FRAGMENTATION OF MAORI LAND

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I

The purpose of this paper is to examine the present legislation concerning Maori Land, (1) to determine its suitability for modern conditions and needs with particular reference to the question of fragmentation.

However, before this can be done it is necessary to look at the history and background of the legislation. (2) The intention of the British Government from the beginning was that the natives should not be dispossessed from their lands with consequent friction, as had happened elsewhere. For this reason the Colonial Office in 1839 instructed Hobson to induce the Maori chiefs to enter into an agreement with the Crown to dispose of their land through the Crown only. He was also to announce that the Crown would not acknowledge as valid any title to lands which had been or should thereafter be acquired unless confirmed by a Crown grant. As Governor, Hobson was to obtain from the natives cession of their 'waste lands' sufficient for the occupation of settlers, to eliminate the danger of land speculation, but he was to take care not to purchase land required by the natives for their own 'comfort, safety and subsistence'. Article two of the Treaty of Waitangi substantially embodied these instructions. (3)

Moreover, the Governor of New South Wales by proclamation had in January of 1840 forbidden purchases from the natives and Hobson reiterated this on his arrival. Commissioners were appointed to investigate claims, which it is said totalled 654,000 acres more than the total area of New Zealand (4). Investigations of these unofficial claims virtually ended with the Land Claims Act 1878.

However, the Treaty of Waitangi itself has no legal significance because it is an Act of State and cannot be considered in the Courts. This was the opinion of

(1) As found in the Maori Affairs Act 1953 reprinted in 1964 (vol. 3, p. 1295).
(2) A general treatment of this can be found in any work dealing with the Maori in the nineteenth century. Norman Smith in Native Custom Affecting Land (Maori Purposes Fund Board, 1942) gives a more specialized treatment. Much of the historical material in this paper is taken from his book.
(3) Article Two reads: "Her Majesty the Queen of England confirms and guarantees to the chiefs and tribes of New Zealand and to the respective families and individuals thereof the full, exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the chiefs of the United Tribes and the individual chiefs yield to Her Majesty the exclusive right of pre-emption over such land as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf."
(4) See, for example, William Webster's Claim (1925) Nielson's Report 540.
the Privy Council in \textit{Te Heu Heu Tukino v. Aotea District Maori Land Board}. (4a) The Treaty can be enforced by the Court only as far as its provisions have been incorporated into statutes by the British or New Zealand Parliaments. Also there seems to be some doubt as to whether the Maori people were competent to sign a Treaty under the law of nations at that time.

Thus the Crown alone had the right to extinguish native title and replace it with a Crown grant, and it was held in \textit{Wi Parata v. The Bishop of Wellington} (4b) that this transaction also, between the natives and the Crown for the cession of their title, was an act of state and could not be examined in the Courts.

At first the Crown did not purchase much land under its right of pre-emption and this caused discontent among both Europeans and Maoris, to whom sale of land was now the chief source of money, and this discontent was further stirred up by speculators. In 1843 Governor Fitzroy gave way to the pressure and waived the Crown's right of pre-emption, thus beginning a process of alternate waiver and revival through the next half century or more. It should be noted that there were powerful opponents to a policy of open-slather regarding land sales, both in New Zealand and in England, especially the missionaries who did not wish to see their new converts exploited and corrupted by Europeans and their money.

Fitzroy's waiver of pre-emption was disallowed by the Colonial Office but not before considerable land had allegedly changed hands. Governor Grey revived pre-emption but he speeded up Crown purchases by the appointment of Native Land Purchase Commissioners who acquired large areas of land.

This increased rate of purchase and increased pressure on the Maori to sell was the cause of new friction between Maori and Maori, and more particularly between Maori and the Crown. The introduction of modern weapons to the tribes in the early 19th century had caused a major upheaval in tribal relationships and tribal land control. The careers of Hongi Hika and Te Rauparaha had had repercussions throughout the whole of New Zealand in terms of tribal movement. Thus when land purchasing on a large scale began, many of the tribes were in relatively new possession of their land and were more willing to sell it, especially if their title was dubious. These sales naturally caused great anguish and bitterness to the dispossessed tribes, living in exile, probably on some other tribe's territory. In some cases large tracts of land belonging to another tribe would be sold in revenge for some act or sale of land by that other tribe. Moreover tribal and hapu boundaries were not always precisely determined and the prospect of a sale would give rise to rival claims, especially as the Maoris would generally sell their more dubious claims first keeping the best till last.

"Again, the proposal on the part of any tribe to sell a block of land to which the fact of colonization and closer settlement had imparted a value previously unknown, could not always be unanimous, while it gave the signal for the revival of a number of dormant claims more or less well founded, and for which there existed no independent tribunal competent to decide, and the refusal of any section of the tribe or of any of the tribes to sell would give rise to rival claims, especially as the Maoris would generally sell their more dubious claims first keeping the best till last.

\begin{itemize}
\item[(4a)] \cite{N.Z.L.R. 590; A.C. 308; G.L.R. 254.}
\item[(4b)] \cite{J.R.N.S.S.C. 72.}
\end{itemize}
numerous claimants to accede to the sale, or of a general reluctance on their part to see what they considered as the inheritance of their fathers passing into the hands of another race, placed them in such a position of antagonism to the Government as would tend to convert the non-seller, first into a disaffected subject and then into an open rebel." (5)

Sometimes it was almost as dangerous to refuse to buy land as to buy it, for a powerful chief could feel that his mana was tied up in a particular sale and if the Crown refused he might also become disaffected. The Crown was placed in a rather invidious situation in being both judge of the right to sell, and purchaser.

It was at least partly these problems which caused the wars of the 1860's. Dispossessed tribes whose land had been sold, turned against the Crown and the settlers, as much as against the other tribes.

