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OFFICIAL

**WAI 686 – HAURAKI REGIONAL INQUIRY
Sixteenth Hearing (“P” Series)
Held at Thames
4-8 December 2000**

- Tribunal Members:** Dame Augusta (Presiding Officer)
Dame Evelyn Dame Evelyn
Professor Wharehuia Milroy
John Kneebone
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Stephen Clark (Wai 423, 792, 694, 806)
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Tavake Afeaki (Wai 177, 810)
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EXTRACT ONLY

Tape 11 Side A

Dr Donald Loveridge cross-examined by Grant Powell on his report concerning the origins of the Native Land Acts and Native Land Court in New Zealand (Wai 686 #P1, Wai 894 #A124)

- 5 Powell Yes, Dr Loveridge in the course of questioning unless I specifically refer you otherwise I will be referring to your main report. Now Dr Loveridge you'd agree that your evidence is really limited to the background to and establishment of the Native Land Court and in particular the Native Land Acts of 1862 and 1865?
- 10 Loveridge Primarily the 1862 Act, yes.

- Powell So by that do you mean you spent more time on the 1862 Act than looking at the 1865 Act?
- Loveridge Well as you'll realise I looked at the 1865 Act and came to the conclusion that there was in fact very limited revision of the 1862 Act and then I proceeded to work back from there, yes.
- 5
- Powell And you've also noted I think at page 6 of your evidence about the "... report focuses almost exclusively on the question of what European officials, politicians and settlers were thinking and doing (or trying to do) in the course of the developments which lead to the establishment of the Native Land Court." So when you talk about things like intense debate on a certain issue, as I think you refer to a couple of times in your evidence, you are really talking about intense debate among officials?
- 10
- Loveridge Yes, I think that is quite clear. That's what I have discussed, yes.
- Powell So in the evidence you don't assess how the Native Land Court system worked in practice?
- 15
- Loveridge Except insofar as I looked at what was done in the Kaipara in 1864 and 1865.
- Powell As what you describe as "a trial"?
- Loveridge The 'Kaipara experiment' - that's what it's called at the time, yeah.
- 20
- Powell And you certainly haven't considered how the Native Land Court system worked in Hauraki?
- Loveridge No.
- Powell You have previously given evidence to a different Waitangi Tribunal about the effects of the Native Land Court system in practice, haven't you?
- 25
- Loveridge Yes I have, yes.
- Powell And in particular your report, 'When the Freshets reach the Sea'.
- Loveridge That's for the Ngati Pahauwera claim.
- Powell For the Ngati Pahauwera, and that was presented to the Tribunal in October 1997, I think.
- 30
- Loveridge That's correct, yes.
- Powell I would just like to refresh your memory on some of the conclusions you made in that report and at page 125 of that report you said, "Over a period of 80 years beginning in 1851 the Crown acquired, or made it possible for others to acquire, more than 200,000 acres of land from Ngati Pahauwera along the shores of Hawke's Bay. It did so in order to promote the settlement and agricultural development of the region and the country.
- 35

5 These purchases created many problems for the original owners of the
land, which grew in complexity and severity as time went on. The cure
favoured by the Crown for such problems more often than not was to
relieve the owners of more of their land. At some point in this process the
Crown clearly lost sight of its duty to ensure that the vendors retained a
sufficient endowment of land and resources for their present and likely
future needs including various forms of farming. The system created by
the Native Land Acts of the 1860s, when laid over the after effects of
large sales, war and confiscation, was a disaster for Ngati Pahauwera from
10 the start. As the Tribunal put it in the Mohaka River claim, the Native
land legislation and the Native Land Court process largely accomplished
what settler governments intended, mainly the subdivision and partition of
interests which facilitated either Crown and private purchases or the
fragmentation and individualisation of Ngati Pahauwera interests". Those
15 were your conclusions?

Loveridge Yes, as far as I can remember, certainly.

Powell And at page 94 of the same report you stated, "It is difficult in fact to see
where the post-1868 sales, which were the first sales in Ngati Pahauwera
that involved the Native Land Court, conferred any benefit on the former
owners which was commensurate with the loss of land and resources
20 which they involved. Had the Crown after the wars had any serious
intention of ensuring that Ngati Pahauwera retained sufficient lands for
their present requirements and future development, all of the blocks put
through the Native Land Court in the 1860s and 1870s would have been
made inalienable by sale. This would have prevented ever smaller
25 numbers of people from allowing large quantities of land to leave the
tribal sphere of influence. It says a great deal that while some 297
signatures were thought necessary on the Mohaka 1851 Purchase Deed
and 72 were needed for the Waihua Block in 1864, a total of only 37
signatures were sufficient to permanently alienate 52,824 acres of land in
30 Rotokakarango and Mangataniwha Blocks in the 1870s and the early
1880s. The Crown had the power and will to impose an alien system of
land tenure on Maori from the 1860s onwards. A very small portion of
that same power and will applied to the task of ensuring that tribes like
Ngati Pahauwera retained a sufficient quantity of lands for their own
35 requirements would have reaped substantial benefits." Do you confirm
...?

Loveridge I am certain, I'm pretty confident that's what I wrote, yes.

Powell Ma'am I will provide a copy of that to the Tribunal in due course. I have
40 only got one copy with me at the moment. Now Dr Loveridge could I ask
you to go to page 16 of your report please.

Loveridge Yes.

Powell In this chapter you look at some of the, I suppose, background to
colonisation in New Zealand, and you suggest at paragraph 2.1.1 that it is
45 not impossible that an attempt could have been made to have applied
some doctrine of *terra nullius* to New Zealand.

- Loveridge No. If colonisation had taken place in the late 18th Century – I am just setting up the scene here - and I am saying that if New Zealand had been chosen for the Botany Bay experiment instead of New South Wales, that we might well have had something similar applied in New Zealand. Yes.
- 5 Powell And I see you rely on or you refer to Henry Reynolds' book *The Law of the Land* for that. Wasn't it the case ...
- Loveridge Sorry, rely on him for what? For the *terra nullius*?
- Powell Yeah.
- Loveridge Well for his discussion of *terra nullius*.
- 10 Powell His discussion of *terra nullius* and why it was applied to Australia.
- Loveridge Yeah.
- Powell But isn't Reynolds' point in that book not that, doesn't Reynolds make the point that Australia was the exception and all the places that the British went, that the one exception was in 1788 when they went to Australia? Isn't that the point he makes?
- 15 Loveridge No it's not his specific point but it's part of it. It's unusual.
- Powell But he makes the point that there was another penal colony started in 1783, I think, in a small island in the South Atlantic where they respected Native rights and he makes the point that the British respected Native rights in the Vancouver area in 1790, either side of the Australian experiment. And what he says, isn't it, that the problem with Australia and why it became different, was Banks's observations on Cook's voyage?
- 20 Loveridge He refers to that, yes.
- Powell That Banks had said that Australia was largely uninhabited. And that's the basis for applying *terra nullius* to Australia.
- 25 Loveridge One of the bases yes.
- Powell And you wouldn't have had that same description of vacant land in New Zealand?
- Loveridge Perhaps not, no. My point was simply that the kind of colonisation undertaken would have been very different from what was eventually undertaken in 1840. The kind of conditions under which annexation took place.
- 30 Powell Well I am just suggesting to you, if you are relying on Reynolds and what happened in Australia, there were quite different circumstances applying in Australia. So even if it had taken place in New Zealand in 1788 they would have still had to have recognised customary title in New Zealand.
- 35 Loveridge Quite possibly.

- Powell Pardon?
- Loveridge Possibly.
- 5 Powell The impression that I got from reading your evidence is that recognition of customary ownership really only seemed to become an issue in the 1830s with Buxton and the various Select Committees that you record, the Select Committee you referred to.
- Loveridge It becomes a major issue at that time, in imperial political circles, if you like.
- 10 Powell But again surely it had been a major issue for several hundred years before that with other colonies?
- Loveridge Well Buxton and his reformers are addressing the specific situation that's existing in the '20s and '30s which they see as being, as I refer to the Select Committee Report, they look at it and say 'well this is not proper and this is how we need to repair, to remedy what's being done in the future'.
- 15 Powell But you would agree with me that they had been dealing with issues of customary title well before that period?
- Loveridge Well they had been dealing with them wherever they went, yes. With greater or lesser degrees of efficiency. And the view of the reformers is that it hadn't been done very well and that a new system was required.
- 20 Powell But there have certainly been a lot of treaties for example in America and what became Canada?
- Loveridge Yeah.
- 25 Powell Now in that chapter you make the point that New Zealand was the first free colony for some considerable period of time. I was interested in your comment in paragraph 2.2.10.
- Loveridge At page 26?
- 30 Powell At page 26, where you say "... the Crown's right of pre-emption was a fixed component of the British colonisation system circa 1840..." How can you say there's a system if they haven't had a colony for 100 years?
- Loveridge No, they've got lots of colonies ...
- Powell Sorry, haven't had a free colony.
- Loveridge It was a system where every British settler, free British settlers went, in New South Wales, South Australia, all these places. Pre-emption was applied, the Crown's pre-emptive right.
- 35 Powell To purchase land?

- Loveridge And in North America, in America before the revolution in Canada. Certainly in Canada in the 19th Century.
- Powell So in this instance you actually are referring to that?
- 5 Loveridge I am saying that wherever the British Empire extended, pre-emption was applied. The Crown's pre-emptive right was applied.
- Powell Though in Australia of course they didn't tend to buy the land?
- 10 Loveridge Well, that's one of the things of course that Reynolds addresses at some length, which is firstly mainly to do with South Australia, that the original purchases there were made by colonisation companies that actually recognised aboriginal title and the British Government sort of came in and removed that. Late in the '30s and '40s there were of course, Reynolds discusses this at some length, it looked for a time as if South Australia in particular, I think that's right, was actually going to be dealt with on exactly the same terms as New Zealand with the full recognition of aboriginal title. And again that came to nothing. This is one of the main points of his book, that *terra nullius* was not absolute even in Australia.
- 15
- Powell But in the end they decided to apply it across the whole of the country.
- Loveridge Yes.
- 20 Powell At paragraph 2.2.9 above, I took you to be saying that the rationale for the pre-emption monopoly in New Zealand was really the deficiencies of Maori title and that it wasn't recognised as being equivalent to an English title?
- Loveridge That was the argument certainly put forward leading up to the Land Claims legislation, the footnote at the bottom of that page is from my report to the Murihiku Tribunal on the origins of the Native Land Claims Act that was applied to New Zealand.
- 25
- Powell Muriwhenua?
- Loveridge I am sorry, Muriwhenua, yes. That's an extended discussion of this very thing. What exactly the British thought they were dealing with and why they chose this particular course in dealing with the pre-Treaty purchases. And that's essentially it, they are saying that because of the nature of Maori title, and because in fact of the protective role required of the British Government, that they would not acknowledge any titles unless they have been approved of by the British Government - which leads to the Land Claims Commissions in various ...
- 30
- 35
- Powell The Crown's protective function in the example that you have just mentioned in your answer, that's not so much a deficiency of Maori title as to ensure fair play takes place? It's a slightly different point.
- Loveridge Yes, I see what you mean. It was seen as a requirement of the protective function to ensure that fair play could flow, as defined by the Act.
- 40

- Powell And one of the key things that emerged in those pre-Treaty transactions and whether they were valid or not, was the important legal point of whether a private individual could extinguish a system of title, wasn't it?
- 5 Loveridge Well actually I have to say that it was whether Maori could transfer the nature of the title they had to an individual and extinguish it in the process.
- Powell Yeah, whether the transfer to the individual extinguished it?
- Loveridge Yeah, yeah.
- 10 Powell So there it is not so much the deficiency of the Maori title, it's more the inability of the private person to extinguish that title?
- Loveridge Well, it was seen as being the reason why the British Government could assert that the title had not been extinguished, unless subject to further investigation. And it was seen as a reason why the Government should take this action.
- 15 Powell Yes. Only the Government could extinguish the title to the Crown. That an individual, the Maori title was strong enough that an individual could not ...
- Loveridge Well not strong, it was the nature, again, the nature of the title was deemed to require scrutiny by the Crown to ensure that the transactions had taken place in a proper manner, and that the extinguishment was a proper one that the Crown could approve. Exactly the same as what they are saying with the 1862 Act is that there will not be direct purchase where somebody just gets out and buys land from any Maori they meet. The title has to be ascertained in a way that's scrutinised and supervised by the Crown and the Crown has to issue acknowledgment of title before ... (voice fades away)
- 20
- 25
- 30 Powell There are also of course important practical reasons for having pre-emption as well, as well as any deficiencies of Maori title. And unless you had pre-emption the Crown couldn't maintain control over the rate of colonisation.
- Loveridge Exactly. And couldn't fund that colonisation.
- Powell And couldn't fund it. The whole principle of buying cheap and selling dear to fund colonisation.
- Loveridge Of the land fund, whereby all of the revenue from Crown land is used for colonisation purposes basically. For immigration, for infrastructure, all those things, yes.
- 35
- Powell And certainly to somebody like Hobson that was probably the more important point?
- Loveridge It's hard to say. It certainly was a major point. Certainly. It's rather difficult to sort of say, in the context of 1840 Hobson has been given quite
- 40

an explicit set of instructions as to what he was going to do, and didn't really have a lot of latitude for doing that. And of course he was under the supervision of Governor Gipps of New South Wales throughout the annexation process, so ...

