The Native Land Laws: global contexts of tenure reform, individual and collective agency, and the structure of 'the Māori economy' – a 'landless brown proletariat'?

Samuel D. Carpenter
for the Crown Law Office
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Research Questions

i. First, what were some of the 'real-world' concerns evident in the evolution of the Native Land Laws (**NLLs**)? In particular how were tensions evident between individual control and collective control of lands?; how could Māori manage land collectively under European/British tenure or legal models?; could they do so under trust or agency concepts, or through incorporation?; even then, was there a limit to the efficacy or efficiency of such structures?

ii. Second, was the intent, or probable result, of Crown policy and legislation (the NLLs) to turn Māori from a landholding people into a landless labouring class (or underclass), that is, a 'landless brown proletariat'?[1] In other words, was the intent to remove Māori from land ownership *or* was it to provide mechanisms by which land could be utilised in the modern economy - including under individual or collective Māori ownership?

About the Author

iii. I have worked in the Treaty sector as an historian for a decade, including at the Waitangi Tribunal and Office of Treaty Settlements. I also have six years legal-practice experience.

iv. I am currently working on a Ph.D. on early New Zealand political thought, *circa* 1830s-1860s. This is part of a Royal Society of New Zealand, Marsden-funded project at Massey University, led by Professor Michael Belgrave, which is exploring the extent to which a civil society was created or imagined in New Zealand that transcended the scattered European settlement and different Māori polities, allowing the wars of the 1860s to be seen as 'civil wars'.

v. I have undergraduate degrees in Arts and Law from the University of Auckland, a Masters in history (distinction) from Massey University, and Te Pōkairua Ngāpuhi-Nui-Tonu (Diploma in te reo Māori) from Tai Tokerau Wānanga (NorthTec).

vi. I consider myself primarily as an historian of nineteenth century political thought in its New Zealand and broader British empire contexts.

[1] The phrase 'landless brown proletariat' was a phrase 'coined' by Sir Douglas Kidd during the Taihape Tribunal hearings as a way to characterise the effects of Crown policy on/for Maori. It has been adopted as part of the research framing, in part because it allows a wide-angle testing of what the native land legislation meant and effected in its contemporary contexts.

PART 1: EXECUTIVE SUMMARY & FRAMING/APPROACH

Executive Summary

1. This report is a contextual analysis of the various land tenure (title or ownership) mechanisms and economic development concepts (or models) that were available at the time when the Native Land Laws (**NLLs**) were created and then amended, in particular, in the first decade of their existence (1862-73). The reasons for the change from an 1865 'trust' title to an 1873 'democratic' title are a focus of analysis. The report also considers the 1894 'committee' model in light of the critical context of the development of legal mechanisms for collective ownership and management in Britain (particularly the joint stock company).

2. The amendments to the NLLs reflected an evolution in thinking about the NLLs, which itself a reflected an evolution in thinking about the economy and legal mechanisms of ownership and management, as well as changes in political and policy approaches of successive governments. The NLLs and the Native Land Court did not arrive in a complete form, or as some tried-and-true model simply imported into the New Zealand context. They were an attempt to deal with complex political, social and economic challenges in the New Zealand colony (or several colonies of settlement and many tribal polities). At the same time, they drew upon various ideas in British metropolitan and imperial contexts about the optimal ways in which real property or land should be held, used and deployed in a 'modern' economy. There were institutional precedents in Britain and its empire that formed part of the Victorian economic and legal backdrop, notably the parliamentary enclosure movement in the eighteenth and nineteenth centuries, but also developments in trust law and the emergence of the limited liability company. Equally importantly, the NLLs had to acknowledge and work with the realities of Māori social structures, tikanga or custom regarding land.

3. This report is an exploratory attempt to consider the NLLs in the context of New Zealand *realpolitik* and these wider intellectual and legal contexts. As such, this methodology is reasonably rare in the context of Tribunal historiography or jurisprudence on the NLLs and Court. As one illustration of this, scans of recent Tribunal reports (Tūranga, CNI, Hauraki, Kahui Maunga, Wairarapa-ki-Tararua, and Te Urewera; together with H Riseborough and J Hutton, Rangahaua Whanui, 'Theme C' report (Waitangi Tribunal, 1997)) reveal few if any mentions of 'enclosure'/ 'enclosure of the commons'. Nor are there examinations of nineteenth century British and global contexts of tenure reform, including the rise of 'individual property', or the development of a market economy or 'capitalism' generally. A number of reports employ the phrase 'commercial economy' or 'colonial economy', however what this was and how it got there is not analysed but is, rather, assumed. These things are treated as 'givens', rather than ideas and institutions which were often the product of long and uncertain historical development.[2]

[2] Another way to put this is that Tribunal reports and research for Tribunal historical inquiries seldom engage with the (often voluminous) literature on these topics. This means, to employ a metaphor, that Tribunal historiography is focussed on the particular action between protagonists in a stage play (Crown and Māori), but its attention is not on the changing backdrop and sets of the play – with which the pratogonists inevitably interact and without which the action cannot fully or adequately be understood.

4. It is to be expected perhaps that in a historiography/jurisprudence of Treaty claims and grievances that the wider intellectual and economic shifts underpinning the changes within both settler and Māori tribal societies should have been left under-examined. However, in seeking to analyse claims, including claims of land loss or alienation, we need to see such land loss and land transactions of all kinds in their wider contexts. To begin with, for every piece of land 'lost' there will be (excepting in cases of outright confiscation) the *quid pro quo* of cash sale payment, mortgage advance, lease payment, timber lien payment, and the like. To focus, however, merely on the *quid pro quo* equation is too reductionist or narrow a narrative. For these kinds of transactions in a market economy imply much bigger changes in modes of thought and economic culture.

5. One way to put the argument at this high level of analysis is that the NLLs were about 'modern economy mechanisms', these being certainty, security and transferability of title. To the extent Māori sold, leased, mortgaged or otherwise alienated land, this was a result that the NLLs intended but *also facilitated*. Land transfer enabled colonial settlement but the various new forms of land transaction *also created (or better enabled) new Māori economies and social forms*, for example: a 'cash economy', and mortgaging, which enabled the purchase of many capital and perishable items in the new economy from flour and timber mills to ships to new tools, clothes, and types of food. Conversion to the new 'fixed' tenure also created or better enabled such economic phenomena as Māori lessors or landlords; Māori sheep farmers and dairy farmers; new Māori settlements based around the new economies – for example, in Taihape, Moawhango; a Māori wage economy both in rural and more urban areas; the rangatira as propertied 'gentleman' and the rangatira as 'court assessor'.[3] Many of these changes had begun before the NLLs, but the NLLs better enabled or facilitated them. A sheep economy, for example, arrived in Mōkai Pātea/ Taihape some years before the Native Land Court did.

6. All this is not to argue that these new economies were ultimately successful for Māori individuals and communities, because in many cases this was not so. But it is to highlight the adoption and adaption by Māori of many new social, political and economic ideas and practices, an adoption/adaption that occurred as a result of real Māori agency in many cases, while in other cases agency was reduced to a limited choice between available alternatives set by colonial law and policy. Before 1865, Māori agency through rangatira was arguably more unrestrained. After 1865, an arena of ongoing Māori agency was the decision over whether to sell, lease or otherwise deal with land (including mortgaging, when that was not prohibited). An arena where Māori agency was more reduced was over the form of title in the NLLs, but even here there were still choices including over whether to retain land in undivided title or subdivide it out to individual or whānau allotments (a choice made in Taihape, often in favour of the latter).

7. Regardless of the specific arenas of agency, it is clear that long before 1865, Māori and Pākehā economies and societies – or rather, hapū/iwi, settler, kawanatanga, business and individual economies – had become 'entangled' or enmeshed with each other and with the expanding material and cultural connections of global empires – especially that

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3 Richard Boast also discusses these deeper transformations, for example, see Boast, *Buying the Land, Selling the Land: Governments and Māori Land in the North Island, 1865-1921* (Wellington: Victoria University Press, 2008), at 249-250. At the same time Boast's analysis indicates that income levels and/or capital accumulation through leasing land and even selling land was not a positive picture overall.

of the British world.[4] Whilst this engagement occurred late in Taihape relative to coastal regions, Taihape was not divorced from those developments with some early leases being in place particularly to the south of the area.

8. In terms of the specific 'findings' of this research, it was the adaption of British ideas by British or settler-colonial policy makers to the New Zealand environment, as seen in the almost endless adjustment to the form of title in the NLLs, that is perhaps most surprising after undertaking a fresh reading of these sources. Although the concept of individual private property was arguably the dominant idea or principle objective of the NLLs, the form that this took varied. The main reasons for this were twofold: first, it was recognised that to instantly divide up communal tenures into individual transferable property interests was not often possible, even if it was desirable.[5] Second, individual private property was not (in any event) understood in isolation from the many laws of real and personal property that operated alongside it, including, prominently, notions of trust and trustees. The trust was adopted in conjunction with Māori title after 1865 to advance collective aims – most famously in the Wi Pere and William Rees trusts on the East Coast; however, trusts were also recognised in other, more prosaic, cases where chiefs had declared themselves trustees of Court granted titles.[6]

9. In terms of arguments in Tribunal historiography about the Crown's failure to provide corporate forms for Māori land ownership, while the active political reforms in company law reached their zenith in the 1860s in the United Kingdom before the principle of limited liability became statutorily entrenched, corporate forms of business did not become prevalent in Britain until decades later.[7] This is important context for assessing the way land ownership and business was conceived. And it reflects wider tensions in Victorian society between individualist norms and responsibility, and collectivist, including traditional and customary, forms of social and business ordering. Contrary to some present-day perceptions (including in some quarters of Tribunal historiography) that the Victorians were a society of 'possessive individualists', the prominence of communal or associational mores and practices in Victorian society must be brought back into the picture – the rise of the joint-stock company, and the many local bodies, local associations, clubs and societies, parish churches and charitable organisations that were the life-blood of Victorian society.[8]

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4 See Tony Ballantyne, *Entanglements of Empire: Missionaries, Māori, and the Question of the Body* (Durham and London: Duke University Press, 2014).

5 Donald McLean, for example, had attempted to identify individual interests in Taranaki circa 1844, and had abandoned the attempt after it proved extremely complex; see Evidence of McLean to Royal Commission of Inquiry, 17 April 1856, "The Affairs of New Zealand," British Parliamentary Papers, vol. 10, at 578.

6 *Cf.* Richard Boast, *The Native Land Court, 1862-1887: A Historical Study, Cases and Commentary* (Wellington: Brookers, 2013), at 197-213 (a section entitled 'The Native Land Court and the Ordinary Courts').

7 I have not had the opportunity to analyse any New Zealand data on personal/partnership vs incorporated forms of business in the seond half of the nineteenth century; I would be very surprised, however, if the situation differed materially from that of the British metropole.

8 See, for example, Angus Hawkins, *Victorian Political Culture, 'Habits of Heart and Mind'* (Oxford: Oxford University Press, 2015); Jose Harris, ed., *Civil Society in British History: Ideas, Identities, Institutions* (Oxford; New York: Oxford University Press, 2005); Martin Daunton, *State and Market in Victorian Britain: War, Welfare and Capitalism* (Woodbridge: Boydell Press, 2008); Jose Harris, *Private Lives, Public Spirit: Britain 1870-1914* (London: Penguin Books, 1994) An egregrious example of the way 'settlers' are sometimes characterised appears in the *Wairarapa ki Tararua* report, vol 1., Wai 863 (Waitangi Tribunal, 2010) at Liv: 'And what of the settlers? What made them so certain that their ways were better? When they looked at the communal lives Māori led, how did they know that their own atomistic lives were more fulfilling, more godly?...' These questions are never actually interrograted and they simply and falsely assume a binary distinction between 'Western individualist' and 'indigenous communal'; or, which may be worse, they assume it without any attempt to historically situate the idea of Western individualism.

10. In light of these broader contexts, and through a close reading of the New Zealand primary texts, I have found in the evolution of the NLLs form of title provisions the following characteristic, prominent, or (in some cases) new/novel ideas:

(a) The Native Lands Act 1862: the 1862 legislation provided for *tribes* to apply to be recognised as owners of tribal land, followed by a process of partition or subdivision between tribal members, with land for common purposes to be also provided for. Tribes were envisaged as the primary applicants for title under the 1862 legislation, however, individuals or 'communities' could also apply. Hence, this was 'tribal title' or a tribal process of application; secondarily, a maximum of *twenty individuals* could be owners on any piece of subdivided tribal land.

(b) The Native Lands Act 1865: the 1865 legislation made little fundamental change to these provisions: the main differences were really ones of emphasis in that it would be any individual who would now apply for title, and only *ten individuals* could be recognised as owners. A tribe could still be named as an owner for blocks over 5000 acres in size. I read these provisions as indicating an intent that for larger, more 'tribal' areas or territories, tribes could still be owners, but for smaller areas, land would be partitioned between individuals or small groups of individuals. However, a trust or agency function is also implicit in the idea of a maximum of ten individuals for each block, as Sir William Martin pointed out.

(c) The Native Lands Act 1867: It was soon realized, from experience, that naming only ten owners when there was a larger group of owners standing behind them could deprive those other owners of their rights in cases where the named owners acted without reference to the wider group. In this context, the named owners seem to have been viewed as types of trustees for a wider beneficial ownership group. I characterise the 1865 'ten owner' title as a form of 'trust title'; a situation that the 1867 amendment did not fundamentally alter.

(d) The Native Land Act 1873: Since the 'trust' mechanism was not fundamentally altered in 1867, some named owners continued to deal with or dispose of the legal interests without reference to the wider group. (It might be supposed legislators thought that, given standard rules of equity, a third party dealing with named owners had actual or constructive notice of the wider group of beneficial or 'court registered' owners; regardless, such 'notice' was not effective.) Ongoing complaints from beneficial owners about such dealings led legislators to require all owners to be listed on the title – and hence we have the 'Memorial' form of title that I characterise as 'democratic'. The idea of chiefs or family heads as trustees (or representative owners) was abandoned. The irony of the Memorial of ownership was that it was scarcely much more than listing a tribe by name or making a list of all tribal members at a particular time (as the Tūranga and subsequent Tribunals have noted and criticized[9]). It was an intermediate form of title, where selling and leasing was allowed only if all owners agreed. However, a 'majority' could force a partition in order to sell or lease it. It was also possible to partition or subdivide into titles of ten or less

[9] See, for example, *Wairarapa ki Tararua*, vol. 2, Wai 863 (Waitangi Tribunal, 2010), at 421, 425.

owners – titles that could then be commuted into Crown Grants and dealt with freely.

(e) 1877 and 1878 Amendments to the NLLs: these amendments made it easier for the Crown and third parties to acquire individual interests. This reduced community or collective control over alienations (although it was still possible for a 'collective principle' to operate, as I explore below).

(f) The Native Land Court Act 1894: this provided an option of incorporation of a block or adjoining blocks of owners, with a management committee providing day-to-day management, and the Public Trustee overseeing all sales or transfers of land, and holding and disbursing receipts or income, with the owners having to approve such transactions rather like shareholders of a company approving a 'major transaction'. This 'committee' model had antecedents,[10] but the immediate political context involved reform pressures on the NLLs from various sources including the Native Land Laws Commission of 1891, and the Rees-Pere trusts and company experiments on the East Coast (including the Mangatu No. 1 Empowering Act 1893).

11. Various other adjustments in the form of title were made in the NLLs, one example being the beneficial owners provisions of 1886 – yet another attempt to deal with issues arising from 'ten owner' titles before the 1873 Act. The limited time available to prepare this report has however prevented examination of these other legislative forays.

12. The report explores how these evolutions in the NLLs were in part a response to the way that Māori themselves utilized the NLLs. In particular, the key reforms to the title mechanism (as above) sought to grapple with the tension between collective and individual rights and/or agency within the NLLs.

[10] In particular the 'registration' of Committees under the Native Land Administration Act 1886; see also Native Committees Act 1883 and McLean's Native Councils Bill 1872, although neither of these were about incorporating land owning groups.

Framing or Approach

> 'Mr Bennet's property consisted almost entirely in an estate of two thousand a year, which, unfortunately for his daughters was entailed in default of heirs male, on a distant relation …'
>
> Jane Austen, *Pride and Prejudice* (1813)

13. The research question invites examination of a broader range of intellectual, cultural, political and economic texts and contexts than have previously been examined in Tribunal reports and inquiry research – for the sake of argument, even 'literary' texts that provide cultural context for the ways that land was conceptualized and utilized, such as *Pride and Prejudice*.[11]

14. This report should primarily be understood as an exercise in the intellectual history of Pākehā/British ideas about land and property, trusts and companies, and how these things interacted with the greater context of the economy and society; followed by an examination of how these ideas were shaped to the Māori tribal context of Niu Tireni/ New Zealand.

15. The report also attempts to contextualise the NLLs more broadly – in terms of global or world changes in land tenure and economies driven by nineteenth century exports of people, capital and ideas – many from Europe but not exclusively so. It is an initial attempt to do what Jerry Bentley describes:

> The global turn [in historical scholarship] facilitates historians' efforts to deal analytically with a range of large-scale processes such as mass migrations, campaigns of imperial expansion, cross-cultural trade, environmental changes, biological exchanges, transfers of technology, and cultural exchanges, including the spread of ideas, ideals, ideologies, religious faiths, and cultural traditions. These processes do not respect national frontiers or even geographical, linguistic, or cultural boundaries. Rather, they work their effects on large transregional, transcultural, and global scales.[12]

16. Christopher Bayly argued similarly in his important work of global history, *The Birth of the Modern World, 1780-1914*, that the 'interconnectedness and interdependence of political and social changes' that emerged across the work in the nineteenth century means that 'all local, national, or regional histories must, in important ways' be 'global histories. It is no longer really possible to write "European" or "American" history in a narrow sense …'.[13]

17. Tribunal historiography, by contrast, is typified by a 'national' framing rather than a British-world or global framing. The Tribunal has, over a number of inquiry reports, considered the local New Zealand political contexts and debates on the NLLs and their development. Some research reports have considered the specific and broader, though

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11 The study of political and legal cultures through fictional works is a burgeoning field of study; see James Taylor, *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture, 1800-1870* (Woodbridge: Boydell Press, 2006), and the references cited therein, including N. Russell, *The novelist and mammon: literary responses to the world of commerce in the nineteenth century* (Oxford, 1986), and R.D. Altick, *The Presence of the Present: Topics of the Day in the Victorian Novel* (Columbus, 1991) – which shows, for example, that of 150 Victorian novels, one-fifth featured passages relating to bankruptcy.

12 Jerry H. Bentley, 'The Task of World History' in *The Oxford Handbook of World History* (Oxford: Oxford University Press, 2011 (online 2012)), at 12-13.

13 C. A. Bayly, *The Birth of the Modern World 1780-1914: Global Connections and Comparisons* (Oxford: Blackwell, 2004), at 1-2.

mostly still New Zealand, political contexts in the development of the NLLs.[14] The evidence of economic historian Gary Hawke has considered broader economic contexts in a helpful way, although at a very high-level of analysis.[15] A few research reports have touched briefly on broader intellectual contexts.[16]

18. Outside the Tribunal sphere itself, Richard Boast has recently sought to contextualize the NLLs more fully, in part by pointing to the comparative or global contexts of tenure reform in the nineteenth century.[17] His Omahu article, now on this record of inquiry, specifically questions a number of common assumptions about Māori land issues at this period, including that they were 'Crown-Māori' issues.[18] Te Maire Tau has recently queried a black and white model of traditional 'communal' Māori title vs 'individual' Western tenures, arguing that individuals did hold important rights (albeit within an overall context of tribes or communities).[19] M. P. K. Sorrenson has recently sought to locate Judge Fenton's thoughts on native tenure reform in the narratives and models of British legal history – a helpful contribution.[20]

19. The more context-informed reports are the exceptions rather than the rule in Tribunal inquiry research. The vast bulk of research for the Tribunal has focussed on particular inquiry areas or sub-regions mostly through the lens of 'land alienation'. We have many accounts of how land was alienated through a series of particular transactions and court processes. To these land reports can be added the 'political engagement' reports, that tend to survey the history of resistance to land alienation and loss of tribal autonomy through petitions and court action, and through various committee and parliament movements. All this has vastly contributed to our knowledge of specific slices of Māori or tribal experience and to the effects of Crown policy and legislation, actions and omissions in localised areas.

20. We do not, however, have a number of things in our knowledge store concerning mid-to-late nineteenth century New Zealand. The existing body of Tribunal research does not adequately contextualise these 'slices' of Crown-Māori history or colonialism (or imperialism). That is, it does not adequately locate these transformations in their broader intellectual and political contexts, *inter alia*:

    20.1 The history of land tenure reform in the United Kingdom and globally, including the 'enclosure of the commons', and the 'contemporary settings' of land tenure reform including the economic debates, circa 1860s-1900 – explored below under 'Context 1';

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14 For example, Donald M. Loveridge, 'The Origins of the Native Lands Acts and Native Land Court in New Zealand', Crown Law Office (2000), Wai 674, #O7; Bob Hayes, 'A Study of the Uses and Misuses of the 1891 Native Land Laws Commission', Wai 903, #A155.

15 Gary Hawke, 'Evidence … Concerning Economic History Issues', Crown Law Office (2000), Wai 898, #A126; Gary Hawke, 'Brief of Evidence', 31 Oct 2006, Wai 903, #A84; Gary Hawke, 'Capital, Finance and Development: Reflections on Economic Concepts and the Gisborne Inquiry', Wai 814, #G1.

16 See Nicholas Bayley, 'Aspects of the Economic History of Whanganui Māori in the Whanganui Inquiry District (Wai 903), 1880-2000', Waitangi Tribunal commissioned report, 2007, Wai 903, #A145.

17 Boast, *The Native Land Court, 1862-1887*, at 45-60.

18 R. P. Boast, 'The Omahu Affair, the Law of Succession and the Native Land Court', *VUW Law Review*, vol. 46 (2015), at 841-874.

19 Te Maire Tau, 'Property Rights in Kaiapoi', *VUW Law Review*, no. 47 (2016), at 677-698 **[SC-22]**.

20 M. P. K. Sorrenson, 'Folkland to Bookland: F. D. Fenton and the Enclosure of the Māori "Commons"', *New Zealand Journal of History*, vol. 45, no. 2, at 68-89; also republished as chapter 4 in *Ko te Whenua te Utu* (Auckland University Press, 2014).

20.2 The history of the development of trust law and company law, and their contemporary social and political settings in Britain – explored below under 'Context 2'; and

20.3 The role of the state in economic development in the 'first-world' and colonial economies, ca. 1860-1900 – explored below under 'Context 3'.[21]

21. The existing research is also inadequately theorized, that is, some things tend to be assumed or presupposed, but not explored or interrogated. One example is the conclusion, or sometimes assumption, in Tribunal historiography/jurisprudence that tribes could have survived more-or-less intact given a more favourable political and legislative environment. A specific expression of this conclusion (or assumption) is that tribes could have been 'incorporated' given more favourable or creative legislation; that is, they could have been structured like companies.[22] However, as Gary Hawke commented in his Hauraki inquiry report, it would have been difficult to replicate the limited liability company or 'joint-stock' model for tribes, especially as to governance arrangements and rights within the group.[23] At least one present-day Treaty settlement acknowledges that the incorporated model of land ownership is 'inconsistent with tikanga'.[24] This report attempts to more closely interrogate or theorise why this might have been the case.[25]

22. I suggest the lack of theoretical underpinnings for much research is a result of the prior inadequate engagement with the contemporary intellectual, political and economic settings (or contexts). Put simply, I define these settings as the ideas and institutions that were prevalent at the contemporary period. Other words for ideas or intellectual contexts would be 'paradigms' or 'discourses', while the political and economic contexts are more about available institutions or 'technologies', for example, the limited liability company – although the limited liability joint-stock company is itself a type of intellectual paradigm or the product of a particular intellectual-economic context.

23. In my understanding of history, I consider the role of ideas to be paramount. This means I tend towards a methodology that focusses on ideas or knowledge, including how and why ideas are produced or constructed. In tending towards an 'intellectual

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21 A context which the Tribunal has considered at some length is that of tikanga Māori or te ao Māori. Tribunal historiography has been strong on this and other aspects, but less strong – because less focussed – on the British world contexts of New Zealand's own transformations, what Greg Dening has called 'a history and anthropology' of the 'colonising side of the encounter' as much as the 'native' side of that encounter (cited Ballantyne, *Entanglements of Empire*, at 15).

22 See, for example, *Wairarapa ki Tararua*, at 402, 407, 416, 421; the Wairarapa Tribunal affirmed earlier tribunals, viz: 'Earlier Tribunals condemned the legislation establishing the court for failing to provide for an effective form of corporate title for Māori lands that would have empowered hapū' (at at 402); however what hapū incorporation would have involved exactly is not explored (unless I've missed it); while the 1894 committees model was also, apparently, not 'a true corporate title', but this supposedly pristine or pure form of tribal land incorporation is also not explored. The CNI Tribunal seemed in two minds about whether the deficiency was in the legislative provisions for incorporation in 1894 themselves or in the lack of Crown action to encourage Māori to adopt this approach (see *He Maunga Rongo* report, Wai 1200, at 379-80, 780-81).

23 See Hawke, 'Evidence … Concerning Economic History Issues', Wai 898, #A126, at 17-18.

24 Ngati Kuri Deed of Settlement, Feb 2014, cl. 3.17: 'The Crown acknowledges that much of those lands the people of Ngāti Kuri retain today are as individual shareholdings in incorporations, holding land in a form of corporate, rather than tribal title. This is inconsistent with, and does not adequately provide for or reflect, Ngāti Kuri tikanga.'

25 In general terms I would argue that at some point native land tenure needed to be recognised in some way by the (Crown/Kāwanatanga) legal system because, absent that, there could be no adjudication or enforcement mechanisms to protect property rights (whatever those turned out to be). However, 'recognising' native tenure is not as simple as it sounds; the very act of recognising it in a form of state law would transform it from custom law to mixed custom-state law.

history', I still consider that the material world is critical for understanding the constraints under which ideas become embedded or are applied. A simple example from Taihape would be the emphasis in the Liberal Government period (1890s onwards) on small-holdings and the model of the single-family dairy farm. The potential for the application of this idea in Taihape was limited due to the lack of land suitable for dairy herds. This does not mean, however, that dairying was not attempted – even on marginal land.[26]

24. The existing research is inadequately contextualised in these various ways. It also suffers, I suggest, from a lack of engagement with a body of literature concerning political and economic institutions. Since about the 1970s, there has been an ever-burgeoning literature on the relationship between property rights (or institutions) and economic development. I attempt to incorporate into my appraisal of the New Zealand scene the insights from this institutional economics (or 'New Institutional Economics') – explored below under 'Context 4'.[27]

25. There are several things this report does not do (or attempt to do): it does not attempt a history of Māori economic enterprise generally, either in Taihape or nationally. However, the findings of various historians who have so far attempted this are relevant to this report in that they fill-out the localised economic contexts of the period.[28] Nor does this report attempt a history of Māori capitalism or capitalists, though I agree with Richard Boast that more detailed and comprehensive studies of the Māori elite or 'aristocracy' is a significant gap in our historical knowledge.[29]

26. Nor does this report engage in a focussed way with tikanga or customary tenure ideas or mechanisms, nor with individual Māori or group motivations or actions; however, it does make a case that these, or at least Māori responses to, or utilisation of, the NLLs, was an important thread in the evolution of the NLLs themselves. And it does make an argument that Māori collective norms or a 'collective principle' was an ongoing and influential part of the informal institutional environment – in plain terms, that Māori groups and individuals were still able to pursue collective aims even despite the individualising tendencies of the NLLs.

27. This last argument, however, is secondary to my central purpose in this report, which should primarily be understood as an exercise in intellectual history or, to use a somewhat older formulation, a history of political ideas. In constructing a schematic (or 'theoretical-empirical') narrative, I wish to make an argument both that wider intellectual and political contexts shaped much of the terms and tools of the debates, but also that there was nothing especially inevitable about the specific form or content

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26 Cf. Philip Cleaver, 'Māori and Economic Development in the Taihape Inquiry District, 1860-2013', Wai 2180, #A48, at 151-52.

27 I note that economist Peter Fraser, in this inquiry, has provided some analysis of the effects on Ngāti Hauiti of the Crown-created institutional environment (primarily the land laws), see Wai 2018, #I06; he does not however, in my view, allow adequately for the resilience of 'collective' norms that were part of the informal institutional environment. See my analysis below on Awarua block.

28 For example, Tony Walzl, 'Twentieth Century Overview' (2016), Wai 2180, #A46; Philip Cleaver, 'Māori and Economic Development in the Taihape Inquiry District: 1860-2013' (2016), Wai 2180, #A48; see also Hazel Petrie, *Chiefs of Industry: Māori Tribal Enterprise in Early Colonial New Zealand* (Auckland: Auckland University Press, 2006); Hazel Petrie, 'Bitter Recollections? Thomas Chapman and Benjamin Ashwell on Māori Flourmills and Ships in the Mid-Nineteenth Century', *New Zealand Journal of History*, vol. 39, no. 1 (2005), at 1-21; Jim McAloon, 'Staples and the Writing of New Zealand's Economic History: A Survey and an Agenda', *New Zealand Journal of History*, no. 49, no. 2 (2015), G. R. Hawke, *The Making of New Zealand: An Economic History* (Cambridge: Cambridge University Press, 1985).

29 See Boast, 'The Omahu Affair', at 873 (and the literature cited therein).

of the NLLs, and, as with law reform in contemporary British contexts, much relied on specific reforming arguments or debates and on the role of individual political actors. That is to say, the argument allows for both human agency and the influence of intellectual and economic forces (or structures). Phillip Lipton has made this argument quite persuasively for company law reform both in Britain and Australia.[30]

28. The report is structured into four main parts:

28.1 introduction and framing materials;

28.2 an exploration of four contexts I consider relevant to deepen or 'ground' analysis of the development of the NLLs;

28.3 applying these contexts to the development of the NLLs; and

28.4 setting out my conclusions on the research questions.

[30] Phillip Lipton, 'The Introduction of Limited Liability into the English and Australian Colonial Companies Acts: Inevitable Progression or Chaotic History?', *Melbourne University Law Review* (advance), vol. 41, no. 3 (2018) **[SC-18]**.

PART 2: CONTEXTS RELEVANT TO THE NATIVE LAND LAWS IN NEW ZEALAND

29. I now explore the four British-world and global contexts introduced above that are relevant to the development of the NLLs and to Taihape, namely:

29.1 land tenure reform in the nineteenth century United Kingdom and empire;

29.2 company law and trust law reform;

29.3 transformations in the nineteenth century state and the state's role in economic development; and

29.4 the role of institutions in economic development.

Context 1: land tenure reform in the nineteenth century United Kingdom and empire

> On the subject of the Native Land Court different theories are current. Some think that **the object of the Court should be to create a body of wealthy Native proprietors**, through whom the Government may influence the mass of the people. Others think the sooner all alike are brought to **the condition of day-labourers [a landless proletariat?]** the better. The Bill now submitted has not been framed upon any theory whatever …
>
> Sir Wm. Martin to the Hon. D. McLean, 29 July 1871[31]

> Our laws relating to land are the remains of a system which, as history tells us, was designed to prop up a ruling class. They were made for the purpose of keeping together the largest possible possessions in the families which owned the land, and by means of it governed the country.
>
> J. S. Mill, 'Explanatory Statement', Land Tenure Reform Association (1871)[32]

30. The statement (extracted above) that Sir William Martin, former Chief Justice, made to Donald McLean, then Native Minister, in 1871, is something of a scene-setter for the discussion in this report. In reviewing the nature and operation of the NLLs, including their faults, Martin pithily characterised thinking on the ultimate aims of the NLLs: were they about recognising in chiefs significant rights to the tribal estate or simply reducing all tribal owners to a proletariat class – the implication is a *landless* labouring class?

31. What is quite obvious is the rhetorical nature of this suggestion, as Martin then claimed there was no particular theory to the draft bill he was putting forward (a statement that this report disputes as there were clearly ideas or theory involved). What is less clear is whether Martin's two pictures were alternatives or were meant to operate in tandem, or the relative degrees of support for the different propositions. It seems doubtful that they exhausted all possibilities in the way the introduced tenure was meant to operate on Māori tribal tenures. Parliamentarian Henry Sewell, for example, and *contra* the received historiography on him, was opposed in some fashion to the de-tribalisation of

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31 *AJHR* 1871, A-02, at 7 **[SC-5, at 74]**.

32 John Stuart Mill, 'Explanatory Statement of the Programme of the Land Tenure Reform Association' (1871); entitled 'Land Tenure Reform', in *Collected Works*, vol. 5, ed. J. M. Robson (University of Toronto Press, 1967), at 687-95, at at 689 **[SC-3, at 51]**

native tenure (as explored below). And a strong current of opinion (at least, of elite opinion) favoured incorporating chiefs into government administration and maintaining in some way their role in tribal society.[33] The conferral, or recognition, of chiefly property rights was one significant way to do this, as Martin suggested, for property was still seen by most classes of British peoples as the *sine qua non* of political status and influence.

32. This discussion links to the second quotation above. In fact, in the same year that Martin wrote his memorandum for Donald McLean, influential British philosopher, John Stuart Mill wrote against the maintenance of the great estates in Britain – the type of aristocratic and gentrified world that Jane Austen brought so vividly to life in her novels of the early nineteenth century. In doing so, Mill represented a strong movement of 'Radical' or 'Liberal' political reform in the United Kingdom that wanted to democratize, even 'socialise', land ownership, although without abolishing private property. The strength of Radical or Radical-Liberal politics in mid nineteenth-century Britain was in the emergent middling classes who wanted a greater share in the direction of public policy and the economic growth accruing to Britain's empire and domestic economy. They were emphatically against aristocratic privilege, and this law included land law that favoured the maintenance of great estates.

33. This view was set out by Mill in this 'Explanatory Statement' for a published programme of the Land Tenure Reform Association (quoted from above). Mill argued that:

    33.1 private property and existing rights of private property should be upheld, however the law of primogeniture (that is, the law of entail or fee tail) should end as it limited the amount of available land for the economy and nation and deprived the people at large of ownership;[34]

    33.2 a tax on the unearned increment (or capital gain) of land should be imposed by the state, as it was due to the increases of population and wealth generally not to individual effort;[35] and,

    33.3 that the state should not grant any further rights of enclosure of the commons (or 'waste lands') to the great land owners as this deprived tenants and others of their rights, instead the state should acquire the land and compensate the interest holders, and then deploy the land for cooperative agriculture or grant it in parcels to small farmers of the labouring classes.[36]

34. In the course of this statement, Mill also explained the common rationale for private property in land, that it 'gives the strongest motive for making the soil yield the greatest possible produce'[37] – that is, the incentive to produce income and accumulate capital.

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33 An influential grouping of 'humanitarian' churchmen, such as William Martin, Bishop Selwyn, Octavius Hadfield, and the early Native Protectorate of George Clarke et. al., clearly saw chiefs as continuing to exercise an important role in a Māori tribal order. New Zealand Company literature of the 1830s-40s also supported the idea, for example, of grants of land to chiefs under the tenths model. Governor Grey cultivated relationships with rangatira. Such history is not the direct subject of this report.

34 Mill, 'Land Tenure Reform', at 689-90 [**SC-3, at 51-52**].

35 Mill, 'Land Tenure Reform', at 691 [**SC-3, at 53**].

36 Mill, 'Land Tenure Reform', at 693 **[SC-3, at 55]**.

37 Mill, 'Land Tenure Reform', at 691 **[SC-3, at 53]**.

35. All of these features of Mill's argument appeared in various guises in the debates on native land tenure reform in New Zealand in the 1860s-70s (and before and after this period):

35.1 'waste land' – note, the same term used by Mill – should not be locked up in the ownership of Māori who are neither using it or occupying it;

35.2 Māori should not retain large tenanted estates as 'landlords' because this would create an idle *rentier* class and because leasehold tenure (or other lesser tenures than freehold) destroys or reduces incentives of the tenant to invest in and productively use the land;[38]

35.3 Māori land that is retained in their ownership will grow in value due to the growth of surrounding population, public infrastructure and general trade and wealth – known as 'the unearned increment' – and it should be taxed or rated like any other;

35.4 land should be made available to those best capable of using it through availability of capital, or agricultural skills and knowledge.

36. It is important to underline that Mill's arguments represented the cutting edge of Liberal, even radical, thought in Britain of the mid-nineteenth century (excepting the more radical working-class, or socialist, movement that wanted all private property abolished).[39] The radicalism of Mill's arguments, even in the early 1870s, can be understood in the context of the ongoing influence of the landed elite on British politics and economy; such arguments as this:

> But though the self-interest of landlords frequently operates to frustrate, instead of promoting, the interest which the community has in the most effective use of the productive powers of the soil, there is another party concerned whose self-interest does work in that useful direction; and that is, the actual cultivator of the soil, if he be either a small proprietor, or a tenant on conditions which secure to him the full fruits of his labour and outlay.[40]

37. Settlers and their representatives made these types of arguments in the 1860s-70s. I suggest they make more sense by relating them to the broader context in Britain and its empire, in which the *ancien regime* was breaking down – though still maintaining its influence – and in which middling class and labouring class settlers were seeking to create a new world not mired in the hierarchies and inequalities of the old world. Moreover, Mill was making his arguments in 1871 – essentially at much the same time as the New Zealand parliament was seeking to bring Māori land into the market through a title adjudication regime.

38. But we must go somewhat further back to the enclosure movement to see the forces at work in Britain to rationalise land ownership and agricultural production through 'enclosing' the commons or shared agricultural lands – essentially, the conversion of common lands into individual freehold property. (Note that, by 1870, Mill was

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38 Mill also articulated the economic rationale against an idle or absentee landlord class in an 1870 article, see J. S. Mill, 'Leslie on the Land Question', *Collected Works*, vol. 5, at 672-74 **[SC-3, at 34-36].**

39 For description of political context and reforming alignments, see J. Stuart Anderson, *Lawyers and the Making of English Land Law*, 1832-1940 (Oxford: Clarendon Press, 1992), at 161-66.

40 Mill, 'Leslie on the Land Question', *Collected Works*, vol. 5, at 674 **[SC-3, at 36]**.

concerned to turn this process to the benefit of the working classes, rather than enclosure benefitting the landlords.)

39. As noted above, Richard Boast has recently begun a broader contextualisation of the Native Land Legislation. He states in his *Native Land Court*, Volume 1:

> The legislation's ideological pedigree lies deep in European history, where for centuries customary tenures and feudal tenures had been slowly transformed into new forms of individual – and thus marketable – property rights in land. This process had been carried furthest in the British Isles, where although the feudal technical language of real property law remained unchanged, customary tenures were placed under sustained pressure from the 16th century onwards – leading to their eventual disappearance from most of the British Isles by the 19th century.