The Waitara War and the outbreaks which followed pointed the need for a more systematic and satisfactory means of ascertaining native title and transferring it in a manner fair to those concerned. As a result the first Native Lands Act was passed in 1862. The preamble stated:

"And whereas 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 when so ascertained defined and declared were assimilated as nearly as possible to the ownership of land according to British Law; and whereas with a view to the foregoing objects 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, and to establish Courts, and to make other provision for ascertaining and defining the rights of the Natives to their lands and for otherwise giving effect to the provisions of this Act ...."

The Court established by this Act was presided over by a European magistrate, but little land was investigated under it because purchasing was virtually suspended while the unrest continued.

This first Act was repealed by the Native Lands Act 1865 which inaugurated the Native Land Court proper,

"as a Court of Record for the investigation of the titles to Native customary land, for the determination of succession to deceased owners of Native lands and partition. The Court consisted of a Chief Judge and such other Judges, together with assessors, being aboriginal Natives of New Zealand, as the Governor should appoint." (6)

Following the war alienation of land continued at a greatly increased pace, by way of direct sale to the Crown, through the operations of the Court and by confiscation. The Maoris appeared to become apathetic in the face of mounting European pressure and in the wake of military defeat. The North Island contains

(6) _Ibid._, P. 7.
approximately 28 million acres. By 1891 the Maoris retained 10.1 million acres, and in 1911 7.1 million acres. (7) The South Island had been almost entirely alienated to the Crown, much of it at nominal prices of 1½d per acre.

The Native Land Court was forced to evolve its own procedures, first to find who 'owned' a certain piece of land and then to change the inchoate title into a legal title, useful to a European purchaser who wished, of course, to own land in the European sense. The Maoris had never had need of such a system of ownership; their use of land did not require it.

The first problem facing the Court when investigating title to land was to decide which tribe owned it. For this purpose occupation as at 1840 was taken as the main criterion. This caused some heart-burning amongst those who had been dispossessed before that time and had now lost their chance of revenge. But this rule did prevent the continuation of tribal strife by rendering it pointless. These struggles took place in Court instead as the rival claimants recited genealogies and local custom and history. Following this the land had to be broken up into units owned by hapus and families, and if the process was taken right through, each individual member of the tribe would receive a share. However the land was often sold before this point was reached.

As far as possible the Court made use of Maori custom in determining title. The Supreme Court in Wi Parata v. The Bishop of Wellington (supra) said that there was no such thing as "the Ancient, Custom and Usage of the Maori people" and that the use of that phrase in the Native Rights Act 1865 was not a statutory recognition of such custom. However, as far as the Native Land Court is concerned, this statement must be taken as too broad because there was a certain amount of existing custom which the Court could apply. The most important rights to land came from discovery, ancestry, conquest or gift, but in all cases this had to be linked with occupation or exercise of rights of user like hunting or cultivation. The practice of the Court was more or less standardized in these respects by the turn of the century.

It might be as well at this point to examine the legal effects of the work of the Court. Before investigation land is called customary land and is defined as: "land, which being vested in the Crown, is held by Maoris or the descendants of Maoris under the customs and usages of the Maori people." (8) This is related to the concept of the Crown as Trustee for the Maoris or 'supreme protector of aborigines' - Wi Parata v. Bishop of Wellington (supra, 78). The customary title has now been mostly extinguished, and, to quote from Sir John Salmond, this has been done chiefly in two ways:

"(1) By the voluntary cession to the Crown of lands purchased from the native customary owners. Such a cession extinguishes the native title, and leaves the land vested absolutely in the Crown as ordinary Crown lands, free to be disposed of by lease or Crown grant in accordance with the Land Acts.


(8) Section 2 Maori Affairs Act 1953.
(2) By the operation of the Native Land Court in ascertaining the title to customary land, whereupon a Crown grant or certificate of title under the Land Transfer Act is issued to the native owners. The land so dealt with, though it continues to be owned by the native proprietors, ceases to be held under the native title and becomes freehold land held under English tenure in fee simple from the Crown." (9)

Such land is today called Maori freehold land and is defined as: "land other than European land which, or any undivided share in which is owned by a Maori for a beneficial estate in fee simple whether legal or equitable." (10)

The system just outlined, of converting Maori land to European tenure and smoothing out the process of alienation, contained, inevitably, many defects and it was the continual attempts to try to improve this bridge, or transformer of the proprietary system of one culture into the proprietary system of another, that accounts for the complex morass of legislation on the subject. It was apparent that the aim of the Colonial Office to protect the interests of the natives in this colony, where it had started with a clean sheet, had not been realized, and although a casual reading of the legislation of the late nineteenth century shows in every case a desire to look after the welfare of the Maori owners, the enactments seldom seemed able to achieve this. The new money economy broke down the old trusteeship of the chiefs and this fortified Parliament in its attempts to individualize the title to land - a system of tenure quite alien to Maori civilization.

Also the expense and delay of litigation gave little incentive to the Maori to go right through the mill and come out with a piece of land of his own. It was better to sell his interest at some stage down the line. Partition was seldom taken further than into family holdings and suspended at that stage in long leases. By the Native Lands Acts (1862, 1865, 1867, 1873 and 1880), in its zeal to reduce Maori land to European tenure, Parliament had set a limit on the number of people who could be put on a single title, (10 people in the later Acts), and this provision also caused considerable hardship by giving those on the title the power to alienate without reference to the desires of the owners not on the title, and to retain the proceeds. It was not till 1886 that this was partially remedied by the Native Equitable Owners Act which gave the Court the right to determine whether those on the legal title were in fact the owners, or merely trustees. Also the 1867 Native Land Act required the names of the equitable owners to be registered against the title.

The way in which the Maoris were waylaid as they came out of the Court with their certificate of title, and duped into alienating at much less than the market value, also came under consideration. The Crown was not the least offender in this respect. A series of Native Lands Frauds Prevention Acts was passed - 1870,

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(9) Sir John Salmond, Introduction to the Native Land Act 1909.
(10) Section 2, Maori Affairs Act 1953.
1881 and the Native Land Court Act 1894. (11) Again the motives were excellent but the provisions were to a large extent nullified by administrative and technical drawbacks. Also these measures came a little late in the day.