- 5 Powell Certainly throughout his governorship and later governors it was the money side of things which was really the pressing concern.
- Loveridge Well not for Governor Fitzroy. A penny-an-acre proclamation could hardly be called an under-consideration with money. Of course he bankrupted the government in the process.
- 10 Powell Now the acquisition of the Crown right of pre-emption from Maori was set out in the Treaty. It was set out as being as exchange for various guarantees to Maori, wasn't it?
- Loveridge In Article 2, first there's a statement of Maori rights and the second part of the Article is the pre-emption, or that Maori accept pre-emption or accept the Crown's pre-emptive right.
- 15 Powell In paragraph 2.2.18 on pages 30 and 31 you say that "... no British official would have signed or ratified the Treaty ... had they thought it committed the British Government to the active preservation of what were seen as 'savage' customs and 'uncivilised' ways of life". So are you saying in paragraph 2.2.18 that right from the beginning, the Crown had no intention of honouring the guarantees that were in the Treaty?
- 20 Loveridge No. I am saying that there was no intention of actively preserving these features, or what were seen as 'uncivilised' features of Maori custom. This is discussed at greater length but again the instructions from Normanby to Hobson, specify what Maori customs will not be considered acceptable. And Lord Russell the next year adds one or two more. Saving these ones just are simply and absolutely unacceptable, cannibalism and that sort of thing. And the rest of what they are saying in the instructions, which is what I am referring to here, what they are saying is that harmless customs will continue as long as Maori care to adopt them, but there is no active support for those things. I don't see anything in the correspondence, in the instructions, which as I have said here, would amount to any acceptance of this idea that the British were committing themselves to preserving the Maori way of life.
- 30 Loveridge
- 35 Powell Even though it's fairly specifically spelt out the Maori customs that Maori wished to preserve?
- Loveridge Well that's it. As long as Maori wished to preserve them. This is the point, and the assumption was that they wouldn't want to preserve them for very long.
- 40 Powell In time of course, in the course of your report, Maori customs of land ownership seemed to come into that first category of customs that the Crown don't seem to want to preserve.
- Loveridge Oh, exactly, yes that's the whole point.

- Powell And yet that's the fundamental guarantee that's contained in Article II.
- Loveridge And again the guarantee is conditional on as long as Maori wish to preserve them. And again the '62 Act is not a compulsory Act. There is no compulsion to bring land under that Act. If Maori wish to have all the benefits of individualisation and so on and so forth, they may bring their land to the Court and get a Crown title.
- 5
- Powell We will deal with that particular issue a little bit later. So as you have said it was for Maori to decide when they wanted to give up those harmless customs. It is not for the Crown because the Crown had committed to protecting them.
- 10
- Loveridge It had committed itself not to force Maori to give them up.
- Powell So any legislation that encroached on those customs would be a breach of the Treaty?
- Loveridge I think insofar as Maori were forced to go along with that, yes.
- 15
- Powell Now there is, as you have discussed in your report, one of the key aims that these settlers, for want of a better term, the settlers were trying to achieve was the civilization of Maori?
- Loveridge Oh very much on their own terms, yes.
- Powell On their own terms. And I note at the beginning of your Chapter 3 you are talking about how the continual holding of tracts of land by Maori were seen to be obstructive to that purpose. 3.1.1.
- 20
- Loveridge Yes. This is Richmond speaking, yes.
- Powell This is Richmond. And in the second quote you have got there he is saying that they have still got three quarters of the total land and it's obstructive to the ...
- 25
- Loveridge Purpose of colonisation, yes.
- Powell If I could just ask you to go back to 2.2.20 on page 32. You are talking about some words by Premier Domett and you note that it was Domett that brought about the 1862 Act.
- 30
- Loveridge Well, he was Premier at that time.
- Powell He was Premier at that time. And your argument is that the Crown saw that that Act was necessary to civilize Maori?
- Loveridge What I am discussing here is this whole question of what the settlers' views on this whole thing were. I quoted Chief Justice Martin on this question of what he thought the whole purpose of the British exercise in New Zealand was. It's very much couched in the same terms as Normanby and the 1837 Committee. Just this thing of civilization as a return for the down side of colonisation if you like. And I've just pointed
- 35

- 5 out, my point here is that this view is very firmly embedded in the debate over all these issues, that there is very much a uniform view on the side of the colonists and settlers and the imperial officials about this. My point was that it is so pervasive that even when you arguing about taking Maori land by force, these same arguments are brought out. The same position. It is felt necessary to couch it in the same terms.
- Powell Mmm. So it's really two planks of the same policy?
- 10 Loveridge No I wouldn't say that. I am saying that there is this very clear picture, very clear consensus in the colonial mind that this is the purpose of the exercise and that anything you do which touches upon Maori has to be justified in the context of that view.
- 15 Powell As you have said Domett has brought, being the Premier of the administration which brings in the '62 Act, and part of the point of the '62 Act was to provide some structure so that the perceived failure of pre-emption, all of that sort of stuff, to start acquiring more land which will assist in the civilization process. Assist in developing the colony, assist in civilizing. You have then got him quoted here in the context of confiscation legislation and as you say he is saying the same things. He is saying this will civilize Maori. We are going to take all his land and we are going to civilize him.
- 20 Loveridge Well, he is saying, other methods not having worked we are going to take land, and oh look, this will be good for them in terms of our mission.
- Powell So it is actually very similar to the rationale, that you have just agreed with me, he is saying is what's needed for the '62 Act?
- 25 Loveridge Oh, I don't think so.
- Powell Well he's saying, 'Our pre-emption has failed ...'.
- Loveridge Well he is not saying that here.
- Powell He is not saying it in this paragraph, I said, we have just discussed it. Pre-emption has failed, they have got to find another way of getting hold of more land, otherwise the colony's going to fall apart.
- 30 Loveridge Yes, and this will assist Maori.
- Powell And this will assist in civilization. So we have got to find a mechanism where we can get Maori land and then we can civilize. Here he's talking about, "We are going to civilize them and we are going to take their land".
- 35 Loveridge Well we are going to take their land and this will have the effect of civilizing them because then we can force them into the proper mode of accepting all of the new institutions and new forms of government.
- Powell So you accept that both processes, the '62 Act and the confiscation legislation have as two central planks to them: One, to acquire Maori land and two, to civilize Maori?
- 40

- Loveridge I don't think that there was an express, it's a central theme of confiscation to civilize. As I am saying, he feels compelled to dress up the Act in these terms.
- Powell Well you saw it as sufficiently important to put it in.
- 5 Loveridge Well I put it in, as I wanted to illustrate how pervasive this point of view is, yeah.
- Powell Well, it is so pervasive, it is clearly important to these people in the way they justify things.
- 10 Loveridge I think this is much more a rationalisation than anything else, of the confiscation. I doubt if many people, I know that Martin certainly wouldn't have agreed that this in an appropriate application of the whole idea.
- 15 Powell But isn't it, at its heart, the actual Native Land legislation, the '62 Act or the '65 Act, the civilizing is a rationalisation for the taking of Maori land there as well?
- Loveridge There is no taking of Maori land under the '62 Act.
- Powell Making Maori land available.
- Loveridge Of enabling alienation, yes.
- 20 Powell So again, I put it to you, there's not really a huge amount of difference here. You have got a mechanism for the acquisition of Maori land, rationalised by 'civilization'.
- Loveridge I think there is a huge difference, I think very clearly seen at the time that there is a huge leap from enabling Maori to get title to their land and if they wish, to alienate it, and actually taking several million acres of it without compensation to all proper owners.
- 25 Powell Had the 1862 or '65 Acts been a complete failure, no Maori had come forward to put their land through those Acts, the Crown would have changed the system and found one that enabled land to be opened up for settlement?
- 30 Loveridge That's a bit speculative, I think. Again, I think one conclusion that you have to draw just on the fact that the '62 Act was put forward, was that there was a general expectation it would work.
- Powell Yes but I am just saying to you, if it hadn't? I mean the reason you put forward, the central reason that you have advanced in your evidence for having Native Land legislation, is because pre-emption is not working and we can't get enough land. So if the Native Land legislation hadn't been successful in opening up more land for settlement, they would have found something that did?
- 35

- 5 Loveridge Oh, presumably. Again, I would think that given that the whole process is based on, I mean that both the pre-emption system and the Native Lands Act system are based on voluntary cession by Maori, I mean that the Crown from the Treaty onwards repeatedly disclaims any intent to take land without the permission of the owners. And we all know there are great flaws in that process, but nonetheless, I would think that if you have suddenly reached a point where no Maori would alienate land to settlers or the Crown, that that would have caused a major crisis in the whole imperial approach to colonisation. It would have gone well beyond just finding a new ploy to get more land.
- 10 Powell Well isn't that what happened really with the failure of pre-emption, that gradually Maori did get to a point where they decided not to sell their lands?
- 15 Loveridge As I pointed out in the report, this is quite a disputed point. I mean everyone is saying that pre-emption doesn't work and yet you then turn to the land sale statistics and you certainly have to wonder. Certainly, Gore-Browne at various points is saying to the Colonial Office - certainly in 1858 with the Territorial Rights Bill - he is saying 'Look I mean here's a list of all the blocks we have been able to buy in the last five years. How can you say pre-emption is not working?'
- 20 Powell Isn't it really a case of perhaps there were particular districts which the Crown wished to open up to settlement that they couldn't get access to?
- 25 Loveridge Oh I think it's generally accepted that the area south of Auckland was the one that was the problem as far as settlers were concerned, yeah. That part of Auckland province south of the City. So the Waikato, here, Bay of Plenty and that sort of thing. Yes. So there was a much higher incidence of support for the King movement in refusal to sell land there, than anywhere else really.
- 30 Powell Could I ask you to go to page 46 please. Chapter 3.4, which is the Board of Native Affairs Inquiry in 1856. And you would agree that this was a pretty important inquiry that took place?
- Loveridge As I pointed out it's probably the most extensive public inquiry that had ever been made in New Zealand to this point.
- Powell And certainly on this particular topic on looking at ...
- 35 Loveridge Almost everything previous to this really had been in-house Government debates and discussions on things. This is actually, yeah.
- Powell And it was quite a formidable list of people who were involved in the Board?
- Loveridge A great deal of experience on that work, yes.
- 40 Powell And it certainly would have had an effect on the development of the 1862 Act wouldn't it?

- Loveridge I certainly think so yes.
- Powell At paragraph 3.4.18 on page 53. Sorry page 54. 3.4.18. You were talking about McLean's evidence to the Board and he makes the point, McLean is giving evidence to the Board about his knowledge of customary tenure and one of the points that he makes is that when he tries to work out the individual's rights to a particular block "... they regarded the arrangement as altogether imaginary, and it did not appear to affect, in the estimation of the Natives, the general or tribal right." He obviously doesn't have much belief in individual rights to the land held by Maori.
- 5
- 10 Loveridge He is referring here of course to the specific exercise he undertook in Taranaki in 1846 as part of the Fitzroy purchase in that year. Where he took a given block of land and talked to everybody and tried to work all this out and was not, pretty clearly, successful. McLean certainly was of the view that Maori title was much too complicated for anyone to untangle to the extent that you could individualise into certain portions. This of course is very much in line with his view that Crown pre-emption should be extended because it's the only feasible way to extinguish title by dealing with the community who owned it and extinguishing on that basis, yeah.
- 15
- 20 Powell Then if you could go back in your report to page 47 which is the Board's report. Paragraph 3.4.3. The Board itself concluded that ""Generally", it was noted, "there is no such thing as an individual claim clear and independent of the tribal right."
- Loveridge Yes. I have to say that it seems to me that they were just stating what was the predominant view at the time. It was fairly clearly understood that there was no such thing as a **(Tape 11A ends here)**
- 25

Tape 11B (Blank)

Tape 12 Side A

Grant Powell continues cross-examination of Don Loveridge

- 30 Loveridge Saying that this is a great revelation for everybody, when I don't think it is. This is of course, McLean's whole point.
- Powell It's the fundamental thing ...
- Loveridge That's right.
- Powell That all their experience that they have obtained, of customary title over the past 16 years since the Treaty ...
- 35
- Loveridge Oh you can go through the Government reports and there's a constant agreement on this point. There are a few questions raised. One of the reasons I suspect they decided to state it that clearly, was that one of the people who gave evidence to the Board was Paora Tuhaere of Ngati Whatua, and he and some of the other Maori who gave evidence were sort of indicating that it did vary and that in some places you did find instances
- 40

where you could single out an individual right. I think what they are trying to say very clearly here is that if that was the case, it clearly wasn't accepted as a general rule over the country, yeah.

- 5 Powell So given that that was so fundamental, surely any attempt to create a system imposing individual, or dividing up individual portions of rights to Maori land, was artificial.
- 10 Loveridge And purposely so. I mean the whole view was that communal tenure was a huge drawback to the individuals and communities involved and that therefore you must work out a way, an equitable way of converting that tenure to a more individualised form of title. There is also of course, what they are saying is, that a properly guaranteed title with well defined boundaries and all this sort of thing is good in itself, and they eventually of course go to the certificate of title idea whereby groups, communal groups, can get a certificate of title whereby the Crown recognises that this group owns all of the land inside these boundaries. But they are also saying that, and it's part of this report and the others, that communal title is simply an unprogressive, well not a progressive mode of tenure and that therefore we must work out a way of converting it.
- 15
- 20 Powell Yes. They say they obviously don't like it, but surely this finding says, well whatever the solution might be, dividing it up amongst individuals can't work.
- Loveridge No, I think what they are saying is, that they don't know how it can work. They are certainly not saying that we should not proceed and try and work out how to do it. I think that's implicit in the whole report. This is a report on the state of affairs at the time of the report and they looked at various possibilities, in fact they looked at the possibility of a pre-emption waiver. They said no, that's not going to be pursued – you don't have firm title and that's a recipe for problems. Then they look at the pre-emption system as it exists and recommend ways to reform that so it can be sort of tweaked out and made to work better than it's working at this time. But there is no dismissal here of the idea that it would be a good thing if we can work out a way to individualise. Yeah.
- 25
- 30
- 35 Powell I accept that, but what I am suggesting is that really they have identified a fundamental problem. That it is impossible to identify an individual's rights. So therefore any attempt to do so will be artificial and will not be consistent with the customary rights of the tribe.
- Loveridge Well to an extent, yeah. But as I say this is clearly seen as part of the process of reaching a solution to the problem, yes. No I take your point, yes.
- 40 Powell Now, in chapter 3.6, beginning on page 60, you talk about Fenton's proposals from 1856 to '57, and paragraph 3.6.12 on page 65.
- Loveridge Yes.