40. Boast briefly describes the nineteenth century enclosure process in Britain. He then notes the similar processes occurring in Scotland and Ireland, and in Latin America, the United States, and Hawai'i. Boast suggests that the NLLs were New Zealand's version of enclosure and that while they "can certainly be seen as the outcome of a particular political crisis in New Zealand, they also exemplify world-wide ideological trends. These trends reveal that changes to tenure in New Zealand were part of a process of global transformation and tenurial revolution".[41]

41. In what follows I inquire into the nature of the enclosure process in Britain and elsewhere.[42]

Land tenure reform in Britain

42. Robert Allen, in the *Cambridge Economic History of Modern Britain* (2004), has this to say about the British agricultural revolution of the eighteenth and nineteenth centuries:

> British agriculture developed in a distinctive manner that made important contributions to economic growth. By the early nineteenth century, agricultural labour productivity was one third higher in England than in France, and each British farm worker produced over twice as much as his Russian counterpart (Bairoch 1965; O'Brien and Keyder 1978; Wrigley 1985; Allen 1988, 2000). Although the yield per acre of grains was no higher in Britain than in other parts of north-western Europe, the region as a whole reaped yields twice those in most other parts of the world (Allen and O'Gráda 1988; Allen 1992.)
>
> Most accounts of British farming link the high level of efficiency to Britain's peculiar agrarian institutions. In many parts of the continent, farms were small, operated by families without hired labour, and often owned by their cultivators. Farms often consisted of strips scattered in open fields, and animals were often grazed on commons. Peasant farming of this sort was consolidated by the French Revolution. In contrast, in Britain, the open fields were enclosed, farm size increased and tenancy became general. While this transformation had been underway since the middle ages, it reached its culmination during the industrial revolution.

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41 Boast, *The Native Land Court, 1862-1887*, at 52-55; see also R. P. Boast, 'The Ideology of Tenurial Revolution: The Pacific Rim 1850-1950', vol. 1, no. 1 (2014) *Law & History*, at 137-57 **[SC-18]**; Richard Boast, *Buying the Land, Selling the Land: Governments and Māori Land in the North Island, 1865-1921* (Wellington: Victoria University Press, 2008).

42 This literature review attempts to touch on key texts in the historiography, from a range of perspectives; if time had allowed, the review would have been more extensive.

> Furthermore, it is often claimed that the agrarian transformation made important contributions to industrialisation by increasing output and supplying the industrial economy with labour and capital.[43]

43. Allen describes further the enclosure process:

> Enclosed farming was the antithesis of the open field system. When land was enclosed, the owners usually exchanged strips and divided commons, so that each proprietor had large, consolidated blocks of property. Communal rotations and grazing were abolished. Each owner acquired exclusive control over his property, so every farmer could cultivate as he pleased without reference to the rest of the community.[44]

44. In basic terms, communal land was consolidated or divided into individual portions. This result was perhaps akin to cases where partition of Māori tribal land resulted in individual whānau allotments (as seems to have occurred to some degree eventually in Taihape, including notably in the central Awarua blocks).[45]

45. The legal process itself bears some comparison with the Native Land Court process of converting customary communal estate into individual transferrable estates or interests:

> In the eighteenth century, much of the enclosing was accomplished by parliamentary act. In such an enclosure the principal landowners of the village petitioned parliament for a bill to enclose their village. Unanimity of the owners was not required: in general the owners of 75 per cent to 80 per cent of the land had to be in favour in order for the bill to proceed.
>
> Since landownership was highly concentrated, an enclosure could – and often did – proceed with a majority of small proprietors opposed.[46]

46. It seems, then, that even if the 75% majority rule was 'democratic' on the surface, those with greater authority or a greater amount of 'ownership' rights in village land (i.e., the gentry or larger farmers) were granted the most say in the decision to enclose:

> In the memorable phrase of the Hammonds (1924: 25), 'the suffrages were not counted but weighed'.[47]

47. Yet, in English parliamentary enclosure, individual interests were still allocated – by a commission, and relying on surveyors – to great and small proprietors, and amongst those for and against enclosure:

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43 Robert C. Allen, 'Agriculture during the industrial revolution, 1700-1850', ch. 4 in Roderick Floud and Paul Johnson, eds., *The Cambridge Economic History of Modern Britain* (Cambridge: Cambridge University Press, 2004 (online 2008)), at 96-216.

44 Allen, 'Agriculture during the industrial revolution, 1700-1850', at 99.

45 See, for example, Walzl, 'Twentieth Century Overview', #A46, at 123, 133 (maps 21 and 24) re Awarua block **[SC-23, at 408-409]**; and for Motukawa 2 block, at 112 (map 18); and Oruamatua-Kaimanawa block, at 101 (map 12); perhaps the most striking map showing district wide whānau holdings at 1910 is on at 626 (map 67); also the western and southern blocks on at 627 (map 67a) **[SC-23 generally]**.

46 Allen, 'Agriculture during the industrial revolution, 1700-1850', at 99.

47 Allen, 'Agriculture during the industrial revolution, 1700-1850', at 99. Some comparison could be made with the Memorial of ownership system under the 1873 Act and the requirement for 'majority' approval for partitions enabling sales or leases (section 65). This seems to refer to majority by number rather than by value, although section 45 empowered the Court to determine the proportionate shares, which proportion was to be recorded in the Memorial – this suggests that 'majority' could have been construed as majority by value. The Native Land Act 1869 (amending the 1865 and 1867 Acts) provided that all grantees be deemed to be tenants in common with a presumption against equal shares (except where stated in grant that shares were equal).

> The bill named commissioners, who carried out the enclosure, and endorsed their award in advance. The commissioners held hearings in the village, identified the proprietors, appointed a surveyor who mapped the village and valued each holding, and finally reallocated the land so that each proprietor (including those who opposed the enclosure) received a grant of land in proportion to the value of his or her holdings in the open fields. A total of 3,093 Acts enclosed 4,487,079 acres of open field and common pasture in this manner. A further 2,172 Acts were concerned exclusively with the enclosure of an additional 2,307,350 acres of common pasture and waste (Turner 1980: 26, 178).[48]

48. Thus, dissenters and small-holders were recognised in the United Kingdom process, as in the New Zealand process (see Native Land Act 1873, s. 65), but the process in both cases obviously also recognised those 'owning' the larger interests, either by law or custom. In 1500, just over half of all land in England was open or common land. By 1700, that figure had shrunk to about 29 per cent. By 1914, it was 5 per cent.[49]

49. Another change over the period 1700-1800 was the increase in farm size. The average farm size increased from 65 acres in 1700 to 150 acres in southern England and 100 acres in northern England by 1800. This process seems to have been closely related to the enclosure of land and a new focus on agricultural improvement and economic rationalization. During the eighteenth century, small estates were bought up by great estates and landlords stopped renewing leases:

> The result was the consolidation of the great estate and the emergence of the three-tiered social structure of rich landlord, substantial tenant farmer and poor landless labourer.
>
> Eighteenth-century agricultural improvers regarded enclosure and the creation of large farms as prerequisites for the modernisation of agriculture, and this view has become widespread among historians.[50]

50. This interpretation seems to involve the notion that people will only invest in property when its title is secure and they can reap the benefits of that investment of capital and labour. Another feature of this process was economic rationalization: larger farms meant, according to the standard story, larger outputs, which enabled or incentivised larger inputs and improvements in farming methods.[51] There was a 'consensus' in the eighteenth-century that enclosure and large-scale farming raised output. It was also supposed to have reduced the agricultural workforce, many of whom migrated to the new industrial towns and cities.[52]

51. Recent historical assessments have revised this standard view. Allen's assessment is that a "review of the evidence about the impact of enclosure on agricultural outputs and inputs suggests that it had a positive but small effect on productivity".[53] He points out that only 21 per cent of the farm land of England and Wales was enclosed between 1700 and 1850. Nevertheless, he also finds that 3 million acres of 'waste land' was

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48 Allen, 'Agriculture during the industrial revolution, 1700-1850', at 99-100.

49 Allen, 'Agriculture during the industrial revolution, 1700-1850', at 99.

50 Allen, 'Agriculture during the industrial revolution, 1700-1850', at 100.

51 Allen, 'Agriculture during the industrial revolution, 1700-1850', at 103.

52 Allen, 'Agriculture during the industrial revolution, 1700-1850', at 101.

53 Allen, 'Agriculture during the industrial revolution, 1700-1850', at 113.

enclosed and improved, stating: "Only when it was enclosed and brought under individual control was it worthwhile for anyone to improve it".[54] He also argues that the real agricultural revolution occurred in Britain during the period 1600-1750 when yields, output and labour productivity all increased sharply. Thus, it preceded the industrial revolution.

52. Joyce Burnette points out that productivity is the measure of outputs per unit of input – whether of land, labour, or capital. She states that Britain had higher rates of labour productivity than the rest of Europe, 'largely because of higher rates of capital and land per worker'.[55]

53. She argues that agricultural productivity in Britain was driven by investments in livestock, soil improvements and crop innovation and that 'institutional changes' such as enclosure and large farms "contributed, but were not necessary conditions for growth".[56] However, the literature she cites estimates that enclosed farms in comparison with open field farms were anywhere from 10% to 40% more productive.[57] Also, large farms were more efficient, producing more units of output per worker.[58]

54. In summary, we can say several things about enclosure in Britain:

    54.1 First, it represented a transition from a communal form of land tenure in Britain to a capitalist or private property-based economy.

    54.2 Second, the legal process of enclosure, enabled by parliamentary enactment, has some resemblances to the Native Land Court process of partitioning out or 'enclosing' communal land in New Zealand (where 'enclosure' can be understood in both places as both legal enclosure through freehold title creation and physical enclosure through fencing off previously common lands).

    54.3 Third, that British contemporaries argued for enclosure on the basis that it would spur investment and improvements in farm agricultural technology, boosting productivity and economic growth.

    54.4 Fourth, that more recent historians speak of enclosure as 'contributing' to economic growth, without committing themselves to a necessary connection between enclosure and increased productivity. As Boast notes, the nineteenth-century liberal orthodoxy about freehold title creation and market dealings (a principal ideological context for the NLLs in New Zealand), after declining in some jurisdictions in the late nineteenth century and earlier twentieth century, has recently been on the rise with neo-liberal orthodoxies on development in the third world and developing world.[59]

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54 Allen, 'Agriculture during the industrial revolution, 1700-1850', at 112, 114.

55 Joyce Burnette, 'Agriculture, 1700-1870', in R. Floud et. al., eds., *The Cambridge Economic History of Modern Britain* (Cambridge: Cambridge University Press, 2014), pp 89-117, at at 99, 109.

56 Burnette, 'Agriculture, 1700-1870', at 115.

57 Burnette, 'Agriculture, 1700-1870', at 114.

58 Burnette, 'Agriculture, 1700-1870', at 114.

59 Boast, 'The Ideology of Tenurial Revolution', at 157-58 **[SC-18]**.

Land tenure reform in Britain's empire (and the world)

The new global connections of 'modernity'

55. The late Sir Christopher Bayly was a leading historian of British India and of an emergent global historiography. In his important 2004 work, *The Birth of the Modern World, 1780-1914*, Bayly set out the book's defining idea:

> As world events became more interconnected and interdependent, so forms of human action adjusted to each other and came to resemble each other across the world. The book, therefore, traces the rise of global *uniformities* in the state, religion, political ideologies, and economic life as they developed through the nineteenth century.[60]

56. While tracing the emergence of uniformities, Bayly was concerned to highlight reactions to global forces, and European imperialism, one of which was assertions or re-assertions of "national, religious, or cultural identity".[61] The Indian nationalist movement of the later nineteenth century, along with the Kingitanga in New Zealand of mid-century and the later Kotahitanga ('Unity') movements, are only a few examples. At the same time as such movements asserted national or ethnic solidarities they often did so using Western ideas and institutions. This is why, in the historiography of British India, for example, such reactions to empire have been termed 'a derivative discourse'.[62]

57. Bayly defined 'the modern' or 'modernity':

> At one level, then, the nineteenth century was the age of modernity precisely because a considerable number of the thinkers, statesmen, and scientists who dominated the ordering of society believed it to be so. It was also a modern age because poorer and subordinated people around the world thought that they could improve their status and life-chances by adopting badges of this mythical modernity, whether these were fob watches, umbrellas, or new religious texts.[63]

58. Bayly is only one of several important historians of nineteenth-century modernity and globalisation. Another is Kenneth Pomeranz who has sought to understand the emergence of a global economy from the perspective of China as an economic power in earlier centuries.[64] Indian scholar, Sanjay Subrahmanyam, is another who has explored the importance of inter-regional connections. A tendency in this more recent literature, including in Bayly, is to stress that Europe was not the sole participant, or sole driver, in the growth of a global economy. The stress is on *interactions* and *exchanges* between the local, regional, and global, highlighting both convergences and divergences

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60 Bayly, *The Birth of the Modern World*, at 1.

61 Bayly, *The Birth of the Modern World*, at 1.

62 A phrase coined, I believe, by Indian historian and theorist, Partha Chatterjee; see Partha Chatterjee, *Nationalist Thought and the Colonial World – A Derivative Discourse?* (Avon: The United Nations University, 1986); *The Nation and Its Fragments: Colonial and Postcolonial Histories* (Princeton: Princeton University Press, 1993); see also C. A. Bayly, *Origins of Nationality in South Asia: patriotism and ethical government in the making of modern India* (Oxford University Press, 2001 (1998)). The historiography on 'nationalist' responses to Western empires by indigenous groupings is huge and I do not attempt to summarise it here (it is a subject I am currently working on for my Ph.D.).

63 Bayly, *The Birth of the Modern World*, at 10-11.

64 Kenneth Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (Princeton and Oxford: Princeton University Press, 2000); Kenneth Pomeranz and Steven Topik, *The World That Trade Created: Society, Culture, and the World Economy, 1400 to the Present*, 3rd ed. (New York: M. E. Sharpe, 2013).

in forms of life and society – though the convergences usually receive greater emphasis.[65]

New land tenures and markets, and old elites

59. A common theme in much of the literature of the nineteenth century British world and empire is the tension between old elites and hierarchies and the diffusion of political rights more evenly through a population.

60. It is clear that old elites held on to property and power in much of the West and non-West for much of the century, however this old world was under pressure. Bayly outlined the attack on the feudal aristocracy in many countries in the nineteenth century, from South and North America, to the Caribbean, to Europe. Liberal and radical thinkers – such as J. S. Mill – saw extensive holdings of landed property as a potentially dangerous source of power, while it also inhibited a free market in land. In Ireland, Protestant landlordism was attacked by Daniel O'Connell and associates in the 1820s and 1830s. In Canada, "the conflict between peasant-farmers and crown land agents provided a rallying cry for the French rebellion of 1838".[66]

61. At the same time, governments around the world often saw fit to ally themselves with enterprising or improving landlords in the provinces, in order to shore up central government power, including the ability to collect tax from the provinces. Bayly wrote:

> The usual result of these ideological and practical tussles was a pact between the liberal bureaucrats of the state and the smarter of the local power-holders. The landowners were trying to maximise profits by turning themselves into big local agro-businesses or efficient tax-collectors. This happened to Prussian junkers, Mexican *hacendados*, and Javanese *regenten*. Entrepreneurial landed interests like this needed the governments to put in roads, railways, and canals for them. Equally, the administrators needed the support of the big landowners, provided they could be persuaded to reform sufficiently to head off peasant revolt and the hostility of the urban dwellers.[67]

62. The concept of traditional elites maintaining their status in the new era is also relevant to New Zealand, as Boast has suggested.[68] Loose 'alliances' of this kind can be observed in New Zealand, during the Crown purchase era to 1865 and following. The relationship cultivated between Donald McLean and Te Hapūku could be considered in this light; and, in Taihape, rangatira such as Airini Donnelly and Renata Kawepo arguably maximised their economic position in land selling and in the Native Land Court title process by cultivating relationships with Crown agents as well as with private commercial partners such as the Studholme family. Other Taihape Māori were in commercial partnerships or agricultural joint-ventures with Europeans, as seen in the sheep returns.[69] Moreover, leading Taihape Māori could see the economic advantages of Government railway development in their rohe, and supported this, while working to maintain enough of a land base to benefit from it. That plan is evident in the Awarua

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65 See also Catia Antunes and Karwan Fatah-Black, eds., *Explorations in History and Globalization* (Oxford: Routledge, 2016).

66 Bayly, *The Birth of the Modern World*, at 297-298.

67 Bayly, *The Birth of the Modern World*, at 298.

68 See Boast, 'The Omahu Affair'.

69 For example, see David Armstrong, 'Mōkai Patea Land, People and Politics', Wai 2180, Appendix #A49(i), including Anaru Te Wanikau and Boyd (at Owhaoko), Donnelly and Hiraka (at Erewhon), Batley and Paerau (at Moawhango).

block narratives; whether these objectives were achieved, even in part, is a matter for debate (and one I engage in to some degree further on.)[70]

63. In a chapter on 'reconstituting social hierarchies', Bayly wrote in a similar vein:

> One general development which could be skilfully used, or abused, by the rural propertied people to maintain their power was the introduction of simpler and more saleable land rights. Colonial officials found the complex, overlapping tenurial systems of the old regimes irritating and diffuse … Very widely, therefore, they vested landlords with powers to coerce those beneath them and buy and sell unified land rights on the land market which had not existed in that form before colonial rule. For instance, India's landholders, *zamindars*, did well at the expense of both the state and their own tenants throughout the course of the nineteenth century.[71]

64. Thus, tenure reform introduced by colonial or imperial regimes also had the effect of depriving some individuals (or members of groups) of communal rights in land. In the effort to make land tenure fixed and secure – so that land could be 'improved', taxed, and dealt with in the market – some people lost rights, while others gained them.[72]

65. In New Zealand, the Native Land regime of the 1860s and following can also be understood as an attempt by the colonial government to fix and simplify customary property in land in order to bring it into the market. Initially, the regime, under the ten-owner rule, worked to favour Māori of status – although it was not necessarily intended to operate in that manner. After the 1873 Act, all individuals interested were recorded as owners (or, at least, were meant to be). Closer analysis of these evolutions follows in the second part of this report.

The rise of bourgeois society and economic 'globalisation'

66. Whereas Bayly emphasised the ongoing role of elites, even in the context of trade liberalisation and the rise of individualism, Eric Hobsbawm, one of the great world historians of the last few decades, emphasised the emergence of bourgeois or middling class society in the third quarter of the nineteenth century.

67. In his important text *The Age of Capital, 1848-1875*, Hobsbawm discussed the great growth of the global economy and international trade in this period. Hobsbawm argued that "this was the period when the world became capitalist and a significant minority of 'developed' countries became industrial economies".[73] Many factors drove the rapid emergence of this 'unified world', but they included the new transport and communications technologies (the railway, the steamship, the telegraph), and the liberalisation of private enterprise – the abolition of old guild, legal and tariff/import restrictions – enabling the free movements of goods, labour, and capital within and across state borders.[74]

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70 See discussion in 'Context 4' subsection below.

71 Bayly, *The Birth of the Modern World*, at 424.

72 Bayly, *The Birth of the Modern World*, at 112, 298-299.

73 Eric Hobsbawm, *The Age of Capital, 1848-1875* (New York: Vintage Books, 1996 (1975)), p 29. It can be noted that Hobsbawm was one of a number of prominent English historians who were politically aligned with the Left (a group which included E. P. Thomson and Christopher Hill).

74 Hobsbawm, *The Age of Capital*, pp 32-37.

68. Hobsbawm wrote that "the question of what part institutional or legal changes play in fostering or hindering economic development is too complex for the simple mid-nineteenth century formula: 'liberalization creates economic progress'".[75] The New Zealand state of the mid-to-late nineteenth century was part of this global picture, including its ideological and institutional drivers. More broadly, the great population growth of the white colonies of settlement – what might be called 'the export of people' or labour, along with new capital – was an important part of this economic picture; stimulated also by the gold rushes in California and Australasia.[76]

69. Quite simply, wrote Hobsbawm, in this period Europeans dominated,[77] and 'capitalism and bourgeois society triumphed'.[78] The emergent global economy and world was one driven by the cultural, ideological, technological and economic priorities of white bourgeois or 'middle-class' society. Hobsbawm generalised the picture:

> The bourgeoisie of the third quarter of the nineteenth century was overwhelmingly 'liberal', not necessarily in a party sense (though as we have seen Liberal parties were prevalent), as in an ideological sense. They believed in capitalism, in competitive private enterprise, technology, science and reason. They believed in progress, in a certain amount of representative government, a certain amount of civil rights and liberties, so long as these were compatible with the rule of law and with the kind of order which kept the poor in their place.[79]

70. The emergence of this bourgeois or 'liberal' world was by no means confined to Europe, but had global reach, including in Latin America:

> The combination of 1848 revolution and world capitalist expansion gave the liberals their chance. They brought about the real destruction of the old colonial legal order. The two most significant – and linked – reforms were the systematic liquidation of any land tenures other than those by private property, purchase and sale (as the Brazilian Land Law and the Colombian removal of limits on breaking up Indian lands, both 1850) …[80]

71. New Zealand, too, developed within this ideological and liberal frame, and certainly, by the 1890s, had its own 'Liberal' party. Individual private property and the breakup of monopolies, including the 'great estates' – both Māori and Pākehā – were important features of the New Zealand political landscape.[81] In this, at an ideological level, New Zealand reflected the new global capitalist order. The total acreage of 'great estates' (greater than 10,000 acres) diminished from 7.8 million acres in 1892 to 3.5 million acres in 1910. Gary Hawke has noted that there were also several important local drivers of the move to 'closer settlement' in New Zealand, including refrigeration, which made fat-lambing and dairying on smaller holdings viable, even optimal.[82] Of

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75 Hobsbawm, *The Age of Capital*, p 37.

76 Hobsbawm, *The Age of Capital*, ch 11.

77 Hobsbawm, *The Age of Capital*, p 135.

78 Hobsbawm, *The Age of Capital*, p 155.

79 Hobsbawm, *The Age of Capital*, p 245.

80 Hobsbawm, *The Age of Capital*, p 120.

81 Tom Brooking, 'Use it or Lose it: Unravelling the Land Debate in Late Nineteenth-Century New Zealand', *New Zealand Journal of History*, vol. 30, no. 2 (1996), pp 141-162; and Tom Brooking, ' "Busting Up" the Greatest Estate of All: Liberal Māori Land Policy, 1891-1911', *New Zealand Journal of History*, vol. 26, no. 1, pp 78-98.

82 Hawke, *The Making of New Zealand*, at 92-97; Daunton quotes figures that between 1892 and 1912, the NZ Government purchased 223 estates and settled 7,000 farmers on the land; see Daunton, *State and Market*, at 135; see also Daunton on the

course, refrigeration can be seen in context as a revolution in transport technology for food products, thus part of the global revolution in communications and travel of the second half of the nineteenth century. Another feature of the sell up of 'great estates' in New Zealand was mortgage indebtedness, which meant that estate holders, and mortgagee banks in possession, wanted to liquidate or sell down their real property assets.[83]

New economies and new tenures

72. One of the other great 'global' changes in this period was the commercialisation of agriculture and the shift in rural labouring populations to new industrial towns and cities. These changes were driven by a number of economic, technical and demographic factors, which operated broadly on a global scale. Institutional factors – social, political, legal – "differed much more profoundly, even when the general trends of world development operated through them". Hobsbawn wrote:

> What a growing part of agriculture all over the world had in common was subjection to the industrial world economy. Its demands multiplied the commercial market for agricultural products – mostly foodstuffs and the raw materials of the textile industry, as well as some industrial crops of lesser importance – both domestically, through the rapid growth of cities, and internationally. Its technology made it possible to bring hitherto unexploitable regions effectively within the range of the world market by means of the railway and the steamer. **The social convulsions which followed the transfer of agriculture to a capitalist, or at least a large-scale commercialized pattern, loosened the traditional ties of men to the land of their forefathers, especially when they found they owned none of it, or too little to maintain their family**. At the same time the insatiable demand of new industries and urban occupations for labour, the growing gap between the backward and 'dark' country and the advancing city and industrial settlement, attracted them away. During our period we see the simultaneous and enormous growth of trade in agricultural produce, a remarkable extension of the area in agricultural use, and – at least in the countries directly affected by world capitalist development – a major 'flight from the land'.[84] [emphasis added]

73. Concerning land tenure reform models – if such there were – I return to statements made by John Stuart Mill in 1870-71. Mill outlined the three available models for the law of succession, a sub-set of the individual private property paradigm, but nonetheless of great relevance to Māori customary land also. Mill outlined the three models as: primogeniture or succession by the eldest son (the 'feudal model'); the French model of succession by all children equally, involving partition of the landed estate; and a limitation on the amount of land able to be inherited by any one individual. Mill favoured, in effect, the French model, to the extent that the restrictions on alienation or use implied by the feudal model be abolished and the children to share in the land or its proceeds.[85]

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sheep station investments of Dalgety, the Australian wool-merchant, which seem to have suffered due to the Governments leaseholder policies (imposition of higher leases) and the price slump in the 1880s; see Daunton, *State and Market*, pp 208-218.

83 Hawke, *The Making of New Zealand*, at 95-96.

84 Eric Hobsbawm, *The Age of Capital*, at 174.

85 J. S. Mill, 'Leslie on the Land Question' (1870), *Collected Works*, vol 5, at 681-682 **[SC-3, at 43-44]**.

74. This little precie of English succession law, *circa* 1870, illustrates the types of issues in the law of real property still subject to reforming debates, in ways that seem to dovetail – *both as to time period and subject-matter* – with debates on native land, and land generally, in New Zealand. Indeed, it is fascinating that the *Papakura* decision of Chief Judge Fenton in 1867 was to follow the 'French model' as advocated by Mill – succession by all children, rather than by the eldest (the 'heir at law') or the 'feudal' English model of settled estates.[86]

75. The law of real property was subject to reform in a number of ways in the mid-to-late nineteenth century. This included the reforms in conveyancing law that led by the 1870s to the title registration system, replacing the old deeds system and other disparate methods for conveying real property.[87] The Australasian version of this was the 'Torrens' system of title registration. Conveyancing reform was ongoing in Britain, even into the twentieth century, another stream of reform that complicates the view of property and property rights as comprising fixed or certain categories, even in the British metropole.

76. A new revisionist interpretation sees concepts of property themselves as undergoing evolution from mid-century in both metropole and empire. Faisal Chaudhry argues that conceptions of property as 'ownership' of a physical and bounded area of land underwent change to a 'bundle of rights' picture. In British India, this idea of 'proprietary rights' rather than property rights *per se* was deployed to argue for the shoring up of the rights of 'subordinate' interests such as tenants and peasant cultivators. These debates and the language of proprietary rights were picked up in metropolitan debates.[88] Related reform (related, at least, at an ideological level) was a return to collectivism in the later nineteenth century, including the protection given to the rights of the crofter (tenant farmers) in Scotland, reforms modelled on slightly earlier Irish legislation.[89]

Tenure reform – summary

77. The move to individual private property or some form of fixed, transferrable title was a pervasive global trend from the mid-nineteenth century onwards.

78. The abolition of the law of primogeniture (entail or feetail) was seen by reformers such as J. S. Mill as part of bigger reforming picture of land ownership and economic growth, as it would break up the old feudal estates and put more land into the market (and make the distribution of land through the population more equal). The parallels with discourse on Māori (and Pākehā) land in New Zealand should be obvious and not discounted, especially when the middling-class make-up of the New Zealand General Assembly is borne in mind. Although there were aristocratic elements, the majority of New Zealand parliamentarians were of the professional classes (lawyers and doctors, ex-military) and other self-made men (including newspaper editors). They did not want 'aristocratic privilege' in New Zealand, and historically land, as the extracted quote from

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86 See Richard Boast et. al., *Māori Land Law* (Wellington: Butterworths, 1999), at 77.

87 See Anderson, *Lawyers and the Making of English Land Law*; and, generally, Stuart Anderson, 'Property Rights in Land: Reforming the Heritage', 'Land Transactions: Settlements and Sales', 'Leases, Mortgages, and Servitudes', in William Cornish et. at., eds., *The Oxford History of the Laws of England: Vol XII: 1820-1914 Private Law* (Oxford, 2010), chs. 2-4.

88 Faisal Chaudhry, 'A Rule of Proprietary Right for British India: From revenue settlement to tenant right in the age of classical legal thought', *Modern Asian Studies*, vol. 50, no. 1 (2016), at 345-384.

89 Such 'counter-trends' have been noted by Boast, 'The Ideology of Tenurial Revolution', at 152-57 **[SC-18]**.

Mill (at the front of this section) makes clear, was almost the primary bastion of both economic wealth and political influence.

79. The nineteenth-century picture of real property, however, is considerably more complex than a shift to individual tenures. As Bayly has pointed out, colonial/imperial states often relied on the support of elites at the local level: elites secured the property acquisition or taxation interests of the state, while their own customary rights were shored-up or even extended by state authority. In New Zealand, the 'old world' held on in the way that the Crown recognised or worked with rangatira to advance its own aims, while reinforcing (and arguably even modifying) chiefly authority and influence. Complexity abounded, and the NLLs did their own evolving dance as they interacted with the collective agency implicit in much of Maori land tenure. In doing so, colonial law drew on not just real property law but also its British inheritance of trust and company law – as the next section begins to explore.

Context 2: company law and trust law, ca. 1860-1900.

> 'I have a horror of them [joint stock companies] – and know full well that they cannot be managed to compete with private firms where partners act in accord and common prudence and energy are expressed.'
>
> F. G. Dalgety (1881)[90]

80. If the law of real property (or aspects thereof) was still in a state of reform in Britain in the mid-Victorian period, the second context I discuss shows that the law of partnership and companies, and, to some extent, trusts were also. This state of flux and development parallels that in New Zealand – collective models of ownership and management continued to evolve in Britain of the mid-to-late nineteenth century.

81. In summary, we can say that business in Britain in the nineteenth century was largely conducted on a personal basis, by family enterprises; and even many large businesses remained unincorporated despite the legal provisions enabling incorporation. The reasons for the personal character of business (not to mention the individual character of property ownership) are explored further below, but revolved around the separation of company management from its ownership and speculative bubbles driven by unaccountable company promoters. At the outset we should recognise that any assumption or argument in Treaty historiography/jurisprudence about the obvious application of corporate models to business or land ownership in the nineteenth century should be interrogated.[91]

Corporate enterprise a late development and, even then, the exception not the rule

82. As Michael Lobban writes in the *Oxford History of the Laws of England*, in 1820, corporate enterprise was the exception not the rule. Corporate status was obtained by special Act of Parliament usually for high-risk enterprises with a public character (overseas trading companies and utility firms such as canal companies). In England, partnerships were

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90 Cited in Daunton, *State and Market in Victorian Britain*, at 212.

91 The examples of chartered local bodies or municipal incorporations are not directly on point as, to the extent they owned property, they did so as representatives of the local population in a 'public' character only; and note that under the Municipal Corporations Act 1835 they were debarred from alienating their real or personal estate without Central Govt consent; see Thomas Lewin, *A Practical Treatise on the Law of Trusts*, 6th ed. (London: W Maxwell & Son, 1875), at 22 [**SC-2, extract**].

typical. Even after the introduction of limited liability of shareholders and company registration in the 1850s-60s, unincorporated partnerships predominated to the end of the nineteenth century.[92] Joint-stock associations, precursors of the modern company, were unincorporated bodies defined by deed, with the capital and trading operations in the hands of trustees.

83. Share markets developed exponentially in the nineteenth century, but most publicly-listed companies were still government-owned or associated, or infrastructural in nature. By 1903, only 10% of stocks on the London Exchange were commercial or industrial companies (such as manufacturing, retail and shipping companies).[93] Phillip Lipton's account agrees with this picture – that despite the limited liability provided by incorporation (or company registration), the uptake was slow, the increase in company registrations from the 1880s being mostly small private companies. In 1885, limited companies were only 5-10% of all business organisations in England. In the U.S. it was higher though still not dominant in the nineteenth century.[94] Some spectacular business crashes affected enterprises with *unlimited* liability; for example, when the City of Glasgow Bank failed in 1878, its unlimited liability meant most shareholders were bankrupted due to a liability of £2750 for every £100 invested.[95]

84. For the contemporary context, it is also possible to find appropriate material in the thought of John Stuart Mill. As at 1850, associations of individuals for commercial profit still could not limit their liability to the particular assets or share-holdings of the venture, as this was not provided for in law. This is part of the context in which Mill gave evidence in 1850 before the Parliamentary committee considering reforms in the law of partnership. Mill's stance and this context is explained by an introduction in the *Collected Works*:

> The minutes of evidence here entitled "The Savings of the Middle and Working Classes" together with the short note on "The Law of Partnership" are a product of Mill's lively interest in the reform of the law so as to permit industrial investment and association without commitment to unlimited liability of the property of the persons concerned. It was his belief that reform of this sort would serve the double purpose of making available for development a larger volume of saving, and at the same time facilitating, on a much larger scale than that then prevailing, the active participation of the working classes in the organization of industry. **This involved changes both in the law relating to partnership and the law relating to joint-stock companies, and to both these movements Mill lent the weight of his support**.[96]

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92 Michael Lobban, 'Joint Stock Companies', in the *Oxford History of the Laws of England*: Vol XII, at 613-73, at at 613-14, 631 **[SC-20, at 308-09, 326]**; for a sustained argument on the way incorporated or joint-stock entities were viewed with suspicion as the promotors of speculation and 'boom and bust' investment, see Taylor, *Creating Capitalism*. Taylor's study 'reproblematises the emergence of the joint-stock economy by engaging with nineteenth-century attitudes to commerce, central to which was the assumption that individual rather than corporate enterprise was the normal form of entrepreneurial activity' (at at 3), and see his 'Epilogue' in which he states: 'In the later years of the nineteenth century, companies and the speculation that sustained them both continued to enjoy at best a mixed profile' (at 211); see also Daunton, *State and Market*, at 25-26.

93 Michael Lobban, 'Joint Stock Companies', at 616, 633 **[SC-20, at 311, 328]**.

94 Lipton, 'The Introduction of Limited Liability', at 25-29, 43-44 **[SC-19, at 287-91, 305-06]**.

95 Lobban, 'Joint Stock Companies', at 633 **[SC-20, at 328]**.

96 Lord Robbins, 'Introduction' to vol. 4, *Collected Works*, at xxxiii; see also 'The Savings of the Middle and Working Classes' (1850) and 'The Law of Partnership' (1851), *Collected Works*, vol. 5, at 405-29, 59-62.

85. Fuller context for Mill's statements in 1850-51 is provided by John Micklethwait and Adrian Wooldridge's adroit account of emergence of the modern company.[97]

86. They begin their history with Gilbert and Sullivan's operetta 'Utopia Unlimited, or the Flowers of Progress' that in 1893 opened to a packed house in London's West End. It celebrated nothing other than the limited-liability company, "another quirky Victorian invention that had changed the world", say Micklethwait and Wooldridge.[98] The authors note that "the great Companies Acts of the mid-nineteenth century" have received little attention in recent leading biographies and histories of the period.[99] They note the importance of 'bodies corporate' – towns, universities, guilds – in medieval law and how European monarchs chartered various of these to pursue imperialism in the sixteenth and seventeenth centuries.[100] They note that Britain, the economic world-leader of the time finally combined three ideas in the nineteenth century:

86.1 the artificial personality of a company;

86.2 the issue by that company of tradeable shares; and

86.3 the liability of those share-holders limited to the value of their shares (or whatever they had invested in the company).[101]

87. They note that the company idea did not carry all before it at the time: such as A. V. Dicey (the great constitutional theorist) who worried that companies would re-collectivise the market-place, with trade between private persons being replaced or dominated by trade between corporate bodies established by the state.[102] Anthony Trollope satirised concerns about corporation-led economic crashes in *The Way We Live Now* (1875).

88. About the company they argue:

> The company has been one of the West's great competitive advantages. Of course, the West's success owes much to technological prowess and liberal values. But [Robert] Lowe and [William E.] Gladstone ushered in an organization that has been uniquely effective in rendering human effort productive. The idea that the company itself was an enabling technology is something that liberal thinkers once understood instinctively. 'The limited liability corporation is the greatest single discovery of modern times', proclaimed Nicholas Murray Butler, one of the great sages of the Progressive Era; 'even steam and electricity would be reduced to comparative impotence without it.'[103]

89. Referring to the literature on institutional economics, Micklethwait and Wooldridge remark:

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97 John Micklethwait and Adrian Wooldridge, *The Company: A Short History of a Revolutionary Idea* (London: Phoenix, 2005 (2003)).

98 Micklethwait and Wooldridge, *The Company*, at 1-2.

99 Micklethwait and Wooldridge, *The Company*, at 3.

100 Micklethwait and Wooldridge, *The Company*, at 4.

101 Micklethwait and Wooldridge, *The Company*, at 5.

102 Micklethwait and Wooldridge, *The Company*, at 6.

103 Micklethwait and Wooldridge, *The Company*, at 8-9.

> Economists have elaborated on why such institutions are crucial to economic development. Companies increase the pool of capital available for productive investment. They allow investors to spread their risk by purchasing small and easily marketable shares in several enterprises. And they provide a way of imposing effective management structures on large organizations. Of course, companies can ossify, but the fact that investors can simply put their money elsewhere is a powerful rejuvenator.[104]

90. They cite Ronald Coase's famous 1937 article, 'The Nature of the Firm', in which Coase argued that companies existed because they enabled coordinated production of economic activity, as opposed to bargaining or contracting at each stage of a production process.[105]

91. Micklethwait and Wooldridge survey early Roman, middle-eastern and Chinese corporate activity, followed by the Italian corporations of Renaissance, and the guilds of northern Europe. In the 1600s, the Dutch led the way with their state-sponsored or chartered trading company. The East India Company was formed in England in 1600 and encountered success but also much domestic and foreign opposition. In the early eighteenth century, John Law's French-sponsored Mississippi Company bubble and then the English 'South Sea Company' burst, with private and state investors losing millions. Adam Smith disliked such state-sponsored companies as they held monopolies and separated owners from management (the so-called 'agency' problem) so were less efficient or vigilant than sole-traders or private partnerships.[106] Smith noted a prominent French author's figures that over 50 joint stock companies established for foreign trade (by European powers) since 1600 had "all failed from mismanagement, notwithstanding they had exclusive privileges" or monopolies.[107]

92. When they reach the period 1750-1862, Micklethwait and Wooldridge discuss the 'prolonged and painful birth' of the modern limited liability company. Most business people in the United Kingdom were owner-operated or were in partnerships until well into the middle of the nineteenth century.

93. Not until the 1840s did parliament really grapple with the confused company laws. In 1844, William Gladstone secured the passing of the Joint Stock Companies Act, allowing companies to incorporate by simple registration rather than obtain a special Government charter. The Act did not provide, however, for limited liability. Many were still against it, as Adam Smith had been. But others such as John Stuart Mill and Richard Cobden thought limited liability would help the poor get into business – as Mill's statements in 1850-51 suggest (see above). Robert Lowe 'masterminded' the Joint Stock Companies Act 1856, which provided generally for limited liability. Under the Act, a minimum of seven people could sign a Memorandum of Association and register their company to obtain limited liability status.[108]

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104 Micklethwait and Wooldridge, *The Company*, at 9 (citing Douglas North and R. P. Thomas, *The Rise of the Western World* (Cambridge: CUP, 1973); Nathan Rosenberg and L. E. Birdzell, *How the West Grew Rich: The Economic Transformation of the Industrial World* (New York, 1986).)

105 Micklethwait and Wooldridge, *The Company*, at 10. Ronald Coase is one of the recognised founding figures of institutional economics.

106 Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (1776), 5th ed. (London: Methuen & Co., 1904), vol 2., at 233; Micklethwait and Wooldridge, ch. 2; see also Daunton, *State and Market*, at 8-9, 25-26.

