land Transfer Act 1885 allowed freehold land to be registered under the (much simplified) 'Torrens system' of land transfer, by which year the NLC had already allocated title to over 9.8 million acres (Royal Commission 1980 11)
[16] In addition, Maori were often branded as feckless and a commercial risk, but a major policy innovation was the Native Land Amendment and Native Land Claims Adjustment Act 1926, which was legislation designed to surmount the title problem by the simple device of making development finance, advanced by the state, a charge upon the land
[17] Ngata resigned in 1934 following a charge of misadministration brought against him, in bringing which the Government clearly did not take into account the total social context of Maori land settlement and the demands it imposed.
[18] Native Land Administration Act 1886.
[19] Maori Affairs Act 1967, Section 65(5)
[20] West Coast Settlements Reserves Act 1892.
[21] Clearance from the controlling Maori Land Board was required before any alienation of the land itself (cf. G 10 1931:ivf). Implementation of this policy was delayed because of unpaid rates and survey liens on much Maori land and because the funds of the Maori Trustee and Maori Land Boards were all but exhausted (Kawharu 1977:29).
[22] Examples are the East Taupo Forest Trust on 30 520 ha covering 61 blocks, the Owhaoka (Deer and Recreational) Trust on 26 796 ha covering 13 blocks and the Rotoaira Forest Trust on 22 584 ha covering 78 blocks
[23] 'Today, Moari opinion is divided and the different approaches are apparent in many of those who appear before me On the one hand some prefer arrangements on inheritance to avoid fragmentation, or, by vesting order, exchange, gifts and sales, have expended time and money to enable one of their number to acquire a predominant interest Others are active in buying shares of close and distant relatives alike with a view to acquiring sole ownership of the whole or to be able to partition out a part. On the other hand, others prefer that all entitled should succeed no matter how large or small the interest. There are those who are opposed to one person acquiring a predominant share and would prefer to lease, even though, in order to favour a relative, the rental might be quite nominal There are those who oppose partition and prefer that all should be part of a common venture. There are those who would sell readily on the open market and there are those who would restrict sales to within the tribe, or the family' (Durie, 1979:18)
[24] Maori Affairs Trust Act 1955, Sec 24(2) beneficiaries' names must be listed on a roll and membership is determined by birth and descent
[25] Section 26(1)
[26] Eg the Tainui Maori Trust Board was established under the Waikato-Maniapoto Claims Settlement Act 1946. Negotiations between the Crown and 'Tainui' (defined as those hapu whose lands were confiscated) eventuated in an offer of £6,000 pa and £50 thereafter in perpetuity. In 1976, in response to pressure from the TMTB, the government was forced to adjust this figure to account for inflation

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