- 5 Powell He perhaps details those and in one of those quotes in that paragraph he talks about: "The Government, he observed, "having failed to introduce the adoption of law in a direct manner, through the means of English Magistrates, ..." and goes on to detail a few things. So, obviously he's thinking along the lines that the best thing to do is to have English Magistrates controlling the system. Being critical of the Government for not bringing in English Magistrates.
- 10 Loveridge Oh, he's definitely being critical of them and this is where he is suggesting that the runanga should fulfil that role. But again, in the context of, insofar as he is putting it, he is still talking about a supervised version of local Maori government here, I think. I think that Fenton, all along, advocated the use of resident magistrates as, if you will, supervisors of both the court system and the district systems that were being discussed at this time.
- 15 Powell Do you think in terms of those proposals that he saw the role of the resident magistrates as being the one who actually made the decision, the English Magistrate making the decision?
- 20 Loveridge I don't think so. I mean, the reason that Fenton's proposal and the scheme for partition that is based on it, the later scheme, are seen as a break through, I think, by the colonists generally, is that what he is saying is that you can rely on Maori, with proper supervision, to make all the right decisions. That they can work out what needs to be done to administer their own communities. They can work out who should have, who has customary rights, that sort of thing. But that you need an English Magistrate to keep them on the right direction, if you will. I think later on
- 25 when Fox is talking about Fenton's, sorry I can't put my finger on it, when Fox is talking about Fenton's achievements he is saying that he has shown us that the only way for Maori to be brought under British law and order is if they do it themselves.
- 30 Powell If that was his view back then, when he finally gets in to become the Chief Judge of the Native Land Court, he takes quite a different view. The system that he is heavily involved in setting up, from 1864, accords a much higher role for the European Magistrate than had hitherto been envisaged.
- 35 Loveridge I don't know that that's right. I mean under the '62 Act the Courts in the Native Land Districts are made up of two Maori Judges and one European President, the resident magistrate. Under the '65 Act you can have one or two European Judges but you still require two Maori Assessors to provide a quorum for the Court to operate. The Act does not kick in unless you
- 40 have at least one European Judge and two Maori Assessors to operate the system.
- Powell But in there you have got a difference in that under the '62 Act you have got, they are all judges together aren't they?
- Loveridge Yes. That's right.

- Powell So it's a bit like the Tribunal here, that they are all, there is a Presiding Officer and other Tribunal members, as opposed to a Court with sort of an advisor and a Judge who makes the decisions, even though the advisor has to be present.
- 5 Loveridge Well, again that assumes that the European Judge was the one who made all the decisions. Or whether he was ratifying the collective decisions of the Court, including the Assessors.
- Powell He certainly has the power to make the decisions in the '65 Act.
- 10 Loveridge Sorry, where is the, can you take us to the right section in the '65 Act. It's in the appendix. It's at page, it's the last item in the appendix. Starting on page 337.
- Powell I'm advised that it does require the concurrence of all three members.
- 15 Loveridge I am just looking for it, sorry. Section 12 says that "Every Judge of the court acting with at least two Assessors shall have the same jurisdiction and may exercise the same powers as the Court in all judicial matters whatever under this Act. Provided always that there shall be no decision or judgment on any question judicially before the court unless the Judge presiding and two Assessors concur therein". Doesn't sound to me like the Judge has an arbitrary power of decision.
- 20 Powell That's certainly how it seemed to work in practice though.
- Loveridge Well, anecdotally perhaps. Again, this is something that has never been systematically studied, this whole question of, overall, the early proceedings of the Court under the '65 Act. I would have to just say that I would put a question mark beside that conclusion of yours. I don't think I want to entirely agree with it.
- 25 Powell Something that would have to be looked at. How a particular Judge ran his particular Court.
- Loveridge I agree, or set of Judges or looking at the proceedings for a given couple of years or something, and do a sampling and get a clear sort of analysis of this.
- 30 Powell The way the 1862 Act worked in the Kaipara under Judge Rogan, is that you had the native Judges who participated were all locals, weren't they?
- Loveridge No. The way it was done was that two Ngati Whatua, Te Kenai and I am sorry I can't think of the other one, were appointed to the North Kaipara. And two North Kaipara chiefs were appointed to South Kaipara. So what happened, at the first hearing, it was Rogan and the two Judges for the South Kaipara District, but they invited the two Ngati Whatua Judges to join them on the bench for the first hearing.
- 35 Powell But they are all related. I mean, within the Kaipara, we are not talking strangers here.
- 40

- 5 Loveridge They are local in the sense that the Maori Judges are appointed from the general area, as a rule. As far as I am aware. We are working on a rather restricted sample here, because we only have the two Kaipara districts actually in operation, and the three Bay of Islands districts, which as far as I am aware, didn't actually hold hearings before the end of '64.
- Powell But certainly from a cultural point of view the four native Judges in the two Kaipara districts would have all shared similar whakapapa, would have known the whakapapa of the region as a whole ...
- Loveridge That's the whole point.
- 10 Powell Yeah. That was the whole point of that legislation, as you say.
- Loveridge But one of the first changes is of course, in those rules that are promulgated ...
- Powell By Fenton?
- 15 Loveridge Well, in '65, wherever they come from, is that Assessors with a personal interest in a case shall not take part.
- Powell And that immediately cut out that type of thing happening, didn't it?
- Loveridge Well, not specifically, I think it removes the Assessors an extra step. Certainly Fenton wrote at some length for his reasons for this. In particular that there had been a couple of problems with this, that there were Assessors who were too closely related to the case they were hearing. The one as I recall that he mentioned was the first round of the Orakei hearings, he raised the complaint that one of the Assessors had behaved somewhat inappropriately.
- 20 Well, not specifically, I think it removes the Assessors an extra step. Certainly Fenton wrote at some length for his reasons for this. In particular that there had been a couple of problems with this, that there were Assessors who were too closely related to the case they were hearing. The one as I recall that he mentioned was the first round of the Orakei hearings, he raised the complaint that one of the Assessors had behaved somewhat inappropriately.
- Powell Doesn't it raise, sort of fundamental issues of I suppose, cultural differences, between somebody like Fenton who is brought up with a sense of impartiality of justice, and in Maoridom where it is important to know, by whakapapa, whether somebody is, you need that background knowledge to make the decisions about whether somebody's claim to the land is valid or not?
- 25 Doesn't it raise, sort of fundamental issues of I suppose, cultural differences, between somebody like Fenton who is brought up with a sense of impartiality of justice, and in Maoridom where it is important to know, by whakapapa, whether somebody is, you need that background knowledge to make the decisions about whether somebody's claim to the land is valid or not?
- 30 Loveridge I mean, I think that when they started experimenting with how to do this in an equitable sort of way that, again, the experience was that in, on occasion, there was a conflict of interest arising and as I say, they seemed to have, and I haven't gone into this in any detail, but my impression is that they looked for an extra step removed. Again, I think the principle, the view was that someone, an Assessor, hearing evidence put before the Court, and as we all know there is a great deal of outside the Court activity involved with Court hearings, would be able to provide that information. That's, it's acknowledged pretty much explicitly that the Court can't function without Assessors who can provide that knowledge and that ability to find out what's going on.
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- Powell But by making, by removing it that further step, that actually removes part of that knowledge base, doesn't it?

- Loveridge Well, I think it probably does, but again, there's a trade-off. The trade-off was seen as being a slight removal in immediate knowledge as against impartiality, or an ability to approach cases with a measure of impartiality, an appropriate measure of impartiality.
- 5 Powell The 1862 Act hadn't provided for a Chief Judge, had it?
- Loveridge No. Well, as I say, it was entirely district based. The Governor would create districts as he considered it appropriate and for each district he would have a President who was a resident magistrate and two Maori Judges. Three Judges, one of whom was the President, and a resident
10 magistrate.
- Powell By and large the changes which we later saw come into the 1865 Act really were tested out after a series of proclamations at the end of '64. That's when Fenton becomes Chief Judge, the district is then moved out to being the whole district of New Zealand ...
- 15 Loveridge The courts are made 'floating' sort of ...
- Powell The Maori Judges are renamed Assessors and things like that?
- Loveridge Yes, and the President is renamed Judge. Yeah.
- Powell Have you, in the course of your research, had a look to see whether anybody, at the time, questioned whether those extensive proclamations at
20 the end of '64 were ultra vires the '62 Act?
- Loveridge I saw no reference to that whatsoever. I mean I have covered most of, as much as certainly I could find, relating to the '62 Act and relating to the approval of the different Acts by the Colonial Office and all this sort of thing. I am not aware of any reference whatsoever in that direction. I
25 think if there had been some sort of official point raised along those lines, I would have seen it.
- Powell But the system that's established by those '64 proclamations then carried over into the '65 Act?
- Loveridge Yes.
- 30 Powell It's starting to get a long way from what Paora Tuhaere was saying at Kohimarama about 'let them be appointed by us to decide'. I think it's 4.9.12. He's talking about a Maori-run system.
- Loveridge Yes. That sounds, is that the quote at the top?
- Powell Second quote down.
- 35 Loveridge Second quote, sorry "Let them be selected by this Runanga." He's talking about the National Conference of Chiefs, if you want. "Let them be appointed by us. Let us not leave that for the Governor to do; let him simply give his approval. Let us also seek a Pakeha as a superintendent.

The Pakeha I should like is Mr McLean, because I have not yet seen any fault in him." Yes.

- Powell But the Native Land Court system, as it's developed by the end of '64, is quite different from a Maori-run system that you've ...
- 5 Loveridge Well, what, in the context of the '58 Act, of provisions made in the Native Territorial Rights Act, which sort of flow on from the Circuit Courts and Native District Acts. And in the context of what they are talking about in '61, '62, under Grey's revived Native Districts system, they are actually looking at the local runanga being, Grey's proposal for example when he comes back, is that the local runanga should function as sort of mini land courts. Then the change is, when they go to, they pick up Fenton's suggestions basically and trim them down into more of a court model certainly. I think that's fair comment. They go from a runanga view to a Tribunal view, I guess is the best way to put it. That we have appointed people who will deal with these matters. There is still an assumption though, I think, under the '62 Act, that Maori runanga will decide what is going to be done with the land, whether it will be taken to the court or whatever.
- 10
- 15
- Powell And that's lost after '64 isn't it?
- 20 Loveridge Well no, again, they have revised the Tribunal that's overseeing the process, but again, certainly it's, the assumption again, I think, is that Maori will communally decide what is going to be done and then it will be dealt with by the court. As we all know, a great many of the, certainly I would say that the standard procedure, such as it is, of the court, is for Maori to bring their own solution to the court and say, you know this is who we want on the ownership list, this is where we want the boundaries and the court reviews this and listens to any dissenting voices and makes a finding.
- 25
- Powell This perhaps leads into another difference that, sort of in the '62 Act you really had a sense that the focus was on tribalism, that as you say, the tribes deciding to bring their land within the system ...
- 30
- Loveridge Yeah. That was certainly how Bell thought it would work.
- Powell Yeah. Whereas certainly, from the '65 Act onwards, you had a much greater scope for individuals to bring lands before the court which then dragged the rest of the tribe in there. Do you accept that as fair?
- 35
- Loveridge I think it's fairly well established that that certainly happened in some cases, and more often in some cases than others, in some areas, yeah. I suppose the problem there is how do you stop people who are acknowledged as having, or acknowledged as having some sort of proprietary interest from getting their rights reviewed by the court?
- 40
- Powell Well, doesn't this lead back to the fundamental point that you and I were discussing a little while ago, that the 1856 Board recognised, that it's

- Loveridge Sorry, 318, yes.
- Powell
5 And you have got "Whereas by the Treaty of Waitangi entered into by and between Her Majesty and the Chiefs of New Zealand it was among other things declared that Her Majesty confirmed and guaranteed to the Chiefs and Tribes of New Zealand and the respective families and individuals thereof the full exclusive and undisturbed possession of their lands and estates which they collectively or individually held so long as it should be their desire to retain the same". Then over the page on 319 it goes on to say "And whereas it would greatly promote the peaceful settlement of the Colony and the advancement of civilisation of the natives if their rights to land were ascertained defined and declared and if the ownership of such lands being so ascertained defined and declared were assimilated as nearly as possible to the ownership of land according to British law." There's no
10 presumption of everything going into individual hands by those terms.
- 15 Loveridge Not in ...
- Powell No. As you've said before in your answers, there was perhaps an underlying assumption that they would make the tribal, establish tribal titles.
- Loveridge
20 There would be more of a staged process, leading to some sort of individualisation.
- Powell And it certainly indicated, the Treaty is given full cognisance of, and the guarantees that we were discussing earlier were given full regard. Then if you turn to page 337 where the preamble of the 1865 Act.
- Loveridge
25 As I said, it's a very terse statement, but it still has that basic point, there is no provision, there is no focus upon individualisation there. It said that "Whereas it is expedient to amend and consolidate the laws relating to the lands in the Colony which are still subject to Maori proprietary customs and to provide for the ascertainment of the persons who were according to such customs are the owners thereof and to encourage the extinction of such proprietary customs and provide the conversion of such modes of ownership into titles derived from the Crown" and so on and so forth.
30 Yeah.
- Powell
35 Yeah. But isn't a fundamental point of that, you've got the, "relates to the land that is still subject to Maori proprietary customs" and "to encourage the extinction of such proprietary customs". It's getting back to that whole thing that we discussed right at the outset, about the Crown's desire to get rid of those customs that they didn't like.
- Loveridge
40 Well, a certificate of title to a hapu or an iwi is an extinguishment of such proprietary custom. It doesn't have to be individualisation. It's converting title into a tenure recognisable in British law.
- Powell But you could still establish a certificate of title without, by recognising those proprietary customs and giving effect to them. You wouldn't have