107 Smith, *Wealth of Nations*, vol. 2 (1904), at 246.

108 Micklethwait and Wooldridge, ch. 3.

94. The company also emerged in the US about the same time, and was propelled along by the craze for private-sector funded railway construction. It was the railway in Britain and the US that 'spawned an investor culture'. The railways were followed closely by the telegraph and telephone lines, and the steamship. The limited liability company attracted huge amounts of capital to these schemes; but many did not succeed: "In the last quarter of the nineteenth century [in the US], more than seven hundred railroad companies, which together controlled over half the country's rail track, went bankrupt".[109]

95. In Britain, the extent and importance of private investment in railways is seen in the classes of permitted investments able to be made by private law trustees. For example, the Trustee Act 1893 contained a number of railway companies in its permitted list, including:

95.1 debenture stock in any railway company in Britain or Ireland incorporated by Act of Parliament and paying at least 3% interest per annum return for the previous ten years;

95.2 debenture stock of any railway company in India in which the interest return was guaranteed by the Secretary of State;

also,

95.3 any stock created by the Metropolitan Board of Works or London County Council; and

95.4 any debenture stock in any water company incorporated by special Act of Parliament.

96. These permitted classes of investment were obviously designed to protect trust beneficiaries but also attract private funds for important infrastructure (as trustees would know they could not be liable for any failure of a permitted investment).[110] Interestingly, trust funds held by Chancery Court were often subject to a standard order that they be invested in government securities at the fixed 3% return, which was, as Anderson points out, the standard conservative trustee investment in the nineteenth century.[111]

97. Even though companies enabled considerable collective economic investment and economic growth, the businesses they conducted could still fail. The company form was no panacea for all economic risks or moral failings in its various agents; its genius was rather to enable efficient collective investment. Even then, the separation between management and ownership was an issue in many settings (the control of directors' decisions, and the lack of information possessed by shareholders, for example). There were many critiques of the concept of incorporation itself, as reducing the role of individual responsibility for business decisions. For example, Herbert Spencer, one of the sages of Victorian times, wrote in the *Edinburgh Review* in 1854 that the real problem

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109 Micklethwait and Wooldridge, at 64-65.

110 See copy of Trustee Act 1893 included in Edward Parker Wolstenholme and Wilfred Brinton, *The Conveyancing Acts*…, 8th ed., (London: William Clowes, 1899), at 205-54.

111 Stuart Anderson, 'Trusts and Trustees', in William Cornish et. at., eds., *The Oxford History of the Laws of England: Vol XII: 1820-1914 Private Law*, at 232-294, at at 236 **[SC-17, at 183]**.

with companies was "the familiar fact that the corporate conscience is ever inferior to the individual conscience – that a body of men will commit as a joint act, that which every individual of them would shrink from, did he feel personally responsible".[112]

98. Features of incorporated entities make them good for some purposes but not good for others – including, I suggest, small group occupation and ownership of land. The application of incorporation to organic groups such as tribes is questionable in many respects – quite apart from the fact that the limited liability company form was only solidified in Britain during the 1850s-60s period. (Further analysis on these issues is below in the section on the 1894 Native Land Act and 'incorporated title'.)

99. Legal historian Michael Lobban notes that even after the mid-century legislative reforms of company law (which provided for the limited liability of shareholders in 1855), legislation left companies or the conduct of directors largely unregulated. However, the private law was modulated or evolved in the Victorian period by judges employing concepts of commercial fairness and equity, in part to protect company creditors that were of the same class as themselves. Thus, "[i]n creating rules to protect investors in the corporate economy, judges were aware that the market could not be left entirely to itself". Judges observed a 'moral economy' in developing the common law (and equity) to ensure responsible corporate behaviour.[113] In effect they used trust or equity principles to hold errant directors to account, including the prohibition on fiduciaries – in this case, directors – making private profits. Parliament itself occasionally got involved directly in this socio-legal milieu. After the Royal British Bank failed in 1856, the Fraudulent Trustees Act was passed to enable prosecution of fraudulent company directors.[114] These examples show how evolution in the concept of trust or trustees was closely related to the evolution of company law.

The law of trusts

100. The law of trusts is considered below when analysing the NLLs. By way of basic context, the trust, an old institution recognised by the Courts of Equity also had strengths and weaknesses as a form of 'agency' in land ownership. Trustees were a type of agent for the settlor and/or beneficiaries of the trust, usually with wide discretion as to administration of the trust fund – not unlike the directions of the company with respect to the company's business.

101. The Courts of Equity had evolved various principles around trustees' duties and the rights of beneficiaries to recover trust property from trustees or sue trustees personally for compensation for breaches of trust. The availability of equitable remedies did not however mean that beneficiaries could necessarily recover their property interests through court action. The time and expense of court action were factors in this, but the key factor may have been that if the property or income had been dissipated, a personal action against a trustee may have been of limited use.

102. A pointed illustration of trustee-beneficiary dynamics comes from the 'trusts reserves' files in New Zealand. The original grants over customary land were made under the Friendly Natives' Contracts Confirmation Act 1866 and, as Commissioner Heaphy

112 Cited in Taylor, *Creating Capitalism*, at 29.

113 Michael Lobban, " 'Private Law' and the *Laissez-Faire* State", in Martin Hewitt, ed., *The Victorian World* (London and New York: Routledge, 2012), at 398-413, at at 400-401; see also Lobban, 'Joint Stock Companies', at 662 **[SC-20]**.

114 See Lobban, 'Joint Stock Companies', at 661-62 **[SC-20, at 356-57]**.

explained, the "grants were generally made out to six or seven of the chiefs, in trust for their tribes". The particular statutory context is less relevant here than the attempt to apply trust concepts. It seems that whilst the titles were subject to a trust, some of the grants conveyed the land absolutely, while others "had varying restrictions on the power to sell, mortgage, and let". Subsequent to the grants being issued, the trustees, as the legal owners, had in many cases managed the land without consultation with the wider group/hapū and had not accounted for profits or rents.

103. In the end, Commissioner Heaphy, after an intensive consultation with "chiefs and people" over three days, managed to arrange a scheme of partition of lands amongst the various tribal members, which involved rangatira in surrendering their titles as trustees. Heaphy remarked by way of background that:

> … the original [customary] rights and holdings had been of a much more complex nature than was estimated. The trusts specified in the grants were in some cases inappropriate, and in others the Natives interested beneficially would not recognise the Māori trustees as the fitting persons to have control over their lands.[115]

104. It might be argued that the failure of this scheme was due to the lack of comprehension of the customary situation in the original awards; but it is unlikely that any 'conversion' into a fixed scheme of title could fully reflect the customary scenario. It might equally be thought that the trust powers or duties drawn in the original awards were inadequate; that might, however, really go to the lack of teeth in the ability of beneficiaries to enforce their will on trustees under standard trust law. The fact is that, in this instance, a series of trust arrangements, specifically designated as such in the original grants, had not prevented the rangatira trustees from doing as they determined. The ultimate result was that the tribal lands were subdivided amongst tribal members and so became a species of private property.

105. It is not claimed here that this example is necessarily representative, although it does seem to share many features with other contemporary settings, including those occurring in the era of the 'ten owner' rule. Much of the critique in the Tribunal literature of the ten-owner rule is that it allowed those owners to expropriate the interests of other owners in the kinds of ways just described. The force of this critique in the Tribunal literature must at least partly be based on the premise (or empirical evidence) that this is how representative grantees *actually operated*.[116] However, it is not always clear in the literature that this was in fact what happened, but it is fascinating (as I canvass more fully below) that much of the official and other contemporary commentary alleges this same critique of the ten owner rule as a rationale for reform in the NLLs.

106. A key point to appreciate in the context of the NLLs is that trusts and trustees were a common phenomenon amongst the propertied classes of Britain. Landed estates were often in the hands of trustees, and the law of settled estates often made the oldest son only a trustee of the estate during his lifetime. Business assets and operations were sometimes in the hands of trustees. I suggest that the prevalence of the trust in Victorian society meant that legislators in New Zealand thought (or assumed) that the

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115 *AJHR* 1875, G-05, at 1-2.

116 It seems that there has never been a systematic nation-wide study of this.

trust could operate alongside the NLLs, *without specific legislative provision*. I examine this context further below in looking at the form of 'ten owner' title in the 1865 legislation.

Context 3: the role of the state in economic development, ca. 1860-1900.

107. Having considered the development of three key legal mechanisms, land tenure and company and trust law, I now assess the role of the state in economic development in the relevant era.

108. The powers, capacity and pervasiveness of the state in nineteenth century New Zealand are often overstated or misunderstood. Most commonly, expectations are placed on what the state 'should have done' in that era that were simply incapable of being achieved by the New Zealand settler government at the time – not only due to its size and revenue base which were a small fraction of the current New Zealand state - but also due to the prevailing ideologies that informed the roles to be undertaken by the state.

'Institutional reach' of the state limited in nineteenth century New Zealand

109. Christopher Bayly's global history of the 'long' nineteenth century also explores the idea or phenomenon of the rise of the modern state. By century's end, the state in many parts of the world exercised or claimed to exercise a hegemonic control over defined territory and populations through the apparatus of a uniform and centrally-controlled political and legal system. He points out that before the 1960s, the British tradition of historical writing about government emphasised constitutional freedoms, the common law and local self-government. After the 1960s, historians began to be interested in state administration and the nineteenth century began to be seen as the century of the state or nation-state.

110. Bayly cautions, however, against a view of the homogenous, all-powerful, all-seeing, state, while agreeing that state administration did 'modernise' and develop new techniques of counting and control, such as the census and mapping projects. Often, however, it was non-state bodies, such as commercial bodies (Cecil Rhodes in southern Africa) or missionary organisations that developed these new state-like techniques of assessing and controlling knowledge and information.[117] He refers, for example, to historical anthropologist, Jean Comaroff's view, that before 1914 missionaries in southern Africa were the nearest thing to a colonial government that locals had experienced.[118]

111. There was no uniform or linear process of expansion in state 'governmentality' (M. Foucault) or power in the nineteenth century – in the British empire or elsewhere. In many parts of the British and French empires, the colonial authorities 'had cognisance of only a tiny proportion of judicial decisions in these societies, and had much less of a grip on their revenues than they liked to believe. Their head counting and ethnographic surveys often had little practical impact, being less a guide to government than a hobby of scholar-administrators'.[119] Bayly provides a helpful breakdown of the multiple versions of 'state' that existed in the nineteenth-century world, covering centralised

117 Bayly, *The Birth of the Modern World*, pp 247-253.

118 Bayly, *The Birth of the Modern World*, p 253.

119 Bayly, *The Birth of the Modern World*, p 254.

European states (France and Prussia), diffused-power or locally-ruled states (Britain and United States), states with counter-states (many Muslim and some Buddhist societies), corporate states (like the Hudson's Bay Company in Canadian northwest), traditional states ruled by local lineages or hierarchies (much of Africa, Asia, Pacific).

112. The size of the state in the later nineteenth century can be quantified, and this is one demonstration that the institutional reach of the state was far more limited than the state of the second half of the twentieth century. Economist Ha-Joon Chang (also an institutional or developmental economist) quotes figures that show in 1880, government expenditure as a percentage of GDP was much lower than today: 15% in France, 10% in the U.K., and 6% in Sweden, for example; whereas the average for 'rich' countries today is somewhere between 30-55% and for 'developing countries', 15-25% (the OECD average in 2009 was 45%).[120]

113. Consistent with these figures, in the 1890s, the New Zealand state's spending was around 13% of GDP; in 1892/3, only about 2.5% of the population paid either the land or income tax, although customs and excise taxes/duties were paid generally and still accounted for the bulk of the government's revenue at this period. But these figures still show how small the state was in New Zealand. As Paul Goldsmith says, "It meant fewer resources were put into education and health, far less was spent on welfare and much of the modern bureaucratic apparatus was not invented".[121] In many areas, New Zealand followed the United Kingdom state as the latter's size and expenditure increased with the franchise or voting population becoming more representative and the state became both more bureaucratic and more oriented toward 'collectivist' or social needs.[122]

Role of the nineteenth-century state largely focussed on supporting economic development

114. In general, the nineteenth-century state in the Western world, including the colonies, was mostly concerned with facilitating economic development through the development of law and property institutions (including the development of company law already spoken about), through infrastructural development – railways, roads, the telegraph, and, in the colonies, the facilitation of immigration (which was thought to encourage economic growth). Even this description is more applicable to metropolitan Britain and its empire that other Western empires. In places like the United States, private investment drove the expansion of infrastructure more than state expenditure (see the brief discussion on companies and railways above).[123] Hence, we should be careful, in appraising the role of the New Zealand state (or Crown) not to impose later paradigms of state activity or responsibility on the mid-to-late Victorian period.

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120 Ha-Joon Chang, *Economics: The User's Guide* (Penguin, 2014), at 397-98.

121 Paul Goldsmith, *We Won, You Lost. Eat That!: A Political History of Tax in New Zealand since 1840* (Auckland: David Ling, 2008), at 80-81, 102-03.

122 Jose Harris describes this phenomenal growth of the late Victorian state: 'Government employment increased fourfold between 1870 and 1914; central and local public expenditure increased tenfold (even though prices were falling till the late 1890s and then only gently rising); and there was a continuous stream of new specialist administrative departments (the Local Government Board in 1870, the Labour Department of the Board of Trade in 1893, the Board of Agriculture in 1894, and the Board of Education in 1899)'; see Harris, *Private Lives, Public Spirit*, at 11-12.

123 Although the railway construction companies in the U.S. received huge grants of public land, partly to offset construction costs via property speculation and development (see Hobsbawm, *The Age of Capital*, at 138).

115. The colonial state can be understood as more interventionist and involved in the economy than the metropolitan state, yet this is really a feature of the second half of the nineteenth century and really only concerned those matters vital to colonial state economic development – in particular support of immigration and roads/railways infrastructure. Our perspectives on this Victorian colonial state have been influentially shaped by the contemporary self-promotion of the Australasian colonies (by Liberal reformers such as William Pember Reeves) as 'progressive social laboratories', but in some areas such as urban sanitation and public health, they lagged well behind Victorian Britain. With respect to the right to vote, the inclusive nature of the franchise in the colonies (especially for white males) meant that the state could much earlier in the century be accepted as an interventionist, even 'entrepreneurial', vehicle to advance settler economic ambitions. At the same time, a strong theme of pioneering independence, 'self-help' and local self-government ran through settler culture. (New Zealand of course had a strong provincial government system until 1876, which contended with central government in some areas.)[124]

116. I turn now to consider some more present-day literature on the role of institutions in economic development.

Context 4: the role of institutions in economic development – the present-day economic literature (and some related analysis of Awarua block dynamics)

117. There is a consensus among many economists and economic historians that property rights or institutions (including political and legal institutions) enable or facilitate economic development. Literature on this issue has already been referred to above, as has the widespread contemporary belief in the eighteenth and nineteenth centuries that rationalising land tenure through enclosure and other means would foster agricultural development and economic progress. In this section I survey a small smattering of the key literature in this area, mostly focussing on the literature associated with 'new institutional economics'.

Relationship between formal and informal 'norms'

118. L. J. Ashton's entry on the 'New Institutional Economics', in the 2018 *New Palgrave Dictionary of Economics* explains that:[125]

> The new institutional economics (NIE) consists of a set of analytical tools or concepts from a variety of disciplines in the social sciences, business and law. The NIE addresses two overarching issues: **what are the determinants of institutions** – the formal and informal rules shaping social, economic and political behaviour? **And what impact do institutions have on economic performance?** It is the impact of institutions via property rights and transaction costs that ultimately affect the ability of individuals and societies (at a macro level) to extract the gains from trade which in turn can lead to enhanced economic well-being.
>
> Institutions are the informal norms and formal laws of societies that constrain and shape decision-making or, as [Douglass] North (1990) defined them, 'the rules of

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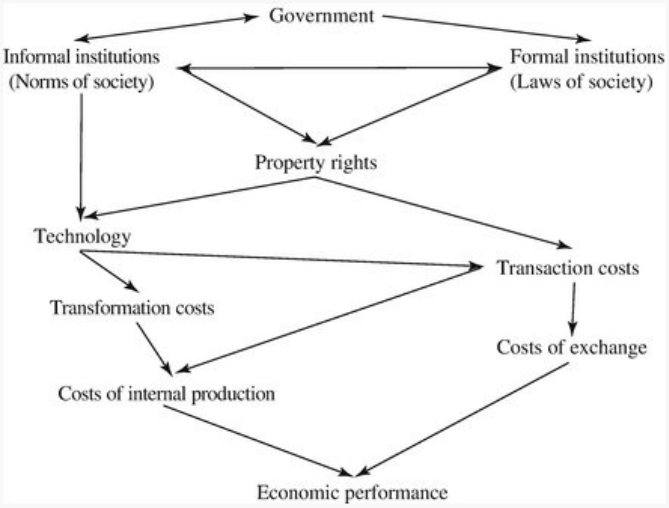
124 See Zoe Laidlaw, 'The Victorian State', in Martin Hewitt, ed., *The Victorian World* (London and New York: Routledge, 2012), at 329-345.

125 *The New Palgrave Dictionary of Economics*, online ed., (London: Palgrave Macmillan, 2018).

> the game' …[126] **Informal norms** do not rely on the coercive power of the state for enforcement whereas formal laws do, in part.
>
> As Fig. 1 shows, **the norms and laws of society determine the property rights that individuals possess**. Here I am concerned with rights that individuals have in regard to goods and services: (1) the right to sell an asset; (2) the right to use and derive income from an asset; and (3) the right to bequeath an asset. Property rights are enforced in three ways. Individuals themselves enforce their assigned rights; for example, we put locks on our doors to protect our property. Societal sanctions such as ostracism can deter individuals from violating the assigned rights of others. And the coercive power of the state can be used to enforce property rights; for example, the police will evict trespassers.



New Institutional Economics, Fig. 1
Institutions and economic performance

119. The protection or enforcement of property rights by legal institutions is an important feature of this model, as Ashton explains:

> The presence of 'honest' courts and a body of law that upholds contracts and safeguards exchanges is a formal institution that determines **the property rights of individuals** which in turn affect the transaction costs of exchange. The shorthand concept used to describe this system is 'the rule of law' (Arrunada and Adonova 2005; Beck and Levine 2005; Hadfield 2005). This does not imply that the courts are used frequently, only that they form a backdrop for exchange… In the absence of honest courts, negotiation and enforcement costs will be higher.

Customary norms in New Zealand as ongoing 'informal institutions' of property

120. With reference to the New Zealand context, I would argue that Government actors and Māori actors both had an expectation that customary norms would continue, including that chiefs would act as representative owners. I develop this analysis below in my

[126] The reference is to Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990) **[SC-21, extract]**.

schematic narrative on the NLLs, however some indication of the argument here might be helpful.

121. I suggest that these customary dynamics – which might be characterised as 'the collective principle' – can, in terms of the NIE model above, be understood as 'informal institutions' (or norms) that contributed to or helped to constitute property rights *as actually exercised or practised by Māori – even in the era of the NLLs*. Even although these norms came under pressure from the new legal norms of individualism (and individual incentives in dealing with interests) they were still expected to operate by many across the political spectrum, including Māori. I examine these matters more closely in the section below on the 1865 Act form of title, which I characterise as a 'trust' form of title (or, at least, as providing for customary or even equitable obligations to operate).

122. One example from Taihape of the ongoing efficacy of the 'collective principle' is the management of the Moawhango sheep operations in the 1880s-90s period in a way which also enabled individual interests in the sheep flocks to be secured. The basic point here is that this collective principle operated even while the land was in undivided shares. That is, *regardless of the state of the titles* – unincorporated or 'unconsolidated', as the letters by Utiku Potaka, Hiraka Te Rango and others complained off in 1892 and 1895 – sheep farming operations achieved some success on the basis of collective action.[127] David Armstrong's Environment Report gives about the clearest account I have seen of this operation:

> [Inspector of Native Schools, James] Pope further noted [in 1888] that the land was used cooperatively for farming or pastoral purposes, and individuals shared the land 'by private arrangement'. In other words, individual Māori flockowners occupying land which had not yet been partitioned made their own arrangements. According to later 1890 press report, the sheep at Moawhango 'all run together', but at docking time ewes and lambs were mustered, and each man took lambs in proportion to the number of ewes he owned. [citing *Hawkes Bay Herald*, 19 Mar 1890] According to Sheep Returns published in the AJHR, there were a total of 18 Māori sheep farmers in the Mokai Patea district at this time, running a total of 67,084 sheep. The average herd size was 3,726. There were ten Māori sheep farmers based at Moawhango, running a total of almost 21,000 sheep.[128]

And:

> In 1894 Māori based at the Moawhango kainga were reported by the *Press* to own around 60,000 sheep. Notably, individual owners continued to make their own arrangements about grazing areas, given that the land 'belongs to anyone or any known one of them'. Each owner apparently had his own earmark, making identification at mustering time easier, but sometimes there were disputes over the ownership of lambs. According to the Sheep Returns there were 26 Māori sheep farmers based in the Moawhango area in 1894, running a total of 88,530 animals, indicating that the *Press* had underestimated the total by about a third. The Māori flocks ranged in size from a mere 134 animals to over 16,000.[129]

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127 For original letters, see Wai 2180, #A16(a), vol. 2, at 12271-12277, 12414-12423 [**SC-1**]

128 D. A. Armstrong, 'The Impact of Environmental Change in the Taihape District, 1840-c1870', Wai 2180, #A45, at 21.

129 Armstrong, 'Environmental Change in Taihape', #A45, at 26.

123. In summary, and comparing these two dates and figures, between 1890 and 1894, the numbers of sheep owned by Māori registered at Moawhango had risen from 21,000 sheep to 88,530 sheep. *And* they were managing to increase sheep flocks and manage things reasonably well even though the land was still effectively communal – that is, in undivided individual shares, or non-partitioned. Armstrong's narrative indicates, therefore, that there was some degree of effective tribal or community management of sheep flocks, despite the undivided ownership-in-common state of the titles. Hence 'the collective principle', as I am terming it, operated in sense autonomously of the state of the titles. (Arguably, although it was operating with some efficacy owners sought greater certainty and ability to leverage the fruits of their productivity – hence both appeals to the government for reorganisation of their legal structures, and applications to the Native Land Court to gain secure and certain titles).

124. I suggest, too, that this is how a Memorial of ownership system was anticipated to operate: with title not yet partitioned to fee-simple individual (or family/small group) titles or Crown Grants, the tenure was one which allowed the operation of collective or tribal norms. In other words – in the language of the NIE model above – they were part of the 'informal institutions' that continued to constitute the reality of Māori property rights. While the memorial system did not explicitly provide for their continuance, it implicitly allowed it.

125. The more difficult question, perhaps, is whether the collective principle could continue to operate even when land was partitioned out to individual or whānau allotments – as it was in Awarua at the 1896 partitions. As at 1896, I suggest that many blocks that were now in individual whānau partitions could have been reconstituted as a collective operation using the committee provisions of the 1894 legislation. This did not happen, but the legal framework for such incorporation certainly existed by 1896. (I conduct a close analysis of the 1894 regime below.)

126. I continue this commentary on 'the collective principle' with reference to statements of another institutional economist, Ha-Joon Chang. In a 2007 edited collection entitled *Institutional Change and Economic Development*, Chang argued:

> The emphasis on the role of human agency brings us to the issue of the role of 'ideas' in institutional change. If human actors are not automata responding to structurally-determined incentives, their ideas – how they perceive their interests, what their moral values are, how they think the world works, what actions they think are possible and impossible, and so on – matter a great deal.
>
> Sometimes ideas can be used as tools by human agents in their attempt to change institutions in the way that they prefer. While ideas cannot be seen as being totally independent of the 'structural' conditions surrounding the human agents holding them, human agents are certainly capable of developing ideational discourses that are not totally 'structurally' determined and use them to advance their interests in particular directions.[130]

127. The Turanga Tribunal advanced the view that individualisation under the Native Land Act 1873 had effectively removed community or hapū decision-making on land retention or alienation, because individual grantees (holders of undivided interests) could now deal with their individuated interests in the market-place 'without reference

130 Ha-Joon Chang, *Institutional Change and Economic Development* (New York: United Nations University Press, 2007), at 9.

to the community'. As it happened, the Tribunal suggested, they not only could, but did, deal individually in a vast number of instances. This, it seems to me, is a too deterministic account of Māori, and human, behaviour. What the Tribunal was essentially saying is that by giving individual tribal members an individuated interest in land, that then turned them into any number of bourgeois free-market individualists. That does not tally. *If* we premise the argument on there being strong hapū structures or communal cohesion as at the inception of the 1873 Act, then it defies reason that those same hapū/community members would suddenly change their cultural norms and behaviour just because they held an individual property interest. As Douglass North has argued re informal norms:

> Although formal rules may change overnight as the result of political or judicial decisions, informal constraints embodied in customs, traditions, and codes of conduct are much more impervious to deliberate policies.[131]

128. Of course, under the 1873 Act there *was* now a *structural/institutional incentive* to act individually – that is, for individual profit – by selling individual interests; but that should not have changed group behaviour or 'customary norms' immediately. Assuming a picture of strong group cohesion, then simply creating individual property interests should not have made a significant impact – though over decades individual interests might erode group cohesion. A more plausible scenario is that communal structures in some places *as at the 1873 inception of Memorial titles* (which of course allows for some cultural change since 1840 or an earlier period) – were not as strong as the Turanga Tribunal postulated, and that at least some individuals or whānau acted alone because they were accustomed to do so or otherwise had no strong sense of obligation to a wider group.

What does the Awarua purchasing and retention pattern tell us?

129. A more nuanced picture than this black and white, or mutually-exclusive, 'individualist norm – vs – collective norm' picture (or individual undivided legal interests vs tribe or hapū norms) is, I suggest, presented by the history of Crown purchasing in the Awarua block in the early-to-mid 1890s. (The observations of Te Maire Tau on social structure and property interests in Kai Tahu would be worth bearing in mind here; as perhaps a parallel.) In research reports conducted for this inquiry, as in other inquiries, Crown purchase methods have been criticised for conducting the purchasing of undivided shares individual-by-individual rather than with a wider collectivity (hapū/group) together.

130. In addition, with respect to the Awarua block, the Crown has been criticised (in the research) for going ahead with purchasing of individual shares and 'ignoring' the requests in the 1892 and 1895 letters to ensure the maintenance of some sort of effective tribal estate for the hapū. I do not comment at this point on or examine the interesting evidence that suggests how the Crown agents conducted purchasing (principally, the various deeds of purchase for Awarua).

131. But what is fascinating, in my view, is what the 'end result' of all this Crown purchasing and partitioning in two rounds of 1894 and 1896 was: because what Awarua whānau were left with was, on one reading anyway, something akin to what they had been seeking over some years, that is, the partition of the larger tribal estate into whānau

131 North, *Institutional Change* (1990), at 6.

allotments (that is, smaller blocks owned by individual whānau rather than larger 'hapū' or 'tribal' blocks). In fact, the division of the tribal estate into whānau allotments extended considerably wider than the case of Awarua, as witness the Motukawa and Oruamatua-Kaimawana blocks.[132]

Map 67: Whanau Holdings: Western and Southern Blocks

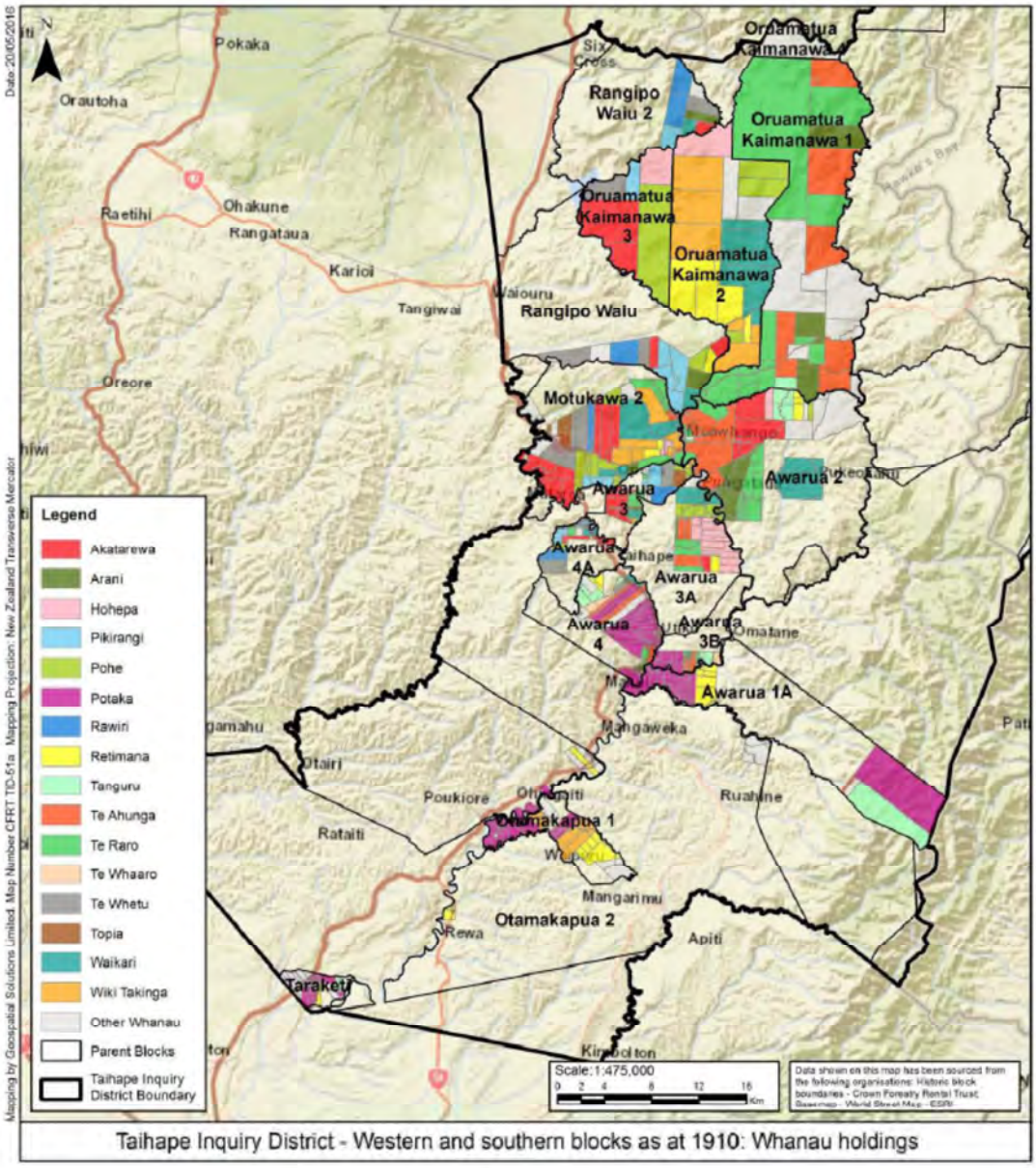

Figure 1: T. Walzl, Twentieth Century Overview, p. 626.

132 Walzl, 'Twentieth Century Overview', #A46, at 101, 123, 133, 143 (at 1900), 626-27 (at 1910, overview map) **[SC-23]**. Even just a general impression of these subdivisions from Walzl's excellent maps is that these were reasonably consolidated whānau-based partitions; cf. Stirling, 'Nineteenth Century Overview', #A43, at 515 (at 1896).

132. Furthermore, the evidence suggests that the arrangement of these partitions between Crown and owners, and between owner whānau *inter se*, was without serious disagreement and was achieved relatively quickly at both 1894 and 1896 partitions.[133] Another feature of the eventual partitions, at 1896, is that Awarua Māori retained all the partitions around their settlement of Moawhango, which can be understood as another of their objectives given that was the central settlement of the associated farming operations. An additional observation is that they retained a significant area of land along the Main Trunk Line.[134] All these are reasonable observations or inferences, I suggest, even though the absolute figure retained in Awarua (about 58,500 acres at 1896) is considerably less than the original area proposed to be retained in 1892 (about 168,000 acres, on the basis that 100,000 acres was offered).[135]

133. Hence, I suggest the Awarua picture is more nuanced than a simple paradigm of individualism vs collectivism (or Crown imposition of individualism) because a reasonable interpretation of the available evidence is that, while selling (some of) their shares in what seems like an individual fashion in many cases (though certainly not all cases), many of the owners were still working towards an objective of obtaining whānau partitions in desired locations. This is a reasonable interpretation, I suggest, because some result like this seems to have occurred.[136]

134. A reasonable inference from this data is that Awarua Māori *achieved individual or whānau allotments* in part at least as the expression of *a collective plan*. The partition of blocks even among a single whānau was clearly deliberate (whatever the purpose of this might have been).[137] And between whānau, the evidence suggests a reasonable level of consensus over the whānau partitions in 1896.

'Collective principle' expressed in various ways

135. If we then take this interpretation to a higher level of abstraction, we could say that the conferral of individual private property rights *in (British or colonial state) law* did not by itself dislodge 'the collective principle' *as a customary norm* or feature of tribal behaviour. This, in fact (and somewhat ironically given the historiography of his 'destroying Māori communism' quote) is something like what Henry Sewell argued in various speeches in the New Zealand General Assembly. I deal with Sewell's speeches below in my analysis of the NLLs.

136. Other aspects of nineteenth and twentieth century historiography demonstrate the many and varying expressions of 'the collective principle' even while Māori communities were adjusting to, and in many cases adopting and adapting, features of

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133 Stirling, 'Nineteenth Century Overview', #A43, at 491-492, 513; see also Stirling and Subasic, #A8, at 99-103.

134 Walzl, 'Twentieth Century Overview', #A46, at 627 **[SC-23, at 412]**.

135 Refer Stirling, 'Nineteenth Century Overview', #A43, at 411, 493, 514 (though also note that of that 100,000 acres offered, about 11,000 acres was stated to belong to the Motukawa block).

136 In this regard, re the 'result' of purchasing and partitioning, there is little evidence of complaint about the 1896 partitions, apart from one 'appeal' referred to by Stirling (nor indeed, complaint about the prior Crown purchasing of interests, as such); Stirling's narrative indicates that, in 1896, for example, Utiku Potaka was centrally involved in discussions on division outside the Court, and there was only a single lawyer representing the owners in Court (which contrasts markedly with the original title hearings when there were multiple divisions among the claimants/counter-claimants and various lawyers and native agents); see Stirling, #A43, at 513.

137 In the Awarua and Motukawa blocks, for example, many individual whānau members held their own blocks alongside other blocks held by a few members of the same whānau; see Walzl, #A43, at 111, 121-23, 130-34, 143, 151. Even in the Owhaoko and Mangaohane blocks there were sizeable subdivisions held by individuals by 1899; see Walzl, #A43, at 90-92.

Western society. In fact, some of the expressions of the collective principle were in Western or British form, such as, prominently, the kingitanga and the parliament movements, to say nothing of the various tribal and smaller group 'committees' that emerged through the nineteenth century. As Mamari Stephens has recently written in the context of social or 'welfare' organisations:

> Over the course of well over a century, Māori consistently sought to cohere across tribal divisions to make decisions for themselves and other Māori in order to bring about competing visions of "welfare" for Māori. Māori have created bodies (rūnanga, committees, local councils and executive organisations), charged with welfare responsibility. These bodies have often included provision for public participation such as elections and conferences. These bodies have also sought to have sufficient power to make decisions about resources, actions and rules that would be followed by Māori communities, even where the bodies have not sought to use those powers (as in the case of the power to make district Māori council bylaws).[138]

137. These varying expressions of a 'collective principle' prove the salience of Douglass North's theory emphasising the importance of informal norms or institutions. This involves the critique of neoclassical economic theory, which assumes that economic actors are 'rational' or 'wealth-maximising' individuals. On the contrary, North has emphasised value-systems and attitudes, which in turn affect individual and group perception of available economic 'choices'; such values may include human altruism and religious ideologies. But this picture of informal institutions is also dynamic and variegated, with North arguing that 'the motivation of the actors is more complicated (and their preferences less stable) than assumed in received theory'.[139]

138. In order to adequately interpret Māori engagement with colonial (or Crown) law and policy, we need a theory more like this one, namely, that takes account of strongly-held customary norms or 'culture',[140] but yet also sees these norms as themselves constituted by history, making them to a degree malleable and able to be reconstructed by individuals and communities to make way for other 'introduced' ideas – such as, for example, individual transferrable property rights (but not necessarily their associated 'values' of individuality). It should be obvious that abandonment of long-held collective principles would not have happened over a short period – in fact it might take decades to displace them (or such displacement might not occur at all). It was quite possible for tikanga to adapt to changing circumstances, without that tikanga being fundamentally jettisoned.

Introductory Commentary from New Zealand Sources re 'property rights institutions'

139. The idea that security of property would promote economic development is not, of course, a new concept. It is found in many of the debates on the NLLs in the 1860s-70s period, and following.

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138 Māmari Stephens, ' "To Work Out Their Own Salvation": Māori Constitutionalism and the Quest for Welfare', *VUW Law Rev*, vol. 46 (2015), at 907-936, at at 935.

139 North, *Institutional Change* (1990), at 17.

140 See North, *Institutional Change* (1990), at 36-37, for further elaborations on informal norms or culture.

140. An early example is from the 1856 Board of Native Affairs, which commented on the need for security of title under law, apart from the tribal imperatives of group (tribe) defence of land and resources, as:

> without such security [of Crown Grants to individual natives or 'heads of families'] their further progress in civilisation is impossible, and, while they would as regards the tenure of their dwellings and cultivations be placed on an equal footing with the Europeans, they would be adding to the wealth and resources of the Colony at large.[141]

141. Dillon Bell's statements in the House in 1862 also reflect this political-economy paradigm. Bell said that it was the Ministry's intention that the Native Lands Bill create 'a bond of common interest' between Māori and settlers and enable them to 'have the full value of their lands either in the way of selling or leasing'.[142] As he said in moving the debate on the bill:

> The only means by which you [the Assembly or Government] can produce a lasting effect upon the Natives is by proving to them that it is not merely a matter of sentiment for them to own allegiance to British authority and submit themselves to British law, but that it is a matter of the greatest material interest to them to do it, and that if they do it they will infallibly themselves become wealthy men.[143]

142. It was a widespread perception that by recognising native title in all unalienated land as at 1862 (that is, the recognition of a rudimentary native 'ownership' in all land, however unoccupied or remote), and by establishing a legal process to convert this into fixed individualised titles, that a great economic benefit was being granted to Māori. J. C. Richmond put this in (characteristically) blunt fashion in parliament when he calculated the total value of 22,600,000 acres unalienated in the North Island at £2,825,000 (at an average cost of 2s. 6d per acre).[144]

143. The 'individual private property = economic development' paradigm is both an explicit argument and implicit assumption running through much of the debates on the NLLs. In summary, these include the following notions:

143.1 Māori would derive direct economic benefits from selling and leasing their lands;

143.2 colonial settlement would lead to an increase in the unimproved value of the land remaining in Māori ownership; and

143.3 Māori would have greater incentive to improve their remaining lands if they knew they could 'reap the rewards' of their own labours in terms of capital increase due to improvements as well as income.

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141 Board of Native Affairs Report, *AJHR* 1856 B-3, at 5 (see copy report in Loveridge, 'Origins' (2000), Appendix, at 256-269).