However Sir Apirana Ngata (12) suggests that the character of the title given by the Native Land Court was the root difficulty regarding the settlement of Maori land by Maoris. The most suitable land was generally that surrounding the village, but it was held under the most congested title. Indiscriminate attempts to utilize this land commercially could lead to serious quarrels. No man was prepared to plant crops if everyone had a right to harvest, or to fence a paddock if everyone put his stock in it. This affected neighbouring European farms also. The farmer would have to bear the entire cost of fencing himself. If he was running his herd on unfenced leased Maori land it would be pointless to try to improve the quality because he had no means of separating it from other loose stock.

Thus in almost every way there was a substantial discrepancy between the aims of Maori land legislation and the results. It would perhaps not be too much of an exaggeration to compare the touch of the Maori Land Court with that of Chancery in 'Bleak House' - and in making this comparison I do not wish to cast any aspersion on the Judges of the Court. The best intentions appeared to be defeated by the administrative difficulties involved in adjusting the practices of one culture to fit in with those of another.

By the beginning of the twentieth century the Maoris themselves were beginning to look for a solution and the Young Maori Party, which contained at different periods such men as Sir James Carroll, Sir Apirana Ngata, Sir Maui Pomare, and Sir Peter Buck, was formed,

"to apply the idea of reorganizing Maori life by adapting, applying, and building into it what was necessary of pakeha ways while holding to features of the Maori cultural heritage which has survived and which could be brought into stronger consciousness and given new usefulness." (13)

(11) The purpose of these Acts was to invalidate alienations of Native Land if they were:

"... contrary to equity and good conscience and in the case of land held under any trust if the same shall be in contravention of the trusts affecting the said land or is not made in conformity with such trusts or if the consideration for such alienation either in whole or in part arises out of or is founded either directly or indirectly upon any contract for or in relation to the sale or supply of fermented or spirituous liquors or of arms or other warlike implements or stores or is in any way of an illegal nature ..." - s. 4, Native Lands Fraud Prevention Act 1870.

Similar provisions are still in force. All alienations, except those to the Crown, must be confirmed by the Maori Land Court. The requirements before the Court will grant confirmation are set out in s. 227 of the Maori Affairs Act 1953.

(12) Sutherland, loc. cit. p. 139.

(13) Sutherland, loc. cit. p. 409.
Among other things this group helped to introduce the concept of incorporation, a system designed to make use of the tribal principle in a form amenable to European law and land-holding. Legislation to authorize incorporation was brought in from 1884 to 1909 when it was included in the Native Land Act. The method of vesting Maori freehold land in trustees or statutory bodies was evolved at the same time. Incorporation was at first confined mainly to the East Coast and parts of the Bay of Plenty but vesting was favoured for unoccupied lands in North Auckland, the King Country and the Hot Lakes area. (14) Sir Apirana Ngata visualized incorporation as a fairly temporary measure designed to use Maori land productively until the ownership tangle could be unravelled and the land broken up into individual farms for Maoris. For this purpose he used Consolidation, another system evolved by the Young Maori Party and authorized by Parliament in the Native Land Act 1909, though not generally applied till after the First World War. The idea in this was to take all the scattered interests in a particular area and amalgamate them into one holding, then redistribute the land to the owners, one holding to each owner, the size being in proportion to the size of his previous scattered holdings, but in any case a holding large enough for him to make use of. These schemes are initiated by the Minister of Maori Affairs and prepared by the Maori Land Court under Part XVIII of the Maori Affairs Act 1953.

In 1929, as Minister for Native Affairs, Sir Apirana Ngata persuaded the Government to assume direct financial responsibility for the encouragement of Maori settlement. As well as developing consolidated holdings he was authorized to develop land regardless of the state of the title. From 1931 to 1960 the Department of Maori Affairs has brought 403,569 acres into grass at an average of 14,400 acres per annum. However this process appears to have lost much impetus over the last few years. (16) Of the four million acres of Maori land remaining, much of which is leased, about one million acres are not used and Crown development has dropped to about 10,000 acres a year. (17)

One problem which has arisen from the development of farms by the Department of Maori Affairs is the finding of Maori farmers trained to take them

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(14) Ibid., p. 140.
(15) Present Consolidation provisions are found in Part XVIII of the Maori Affairs Act 1953.
(16) The Hunn Report of August 1960 gives the following analysis of land use at p. 141:

<table>
<thead>
<tr>
<th>Category</th>
<th>Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>4,000,000</td>
</tr>
<tr>
<td>(1) leased to Europeans</td>
<td>750,000</td>
</tr>
<tr>
<td>(2) under control of Department of Maori Affairs or Maori Trustees</td>
<td>445,230</td>
</tr>
<tr>
<td>(3) farmed by Maori incorporations and trusts</td>
<td>1,477,770</td>
</tr>
<tr>
<td>(4) idle land suitable for development</td>
<td>550,000</td>
</tr>
<tr>
<td>(5) idle land not suitable for development</td>
<td>777,000</td>
</tr>
</tbody>
</table>

(17) One of the main reasons for this is that development is paid for out of the Land Settlement Account. The cost of Maori urban housing also comes out of this account and the percentage of it spent on housing has increased from 4.7% in 1945 to 47.4% in 1960. (Hunn Report para. 121).
over. The Hunn report says on this point:

"As to the supply of Maori farmers, there is no dearth of nominees for settlement but they are not good enough. The personal factor, which is the most important element in successful farming, cannot be assured under the selection system that has been in force all through the years. It has been the policy to allow the Maori owners to nominate the settlers .... Usually nominees are, quite understandably, members of the family, but too often they lack either aptitude or experience. The best Maori farmers in the country or even in the district, are not given a chance to compete." (18)