- to extinguish them. Here the thrust is on extinguishing customs we don't like.
- 5 Loveridge No I don't think so. I wouldn't agree with that. I think this is a shorthand, as I have said, all this is stated in the '62 Act. We have added several different things to this Act and this is what this particular Act is about. That's how I would look at that.
- Powell If I could ask you to go to page 228 please.
- Loveridge Yes.
- 10 Powell 6.3.14 and over the page, what you are talking about there is Sir William Martin is making various arguments and didn't get a sympathetic hearing from Mantell and Weld, because they saw him as being a generation out of date.
- 15 Loveridge What I am saying is that they probably saw him as not being sort of part of the official, being properly in the loop and knowing what was going on and understanding self-reliant policies and all this sort of thing.
- Powell I was just a bit intrigued by that description of "a generation out of date" because after all, Weld and Mantell weren't in any sense 'new' men at that stage.
- 20 Loveridge No. That's probably not the best possible way of saying it. What I was trying to say was that people like Martin and Weld had, in their view, probably moved on from the old arguments of the past and from things like advocating things like authoritarian native councils and things like that. Martin is very well respected during this period. He was constantly being consulted by the Crown on major things like confiscation and court processes and things like that. From memory, he drafted the 1871 Native Lands Act, put forward a draft of it. Very actively sort of being consulted all the way along. My impression was that this particular thing, especially since he didn't seem to know what had been going on for the last year, was probably viewed by them and written off because he recommended a native council, which was considered well out of date as an idea, and because he wasn't up to speed with what had been going on. That was why, part of the reason why they didn't adopt some of his suggestions.
- 25
- 30
- Powell The Weld Government itself, administration itself though didn't last for very long.
- 35 Loveridge What, '65, I believe.
- Powell It sort of lasted I think another month or so after the 1865 Act had been passed?
- Loveridge Or early the next session, I can't swear. I can't say off the top of my head. He, of course, left the colony and went off to become a Governor in Australia by the end of the decade. That thing of his that I've quoted was written after he left New Zealand. His review of his experience as a Premier, basically.
- 40

- Powell Could you go to page 193 please.
- Loveridge Yes.
- Powell In that paragraph, in paragraph 5.7.13 you talk about the failure of the Crown pre-emptive purchase system. Now, I take it you would accept that this is a failure from the perspective of the Crown?
5
- Loveridge Oh yes, and settlers, yes.
- Powell Because clearly the Treaty did not require Maori to sell land, did it?
- Loveridge No, definitely not, no.
- Powell And so if the pre-emption system isn't working and as you have indicated, there may be even some question as to whether it was working or not.
10
- Loveridge Well, there's a question in the 1850's, there's not much of a question after Waitara, because the Crown becomes very timid about buying land. There's not many transactions taking place in the early '60's until a bit later. Oh well, McLean's buying land in Hawkes Bay of late, but that's about it really.
15
- Powell So, again, just perhaps a slightly different way of looking at it, than we were looking at it before. If Maori are retaining their land, a new system is really only going to be needed if the Crown wants to get around its Treaty obligations and get Maori to sell that land, when they have indicated that they don't want to sell.
20
- Loveridge I think the point of view is that they are offering them an alternative way to do it. There seems to be a feeling that one of the reasons why Maori aren't selling is because, just because of this huge price differential in Crown pre-emption purchasing. I mean, as you know, there's a lot of complaint from Maori about what they see as the difference between selling for tuppence an acre and the Crown selling it for a minimum of 10 shillings an acre. Part of the feeling, certainly it's part of the major part of the direct purchase debate in Auckland that I have discussed, is that people are saying that we have to go to some system whereby Maori aren't paying, in effect sort of handing the Crown 10 shillings an acre with every acre that they sell, and that we have to find a way that Maori can actually sell at market prices, and that's certainly what Bell himself says during the debates, and various others. What they are saying is that okay, pre-emption purchase is a failure in that since Maori won't sell we don't have enough land for colonisation, and it's a failure clearly in that Maori don't consider it to be an appropriate way of disposing of their land, or some Maori don't consider it appropriate. It's, as I say, it's still an alternative based upon Maori voluntarily deciding to use the mechanism.
25
30
35
- Powell Can you go to page 197 please.
40
- Loveridge Yes.

- Powell Here you've got I think it's Rogers isn't it?
- Loveridge Yes, this is the permanent Under-Secretary of the Colonial Office responding to the news of the 1862 Act and summarising for the Secretary of State all the various arguments for and against pre-emption, yes.
- 5 Powell And one of the things he notes about the complaints, about the pre-emption purchase system, is because it led to illegal leasing and renting and a defiance of law on a large scale. Now, of course, the restriction on leasing was a Crown restriction wasn't it?
- Loveridge Under the 1846 Ordinance, yes.
- 10 Powell And it really did give Maori only two choices in terms of their land, either use it themselves and retain it, or sell it?
- Loveridge That's right.
- Powell So it's using a Crown policy as a justification for saying pre-emption is not working.
- 15 Loveridge Well, this is Rogers listing the reasons why it's, as he says why it gave rise to complaints, he's saying people are complaining because of this, yes. I may say that one thing that's sort of struck me, I mean we are all aware of the illegal leasing in Hawkes Bay and the Wairarapa and that sort of thing. A number of people are saying, during the late 1850's certainly, that there isn't a great deal of illegal leasing in Auckland province for some reason. It's a difference between different areas, which is rather surprising. I hadn't sort of picked that up before.
- 20
- Powell I suppose that just picks up on the point that you and I were discussing before, about there were differences in terms of how big the failure of pre-emption was, that it varied from district to district as well.
- 25
- Loveridge I mean, it probably comes back, if there had been, part of the problem with, as you say, the 1846 Ordinance is a Crown Ordinance which says that settlers will be punished if they lease lands from Maori. The penalty is on the settlers if you are in possession of an illegal lease. If there had been a mechanism for determining title that was mutually agreeable to everyone concerned, then presumably there could have been a leasing regime under the Crown pre-emption system.
- 30
- Powell That was certainly something you, a point you raised in your evidence for Ngati Pahauwera wasn't it? That the Crown should have provided a ... for leasing.
- 35
- Loveridge There is an absence of a mechanism. But again, this is, the Ordinance comes in in '46, and it's not widely enforced as far as you can tell, and there is a great deal of illegal leasing. Then again, as soon as the Constitution Act is in place, the whole subject, as most of this report is about, is being discussed at great length, how do we put in this sort of thing. I was rather surprised again, that it's another thing that the Board of Native Affairs didn't discuss, was how can we relieve, you know, solve
- 40

some of the problems here by working out some way of enabling leasing. It's not part of what's being discussed really.

Powell So you are saying they didn't discuss it as a possible solution?

5 Loveridge Well, it wasn't. I mentioned with the 1856 enquiry that I was surprised that McLean's buy-back system wasn't discussed more. Again, his system was that you set aside, Maori were given first refusal on buying some of the Crown land that they had just sold to the Crown and getting it with a title and all that sort of thing, and that wasn't discussed, which I thought was very curious, and it hadn't occurred to me but leasing is not
10 there either.

Powell Well, just with those two examples, I mean, do you think that there's really a fixation on finding, of just working on basic methods of alienating Maori land, rather than looking for some other solution?

15 Loveridge There's an element of that, through this whole thing. I mean, certainly that the view was, and again, it's again this whole fixation as you put it, that Maori have too much land and I have seen arguments to this effect, that leasing doesn't solve the problem of helping Maori to become civilised because it just leaves them under the old communal tenure. So there's an element of that, yes certainly.

20 Discussion as to timetabling

Adjournment

Powell Dr Loveridge if I could ask you to begin by going to page 204 please.

Loveridge 204. Yes.

25 Powell And in paragraph 6.1.3, you note that there really has been no formal consultation on the 1862 Act.

Loveridge Well, there wasn't a process for formal consultation and in that sense there wasn't any, yes.

Powell There was none. It was an issue at the time though, wasn't it, that some sort of process should have been undergone?

30 Loveridge Sorry, in what way?

35 Powell Well, take for example that you mention the Duke of Newcastle and his, I think it was the Duke of Newcastle on page 142, when he is talking about what sort of institutions are needed in the colony, he's saying that some Tribunal, sorry this is at paragraph 5.1.4, he's saying whether "... some Tribunal cannot be established entitled to the confidence of both parties, for the purpose of adjudicating upon disputed claims ...". Now, how could the confidence of both parties be ascertained if you didn't attempt to include Maori in the process in developing an institution?

- Loveridge I think what he is referring to specifically in this context is creating a system that will have the confidence of both parties.
- Powell But surely a necessary part of creating a system that's going to have the confidence of both parties is to find out the attitude of one of the parties?
- 5 Loveridge Yes, but again, there isn't a system in place for making formal consultation. It's going to be as much a matter of whether the officials involved think that Maori will accept it or not.
- Powell But isn't it, it's really the Crown's decision not to set up a formal process for consultation.
- 10 Loveridge No, there are, I mean the Kohimarama was supposedly a step in that direction. There was a proposal, an ongoing proposal and at certain points you will see in my discussion that officials are assuming that there will be another conference
- Powell And Maori certainly requested it, didn't they?
- 15 Loveridge They requested it at (tape stopped)

End of tape 12 side A

Tape 12 side B

- Loveridge ... said 'Yes, this is a good idea, we'd like to go on with this.' As I say, the one didn't happen the next year, partly because of Gore Brown going and Grey coming in. And then Grey decided the situation was not suitable for such a conference to be held so that sort of died at that point.
- 20 Powell So, the Kohimarama conference could have been the mechanism that was used, but through a Crown decision, wasn't?
- Loveridge Yeah, basically.
- 25 Powell And likewise, there's quite a lot of discussion in your report about the Crown vacillating on whether to have an advisory Native Council.
- Loveridge Sorry, no. The Native Council referred to there doesn't include any Maori. No, this is a council made up of three or four, those three different councils, Sewell and Gore Brown and the British one, are to consist of officials.
- 30 Powell Oh, okay.
- Loveridge There are three or four appointed by the Governor, a couple from the Ministry and this sort of thing.
- Powell Sorry, I hadn't quite understood from your evidence.

- Loveridge I think at one point the idea was raised there might be an ancillary council provided, of Maori. But, that was never a prominent part of the discussion.
- 5 Powell But, as you just said, there was an ancillary council of Maori, I am sure I had seen it in your evidence somewhere, that there was some discussion of it.
- Loveridge Yeah, there was, I can't remember where.
- 10 Powell So it was talked about, of having some body that they could have consulted with, and again, through a Crown decision, it wasn't proceeded with.
- Loveridge That's right, or a failure to make a decision as much as a direct decision, I think.
- Powell And likewise, with Grey's district runanga that had been set up about this time, they could have been used as a basis for consultation.
- 15 Loveridge I think they actually were used that way. This is one problem with this, that I had trouble with when I was preparing this report. Is that there are so many of these areas where there hasn't been any study of these things. There were the councils, there were a couple of runanga, native districts established under the 1858 legislation for example. They certainly were proclaimed in the gazettes, the districts were created and the councils were created, but I couldn't find anything where anyone had discussed whether or not, they are sort of dismissed as saying well, nothing happened, but I haven't been able to find details. Similarly with the Grey's new institutions with the native districts and the runanga created under that, there were quite a few of them created between 1862 and 64. I know that some of them were active, but again, it's not something that people have gone into to try and get a sense of this.
- 20
- 25
- 30 Powell But certainly there's nothing that you have seen with the officials who were establishing the '62 Act, that any of them went out and talked to any of the runanga that were established at that time?
- Loveridge No, it's purely a Parliamentary process. As I say, I think it's fairly clear that the basic idea was that this was the Governor's prerogative, that this would be done under the control of the Governor, he would make the decisions, the native districts and the runanga would be created, and the Land Act follows right in with that, they used almost the same procedure that it's a discussion amongst officials, which leads to the Act being passed.
- 35
- Powell And another way in which the Crown could have taken steps to consult with Maori would have been through having some sort of Maori representation in Parliament itself?
- 40
- Loveridge Oh, absolutely, yes.
- Powell And again they chose not to do that.