142 Dillon Bell, *NZPDs*, 27 Aug. 1862, at 653.

143 Dillon Bell, *NZPDs*, 25 Aug. 1862, at 611.

144 J. C. Richmond, *NZPDs*, 26 Aug. 1862, at 631; although a somewhat meaningless figure and comparison, Richmond's figures produce an inflation adjusted figure in 2018 dollars of $333,493,306.72 (general CPI index). Of course, this is purely monetary value and does not take into account customary values of land.

In many ways, these are older versions of the arguments being advanced by today's economists/economic historians, including those associated with the New Institutional Economics.

144. These observations are built upon in what follows, in which the 'texts' of the Native Land Laws, and various associated debates and memoranda are read in light of various 'contexts', including those of metropolitan Britain.

PART 3: WHAT WERE THEY THINKING?

Building a theoretical-empirical model: a schematic narrative of the Native Land Laws (NLLs).

> 'I have thus endeavoured to explain the intention of this measure. It only remains for me to remark, that Ministers do not pretend to hope for any immediate results from it.'
>
> F. Dillon Bell to G. Grey, 6 Nov 1862 [re the Native Lands Bill no. 2]

> '[The Natives] will look upon their property, not in the light of an unavailable and undefined right, but as something tangible, that they can deal with or improve.'
>
> H. J. Tancred, 9 Sep. 1862, Legislative Council [moving the second reading of the Native Lands Bill no. 2 for the Government][145]

> 'I hold it therefore far more advisable that Government should purchase territories than that individuals should purchase properties…'
>
> Lord Carnarvon, 1858, cited by R. Stokes, 9 Sep. 1862, Legislative Council [opposing the Natives Lands Bill no. 2][146]

> 'Government, in that case [the fall of successive Ministries], must degenerate into nothing more than a series of successive experiments - it must become mere empiricism.'
>
> J. E. FitzGerald, Native Minister, 18 Aug. 1865 [moving the first reading of the Weld Ministry's new native policy][147]

145. This section attempts to place the NLLs in historic context by outlining the way in which Government Ministers explained them and in which the General Assembly debated them, and by, additionally, describing and evaluating them in terms of the available ideas or political-legal models of the time. It is thus both an 'empirical' model and simultaneously a 'theoretical' model:

    145.1 It is an 'empirical' model with respect to its assessment of the New Zealand historical data (which, as the FitzGerald quote above indicates, were a 'series of experiments'); and

    145.2 It is a 'theoretical' model with respect to the many ideas or 'theories' in play in the wider political or intellectual discourse.

    It is a 'schematic narrative' in that it attempts to identify in these specific and broader texts the core ideas or paradigms.

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145 *NZPDs*, 9 Seat 1862, at 684.

146 *NZPDs*, 9 Seat 1862, at 686; the passage continues: '… so that the line which separates the purchased lands on which European law is to prevail from the unpurchased on which the Native usages will continue to subsist, though always advancing, will be broad and unequivocal'.

147 NZPDs, 18 Aug. 1865, at 321; FitzGerald appeared to be arguing that with so many Ministries being formed and then falling, the Assembly had little opportunity to make them accountable for their policies, or, as he puts it, 'exercise … real or wholesome control over the conduct of Native or of other affairs'. What it also suggests is that policy-making on native affairs (as generally) was experimental and a question of *realpolitik* – the result of practical or political considerations of the moment.

146. I am interested here primarily with the nature and form of title rather than the structure of the court or other legislative machinery.

1862: 'tribal title' – a named tribe or 20 individual owners

The Parliament's and/or Government's intention in 1862: confirmation of property rights in Māori akin to European ownership

147. It is clear that settler politicians in 1861-62 were exercised about how European settlement could proceed peaceably in light of the Waitara experience and the first Taranaki war arising from it. The pressing political and economic question was how to acquire Māori land when direct purchase by the Crown of land in customary tenure was fraught because tribal groups were divided between land-sellers and land-holders. This is certainly one way to characterise the problem as perceived by settler politicians and the settler public.

148. There were also, of course, longer term settler political-economic imperatives in play that favoured settlers being able to acquire Māori land on an open market. This was driven in part by economic ideology that favoured free market principles, partly on historic settler opposition to Crown-controlled settlement, and partly on the belief that Māori would be benefitted too by the ability to sell their land in competitive conditions.

149. At the same time, there were many voices in favour of maintaining Crown pre-emption and systematic colonisation.[148] The significance of the shift from the 1840-1860 policies and practices to the 1860's initiatives, not only in policy but in settler-politician consciousness, should not be underestimated – indeed, it has the hallmarks of a 'paradigm shift' brought on in large part by the crisis of Crown land acquisition methods, intra-tribal (and perhaps inter-tribal) disputes over land sale, and their result in colonialist-native warfare.[149]

150. When Dillon Bell moved the second reading of the Bill, he plainly acknowledged that the Bill involved a great change in policy from that which had guided the Government on the land question 'for the last twenty years'. It was 'no small matter' for the Government to ask the House to reverse the current policy.[150] Bell stated the new policy that he invited the House to approve:

> I ask you [the House] to declare that all land over which the Native title is not extinguished is the absolute property of the persons entitled to it by Native custom, and that, after their ownership has been ascertained and registered, the proprietors may deal with it in like manner as Her Majesty's subjects of European race may deal with land held by them under grant from the Crown. That is, in a few words, the principle of the Bill.[151]

151. The emphasis of this statement was on a confirmation of property rights in Māori akin to European ownership.

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148 Mr. Jollie, *NZPDs*, 25 Aug 1862, at 619.

149 Mr. Crawford, in the Legislative Council, in effect described this as a paradigm shift by drawing (an admittedly imperfect) analogy with the Peel Ministry's great about-turn in reversing the protectionist policies of the 'Corn Laws' in the 1840s; see *NZPDs*, 9 Seat 1862, at 684.

150 Dillon Bell, *NZPDs*, 25 Aug 1862, at 608.

151 Dillon Bell, *NZPDs*, 25 Aug 1862, at 609.

152. In producing this new policy, Governor Grey and the various Ministries could invoke as authority the instructions of the Secretary of State, the Duke of Newcastle, of 5 June 1861, despatched before Grey had left the Cape Colony. Referring to the present political difficulties in the colony relating to land transactions, Newcastle instructed Grey to consider carefully whether the present policy of Government – owner negotiation:

> …may not, in the present condition of the Natives and settlers, require to be modified or superseded … Her Majesty's Government will accordingly be willing to assent to any prudent plan for the individualisation of Native title, and for direct purchase under proper safeguards of Native lands by individual settlers, which the New Zealand Parliament may wish to adopt.[152]

153. Regardless of these immediate political and economic drivers, the Government, and Parliament, still needed to grapple with the question of exactly 'how' to achieve a transition from Crown-purchasing of customary land to Māori land being transacted on a more secure basis by the Crown and third parties. The parliamentary debates on the bill were largely consumed with the principle of the bill, and especially the abolition of pre-emption and systematic colonisation enabled by it. They did not descend into the detail of the bill's machinery.[153] (Don Loveridge's 2000 report explores the various models that were in existence already, including the Native Council model, Grey's runanga or new institutions, and various models for local governance and dispute resolution involving juries, runanga and circuit courts with native assessors (the 1858 legislation).[154])

154. At the outset, the Government's intention for the 1862 legislation was plain enough: establish a court to investigate and confirm native titles to land; and then enable Māori to deal freely with their lands. Governor George Grey described this intent concisely in a despatch to the Imperial Government:

> That Natives of New Zealand should be allowed to have as good a title to their lands as Europeans, and that they should, in the event of their disposing of or renting these lands, be allowed to obtain the value of such lands.[155]

155. Native Minister, Dillon Bell, similarly described the 'chief design' of His Excellency's Advisers (that is, the Government):

> namely, that the title, according to Native custom of the owners of Native lands shall be ascertained by regular tribunals instead of being determined by the Executive Government, and that when that title has been so ascertained and registered, the Native owners may deal with their land as they shall think fit.[156]

156. I suggest this identifies the key elements that:

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152 Cited by Dillon Bell, *NZPDs*, 25 Aug 1862, at 610.

153 For a good summary of the high points of the debate, see Dillon Bell's masterclass in rebuttal: *NZPDs*, 27 Aug. 1863, at 652-654.

154 Loveridge, 'Origins' (2000).

155 G. Grey to Alfred Domett, 25 Aug. 1862, in G. Grey to Duke of Newcastle (Sec. of State), 31 Oct. 1862, in *AJHR* 1863, A-01, at 8.

156 F. Dillon Bell, 'Memorandum' to G. Grey, 6 Nov. 1862, in G. Grey to Duke of Newcastle (Sec. of State), 31 Oct. 1862, in *AJHR* 1863, A-01, at 9.

156.1 Māori should be able to deal with their lands freely once their ownership had been confirmed by the Court;

156.2 ownership should be determined by a Court not by Executive Government;

156.3 the paradigm was about free or competitive market transactions replacing Crown monopoly purchasing; and

156.4 the focus was on Māori owners being able to deal with land either by sale or lease; it does not seem that at this point that the use of land as security for lending and agricultural development was much thought of – at least on the evidence of the parliamentary debates and Government memoranda.[157]

157. Loveridge notes that debate on 1865 legislation was brief as compared with on 1862 Act.[158] He argues that the Native Lands Act 1862 was the 'cornerstone and foundation for all subsequent Native Land Court legislation up to 1909', rather than the 1865 legislation, as others have suggested.[159]

158. What about Sewell's famous/infamous statement about the NLLs intending to destroy the communistic tenure of the Māori? It is difficult in fact to extract this statement. The fewer of the surrounding statements that are given, the less context there is to understand the statement's meaning – as I go on to highlight below. Therefore, the best methodology here is to extract the whole speech – see **Document Bank, SC-4**. However, to avoid doubt, I cite the oft-quoted statement, as follows:

> The other great object [besides bringing the native estate 'within the reach of colonization'] was, the detribalization of the Natives, - to destroy, if it were possible, the principle of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Native race into our own social and political system…[160]

159. Te Maire Tau captures the central statement, but also comments adversely on the practice in Tribunal historiography of quoting this statement *ad nauseum*:

> If there was ever an overcooked sentence when dealing with Māori land law, it must be Henry Sewell's explanation to the Native Land Act 1865 and his declaration that its purpose was to end tribalism and stamp out the communism of the Māori.[161]

160. The frequent citation of this statement is not however the real error. The real error is that the quotation is not properly contextualised, and this in a number of ways.

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157 See Dillon Bell [in reply, second reading], *NZPDs*, 27 Aug. 1862, at 653: 'I have openly said that I wished to create a bond of common interest between the two races, and **let the Natives have the full value of their lands either in the way of selling or leasing**'; on the other hand, see clause 17, Native Land Act 1862: 'The individual person or persons named in any Certificate … may dispose of the estate or interest … by way of absolute sale or lease **or in exchange for other lands or otherwise** to any person or persons whatsoever'.

158 Loveridge, 'Origins' (2000), at 12-13.

159 Loveridge, 'Origins' (2000), at 11-13.

160 Sewell, *NZPDs*, 29 Aug. 1870, at 359-62, at at 361 **[SC-4, at 60]**.

161 Te Maire Tau, 'Property Rights in Kaiapoi', at 677 **[SC-22, at 384]**.

160.1 First, it comes eight years after the first Native Land Act 1862, in a debate of 1870 on the Native Land Frauds Prevention Bill (of which more below). Hence it is not even contemporary with the passing of the first and second versions of the native land legislation.

160.2 Second, although it can be argued that the quote does capture accurately the central purpose of the NLLs – the granting of individual property rights – Sewell's language of 'communism' hardly appears in the original debates. What those debates are about is recognising native rights to land in a form in which native land can be dealt with in a new open land market (via the granting of secure titles on the English model). If one needs another verb then amalgamating or 'assimilating' native tenure with the English land system would be a better way of characterising the main objective of the original legislation. And in this context, 'assimilation' must surely only carry the plain meaning of 'making similar to' – or perhaps, 'understood in terms of'.

160.3 Third, if the quote is read in the full context of Sewell's parliamentary speech, it loses a degree of its punch in explaining the NLLs of the 1860s. Because what Sewell went on to state was that, although the NLLs conferred individual titles via Crown grants, those grantees still had tribal obligations or obligations as trustees for wider tribal groups.[162] What the bill he was introducing was designed to do was introduce the mechanism of the trust commissioners who would investigate whether land contracts had been entered into fraudulently or contrary to the native proprietors' trust obligations. Sewell was in fact concerned about the 'pauperism' of groups who had lost land due to the actions of their legal representatives. This issue of trust, and the legislation that was passed – the Native Lands Frauds Prevention Act will be discussed more later, but it is sufficient to say that quoting Sewell without this wider context actually totally obscures the intent or meaning of the speech he was making at the time in the Legislative Council.

161. I suggest another quote of Sewell's is just as relevant and perhaps captures more accurately the central issue of 'settling land rights' through a definitive title system. It also comes from the 1862 legislation debates, rather than a debate eight years later, so is more relevant on that score:

> I say with confidence that, till we have done this [settled native land rights], we have done nothing towards effectually planting amongst them civil institutions or reducing their social condition into order. No community, civilized or barbarous, can settle down into a state of order and law without a settlement of their rights to land. Land is the foundation on which every organized political system is based it is almost part of ourselves.[163]

162. Grey also captured the essence in his address to the Assembly:

> The Act you have passed to secure to them the practical advantages of ownership in their lands, and to give them titles which can be recognised by our laws, will, I trust, if administered with discretion and judgement, contribute very greatly to

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162 Sewell, *NZPDs*, 29 Aug. 1870, at 361: again, extraction is difficult, but a key couple of sentences would be: 'Crown grants were issued to individual Natives conveying to the grantees named in the grants individual proprietary rights. But, underlying those individual rights, were those tribal communistic interests which were still existing.' **[SC-4, at 60].**

163 H. Sewell, *NZPDs*, 9 Seat 1862, at 689; also cited Loveridge, 'Origins', (2000), at 184.

> remove the distrust and disaffection prevailing amongst a portion of the Native population. It will be my care to endeavour so to administer this law, if it should receive Her Majesty's assent, as to secure the beneficial results which it has evidently been your object to attain.[164]

Describing and Evaluating the form of title (in terms of title individualisation/enclosure, trust and company law…)

163. The eventual legislation of 1862 – the Native Land Act 1862 – provided for the Court to award title to named 'tribes' or to a group of up to twenty named individuals – what might be characterised as the 'twenty-owner rule'.

164. The form of title seemed to incorporate aspects of individual and group ownership. The idea of trust – that named owners act as trustees – was also present. Bell described the "course of proceeding" under the Bill in his memorandum for Governor Grey. This seems to have been an attempt to set out how the Bill would operate in practice, or how the Government anticipated it would operate:

164.1 Tribes may apply to have their title defined. The Court may declare that a tribe are the proprietors of land, and issue a certificate of title accordingly. Reserves for the tribe generally or 'particular Chiefs or families' may also be made at the same time. The tribe will then be recognised as owners in the general courts.

164.2 A tribe may return to court to partition their land and 'individualise their title'. This process can be repeated indefinitely, but tribes may retain portions as tribal land while subdividing the rest amongst 'particular persons or families'.

164.3 On some occasions there will be some 'sections, hapūs, communities, or individuals', actually entitled to land not covered by any 'general tribal right', in which case they may apply for certificates 'in their own names as joint or separate owners'.

164.4 If a title is issued to not more than twenty individuals, they may deal absolutely with the land by sale, lease or otherwise; such a title is equivalent to a Crown Grant.

164.5 If 'an entire tribe' is named in the certificate, they cannot deal with the title in that state as "**the 'tribe' cannot make a conveyance"**. They must first apply to partition or "apply to have a new certificate issued in the names of **trustees, with a proper declaration of trust to act on their behalf**". [emphasis added]

164.6 If 'an entire tribe' is named in the certificate, they may "propose a regular plan for the partition, disposal, leasing, or otherwise dealing with their land". This may include laying out a township, raising money on security of the land for making roads, buildings and endowing churches and schools, building mills, sowing grass, etcetera. Bell referred to these provisions as enabling tribes 'to organise the colonisation of the land themselves'.[165]

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164 Cited Loveridge, 'Origins' (2000), at 188.

165 Dillon Bell, 'Memorandum', *AJHR* 1863, A-01, at 10-11.

165. Why did Bell say that a tribe cannot convey? The main reason was perhaps that an unincorporated group had no agency without individuals, and since no individuals had been named or identified as the owners, there was no legal certainty over who was to deal for the tribe or land-owning group. This interpretation is supported by Bell's statement that in order to deal with their land the tribe could partition – that is, subdivide to individuals or family groups – or they could provide for the land to be held in the names of trustees who could then 'act on their behalf'. In a sense, therefore, the granting of title to a named group was only a limited advance on the previous position of undetermined customary title: the tribal group (or groups) might now be identified, but there was no mechanism by which that group could deal with its title at law. It might be alleged (and has been argued in Tribunal reports and research) that the group could have been legally recognised as a body corporate, but this creates all sorts of other issues; I assess these below in the section on 1894 incorporated title.

166. The other, more practical, reason for a tribe not being able to deal is that a group of many individuals would be too difficult for participants in the land market to deal with. This was a point noted in opposition to the bill.[166] It was often complained about by purchasers following the 1873 legislation.[167] William Rees himself (key member of the 1891 Native Land Commission) said in 1881 (at a public meeting to promote his East Coast Land Settlement Company) that it seemed as if the legislature had intended that Māori land should not be settled by Europeans.[168]

167. Bell went on to note that the transfer tax was not imposed until the land was sold, so in that way Māori wishing to retain their land were not penalised by the unequal sales tax: tax on first sales of Māori land had a tax (or transfer duty) imposed of 10% of the sale value, compared with much smaller rates on standard land sales.[169] But this was in fact a major issue in the shift to market dealings in land, as without Crown pre-emption the Government, especially the Provincial Governments, would lose their income from the re-sale of land, which had been substantial sources of income for public works and immigration.[170]

168. As the quotation above reveals, Ministers were not hopeful for immediate results from the legislation. Trust needed to be gained and regarding those "banded together in the King Movement" that would not be easy. But Bell expressed the hope that the legislation would "give them a common bond of interest with ourselves", by giving legal rights to and "the full money of" their "great territorial possessions". This language reflects a central British legal and historical paradigm that property rights gave a person a secure stake in the kingdom. Property rights and personal liberties were, of course, famously protected in the Great Charter of 1215, followed by other

166 Mr Renall, in *NZPDs*, 25 Aug 1862, at 621.

167 Complaints of this kind are certainly made by witnesses in the 1891 Native Land Laws Commission (Rees-Carroll Commission; see *AJHR* 1891, II, G-01

168 *Poverty Bay Herald*, 25 Aug. 1881, at 2; and see Macky, 'Trust and Company Management by Wi Pere and William Rees', Wai 814, F-11, at 100.

169 See Loveridge, 2000, at 187-88. It was Gov. Grey who introduced this provision after the bill had passed the House; Grey struck out the Legislative Council's imposition of a specific duty per acre.

170 Bell thought the high rate of first-sale duty would 'encourage improvidently long leases', and so would have to be amended subsequently ('Memorandum', in *AJHR* 1863, A-01, at 11); it was not however amended for a considerable period. For opposition to the bill on the grounds it would greatly reduce the Land Fund, see for example Mr Renall, W. W. Taylor, Mr. Carter, Mr. Harrison, in *NZPDs*, 25 Aug 1862, at 622-24, 629.

constitutional documents that recorded rights of citizens as against the Crown, including the Bill of Rights 1689.

169. It is interesting to note, regarding the 1862 Act, Grey's quite different proposed model, as Bell put it:

> to introduce very gradually the practice of direct dealing in land between the Natives and Europeans, and to make such dealing dependent upon personal occupation of the land by the Europeans, under penalties to be enforced by the Executive Government.[171]

170. The legislative history of the various bills and process of amendment of the ultimate legislation as it made its way through the Assembly puts pay to any notion that what to do with native lands was obvious or that the Government of the day produced the model of the Native Land Court ready-made. As Bell said of the legislation:

> … a certain amount of compromise had to be made on every side. As usual, any advantage gained by such compromise has been balanced by the imperfections necessarily attending a design worked out by many people, and these in a hurry.[172]

And he noted further along the same lines:

> … the late Attorney-General (Mr Sewell), seemed to consider his reputation as a lawyer so compromised by the supposition that he was responsible for the Bill, that he requested the Government to send home a Minute of his objections; which is accordingly annexed with marginal notes.[173]

171. It should be noted, not incidentally, that Sewell opposed the concept of a court or tribunal adjudicating on native title, both on constitutional grounds, and on grounds of practical reality that he felt no English court could deal adequately with a quite alien system of tenure. Sewell's bill (the Native Lands bill no. 1) had left the recognition of native title to the Governor.[174]

172. Other commentary in Bell's memorandum reflects this same reality – that the Ministers were searching for a policy or legislative solution, and recognised that there would be defects in it that would subsequently require remedy, or matters of detail that would need to be provided for subsequently that could not be foreseen at that moment.[175] A number of speakers in opposition to the Bill favoured Governor Grey's earlier proposed model that involved controlled purchase by settlers in actual occupation of farms, with sales approved by the native runanga.[176]

173. Another fascinating feature of the new native land policy – at least as Dillon Bell envisaged it – was the idea that the Court would somehow codify Native custom, but in so doing would 'purge it from barbarous practices by refusing to admit these as Custom at all'. What is meant by 'barbarous practices' may partially be explained by Bell's

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171 Dillon Bell, 'Memorandum', in *AJHR* 1863, A-01, at 7 (noting this scheme set out in Grey's Despatch of 2 Nov. 1861, no. 15).

172 Dillon Bell, 'Memorandum', in *AJHR* 1863, A-01, at 8.

173 Dillon Bell, 'Memorandum', in *AJHR* 1863, A-01, at 9.

174 H. Sewell, *NZPDs*, 9 Seat 1862, at 688.

175 Dillon Bell, 'Memorandum', in *AJHR* 1863, A-01, at 9.

176 See, for example, R. Stokes, in *NZPDs*, 9 Seat 1862, at 686 [Legislative Council].

previous phraseology in which he stated that certainty of native tenure would emerge in time from the Court's processes; as he put it, the Court would have:

> a power to declare, record, and amend the Native law or custom relating to land: so that in process of time some Canons of Native Tenure may be laid down, and the varying customs of different Tribes acquire some settled form.[177]

174. This reflects the Sewell quote about a principal objective of the legislation being to 'settle' native land – that is create certainty and security of title. The other connotation of 'settle' might be the sense that Māori occupation itself would become settled or 'fixed' through awards of title to certain areas. The idea of fixity of residence was one of the pre-occupations of the British and Western idea of private property rights, and was seen to be contrary to historic 'barbarous' civilizations that were hunter-gatherers or nomadic.[178]

Sewell's Memorandum on the Bill

175. Enclosed within Bell's Memorandum was a Memorandum of Henry Sewell. As Loveridge details, Sewell had been Attorney-General in the previous Ministry of William Fox, which had prepared an earlier Native Lands Bill (no. 1). When the Fox Ministry fell, Sewell stayed on as Attorney-General, however he obviously did not see eye-to-eye with other Ministers on the Bill presented to the Assembly by Bell, which became the legislation.[179]

176. In this Memorandum Sewell set out various objections to the draft legislation. One objection concerned the number of individuals to be named in certificates. Sewell thought six should be the maximum, whereas the bill and Act provided for 20. Sewell thought that more than six would likely result in 'inextricable confusion of title', and that any number beyond six should be deemed to be a tribe or 'community', who would have the rights of dealing set out elsewhere in the legislation. (By this he was probably referring to the provisions to enable partition of tribal land to create 'towns', roads, etcetera.) The Ministers' response suggests they thought that by providing for 20 owners, this would encourage larger groups to obtain titles 'clothed with Crown Grants'. The owners of such titles or Crown Grants then had the right to deal with them by sale, lease or exchange. Ministers suggested that to limit the number to six would have "defeated one of the principal objects of the Bill" – that is to get (larger) groups to convert their tribal titles to individualised titles equivalent to a Crown Grant held by a European settler (and thus transferrable on the open market, etcetera).[180] The Ministers thus seem to have thought that the 'twenty-owner' title in undivided shares was a quick way to achieve individualisation and the transferability of land. The

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177 Dillon Bell, 'Memorandum', in *AJHR* 1863, A-01, at 9.

178 As per the 'stadial' or stages of civilisational history, as set out by prominent writers of the Scottish Enlightenment, including Adam Smith; for this see S. D. Carpenter, 'History, Law and Land: The Languages of Native Policy in New Zealand's General Assembly, 1858-62', M.A. thesis, Massey University (2008); Mark Hickford, '"Decidedly the Most Interesting Savages on the Globe": An Approach to the Intellectual History of Māori Property Rights, 1837-53', *History of Political Thought* 27 (2006): 122-67; Damen Ward, 'A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia', *History Compass* 1 (2003): 1-24; Bruce Buchan, 'The Empire of Political Thought: Civilisation, Savagery and Perceptions of Indigenous Government', *History of the Human Sciences* 18 (2005): 1-22. See also, M. P. K. Sorrenson, 'How to Civilise Savages: Some "Answers" From Nineteenth Century New Zealand', *New Zealand Journal of History* 9 (1975): 97-110.

179 See Loveridge, 'Origins' (2000), at 158-162.

180 Henry Sewell, 'Memorandum', 6 Seat 1862, in Dillon Bell, 'Memorandum', in *AJHR* 1863, A-01, at 13.

alternative, slower route, was for the tribe or group to obtain a tribal title, and then apply again to partition its land among tribal members.

177. This type of discussion, and disagreement, illustrates that there was nothing especially 'scientific', or alternatively 'magic', about the ten owner rule in the later 1865 legislation. In 1862, twenty owners was an experimental number and there was disagreement on the wider policy or what the legislation ought to be achieving. Sewell's objection that 20 owners was too many and would 'confuse' titles through multiplying numbers of owners seems well-founded in light of later experience. Sewell would seemingly have given greater power to groups to determine their internal divisions of property rights or title under the new regime (as his short-lived Native Lands bill no. 1 had provided for). The 1862 legislation was more focussed on the objective of individuating tribal ownership to enable transfer or title dealing, though it still put the tribe at the centre of the process of title identification and application (including for partitions among tribal members).

178. The summary of this point about the indeterminacy and contingency of the native land legislation is neatly encapsulated by Sewell's own description of the nature of property rights in English law:

> The principles on which property in land is based, even amongst civilised communities, are of a subtle and difficult character. There are refinements and distinctions which only accomplished jurists can enter into or expound. There is the right of enjoyment, and the right of disposition. And the conditions by which these rights are or ought to be governed and controlled are by no means of a settled or uniform character. The history of our own law will supply us with abundant illustrations on this point.[181]

179. Later in his address, Sewell articulated the central purpose and resulting change in policy of the Bill before the House:

> I can perceive nothing which remains to us but to set aside, for the present at least, theories of systematic colonisation, which are no longer practicable, and, under properly-guarded conditions, to admit the rights of Native ownership, **transmuting them carefully into rights founded on British law and assimilated as nearly as may be to our own.** And we must trust to other remedial agencies for correcting or mitigating the possible mischiefs to which this may lead.[182] [emphasis added]

180. 'Assimilating' native tenure to British tenure was the express purpose of the 1862 legislation, not the defeat of tribal 'communism'. Assimilation in this sense means making alike to or the same as – not subservient to.

1865: 'trust title' – ten chiefs (or a named tribe)

The Parliament's and/or Government's intention in 1865

181. The 1865 Act was not seen to be a change in policy from the 1862 Act. The changes were largely mechanical to give better effect to the 1862 policy.

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181 *NZPDs*, 9 Seat 1862, at 688.

182 *NZPDs*, 9 Seat 1862, at 691.

182. In moving the first reading of the Native Lands Bill, along with other native legislation of the Weld Ministry, James E. FitzGerald as Native Minister explained that:

> The … Bill … is one to amend and consolidate the laws relating to lands in the colony in which the proprietary customs of the Natives still exist, and to provide for the ascertainment of the titles to such lands, and for regulating the descent thereof, and for other purposes. [quoting the preamble] **This Bill is in pursuance of the policy of the Bill of 1862**, and is, in fact, an amendment of the Native Lands Act of that year. **It confirms and carries into effect the policy of my honourable friend the member for Wallace (Mr. Dillon Bell) in 1862**, and has been framed with great care and labour, with the assistance of the Chief judge of the Native Land Court [Fenton].[183]

183. In moving the second reading, FitzGerald reiterated that it was intended to 'consolidate the laws concerning Native lands'.[184]

184. Part of the context of this Act was the other legislation of the Weld ministry, in particular the Native Rights Act 1865. As FitzGerald explained, this legislation was designed to confirm that the general courts of the colony – the Supreme Court in particular – had jurisdiction over native property, whether real (land) or personal. It is clear by his introduction that he saw the conversion of customary title into title derived from the Crown as better enabling this jurisdiction to be exercised. However, he was also clear that the Native Rights Bill (subsequently, Act) would apply to all native land, whether held under customary tenure or under Crown Grant.[185] As FitzGerald understood it, it was no good applying British law (including criminal law) to Māori if it did not also apply to their land, as land was "the basis of the organisation of all human society".[186]

185. What is immediately apparent about the parliamentary debates on the 1865 legislation is that they are sparse by comparison with the extended debates of 1862. The lack of debate is one indication that parliamentarians thought there was little new about the new legislation, or at least, little that drew forth extended debate over principles or policies.[187]

186. When a copy of the Act was transmitted to England in January 1866, the cover note by Edward Stafford summarised the key provisions and commented:

> The machinery provided by this Act will be an important step towards vesting in the aboriginal inhabitants those individual rights to property in land which in other countries form the best guarantee for peaceful and orderly conduct.[188]

187. Don Loveridge argued that there was a 'lack of significant difference between the 1862 and 1865 Acts'; that the 'chief design' of Bell in 1862 did not alter.[189] I agree with this assessment for the most part.

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183 *NZPDs*, 18 Aug. 1865, at 324-25.

184 *NZPDs*, 29 Aug. 1865, at 370-71.

185 *NZPDs*, 29 Aug. 1865, at 325.

186 *NZPDs*, 29 Aug. 1865, at 324. This echoed Sewell's quote in 1862 about the property basis of (modern) society.

187 The only statements of substance about the Bill in either the House of Representatives or Legislative Council are those by FitzGerald just referred to; but see other page references for House, *NZPDs*, Aug-Oct 1865, at 371, 417, 438, 537, 627, 636, 646, 654, 742. The page references for the Legislative Council are *NZPDs*, Oct 1865, at 649, 705, 720, 729.

188 *AJHR* 1866, A-01, at 56.

Describing and Evaluating the form of title (in terms of title individualisation/enclosure, trust and company law…)

188. What was the intent/meaning of the legislation vis-à-vis the title mechanisms?

189. Some of the language of the 1865 Act was different from 1862: the preamble talked about 'conversion of such [customary] modes of ownership into titles derived from the Crown'. This differed from the 1862 Act language of identifying – or 'ascertaining, defining and declaring' ownership – although an equivalent in 1862 was the concept of 'assimilating' such ownership 'as nearly as possible to the ownership of land according to British law'.

190. Another obvious difference was in the language stipulating who could apply for title investigation. The 1862 Act provided for application by "any Tribe Community or Individuals of the Native Race", and this same phraseology was used a number of times in the 1862 Act.[190] By contrast the 1865 Act provided for "any individual" to make application to the Court, although in such application the other persons or the "tribe" interested in the land could also be stated. (Note the wording 'may' did not impose an obligation on applicant(s) to state the other parties interested.) This shift from 'tribe, community or individual' to 'individual' seems to reflect a more decided emphasis in the 1865 legislation on the application for individualised titles. That said, the drafters may simply have decided to adopt a more mechanistic view of the application provision, for any application would be made by an individual or individuals whether or not they represented (or claimed to represent) a tribal group. A group, after all, has no agency apart from individuals composing it, at least in the absence of an ability to incorporate the group (in which case agency rules *intra-group* must still be determined – for example, directors having the authority to bind the company). One might compare this with the Treaty of Waitangi Act 1975 that, similarly, provides only for individuals to apply to the Waitangi Tribunal, although they may obviously do so on behalf of tribal groups.

191. The section (section 23) providing for the grant of a certificate of title, and stipulating the form that title may take, also carried an emphasis on the individual. A certificate, if granted by the Court, was to be to named individuals or a named tribe. The maximum number of individuals could only number ten. If more than 5000 acres, then a tribe could be named as the owner (the inference of the section being that individuals could also be named for blocks of this size). This provision constituted what we know today as the 'ten owner rule'.

192. Although the language or form of the provision differed from the 1862 Act, I argue that the substance was identical. Even in the 1862 legislation, the underlying emphasis was on individual dealing – on the ability of individual property owners to deal with land. But although there was this central similarity between the two Acts, this should not obscure the way *tribes* still featured in both sets of legislative provisions. In the 1865 Act, this provision was muted, but nevertheless remained.

193. The one real difference in substance, arguably, was the legislative limit in 1865 of tribal ownership to larger blocks of more than 5000 acres. Once again, though, this could be seen as simply a mechanism to encourage the individuation aimed at since 1862. It was

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189 Loveridge, 'Origins' (2000), at 224-25.

190 See sections 7, 12, 20, 21, Native Lands Act 1862.

always envisaged, as the 1862 legislation itself reflected, to encourage subdivision of property by tribes amongst their memberships should they wish to deal in the market. In summary, I argue that, with respect to the form of title, any differences between the 1862 and 1865 legislation were those of emphasis or degree not of kind.

194. That stated, although not different in substance, the emphasis on the individual in the 1865 legislation was reflected by the limitation on grants to named tribes and on the reduction in the limit on individual owners from twenty to ten. (Somewhat ironically this provision moved closer to Sewell's original preference in 1862 for only six owners – the reason he gave being that any more would confuse the titles in which free dealing was allowed.)

195. What was the nature and extent of the rights of the individuals so granted? The Tribunal historiography and jurisprudence (and much of the contemporaneous case law) has essentially concluded that such grants made the individuals absolute owners – that is, with a right to deal with title or dispose of ownership, without restriction. The legislation of 1862 (expressly) and 1865 (by implication) authorised such dealing. As section 17 of 1862 stated:

> The individual person or persons named in any Certificate as the owner or owners thereof or as having any particular estate or interest therein may dispose of the estate or interest which he or they may have in the Lands described in such Certificate by way of absolute sale or lease or in exchange for other lands or otherwise to any person or persons whomsoever.

196. This express authorisation of the power of dealing with title by the owner was not included in the 1865 Act, but it was implied by the whole scheme of the Act as well as particular provisions. These provisions included those that empowered the restriction on the power to deal (or 'alienability'). The Court had the power to recommend such restrictions to the Governor, to be included in the Crown Grant.[191] Interestingly, it was not just restrictions on alienability that could be imposed (as they were in many cases), but restrictions on the nature or extent of the 'estate' or interest.[192] Section 28 is worth quoting in full here:

> It shall be lawful for the Court during the investigation to take evidence as to the propriety or otherwise of **placing any restriction on the alienability** of the land comprised in any claim or of any part thereof **or of attaching any condition or limitation to the estate to be granted** and to report its recommendation on the premises to the Governor which recommendation (if any) with any reasons therefore which the Court shall think proper to add shall be appended to the certificate. [emphasis added]

197. Although restrictions on alienability were often granted, I am not aware that conditions or limitations on the estate were often imposed. The simple fact is, though, that the 1865 Act enabled such conditions or limitations to be imposed. Such could plausibly have included limitations on the absolute grant of a title in fee simple, for example, by making the grantees or holders of certificates trustees for others. This occasionally did happen. For Taihape, the grant to Aperahama Tipae in the southern block Paraekaretu was impressed with a trust of some kind through the Court's direction that a trust be

191 Section 28, Native Land Act 1865.

192 See also section 28, Native Land Act 1865.

declared by Tipae in favour of ten hapū. This is one example that the Court was capable of recognising trust relationships.[193] A quotation from Sewell's 'tribal communism' speech of 1870 also states that declarations of trust were made in some cases, though not in many others.[194] In the north of Mōkai Pātea, Hiraka Te Rango referred, in evidence before the 1891 Land Laws Commission, to a trust deed that the owners had entered into over Owhaoko land. Hiraka reported that the deed was prepared 'at great expense' by the owners (134 of them), but after that the Committee in whose hands the management was vested was able to carry out its work 'in a satisfactory manner'.[195] This was apparently a voluntary arrangement; not one imposed by the Court.[196]

198. Other than restrictions as to alienability and limitations occasionally imposed on an absolute fee simple title, holders of certificates or Crown Grants under the 1862 and 1865 Acts had uninhibited rights of dealing. (These included the right to mortgage, which is referred to as an 'other disposition' in the 1865 Act.)[197]

199. Hence, in summary we can say that the legislation enabled limitations on an absolute title to be recognised, including for trust relationships to be recognised. In practice such limitations were seldom imposed because the main intent or purpose of the legislation was to grant private property with unencumbered rights of 'free' dealing in a market for land.

Notions of trust implicit and explicit in the early Acts

200. However, this construction of general intent carries with it a significant caveat. The discussion above about Sewell's 1870 trust commissioner legislation implies that the General Assembly and various Governments at 1862 and after recognised that although in strict legal terms holders of certificates were absolute owners, they were often *representative owners* – holding their title on behalf of a wider set of beneficial or customary owners. In a sense, the 1865 legislation, and the other legislation and discussions between 1865 and 1873, recognised the customary reality that legal titles were still impressed with customary obligations, or trusts. I explore these discussions and legislation more below, and why it would have been difficult, or simply impolitic (and hence bad policy) for the Government to have attempted to impose trust obligations on legal owners.

201. What needs to be recognised, at the outset, is that trust obligations were those historically imposed by the Courts of Equity in England. Even though, therefore, a legal owner was just that – the legal owner – the equity courts recognised that if that legal owner was in 'a relationship of trust and confidence' with other persons, or those

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193 See T J Hearn, Southern Blocks report, #A7, at 141-142. The circumstances of Paraekaretu are not entirely dissimilar from a number of other blocks in the 1870s when the owners had decided to sell before the block came to the NLC. It was quite common in the 1870s that owners in these circumstances would put only a small proportion of their number on the title to facilitate the sale. The legally recognised owners would be expected to distribute the payment among the wider community of owners as occurred in relation to Kaingaroa 1 in 1880.

194 *NZPDs*, 29 Aug. 1870, at 361; as follows: 'A tribe, for instance, wishing to bring its land under the operation of the Act, was obliged to do so by having its lands granted to certain Natives by name as individual proprietors, though the real intention of the transaction was to vest the lands in them as administrators only, for the benefit of the tribe. **In some cases** these grants were made without any declaration of trust ...' **[SC-4, at 60]**

195 *AJHR* 1891, II, G-01, at 54.

196 In the time available I have not been able to investigate the trust Hiraka testified to the Commission about. It would be helpful to know the timing, purpose, form of this trust.

197 See ss. 50, 55, 58, Native Lands Act 1865.

'beneficially interested', then the equity courts might recognise that that legal owner had equitable obligations to others rather than strictly 'legal' obligations – that is, those enforced in the Courts of Common Law. As the maxim went, 'equity followed the law', but the equity courts were capable of imposing obligations outside of, or in addition to, those expressly supported by legal documents – through an implied or constructive trust, although the most usual trust relationship was an express trust created by transfer to trustees or by declaration of the owner. Equity looked rather to the essential fairness or justice of the situation in the full context of the relationships in play. Relationships in which, historically, such obligations of trust and confidence (or fiduciary relationships) arose were business partnerships, directors and companies, guardians and wards, solicitors and clients.