"A matter of some public concern nowadays is the extent of Maori land that has reverted to second growth and gone out of production. The Board of Maori Affairs has lately had to assume the responsibility of salvaging large tracts of hill country on the East Coast and 'pocket handkerchief' dairy holdings in Northland. Reverted land not only has to be restored to economic farms but also has to be kept from deteriorating once again. On this point it would be interesting to know the present condition of the 32 stations, valued at £1,232,578, handed back to the owners up to 30 June 1959; and also the unit farms that have been released from departmental control on repayment of mortgage debt in full." (19)

II

We can now make a more detailed examination of the problems faced today with fragmentation and the suggested methods of dealing with them. In this paper I intend to deal mainly with those set out in the 'Report of Commission of Inquiry into Laws Affecting Maori Land and Powers of the Maori Land Court' dated 15 December 1965 which will hereafter be referred to as the Prichard Report. This Report cites four main reasons for the necessity for an overhaul of the law: fragmentation, uneconomic partitions, the high cost of developing the remaining land, and the fact that many Maoris have now left their land and are living near their work in the cities. (20)

Fragmentation or fractionalization is multiple ownership of a single block of land. This began with the original Court award of a block to those entitled following the extinction of the customary title. The titles to these blocks have become progressively more crowded as a result of succession or vesting orders of the Court, on the death of an owner, which vest his interests in his children in equal shares. A Maori can dispose of his land by will, of course, (to another Maori) but the vast majority die intestate. (21) The Maoris explain this by saying that they lack the 'ruthlessness' of the European in selecting one successor to his land; it is felt that every member of the tribe is entitled to a stake in the ancestral

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(18) Hunn Report, para. 126.
(19) Ibid., para. 133.
(20) Prichard Report, para. 9.
(21) The provisions relevant to intestacy are found in ss. 110-117 of the Maori Affairs Act 1953.
land; some even go so far as to say that they are trustees of their land rather than owners of it. Whatever the reason, the result has been that the number of owners in many blocks has become so unwieldy that it interferes with the use of the land and causes great expense in servicing the title. Where an owner had interests in several blocks his children would each get a share in each of them, which means that the roll of owners is much larger than the total number of owners. The searching of titles is an extremely laborious task. Moreover, the value of individual interests as they are subdivided is, inevitably, declining.

The Prichard Report cites a random case of a block where the largest interest is worth about £11 and smallest threepence. (22) The titles to the blocks are serviced by the Department of Maori Affairs and it distributes profits gained from, say, leasing the land. The cost of servicing each entry is estimated at five shillings but often the average rent per person would be less than that.

Sometimes the interests of an owner are so small that his successors do not bother to apply for a vesting order, so it is almost impossible to find the true owners of a block. (23) The unclaimed revenue is then held in trust by the Maori Trustee.

This situation leads to apathy on the part of the owners, who don't find it worth their while to leave work to attend meetings called about the sale or lease of their land. (24) These meetings are attended mainly by owners still in the locality; often they have already leased the land informally to a neighbouring farmer and thus vote against a legal sale or lease. For this reason it is difficult to deal with such land.

Another barrier to the use of Maori land is uneconomic partitions. For these much responsibility must lie with the Court of earlier times. Land was often partitioned with little regard for use or access. The Prichard Report quotes cases where the Court said to a petitioner, "I will give you your share of the road frontage and of the river" and partitioned out an area which may have been one chain wide and miles long and was in any case quite unsuitable for farming. (25) They were designed to satisfy the desire for sole ownership and until 1932 they were surveyed at the Crown's expense, the cost being charged indefinitely against the land. This ceased in 1932 but the Court continued to make partition orders which were not surveyed but merely described in the Court minute book and noted on the old plan. Since a survey is generally required (26) before the title can be registered, many titles are not registered. This causes complaint among lawyers because it is an

(22) Prichard Report, para. 23.
(23) An example is given in the Prichard Report, para. 37, where 20 out of 38 owners have died and there have been no succession orders.
(24) The assembled owners have, under Part XXIII of the Maori Affairs Act 1953, the power to sell or otherwise dispose of their land by resolution, subject to the Court's confirmation.
(26) However a survey is not mandatory. Under S.167 of the Land Transfer Act 1952, the District Land Registrar has power to issue a certificate of title 'limited as to parcels' without a plan.
exception to the Land Transfer doctrine that the register should show the true state of the title and thus weakens the Land Transfer system. An order of the Maori Land Court takes effect from the day it was pronounced (26a). However until it is registered an order affects only the equitable title to the land (s.36(3) Maori Affairs Act 1953). There is no indication that such an unregistered order has any more priority than any other unregistered interest. It is estimated that of a total of about 40,000 blocks of Maori land only 23,000 are surveyed. (27)

Measures are already being taken to combat these problems. Consolidation continues (28) but has not proved as successful as Sir Apirana Ngata anticipated. The administrative difficulties involved in consolidating small scattered holdings into one place are almost overwhelming and, of course, the work is constantly being set back by new vesting orders of successors to a deceased owner.

Incorporation (29) is being continued with increasing success. It consists of the transformation of one or more blocks of owners into a unique form of incorporated body; the land is pooled in a co-operative venture, each owner getting a share of the profits proportional to his share in the land. Equitable interests are actually retained in the land, the incorporation holding the legal estate in trust for the owners. These incorporations are also unique in that they may buy up their own shares as a body corporate, thus increasing the value of those remaining. However there must be more than three owners in the incorporation. They are run by a committee elected by the owners, and being a form of community effort with their own administrative hierarchy, they are admirably suited to fit in with the Maori tribal system. This device of incorporation gets around the almost insuperable difficulties posed by fragmented interests since the incorporation has full power to deal with and alienate land, and it is a means of ensuring that the owners pull together and collectively make good use of land which as individuals they would find hopelessly uneconomic.