- 5 Loveridge Again, this was discussed on and off and one of the main stumbling blocks was how do you put them in Parliament if most Maori don't have a vote? And if you have a vote that's based on a tenure recognisable in British law, which very few Maori had, then to give them the vote would have made no difference at all. For them to exercise their vote wouldn't have resulted in any effective Maori representation in Parliament.
- Powell That in itself, of course, is another Crown policy decision, but that's the basis from which we ...
- 10 Loveridge It is, yeah, yeah. I refer to them in here in 1857, '58, '59. They are trying to figure out ways that they can get around this and give a franchise without having it based upon tenure and it's completely rejected by the Colonial Office, or the Colonial Law Officer in 1859, I believe it is.
- Powell So again it is a Crown decision.
- Loveridge Mmm.
- 15 Powell Now, just having touched on the issue of enfranchisement, in various places in your evidence you talk about the importance I suppose of Article 3 rights, of getting equality under the law for Maori and crucial in that is the vote. So by enfranchisement you are talking about the system that was in place, that they needed a property qualification to vote?
- 20 Loveridge Yeah. Well that's what – as I said, the alternate title for the direct purchase movement in 1858/59 was the enfranchisement movement, because by creating this mechanism of giving Maori title to land you would, by that, by doing that, create a Maori electorate and franchise it.
- 25 Powell At the time that 1862 Act went through, wasn't there some resolutions put through the General Assembly at the same time by Fitzgerald, and he was saying that Maori should have fair representation in the House of a race which constitutes one third of the population and that was soundly thrown out at the time.
- 30 Loveridge Yes. I gather partly by people who didn't like the idea I would imagine but also substantially by people who said there is no mechanism to do it unless Maori have a Crown title, a Crown grant.
- Powell Well doesn't that sort of really expose that enfranchisement was a justification for the 1862 Act?
- Loveridge One of them.
- 35 Powell: At the same time you have got the General Assembly saying "No we are not going to give Maori a fair representation".
- 40 Loveridge No we're not going to give them representation which is based on a different standard than other British subjects. That's what they're saying. FitzRoy, he didn't have a wide following I must say. It was sort of tossed out the middle of all the politicking that was going on between the fall of the Fox Ministry and the institution of the Domett one. He sort of

- hovered, and threw these on the table. I think a lot of the things he was saying people would have agreed to as being a desirable outcome but they simply, he made no effort to provide a mechanism that people could accept, or could be accepted.
- 5 Powell And again wasn't it the case that when Maori started to put land through the Native Land Court and started to get that property qualification, that the Government just changed the rules anyway and brought in the Maori seats.
- 10 Loveridge I can't comment on that, I know very little about the electoral situation later in the century.
- 15 Powell But surely that would have been a sensible point to have followed through that if you were saying 'Well this is a key part of it, we are trying to civilize them, we are trying to give them enfranchisement through the individualisation of their interests' and then within, I think it's two years of the 1865 Act coming into operation 'we're going to change the rules and we're only going to give them four seats'. Doesn't that show that there wasn't really much substance to that suggestion that they were doing it to make sure that they were fairly represented?
- 20 Loveridge I don't know that you can say that. Again I haven't studied this part of it as much as I would like to. Again this is the Weld Government comes in and says 'There will be Maori representation in Parliament'. Then they fall, but the idea is picked up and is pushed through in '67. I think part of it is that even by 1867 or later there aren't a lot of Maori who would have had a property qualification.
- 25 Powell But there were certainly an increasing number of Maori?
- Loveridge An increasing number, but what they are saying is as I understand it, and this is not something I have looked at very closely, as I understand it what they are saying is 'We need representation now and we will proceed with this mechanism'.
- 30 Powell Of course the alternative argument that Ranginui Walker and others have put forward is that when the Government, or the Crown, began to realise how many Maori could start to get the property qualification it may well upset the balance of power, and ...
- 35 Loveridge Well he may say, but I couldn't comment on that. I will say that the histories of Maori representation I have looked at – I maybe have looked at the first bits just to see what they discussed before 1868 – my view would be that none of these things have looked at the development of the Maori franchise and franchisement issues through the '50s and '60s. It's something else that needs a closer look at. There's an article which I have cited in here by Sarah McLellan, I believe is her name, which starts to do that but doesn't get too far with it actually. Again people sort of seem to assume that nothing interesting happened before 1862.
- 40

- Powell Now you have quoted quite a lot from Alan Ward's *A Show of Justice*, in terms of the reasoning by the Crown in terms of colonisation.
- Loveridge Well, not exten- a couple of times I think.
- 5 Powell A couple of times. But I don't think you really touched on, his thesis overall was, it was always just a show, all the institutions they put through, there was no substance to it. Isn't that what he argues?
- Loveridge That's part of his argument, yes.
- Powell And that's the part that you have sort of diverged from?
- 10 Loveridge Well I haven't sat down to write a critique of Alan Ward. I don't actually agree entirely with that interpretation. It's always a book that is well worth going back to to look at the way he has developed ideas and things like that, but I don't agree with everything he has put forward. And part of it is, the reason in this particular instance, is that his discussion of the origins of the Land Court and the Land Acts, I think this was written 15 years ago now, and I think he didn't develop it anywhere near as well as it should be developed, put it that way.
- Powell One of the other points you make towards your other evidence is about the need to have one law in New Zealand for Maori and Pakeha.
- Loveridge Well that's what people were saying at the time, yes.
- 20 Powell The settlers certainly were.
- Loveridge Yep.
- Powell That wasn't necessarily the case in much of the rest of the Empire was it? In Canada, India, places like that you had a multiplicity of laws within the Commonwealth.
- 25 Loveridge Within the Commonwealth. Well this is of course a point raised by people a number of times in the course of this particular debate that I have examined. I think there are comments made that it doesn't have to be British law, you can modify it to accommodate local custom. I think it is when they are discussing the Native Districts Act in 1858, yeah.
- 30 Powell There is certainly no particular reason for having to extinguish all that Native custom, just to have one set of laws.
- Loveridge Yeah. Well part of the problem in New Zealand as opposed to, say, India or something like that was that the law wasn't codified, the Native custom wasn't codified.
- 35 Powell Well it wouldn't have been codified in half the places?
- Loveridge Well in many places it was.
- Powell Some places it would be.

- Loveridge In many of the discussions about the ability to adapt local law to common law, British law, British common law to local custom, relates to India and things like that.
- Powell Mmm, and places in Africa too.
- 5 Loveridge Perhaps, yeah.
- Powell Would it be fair to say that what Maori were looking for rather than one law was equality of laws? Is that a fair description?
- Loveridge I think it's difficult to say that. Again there is an absence of analysis, there's an absence of research to give us a clearer picture of what Maori were looking for in this period of time. Again you can always pick out a piece here and a piece there, but a consistent and reasonably thorough analysis of what evidence we do have is lacking, I think, on this.
- 10
- Powell And if you look at the land legislation that you have looked at in the course of your evidence it would be hard to say that what they get out of it, although they can individualise their title and get titles, the titles they get out at the end are still not equal. There are still restrictions, there are still expenses that they have to incur that Pakeha don't, that makes the final result not an equal law. Would you accept that? In terms of the Native land legislation?
- 15
- Loveridge What particular thing are you thinking of?
- 20 Powell Survey costs. The costs and expenses of the Native Land Court system vis-à-vis the costs and expenses to a Pakeha?
- Loveridge This has been recognised as a grievance very early on of course. Fenton is talking about it in 1867/68, things like that. I think this is one thing that simply wasn't considered, that you know, just why should Maori bear the costs of conversion of title. I think I mentioned the first, Sewell's Land Bill, provided for the Crown to pay for all surveying required. That sort of disappears. People complained bitterly about settlers having to pay for surveying and things like that.
- 25
- Powell So there was an awareness by the Crown of the expense of surveying?
- Loveridge There was a spotty sort of awareness, but again the '62 Act doesn't have a provision for costs really. It sort of, from memory, there's just the court costs, in the way you'd use any other kind of court. But it isn't until later on that you actually get these tables of survey, you know tables of fees, and costs and things like that.
- 35
- Powell The costs become a focal point in the '65 Act don't they?
- Loveridge Oh, but it's the first time they are laid down as tables of expenses, if you will, and things like that. I mean, it's an issue that simply was there, it sort of flitters occasionally as thought about, and occasionally recognised. Whether Maori should have had to bear these costs given the purpose of the exercise is to facilitate, one of the purposes is to facilitate colonisation
- 40

- 5 and it is seen that without providing Maori with an acceptable way of enabling them to sell land, that colonisation will fail. And yet, nobody seems to take that extra step and say, well, you know under pre-emption purchase the Crown makes a profit from the differential between the price paid and sales which you then apply to colonisation. Maori to a certain extent pick up those costs by being lumbered with the survey and all the other court fees that arise from that.
- 10 Powell One way of describing it would be that the Crown having achieved what it wanted to achieve, didn't ever assess its obligations under its protective function under the Treaty.
- Loveridge Well I would hesitate to say that just because it was being addressed in the later land legislation. I am not familiar enough with it to...
- 15 Powell They certainly didn't assess it at '62 or '65.
- Loveridge Well at '62 it wasn't a central issue of the thing. This survey provision was the only one that seems to have had much discussion from what I can remember.
- Powell And that was just to make sure that the Crown didn't end up paying for it all?
- 20 Loveridge Yes. I am trying to remember exactly where that is. That was from memory but that was the only sort of vestige of that issue being tackled at the time, yeah. I am not too aware, I certainly haven't seen any discussion that this might be a problem until quite a bit later, until after the '65 Act comes in. It sort of gets in there but they sort of set up the strike, and the normal court has the schedules of fees, and all that sort of thing. That's sort of set in place as part of this institutionalisation or restructuring of the court in '65, and again it doesn't seem to strike anybody that this is going to be a problem until a bit later down the road.
- 25
- 30 Powell It's almost a bit like the way, the focus of your evidence is almost like a microcosm of what happened in the court. That you have got this build up where they don't consider all these different things that could go wrong or what the effect might be on Maori and those things all start manifesting themselves when the Land Court comes into operation which is after the period of your evidence.
- 35 Loveridge Well, I mean there's a very explicit undertaking in '62 that everyone says, this is not a perfect Act, we will repair it as we go. That's what Bell and his Ministry says, and that's what the Governor says and that's what the Colonial Office says. 'Yes, this will do now we will fix it as we go.'
- 40 Powell And if they are fixing it as they go of course the problem that exists is that if Maori suffered in the meantime there would be no redress for those people?
- Loveridge Mmm. Unless that's part of the fix-up I suppose.

- Powell
5 Now at paragraph 7.1.3 on page 232 you say that “The idea that Maori should be encouraged to retain most of their lands or might want to maintain a separate identity, was not one which British settlers, missionaries, and officials in the mid 19th Century could readily grasp.” It’s the first sentence of that 7.1.3. There would have been a few clues to Crown officials and settlers who wanted to see though, wouldn’t there?
- Loveridge
Oh there were certainly one or two who perhaps did grasp it, but they’re certainly not the majority and certainly the notion, I don’t think, takes any grip at all on sort of the general view of the subject, if you will.
- 10 Powell
What about the Kingitanga and the rise of the Kingitanga? Surely that would have been interpreted that Kingitanga wants to retain independence?
- Loveridge
15 Yes, but they are seen as being very obstructive and not understanding the benefits that will accrue to them. Partly of course Gore Brown is fairly firmly of the impression by ’57, if not before, that the Kingitanga is really just an expression that Maori want law and order brought to them. In other words that this is just a different way of expressing sort of the same desires that the British are saying they should be pursuing.
- Powell
20 But surely, unless the British understood that Maori did wish to retain these various customs that the British didn’t like, there would have been no need to deliberately go out and attack them?
- Loveridge
What deliberate attack are you talking about?
- Powell
25 Well isn’t it quite clear that, for example, in the words of Henry Sewell “... individualisation could also facilitate the destruction of the principle of communism which ran through the whole of their institutions upon which their whole social system was based and which stood as a barrier in the way of all attempts to amalgamate the Maori race in our social and political system.”
- Loveridge
30 ‘Facilitate’ being the operative word there I think. Giving Maori an opportunity to pursue other means, other customs and other ways of life. I wouldn’t construe that, that he’s saying that there is an ‘attack’. He is saying that these are fairly decadent and, he’s saying that these are not effective and appropriate institutions and that Maori will jump at the chance if they are offered a way of getting other ones, of becoming part of
35 the British civilization, if you will.
- Powell
But those Maori who you do quote in the text who are sort of embracing the Native Land Court ...
- Loveridge
Sorry, which quote are you referring to?
- Powell
40 Sorry, not so much quotes, but you do make the point at the end of your paper that Maori did embrace the Native Land Court.
- Loveridge
Going on the basis of their use of the Court, yeah.

- Powell And he would have said that to the chiefs, who wielded the traditional authority?
- Loveridge I think so. Mmm – but again I can't sort of hand you a list of references to this. This would be my view, my feeling.
- 5 Powell Hand in hand with the publicisation of the Native Land Acts and what they meant, was the problem of arranging translations. Of course there were no translations to the 1862 Act provided, I think probably through the whole operation of the 1862 ...
- 10 Loveridge No. They were provided in, Rogan had them by early 1865, when he was distributing copies to assessors and others. I can give you the reference to that.
- Powell Sorry. Yeah, no, that's right but he also makes the note that in terms of the 1865 Act he didn't, translations to that Act weren't being, or was it the rules of the Court until about '67?
- 15 Loveridge I am not too sure about that, I couldn't say. I believe that's right.
- Powell And that was an obvious way in which the Crown could make the import of the Acts known to Maori, was actually to provide translations from the very beginning, if it had been serious about making sure Maori understood it.
- 20 Loveridge You'd think so. Mmm. I mean again, I don't know what other avenues may have been used to publicise the '65 Act, in terms of newspapers, various other means of doing it but as you say, they don't seem to have translated the '65 Act for a while.
- 25 Powell Ma'am that concludes my cross examination, I just would like to raise one issue and that's, I would like to, as you're aware, the Crown is intending to call further specific evidence on the Native Land Court in due course. Because we haven't seen that evidence we don't know if there's any cross referencing back that might be needed in terms of, if that witness when they write their evidence might rely on something that Dr Loveridge said and so I raised with my learned friend yesterday that I'd like leave to reserve the right to cross examine/recall Dr Loveridge further, if there's something in that later evidence that impacts on his evidence.
- 30
- Andrew The Crown's happy with that provided obviously that we get advance notice of Dr Loveridge being required to come back.
- 35 Dame Augusta Yes, well I don't see any problems with that at all. In fact I think you might have rather have anticipated that that sort of thing could happen when the Crown agreed to give evidence at this stage.
- Powell Thank you Ma'am.
- 40 Dame Augusta Well that's noted, and you have concluded your cross examination as at this moment.