202. With this in mind, it is not incongruous with the absolute legal property owner status of Crown Grants holders that they might also have other forms of obligation. Such is implied in the Waiuku case by Trust Commissioner Heaphy's note (see above) that some grants were impressed with a trust even though the technical wording conveyed title absolutely.[198] That the governments or parliaments of the time thought this way, and even envisaged the ongoing relevance of wider customary/beneficial relationships seems to be borne out by the ensuing debates and legislation.[199] The *Waiuku* case highlighted by Heaphy was contemporaneous with the era of 'ten owner' restrictions in the principal Native Land Act 1865; but by the time Heaphy resolved the issues through partition among all interested parties in 1875, it was more clearly the era of 'democratised' titles that I discuss below.

203. Apart from the specific New Zealand contexts and debates, this understanding of ten owner titles fits with the contemporary state of trust or trustee law. As Stuart Anderson explains, trusts were conventionally understood as an adjunct to the law of real property, in particular conveyancing. From the 1840s, this started to shift towards understanding the trust as an institution in its own right. The archetypal trust was an express trust for the settlement of family property, either by will or during the property owner's life (*inter vivos*). The trust relationship could be created in two ways *inter vivos*: by declaration of the property owner that they held their property on trust for beneficiaries; or by an effective transfer of the legal estate to some other person on trust for beneficiaries. By the early 1850s these two methods had been settled by the Courts of Equity.[200] This means that, assuming it is correct that the 1865 Act allowed for any disposition by the grantee, that a rangatira grantee could have formalised a trust relationship simply by declaring themselves a trustee on behalf of the wider hapū group.

204. The 1878 Court of Appeal decision in *Pateriki Te Ririheke v Ormond* confirms that declarations of trust were legally possible for native land under the 1865 legislation. The unanimous decision of a full bench of five judges in *Pateriki* confirmed that a declaration of trust by a grantee of land under the Native Land Act 1865 for other hapū owners not named in the grant was valid; and that a third party transferee with notice of the trust could not avoid it. The declaration of trust, made in writing after the issue of the Crown grant and 'registered', read as follows:

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198 Refer *AJHR* 1875, G-05. This is the way I interpret Heaphy's words, that all the grants were made out to chiefs, in trust, with some conveying an absolute fee simple title, while others had restrictions on the power of sale, mortgage or lease.

199 And see Boast's commentary on the potential 'trust' dimensions of ten owner title; Boast, *Native Land Court, 1862-1887*, at 67-69, and following.

200 Anderson, 'Trusts and Trustees' in *The Oxford History of the Laws of England: Vol XII*, at 238-46, 252-62 **[SC-17, at 185-193, 199-209]**.

> I, Apera Paroho [sic?]… do hereby declare that I am one of the grantees in a certain deed of grant from the Crown of all that block of land situate, &c. And I further declare that I am seized of or interested in the said block of land jointly with the other grantees therein named, not solely in my own right, but as trustee for and on behalf of Ngati Papatua Maro, that is, of Pateriki te Ririheke, or Porehau, who are also aboriginal natives, and have an interest with me in the land described in and conveyed by the said deed of grant. As witness my hand, &c.[201]

205. Johnston J's judgment was concurred in by the other four judges. Johnston stated, *inter alia*:

> After the issue of the grant Apera Pahoro had a good legal title, which from that time was to be dealt with according to English law. He then made a declaration of trust, which would have been deemed sufficiently certain if the parties had been Europeans. I think it is not necessary for us to decide, at this stage of the case, whether the interests of the plaintiff and the other members of his hapū mentioned are to be taken as being of equal amount; or whether before decree it may not be necessary to have recourse to the Native Lands Court to ascertain their respective interests.[202]

206. The case note recorded various other statements that amply demonstrate that judges and counsel were thinking in terms of the English law of trusts. One example was the comment that the Statute of Frauds in England was meant to prevent use of trusts for fraudulent means; at the same time, that statute was not to be used as a cover for fraud – the clear implication being that in the present case, the third-party transferee could not avoid the declaration of trust in favour of other tribal owners (of which he had notice).[203] Gillies J also made the comment that 'every day' in the Native Land Court some grantees went into the grant to hold for others due to the ten owner rule – impliedly, that is, upon trust.[204] Again, this reflects judicial understanding that native land was quite susceptible to the application of English private law or equitable concepts and institutions.

207. In 1886, Judge Fenton, by then retired, gave evidence before the Owhaoko-Oruamatua Committee. Fenton's evidence made clear that under the 1865 Act, the ten owners were understood often to be acting for a larger group. Fenton stated that, in his experience, where there were more owners than ten, the others had 'voluntarily excluded' themselves. When it was discovered, however, that grantees were abusing their position of advantage (perhaps by not sharing the fruits of sale or rents with the wider group), there was some attempt to get grantees in particular cases to execute 'deeds of trust' that they held land for the wider group. Fenton's account is worth quoting in full, partly because it also involved Sir William Martin in the narrative:

> When we found out what the result of that [ten owner titles] were, and how mischievous it was, Sir William Martin and myself prepared a deed of trust. We collected all the cases where the mischief had occurred as far as we could, and Major Heaphy [as Trust Commissioner?] and some other person were sent all

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201 *Pateriki Te Ririheke v Ormond (1878) 3 NZ Jur (NS) 63 (CA), at 64* [**SC-13, at 153**].

202 *Pateriki Te Ririheke v Ormond* [1878], at 68**[SC-13, at 157]**.

203 *Pateriki Te Ririheke v Ormond* [1878], at 65 (per Prendergast CJ in Sup Ct. judgment), at 67-68 (Izard, counsel for respondent, viz., the beneficiary plaintiff) **[SC-13]**

204 *Pateriki Te Ririheke v Ormond* [1878], at 66 **[SC-13, at 155]**.

> round New Zealand to get those ten who were in the orders to execute **the deeds of trust. A great many of them are still in existence**.[205] [emphasis added]

208. The high-profile case of the Rees-Pere trusts on the East Coast illustrate the second method of creating a trust – by transfer of the legal estate to trustees on trust for beneficiaries. Michael Macky argued in his report on these trusts for the Gisborne/Turanga inquiry that many of these trust deeds were effective as they involved Māori land under Crown Grant – which, as I have argued above, was usually capable of free dealing. The case of *Pouawa* did not affect these particular deeds, Macky argued, as *Pouawa* only concerned a block under 1873 Act Memorial of ownership, which had restrictions on its alienation.[206]

Attempts after 1865 to deal with 'breaches of trust'

209. What is evident in the native land legislation debates and memoranda ca. 1862-1866 is that the result of a new tenure system that named only some members of a group as property owners were not foreseen or considered in any detail. In other words, complexities arising from a system of ten- or twenty-owner titles were not in the forefront of the minds of policy-makers. The aspect of complexity that policy makers had in mind about twenty- or ten-owner titles concerned the complexities of dealing in the market with multiple owners. They did not turn their mind to possibility of breaches of trust – the trusts they thought were implicit in the titles – until evidence of those breaches started to emerge in practise.

210. This evolution in thinking is perhaps illustrated by two memoranda written by Sir William Martin – the first in 1865, the second in 1871. When, in 1865, Sir William Martin wrote to the Native Minister on the workings of the Native Lands Act of 1862, he focussed in the first instance on the issue of the identification of native land owners and the security of title afforded to them and to those dealing with them. The context of the recent wars in the North Island are an evident and significant context for his comments:

> To require a certificate which asserts on the authority of a Native Court that a certain block of land, properly identified and delineated thereon, belongs to certain Natives enumerated therein, and to require and connect therewith an actual survey and marking out of the land, will be seen to be a reasonable and necessary precaution for the good of all; a needful security against mischief between the races and even war.[207]

211. Martin glossed the certificate of title provision as a simple way to legally recognize native property owners as a precondition to land dealings. He was less concerned about whether it was individuals or groups of individuals that were initially recognised as owners:

> The certificate will give us all that in the first instance we need; for the first thing is to mark out the boundaries of separate pieces of property and to register the

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205 Fenton, Evidence, *AJHR* 1886, I-8, at 63; I am unaware that this narrative about trust deeds has ever been examined into in the Tribunal research, as to its veracity or as to how widespread this practice was.

206 Macky, 'Trust and Company Management', at 81-85; and see fuller discussion of the Rees-Pere schemes and the *Pouawa* case in the 1894 Act section, below.

207 Sir William Martin to the Hon. Native Minister, 18 July 1865, encl. 3 in no. 31, Gov. Sir Geo. Grey to the Rt. Hon. Edward Cardwell, 2 Feb. 1866, in *AJHR* 1866 A-01, at 75.

> owners thereof; to gather those owners into groups, and to bring them as groups into legal action. This is the first step. The individualisation (of which much has been said) is a further step, for which every facility ought to be given, but for which there is no reason why we should wait; as the members of the several groups of owners may join in letting or selling the land. Much of the soil of England was at one time in a similar condition.[208]

212. What is perhaps significant about this commentary is the way Martin writes of "gather[ing] those owners into groups" – in other words, it is *groups of individuals rather than groups or tribes per se* that are to be recognised as legal owners. For all Martin's sensitivity about, and advocacy for, Māori collective or tribal rights, the idea that a tribe or group of property owners could be recognised as an incorporated entity is not present in this discussion.

213. Martin made several other points of relevance here. One was that he preferred a Certificate of Title system to a Crown Grant system because he thought that Crown Grants would bring in by implication all the many incidents of "our English Law of Real Property", and these would be an "intolerable" burden for Māori.[209] The other point is that Martin thought the Certificates, as instruments of title created by statute, would only have attached to them the rights of alienation provided for in the legislation. He thought these powers should be, "in the beginning, the power of letting land for a term not exceeding 21 years, and the power of sale".[210] Such a model seems to have been followed in the 1873 legislation.

214. William Martin did not consider, at least explicitly, the notion that individual named owners might in fact represent a wider group of owners. All this had changed by 1871 when he wrote another long analysis of the workings of the "Native Lands Court", with recommendations for improvements or amendments to the legislative scheme. He noted that his memorandum was prompted by the grievances complained of by Hawke's Bay rangatira Karaitiana Takamoana when visiting the Native Minister in January 1870.

215. The first of the "two chief grievances" was the framing of the Certificates of Title and Crown Grants so as to only name some of those interested in the land. Martin noted that section 23 of the 1865 Act stipulated that all the owners be ascertained, but that a "proviso" was then added that no more than ten owners should be named in a certificate. Martin then seems to speculate at the rationale for this ten owner "proviso":

> This was added, no doubt, for the purpose of avoiding the inconvenience which would, in many cases, lie in the way of a person desiring to rent or buy land, if it were necessary for him to deal directly with all the owners. It was therefore provided that such intending lessee or purchaser should have a limited number of persons to deal with, and that the names of these persons should appear on the face of the document. That was a very reasonable object, and capable of being attained, as we shall see presently, without any unjust or injurious consequences.[211]

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208 Ibid., at 76.

209 Ibid., at 75.

210 Ibid., at 76.

211 Sir William Martin, 'Memorandum on the Operation of the Natives Lands Court' (Wellington, 1871), *AJHR* 1871, A-02, at 3 **[SC-5, at 70]**.

216. This supposed rationale for the ten-owner proviso seems eminently plausible, and directly supports my interpretation that the ten owner grantees were seen as representative owners or trustees. Martin then described the results of this proviso, results which he obviously believed were unintended from the point of view of the 1865 legislators:

> The grievance of which we now hear is this: that the proviso and the original enactment have not been reconciled, but that the proviso has been allowed to overrule and defeat the substantive enactment to which it is appended; that, although the land comprised in the Certificate may belong to more than ten persons, a Certificate is granted which names only ten of the owners, and gives no indication of the existence of other owners; **that the ten persons named in the Certificate or the Grant have not**, on the face of the Certificate or the Grant**, been made to appear as only joint owners with others unnamed and trustees or agents for those others**, but have appeared on the face of those instruments as the sole and absolute owners; that, as such, they have, either of their own motion, or being induced by other parties, conveyed the land to purchasers; and that in this way many persons have been deprived of their rights.[212] [emphasis added]

217. Martin's reasoning here was also plausible, viz., that the ten named owners must in many cases have been representatives of, or agents or trustees for, other owners unnamed, as the main provision (section 23) required the Court to ascertain (all) the owners.

218. This reasoning was supported by the subsequent amendment of the title provision in section 17 of the Native Lands Act 1867, which required all the owners to be registered in Court. However, as Martin, noted, although this amendment was 'valuable', it was not a 'completely effective' remedy. The main problem, Martin thought, was still that there was no 'distinct form of words' that was required to be placed on the title to show that the named owners were 'trustees for other owners'.[213]

The 1867 Amendment

219. As Martin identified, the 1867 Act was designed to deal with problem of lands held by representative owners who dealt with the land as if it was their absolute property (that is, as to both legal title *and* beneficial interests). When J. C. Richmond elaborated on the purpose of the 1867 Bill in the House he referred to these titles as 'unacknowledged trusts' or 'unrecorded trusts', which the new provision was concerned to remedy. The full flavour of Richmond's explanation can only be seen from an extended quotation from the debates (and in so doing the suppositions made by Martin in 1871 are borne out):

> There was power [in the Bill] given to grant certificates to any number of persons. This section was not satisfactory to his own mind, and he would propose to amend it. **Great difficulty would be likely to arise in many parts of the country, from tacit and unrecorded trusts being placed in the power of a few Natives holding grants or certificates for large tracts of land**. The evil that existed in that respect should not be continued. It was very plain that hereafter persons holding those lands nominally in their own right, but really for

212 Ibid., at 3.

213 Ibid., at 3.

> large bodies of Natives, if they should find themselves pressed, as was not unlikely to be the case, for money, would desire to alienate from time to time, and the Government would have to sustain the irritation and discontent of those Natives for whom **those persons held the property in unacknowledged trust**. **He had desired that those who should have granted to them certificates for Crown Grants virtually in trust, should be called upon by the court to execute some declaration of trust, but the Attorney-General was of opinion that it would be attended with very great inconvenience.** He would bring down another amendment by which the present proposal to make grants to a larger number would be done away with**; but where it appeared that a large number of persons were really interested in the land, and desired that a few not exceeding ten persons should hold the land in trust, the interests of the persons should be recorded by the court and the land held inalienable**, and not subject to be leased for a longer period than twenty-one years without again coming to the court to have the title individualized further. Those who had to deal with the Natives found it difficult to obtain ten persons to execute a lease, and it would be a substantial check upon the alienation of land held in trust.[214]

220. Richmond's reference to advice from the Attorney-General regarding declarations of trust supports my brief introduction on trust law above, as well as the reference by Judge Fenton to the attempt to get ten owner grantees to make express trusts. Simple declarations could have been made but, at the same time, the legal advice was (apparently) highly circumspect about the consequences of the court ordering that grantees make such declarations. I suggest the relevant considerations or difficulties were perceived as political as much as legal – as I explore further below.

221. Richmond's explanation of the Bill requires some untangling, partly because Richmond was speaking in the House to a draft Bill that was not the final form of the Bill vis-à-vis this particular section; he thus spoke of an 'amendment' which would alter the drafting somewhat. The original drafting of section 17 (originally appearing as section 16) provided, as Richmond's speech suggested, for the ordering of certificates to all parties interested, and it specifically abolished the proviso for a maximum of only ten persons to be named.[215] However the 'amendment' (that is, to the draft bill), as referred to by Richmond, seems to be the gist of the eventual form of section 17 of the 1867 Act, which sought to balance the need to recognise all other interested persons on the title – through the mechanism of 'record[ing] by the court', while at the same time ensuring the (relative) efficiency or ease of dealing by prospective lessees or purchasers by only requiring a maximum of ten owners to be recorded on the face of the title. This resulted, it must be said, in convoluted drafting.

222. In this way, section 17 can be seen as a halfway house between the 'ten owner' limitation of the 1865 Act and the requirement to actually name all owners on the title in the 1873 Act. And this move to a fully 'democratic' or full beneficial owner title system in 1873 can be read as a response to the failure of the 1867 amendment to actually remedy the problem of 'unacknowledged trusts', as Richmond called them. The reason why section 17 failed to remedy this problem is possibly that identified by Martin in 1871: that by still only naming ten owners on the face of the title, these owners could deal with the land without reference to the other beneficial owners – even if these had been 'registered in the court' and the certificate stated that it was issued

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214 *NZPDs*, 27 Seat 1867, at 1135-36.

215 Native Lands Bill 1867 (available at http://www.nzlii.org/nz/legis/hist_bill/nlb1867921141/).

under section 17. (Section 17 further stipulated that the certificate should 'recite' that the land, until further subdivided, was unalienable by sale gift mortgage lease or otherwise except for a lease of not more than 21 years).[216] Another reason why s17 'failed' was that Māori applicants for title either did not want a section 17 title, because it could not be easily mortgaged or sold, only leased; or they were not aware of the provision in the first place.[217]

223. Hugh Carleton in the House commented on the provision in the original draft bill, stating that 'there was very great difficulty existing, and if the Government had not been able to surmount that difficulty he would not be one to cast blame upon them. He (Mr Carleton) did not see how it was to be got over'.[218] It appears the 'difficulty' he referred to was that of legal owners named in certificates acting without regard to the wider group.

224. The Hon. Major Richardson, moving the second reading of the Bill in the Legislative Council also pointed out another amending aspect of section 17 in that 'the court would not be restricted in its operation, but would have power to examine into the nature of the estate, as affecting every other person or tribe that might be interested, as well as the claimant'.[219] This made it an explicit requirement of the legislation that the Court consider all possible interests, not only those represented by claimants in court. The inclusion of 'any tribe' as well as any individual interested shows that legislators were still thinking about the obvious realities of tribal ownership.

The Native Lands Frauds Prevention Act 1870

225. This legislation was introduced to the Legislative Council by Henry Sewell. As noted above, this was the context in which Sewell made his (in)famous statements about the NLLs being about destroying native 'communism'. The irony about this statement in light of the historiography of it is that Sewell was actually concerned in this legislation to protect group or 'communistic' rights. In other words, the subject of this Act was concerned with the same 'unacknowledged trusts' issue that the 1867 Act, section 17 had attempted to remedy. The eventual legislation of 1870 clearly set out this rationale in the Preamble:

> WHEREAS there is reason to believe that frauds and abuses are practised in connection with the alienation of land by Native proprietors and **that lands held by them upon trusts have been improperly disposed of and dealt with** and it is expedient to prevent as far as possible the practice of such frauds and abuses. [emphasis added]

226. Section 4 provided that no alienation would be valid without consent of the Trust Commissioner to be appointed under the Act. The language of trust is prominent again in this section and the powers to investigate are very wide:

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216 Natives Lands Act 1867, section 17.

217 See Boast, *Native Land Court*, vol 1., at 73-76, who shows that only 7 of 140 blocks granted title in Hawke's Bay were granted with a list of names in addition to the ten grantees (that is, observing the s 17 provisions); he also shows the predominance of chiefly names in these awards, supporting my argument that the NLC 'followed the mana' in this period (see Boast, at 76-82).

218 *NZPDs*, 27 Seat 1867, at 1137.

219 *NZPDs*, 7 Oct. 1867, at 1288.

> No alienation whether absolute or limited and whether in fee-simple or for any less estate of land held by any Native or Natives under title derived from the Crown or under any Act of the General Assembly **and whether or not subject to any trust and whether such trust be expressed or implied** shall be valid if such alienation shall be 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 spirituous or fermented liquors or of arms or other warlike implements or stores or is in any way of an illegal nature and every deed intended to effect any alienation contrary to the provisions of this Act shall be null and void to all intents and purposes whatsoever. [emphasis added]

227. Section 5 provided for the Trust Commissioner to inquire into the nature of any alienation:

> **It shall be the duty** of the Trust Commissioner to ascertain as far as possible the circumstances attending every such alienation and **especially to inquire whether the same is valid within the intent and meaning of the last clause** and whether the parties to the transaction understand the effect thereof and also as to the nature of the consideration intended to be paid or given upon such alienation and to satisfy himself that the consideration purporting to be paid or given is or has been actually paid or given and that sufficient land is left for the support of the Natives interested in such alienation and for that purpose a Trust Commissioner shall have all the powers which by "The Commissioners Powers Act 1867" are given to a Commissioner appointed by such Act. [emphasis added]

228. In a circular to Trust Commissioners appointed under the Act, Sewell reiterated the principal intent of the legislation:

> The object the Government has chiefly in view is to prevent, as far as possible, **the mal-administration of lands vested in trustees for the Natives**, in cases where trusts have been created in the names of individual proprietors, but really for the benefit of Native communities; to take care that those trusts are fulfilled, and that lands are not alienated so as to defeat the true objects of the trust.[220]

229. Bob Hayes has previously conducted a series of studies investigating the role and performance of the Trust Commissioners (including for the Tūranga, Hauraki, and Tauranga inquiries).[221] He cites 1871 instructions given to Trust Commissioners under the original 1870 frauds legislation, which directed them to refuse their certificate for a proposed alienation if it was contrary to any trust express or implied from the terms of the particular deed; they were not to inquire 'too minutely' into the existence of any 'undisclosed trust', although an obvious 'constructive trust' could be given effect to; nor was it to be taken as evidence of a 'constructive trust' that the grantees held 'by arrangement' with others interested in the land. Hayes interprets these instructions, reasonably in my view, as reflecting a Government intention that the Trust

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220 *AJHR* 1871, G-07a.

221 Robert Hayes, 'Protection Mechanisms: Issue 17 [re: the role and performance of the Trust Commissioners]', research report commissioned by the Crown Law Office (2002), Wai 814, #F15 [Gisborne inquiry]; Robert Hayes, 'Evidence of Robert Hayes on the Native Land Legislation, Post-1865 and the Operation of the Native Land Court in Hauraki', research report commissioned by the Crown Law Office (2001), Wai 686, #Q1 [Hauraki inquiry]; Robert Hayes, 'A Study of the Origins of the Crown's Policy on Imposing Restrictions on Land Alienation and its Administration', research report commissioned by the Crown Law Office (2000), Wai 215, #M11 [Tauranga inquiry].

Commissioner not be another 'court' for relitigating the issue of ownership. As well as the functioning of the office, Hayes research shows the ongoing relevance of trust concepts, even under 1873 Act regimes. He discusses, for example, various alienations that were really transfers to trustees in the 1880s. These are other examples that show Māori themselves were actively employing the trust.[222]

William Martin's comment on the 1870 legislation

230. Martin's memo in 1871 identified Sewell's Trust Commissioner Act as one possible 'cure' or 'check' for frauds and abuses, but he preferred 'prevention'. His solution was to list all owners on the title but also designate some of these owners as trustees or agents for the rest. He also recommended that all title dealings by way of sale or mortgage be prohibited until the owner of an undivided share had partitioned out his interest (as section 17 already stipulated for). He added to this revised scheme for title:

> Let these trustees or agents receive the rents and be chargeable with the due division and distribution thereof among the owners, their receipts being valid discharges to the lessees.[223]

231. Martin's revised scheme for title was yet another iteration of the attempt to make a small number of named grantees responsible for the interests of a wider group. But it is highly questionable whether specifying a few owners as trustees would have prevented abuses, although *prima facie* it would have made more viable an equitable suit against a named owner for breach of trustee obligations. At the least, it would have made it clear from the start that their interest was as a trustee, not as a full beneficial owner. However, I conduct more of a thought-experiment below on why formalising a trust mechanism was a difficult proposition, even if it was possible in technical terms to explicitly recognise a trust on the title.

Theoretical-empirical discussion about trust mechanisms

232. If the legislation had formalised a trust mechanism (as some Tribunal historiography/jurisprudence suggests it should have), how could this have been achieved legislatively? Even if it could have been achieved, would that have been good policy?

233. We could say that it was certainly possible for the NLLs to have created, or enabled the creation of, obligations in the nature of trust by title holders to a wider tribal group of interested owners. The legislation could have empowered the Court to direct the making of declarations of trust by grantees, although this option had been considered and rejected in 1867. Alternatively, the legislation could have 'deemed' ten owner grantees to be trustees for a wider group 'registered in the Court' (as per the 1867 Amendment) or listed on the title (essentially the 1871 proposal of Sir William Martin).[224] This would have been an efficient way to achieve an express trust. It should

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222 Hayes, 'Protection Mechanisms', Wai 814, #F15, at 24-27; Hayes interprets these particular transfers around 1886-87 as designed to avoid the coming into force of the Native Land Administration Act 1886, which prevented direct dealing in Māori land apart from Crown agency.

223 Martin, 'Memorandum', *AJHR* 1871, A-02, at 4 **[SC-5, at 71]**.

224 'Let the Certificate do what it was intended to do, that is, show *all* the owners of the land by their names, if possible, or by some sufficient description or reference. Let it also name a certain number of those owners **as Trustees or Agents** for the whole body of owners'; see Martin, 'Memorandum', *AJHR* 1871, A-02, at 4 **[SC-5, at 71]**.

be noted that the Native Land Court certainly seems to have recognised trusts of land for children or minors.

234. Assuming that a trust had been created, what were the main obligations of trustees? Normative duties included: the obligation to act in the best interests of beneficiaries, to maximise the trust fund or otherwise invest it prudently, to treat beneficiaries impartially, and to account for income received or profits earned. The trustee had discretion in how they administered the fund, what they invested in, and so on, but the discretion could be restricted or quite unrestricted (depending on the terms of the trust).

235. Rights of beneficiaries included to request information or accounts, and sometimes included powers to appoint and remove trustees (depending on the terms of the trust). If a simple trust of property vested in one person upon trust for another, the beneficiary (or *cestui que trust*) had the right to be put in actual possession of the property.[225] A common remedy for a breach of trust was an account of profits by the trustee (where the trustee had to produce the profits or proceeds they had received from a transaction, the benefit of which should have accrued to the beneficiaries). Beneficiaries could also sue for specific performance (a court direction that a trustee perform a specific obligation) or an injunction (a court direction prohibiting a trustee from acting or requiring them to act in a certain way).[226]

236. It would have been possible to create a trust relationship or rights and duties in the nature of trust via legislation, and to provide for their enforcement either in the Native Land Court or ordinary courts (remembering that ordinary courts had the jurisdiction to enforce trust obligations in any event). However, would it have been good policy to do this?

237. The context should be recalled: at this point, the NLC seems usually in its practice to have followed the evidence and submissions of applicants as to the names to be included in title; that is, it tended to 'confirm' what the leading witnesses or representatives of applicant groups wanted as to individuals to be named in the title. A good reason for this in the wider context is that these witnesses and grantees were generally of chiefly status: this arguably conformed with customary usages in which chiefs represented the wider group. And it made, generally, good sense for the Courts to go with the evidence of 'mana whenua' and 'mana tangata' in the Courts – it was difficult for the Courts to substitute their own reasoning or to weigh other evidence (especially if such other evidence was not even given in court).[227] (It might also be argued that – to frame the issue in terms of 'Treaty principles' – that granting title to

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225 Thomas Lewin, *A Practical Treatise on the Law of Trusts*, 6th ed. (London: W Maxwell & Son, 1875), at 18.

226 I am using more modern-day trust language, but all of these remedies were in some fashion described in Lewin, *The Law of Trusts*, which was an authority on trust law in the 19th century [**SC-2, at 26**]; it can also be noted that although a trustee was generally liable to actions in equity, such as those above, the liability of a trustee for monies received was generally limited to actual sums received; see Trustee Act 1883, s 82 (NZ).

227 See the evidence from Judge Rogan in the Owhoako-Oruamatua Committee that described such a scenario of having to accept the evidence of leading chiefs in Court – bearing in mind too that this is title under the 1873 Act; *AJHR* 1886, I-8, at 18-19: Rogan is asked: why did you not put 20 names in the Memorial of Title if 20 persons had been referred to in evidence? Rogan: 'Because neither Noa nor Renata would give me the names of these people'. Next question: 'Did they tell you why they refused to give you the names?' Rogan: 'Renata was the chief… Renata said… "We have an arrangement among ourselves about this land… Those are the names that we have decided upon to put in this block." (p 18). Rogan recalled that he asked the Assessor sitting next to him what should be done, and the Assessor said to follow what Renata was saying – 'because Renata is a chief of great responsibility, and if he makes any mistake the mistake will be his, and the responsibility not ours'. (p 18)

chiefs was a real recognition of 'tino rangatiratanga' in terms of article 2 of te Tiriti/the Treaty.)

238. This being the case – that title often 'followed the mana' in this period *circa* 1865-1873 (and beyond) – would it have been good policy for the law to have allowed tribal memberships to sue their rangatira or whānau heads for breach of trust? I suggest that this would have created a whole host of political and customary issues if the NLC or another court had jurisdiction to impose equitable damages or other remedies on rangatira who had not fulfilled their trust obligations. It is quite probable that rangatira themselves would have resisted such 'interference' in their customary mana and status. (These are possibly some of the considerations that influenced the legal advice in 1867 not to require declarations of trust.)

239. Another consideration in this question would have been the real difficulties of evidence in proving a breach of trust by grantees. Assuming a grantee (or trustee) had the typical duty to account to a wider beneficial group of owners, in what ways could it be alleged, and proven, that there was no such accounting? In the nineteenth century contexts of Māori society, there would have been almost interminable issues of evidence, including issues of how to 'trace' trust property (such as rental receipts) into other forms of property (whether land, or chattels, or expendable items). This was not for the most part an era of double-entry book keeping, nor even of bank accounts and cheque books. Another more 'legal' issue arising in this context is that grantee rangatira were themselves also 'beneficiaries' of land blocks – a reality that would have complicated the idea of a breach of trust, as grantees/trustees would usually be able to claim that they had managed trust property on behalf of *both* themselves and others.

240. Stepping back from the intricacies of trust law and how it might have been better applied within the scheme of the NLLs, there is a question here that requires further consideration in terms of the Victorians' worldview (or 'mental furniture'): how was it that there was an expectation on the part of parliamentarians and Government agents that trust concepts would still apply to owners or grantees under the NLLs? The answer to this question can only be reconstructed by understanding the nature of trust law in the context of nineteenth century Victorian society.

241. As Chantal Stebbings explains, the modern (or early modern) foundations of trust law were in the eighteenth century, where the relationships between trustees, settlors and beneficiaries were part of the social, economic and political fabric of elite or landed society. Trustees usually operated in a context of family or intimate social relationships; and their obligations were perceived to be as much moral – matters of 'conscience' – as legal. The Victorian era saw reforms in the law of trust administration, as in much other law, reflecting the emergence of a strong middle class and new commercial enterprises and relationships. Although aspects of trust law became subject to public reform, Stebbings elaborates on the essentially private and familial context of trusts and trust law in Victorian Great Britain:

> Since the trust was a purely private arrangement, with no requirements of registration and with significant fluctuations in the value of trust funds, it is impossible to state with accuracy how much property was held in trust in the nineteenth century. It was widely believed by contemporaries to be considerable, and to be increasing as the country became wealthier with more money available to be settled. In 1895 it was said that an 'enormous amount of personal property, as well as a great deal of land', was held in trust, and some believed it was as much as one-tenth of the property in Great Britain…. As a result Lord St Leonards

> could say that there were 'few social questions of more importance' than the trust relationship in Victorian England, and as early as 1857 the trust could accurately be described as 'one of the most ordinary relations of life', and the positions of trustee and beneficiary as 'among the most common and the most necessary'. Writing in the early years of the next century, Frederic Maitland observed that the trust 'seems to us almost essential to civilization'.[228]

242. This, I suggest, is vitally important context for appreciating the thinking of New Zealand parliamentarians about the nature of private property relations among whānau and extended whānau *inter se*. Because the private law trust and the trustee-beneficiary relationship was so embedded in the social and intellectual consciousness of the Victorians – including, it should be added, colonial Victorians – it is not difficult to see why parliamentarians did not necessarily consider this to be an explicit subject for legislative provision, but instead saw it as operating alongside or in tandem with the law of real and personal property. Since Māori were, under the NLLs, to have their tenure converted into English forms of private property, there was no reason – at least in the general awareness of these law and policy makers – why the general law of trust could not have applied. (Whether in technical or legal terms there may have been barriers to this is not something I suggest was much considered, especially in the initial period, ca. 1862-1866.)

243. The shape of modern trust law and administration had not only to await the Judicature Act reforms of the 1870s and following, but the consolidation of trustee law itself in the 1880s and 1890s. This was not achieved in Britain in comprehensive fashion until the Trustee Act 1893, which consolidated the provisions relating to trustees previously found in over thirty separate pieces of legislation.[229] In New Zealand, the first consolidating statue was the Trustee Act 1883. This is another reminder that statute law reforms of essentially private law or common law, as with company law and the law of partnerships, were essentially a feature of middle to late Victorian Britain. They are recognisably a 'modern' phenomenon, but a phenomenon in which the older common law or equitable modes of thought continued to exercise considerable influence over legal and legislative culture – including in Britain's empire.

244. The literature shows that Victorian people of property saw the institution of trust as intermingled with the management of family estates through the generations. The trust was a collection of maxims of equity but also a concrete relation of private law, the prevalence of which was an integral feature of the cultural landscape. For this reason, it is no surprise that the debates on how to recognise Māori property in land are suffused with the language of trust and yet, at the same time, the specific legislative provisions in the NLLs never explicitly provided for it. There was possibly a reluctance to legislate on something that could easily operate under the principles of private law or equity in any event. But if both private law and customary obligations were expected to operate under the 1865 legislation – which it seems they definitely could do and did – then they failed to prevent abuses in some cases. At least, this was how the requirement in 1873 to list all ownership interests was justified.

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228 Chantal Stebbings, *The Private Trustee in Victorian England* (Cambridge: Cambridge University Press, 2002), at 5.

229 Stebbings, *The Private Trustee*, at 19.

1873: 'democratic title' – all interested tribal members

245. I am characterising the form of title provided for under the 1873 Act as 'democratic', as it required the Court to list all owners in the new 'Memorial of ownership' instrument. I suggest that it is quite clear based on the previous legislation and official (and semi-official) discourse that this was the latest iteration of the attempt to protect all ownership interests. In this sense, the Memorial of ownership can be seen primarily as a protective measure – the 'trust' concept of 1865 and the 'registration' amendment of 1867 having failed, at least on the anecdotal evidence, to remedy the problem of the 'ten owners' dealing with title without reference to the wider ownership group (or not distributing rents or profits, *etcetera*).

246. Although this Act created this important new mechanism, and also imposed automatic restrictions on alienation, I suggest below that the principles of title had not fundamentally altered since 1862.

The Parliament's and/or Government's intention in 1873

247. Although the form of title was obviously an important feature of the legislation, the preamble mentioned the issue of survey costs and sufficiency of reserves as paramount concerns:

> WHEREAS it is highly desirable to establish a system **by which the Natives shall be enabled at a less cost to have their surplus land surveyed**, their titles thereto ascertained and recorded, and the transfer and dealings relating thereto facilitated: And whereas **it is of the highest importance that a roll should be prepared** of the Native land throughout the Colony, showing as accurately as possible the extent and ownership thereof, **with a view of assuring to the Natives without any doubt whatever a sufficiency of their land for their support and maintenance**, as also for the purpose of establishing endowments for their permanent general benefit from out of such land. [emphasis added]

248. The legislation stipulated that specific reserve lands be set aside (ss 21-32). It also provided for a preliminary inquiry (s 38) to ascertain whether the application was in accordance with 'the wishes of the ostensible owners'. The Judge was required to report, *inter alia*, that the hearing of the claim 'is not likely to lead to any disturbance of the peace of the country'. I do not examine these sections further, but they indicate that the parliament (or Government) was exercised about the reservation of enough Māori land for the future and issues relating to the peace of the colony that might be impacted on by untoward land dealings.

249. The Court was required under section 41 to ascertain the title of the applicants but also 'of all other claimants to the land'. The Court could inquire into 'the proportionate undivided share' of the owners if a majority of the claimants so desired it (section 45). This was recommended by William Martin in 1871, as a fault in the existing legislation (so he and some Māori leaders thought) was that the owners were assumed to share equally.[230] Section 46 provided for voluntary arrangements to be made, the Court to record all those consenting to such arrangement. The Court was required, under section 47, to record all owners in a Memorial of ownership for the land, including their

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230 Martin, 'Memorandum', *AJHR* 1871, A-02, at 3-4 **[SC-5, at 70-71]**. Martin thought that the Native Lands Act 1869 amendment (section 14) which stated that the shares 'shall not be deemed to be equal' unless they had already been purchased, in which case they were deemed equal, was confusing; which indeed it seems to be.

'respective hapū', and (if a majority had required it) the proportionate shares of each owner.

250. Section 48 added a blanket condition for all titles: they were unable to be sold or disposed of except by way of lease of twenty-one years or less. On its face, this was a significant departure from the free dealing envisaged by the 1862 Act, while the 1865 Act enabled restrictions to be recommended by the Court but did not impose a restriction by legislative fiat. However, section 49 provided significant exceptions to the no alienation rule: where all owners agreed, land could be sold; or land could be partitioned in accordance with sections 59, and 65 to 68.

251. Section 59 essentially allowed 'any number of collective owners' to partition and sell land where 'the assent of all the owners to such sale' was evident. Section 65 allowed a block to be partitioned between a 'majority' who wished to sell or lease and a minority of 'dissentients' who wished to retain the land in their possession. Section 66 allowed those dissentient owners to make a further subdivision between themselves. Section 67 allowed any allotment held by not more than ten owners to be 'commuted' from a Memorial of Ownership to a Crown Grant or 'an English title of freehold'. Section 80 provided further procedural detail for this process of 'commutation'; in essence, the Crown Grant could be issued to no more than 'ten collective individual owners' in defined undivided shares as tenants in common.

252. The drafting of the 1873 legislation was ambiguous at points. One issue concerned the right to 'dispose' of land by way of mortgage. The legislation clearly contemplated such a right (section 84, see also sections 81, 83), but it is not entirely clear that Memorial of ownership land could be dealt with in this way. As pointed out, section 48 imposed the restriction on dealing, but section 49 then allowed dealing based on agreement of all or following partition. Section 65 then provided for partition, however each 'aggregate allotment' would still have a Memorial of Ownership issued for it – which presumably would carry the blanket restriction imposed by section 48. (This interpretation is consistent with my analysis of the title regime below.) On the other hand, section 83 referred to 'every memorandum of transfer or of lease, **or other instrument of disposition**, affecting land held under Memorial of ownership', which implied that other forms of disposition such as mortgages were possible.

253. The case law relating to the 1873 Act confirms the interpretation of Memorial land as an intermediate form of title between customary tenure and freehold title (although it does not, to my knowledge, resolve directly whether Memorial land could be mortgaged.[231]) In the Supreme Court, Richmond J in *Hobson v Sheehan* confirmed that memorial land was a form of 'native title, and in the absence of express provision, there is no alienable quality in such a title'.[232] A longer statement by Richmond J in this case expressed the tension in the NLLs between individual private property and the realities of land held by customary groups – *including* under 1873 Act Memorial of ownership:

> A certificate of title issued under the "Native Lands Court Act 1880" has the same force and effect (see section 70) as a memorial of ownership under the "Native Lands Act 1873". It is a recognition by the Court that the holders are owners according to native custom. But ownership according to native custom, whatever

231 The presumption, perhaps, is that it would require all the owners to assent to the mortgage (or the 'majority' of owners, which would enable a partition between that majority assenting to the mortgage and the 'dissentient' minority).