One main trouble with at least some of the incorporations at the moment is that they tend to keep management 'in the family' and this does not make for efficient running. Sometimes in the smaller ones, families think they have a right to a seat on the governing committee and there is a certain amount of nepotism in the allocation of jobs. The Prichard Report considered this matter (30) and pointed to the practical difficulties and cost involved in removing an unsuitable committee-man from his seat, recommending the abolition of a committee-man's right of appeal from a Court order dismissing him. However this appears to be primarily an administrative and practical matter, rather than a legal one.

Another more basic problem is that although incorporation eases the difficulties arising from fragmentation it is not completely immune from them itself - they have been staved off rather than eliminated. This is because the

incorporations service their own rolls of owners in issuing dividends and if continuing fragmentation of the equitable interests continued unchecked it could be quite burdensome distributing profits. However, many of the incorporations put aside part of the revenue to buy up and extinguish the smaller shares and it appears that in the near future incorporation will prove a valuable method of making effective use of land under crowded titles, though it remains to be seen whether this will be the permanent situation. (31)

The use of trusts also helps minimize problems arising from fractionalization by vesting the legal interests in one or more blocks in one person or body, to deal with it as owner. (32) The Court is empowered to set up these trusts by s.438 of the Maori Affairs Act. In most cases the trustee is the Maori Trustee who performs the laborious task of distributing the profits to the beneficial owners each year. The total amount of Maori land either farmed by incorporations or held in trust was estimated by the Hunn Report in 1960 to be 1,477,770 acres. (33)

A more recent device now used to ease congestion of title is conversion by the Maori Trustee introduced in 1953. The Maori Trustee is a corporation sole set up by the Native Trustee Act 1930 (now the Maori Trustee Act 1953). In the words of the Hunn Report:

"He is both orthodox trustee and general factotum. Under the Maori Trustee Act he has the normal trustee functions of estate administration, much as the Public Trustee possesses under the Public Trustee Office Act. Under the Maori Affairs Act and related Acts he is called into service whenever it is necessary to find a substitute for multiple ownership. Doubtless the law would regard all his diverse capacities as being fiduciary in nature, but those acquired outside his own Act seem more administrative than fiduciary in essence. From the variety of duties entrusted to the Maori Trustee, it could be inferred that the Legislature has long since come to regard him as the appropriate custodian and conservator of the assets of Maoridom whenever one is needed. It is a most persuasive precedent for calling still further on the Maori Trustee's services as a way out of the 'arithmetic trap' of multiple ownership." (34)

The functions of the Maori trustee are: administration of estates of

(31) See also The New Zealand Herald 25 May 1966, p. 6, col. 8, when Judge Sheehan on his retirement from the Maori Land Court said that the present system of incorporation was the best approach he had seen in his term of office. However he emphasized the need for supervision by trained personnel.

(32) An example of this was given recently when Judge Scott approved an application by the registrar of the Waikiki Maori Land Court to have 40 titles comprising 38,000 acres of Maori Land in the Tarawera Valley amalgamated and vested in the Maori Trustee. The Maori Trustee was given discretion to enter agreements with the Government and Tasman Pulp and Paper Co. to include the land in a timber forest to be developed. - Reported in The New Zealand Herald 20 August 1966, sec. 1, p. 5, col. 6.

(33) Hunn Report, p. 141.

(34) Ibid., p. 66-67.
deceased Maoris; administration of property of Maoris under disability; control and
alienation of lands held in trust; execution of instruments of alienation as agent of
owners; collection and distribution of rents etc, arising from alienation of Maori
land; investments of trust moneys held in the common fund; assistance by advances
from the General Purposes Fund, and operation of the Conversion Fund. (35)

The present provisions governing conversion are found in Part XII and Part
XIII of the Maori Affairs Act 1953. The object was to allow the Maori
Trustee to acquire, compulsorily, interests in land worth less than £25, gather
these interests into a unit of economic size, and then sell the unit to a Maori. A
revolving fund was established for that purpose but it was not large enough, at
£110,000, to permit large-scale conversion of land, so the Maori Trustee has mainly
restricted himself to buying interests in blocks where the consolidated holding could
be quickly sold, to avoid having too much of his funds tied up in land where there is
no immediate possibility of a sale. The statistics of the Department of Maori
Affairs (36) show that from 1953 to 1959, 10,874 interests were converted at a cost
of £109,936. The average value of each interest was thus £10. By 1959, 5,930
interests had been sold for £74,764, an average price of £12.10.0 per interest.
This is not much when the magnitude of the land problem is considered, however -
there are still over one million acres of idle land.

Finally, in 1957 a device called the '£10 rule' was introduced. The object
of this was to prevent further deterioration of the title by authorizing the judges not
to make vesting orders, for a share worth less than £10, to more than one
successor, or alternatively to vest it in someone who already had an interest in the
land. This rule was incorporated in the Maori Affairs Act 1953, as reprinted in
1964, section 136 (2) (d) and (e).

III

To pass now to remedies which have been put forward to deal with the
problems outlined: as a preliminary it is necessary to consider the question of the
interests or values bound up in Maori Land and the law. This is important because
integration of Maori and Pakeha is by no means complete and in some respects the
interests of the Maori people differ from those of the rest of the community. We
must ask questions like 'What do the Maori people want ?', 'What is the interest of
the nation in this matter ?' There is a marked diversity of thought among both
European and Maori on how such questions should be answered and, having answered
them, how much weight should be given to each interest.

There are many competing interests to be considered. It is hard to say
whether it is realistic to talk of an 'interest of the Maori people' because they have
conflicting desires and needs like everyone else. Many of those in the city have no
intention of returning to the land and would rather sell their interests and use the

(35) Ibid.
(36) Ibid., p. 55.
proceeds to further themselves in the city. (37) On the other hand there is still a large number in the country, not trained to do anything in particular except subsistence agriculture. For these it can be argued that they should be restrained 'for their own good' from divesting themselves of their land until there has been time to straighten out the ownership problems and develop the land for their use.