Powell That's right Ma'am, thank you.

Stephen Clark cross examines Don Loveridge

- 5 Clark Dr Loveridge, one of the conclusions you reach with respect to the operations of the Native Land Court was that many Maori embraced the court with enthusiasm.
- Loveridge Based on the volume of business dealt with by the Court, yes.
- 10 Clark Some Maori of course though, say oh sorry, that comment or conclusion you reach must be read with the caveat that some Maori of course didn't get that opportunity given that vast tracts of land in the North Island were confiscated.
- Loveridge Well of course in that case, yes.
- 15 Clark Now dealing with the situation of the North Island for a start. You probably don't have the exact figures but would you agree something in the order of some three million acres were confiscated? Certainly more than two million, wasn't there?
- Loveridge I am sorry – I am sure that's roughly a ballpark figure. Of course it takes place over a period of time.
- 20 Clark So with respect to the North Island anyway, if three million is accurate then perhaps close to a quarter of the North Island was never put through the Native Land Court?
- Loveridge Well if we're using two million as a figure, there is roughly I think 19-odd million acres still in Maori customary tenure as of '62, '63, so we'd be looking at more like 20% of that – somewhere in there. But I think that's probably a very rough figure.
- 25 Clark Oh I think we're both dealing with estimates at this stage. One thing that strikes me in the debate or power struggle probably which existed between the Imperial Government and the Colonial Government, and the debate about who would control Maori Affairs, was the distinct lack of Maori input into that debate. Would you agree with that?
- 30 Loveridge Oh definitely.
- Clark And as a continuation of that theme, is the lack of Maori input into the debate, or promulgation of '62 and '65 legislation.
- Loveridge Promulgation in what sense?
- 35 Clark Well Maori weren't sitting in Parliament debating or drafting it were they?
- Loveridge Yep.

- Clark And, would you agree that the decision to abandon their policy of Crown pre-emption, again Maori had little input into that decision?
- 5 Loveridge Yes in that one case certainly, there was a fair bit of effort made to discuss this issue with Maori. For example, in 1859 I think it was, Governor Gore Brown sent out Turton, Hanson Turton who was a land purchase officer and district officer, to wander about Waikato and Hauraki to discuss exactly that issue with them and report back to him. And there were others who were given similar instructions that I'm aware of, yeah. But as I said there isn't a formal mechanism for consultation.
- 10 Clark But with respect to Turton he met some opposition in the Waikato, didn't he?
- Loveridge He basically, from memory, I haven't read this for a little while, he reported back that a majority preferred to stay with pre-emption at that stage. This is '59, '60 in there somewhere.
- 15 Clark Do you rely on the Kohimarama conference as an example or attempt at discussion with Maori?
- Loveridge Oh well, the reason that Kohimarama is dealt with in the way it is here, is because it's literally the only formal occasion where the Crown actually made, if you will, a formal presentation of its thinking on these issues to an assembly of chiefs. I think it was, certainly on Gore Brown's part, I think it was a serious effort to canvass Maori opinion. As I say there was a major, an overt political purpose to the conference which was to sort of reinforce support for the Crown and a lot of people didn't come. But with those who were there, as I say it wasn't just a political thing, there was a lot, a very great range of issues discussed and with reports being made back to the Governor. He comments on it a great deal in his various reports and his private correspondence. For example, Henry Sewell attended almost the entire conference, a fairly prominent politician. Others were there, Bell and others came in so it was a fairly major sort of a convocation between the Crown and Maori to discuss various issues of the day, I think.
- 20
25
30
- Clark Just to pick up on the comment you just made, it wasn't necessarily representative of all Maori though, was it?
- Loveridge No it wasn't no. It was representative of those who chose to come.
- 35 Clark And perhaps representative of those who were loyal or friendly?
- Loveridge Primarily yeah, or neutral, whatever you want to say, yeah.
- Clark I think with respect to the 11 who you cite as speaking specifically about your topic, there seems to be a range of representatives from Ngati Whatua, Te Arawa and Ngati Raukawa from the Otaki area.
- 40 Loveridge The Wellington west coast was well represented in that group certainly, and one or two others.

- Clark
5 Okay if we can perhaps agree that it was an attempt but certainly, ... representative attempt ... Maori. One of the comments you make with respect to the operation of the court in Kaipara, in the early experiment, was the lack of protest in that area. But that's not to say that there were no protests during the operations in that three year period, was there, in Kaipara?
- Loveridge
I'm not too aware of any in 1864 and 65. None spring to mind. There certainly were later, of course.
- Clark
So you were limiting that comment to that three-year period?
- 10 Loveridge
Well to the period of the experiment which is '64/65 really. I am just saying that it went through apparently very smoothly.
- Clark
But you are aware that there was some protest though with respect to some blocks. For example the Tauhaki Block.
- 15 Loveridge
That was put through later wasn't it? '66 or '67. I am sorry, my comments there were pretty much confined to this trial run if you will. I wasn't implying that there was no protest at all or anything like that, but that what was done in that period seems to have been done, gone through in a fairly smooth way.
- Clark
I have no further questions, Ma'am.
- 20 **David Ambler cross-examines Don Loveridge**
- Ambler
Wai 355. Dr Loveridge can I just understand at the outset, is it intended at this stage that this evidence is the extent of your evidence in the Hauraki region?
- Loveridge
I have not been commissioned to do anything else at the moment.
- 25 Ambler
So you are not going to study and present evidence on individual Native Land Court transactions?
- Loveridge
No, not at this moment, no.
- Ambler
30 Can I just pick you up on a point that was raised by my friend Mr Powell. I think it was in the context of consultation and you referred to Judge Fenton having explained the benefits of individualisation as being participation in the economy.
- Loveridge
I am sorry did I say that? I am not quite sure what you are referring to.
- Ambler
35 You referred to him explaining that there would be the ability to sell land interests and expend the money on capital for the land that remained. Do you not recall?
- Loveridge
I am not quite sure, explain to whom?
- Ambler
To Mr Powell today in your evidence.

- Loveridge I am sorry you have lost me a little here.
- Ambler Mr Powell was discussing with you the question of consultation with Maori and you made a comment about Judge Fenton having explained to Maori the benefits of individualisation. Is that the case or not?
- 5 Loveridge I am sorry, I don't recall saying that.
- Ambler Maybe I misheard you. Well can I ask you then? Do you know of whether Judge Fenton did explain to Maori the benefits of individualisation at about the time of the 1862 and 1865 Act?
- 10 Loveridge Oh in 1862 Fenton was an Assistant Crown Law Officer in Auckland. I think as I commented somewhere later in the report that he doesn't appear to have had any major involvement with the '62 Act, with drafting the '62 Act. He was probably involved with advising Governor Grey about the Native District Scheme and he may have been involved in giving advice on various drafts of legislation. I am not aware of him making any such statements in 1862. In 1865, again he was Assistant Crown Law Officer until he was appointed Chief Judge. I am not aware of any public statements made by him in 1865, but I would assume that in the course of court proceedings he would have made statements. I haven't researched that aspect.
- 15
- 20 Ambler Perhaps I misheard your evidence but would you agree that for Maori to participate in the Colonial economy, in principle it didn't require individualisation of title? They could sell and did sell land at a tribal level and were then able to participate.
- Loveridge To the Crown?
- 25 Ambler Yes.
- Loveridge Well again they could if they chose to sell land.
- Ambler Yes. If they chose at a tribal level to sell land they could participate in the economy?
- Loveridge Yep.
- 30 Ambler I gained a sense from your précis of your report and the report itself, that you saw the motives in bringing in the 1862 and 1865 Act as purely benign, ie the civilization of Maori.
- Loveridge Oh no.
- Ambler That's not the case?
- 35 Loveridge No. I am saying that there were two very clear purposes in the exercise. One was 'civilization' to enable Maori to do things that settlers considered essential for them to do to become 'civilized'. And the other thing was quite clearly to facilitate colonisation, was to keep the engine running by providing land for settlers.

- Ambler Well in fact the primary purpose really was to facilitate colonisation, wasn't it?
- 5 Loveridge Well it depends what priority you assign. Some would have said a fairly substantial portion if you will of certain parts of the colonial establishment would have said that bringing Maori under British law and order was the most important part of it in the long term.
- Ambler But if the Crown ...
- Loveridge Sorry, what I should be saying, I don't think you can actually quite separate them that easily in the minds of the people involved.
- 10 Ambler Well the pressure from settlers was for increased land alienation.
- Loveridge Yep, one way or the other.
- Ambler They wanted more land available to settle on, which was colonisation.
- Loveridge Yep.
- 15 Ambler If the land was not going to become available for colonisation then isn't it fair to say that the Crown would not have been bending over backwards to civilise Maori?
- Loveridge It's part of the package. That's certainly the thrust of my report that it was seen as being a fairly inseparable process. That colonisation provides or promotes the civilisation of the people involved and vice-versa.
- 20 Ambler Yes but ...
- Loveridge Colonisation is, or civilization is the major price being paid for colonisation.
- Ambler Well outwardly the Crown representatives are saying that civilization is the benefit that Maori get.
- 25 Loveridge Yes.
- Ambler But stepping back and looking at the process, the primary objective of colonisation, sorry, the primary objective of the Act was the freeing up of land for colonisation by primarily British settlers.
- Loveridge In this particular Act, insofar as this is part of the whole process, yeah. And this is the specific part of the process being dealt with by this Act yeah.
- 30 Ambler Now my friend Mr Powell has already raised with you the reference to the comments of Henry Sewell I think, in 1871, in relation to the purpose of the legislation.
- 35 Loveridge He didn't actually say what the date of that reference he wrote. I am familiar with that one, yeah.

- Ambler Sorry it was 1870. And to paraphrase, he described the object of the Acts as twofold, firstly to bring the great bulk of the lands in the North Island within reach of colonisation and secondly the detribalisation of the Natives which is another term for individualisation of title.
- 5 Loveridge That's part of it, yeah.
- Ambler Now I think you have already accepted that Article 2 of the Treaty recognised collective rights of Maori?
- Loveridge Yes it recognised them, yes.
- Ambler It expressly recognises?
- 10 Loveridge Yes.
- Ambler My friend also referred you to, and I will just find the reference for you Dr Loveridge. I think we're at page 54 of your report, where my friend referred you to the comments of Donald McLean.
- Loveridge Yes. In 1856.
- 15 Ambler In 1856 he's making the observation that, and at the top of page 54, there was really no such thing as individual title that is not entangled with the general interests of the tribe. So as at 1856 that was abundantly clear to the Crown?
- Loveridge I think so, yeah. That's certainly incorporated in the Board's findings, yes.
- 20 Ambler Yes. And earlier, I'll just find the reference. At paragraph 2.2.9 page 26 you also make reference to, and my friend Mr Powell brought this to your attention, the comments of Governor Gipps. I assume I've pronounced that right, again confirming no individual right in property. No individual property right. That quotation I think is taken from July 1840.
- 25 Loveridge That's right, yes.
- Ambler Is it fair to say that at the time of the signing of the Treaty the British had a very clear understanding of that principle?
- Loveridge I think so, yes. Perhaps the upper levels in London may have been a bit fuzzy but there was clear understanding I think in a practical kind of sense. I mean, certainly if Hobson had any different views he would have been relieved of them by the missionaries who were available to advise him at the time. But I would say, yes, that they had a pretty clear understanding generally.
- 30
- Ambler So don't we get to the point where in terms of Article II of the Treaty where it refers to both collective and individual rights we are really talking about collective rights in relation to land?
- 35
- Loveridge Yes probably, yes.

Ambler I don't understand there to be any evidence that prior to 1862 or 1865 Maori had within their own institutions said, 'We are going to abandon tribalism and move ourselves voluntarily to an individual rights approach as per ...' [Tape ends here]

5 **Tape 13 Side A**

David Ambler continues cross-examination of Don Loveridge

Ambler Well I saw some comments there as to support amongst one or two individuals of Crown proposals. That's the extent of the commentary that you've been able to locate?

10 Loveridge Insofar as I've brought it out. As I've said this wasn't something that I address specifically and searched for, for various reasons.

Ambler I am not so much interested in commentary as to the Crown proposals, but more Maori changing their own institutions. They hadn't changed those institutions by 1862 themselves so that they were abandoning a tribal approach to land ownership, had they?
15

Loveridge I wouldn't want to answer that question. I think this goes well out of my area that I have worked on. On this, anything I said would be purely a personal opinion without being properly informed on the subject.

Ambler But we can at least say that it took the 1862 Act at least to begin the process of individualisation of title.
20

Loveridge It was the first time a mechanism had been provided. Yes.

Ambler You commented that there was no legal compulsion to bring land under the 1862 or 1865 Act. Do you agree with, well, firstly, are you aware of Dr David Williams' evidence to this Tribunal, and I am referring to his commentary from paragraphs 85 through to 91.
25

Loveridge I haven't read it for some time. I don't think I could comment.

Ambler Oh well I'll cut to the chase anyway. He talks about the fact that while there may not have been formal legal compulsion, there was practical compulsion in the sense that it took one individual to bring a block of land.
30

Dame Augusta I am interrupting you and I wonder, if you are going to ask the witness to comment upon what Mr Williams has written, I think it might perhaps be fairer to him if you presented to him what had been written by Williams rather than giving him your précis of it. Which I am sure is entirely accurate but ...
35

Ambler I am happy Ma'am.

Dame Augusta Would you mind? I think it would make it more comfortable for you, wouldn't it?