232 *Hobson v Sheehan & ORS* (1884) 3 NZLR (SC) 230, at 232 **[SC-10, at 138]**.

> be its exact nature, is certainly not the same thing as ownership in fee simple. **The power of absolute alienation which is an incident of an estate in fee is the creation of a highly artificial state of society**. Probably the **native notion of property** in land **never included more than an usufructuary right**.[233]

254. This confirmed the intermediate nature of the Memorial title, in which the incidents of absolute ownership in fee simple were restricted to the express legislative provisions. The highlighted portion could be unpacked at length, but it is an acknowledgement by Richmond that absolute rights of dealing in real property are those corresponding with large or modern market societies – what he characterised as a 'highly artificial' state, in that the relationships between people are by contract or anonymous dealing – rather than in smaller customary settings where relationships are personal or kin-based and rely on unwritten codes. This description, not incidentally, is one of the contrasts found in the New Institutional Economics literature (and a sizeable anthropological literature) where modern markets are compared with customary or tribal societies.

255. Richmond took further this analysis of 1873 Memorial land as reflecting a customary title that comprised rights in the nature of use rights (or 'usufructory' rights). To explain these comments the particular factual matrix of this case must be outlined. In this particular case, Richmond confirmed that owners of Memorial land could not lease land for longer than 21 years. In so doing, he upheld a decision by the Trust Commissioner to refuse his certificate (or confirmation) for a lease, that purported to be for 30 years, on the grounds of 'equity and good conscience'. It is Richmond's reasoning on this matter that is of real interest to the present discussion:

> It is alleged that the transaction [the lease for 30 years] is a piece of perfectly fair dealing between the parties to the lease, and that **no one else is or can be interested**. **The latter part of this assertion can, however, by no means be admitted as correct.** Could it be said that a lease for a long term of years a tenant for life was a matter in which the remainder-man was not interested; or that the issue-in-tail were not interested in a disposition of the land by the tenant in tail in possession? **For a like reason the native certificate-holder having in reality but a limited interest in the land – virtually a life-hold with restricted powers of alienation – their descendants, or other successors according to native custom, are parties interested in every alienation by them.**[234] [emphasis added]

256. Again, there are many statements within this quotation that are fascinating, but which also require some interpretation. Perhaps the most fascinating feature is the way Richmond translated such customary or 'usufructory' native title *in terms of the English idea of a life-interest* or a title that was restricted by entail or feetail – that is to say, a title that could not be alienated outside of the hereditary line of succession. (For more on entail, see the discussion on J. S. Mill in the 'Context 1' section above.)

257. This characterisation then creates a quite astounding proposition – if one only has in mind supposed 'Western' notions of 'individual property' – that even for Memorial land, the grantees could be understood as having a life interest only, and that their customary successors or 'descendants' were also interested in the land. Now one can point out that this characterisation would only hold while the title remained as Memorial land; that is, it would not hold once such land was commuted in a Crown

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233 *Hobson v Sheehan & ORS* (1884) 3 NZLR (SC) 230, at 234 **[SC-10, at 140]**.

234 *Hobson v Sheehan & ORS* (1884) 3 NZLR (SC) 230, at 235 **[SC-10 at 141]**.

Grant. If one wanted to be critical, it could also be pointed out that the English entail scenario only applied so far, for if all owners of Memorial wanted to sell, then they could do so.[235] Nevertheless, as Richmond pointed out, the legislation restricted alienation in other ways, including to leases of only 21 years.

258. Richmond's discussion here requires further contextual commentary because, as noted, it raised direct parallels with the English law of real property, especially the area known as 'family settlements', in which land was passed down the generations, with each generation being limited by the terms of the 'settlement' in its ability to permanently dispose of it. Family settlements were really a species of trust, involving often complicated layers of trusts and life interests. As discussed above (in 'Context 1' section re J. S. Mill), this law of settlement – in which the rules of primogeniture or entail formed a key part – was under attack in this period by Liberal-Radical elements in the British body politic, as it was argued that it kept large estates out of the market and the productive economy. Family settlement law held on but by the end of the nineteenth century was evolved (and reformed) to enable more freedom of dealing with estate land.

259. The parallel I especially want to highlight between this English context and the New Zealand Memorial of ownership context is that the management of family or 'settled' land in England (even when 'freed') had a strong preference for leasing rather than for mortgaging.

260. As Anderson writes, the English legislative reforms (and consolidations) of this law in the Settled Estates Act 1856 and Settled Land Act 1882 still contained a strong supposition that settled land would not be mortgaged but 'would be leased to capitalists'. Powers to mortgage for commercial purposes (as opposed to raising annuities for family members) under settlements were limited and not part of standard settlement terms. The reason for this was 'to protect future generations from the unrestrained borrowings of the family's current head'. Similarly, the standard models 'permitted outright sale only for the purposes of reinvestment in land'.[236]

261. These types of conceptions of landed property can be related to New Zealand policy-makers' conceptions of land under a Memorial, in which leasing for 21 years was the presumptive use and all other applications were restricted. (It can be noted too that powers to lease for 21 years were a standard feature of family settlements in England.) Powers to mortgage land under the NLLs were frequently restricted, and this was due at least partly to fears that borrowing would lead to mortgagee sale or alienation.[237]

262. Other New Zealand case law reveals or confirms other aspects of the 'limited' nature of Memorial of ownership land:

    262.1 In the case of *Henare Potae* the Supreme Court (Prendergast C. J.) found that the interest of an owner of an undivided share in Memorial land did not

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235 The concept of English law/equity that all beneficial owners of land, if unanimously agreed, could request the transfer of the legal estate from a trustee to themselves (making it their freely disposable property) is a possible parallel to the idea of all Memorial of ownership holders agreeing to alienate their interests in what, as Richmond indicated, was still conceived as the beneficial property of a group/tribe, including those unborn (absent this agreement, it could not be alienated).

236 Anderson, 'Land Transactions: Settlements and Sales', in *The Oxford History of the Laws of England: Vol XII*, at 81-82.

237 I have not had time to trace through the chronology on the NLLs restrictions on mortgaging. One early example is section 4, Native Land Act Amendment Act 1878 (which applied to land under both a Memorial and a Crown Grant).

become available to his creditors' trustee on his bankruptcy.[238] In deciding this way, the Court relied on (in part) section 88 of the 1873 Act that provided that 'no judgment of any Court obtained against any owner of an undivided share of any land shall … affect such share'. In effect, therefore, that interest was not his individual property and available to his creditors because it was still part of a communal estate. (Another, not inconsistent, reading of this section is that the legislation was attempting to prevent debt being used to secure land as had occurred in many cases, including in Hawke's Bay, while the ten owner rule was in force.)

262.2 In the case of *Mangakahia & ORS v the New Zealand Timber Company* the Supreme Court held that the nature of the interest under a Memorial did not ground a right of re-entry or an action for trespass as the title holders were not in possession of the land. This can be understood as a judgment as much about the English law of trespass as the 'limited' nature of the title under a Memorial. (This is indicated by the Court's comment that if the plaintiffs had alleged possession 'the nature of their title would be of no consequence' as 'bare possession is sufficient to entitle the possessor to bring trespass'.)[239]

263. Although the incidents of title were limited under a Memorial, the case of *Ani Kanara v Mair* was authority that the Memorial was conclusive of ownership; that the Supreme Court could not make a finding that the grantee (Renata Kawepo) was a trustee for others not named in the Memorial, and could not refer the question to the Native Land Court to ascertain the interest of such others (the plaintiffs, Ani Kanara and others). Prendergast also commented that to allow such a finding on the basis of a 'parol' or verbal agreement would be against the Statue of Frauds.[240] That a Memorial was conclusive of ownership was an obvious implication of the statutory regime in which all owners needed to be listed. (Note this is also consistent with the instructions to Trust Commissioners discussed by Hayes, that is, that a trust needed to be express or implied in the title document itself, and that an arrangement in Court that the grantees hold was not by itself evidence of any constructive trust.)

264. While the title was intermediate or 'limited', the requirement for all owners to consent to an alienation imposed a burden on third-parties in many cases. In *Seymour v MacDonald* the Court of Appeal upheld a decision of the Supreme Court (Richmond J) that the title of the plaintiff (a European) was not valid as it was subject to alienation restrictions and he did not have the consent of all owners to the sale and it was not confirmed by the Native Land Court (as per sections 59-61 of the 1873 Act).[241]

Describing and Evaluating the form of title (in terms of title individualisation/enclosure, trust and company law…)

265. I suggest that the legislation of 1873 can be seen as an extension or development of the principles of title established by the 1862 and 1865 legislation, as it still provided for sales or leases of land held by large groups (section 59) and for partitions between selling and non-selling sub-sets of owners (section 65). The key difference was the

238 *In re Henare Potae. Ex parte Cattell & Buckley* (1882) 1 NZLR (SC) 214 **[SC-11]**.

239 *Mangakahia & ANOR v The New Zealand Timber Company, Limited* (1881) 2 NZLR (SC) 345 **[SC-12]**.

240 *Ani Kanara v Mair* (1885) 4 NZLR (SC) 216 **[SC-9]**.

241 *Seymour v MacDonald* (1887) 5 NZLR CA, 167 **[SC-16]**.

creation of this intermediate form of title – the Memorial – that was restricted in the ability of owners to dispose or deal with it, excepting lease of 21 years and absent the approval of all to sale or other disposition.

266. As noted, however, this intermediate form of title could be converted into freehold: at the point where a block had ten owners or less, these owners could commute their title into a freehold title or Crown Grant, in which case they would be perfectly free to deal with the land. In this way, the 1873 Act actually continued the 'ten owner' or 'twenty owner' rule of the 1865 and 1862 legislation. It should be recalled that only when land was held under these Acts by not more than ten and not more than 20 owners, respectively, could land be dealt with freely. Prior to that it was conceived as held by larger groups of owners akin to tribes. The underlying principal (or assumption) running through all this, as suggested above, may have been one of agency – that there was no simple way of providing for a large group of owners to act as one, or deal with their title, including pledge it as security for loans (that is, by mortgage) in such a way as would bind all the owners. Hence, only when land was partitioned out to ten owners or less (or 20 owners in the 1862 legislation) was it capable of being dealt with in a free market. Before it reached that status it was more akin to collectively-owed land that needed restrictions on dealing to protect the interests of the wider group. I think this is a reasonable construction of what all of this legislation was 'doing' – as far at least as the form of title was concerned.

267. Judge Martin of course had suggested in his 1871 memorandum that, at the point of title, some of the owners might be identified as trustees or agents for the wider ownership group. But what is fascinating about this is that he was thinking *only* about situations where the wider group retained ownership and the land was leased. The appointment of trustees was for the purposes of dealing with lessees or, in any event, receiving rents and then distributing them among the owners. For all other purposes or types of transfer or disposition – *including sale and mortgage* – Martin thought there should be a blanket prohibition on dealing with undivided shares. (Again, the parallel here with the English law on family settlements is striking.) However he also thought that individual owners should have the 'liberty' to partition out their interest, in which case, presumably, they would have all the rights of free dealing.[242] What the 1873 legislation seems to achieve is something like this, except that titles of *ten owners or less* have these rights of free dealing (or at least they would when commuted to Crown Grant).

268. Importantly, in terms of managing leases and rental receipts, *the legislation provided for something like the trustee or agent system proposed by Martin*, including making the receivers accountable to the Court (see sections 63-64). It could be commented further here that effectively what these provisions did was impose obligations of trust on the receivers of rents –obligations akin to those of trustees in equity – including the obligation to account for monies received on trust, with the NLC also having a supervisory jurisdiction over this relationship, with power to 'make any order it shall think just and fitting'. These were important amendments in the context of the development of the NLLs: they effectively stipulated for or imposed equitable obligations on some designated Māori property owners and an equitable jurisdiction in the NLC.

269. As for imposing general obligations of trust on a select group of owners – to act in all situations of title dealing – such was not in fact Martin's proposal. And if it had been

242 Martin, 'Memorandum', *AJHR* 1871, A-02, at 4 **[SC-5, at 71]**.

considered by the Government, it was not adopted, perhaps for the considerations of or perceived problems associated with, group agency (or rather, a few individuals having legal rights to deal for a larger group, but with little recourse if those individuals acted alone or without reference to the wider group). The legislature in 1873 instead decided to pursue, I suggest, the policy that ran through the NLLs since 1862: *all owners would be identified, and once those owners had subdivided out to a certain number of owners per block, then and only then did it make sense for the land to be fully exposed to free dealing.* Only at that point would owners be able *to make the decision themselves* on what to do with their shares.[243]

270. It can also be noted that the 1873 Act adopted the recommendation of Martin to require the Court to determine the proportionate shares in which a tenancy-in-common title was held. This was one of the two 'chief grievances' that had been presented by Karaitiana Takamoana, as recorded in Martin's memo (the other being the failure of ten owner 'trustees' to act for the wider group).[244] It made sense, to enable ease of dealing with shares, including disposition by way of mortgage, to identify the proportionate shares, because then it would then be clear to the owners and those dealing with them the extent of rights held, and would more easily enable further partition later on.

271. As it happened, the concept of trusts for larger community interests versus the conferral of individual property rights on Māori was an intriguing theme running through the debate – more in the Legislative Council, it must be said, than the House of Representatives. With reference to the ten owner rule, Donald McLean, speaking for the Government in the House at the bill's second reading, stated:

> One source of difficulty had arisen from having **ten men's names in a grant, who acted as trustees** on behalf of a certain number of Natives not named in the grant. It was proposed that the names of all the Native owners should now appear. Hitherto it often happened that eighty out of a hundred might not participate in the benefits of the grant, and that ten persons, who looked upon themselves as the legal holders of the estate, might sell it without accounting to the remainder of the owners. It was **one of the great defects of former Acts**, and which this Bill would remedy, **that the intended trusts were never properly secured** or looked after.[245] [emphasis added]

272. This commentary by McLean is another illustration of the notion that the 1865 ten-owner rule enabled representative owners or trustees to act for a wider ownership group. However, given the 'defects' of this system, the solution now proposed was to provide for all owners to be listed in a grant. In practical terms, this meant all owners interests were to be protected. At the same time, the legislation created a trust mechanism for rental receipts on land still held by a wider group under Memorial title (as described above).

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243 Dillon Bell's explanation in 1862 is apt, where he stated: 'the "tribe" cannot make a conveyance', as they must first apply to partition or 'apply to have a new certificate issued in the names of truste,es, with a proper declaration of trust to act on their behalf' – hence individual proprietorship or an effective agency relationship – see 1862 section above.

244 Ironically, Karaitiana Takamoana spoke largely against the 1873 Bill when Donald McLean introduced it in the House; see NZPDs, 25 Aug. 1863, at 611. He did not however address himself to particular features of the bill, and seemed to be responding more to McLean's speech in introducing it. It is also not clear whether the Māori members had a translated copy of the bill available at this point in time; in fact Colonel Kenny, in the Legislative Council debates, raised concerns that the Bill was not printed in Māori and circulated as it should have been prior to introduction (see *NZPDs*, 25 Seat 1873, at 1375).

245 *NZPDs*, 25 Aug. 1873, at 621.

273. Perhaps the most fascinating contributions on this issue came from Henry Sewell (once again) in the Legislative Council – but not in the Government/Ministry – and in the replies to Sewell. Sewell engaged in a sustained critique of the proposed legislation, especially the mechanism of individual applications and the individuating of the tribal ownership, both of which would, in his view, dismember corporate action by tribes/ hapū. He criticised Dr. Pollen, the Government Minister in the Council, for not giving the Council a full or proper explanation of the measure. His most direct (and incisive) comments on the individualisation point were perhaps the following:

> The fault he [Sewell] found with this Bill was one which pervaded it throughout. It was the attempt to force upon the Natives the system of individual title to the subversion of tribal rights. What the Natives contended for was this: they say, "We are communistic in our territorial rights, our habits, and ideas. We desire to retain them. We can no more suddenly change them than the leopard can change his spots. Do not force upon us the adoption of a system of law which is foreign to us. **We are tribes, and we desire to remain so**." …[246] [emphasis added]
>
> By those provisions they were introducing a system into the mode of dealing with Native lands wholly foreign to Native custom. The Natives of a tribe held a collective corporate interest in the whole of their lands, and **had no idea of divided shares**. Now it was proposed to say to them, 'One-third of you, it may be, are King Natives, who will not sell, and two-thirds of you are Queen Natives, who will sell. If you come to the Native Lands Court, the Court will direct that two-thirds of the tribal estate shall be alienated, and one-third shall be set apart for those who dissent. He had no hesitation in saying that if such a law were enforced, they would have he did not know how many wars.'…
>
> What was now said was, that the Natives should be governed by majorities, and that their interest in their land should no longer be tribal or collective, but that each individual should have a distinct aliquot part. That was a fundamental vice in this Bill.[247]

274. Having said all this Sewell did not say he would vote against the bill, but rather than the measure should be postponed to another session so that "the Natives could have an opportunity of considering the whole of its bearings…".[248] This commentary is intriguing for a number of reasons. It carried on Sewell's crusade against individualism that was evident in his earlier presentations in the Assembly. At the same time, it is his most critical commentary on individualism – seemingly confronting the whole principle of private property for Māori head on rather than seeking to ameliorate the way the legislation operated – as in the Trust Commissioner legislation of 1870. One of the key points he made was that the ability of land blocks to be divided between selling and non-selling groups would be to divide tribes and even impinge on the way tribes customarily operated (that is, he implied that tribal governance was not a majority rules scenario).

275. Dr Grace, however, said Sewell's speech 'had interested him very much, but he would find great difficulty in following it even briefly'.[249] He believed the Act did redress real issues, including the cost and difficulties of surveys to the Natives. He argued that the

246 *NZPDs*, 25 Sep 1873, at 1369.

247 *NZPDs*, 25 Sep 1873, at 1370.

248 *NZPDs*, 25 Sep 1873, at 1370.

249 *NZPDs*, 25 Sep 1873, at 1370.

Native Land Court had earned the respect of Māori by and large.[250] He was direct in replying to Sewell's contentions on the nature of title:

> With regard to the tribal and communistic rights of the Natives, upon which his honourable friend had laid so much stress, he would like to point out that under the old Act they had been largely used to the disadvantage of the Natives themselves. The recognition of those rights by the old Acts led to the provision for the insertion of **ten names** in a Crown grant. **The supposition entertained by the Council at that time was, that if the Legislature recognized their tribal and communistic rights, and appointed as trustees ten chiefs who were interested in the property, they would respect those rights and act fairly**. But what did they find? **They found that when it ceased to be to the interest of the trustees to respect those rights, they used them against the commune they were supposed to protect.**[251] [emphasis added]

276. He supported the provisions for reserves to be set aside, at 50 acres for each individual. In effect, Grace turned Sewell's critique on its head (it certainly turns typical Tribunal critiques on their head) by saying that *the ten owner rule was intended to allow for the continuation of tribal management*, through chiefs who would be the legal owners or trustees for the group. This is consistent with the reading of the 1865 legislation given by others in the preceding years, and consistent with my reading of what the ten owner rule allowed for (even if the legislation did not expressly create or impose trusts on grantees as a matter of law/equity).

277. Mr Hart also responded to Sewell in a similar fashion to Grace. He defended the draft legislation and went through its various provisions. Concerning the existing 'ten owner rule', he stated:

> Under the rules of the Native Lands Court, **a grant had to be made to ten trustees**, who then considered it their property, to deal with by leasing the land and applying the rents to their own purposes; and whenever any person, beneficially entitled, if not named in the grant, wished to enforce his rights, there was no power, under the existing state of the law, to enable him to do so. Suppose ten names had been put in a grant as trustees for 100, there was not a single process by which the ninety could make the ten respect their trust. If this Bill passed, that state of things would be entirely done away with, and there would not be a single person interested in the land comprised in future grants to Natives who would not have a remedy.[252]

278. He then referred to the draft provisions whereby those interested in rent moneys could obtain remedies from other owners dealing with rent themselves. This is entirely consistent with my interpretation, which recognizes that the 1873 legislation did create trust obligations with respect to rental receipts at the least.

279. To complete the coverage of this debate in the Legislative Council, Dr. Pollen, in replying for the Government, called Mr Sewell's speech 'a sort of Rip Van Winkle speech' – suggesting Sewell had forgotten all that had transpired in the last two to three decades re native land tenure and purchasing.[253] Pollen recounted the great political

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250 *NZPDs*, 25 Sep 1873, at 1371.

251 *NZPDs*, 25 Sep 1873, at 1371.

252 *NZPDs*, 25 Sep 1873, at 1374.

253 *NZPDs*, 25 Sep 1873, at 1377.

argument between proponents of free market policies and Crown pre-emption policies. Because dealing in native lands was going on anyway, regardless of the illegality, the Government were eventually forced to act, argued Pollen, and so introduced the 1862 legislation (which Pollen thought Sewell was part of; Sewell denied this saying the bill contained the same principle he had just been denouncing, which is true to an extent), and then the 1865 legislation, which was actually implemented.[254]

Amendments to the 1873 Act

280. It should be added here that amendments to the native land laws in 1877 and 1878 made it easier for the Crown and third parties to acquire individual interests.

281. The Crown secured ownership of a large amount of North Island land through applications under section 6 of the Native Land Act Amendment Act 1877, which empowered the Crown to apply for any interests it had acquired in Māori land. In applying this Act the legislation did not require that the owners of any block in which the Crown had acquired interests to unanimously consent to the Crown being awarded its interests.

282. Section 11 of the Native Land Act Amendment Act 1878 allowed private parties the same ability to apply for interests they had acquired.

283. How to understand these amendments in light of the discussion above? They developed, or further supported, the concept of individual private property; that is that property interests could be dealt with freely, without reference even to a wider group of owners. Having provided for all beneficial interests in Māori land to be identified in the 1873 Act, through the Memorial of ownership, the legislation recognised a right in those individual interest holders to alienate their interests. The 1873 legislation had allowed for partition if a majority of block owners agreed; that majority principle was effectively done away with by the 1877 and 1878 amendments.

284. While this was certainly *one possible effect* of these amendments on the majority principle, it could be pointed out that the legislative provisions were focussed on providing clear rights for *purchasers* of individual interests to have those individual interests 'vested'. Such 'vesting' by Court order would, of necessity, require a partitioning out of those interests from the greater block. Although many European settlers used this provision over time, the section expressly allowed for 'any Native owner, or other person interested' to make such application. Hence, it could have been used as a way for native owners to exchange interests, and even consolidate land holdings.

285. In addition, although these amendments to the NLLs made more difficult than previously tribal or collective control of land dealing, there was still nothing in the legislation positively preventing the ongoing influence of a collective principle. If a tight-knit group had wanted to retain its undivided tenancy-in-common interests in a block then they could have done so by agreement between themselves. Nor was it impossible, apparently, that individual grantees could alienate to third parties (such as their solicitors), who would in effect be trustees for the transferor and their whānau.[255]

254 *NZPDs*, 25 Sep 1873, at 1378.

255 See discussion in Hayes, 'Protection Mechanisms', Wai 814, #F15, at 24-27.

1894: 'incorporated title' – of identified individual owners, not a 'tribe'.

The Parliament's and/or Government's intention in 1894

286. In 1894 the Native Land Court Act was passed. The Act provided, in addition to more standard title arrangements, for the incorporation of block owners, with a management committee to run the day-to-day affairs of the incorporation. The Public Trustee was to receive and distribute all 'proceeds of alienation' after deducting its costs (ss 122-130). It should be noted that provision was made to incorporate not just a single block of owners but also adjoining blocks of owners; so in this respect it was capable of consolidating the ownership and management of multiple (adjoining) blocks that had already experienced a degree of fractionation of ownership.

287. The committee provisions can be understood as the descendant of the provision for receivers of rent in the 1873 Act (see above). In that respect, these provisions were a development of trustee or agency principles that had already been provided for over two decades. The role of the Public Trustee in receiving and distributing the proceeds of transactions (whether sale, lease or otherwise) can be seen too as a development from the supervisory role over receipt and distribution of rents that was exercised by the Native Land Court under the 1873 Act.[256]

288. In the British context, corporate trustees and public trustees were proposed as alternative trustee models from the 1850s, in part due to much-publicised cases of private trustee and (especially) solicitor trustee default or breach of their trust obligations. Such cases often involved failures of investment of trust funds and property; and the increasingly financially savvy and well-healed middling classes sought alternatives.[257] Gary Hawke noted that New Zealand was the first to establish a Public Trustee, in 1872, although he also referred to previous models in Scotland and India.[258] In England, the Court of Chancery itself acted as a significant holder of trust funds in the Victorian period (a Trustees Relief Act 1847 had made payment into Chancery easy for trustees who wished to relieve themselves of their obligations to manage the trust fund).[259]

289. With respect to the NLLs, the major difference between the agency of trustees for rents in the 1873 Act and the agency of the Committee in the 1894 Act, was that the agency of the Committee extended to essentially all forms of 'alienation'. As defined by section 2 of the Act, 'alienation' meant 'any sale, lease, contract or other disposition, absolute or limited, mortgage, charge, lien, or encumbrance'. This definition was confirmed by Regulations made under the Act, promulgated by the Governor by Order in Council on 1 April 1895.[260] This agency was carefully circumscribed, however, as the Public Trustee held and administered all funds (or 'profits and revenue') of the incorporation, and the consent (or resolution) of a majority of proprietors in general meeting was necessary for the mortgaging of the incorporation's land. Other alienations such as sales and leases

256 Refer Native Land Act 1873, ss. 63-64.

257 Anderson, 'Trusts and Trustees' in *The Oxford History of the Laws of England: Vol XII*, at at 235 **[SC-17, at 182]**.

258 Hawke, *The Making of New Zealand*, at 112.

259 Anderson, 'Trusts and Trustees' in *The Oxford History of the Laws of England: Vol XII*, at at 235-36; in 1864, Chancery held on trust £50 million in 25,000 separate accounts **[SC-17]**.

260 Rules and Regulations of the Native Land Court, Division II., Part II., of "The Native Land Court Act, 1894", 1 Apr. 1895, in *New Zealand Gazette*, 4 Apr. 1895 **[SC-8]**.

required, in addition to a majority resolution of the owners, the consent of the Commissioner of Crown Lands.[261]

Describing and Evaluating the form of title (in terms of title individualisation/enclosure, trust and company law…)

290. I am characterising this form of title as the individuated group (or groups) now re-incorporated through a committee mechanism, which bore some similarities with the joint stock company model. W. L. Rees advocated in 1884 for tribal ownership and management via a joint stock company model. Rees critiqued the then current native land tenure system and presented a strong argument for an "alternative possible world" of tribal land ownership.[262] On closer consideration, however, Rees left various questions unanswered, including how to identify the group/tribe, its membership and leadership, and the powers of its management. (These matters are explored below.)

291. Rees took his advocacy of the company model for tribal land management further in his report for the 1891 Native Land Commission. Through the 1880s he had, together with Wi Pere and others, attempted the creation of Māori and settler land owing trusts and companies. These are briefly recounted. Rees was the lawyer for Te Aitanga a Māhaki rangatira, Wi Pere. In the late 1870s they attempted to establish a trust scheme in Tūranga, involving discrete trusts over a number of blocks. In 1878 the owners of Pouawa (a block between Gisborne and Tolaga Bay) signed a deed vesting their land in the trusteeship of Wi Pere and Rees, and in 1881 they asked the Native Land Court to give effect to this trust so the trustees could complete a sale to some settlers on their way from Ireland. The Native Land Court stated a case to the Supreme Court which held that the owners could not convey their interests to trustees for nominal consideration, and the deed was invalid. Following this case, and other financial difficulties, Pere and Rees formed a company to take over their scheme, but this ran into severe difficulties during the economic depression of the 1880s.[263]

292. This shows that a company scheme with native land was possible, even despite the NLLs, although it basically involved selling the land. The gist of the scheme was that native owners sold their land interests to the company in return for shares and/or cash (and in the case of at least one block, for nearly 20% of the block to be returned to owners after development by the company). Justice Richmond, in a case involving one of the blocks transferred to the New Zealand Land Settlement Company, described the Company effectively as a form of joint-stock company. In this description he was also confuting the argument that payment for native land under 1873 Act Memorial of ownership needed to be cash:

> The property [the native land] passes absolutely to the company and the benefits secured to the natives are wholly distinct from their former rights of ownership. The scheme of the company is that the native shareholders shall contribute land and the European shareholders money. The natives are in the position of partners

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261 Rules and Regulations of the Native Land Court, 1 Apr. 1895, regs. 76, 87-88 **[SC-8, at 130-31]**.

262 W. L. Rees, 'Papers Relating to a Proposed Māori Lands and Perpetual Annuities Assoc. (Ltd)', *AJHR* 1884, G-2 **[SC-6]**.

263 See also the brief account in the Ngāti Porou Deed of Settlement, 22 Dec. 2010, paras. 2.37-2.42); see also Macky, 'Trust and Company Management', Wai 814, F-11.

> who bring land into the joint stock; such a transaction is clearly a sale to the co-partnership, at all events where the co-partnership is an incorporated company.[264]

293. They therefore shared to some degree in the capital assets, income and/or profits of the company, although their ability to manage or deal with their land was obviously reduced overall. It should be noted, however, that this picture of attenuated rights to manage or control land is one applicable in any incorporated scenario, which is, after all, some form of agency for particular ends; in the East Coast case, as in many other incorporated scenarios, these ends were largely commercial or 'capitalist' ones.[265]

294. In addition, in 1880 the Whanganui rangatira, Te Keepa Rangihiwinui (Major Kemp), attempted to have a large amount of land vested in trust in Whanganui. The objectives of this scheme, as described to the Government by Te Keepa's lawyers Sievewright and Stout, were broadly similar to the objectives of the Pere Rees trusts in Tūranga. However, Te Keepa's trust was never made legally-effective. Te Keepa did not even reach the point of asking a Court to recognise his trust.

Analysis of Pouawa

295. The decision in *Pouawa* was that the sale or transfer to trustees for nominal consideration had no operation because the alienation provisions under the 1873 Act for Memorial land did not allow it.[266] That is to say, the Act allowed all owners in a block to sell outright or lease, or a 'majority' of owners could sell or lease following partition, but there was no ability to convey only the legal estate while retaining the beneficial estate. The Supreme Court suggested, however, that if the trust deed had conveyed to persons already interested in the land (that is block owners) then it might have been effective or able to be confirmed by the Court as an 'assignment' (though this is *obiter dicta* and the interpretation of this passage of the judgment is difficult). The Court also indicated that the judgment applied to land under the 1873 Act, implying that land under other legislation (perhaps 1865 for example) might be a different scenario.[267]

296. Indeed, the 1878 Court of Appeal decision in *Pateriki Te Ririheke v Ormond*, considered above in the 1865 Act section, confirms that declarations of trust were legally possible for native land under the 1865 legislation. Michael Macky agrees with this, stating that 12 of the 14 trust deeds in the Rees-Pere trusts (that fell in the Gisborne inquiry district) concerned titles for which Crown Grants existed, and these remained valid after *Pouawa*, which only concerned title under s 17 of the 1867 Act (treated as equivalent to Memorial land under the 1873 legislation). Macky points to Rees' later commentary on this point in the Validation Court, and to the presentation of deeds to the Trust Commissioner for approval after *Pouawa* (of which some at least were approved).[268]

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264 *Wi Te Ruke and ORS v New Zealand Native Land Settlement Company* (1884) 2 NZLR (SC) 378, at 383 **[SC-15, at 167]**.

265 Ngāti Porou Deed of Settlement, 22 Dec. 2010, para 2.39.

266 Transcipt of Supreme Court decision in *Re Partition of Pouawa Block*, 8 Feb 1881, Wai 814, #F33, vol. 10, at 3416-3417 **[SC-14]**.

267 Apparently this is s11 of the Native Land Act Amendment Act no. 2 1878; see Transcript, *Re Partition of Pouawa Block* **[SC-14]**.

268 Macky, 'Trust and Company Management', at 81-85, 88-89.

297. In general terms, the use of the trust mechanism in the initial Rees-Pere trust deeds, followed by the company mechanism in the case of the New Zealand Land Settlement Company, illustrates the salience of trusts and incorporations in relation to Māori land – especially Māori land that had been converted to Crown Grant, but also more broadly. Indeed, the NZ Land Settlement Company shows that even with land under Memorial of ownership, it was possible to convert land shares into company shares to achieve a corporate form of agency for Māori aspirations. (Of course, delivery on those aspirations in this case was a mixed bag, but that, as Macky argues, was more to do with financial and company management and wider economic downturn as it was to do with the legal mechanisms employed.[269])

Comparison of 1894 Committee provisions with Mangatu No. 1 Empowering Act 1893

298. Given the confluence of ideas influencing native policy at the time, including the recognisably strong influence politically of the East Coast trusts and companies, it would be no surprise if the East Coast models influenced the 1894 Act provisions.

299. The Mangatū No. 1 block story seems to be directly relevant. In 1880 the owners of Mangatū persuaded the NLC to award title to Mangatū 1 to twelve individuals (including Wi Pere) who were to act as trustees for the 106 individuals who had interests in the block. The Court warned the owners that, if the inalienability order the Court imposed was removed, the "trustees" would be able to dispose of the land without reference to the "beneficiaries". At the Court's recommendation, the trustees executed a declaration of trust declaring that they held the land as trustees for the named beneficiaries. However, after 1880 subsequent Courts refused to recognise any other interest holders for any purpose, including powers of management in cases were trustees had died. In the end the owners succeeded in persuading Parliament to enact the Mangatū No 1 Empowering Act 1893, which created the first Māori incorporation sanctioned by the law. The Mangatū Incorporation remains intact today. Litigation involving it continues to today.

300. A simple comparison of the provisions of the Mangatū legislation and the 1894 Committee provisions shows their close relationship. Both obviously provided for incorporation of named individual owners, 'with perpetual succession and a common seal'; a Committee was to manage the land; in both cases land could be sold by consent of a majority of owners, with the 1894 Committee provisions also requiring owners consent for mortgages and leases (the Mangatu Committee had power to lease for 30 years); the Public Trust was in both cases to receive rents and profits on the land and distribute after deducting expenses. With some less important variations, the core provisions were essentially the same.

Theoretical-Empirical discussion about tribal land incorporation mechanisms

301. Incorporating a number of individual owners into a body corporate, 'with perpetual succession and a common seal'– as in the case of Mangatu No. 1 Block and the 1894 Committee provisions - is not exactly the same thing as incorporating a tribe. Why could a customary group or hapū not simply have been incorporated from the outset? These perhaps are some reasons:

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269 Indeed, aspects of the Rees and Pere schemes, especially the purchasing back of land in European ownership or subject to leases, seems of doubtful economic viability; especially so when combined with the lack of capital available in the first instance, which means that almost all the capital of the schemes was borrowed capital on interest.

301.1 First, because company law itself was still in a formative stage in Britain, especially as regards the element of limited liability. (In 1860, New Zealand adopted the English provisions for incorporation of a joint stock company by registration, 'with or without limited liability'.[270]) But even as regards the joint-stock or incorporated principle, a strong stream of public or elite opinion was against the inevitable separation between management and ownership (or shareholders) in any company that was much larger than a small family firm (or closely-held company). That is, a section of public opinion was against the concept of anonymous ownership and professional or non-owning management. (See the British statistics in 'Context 2' section above showing private enterprise was still mostly in partnership form or unincorporated for most of the nineteenth century.)

301.2 Second, the idea of an incorporation of a *land-owning* group ran counter to the whole stream of individual tenure and enclosure and individual capital accumulation.

301.3 Third, the incorporation of a land-owning group, especially a customary or traditional (pre-market) one is a different thing from a joint-stock company, because in the latter (archetypally) the company is formed for a joint commercial enterprise by varying market actors who may or may not know each other. In other words, the joint stock company is an artificial person, whereas a tribe is an organic entity. A joint stock company defines its internal and external relationships through contracts of various kinds (including articles of association), whereas as tribe is an organic entity, whose membership changes not due to arms-length contract but rather due to natural causes (births, deaths, marriages, etc).

302. In making these comparisons, it should be noted how the incorporated owners model of the 1894 Act enabled the transfer of shares to other proprietors, to the Crown, or to 'a Native (other than a proprietor)'. This effectively enabled the ownership of the incorporation to become mixed between original customary owners and more recent, introduced owners. (This was effectively a restriction on a free market in incorporation shares.)[271]

303. This last characteristic of organic entities raises a fourth problem: the problem of how to identify the group to incorporate apart from first identifying its individual members.. This is essentially what the 1894 legislation provided for: the incorporation of a land-owning group whose individual members had previously been identified. But consider the issues arising from the outset if *tribal* incorporation was to occur:

303.1 First, identifying the members – this would of course be feasible, as all men women and children could be listed, as they often were after 1873;

303.2 Second, identifying the leadership or management entity of the incorporated group – this also would have been feasible in theory, and would most likely consist of recognised leaders of the group. But this assumes a simple model of one distinct group (hapū or tribe) per area of land – a model often not seen in

270 The Joint Stock Companies Act, 1860.

271 Rules and Regulations of the Native Land Court, 1 Apr. 1895, regs. 100-102, 104 **[SC-8, at 131]**.

practice in New Zealand. It also requires a measure of agreement among the group about who the leaders (or managers) should be – this was not always (or often) the case.

303.3 Third, the relationship between the management and the owners would need to be defined legally. Whatever the manner in which this was to be done, it would involve transformations of, or alterations in, customary relationships. For to begin with, these relationships would now be defined on paper, in some sort of contract, a modification in the form if not in the substance of customary relationships.

304. Lastly, and perhaps the main reason: incorporating a tribe as a land-owing group was simply not contemplated in the mid nineteenth-century, or at least, there is little if any evidence it was ever considered in the period ca. 1860-1880. The emphasis was towards the identification of individual rights to land, or if not individual rights, then that of family groups. A (hypothetical) parallel in England would be to incorporate the traditional field system of a village into a single incorporated village entity. This is the crux of the matter, because although the United Kingdom was among the first to legislate for the limited liability joint-stock company in the mid nineteenth century, such a model was not typically applied to land ownership. By then, the enclosure movement, most recently provided for by parliamentary legislation, had transformed communal village tenure into individual holdings in fee simple.

305. A further point to make, in concluding this discussion about the validity of the concept of *tribal incorporation*, is that the company form represents a commercial 'technology' produced by a 'modern' commercial or industrialising society attempting to find ways of mobilising capital for commercial/industrial enterprise. As such, as already pointed out, it is a structure or legal vehicle created by contract – or a number of contracts. It represents, to employ Sir Henry Maine's famous formula, a society that has moved from 'status to contract' – a 'modern' society consisting of large markets with any number of anonymous actors and investors. It is not a structure that reflects a 'traditional' society, including 'tribal' societies where commerce is typically conducted between people who know each other and according to customary patterns or unwritten norms. To employ another contemporary assessment, of the German professor, Ferdinand Toennies, in 1887 – the company best reflects the commercial modes of a 'society of individuals' rather than a traditional 'community'.[272] This is not to argue that the company or incorporated form could not be applied or adapted to a customary land-holding group; but to do so would have been applying the company quite a few steps removed from its conceptual origin and typical commercial uses. Thus, the 1894 Committee model was perhaps visionary; of course, in context, it seems to have been based, at least in part, on the visionary experiments of Rees, Wi Pere and co. with trusts and companies.