There is also, among the Maori people, a mixture of racial pride and sense of tradition which, for various reasons, leads to a desire to retain the land and a desire for measures restricting its alienation. On the one hand there is the concept of 'turangawaewae', 'a resting place for the feet'. According to this doctrine, a proprietary right in the tribal land, however small, is needed to give a member of that tribe standing to speak on the marae. However some Europeans, experienced in the Maori land question, say that this concept of turangawaewae is dying, if not dead, and in fact any person who can show blood relationship with the tribe may generally speak on the marae, except perhaps on questions regarding the land itself. They suggest that it was actually the Hunn Report which resuscitated this idea (38) and that it has little validity today. It would not be wise however, for a European not steeped in Maori feeling and tradition to dismiss this point too lightly.

The other wing of this movement to retain Maori land in Maori ownership is of more recent origin and contains those who are not interested as much in 'turangawaewae' as in the 'mana' of the Maori people. They aim to show that the Maori is just as capable of economic use of his land as the pakeha and to this end they endorse efforts to overcome fragmentation through increased conversion, amalgamation and repartition, incorporation and consolidation. Some of these measures are to some extent opposed by the more conservative elders since they tend to eliminate the smaller holdings and leave no room for the traditional proprietary 'trusteeship' of the land where each man had his small, though often useless, share. However to the modern group this is of less importance than economic use of Maori land by Maoris.

In addition to those variations another view was put forward at the Conference which met at Auckland 13-15 May 1966 to discuss the Prichard Report. It was suggested (39) that Maori land, particularly the uneconomic interests, could be gathered together and used to provide revenue for the next generation or so to increase the rate at which the Maoris are approaching European social and economic standards - an idea rather similar to the Maori Education Foundation. This idea was advanced in the Hunn Report (40) which suggested tentatively that if the Maori people really wished to keep their land they could assure this and at the same time eliminate the fragmentation problem by incorporating tribes on a national or regional scale. These bodies would buy up uneconomic interests and hold them in trust for

(37) This is alleged in, among other places, ch. IX of the Prichard Report pp. 76-78, but on the other hand is denied by some Maori groups: see, for instance, A Maori View of the Hunn Report, prepared under the auspices of the Presbyterian Maori Synod, 1961, especially at p. 20 ('Land Settlement, Land Titles and Maori Incorporations').


(39) By Dr Sinclair of the New Zealand Maori Graduates Association. He put this forward not at the Conference itself but at the valedictory.

(40) Hunn Report p. 58 and p. 69 following.
the benefit of the members of the tribe, allowing them to overcome any economic
disadvantage which might be hampering their progress. No-one has yet suggested
where the money to do this should come from. By eliminating individual land owner-
ship this project would also, of course, overcome any difficulties caused by the
'Turangawaewae' doctrine (if it exists). However this solution, while theoretically
attractive, has not found a great deal of acceptance and was not discussed by the
Conference itself. One reason for this may be that those people who are most
interested in Maori land reform are generally those who have a reasonable stake in
it and wish to make something of their land for themselves and perhaps their immed-
iate community. They wish to clear up the titles and go ahead with capitalistic
development, turning their land into individual economic units or if that is not
feasible, into revenue-producing corporations.

The interests mentioned above do not by any means form an exhaustive list
of the interests affecting the Maori people, regarding their land and changes in its
status, but they are perhaps some of the more distinct 'Maori' interests as opposed
to those affecting Maoris along with all other members of the community.

However the majority of Europeans consider, to a greater or lesser extent,
that Maori land should be on the same footing as European land and the restrictions
should be removed. This view is shared by some of those Europeans who are
familiar with the Maori land system. They feel that many of the problems arising
in relation to it are caused by overprotective legislation. They say that this has
resulted in inefficiency and non-utilization of land, and to a lack of incentive either to
farm competitively or sell the land to someone who can.

To point out the evils of having a separate system of ownership for Maori
land, the case of the Waimana Valley was mentioned. It is said that before the war
this contained smallish dairy farmlets of 30 acres and upwards which supported a
dairy factory. After the war increased fragmentation caused by succession orders
and the necessity for larger mechanized farm units made those farmlets uneconomic.
They were allowed to revert to secondary scrub, most of the men went elsewhere
and the factory closed down.

It is contended for this view that the way to combat such cases is not to
develop new methods of Maori tenure, such as incorporations or trusts, but to
abolish Maori tenure altogether. It is realized that this would entail many Maoris
becoming landless but it is questioned whether this is of great importance. The
Maori is no more a born farmer than the European is - if he wants to farm why should
he not acquire land in the same way as the European? This view takes no account of
the connection between the land and tribal tradition and the sense of tribal heritage,
but this connection is diminishing.

However one point not mentioned was how the conversion from Maori to
European tenure should take place. The legal and administrative difficulties
involved seem just as formidable as those arising in the mere reform of Maori tenure.

I do not intend to resolve the interests and points of view, expressed above,
to any great extent. The reader will, no doubt, have his own opinions on them. I
mention them as a background to the question of reform of Maori land law and to
give some idea of the complexity of the values involved in an evaluation of the social
effects of these laws.

It is possible to pass now to the solutions suggested to the fragmentation problem in the Prichard Report and the opposing solutions arising from the reaction to it. To consider first the Order of Reference of the Prichard Report, the charge has been levelled that the government, in setting up this Commission, framed the Order of Reference in such a way as to push the Commission inevitably to the conclusion which it did reach, i.e. greater Crown control and easing of restrictions on alienation (perhaps intended as part of the drive to improve New Zealand's agricultural production and exports). When the order of reference is considered it does indeed appear to be aimed at a particular result. (41) The first sentence sets the tone by speaking of difficulties 'inherent' in the system and requiring recommendations on the 'better use of the land'- it doesn't say by whom.