- Ambler Perhaps if I can ask Dr Loveridge, I am not trying to trip you up, but just to read through paragraph 90 of Dr Williams' evidence.
- Dame Augusta Take your time.
- Ambler Does that help you refresh?
- 5 Loveridge Yes I have read that. I would consider it a fairly extreme statement and quite an unhistorical presentation of this. It is pretty much a shotgun blast at everything that happened in the Land Court from 1865 through to the end of the century and I don't even know that I can comment appropriately on that level of generalisation.
- 10 Ambler Okay.
- Dame Augusta Well may the Tribunal know what it's all about?
- Ambler Yes, at paragraph 90 of ...
- Dame Augusta I don't have that with me.
- 15 Ambler No, of Dr Williams' evidence he discusses the point that although there was no legal compulsion to bring lands under the Act in a practical sense there was compulsion by way of participation once a block was brought under the Act. And Dr Williams develops several points including the fact that it only took an individual to bring a block under the authority of the Land Court and the whole hapu or everyone with any interest in that block was then dragged in. He refers indirectly to the practice of raihana. He refers to the costs of the participation in the Court process. So that's the point that's developed by Dr Williams there. I just really ...
- 20
- Dame Augusta The Tribunal is interested to know what it is about in view of the somewhat robust reply that was given by the witness.
- 25 Ambler I guess that the one point I wish to make is that under the 1862 and 1865 Acts, all it took was one individual to take a block of land before the Court.
- Loveridge As I said to Mr Powell, this is a generalisation which is frequently repeated and we certainly know what happened in certain instances. We have very little idea what the instance of it was proportionally. Again as I said to him, it is something that is very difficult to comment as an historian on, without that information.
- 30
- Ambler I appreciate in that you haven't covered what actually happened from 1865 on, but in terms of dealing with the scheme of the Act, in terms of the legislation itself all it did take, in theory at least, was an individual to bring a block before the Court and then that block was processed by the Court and so all and sundry who had a connection with the block were caught up by that process.
- 35
- Loveridge Is there a question in this?

- Ambler Yes, well do you agree with that?
- Loveridge I agree that that's in theory, what you have said. In theory there are – you can read that as an omission in the Act to prevent that, if you will. If that's what you're getting at?
- 5 Ambler I mean we have to deal with it at a theoretical level in a sense in terms of your paper, because obviously you are not intending to deal with individual cases and so I am endeavouring to step back and look at the legislation itself. And the fact is that in the scheme of the legislation it only took one individual to bring a block of land under the regime of the Court.
- 10 Loveridge I would agree with you that there's an absence of a prohibition on one person for example, doing that, and as I said, as I responded to Mr Powell, that part of this I think is a problem in that what basis would there be for forbidding people who have interests from going to the Court with them?
- 15 Ambler Well the point really just comes back to the one that's developed by Dr Williams. Which is that while there might not have been legislative compulsion to bring a block under the Act, in effect, the effect of the Act is that once an individual has brought it under the Act it is compelled to be under the Act. I'll leave that point.
- 20 Dame Augusta But the individual who brought it under the Act had to be a Maori?
- Ambler Yes the point is Ma'am ...
- Dame Augusta Sorry I am just catching up with what your thread, this is related to customary Maori land and so on isn't it?
- 25 Ambler The point is though that all sorts of other hapu and individuals will have had an interest in that block and so they are compelled obviously to be before the Court. Now just finally Dr Loveridge paragraph 7.1.8, which is your conclusion ...
- Loveridge Yes, at page 235?
- Ambler Yes.
- 30 Dame Augusta What page is that? Can you help us by ...
- Ambler 235.
- Dame Augusta Thank you.
- Ambler You comment "It is doubtful whether such an approach would have satisfied the aspirations of settlers and immigrants for very long. They would have judged it on exactly the same basis as the old pre-emption purchase system had been judged - its ability to provide land for colonisation in sufficient quantities at a satisfactory rate."
- 35

- Loveridge Yes that is referring to the idea of a Native Council controlling all the dealings.
- 5 Ambler Yes. There is a sense of inevitability in terms of the unsatisfied appetite for land by settlers that there would inevitably need to be change to the system.
- Loveridge Well as long as the pre-emptive system wasn't fulfilling what they considered to be the [indecipherable] they certainly are going to put pressure upon Government to try new ways of freeing up the flow of land, yes.
- 10 Ambler And really, as at 1860 the Crown would have seen that that appetite or that pressure would continue?
- Loveridge At almost any date you care to mention, yes.
- Ambler I am sorry I missed that?
- 15 Loveridge At not just 1860 but almost any date you care to mention. This is a pressing factor, yep.
- Ambler Which is really the whole point of the protections and guarantees that the Treaty set in place, isn't it? To protect Maori from that unceasing appetite?
- 20 Loveridge As long as they, to protect them if they do not wish to sell, or to dispose of their land, yes.
- Ambler There is even, in terms of Treaty jurisprudence, there is a broader obligation of protection of Maori to ensure that they are not landless for example.
- Loveridge Mmm.
- 25 Ambler Thank you very much. That is all I have Ma'am.
- Dame Augusta Right thank you. Mr Kahukiwa do you have any questions?
- Kahukiwa No questions Ma'am.
- Dame Augusta Shall I start at the other end?
- Dame Evelyn Stokes questions Don Loveridge**
- 30 Dame Evelyn This one I think to start off in a very general way. At page 20 you make a very appropriate warning for present day historians dealing with this period and I don't think we can emphasise too much the importance of seeing things through the eyes of the contemporary beholders or participants. But how do you explain that the things that these officials, Parliamentarians or whoever, did in producing an Act, may well have had unforeseen circumstances. It is a kind of negative history that there is not
- 35 a lot of evidence. You can say well I don't think they thought about it but

5 apart from the debates in Parliament is there any evidence of too much thinking through beyond the assumptions that you rightly make that it was part of a civilising process? That the effects, longer term, of the Native Land Court operation and individualising titles. Just comment really, I'm looking for.

10 Loveridge It is obviously a problem. I have to say that in between the research for this and other projects that what you tend to see in terms of looking forward and trying to weigh what needs to be done and all this sort of thing, what you tend to see is people casting it in terms of 'what will happen if you don't do this?' 'What will happen if we don't provide a means of individualisation?' 'What will happen if we don't turn Maori into yeoman farmers?' rather than sort of looking, if you see what I mean, rather than looking and saying 'what will happen if we actually do this particular thing?' There is very much I think a focus in here on the very distant ends if you will, this civilisation of Maori in the far distance, rather than looking for those particular pitfalls of what you are actually doing.

Dame Evelyn Well was the nature of this civilisation of Maori really debated? Like was one objective to create a lot of Maori yeoman farmers for example?

20 Loveridge I think it is fairly extensively debated. It is certainly debated in the missionary and Church circles.

Dame Evelyn Yes, earlier. I am thinking about the Parliamentarians who put through the 1862 and 1865 Acts.

25 Loveridge Well I mean, part of the problem with something like this is that I am giving you a very selective view of what was going on in Parliament. I've referred to a couple of motions and a couple of Acts whereas we are talking about 400 pages of Parliamentary debates, perhaps half of which might refer to Maori issues. And again, you have to sort of pick and choose when you are doing something like this. I think you could quite easily sit down and write a whole thesis on what Parliamentarians were saying about Maori rights in 1860 for example and you know, looking at all these various things. It actually surprises me whenever I go back to these things, the extent and the sophistication of the debates. But as I say, it is done in fairly blinkered sort of, with fairly blinkered sort of terms. The parameters are pretty narrow of what they are discussing.

35 Dame Evelyn It was a lot of debate but it tended to be fairly focused, directed or blinkered or ...

40 Loveridge It tended to take place within this paradigm of 'Civilisation is good.' 'Colonisation is good.' It didn't stray too far off of that. Fitzherbert is one of the exceptions who actually sort of pops up and throws out what everyone else considers to be fairly wild ideas and they make no impression that you can see at the time, but that is a rarity I think. You get it occasionally in the newspapers, letters to the editor and things like that. I tried to cover a fair amount of ground, I tried to look at all the major newspapers published during the periods of what I had identified as the contributors of the legislation, just to get a sense of what is actually

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- 5 being said out in the community as well as what Parliamentarians are saying. I didn't by any means cover all the newspapers I could, or I would like to have, it is a fairly time consuming process, but there is a surprising degree of debate about the Treaty and about relations between settlers and Maori and about what the Government should be doing and isn't doing. Very extensive during this period.
- Ambler 'Closing the gaps'.
- 10 Loveridge Well, yeah, that is actually a good part of it. There was a major gap perceived, they are looking saying 'We've been here 20 years' - settlers - 'We've been here 20 years and gosh Maori haven't really become much like us yet, have they. How do we fix that?' That's what they are saying.
- 15 Dame Evelyn It seems to me they might be still saying it. I think that might be the comment I have got written down further on. A couple of points. I don't know whether they're typos. What, on page 54, footnote 87, the Fitzroy purchase. Which one is that?
- 20 Loveridge That is the one at Taranaki where the Governor Fitzroy himself came down and negotiated at the Spain He came down and negotiated a purchase in lieu of the Spain, you recall the Commissioner Spain rejected [indecipherable] and so Fitzroy then went down there and purchased the blocks that contained most of the land the settlers had actually occupied. This was the one where McLean was brought in to try and work out all of the individual holdings within the area that he refers to in '56.
- Dame Evelyn So it is really the old New Zealand Company purchase then ...
- Loveridge Well it is a Crown purchase.
- 25 Dame Evelyn The development of a Crown purchase of what was ...
- Loveridge Yes. It was a Crown purchase to make up for all the problems that arose.
- 30 Dame Evelyn Okay. I couldn't remember. I was interested in the quote on page 61, paragraph 3.6.4 and Fenton and he talks about "the almost entire destruction of the old Maori law". First of all, did he ever define what he meant by Maori law?
- Loveridge He doesn't, not here, I think he is talking about authority I think as much as anything, the old structures.
- Dame Evelyn I was interested he used the term "Maori law" rather than custom or some other phrase.
- 35 Loveridge No he doesn't, you get from sort of reading the rest of it he is talking I think about the authority structure of chiefs and hierarchies, if you will.
- Dame Evelyn Okay, decision-making, that kind of thing?
- Loveridge I think so yes.

- Dame Evelyn And what was his evidence for its destruction?
- Loveridge Well a lot of this, this got written in 1856 and it's after he had been in Kaipara as Resident Magistrate for two years. He had only been in New Zealand I think for 7 or 8 years I think at this point. He had lived in the Waikato and then he became Resident Magistrate for the Kaipara of course so there is no records I am aware of remaining from that period, there are very few available.
- 5
- Dame Evelyn No. In the Kaipara hearing we haven't got very much about him either.
- Loveridge No, no. He was then Native Secretary for a year which included his stint and as I say he was heavily involved with the Board of Native Affairs and he listened to all the witnesses and as I said he made all of these extensive notes on it. He put a great deal of work into that and I would assume that this conclusion is drawn from that experience and that evidence. Certainly people were saying similar things to the Board and some of the people were giving evidence, just that the old chiefs no longer had the authority they had.
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- 15
- Dame Evelyn They didn't have the authority that they had before and the young weren't taking any notice of it. The generational stuff. It seemed to go a little bit far, given that later on there is all this debate and legislation which is designed to do away with Maori law and he is now saying back here that they are talking about the destruction of Maori law, it seemed a bit over the top. I think perhaps that was because he was a bit younger and more inexperienced?
- 20
- Loveridge Well he very much sort of sees himself as the new broom, you know the man with all the ideas coming in that clear out the cobwebs from the old Native Department and that sort of thing. There is probably something of that to it as well, and of course he is writing this, having lost his plum job as Native Secretary. He is writing it to impress the Governor while he's being sent back to the Waikato. I suspect.
- 25
- 30
- Dame Evelyn I wish somebody would do a study of Fenton.
- Loveridge There is a thesis that's cited in ...
- Dame Evelyn There's a thesis on part of, I saw you cited one, I can't remember where it is now ...
- Loveridge It's quite good – it's Alexander Brown, *A Humanitarian Institution - Francis Dart Fenton and the Origins of the Native Land Court*. I found – it's a BA thesis – I found actually going through it that he had missed a couple of fairly major things like some of the reports I have cited, but it's quite a good thesis.
- 35
- Dame Evelyn But that's the only one I know of and it's a fairly low level thesis in the sense it's a BA Honours thesis rather than a ...
- 40
- Loveridge Well, it's the old problem that there aren't any Fenton papers, and most biographies get written on people's papers.

- Dame Evelyn Yes well he seems to have written a lot on particular purposes but covered his tracks by throwing them out – I don't know. I wonder, just following up Fenton, on page 72 I wondered about this comment that he made "... argued long patient accumulation of experience with Maori", but Fenton argued on the contrary – that's McLean – "that sound policies could be deduced from first principles, and could be applied through the normal administrative processes of government ...". Is this a clue to the way he ran the Native Land Court or how he shaped the ...?
- 5
- Loveridge Oh to a certain degree, his view was that ...
- 10 Dame Evelyn He had processes and views that he was going to make sure ...
- Loveridge Oh his view, for example, was that any good judge regardless of their knowledge of tikanga Maori or of the language, could operate effectively in the Land Court with interpreters and all that sort of thing. He's very much – I think you'd have to say he's a real technocrat – would be the term we'd apply now. The idea being that any gentleman of talent can handle any job he puts his mind to, I think.
- 15
- Dame Evelyn A bit arrogant, eh?
- Loveridge Yeah, oh yeah.
- Dame Evelyn So in a sense he is a real architect of the Native Land Court?
- 20 Loveridge I think it's been overstated, people have sort of drawn this picture of the Land Court as being sort of Fenton's sole creation. My view would be that institutionally that's not entirely the case. Once he becomes Chief Judge clearly he exerts a lot of influence, once he becomes Chief Judge.
- Dame Evelyn Certainly on procedures and the idea there'd be set rules and they'd be applied and ...
- 25
- Loveridge We mustn't forget though, the extent of the debate that went on about the Native Land Acts up to the early '70s. You know there's sort of a new Act every year, and Fenton was at daggers drawn with a number of other people about these things. He had an ongoing fight with Donald McLean about what should be used in the Land Acts and this sort of thing.
- 30
- Dame Evelyn My other question on this page was to what extent that fight with Donald McLean influenced native policy at the time?
- Loveridge Oh pretty extensively I think.
- Dame Evelyn It created debate but how much influence did it have?
- 35 Loveridge Well, for example, his sort of lack of communication with Donald McLean was certainly a major factor in the failure of the Waikato experiment. Where they did in fact go in and try out this whole native district idea in a fairly welcoming sort of environment and McLean, it was a very odd situation because Fenton was not put under McLean to carry this out. He was appointed by the Governor but reported to the Ministers
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rather than to McLean, which caused an immediate sort of bureaucratic snarl-up.