306. An additional point about incorporation is that fragmentation of ownership still occurs with each generation passing, in that there are an increasing number of owners, which reduces the share of each owner in the assets and income of the incorporation. Each passing generation also adds communication issues, especially with a far-flung membership not resident locally (which I understand is the case with most of the big Māori land incorporations today). The main advantage of incorporation is that it

272 Quoted in Hobsbawm, *The Age of Capital*, at 209.

enables the management of large asset bases with multiple shareholders; but the separation of this large and growing shareholder base from the management of the land and the land itself means this picture is a decidedly different one from customary tikanga (as at least one Treaty settlement deed has acknowledged).

307. As a postscript to this section: was the 1894 Committee model available in Taihape? The short answer is that incorporation was possible once the Act came into force. The next issue is whether the incorporation could then deal with third parties. Until 1894 the railway land restrictions prevented free dealing, and then the nationwide blanket prohibition on dealing in s 117 of the Native Land Court Act 1894 applied. These various provisions over the 1880s and early 1890s created a Crown monopoly on dealing.[273] However, the s 117 restrictions could be lifted on application under the Native Land Laws Amendment Act 1895, and various Awarua block owners obtained exemption in this way.[274] At that point, once an application was approved, all forms of alienation were possible under the Act and Regulations including sale, lease, mortgage, etcetera.[275]

308. Stirling has suggested that by the time the Crown-Māori partitioning occurred in 1896, there was 'nothing left worth to incorporate'.[276] I disagree. There was potentially almost 60,000 acres still available to incorporate, much of it in contiguous parcels, especially around Moawhango. Under the Committee provisions, these adjacent parcels could have been 're-collectivised', but this time as a tribal land incorporation at law. On one reading of the 1892/1895 letters, this is what Hiraka te Rango and others were seeking. On another reading, however, they were by 1895 actually seeking individual whānau allocations, which is something like what they achieved (as outlined in section above). That being the case, there was no need or desire to incorporate those whānau parcels after 1896; and, in fact, none were incorporated to my knowledge, even though they could have been.

309. Stirling and Subasic confirm that many applications for removal of restrictions on alienation were made, for example, in Awarua 2C, from the late 1890s; and many were granted, which enabled alienations, including mortgages, leases and sales.[277] The process

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273 See Stirling, #A43, at 339, map showing pre-emption boundaries imposed under the Native Land Alienation Restriction Act 1884 (part of Awarua block) and the North Island Main Trunk Railway Loan Application Act Amendment Act 1889 (the whole of Awarua block); the Crown also, in March 1889, issued a monopoly proclamation, prohibiting private dealings in the block, under the Government Land Purchase Act 1877; see also P. Cleaver, 'Taking of Māori Land for Public Works', Wai 2180, #A9, at 141-45 (Cleaver says the alienation restriction area was 'superseded' by the 1894 Act blanket prohibition).

274 For explanation see Boast, *Native Land Court Volume 2, 1888-1909*, at 33-35; examples of exemptions obtained are re Awarua 2C, no. 13E, on 8 March 1897 (*NZ Gazette*, 11 Mar 1897, at 669); re Awarua 2A, no. 2B, on 6 Nov. 1900 (*NZ Gazette*, Nov. 1900, at 2066); re Awarua 3B, no. 2B, no. 1, on 7 November 1904 (*NZ Gazette*, Nov. 1904, at 2696).

275 See discussion of Regulations above.

276 Cross-examination of Bruce Stirling and Evald Subasic (by Rachael Ennor), Hearing Transcript week 5, Wai 2180 #4.1.012, [at 342, PDF]

277 Bruce Stirling and Evald Subasic, Central Blocks Report, Wai 2180, #A8, at 116. An interesting feature of these further partitions and alienations is how many significantly sized blocks (over 500 acres) become owned by very few individuals, which indicates that all the advantages of title dealing, including the raising of finance, would now be available at the behest of individuals (subject of course to any alienation restrictions still in place). The title history of Awarua 2C block, for example, reflects a veritable hive of activity, with alienations of various kinds, including sale, leasing, mortgaging (see #A8, at 118-127). This level of activity, with a high number of market exchanges (supervised of course by the NLC) was only possible because of the title process, in the first instance, and the ability to partition down to closely-held subdivisions. The costs of getting to that point (surveys, Court fees, lawyers costs, and time) might have been considerable; but there was some corresponding economic advantage in the sheer number of land dealings that could now take place, that weren't available before. And that sheer number of dealings indicates a much greater economic return overall. To put the point simply: the economic gain to, say, a tribe of Māori lessors through a lease of customary land of say a single block of 10,000

for removing restrictions may have been cumbersome in some respects, as Stirling argues, but nevertheless, there were many applications on Taihape lands that were approved, while at least some were rejected. (See also the standard forms provided for applying to remove restrictions under the Act.)[278] A reasonable inference from this record of approvals and rejections is that real discretionary judgment was exercised over whether to remove restrictions, at least one reason being to protect Māori interests in retaining land.[279]

310. Lastly, there have been a number of critiques in various research reports in this inquiry on the lack of financial assistance for Māori land development. But what is interesting is that there is in fact considerable evidence that numbers of Mōkai Pātea land owners *were* able to secure finance – both from Government and the private sector especially once they obtained closely-held titles, and even prior to that stage. This finance was secured in some cases against land and in other cases against stock/moveable property. The clearest summary of mortgage lending (that is, against land) I have seen is provided by Armstrong. Although his section is headed 'The Lack of Government Financial Assistance', it seems apparent that numbers of MP land owners were able to secure mortgage finance.[280] And it is clear from material in other reports that Taihape Māori were able to obtain finance secured against stock or other items for farming development. The interest rates on these loans, moreover, do not appear high – 6% is mentioned for a private loan.[281]

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acres, with no security of tenure or possession provided to the tenant in state law, cannot be compared with the economic gain derived from ten 1000acre blocks under state-guaranteed title.

278 'Rules and Regulations of the Native Land Court', *NZ Gazette*, 7 Mar. 1895, no. 18, at 442-456, at at 450-451.

279 See Bruce Stirling, 'Nineteenth Century Overview', #A43, at 536-558; see *AJHR* 1905, G-4 **[SC-7]** (by mid-1904, 446 applications to release restrictions had been approved nationwide, covering 423,184 acres, while 111 applications had been rejected, covering 87,720 acres). The schedule of applications approved includes Awarua blocks as follows: Awarua 2C/13E, 50 acres (interest in), on 8 Mar 1897 (Horima Pairau); Awarua 1A/2, 2,653 acres, on 22 Apr 1898 (Utiku Potaka); Awarua 1A/2, 2,653 acres, on 8 Aug 1898 (Utiku Potaka) [this last seems like a double-up]; Awarua 2C/9, 948 acres, on 5 Jun 1899 (Puru Rora); Awarua 2C/10, 3,595 acres, on 5 Jun 1899 (Puru Rora); Awarua 2C/3A, 118 acres, on 20 May 1899 (Public Trustee for Paora Tamakorako); Awarua 2C/15, 1,953 acres, on 28 Oct 1899 (Hiraani te Hei); Awarua 2A/2B, 1,531 acres, on 6 Nov 1900 (Wiki te Ua and others); Awarua 2C/20, 892 acres, on 31 Jan 1902 (Erueti Arani); Awarua 2C/20, 892 acres, on 27 May 1903 (Erueti Arani). Stirling lists 10 applications that 'failed or were simply never dealt with' over this same period (see Stirling, #A43, at 537), however only the first two of these were listed by the *AJHR* in the 'Applications Refused' schedule, while 8 applications were in the 'Applications not yet dealt with' schedule. A cross-comparison with Stirling and Subasic, #A8 report, shows a few interesting apparent anomalies in this last schedule that would require further research, for example, Utiku Potaka applied to release restrictions on Awarua 4C9 in 1900, but by 1899, 4C9 was already partitioned into 6 subdivisions (see #A8, at 150), and in 1900 Utiku Potaka applied to release restrictions on Awarua 3B2B1, although that block was apparently not in existence until a partition of the parent block 3B2B in 1902 (see #A8, at 136).

280 Armstrong, 'Environmental Change in Taihape', #A45, at 30-38. And Armstrong footnotes that he did not locate any unsuccessful applications relating to Awarua lands (which suggests that whenever owners applied for finance they were successful).

281 See Armstrong, 'Environmental Change in Taihape', #A45, at 33.

Building a theoretical-empirical model no. 2: from the Native Land Laws to the structure of the 'Māori economy', ca. 1900?

> On the subject of the Native Land Court different theories are current. Some think that **the object of the Court should be to create a body of wealthy Native proprietors**, through whom the Government may influence the mass of the people. Others think the sooner all alike are brought to **the condition of day-labourers [a landless proletariat?]** the better. The Bill now submitted has not been framed upon any theory whatever …
>
> Sir Wm. Martin to the Hon. D. McLean, 29 July 1871[282]

Introduction and Key questions:

311. This quotation from Sir William Martin was canvassed in the opening paragraphs of the Context 1 section above. I suggested there that it is doubtful whether Martin's two scenarios exhausted all possibilities for Māori tenure and the Māori role in the economy. It is more probable that Martin was rhetorically describing two extremes of a debate taking place in the wider colonial society; debate on these terms is seldom seen in the actual parliamentary debates on the NLLs.

312. Nevertheless, the terms of this supposed public debate, described by Martin, indicate that the overarching question posed by this report was not irrelevant to how public and policy-makers were thinking when they stood back from the intricacies of the NLLs to consider their broader social or economic objections and indigenous cultural setting.

313. We might paraphrase Martin's underlying question as: 'How did policy makers envisage the Māori citizen?' This might then be broken down into such questions as: Were Māori to be bourgeois property-owners and farmers? Or were they to be labourers in a predominantly European economy? Were chiefs to become large landowners and lessors? Were Māori to remain separate rural communities or become incorporated as landowners and/or tenants in the Pākehā towns and cities? These are all different ways, I suggest, of approaching the key question of the shape of a 'Māori economy'.

314. In terms of the research which it has been possible to do for this report, I indicate a number of contexts which are relevant to answering this question. A more definitive answer would require extensive further research on contemporary public discourse and paradigms.

Contexts:

From the NLLs debates

315. In the early debates of the first decade of the NLLs there were few expressions of opinion by parliamentarians regarding the broader economic context of the NLLs. About the most direct example of this was William Fitzherbert, MP for the Hutt Valley, in a debate about the 1873 legislation.[283]

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282 *AJHR* 1871, A-02, at 7 **[SC-5, at 74]**.

283 FitzHerbert was not part of the Ministry at this period, but had been an important Colonial Treasurer in the Weld and Stafford ministries of the 1860s. He was an excellent debater and remained influential in the House as a critic of Government policy, including Vogel's public works policies; see David Hamer, 'Fitzherbert, William', *Dictionary of New Zealand Biography*, first published in 1990. Te Ara - the Encyclopedia of New Zealand, https://teara.govt.nz/en/biographies/1f11/fitzherbert-william (accessed 11 February 2019).

316. Fitzherbert supported the bill in the House, but he did not approve of it in its entirety.[284] He believed the Natives would become "an important part of the permanent population of the country". He did not believe "exceptional legislation" should long continue. The natives should have "sufficient land, and a margin"; but he thought that not less than 50 acres for every man, women and child was "too high a rate". He then stated:

> He strongly believed that the Natives would continue to be an important portion of our population; if so, **what an extraordinary thing it was that they should teach an important portion of the people of the country simply to depend upon the cultivation of the land!** He would say that it was as retrog[r]ade a practice and theory as was ever propounded in any country of the world. **Were they all to live simply by the land of New Zealand; was that to be their future?** If so, he did not know how they were going to bear the burdens that would be imposed on them: he was at a loss to know how they were to work up to those high ideas of what New Zealand should become if they were to be all sheepowners, flockowners, farmers, and agriculturists. Was that all New Zealand was destined to become? **If it was not, then they were leading a large portion of the people to look to a narrow mode of livelihood, whereas they ought to be taught, like their fellow-countrymen in Great Britain, to consider that that was not the only business of life,** but that there were many others in a civilized and advanced country. [emphasis added][285]

317. He further argued that:

> The Natives would be found quite equal to enter with the Europeans into the common pursuits of life, and to distinguish themselves in many callings other than those connected with the cultivation of the land or the following of herds of cattle or flocks of sheep.[286]

318. FitzHerbert's comments were not left unremarked on. Reader Gilson Wood, MP for Parnell, disagreed with him, stating:

> He thought that even the honorable member must admit that for some time, at any rate – whatever might be the ultimate future of the Natives, however excellent tradesmen, merchants, or speculators, they might turn out to be – they must mainly draw their living from the cultivation of the land.[287]

319. John Sheehan, MP for Rodney district, agreed with the provisions to set aside reserve lands for 'the various tribes', and then stated:

> There was no question that the vast bulk of the Native territory must pass eventually into the hands of the Europeans; there was no use trying to disguise that fact, and talk philanthropic nonsense, because the colonization of the North Island would not, and could not, be accomplished unless we became masters of the greater portion of the territory. The duty of the House, in the first place, was to set apart ample reserves for all purposes of occupation and cultivation by the

284 *NZPDs*, 25 Aug. 1873, at 611.

285 *NZPDs*, 25 Aug. 1873, at 612.

286 *NZPDs*, 25 Aug. 1873, at 612. He also opposed the exemption of native land from local taxation, especially when they owned about two-thirds of the North Island. This was a 'monstrous' doctrine, although it could be applied for a set period of say 5 years and then be reconsidered. (see at 612-613)

287 *NZPDs*, 25 Aug. 1873, at 615.

> Natives inhabitants [but otherwise they should not impose unnecessary restrictions on the remainder].[288]

320. As noted, this type of wider angle 'political-economic' commentary is often not present in the early debates on native land legislation. British policy-makers and parliamentarians in New Zealand tended simply to characterise the Māori need for land as one of 'occupation and cultivation'; a theme that has been often discussed in Tribunal historiography, usually in the context of what was a 'sufficiency' for present and future needs. (To some extent, this was also a debate that extended from the time of the instructions to Hobson regarding a treaty with New Zealand chiefs). In most of this European discussion, the notion that Māori might want to use land for commercial ends was not generally prominent (if it was discussed at all). At the same time, as William Martin's statement suggests, there were other models (or debates) available that stressed the place of chiefs as landholders. Martin of course did not mention chiefs or rangatira as such, using the phrase 'a body of wealthy Native proprietors' through whom the 'mass of the [native] people' might be governed. However, he almost certainly had rangatira in mind, envisaging them as akin to an English gentry class who would have government-recognised authority in their tribal areas.

321. FitzHerbert and Wood referred to another aspect, less often commented on in the contemporary debates about land – that is, the place of Māori in the wider economy as 'tradesmen, merchants, or speculators' (Wood), that is to say, *not* 'sheepowners, flockowners, farmers, and agriculturists' (FitzHerbert).

322. FitzHerbert raised a real issue, and one that cannot be explained away as mere self-interested rhetoric to support the idea of a limited reserve of Māori land. The reason this cannot be just dismissed is that FitzHerbert was pointing up what in fact was the structure of the wider economy at the time.

The Structure of the Settler Economy

323. FitzHerbert's question – "were they all [that is, the inhabitants of the country as a whole] to live simply by the land of New Zealand?" – already had an answer at the time, being that a large percentage of the settler population was *already* not employed in agricultural occupations.

324. As Gary Hawke's invaluable analysis shows, farming employed only about a third of the working population after 1870, and by the 1920s this had dropped away to below 25%. Meanwhile, the 1871 census showed those in trade and services constituted about 25% of the workforce; by the 1920s, this was over 35%. In 1871, about 5% of the workforce was in manufacturing; this had risen to about 15% by 1900. The other sectors of the workforce, all between about 5 and 10%, were building and construction, transport and

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288 *NZPDs*, 25 Aug. 1873, at 616-17. Sheehan was involved in the Hawkes' Bay Repudiation Movement of this period, working with Karaitiana Takamoana and others. His biographer outlines his various positionings on the Māori land issue, including support of Crown pre-emption to cut out 'middlemen and speculators'; and states: 'In common with other radicals, Sheehan saw the question of land ownership as crucial to the development of a new society in the colonies. Like his mentor, Grey, he was a bitter opponent of landlordism, and advocated the purchase of Māori land at a rate sufficient to give moderate amounts of land to men of moderate means; this would avoid class warfare and, ultimately, through numbers and taxation, break the hold of big pastoral capital in Hawke's Bay and the South Island'; see D. B. Waterson. 'Sheehan, John', *Dictionary of New Zealand Biography*, first published in 1993. Te Ara - the Encyclopedia of New Zealand, https://teara.govt.nz/en/biographies/2s19/sheehan-john (accessed 11 February 2019).

'handicraft'. Mining was almost 10% in 1870; by the 1920s, it was about 2%.[289] (See graphic below.)

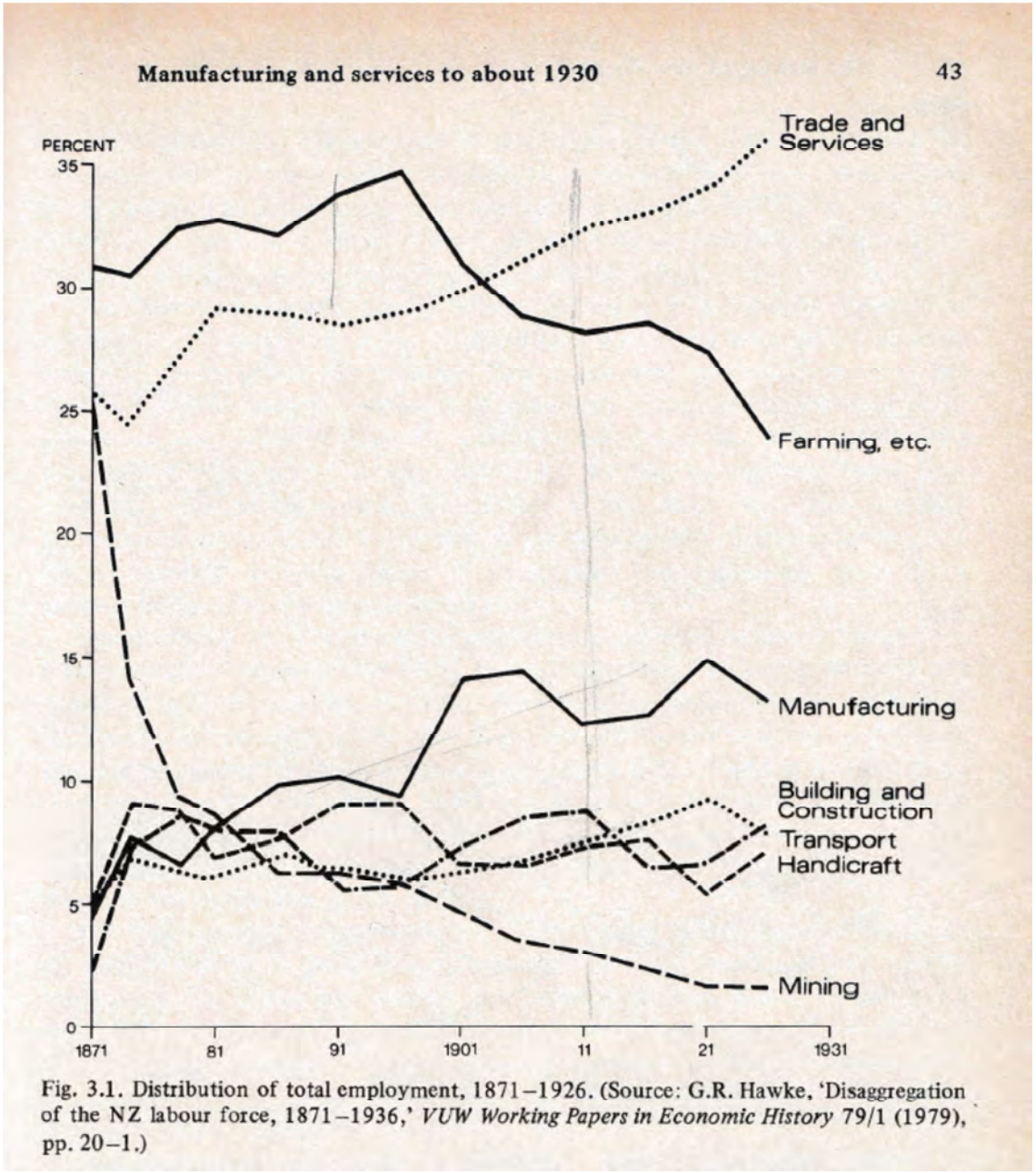

Fig. 3.1. Distribution of total employment, 1871–1926. (Source: G.R. Hawke, 'Disaggregation of the NZ labour force, 1871–1936,' *VUW Working Papers in Economic History* 79/1 (1979), pp. 20–1.)

Figure 2. Gary Hawke, The Making of New Zealand, p. 43.

325. This means that agriculture – which includes in these percentages wool, dairy, forestry and fishing combined – was never more than 35% of the workforce, and at most times after 1870, considerably less than this. It is interesting to compare these percentages with the United Kingdom and Europe. By 1914, only 8 percent of the British population was employed in agriculture; this contrasted with the still more rural

289 Hawke, *Making of New Zealand*, at 43.

Germany (27%) and France (38%). In terms of residence, by this time only a quarter of Britons and one-eighth of the English lived in rural areas and small towns.[290]

326. How did Māori fit into this picture? It is reasonable to ask the question as the onset of colonial settlement and the growth of a colonial economy increasingly linked to a global (or at least, British-world) economy meant that the division and specialisation of labour within the economy continued to increase or diversify. This is, perhaps, another way in which the Tribunal historiography has not been alive to context as it has been focussed on a land or agriculture paradigm, in which Māori prospects have been measured by the extent to which they retained land – both for customary purposes but more especially agricultural production in the wider economy. How realistic is that paradigm in light of the wider economic trends?

327. It would be simply inaccurate, of course, to argue for a dichotomous picture here, viz., that there was a 'land economy' separate from a 'services, trade and manufacturing economy'. In the British context, as in others, land was a principal basis on which credit could be extended for other things, including the new commercial and manufacturing economies of the nineteenth century. (In this period, in the United Kingdom, there was a great increase in the absolute amount of wealth of all kinds (landed and personal property), but also a great shift in relative terms from landed wealth to wealth represented in shares and bonds and other credit-based investment.[291])

328. But, at some point, the link between land and other sectors of the economy runs out; trades of various kinds will service the agricultural sector but the bigger demand will stem from the growth of towns and cities that require carpenters, gas-fitters, ironmongers, lawyers, accountants, and financiers, but also the many specialties into which manufacturing and industry have evolved. Adam Smith spoke of this increasing division of labour in an expanding industrial economy.[292] The New Institutional Economics School has taken these insights further by studying the expanding role of services and 'transaction costs' in the economy, as opposed to mere production (see Context 4 section above). Douglass North outlined the influential stage theory of (economic) history, beginning with village society and progressing through the development of regional trade and increasing division of labour, with 'a substantial increase in the proportion of the labor force engaged in manufacturing and services', until 'the last stage':

> … the one we observe in modern Western societies, specialization has increased, agriculture is a small percentage of the labour force, and gigantic markets that are national and international characterize economies. Economies of scale imply large-scale organization, not only in manufacturing but also in agriculture. Everyone lives by undertaking a specialized function and relying on the vast network of interconnected parts to provide the necessary multitude of goods and services. The occupational distribution of the labour force shifts gradually from dominance

290 Harris, *Private Lives, Public Spirit*, at 43.

291 See Harris, *Private Lives, Public Spirit*, at 97-98, 103-105; Harris, along with other historians, cannot be certain about whether wealth became more distributed through the population at this period, as there are indications both ways. Land itself was transformed into another business asset during this period, rather than being the basis of social and political status and influence (though that older view held on).

292 See *An Inquiry Into the Nature and Causes of the Wealth of Nations* (1776)

> by manufacturing to dominance, eventually, by what are characterized as services. It is an overwhelmingly urban society.[293]

329. Another angle on this 'structure of the economy' question is one highlighted by Daunton in his exploration of tax systems, land tenure models and the labour market in Britain's empire, including the white settler colonies. This approaches the labour market question from the point of view of the nature of tenure, in a way that is helpful for thinking about how Māori land holdings might have been conceived in this mid-to-late nineteenth century period. Daunton explains contemporary thinking on different models:

> The structure of land ownership also connected with the labour market. A concentrated pattern of landownership with large tenant farmers entailed a class of landless labourers with implications for welfare provision to cover seasonal unemployment. By contrast, small owner-occupied farms drew on family labour, sometimes reallocating surplus members between each other as part of the life-cycle. Families might opt to use the farm to support their members rather than to maximize output for the market; even if they did adopt a highly commercial attitude, the welfare implications were different, for the farm provided an asset in old age. There were advantages and disadvantages of each system. Landless labourers might become a threat to social stability, or they might provide a flexible source of labour for capitalist farming. Small family farms might offer stability, but their owners might lack the necessary capital and knowledge to develop colonial agriculture, and especially export crops.[294]

330. Daunton's two models – the small family farm and the large capitalist farm – thus had their respective implications for a labour force and for agricultural productivity. The family farm model distributed property ownership widely, but at the cost of productivity. The large agricultural farm would be more efficient or productive (so the argument runs) and rely on a landless and mobile labour force for 'seasonal' employment. This is not perhaps too dissimilar from what William Martin had in mind – a Māori 'landed gentry' and/or a Māori labour force. Arguably by the time of 1880-90s, Liberal government policy-makers thought that the small family farm model would suit the landholdings remaining in Māori ownership; although this coincidence of Māori land-holdings size and the family-farm model was perhaps just that – coincidence.

331. For our purposes, a very simple and undeniable proposition would be that the new colonial economies produced many more economic opportunities than those presented by agricultural production. This is what FitzHerbert was alluding to in 1873 - an important strand of thinking that links to the actual structure of the Pākehā settler economy.

332. My impression from research to date is that Māori were usually envisaged by Pākehā policy-makers in the nineteenth century as an agricultural and rural population, but more research on government and public discourse might show a more complex picture. It could just be that the focus of nineteenth century New Zealand and Treaty historiography on land and settlement issues, and on farming and rural communities, has conditioned and somewhat distorted our understanding of the contemporary reality

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293 North, *Institutional Change*, at 119-20 **[SC-21, at 371-72]**; for the growth of cities and urbanisation generally see also Hobsbawm, *The Age of Capital*, ch. 12; and Lynn Hollen Lees, 'World urbanisation, 1750 to the present', in the *Cambridge World History*, vol. 7, eds., J. R. McNeill and Kenneth Pomeranz (Cambridge University Press, May 2015 (online)).

294 Daunton, *State and Market*, at 131.

that New Zealand by 1870 was already an economy where the majority of people did not earn their livings from agricultural land ownership or farm work.

Description of the Māori economy, circa 1900:

333. Māori were always engaged in other economic activity from first contact with Europeans, including flax trading – which is extractive rather than a 'farming' activity. But 'farming' – that is, agriculture of some sort – seems the main paradigm still against which to measure how declining land ownership was prejudicial to Māori. Vincent O'Malley and Judith Binney state in *Tangata Whenua*, chapter 11:

> According to a Native Department analysis in 1920, of the 4.8 million acres remaining in Māori hands that year, more than three million acres was leased; another 750,000 acres was 'unfit for settlement'. That left some 907,000 acres (19 acres per person) suitable for farming by the Māori owners – considerably less than the 50 acres (previously 100 acres) per person that was supposed to be used as a guideline to ensure Māori retained sufficient land 'for their maintenance'.[295]

334. With the focus on 'farming', this statement seems to forget that rents from 3 million leased acres would have contributed a sizeable amount of 'maintenance' for Māori communities. The same chapter also basically acknowledges that the 'Māori economy' was already – even if still mostly land-based – substantially a labour or proletarian economy by the 'late nineteenth century':

> The Māori rural economy of the late nineteenth century depended on family labour. Men and women often worked together – in the shearing sheds or gathering food. The children helped out, and were taken from school for lengthy periods as their families shifted around the seasonal jobs of fencing, shearing, ditch-digging, road-making or gum-collecting. Small dairy farms (which would be increasingly encouraged in the early twentieth century), with herds of fifteen and twenty cows, were also family enterprises in which the children's help was needed.[296]

335. This statement suggests that the Māori economy was substantially based on wage-labour by the end of the 19th century – covering farm-based work, infrastructure development and extractive industries. Apart from the reference to smaller scale dairy-farms, the livings were not derived from 'farming', in the sense of owner-operators living directly from wool, sheep, beef or dairy, or crop production There was in addition a substantial leasehold income (based on the 3 million acres figure above.)

336. The point here is that regardless of how much land Māori owned, a mixed economy developed anyway, as indeed it did from the mid-19th century (or even earlier), comprising owner-operated farms, leasehold land, and wage-labour. And as towns and cities grew, the economic opportunities they offered to Māori by way of wage-labour – both skilled and unskilled – also grew. (It should be pointed out that this is a general statement for New Zealand as a whole. In Taihape, because of its isolation and small population, and because Crown purchasing was late relative to other areas, most Taihape Māori could still live off their customary land until at least 1900; by the 1890s it

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295 Judith Binney and Vincent O'Malley, 'The Quest for Survival, 1890-1920', in *Tangata Whenua: A History* (Wellington: Bridget Williams Books, 2015), at 280-307, at 294.

296 Binney and O'Malley, 'The Quest for Survival, 1890-1920', at 298.

seems many livelihoods were in some way connected to the 'new economies' of wool or timber; but there were doubtless still substantial customary uses of land.)

337. To put this another way, and as one response to the research question posed by this report, the contention here is that at least some significant percentage of Māori would have become 'proletarian' regardless of how much land was retained – that is, they would have earned their living from extractive industries, 'seasonal work' in the rural economy, and, as the country's general urbanisation increased, from wage labour in the towns. These processes of economic or employment diversification were already happening when Māori still held significant land areas.

338. Some good evidence of Māori views about their economic prospects and work training comes from the evidence of the Te Aute and Otaki-Porirua education trust commissions of 1905-06.[297] This evidence shows that at that time some Māori at least wanted trades-training (or 'industrial' training) such as carpentry, saddlery, blacksmithing, and the like. Such calls for trades-training would seem to reflect a view that a purely agricultural or land-based economy was not realistic or even desirable for Māori. In engaging with the new Pākehā economy (or economies) other skill-sets or economic opportunities were needed besides farming. The evidence raises fascinating issues about what sort of life such trades-training would produce for the trainees – as it usually occurred in the Pākehā settlements and (according to the views of some witnesses) was not necessarily an economic need of the rural Māori villages. So once the trainees earned their apprenticeships, would they remain in the Pākehā town and service those economies, or would they return to their villages where some of those newly-acquired skills may not have been needed?

339. There were also calls for specific or advanced agricultural training – across a range of agricultural enterprises or stock: from beef to poultry, from pigs to sheep (see, for example, the evidence of Paratene Ngata – Te Aute Commission). Again, this seems to have been a new emphasis from the early decades of Te Aute in which Māori parents were simply wanting their children to get a higher education, or grammar-school education, to enable them to enter the professions or obtain clerical work. This 'holy grail' of educational and vocational prospects, of which Ngata, Buck and co. were the exemplars, seems to have been, if not substituted by, then certainly conjoined to, a concern about how to advance rural Māori economic development.

340. A summary of this educational trust commission evidence from 1905-06 would be that it reflects varied and multiple views (both the evidence of Māori witnesses and of Pākehā witnesses) of the appropriate or best functions of Māori education and vocational training. This can definitely be understood as a reflection of the diversification of 'the Māori economy', including the labouring or 'proletariat' sectors of the economy, but also the agricultural economy.

341. Of course, a land-based or agricultural economy remained important for Māori communities, even as the opportunities of expanding urbanisation grew. In 1940, Horace Belshaw, Economist at Auckland University, thought that remaining Māori land, if developed, could sustain about 25% of the Māori population (or 20,000 people). In fact, Board of Native Affairs figures of around this time showed that 1774 Māori

297 'Te Aute and Wanganui School Trusts', *AJHR* 1906, II, G-05; 'Porirua, Otaki, Waikato, Kaikokirikiri, and Motueka School Trusts', *AJHR* 1905, I, G-05.

farming operations were currently 'supporting' considerably over 21,600 people.[298] These figures indicate that Māori were still more land-based than Pākehā, as. Miles Fairburn gives figures that in the 1920s only 14% of the adult voting population were farmers (while 60% of the voting population comprised manual workers).[299]

Table: 'Structure of the Māori Economy'

342. The table below illustrates what is, in effect, a key argument of this section of report: that land ownership *per se* cannot be the sole measure (even the most important measure) of Māori economic success. This is because 'land' does not equal 'livelihood' in the same way that having capital *per se* does not equal income. A number of 'success factors' must be operating before land can produce income. The table indicates, *inter alia*, that of all occupations, commercial farming was the most risky or difficult, because success depended on so many institutional, infrastructural, and personal know-how/managerial factors. (Of course, this is premised on economic values of land only – not the perspective of broader customary relationships and interests.)

343. The table also shows the various options open to Māori that were not proletariat/labouring/working-class occupations. Where Māori retained and lived off the produce or earnings of land – even in part – obviously they were not proletarian. But the economic options were wider than this – certainly over time – in particular, the professions and skilled trades.

Land-Use and/or Work Type	**Form of Livelihood/Income**	**'Success Factors'** (including 'institutional' or 'enabling' factors)
Subsistence farming (cropping, stock, dairy, and customary uses – birding, eeling, etc.)	*Food* (with secondary bartering/exchange economy)	• Secure real property rights[300] • Sufficient (irregular) work • Weather/climatic factors
Commercial farming (cropping, wool, stock, dairy)	*Profit* from commercial operations	• Secure real property rights (including as to title, survey, and enforcement/Courts)[301] • Secure personal property rights (i.e., contractual enforcement re suppliers/purchasers; court system) • Access to credit • Farming 'know-how'

298 Cited by the Turanga Tribunal, *Turanga Tangata, Turanga Whenua*, Wai 814, at 522.

299 Miles Fairburn, 'The Farmers Take Over', in Keith Sinclair, ed., *The Oxford Illustrated History of New Zealand*, second ed. (Auckland: Oxford University Press, 1996), at 204. These figures include the 'adult dependents' of those workers/farmers, which I take to mean (married) women and perhaps older parents.

300 Although subsistence farming could easily enough occur on common/customary lands, as long as the group or local custom and force of arms could support/protect such agriculture. With secure, state-granted, titles, there would, however, be greater incentive to invest in the land and infrastructure (drainage, fertiliser, irrigation, and buildings).

301 Commercial farming, because of the greater capital investment required (including farm buildings and infrastructure), requires a secure property-rights system.

		• Managerial/business skills • Infrastructure (roading and rail to take produce to markets; communications – the telegraph/telephone, to negotiate longer-distance contracts, communicate re delivery etc) • Technology (e.g., refrigeration, shipping, to take produce to markets) • Access to labour • Weather/climatic factors
Leasing of land	*Rents*	• Secure real property rights (as above for commercial farming) • Secure personal property rights/contractual enforcement (as for commercial farming) • Ability of tenant to pay rents (dependent on many of factors above; assuming agricultural land lease).
Professional occupations (lawyers, accountants, clerks, bankers, etc)	*Self-employed/business income (or wages)*	• Secure personal property rights/contractual enforcement • Higher-education system/Universities
Skilled Trades (carpenters, bricklayers, masons, painters, plumbers, smiths, butchers, bakers)	*Self-employed/business income (or wages)*	• Secure personal property rights/contractual enforcement
Other Business types (shops and hotels, merchant trades, mills, manufacturing businesses, transport (ferries, canoes, pack-horses, etc))	*Self-employed/business income*	• Secure personal property rights/contractual enforcement
Proletarian workers (wage labour generally, often unskilled)[302]		
Farm workers (labourers, ploughmen, reapers, shepherds, hut-keepers, sheep-washers,	*Wages (and sometimes board)*	• Fair employment laws

[302] Examples of wage labourers and artisans/skilled trades (as above) from *New Zealand Official Yearbook, 1895*, at 164-66.

shearers)		
Domestics/ Servants (grooms, gardeners, cooks, housemaids, nursemaids, needlewomen)	*Wages (and usually board)*	• Fair employment laws
Factory or 'urban' workers (general labourers, stonebreakers, seamen, miners, engine-drivers, tailors, dressmakers, milliners, storekeepers, storemen)	*Wages*	• Fair employment laws
Government workers (roads and railway labourers, ditch-diggers, military service)	*Wages*	• Fair employment laws

344. One last, Taihape-specific comment on agriculture is that it had diversified and become more viable by the mid-to-late 1890s, in large part due to the infrastructure of roading, rail and refrigeration. A phenomenon for which there can be no certain explanation and was probably a mix of different factors was the dramatic falling away of sheep numbers on Awarua and associated blocks from the late-1890s. Factors probably included debt from the NLC process as well as borrowing for farming and living expenses, and the economic depression of the 1880s-90s that drove down prices obtainable for produce (including wool). Another factor, which is a noticeable trend from the early 1900s, is that many Taihape Māori decided to lease their land rather than work it themselves.

345. Another possible factor, although the evidence is sketchy, was a shift by some Taihape whānau to dairy once the whānau holdings in Awarua and Motukawa were obtained. Cleaver hints at this possibility in his economic development report.[303] If Māori were quick to adopt sheep farming because it was the most economically productive or viable land-based economy from the 1860s, then it makes sense that dairy would have been adopted once that became a viable land use on smaller holdings from the 1890s. This statement, by itself, is quite conjectural. However, as Cleaver outlines, a number of dairy factories or creameries developed in the first decade of the twentieth century in Taihape district. About 1900, a butter making factory was established at Rata. In 1902 local farmers formed a company to acquire the Rata factory and creameries. From 1904, once the railway reached there, creameries were developed at Taihape and Mangaweka.[304] Cleaver says that "In the inquiry district, dairying has been restricted to areas of relatively flat country, primarily in the vicinity of Rata, Ohingaiti, and Taihape".[305] Māori land ownership in those areas, in reasonable proximity to the

303 Cleaver, 'Māori and Economic Development', Wai 2180, #A48, at 120, 166-67, 195, 240. Cleaver quotes the Māori census enumerator for Rangitikei County in 1911, who stated that Māori across the county had 'gone in largely for dairying' (at 167).

304 Ibid., at 158-59.

305 Ibid., at 157 (and see landuse map, at 234).

processing plants, would have enabled dairying.[306] Goldsmith's figures for a 'typical' Taranaki dairy farm in 1899 are a unit of 100 acres with 30 cows. Even allowing for regional variations in land suitability and climate, this shows that land size needed for an economic dairy operation was not great.[307]

306 See Māori land ownership map in 1910, Walzl report, #A46, at 626-27 **[SC-23, at 411-12]**.

307 Goldsmith, *A Political History of Tax in New Zealand*, at 97.

CONCLUSION

The critical importance of (British and global) contexts

346. This piece of research has been an analysis of New Zealand texts in their broader intellectual and political contexts.