If indeed the order of reference was designed to make the Commission reach the result that the Crown should have more control over Maori land or that alienation should be made easier or that any other method should be adopted to make for more efficient use of the land, then it has succeeded in this object. (42) On the whole the recommendations have not been well received by the subcommittee of the N. Z. Maori Council which studied it, nor by the Auckland Conference. (43)

(41) As far as relevant to this paper, the Order of Reference is set out below; (my underlining):

1. What measures should be adopted to overcome the difficulties inherent in the system under which Maori freehold land is held in common ownership; and to make for the better use of the land.

2. Without prejudice to the generality of the foregoing proposition:
   (a) What Maori freehold land, if any, should be given the status of European land and at what point should that status be imposed.
   (b) To what extent should the restrictions on the powers of the owners of Maori freehold land to alienate their interests be relaxed or removed.
   (c) Omitted
   (d) "
   (e) "
   (f) Whether any system of ownership other than that of the beneficial ownership of the land should be prescribed in respect of the Maori incorporation undertakings, or any other class of Maori freehold land.
   (g) Whether any provisions additional to those now subsisting, are necessary for the better use of Maori freehold land.
   (h) Omitted

(42) Relevant statements and recommendations of the Prichard Report are:
1, 4, 8, 11, 12, 14, 15, 16, 17, 20, 22, 24, 34.

The Report commences its recommendations by saying that "Fragmentation and unsatisfactory partitions are evils which hinder or prevent absolutely the proper use of Maori lands" and "Fragmentation will become progressively worse unless urgent drastic remedial action is undertaken." The recommendations on fragmentation were based on this statement, the truth of which has been at least partially shown earlier in this work. However the Auckland Conference contested whether this need be the case, whether fragmentation carried inherent drawbacks. (44) It was considered that although uneconomic partitions were a fault of the Maori Land Court and Maori Land law as of the Maoris themselves. Moreover multiplicity of ownership was felt to be no bar to effective utilization of Maori land. It was pointed out that there were already devices existing to overcome the problems in multiple ownership - e.g. leasing and incorporation. The Conference therefore opposed the Prichard Report recommendation fifteen, that the value of a convertible interest should be raised from £25 to £100 and that the Crown should have the right under some circumstances to change the converted holding into Crown land. It was thought this measure should be opposed particularly until the full potential value of the land concerned had been discovered. (45) This presumably means that the status quo should be maintained until there has been time for special land development officers (46) to examine the land and suggest possibilities of incorporation or leasing or find factors influencing the land's value which have been overlooked by the government valuer.

The Conference did not rebut or mention at any stage the points brought forward by the Commission regarding the expense falling on the taxpayer in servicing the status quo. This is brought out in recommendation four of the Prichard Report:

"It would be fairly correct to say of a section or block of Maori land owned by more than one person that if it is unused, not only is it paying no rates but also the State is paying £6 per annum to keep a record of who owns it. Even if it is used it is paying rates but it is still costing the state £6 per annum."

Another example is the right of appeal of a committee-man against his dismissal by the Court and the right of appeal as of right by an owner against amalgamation and repartition of land. The Prichard Report recommended the abolition of these except in certain cases. (47) The Conference rejected these recommendations saying that the right of appeal is 'fundamental'. However the points about expense made by the Commission (48) are valid reasons to hasten reform of tenure and I feel that the Conference weakens its case by not making some concession to the taxpayer in this matter, or exploring ways of reducing costs in the meantime.

Another proposal which raised considerable furore was the recommendation that conversion should be undertaken by the Crown and not by the Maori Trustee.

(45) Ibid., p. 1.
(46) See R. D. Macgregor, The Report - A Perspective (Holland, Beckett and Co., Tauranga). The question of obtaining proper advice concerning the use and value of land before using it or disposing of it was discussed at the Auckland Conference (Conference Report p. 5.)
(47) Prichard Report, recommendations 2 and 26(ii).
(48) These are discussed generally in the Prichard Report pp. 19-47.
This is embodied in recommendations 16 and 15(c) and (d). (49) As has been mentioned previously, those attending the Conference were mostly people interested, for one reason or another, in the preservation of Maori land as Maori land. Thus they rejected a proposal which could reduce some Maori land to European land without the owner's approval - deprive him compulsorily of his 'tribal heritage'. The reason given by the Commission for the Crown undertaking conversion rather than the Maori Trustee was that the Maori Trustee didn't have the means to buy on the scale suggested, (50) but as some people have pointed out, if the Crown itself has these funds available there seems to be no reason why it should not lend them to the Maori Trustee to carry on on a larger scale. Also, with its other conflicting interests, the Crown is not really a suitable Trustee for the Maori people. Regarding the level of conversion, Dr Kawhuru suggests that it would be pointless to raise it because the Prichard Report itself shows that the average uneconomic interest is much below the present £25 limit; (51) however this criticism might not apply if the Maori Trustee were given or loaned more money to use on conversion. Dr Kawhuru adds that these increased powers are not needed to encourage the Maori to sell since in 1964 18,750 acres of Maori land was sold to Europeans. (The 1965 total was much higher.) However, with respect, this does not quite meet the point. The object of conversion, even by the Crown, appears to be not to take Maori land away from the Maoris, but to simplify the titles by buying out small owners and selling economic interests to other Maoris. But if it is felt desirable that such land should remain in Maori ownership whether any Maori wished to buy it or not, recommendations 15c would have to be changed as suggested in the Auckland Conference Report (page 2).

Another recommendation was rejected on rather similar grounds. This was the proposal that incorporated owners should hold their shares in the incorporation not in the land as at present. (52) It is possible that some of the opposition to this change lies in the fear that change of the unique status of the land corporation to the legal position of an ordinary company will involve loss of taxation privileges. This reaction was anticipated in the Prichard Report which tried to overcome it by

(49) Recommendation 15c and d:

(c) That the Crown, having taken over the fragmented interests, offer to sell them to other owners or failing that to other Maoris on time-payment, but that if no owner will buy, and after him no Maori, the Crown may retain it as Crown land and as such, if the Crown so decides, available for disposal.

(d) That to ensure that there shall be utilization as well as ownership of interests as converted the Crown shall, on acquisition, be entitled to exchange such interests for others of equal value in the tribal area or within 20 miles of the block whichever shall be the greater distance and that the only permissible objections to such exchanges shall be:

(i) loss in value
(ii) effective and not nominal occupation by the person whose interests are being exchanged.

(50) Prichard Report, para. 196.
(51) Inquiry Into Maori Land loc. cit. p. 6.
recommending that there by no change in the present system of taxation for some
years after the changeover. (53) However the Report also recommended that there be
a special Commission of inquiry on incorporations (54) and the Conference accepted
this, considering that there should be no action on recommendations in this field until
such a Commission had reported. The suggestion in the Prichard Report that a
shareholder should be able to sell to a non-Maori if no Maori had bought after two
years, recommendation 26(iii), was, predictably, rejected.

Also rejected was the proposal that consolidation be abolished (i.e. all part
XVIII of the Maori Affairs Act 1953). Reasons why consolidation was not as useful
as had been hoped have been given in this paper and the Prichard Report mentions
some at paragraphs 385-388. However it appears possible that apart from the
schemes already in operation, consolidation might prove useful in some cases - at
least there appears to be no harm in leaving it on the statute books. The Auckland
Conference Report says at page nine:

"The meeting recommends that the present machinery for consolidation
be investigated with a view to expediting the processes involved and
that more trained officers be appointed by the Department of Maori
Affairs to implement these methods."

The Conference Report shows that the Maori people, as represented at the
Conference, on the whole do not feel there is a need for a great deal of legal reform.
The general feeling appeared to be that the present system is workable and that what
is needed is more administrative reform - more money spent on development,
expansion of advisory services in agriculture, more emphasis on incorporation and
amalgamation and repartition of uneconomic partitions - more oil to ease the
workings of the machine rather than a change of design. The Maoris have some
incentive to retain the present system - Maori land cannot be taken to pay debts or
in bankruptcy proceedings (55) and if unused it does not pay rates. There may also
be a natural tendency among the older people to stick to the ways of the past.

Here they are up against the Commission recommendations which could be
regarded as the thin end of the wedge to abolish Maori land as a separate tenure.
This is especially so in the light of the sweeping recommendations designed to bring
about the abolition of the Maori Land Court, replacing it by a form of administrative
tribunal staffed mainly by the Department of Maori Affairs. (56)

It remains to be seen to what extent the Government will implement the
recommendations of the Commission. It might think twice before proceeding in the
face of so much influential Maori opposition. However it cannot be denied that the
present state of affairs is highly unsatisfactory and will deteriorate further unless
checked. The Maori solution seems, broadly, to be the continued protection of
Maori land while increased sums of money are spent to bring and keep it in produc-
tion, meanwhile servicing the titles somehow. There appears to be a feeling,
justified to some extent, that Government and Land Court policy has caused the
present situation so it is up to the Government to fix everythiing up.

(53) Ibid., paras. 353-355.
(54) Ibid., para. 337.
(55) This is provided in ss. 132, 132A and 455 of the Maori Affairs Act 1953.
(56) Prichard Report, recommendation 25.
The Commission, which probably represents, at least to some extent, the Government view, is obviously looking for ways to curb expenditure and make administration more efficient by reforming the methods of land holding, eliminating small holdings and at the same time increasing productivity with a minimum of wastage caused by e.g. incapable nominees. In this aim the Commission doesn't seem to have worried much about the repercussions on Maoritanga or the Maori heritage.

One thing everyone has agreed upon is that the key to a solution lies in education - training in farming, in the use and value of land, and general education. When the relative size of the populations is considered it seems likely that education will result in "Europeanization", though many will regret this, and as this takes place Maori land must inevitably disappear also.

However we are still left with the important question of the pace at which the change will take place. Is the time yet ripe for altering the legal structure of the Maori Land system and taking away the protection? Alternatively, do present social conditions demand the retention of the existing structure, at the same time removing the worst defects through amalgamation and repartition, incorporations, trusts, and especially through more intensive education about the evils of breaking up an inheritance into ever smaller parts? Training in the efficient use of land would also be required.

This is a policy decision involving value judgments, not a legal one. It is a decision of great importance to the Maori people but also the whole community, since anything which could affect the prosperity of our primary industries affects everyone. Yet the matter is not simply economic, though the thought of losing their privileges no doubt reinforce Maori objections to change. In setting the pace of change regard must be paid to Maori tradition which runs deeper than many Europeans appear to suspect and is still partly tied up with the system of landholding. However it must also be borne in mind that this system began as a pakeha expedient to bring the title to tribal land into a form useful to the English legal system at the same time attempting to do justice to the Maori owners. It was never intended as more than a temporary measure to be used while the change-over actually took place and while the Maoris were still unused to the British notion of landholding which was then being imposed on the country.

Perhaps the best solution would be to reform Maori tenure, particularly through incorporation, and at the same time to continue conversion to build up units of an economic size which could gradually be brought under European tenure at a pace appropriate to the increasing skill of Maori farmers and the increasing awareness of land values by Maori owners. Then at some time in the future the incorporations could be changed to ordinary land companies. This is essentially a compromise solution but there are so many conflicting interests tied up in the Maori land structure that it seems dangerous to advise bold moves either to eliminate it altogether or to turn it into a more or less permanent institution.

The two-pronged method of reform briefly outlined above would enable Maori land to be used efficiently and at the same time allow it to be phased out in a controlled manner as the need for the separate tenure disappears.