347. As such, it has operated at several levels: first, an analysis of the NZ primary texts (the texts of the NLLs, parliamentary debates and other official and semi-official memoranda); second, an engagement with Tribunal historiography; third, an engagement with New Zealand historiography generally; fourthly, and perhaps most significantly, an engagement with British empire and global historiography. It has sought to relate New Zealand debates on and transformations of the general economy and the Māori economy, including land tenure, to broader pressures and ideas in politics, economics and society (remembering that in the Victorian era these arenas were seen more holistically and were not yet divided up into different academic institutions and disciplines.[308]) As Gary Hawke has pointed out in previous evidence to the Waitangi Tribunal, and as the literature surveyed in this report has suggested (including that of C. A. Bayly and Eric Hobsbawm), we cannot isolate the New Zealand or Māori economy from global economic trends and pressures. I would add, that we cannot isolate the NZ or Māori economy from global economic and political *ideas* – ideas that helped to shape and form economic actors and economies.

348. A real risk of considering the New Zealand situation in isolation is that broader ideological, economic and institutional changes occurring in the wider world are not properly considered or registered as factors in or, at the least, background to, the New Zealand reforms. The rise of individual property in land and the loss of 'the commons' or more flexible communal tenures was a phenomenon throughout the British empire and globally. Associated with these 'institutional' or legal changes were the expansion of markets and trade both domestically and internationally, and the growth of industrial society and the shift of rural labouring populations to emergent towns and cities. These were changes that occurred across the world in the nineteenth century and twentieth centuries, in both the West and non-West.

349. If the New Zealand tenure reforms are isolated from the broader context, there is a greater risk of making insular judgments about Crown policy. This is not (necessarily) to argue that previous findings should be modified or set aside, as the significance of te Tiriti o Waitangi, its texts and principles, should be grounds-enough for judging Crown policies and actions. Nevertheless, having a greater appreciation of the global contexts delivers a more realistic picture of the forces in play in nineteenth New Zealand – forces that conditioned, if they did not exactly determine, Crown and settler-government policy settings. At a fundamental level, these greater British and global contexts need better incorporation into not just Tribunal historiography but also New Zealand historiography generally in order to better comprehend what historical protagonists *were thinking*, and therefore what the real meanings of their aims and objectives were. This report is an exploratory attempt in that direction.

308 For example, one of the older economics schools, the London School of Economics, was not founded until 1895.

350. To attempt an answer to the research questions posed at the outset: what were the real-world concerns of the NLLs; and did Crown policy as expressed in the NLLs intend to produce a 'landless brown proletariat', or was that its probable result?

The real-world concerns of the NLLs: individual and collective agency (and the limitations of legal mechanisms)

351. The NLLs were a response to real-world concerns at many points. The basic intent of the NLLs was to 'assimilate' (make similar) Māori customary property to English tenure – that is, make it fixed and certain and able to be transacted in a land market. The ultimate objective was to facilitate a peaceful or orderly process of colonisation in conditions where Crown pre-emptive purchasing had become problematic for various reasons – including leading to intra-tribal wars (Pakiaha, for example) and native-colonial wars (Waitara).

352. The NLLs attempted to individualise tribal title, but not without regard to the customary or communal contexts: the idea of trust (or representative capacity) was recognised, including in 1867 when other beneficial interests could be 'registered' in Court'; when that did not resolve matters, the 1873 Act stipulated for the listing of all ownership interests. In 1894, the legislature provided for an incorporated structure for Māori land.

353. I argue that, whether it was the English law mechanisms of trust or incorporation, or a tikanga context, similar issues of agency and accountability would arise, including the question of 'how do chiefs represent or act for the group?' and 'how do chiefs remain accountable to the group?'. The context of European settlement meant that tribal tenure had to be recognised in some way by the Crown/Kāwanatanga legal system. Tribal tenures would (and did) inevitably raise issues of agency/representation of the group, and the authority of the group over the individual, including the authority of a high-ranking chief to control land sale (Waitara is, perhaps, a paradigmatic case). Neither was this simply a case of group-vs-individual or chief-vs-'lesser chiefs'; it was as much a test of the nature of the group, the 'boundaries' or 'intersections' of the group vis-à-vis constituent or related hapū (or whanau) inclined to act apart from the group (howsoever defined).

354. Legal mechanisms of the trust and the incorporation could only inadequately seek to represent customary or tikanga relationships – both *intra*-group and *inter*-group. Moreover, to automatically impose trust obligations on legal grantees (often rangatira in the early decades) or automatically 'incorporate' land-owning groups through legislative fiat was not obvious or sound policy. In the case of incorporations, a settler-dominated parliament of the 1860s-80s period was simply not favourable to – if it was even thinking about – the concept of incorporating tribes. The refusal to legislatively empower the Rees-Pere company schemes (that, it should be recalled, were for Pākehā settlers as well) in the 1880s is one indicator only that incorporated forms of business – especially for groups, and especially for customary groups – were not seen as the thing to do. The British political and cultural contexts of joint stock company 'bubbles' and the issues of agency by a few managers from often distant (and relatively powerless) shareholders are critical to understanding why providing the 'committee' model for Māori land, even in 1894, was a profoundly 'progressive' or far-sighted step.

355. Nevertheless, even land incorporations did not (nor have not) solved all issues of collective agency in the ownership of land. Agency mechanisms – whether in law or custom – inevitably have their limitations.

A 'landless brown proletariat'?: intentionality and the critical context of economic (and cultural) change and market diversification

356. Regarding the question of intentionality, in light of what has been reconstructed here through a fresh reading of the primary texts, it is clearly possible to say that the NLLs themselves did not *intend* to remove Māori from land ownership or, in particular, produce a 'landless brown proletariat'. What they were intending or *aiming at* was fairly basic (in theory, though not often in practise): – to convert the fluid and indeterminate forms of native tenure (as it was perceived by Europeans) into fixed and certain tenure to enable free market dealing and avoid more wars. Particular mechanisms can be pointed to, including the provisions for 'sufficient' reserves (however that is interpreted and whether or not it was implemented effectively), and the Trust Commissioner, as well as many statements of Government agents and others.

357. But more critically than particular mechanisms, the amendments to the central title provisions of the NLLs can be understood as a response to actual issues encountered with the laws in practise – including the important shift from the 'ten owner' rule to the 'democratic' principle of all owners being listed – which I have argued was at least partly driven by the rationale to protect those who had been 'outside the title' under the ten owner regime. There is a real argument that the 1873 Memorial regime made purchase or lease from Māori more difficult, even for the simple reason that 40 or 100 owners now had to be contracted with rather than ten. On this reasoning, the Tūranga Tribunal argument (reiterated by later Tribunals) that Crown or settler legislators 'foresaw the risk' of Māori landlessness 'but took no real steps to guard against it' is highly contestable if not demonstrably incorrect.[309]

358. The question as to 'probable result' is more difficult, as there is often a gap in human society and action between intentions and actions. Ultimately, however, it is difficult to say Māori becoming landless was a probable result of the NLLs (even though some like Sheehan spoke rhetorically about such an outcome). The NLLs themselves, and Government/Crown practise, can be seen as enabling and facilitating the transfer of considerable amounts of landed estate into the hands of others, but to argue that a certain percentage of alienation was *probable* is in the realms of pure speculation – whether that figure was 50% or 95% or some other figure. A helpful analogy – also from the mid-nineteenth century – is the creation of 'a legal framework regulating the formation, existence and winding-up of companies, and rendering joint-stock property secure'. Concerning this, James Taylor argues that:

> It is an irony that the emergence of the limited company as the dominant, and in the twentieth century, practically the sole, form of business organisation, **was an unintentional result of this policy**.[310] [emphasis added]

359. Creation of the statutory framework for company incorporation was not the same thing as the eventual, ultimate uptake of this business model. Similarly, the NLLs were mechanisms of title conversion; they were not instruments to effect a certain level of

309 *Tūranga Tangata, Tūranga Whenua* report, Wai 814, at 532.

310 Taylor, *Creating Capitalism*, at 210.

alienation. Māori agency in that alienation process was obviously an important factor. On this reasoning, too, the Tūranga Tribunal argument that the 'designers' of the system of the NLLs were 'reckless as to whether [Māori landlessness] would be its outcome' can be seen as flawed.[311] No one could predict with any level of certainty – as if the NLLs constituted some 'formula' – what the ultimate 'outcome' in terms of Māori land holdings would be.

360. And regarding the amorphous concept of Crown or settler parliament 'motives': although some statements that look like 'smoking-guns' can be extracted from the record, there are other statements that go to the opposite position – a desire to preserve enough land in Māori ownership, even from self-interested 'motives' that the state and wider population did not want the spectre of a wandering landless class.

361. The question of intention – or perhaps ultimate intention, or motivation – is not one that can be answered with any certainty, in part because of the multiplicity of actors and agendas in play. Sir William Martin's statement from 1871 perhaps captures the spectrum of these:

> On the subject of the Native Land Court different theories are current. Some think that **the object of the Court should be to create a body of wealthy Native proprietors**, through whom the Government may influence the mass of the people. Others think the sooner all alike are brought to **the condition of day-labourers** the better. The Bill now submitted has not been framed upon any theory whatever …[312]

362. In many respects, however, I disagree with Sir William Martin's last statement that the framing of his draft Bill – and any piece of legislation or political text – was not a matter of 'theory'. To the contrary, this report contains an underlying argument that, in approaching an understanding of past political texts and actions, it is the ideas or 'theory' embodied in them that are the essence of their meaning. And, whether we agree with those ideas, they can be understood as constitutive of the paradigms, discourses and institutional settings within which people operated.

363. In addition, I have explored the notion that I have called 'the structure of the Māori economy'. In particular, I question the focus on land and agriculture in the Tribunal literature, as it is clear that the Pākehā economy itself was not an agricultural economy, even by 1870 (at least with respect to a majority of the workforce), and some contemporary thinkers, especially from the early twentieth century (see the school land commissions) were asking whether – aside from lands for residence – the Māori economic future was to be agriculture-based or more integrated with a settler economy that was made up of many different trades and services, as well as manufacturing and labouring of various kinds.

364. Finally, if Māori were, to some extent at least, adopting and adapting Western ideas and social forms, including the concept of individual private property – or at least, the mechanism of title or Crown Grant, as well as the almost brand new 'technology' of the limited liability corporation – then Government policy makers and officials were bending Western ideas and institutions to suit a tribal context. The adaption went both ways. Although the greater flow was, by the end of the nineteenth century, in the

311 *Tūranga Tangata, Tūranga Whenua* report, Wai 814, at 532.

312 *AJHR* 1871, A-02, at 7 **[SC-5, at 71]**.

direction of the bourgeois property-owning individual and 'citizen' of a modern state, there were significant exceptions in the use of trust concepts and the corporate model – the latter in places like the East Coast but certainly not confined to there. This, it must be argued, was true of the greater mass of British colonial subjects – seeking to find their place within the state through property ownership, and its concomitants, the franchise and representative government – as well as it was true of many, although by no means all, Māori individuals, whānau and hapū/iwi. Despite these individualising or fragmenting pressures, the collective principle maintained its existence, if not its vibrancy, in Māori or tribal society, only to find new expression in more recent times.

Appendix 1: Other excerpts from the economic literature

365. Avner Greif's entry in *The New Palgrave Dictionary of Economics* on Douglass North, Nobel laureate and one of the leading exponents of the NIE, explains further some of the key rationale of this 'school' of economic history:

> Good institutions promote growth by bringing private return from economic activities closer to their social return. Economic growth transpires in response to low-cost enforcement of contracts when property rights are secured and when governments pursue growth-oriented policies rather than prey on the wealth of their subjects. Institutions that achieve these goals encourage technological innovations, foster capital accumulation, and increase labour input. Growth follows as technology improves, capital accumulates, and specialization occurs.
>
> Institutions in the Northian framework consist of rules and regulations which, together with their enforcement mechanisms, determine the incentives faced by economic agents.
>
> [North's book *The Rise of the Western World: a New Economic History* (1973)] argues that patterns of growth and stagnation in Europe reflect whether property rights were assigned efficiently and secured. The feudal system ended in economic stagnation and crises because of the misallocation of property rights to land. Peasants had few incentives to increase land productivity because they did not own it. Later, the Dutch Republic and England outpaced Spain and France because their property right's assignments were better designed to close the gap between private and social rates of return from economic activities. England's rising technological superiority, for example, reflected its effective system of patenting. In the long run, other European economies adopted similarly efficient systems of property rights.[313]

366. In a far more recent work (2005), Douglass North argued that '[u]nderstanding the process of economic change would enable us to account for the diverse performance of economies, past and present', and help improve the performance of economies in the present and future, thus reducing poverty and increasing human well-being.[314]

367. He explained that his book was 'an extension … of the new institutional economics'; that he has 'placed institutions at the center of understanding economies because they are the incentive structure of economies'.[315]

368. North argued that 'well-developed property rights that encourage productivity will increase market efficiency. The evolving structure of political and economic markets is the key to explaining performance'; and that 'the key to understanding the process of change is the intentionality of the players enacting institutional change and their comprehension of the issues'.[316]

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313 Avner Greif, 'North, Douglass Cecil', in *The New Palgrave Dictionary of Economics*, online ed., (London: Palgrave Macmillan, 2018).

314 Douglass C. North, *Understanding the Process of Economic Change* (Princeton and Oxford: Princeton University Press, 2005), at vii.

315 North, *Economic Change*, at vii.

316 North, *Economic Change*, at 1-3.

369. At about the widest angle of analysis possible, North argued that:

> Man's subjugation of the uncertainties related to the physical environment is most clearly manifested in the explosive increases in population since the beginning of the modern age in the eighteenth century. Figure 7.1 illustrates this dramatic change along with major developments in knowledge, technological process, and scientific breakthroughs that contributed to this explosive development. The consequence has been the immense jump in life expectancy (figure 7.2) and decline in infant mortality (figure 7.3).[317]

370. I extract these figures below:

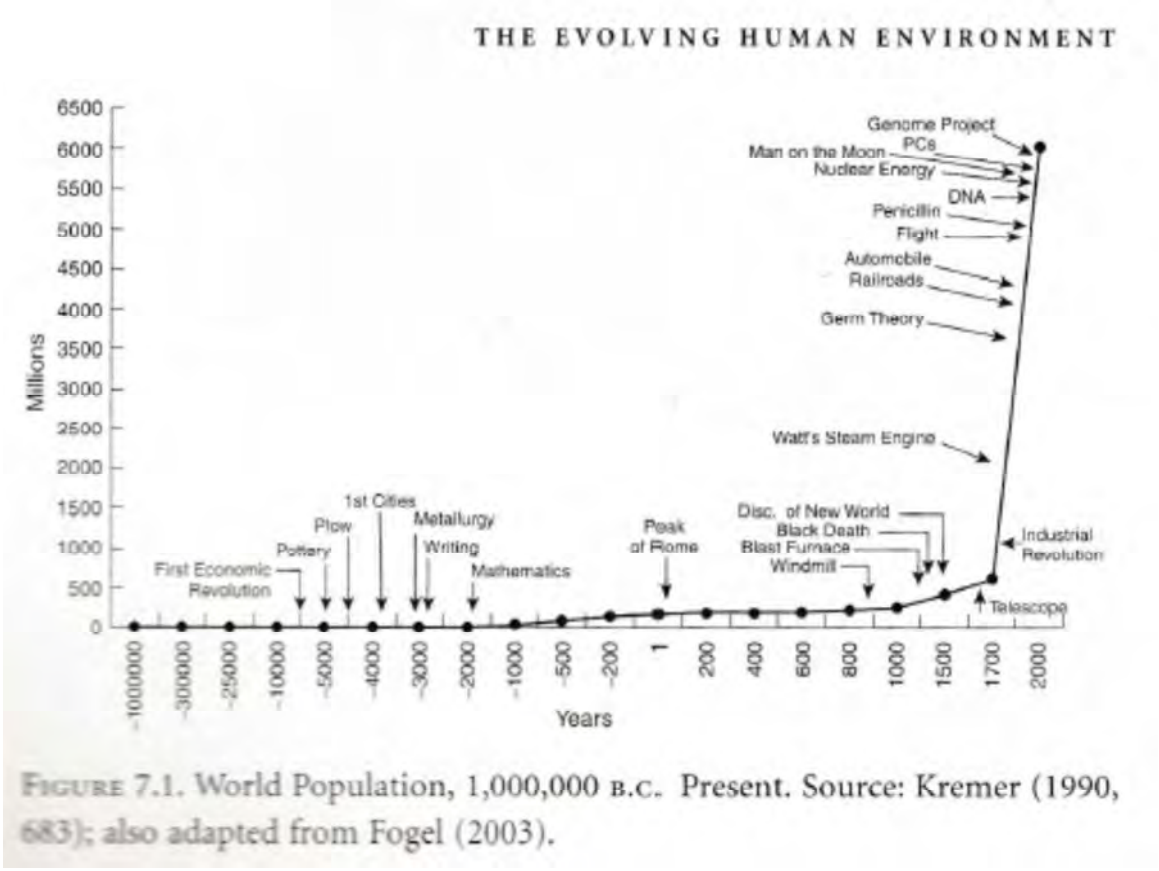

FIGURE 7.1. World Population, 1,000,000 B.C. Present. Source: Kremer (1990, 683); also adapted from Fogel (2003).

Figure 3 North, Economic Change, p. 89

317 North, *Economic Change*, at 89.

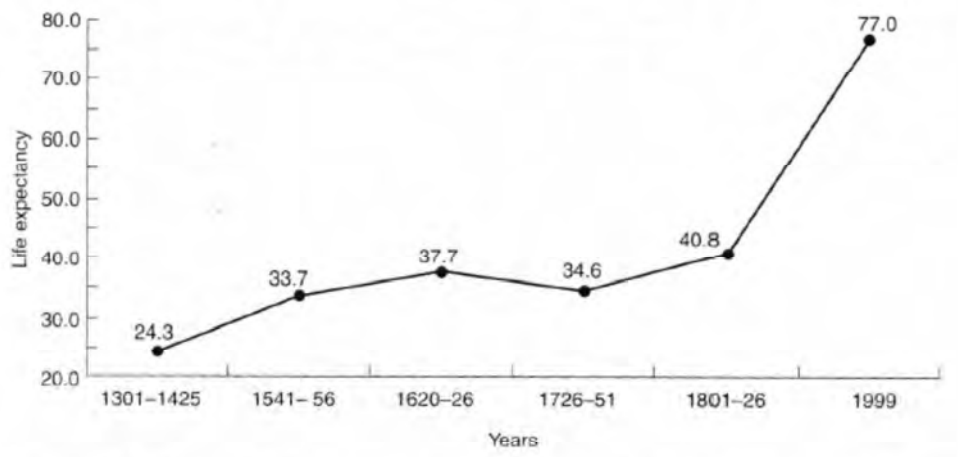

FIGURE 7.2. Years of Life Expectation at Birth in the United Kingdom, 1300–Present. Source: Maddison (2001, 29).

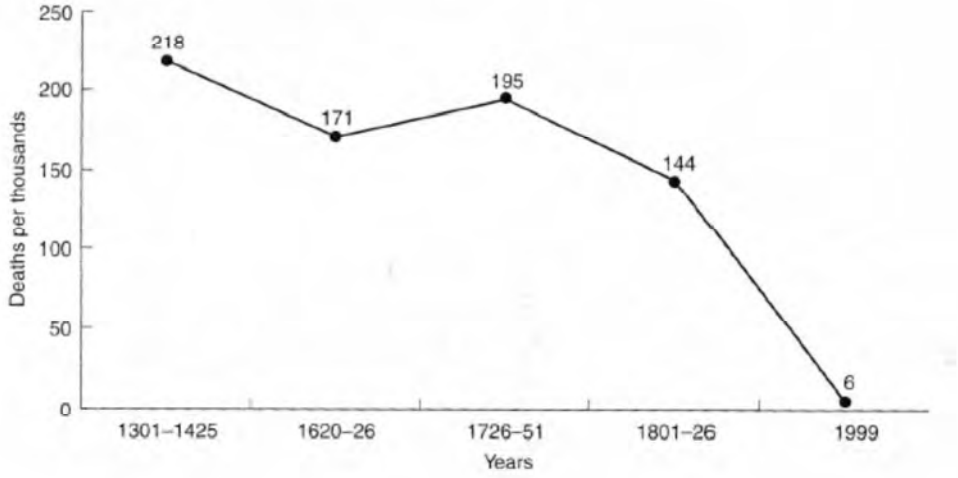

FIGURE 7.3. Deaths per Thousand in First Year of Life in the United Kingdom, 1300–1999. Maddison (2001, 29).

Figure 4 North, Economic Change, p. 90

371. North emphasised both institutions (political systems, property rights, etcera) and beliefs or knowledge (including science and technology) as the reasons for the marked divergence between developed and third-world in modern era. Until the modern era, there was globally little difference in life expectancy, mortality, quality of life, etcetera. Other aspects of this change have been the growth of cities or urbanisation; increased division of labour and specialisation; increasing percentage of GDP comprised of 'transaction costs' or the value of exchanges and 'service industries' (banking and finance, insurance, lawyers and accountants) rather than agricultural or industrial production per se; corresponding to greatly increasing productivity of agriculture and manufacturing (one definition being less units of input for every unit of output); and the growth of inter-country trade.[318]

318 North, *Economic Change*, at 89-94.

372. North contrasted, for example, North America and Latin America in terms of the institutional differentials:

> The United States retains a robust system of federalism, democracy, limited government, and thriving markets. Much of Latin America is still characterized by stop-and-go development, fragile democratic institutions, questionable foundations of citizen rights, personal exchange [as opposed to 'impersonal' or large market exchange], and monopolized markets.[319]

373. Of relevance to the nineteenth century New Zealand context, North contrasted 'personal exchange' in customary economies and 'impersonal exchange' in modern economies:

> Personal exchange relies on reciprocity, repeat dealings, and the kind of informal norms that tend to evolve from strong reciprocity relationships. Impersonal exchange requires the development of economic and political institutions that alter the pay-offs in exchange to reward cooperative behaviour.[320]

374. What is needed, in North's view, is institutions like bills of exchange, banks, corporate structures, firms, and various other economic institutions; and coercive state institutions that can enforce or ensure certainty of contracts or exchanges.[321]

375. Thorsten Beck's entry in the *Oxford Handbook of Capitalism* provides further analysis on the relationship between legal institutions and economic development. Beck explains the background:

> Stark cross-country differences in levels of economic development have motivated economists to look for factors that explain these differences. But there is also a historic dimension; only for the past 500 years has Europe gained a dominant socioeconomic position, which has gone hand in hand with the rise of capitalism. What has driven this increasing divergence in the economic fates of societies? This chapter focuses on the efficiency of legal institutions as a major explanation for the rise of capitalism in Europe and other parts of the world, including some—but far from all—areas settled and colonized by Europeans. Specifically, this chapter (1) defines and discusses indicators of legal institutions; (2) surveys the historic, theoretical, and empirical literature on the importance of legal institutions for market-based capitalism and economic development; and (3) presents and compares different theories of why and how legal institutions developed differently across societies.[322]

376. Beck refers to related studies including the role of finance in economic growth and the importance of corporate governance for economic development.[323]

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319 North, *Economic Change*, at 114.

320 North, *Economic Change*, at 117-18.

321 North, *Economic Change*, at 119; for another breakdown of types of 'institutions', see Oliver E. Williamson, 'The New Institutional Economics: Taking Stock, Looking Ahead', *Journal of Economic Literature*, vol. 38, no. 3 (2000), at 595-613; for the importance of the constitutional structure as an 'institution' enabling economic growth, especially the idea of 'limited government', see Barry R Weingast, 'The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development', *Journal of Law, Economics, & Organisation*, vol. 11, no. 1 (1995), at 1-31.

322 Thorsten Beck, 'Legal Institutions and Economic Development' in the *Oxford Handbook of Capitalism*, Dennis C. Mueller, ed., Oxford Handbooks Online, (Oxford University Press, 2018 (2012)), (www.oxfordhandbooks.com), at 1 [online entry numbering].

323 Beck, 'Legal Institutions and Economic Development', at 4.

377. Beck explains why 'legal institutions' are important for a 'modern market economy':

> **Organizations in bands or tribes did not require formal legal institutions** because transactions were repeated and among agents who knew each other. Instead, humans could rely on the logic of repeated games and reputation. Bilateral arrangements break down if markets become thicker, that is, if contract parties have alternative partners for future transactions, thereby reducing the cost of cheating. In addition, information asymmetries increase as markets grow in size and geographic extension. **Therefore, as tribes developed into chiefdoms and states, the likelihood of repeated transactions decreased and the need for rules to govern transactions between strangers arose**.[324]
>
> Adam Smith (1776) already stressed that private property rights encourage economic agents to develop their property, generate wealth, and efficiently allocate resources based on the operation of markets. **The importance of property rights and legal system efficiency in the rise of capitalism in the West has been documented by several economic historians.** Among the first, North and Thomas (1973) pointed to **the critical role of property right protection** for international trade and economic development in Europe and North America. Similarly, Rosenberg and Birdzell (1986) point to institutions favourable to commerce and **the emergence of the corporation** as critical explanations for the rise of Europe and the West. Engermann and Sokoloff (1997) describe how extractive coercion-constraining institutions helped secure the entrenchment of the ruling elite in large parts of Latin America and undermined the build-up of effective market-supporting legal institutions and public infrastructure, while **broad-based coercion-constraining institutions** in the northern part of the Americas and the resulting private property right protection helped develop markets and ultimately fostered economic development.[325]
>
> A growing empirical literature has documented the important relationship between efficiency and structure of legal institutions and the process of economic development. By documenting this relationship, this literature has also explored the different channels through which legal institutions help economic development. First, **in environments where property rights are well defined and protected, people focus their entrepreneurial energy** on innovative entrepreneurship rather than on predation and other criminal activity (Baumol, 1990). At the same time, people have to spend less time and resources to protect themselves from predation—from other private agents or the government—and can therefore become more productive.[326]
>
> Second, and related to the first point, **the certainty of property rights facilitates investment and ultimately firm growth, as it increases investors' confidence that they will be able to appropriate the returns of their investment.** Johnson, McMillan, and Woodruff (2002) show that in transition countries with strong private property rights protection, entrepreneurs are more likely to reinvest their profits. Similarly, Cull and Xu (2005) find for China that both property rights protection and access to credit matter for investment decisions of firms.[327]

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324 Beck, 'Legal Institutions and Economic Development', at 11-12.

325 Beck, 'Legal Institutions and Economic Development', at 12.

326 Beck, 'Legal Institutions and Economic Development', at 13.

327 Beck, 'Legal Institutions and Economic Development', at 14.

> Third, **entrepreneurs have higher incentives to work in the formal as opposed to the informal economy, if their property rights are protected and contract enforcement allows them to broaden their market outreach**…[328]
>
> Fourth, legal institutions can have a critical impact on corporate structure and governance and ultimately firm size. Specifically, **better legal institutions allow firms to grow faster by becoming more efficient and expanding their markets**…[329]
>
> The impact of legal institutions on corporate governance structures of shareholding companies is also reflected in the valuations of firms by outside investors. Claessens et al. (2000, 2002), La Porta et al. (2002), and Caprio, Laeven, and Levine (2007) find **a positive relationship between the protection of minority shareholder rights and corporate valuation** on the stock exchange.[330]
>
> Fifth, a very rich literature has shown **the importance of legal system efficiency for financial sector development**, both in general and with respect to specific institutions (Beck and Levine, 2005). The rights of secured creditors and minority shareholders have been found to be positively associated with the size of credit and stock markets across countries; credit information sharing is important for financial sector depth; the effect of legal institutions on financial development can be traced through to economic growth; and more efficient contract enforcement institutions are associated with lower interest margins, thus a higher intermediation efficiency.[331] [emphasis added]

378. In the concluding section ('Implications for Policy Reform and Future Research') Beck states:

> A large body of literature has shown the importance of legal institutions for the real economy. Coercion-constraining [state constraining] institutions that guarantee private property rights and effective contract enforcement institutions that resolve conflicts in a swift, predictable, and fair manner foster entrepreneurship and investment in the formal economy, enhance market exchange and trade within and between countries, and ultimately help economies grow faster. Less is known, however, about which institutions matter…
>
> While a large body of literature has helped us understand the historic origins of legal institutions, including colonial ties, less is known about the cultural origins of legal institutions. This debate has obtained new attention as China has recently been cited as counterexample for the law and development and—more specifically—the law and finance literature, as it has economically thrived without the public legal institutions of the West.
>
> The research discussed in this survey also has critical repercussions for policy reform in developing countries. The finding that legal institutions have a critical impact on the development and structure of economies calls for attaching a high priority to reforms in this area… However, the experience in transition and developing countries as well as the literature also provides important insights into how to reform legal institutions. **First, legal institutions have to be seen in the context of the legal tradition of a country.** Trying to impose institutions out of

328 Beck, 'Legal Institutions and Economic Development', at 14.

329 Beck, 'Legal Institutions and Economic Development', at 15.

330 Beck, 'Legal Institutions and Economic Development', at 15.

331 Beck, 'Legal Institutions and Economic Development', at 15-16.

> a different legal tradition is not helpful, as Russia found out the hard way—the short flirtation with the common law tradition did not bear fruit…. **Second, in the absence of external pressures, legal system reform cannot happen against the interests of the ruling elite.** Again, the experience of the transition economies has clearly shown this. In countries with more entrenched communist elite and where these elites had higher surplus stakes in the form of natural resource rents, there was a slower or no development of the necessary legal institutions for a functioning market economy (Beck and Laeven, 2006). A third important insight from the literature is that **contract enforcement institutions cannot be separated from coercion-constraining institutions. … The state cannot really function as neutral arbiter in disputes between private agents if it cannot be held accountable through coercion-constraining institutions** (Greif, 2005).[332] [emphasis added]

379. In a 2005 article in *The American Economic Review*, Abhijit Banerjee and Lakshmi Iyer analyse:

> the colonial land revenue institutions set up by the British in India, and show that differences in historical property rights institutions lead to sustained differences in economic outcomes. **Areas in which proprietary rights in land were historically given to landlords have significantly lower agricultural investments and productivity in the post-independence period than areas in which these rights were given to the cultivators**. These areas also have significantly lower investments in health and education. These differences are not driven by omitted variables or endogeneity problems; they probably arise because differences in historical institutions lead to very different policy choices.[333] [emphasis added]

380. They argue from historic data-sets that the areas of India where the British established a land-tax on individual cultivators produced better economic productivity and better health and education indicators over time than the areas where they imposed a landlord-based revenue system (in which the landlord had the tax liability to the British and kept any surplus income or profit from the cultivators under him).

381. Concerning the latter, the British imposed the landlord system because in areas like Bengal they believed they 'found landlords when they arrived', although these 'were really local chieftains and not the large farmers that the British had thought them to be'.[334] The British invoked history to support their policy choices, but different ideologies or principals were also in play. In Madras, for example, Governor Thomas Munro argued for the individual cultivator system on the basis it would improve incentives and increase agricultural productivity, and that the government would better protect the cultivator's rights than a landlord would.[335]

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332 Beck, 'Legal Institutions and Economic Development', at 29-30.

333 Abhijit Banerjee and Lakshmi Iyer, 'History, Institutions, and Economic Performance: the Legacy of Colonial Land Tenure Systems in India', *The American Economic Review*, vol. 95, no. 4 (2005), at 1190-1213.

334 Banerjee and Iyer, 'Colonial Land Tenure Systems in India', at 1195.

335 Banerjee and Iyer, 'Colonial Land Tenure Systems in India', at 1195. This also shows that the British responded to different socio-political structures in different ways, but also in ways that reflected the then current thinking of the British personnel (ie., the Bengal system was established earlier in time, c.1790s than the South India system, c. 1820s).

382. They note that the land-tax systems established between 1820 and the late 1850s were typically individual-based systems. They suggest one reason as the influence of utilitarian thinking by the 1820s.[336]

383. In a 1994 journal article, noted historian of British India, David Washbrook, examined the effects of the commercialization of agriculture in South India. He began:

> Although it would now seem established beyond question that agriculture in most parts of India had been exposed to commercial influences from medieval times, there can be little doubt that a variety of developments from the second half of the nineteenth century greatly strengthened those influences. **Railways and road transport made possible a huge expansion in cash cropping, for national and international markets, and production regimes across the subcontinent were placed in a new context of opportunity—and of pressure.** While so much would scarcely be disputed among historians, what has become—and remained—more controversial, however, is an understanding of **the implications of this extended commercial logic for agrarian economy and society. Since colonial times, opinions would seem to have been divided between 'optimists', for whom commercialization marked progress and a growing prosperity for all; 'pessimists', for whom it marked regress into deepening class stratification and mass pauperization; and 'sceptics' who held that it made very little difference and that its impact was largely absorbed by pre-existing structures of wealth accumulation and power on the land.**[337] [emphasis added]

384. Washbrook looks at the 'remarkable expansion and proliferation' of farming on small-holdings in the period (in this area of Madras province) – mostly for cotton cash crop production.[338] A key question is whether this delivered general economic growth and more 'prosperity' across the board.

385. In the end, Washbrook sticks with his earlier 'pessimistic-to-sceptical' view, essentially that landed magnates controlled the majority of good agriculture land before 1870, and that after 1870, the affects of new capital investment entrenched this position. He attributes considerable responsibility to the colonial state that had earlier in the early nineteenth century allocated large estates to these magnates or revenue collectors, which became their 'private' property.[339]

386. Jeffrey D. Sachs and Andrew Warner, in a 1995 paper on 'Economic Reform and the Process of Global Integration', argued from the international economic data that 'trade liberalization' or 'open borders' helps poor countries catch up to rich countries; whereas countries that close their borders to international trade stagnate or have balance of payments crises.[340] The confidence of the conclusion that border openness leads to

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336 One might also suggest that the Evangelical-humanitarian influence on British policy in India was significant by this time; as in New Zealand of the same period.

337 David Washbrook, 'The Commercialisation of Agriculture in Colonial India: Production, Subsistence and Reproduction in the 'Dry South', c. 1870-1930, *Modern Asian Studies*, vol. 28, no. 1 (1994), at 129-164, at at 129.

338 Washbrook, 'The Commercialisation of Agriculture in Colonial India', at 133-34.

339 Washbrook also noted (at at 134) the effects of the global economy on agriculture, of some relevance to the Taihape/New Zealand situation: he noted that the years 1890-1904 were difficult for agriculture, with periods of drought and cotton prices 'little more than steady'. From 1904 to 1914, a 'golden age', with cotton prices rising by 40%, and variable fortunes after that.

340 Jeffrey D. Sachs and Andrew Warner, 'Economic Reform and the Process of Global Integration', *Brookings Papers on Economic Activity*, vol. 1995, no. 1 (1995), at 1-118.

absolute income convergence was queried by one of the paper's reviewers. But he affirmed Sachs and Warner's conclusions that other factors are necessary for economic growth too, including stable macroeconomic policies, structural policies, and institutions.[341]

387. Sachs and Warner quoted Marx and Engels in the *Communist Manifesto*, who predicted the global dominance of capitalism:

> The bourgeoisie, by the rapid improvement of all instruments of production, by the immensely facilitated means of communication, draws all, even the most barbarian, nations into civilization. The cheap prices of its commodities are the heavy artillery with which it batters down all Chinese walls, with which it forces the barbarians' intensely obstinate hatred of foreigners to capitulate. It compels all nations, on pain of extinction, to adopt the bourgeois mode of production; it compels them to introduce what it calls civilization into their midst, i.e., to become bourgeois themselves. In one word, it creates a world after its own image.[342]

388. They described the growth of a more integrated world economy from the later nineteenth century, a description of some relevance to New Zealand:

> By the 1870s a global market had begun to take shape on the following economic lines. Western Europe and the United States constituted the main industrial powers. A major push toward industrialization, especially in east-central Europe, followed the unification of Germany. Russia began a period of rapid industrialization, partly through the building of foreign-financed railways across Russian Eurasia. Japan had begun its dramatic opening to the world economy through the adoption of capitalist institutions and free trade. (Note that early Japanese industrialization took place entirely under free trade, since the dominant Western powers imposed low Japanese tariff levels through "unequal treaties" that lasted until the end of the century.) Latin America, after a half century of postindependence upheaval, finally settled into market-based, export-led growth in the 1870s, based on raw materials exports and capital imports (primarily for railroad construction). Africa, which lagged farthest behind, was gobbled up by the Western European powers in an orgy of imperial competition that reached its height between 1880 and 1910. Trade barriers remained low among these economies for several decades, from the 1860s to 1914.
>
> As in the late twentieth century, the emergence of the first global system [in the second half of the 19th century] was based on the interaction of technology and economic institutions. Long-distance transport and communications achieved breakthroughs similar to those in the present. The Suez Canal, completed in 1869, and the Panama Canal, completed in 1914, dramatically cut international shipping times, as did the progressive development of faster and larger steamships from the 1840s. New railways in India, Russia, the United States, and Latin America-often built with foreign finance- opened vast, fertile territories for settlement and economic development. The spread of telegraph lines and transoceanic cables from the 1850s linked the world at electronic speed. Military innovations, particularly the breech-loading rifle in the 1840s, combined with mass-production made possible by industrialization, decisively shifted the military advantage to Europe. Medical advances, particularly the use of quinine as a preventative against malaria, played a pivotal role in the spread of European settlements, domination, and investment, especially in Africa. Without doubt, these technological

341 *Ibid.*, at 104-105.

342 *Ibid.*, at 5.

breakthroughs were as revolutionary in underpinning the emerging global system as those of our own age.

On the economic level, key institutions similarly spread on a global scale. International gold and silver standards became nearly universal after the 1870s, eventually embracing North and South America, Europe, Russia, Japan, China, as well as other European colonies and independent countries. By 1908 roughly 89 percent of the world's population lived in countries with convertible currencies under the gold or silver standard. Basic legal institutions, such as business and commercial codes, were widely adopted. These were based on European models, mainly the Napoleonic Code. New multilateral institutions were established, such as the Universal Postal Union in 1878. The system was highly integrative, as in the present. A network of bilateral trade treaties kept protectionism in check in most countries (the United States and Russia, where tariff rates were relatively high, being the exceptions). Nations as diverse as Argentina and Russia struggled to adjust their economic policies, and especially their financial policies, to attract foreign investment, particularly for railway building. The adoption of a stable currency tied to gold was seen as a key step in the strategy of international integration. In Russia, Count Witte recalled how he out- maneuvered the conservative tsarist court to introduce the gold standard at the end of the nineteenth century. In Latin America, liberal market regimes stabilized under both democratic (Argentina and Chile) and authoritarian (Brazil and Mexico) political regimes. In all four cases, overall growth of GDP and exports was very rapid, indeed historically unprecedented. India similarly enjoyed rapid export growth between 1870 and 1914, under British rule.

In a series of important papers, Jeffrey Williamson and his collaborators have shown that the open international system at the end of the nineteenth century produced an era of economic convergence. Peripheral countries in Europe, such as Ireland and the Scandinavian countries, experienced rapid growth that narrowed the gap in real wages with the more advanced countries, the United Kingdom, France, and Germany. Former European colonies in Latin America and the South Pacific (Australia and New Zealand) similarly achieved convergent growth rates based on export-led growth. In a massive study of long-term growth in forty-one developing countries, Lloyd Reynolds similarly finds that **the open international economy of 1850-1914 was crucial in promoting the onset of rapid economic growth in much of the developing world outside of Europe and North America. Reynolds notes that "politics apart, the main factor determining the timing of turning points has been a country's ability to participate effectively in the trade opportunities opened by expansion of the world economy."**[343] [emphasis added]

[343] *Ibid*., at 6-8.