Dame Evelyn Yes, but then Fenton fell out with the locals as well, didn't he?

Loveridge Oh he did, or some of them.

5 Dame Evelyn So maybe it would have failed because of the person he was?

Loveridge Well it certainly didn't help having that other sort of structural problem behind it at the same time. Fenton then sort of vanishes in to the Crown Law Office for two or three years and you get the odd thing, he did an opinion on the taking of Maori land for roads in 1862 or '63, you get odd pieces like that that pop up and there's not much else – he was in Auckland, he was in constant communication with all the people in Government, with the Governors – he was pretty much the Governor's legal advisor and yet there's hardly any record of that – you occasionally suspect that more is going on than you understand in there.

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15 Dame Evelyn Well this has been my feeling all along but never been able to actually put a finger on it and you – on page 225, just a minute while I work out why I have got a note here – oh we're still with Fenton and his arrival as Chief Judge "... made relatively little difference to the ordinary operation of the courts." The tail end of paragraph 6.3.9, page 225. The phrase "flaws in his personality" can best be explained as a consequence of the 'nationalisation' of the Native Lands Court." I was wondering if you could explain that a bit better.

20

Loveridge Sorry, most of the writing about the early years of the Court focuses almost entirely on Fenton. They sort of attribute everything that happened to him, in many cases without sort of having a clear idea of what actually did happen, which was my complaint about that. And so people tend to look at what they think happened and try and figure out how Fenton was responsible for it. My argument would be, and I sort of developed it, a lot of these things weren't in fact directly a result of Fenton's activities but were a consequence of changing from this idea of working in native districts to making the Court a national institution, and that when that changeover was made, things happened without necessarily being deliberately done by Fenton and things like. That would be my tentative sort of proposition.

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35 Dame Evelyn But given your earlier comments about Fenton and his somewhat rigid approach to the principle of the law, using his own words, then he probably went about it in a fairly rigid sort of way shall we say? Which might of influenced attitudes towards it?

Loveridge I personally think that his real impact is after 1865, that's when his personality really does impress itself on the court, with varying degrees of success. As I say, looking at what was happening in 1865 itself, I have reservations about the extent of his personal sort of influence on the whole thing, that's what I am trying to bring out here. I guess I am trying to get

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away from this personality-oriented study of the court. I think the institution itself needs to be looked at a lot more closely than it has been.

- 5 Dame Evelyn Alright, let's leave Fenton. There's one other issue really, sort of blooper, or I want to follow through. On page 150 there's the suggestion that there's some public purposes for - funds set aside for various public purposes including a list you've got there near the top of page 150 - paying for maps and surveys. Now when did the idea of loading survey costs on to Maori owners come in, because this tends to suggest that public money could be spent on surveys and yet by 1862 ...
- 10 Loveridge I think I referred to this earlier that there was this proposal in the Sewell bill that all of that should be paid for by the Crown, yes, and I am trying to remember exactly ...
- 15 Dame Evelyn It seems to disappear out of the ... The 1862 Act simply said land had to be surveyed before a certificate is issued, it doesn't say anything about who does it or who pays. It does in the 1865 Act, though.
- Loveridge I thought I had referred to this. There was a - I think what I am thinking of, there was a howl of outrage in the press about the very idea ...
- Dame Evelyn About money going on Maori land?
- 20 Loveridge That survey costs should be paid for. I am trying to recall, I don't think there was any sort of - because Sewell's bill sort of just vanished. It was replaced by Bell's which, as you say, doesn't specify anything like that, but from memory I thought I had referred to it. People sort of looked at this with horror at the idea that - well and the argument being that public money should not be spent for the benefit of private individuals, that was the argument I believe, the main argument and after that it's no ...
- 25 Dame Evelyn It's just not an issue.
- Loveridge It's not an issue.
- 30 Dame Evelyn I wondered really where it came through because it's a major issue later on, in the operation of the court, that I don't want to get into, but it's really how it got into the legislation in the first place.
- 35 Loveridge Part of it is here that of course Sewell is proposing this, in the context of, well I call it 'systematic settlement of Maori lands', he sort of grafted the Wakefield idea on how to deal with Maori land and he's clearly seeing the whole process as a package and trying to fit in where everything should be done. And this has come into the bill with this provision for paying for maps and survey which makes a good deal of sense clearly in that context. Once you sort of - and as I say that this was all discarded in Bell's bill, all of this superstructure if you will, and the idea of the Crown paying the cost more or less disappears with it.
- 40 Dame Evelyn There is a provision in - I looked up the Act, s 25 - some regulations for raising money for public object including paying or reimbursing costs of maps and surveys but by 1865, it really doesn't become an issue until the

5 1865 Act when surveys are required, surveyors to be licensed, surveyors can receive the Crown grant, that is can have a lien on the land and you ... get a structure charging all the costs of surveys against the land but if there wasn't a great deal of debate about it, then we probably can't take it too much further.

Loveridge Well the debate was limited ...

Dame Evelyn Limited to not wanting to pay.

10 Loveridge Yeah, this was, as I say the bill itself was published or a version of it or an abbreviated version of it and that was the, it was a newspaper debate about that particular issue and, as I say it just simply was not incorporated in Bell's bill.

Dame Evelyn I think that might be it. I think the others got asked. Thank you very much. I found this very interesting indeed. Thank you for all the work doing it.

15 **John Kneebone questions Don Loveridge**

20 Kneebone Dr Loveridge, I'm a farmer and, like Brown's cows, I'm all over the place. Could we go back to your précis – I'd just like a wee bit of clarification, on page 12? The quote there in the first line you talk about "the gratuitous alienation of wastelands". What do they mean by "gratuitous"?

25 Loveridge Under the system at the time there was a very strict control on the disposal of any Crown land. It had to be sold, with a very few exceptions, it had to be sold for a minimum price, an upset price of ten shillings an acre at public auction. The context here is that, as part of the 1858 Act which I am pretty sure I was referring to, yes, as part of this Native Territorial Rights Bill, it was basically proposed that the Crown should scrutinise title and would then issue a grant for land, Maori customary land, whose title had been investigated and that would give the grant directly to the people identified as owners. And what this is referring to is that people were saying this is a breach of the law. That this land has to be sold for 30 10 shillings an acre, you can't give free grants to Maori because the minute it has a Crown grant it becomes Crown land and therefore that's "gratuitous alienation", if you do that. And the Natives Reserves Act is a similar thing, it was a mechanism to do the same thing which is give a 35 Crown grant to Maori land and give the grant to the owners. And people are just saying that 'no, you can't do that', because that's a free grant, in effect, without all of the mechanisms being followed for Crown land.

Kneebone Which would include survey?

40 Loveridge They're talking here specifically about the title that they're giving away Crown land for free without, that anyone who gets a title should have to pay at least 10 shillings an acre for it.

Kneebone But a title can't be issued until the land's identified by survey, can it?

- Loveridge No, presumably, no.
- Kneebone So this really is the genesis I guess of the problem of who bears the cost of creating the tradeable title.
- 5 Loveridge In the Crown land system of course, once land becomes Crown land, with a purchase from Maori being the underlying mechanism, then the Crown then proceeds to survey it and put in roads and all the things that are necessary and then offers it for auction at an upset price of 10 shillings an acre. People bid on it and so therefore you're paying a minimum of 10 shillings an acre for which you also get a surveyed piece of land with roads in many cases, and you pay more presumably, the more facilities you get the more you pay for the land. So people getting land from the Crown get land with all of those problems resolved, basically.
- 10
- 15 Kneebone So, did you pick up in the arguments and the debates that one of the reasons that the community was getting rather impatient with these preemptive rights, that in fact the community was actually selling the land at a loss?
- Loveridge What, that it was costing more to put Crown lands in the hands of settlers than ...?
- Kneebone Yes.
- 20 Loveridge Well not particularly, there's certainly ...
- Kneebone Well to put it another way. Was it a transparent system? In other words, the people who are paying their taxes by way of duties and things, in fact were providing the immigrants with subsidised land.
- 25 Loveridge Well the actual land revenue was helping to pay for immigration and to pay for survey and further purchase – it was meant to be a self funding system if you will. Generally, I mean in most of the country – one point is that in the mid-50s, in the 1850s, the provinces took control of Crown lands by and large. It was very muddled for about five or six years while they straightened it out but in essence there are general land regulations and then there are provincial ones which make the exceptions and this sort of thing, and the provinces – the provincial governments - are responsible for spending the land fund and all this sort of thing. But by and large, all of the Crown land was sold under those conditions. As I say, the exception was in Auckland province in the late 1850s they brought in, basically giving away land for free to people who paid their own passage to New Zealand. So if you paid £2,000 to bring your family and everything you got x-amount, as much as, the forty acre system it was called, and that's the only case, in that case they are giving away free, but there are fairly carefully defined conditions as to how you go about getting your free grant, you have to register and do all these sorts of things. The Crown land system itself probably worked as well more or less as it was meant to do, I suppose. All the usual problems you get with any land disposal system anywhere. But it's this interface between the Crown system and Maori land. A huge amount of agonising spent on
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- 5 trying to figure out how you can give Crown titles to Maori without alienation being involved because if you alienate, if alienation takes place the land becomes Crown land and goes immediately under the Crown regulations. So as I say they actually have to revoke pre-emption in order to make it work, and that's what all this is about.
- Kneebone And the system broke down because there was never really a free market in the sense.
- Loveridge The pre-emption system?
- 10 Kneebone A free land market in the sense that the Crown for many many years was the principal buyer, it set the price of land and the vendors were never really able to recover the cost of production for want of a common phrase.
- Loveridge That's presumably why there's an increasing tendency as the 19th century goes on, for more land to be either leased or sold on better and easier terms to reduce the capital expenditure required from settlers.
- 15 Kneebone No I am thinking in terms, when I talk about below the cost of production, what I am getting at is the cost of going through the land court for the Maori vendor and then the actual cost of survey, exceeded the price that the vendor achieved on the market because it wasn't an open market.
- Loveridge In many cases, yes.
- 20 Kneebone Was that in most cases?
- Loveridge Not in all cases. I think it depends on circumstances, location and this sort of thing but it was certainly a persistent problem around the country, yes.
- 25 Kneebone Oh yes there's one other one. Again on your brief, on page 22, again just clarification. Paragraph 36, towards the end there when Fox was put out of Parliament – out of power, the Ministry fell – “in essence Fox was accused of accepting too much responsibility for Maori affairs and so exposing the colony to liability paying for any of Grey's mistakes.” Now what sort of liabilities were they thinking of?
- 30 Loveridge Oh thinking in terms of, if Grey made a mistake and started a war with Maori that settlers would have to pay for the full cost of the war and of course that's more or less what Grey did in 1863, the whole mess in Taranaki with the Waitara block.
- Kneebone So they're talking really in terms of political liabilities?
- 35 Loveridge Well, actual costs. Of actually paying for British soldiers to come and fight the war and everything that's involved with that.
- Kneebone Thank you. No, that's all I have got really. And I'd also like to thank you for a very useful document.

Prof Wharehuia Milroy questions Don Loveridge

- Milroy I have only got one and it's to do with the assessors. Who made the appointment?
- Loveridge The Governor, I think. He certainly – the people who were appointed as assessors in 1865, all the ones who had been judges in the court previously were appointed by an Order in Council.
- 5 Milroy Did those assessors move outside their own tribal areas?
- Loveridge Yes.
- Milroy They did?
- Loveridge I have got for example – I'm trying to think – there was a case recently that evidence was given in the Kaipara claim in which case the assessor was from the Waikato I believe, in a case dealing with a block in the central Kaipara. And I think that was a fairly common sort of a thing that it would be somebody, generally speaking, the assessors weren't from the specific area where the cases were being heard. That was the practice I believe.
- 10 15 Milroy And in terms of decisions of the court, they bore the same powers as the judge?
- Loveridge They certainly did under the 1862 Act. There were, all the three people in each court were judges. Under the 1865 Act, I was discussing this with Mr Powell, this question of exactly what the authority of the assessors was at any particular point and I have to say that I can't give you a very clear answer on that one.
- 20 Dame Augusta The Act itself does, doesn't it? The Act itself gives a fairly clear idea ...
- Loveridge Pardon? Oh we read the Act you will recall, and it seems, as I read it, it says that assessors will have the same standing as the judge. Mr Powell suggests that that wasn't always the case, so I leave it at that point.
- 25 Milroy I just wondered how fluent they were in English?
- Loveridge The assessors? To the best of my knowledge no one has ever done a study of the assessors of the Native Land Court to answer those very questions.
- 30 Milroy Well it may have a bearing in terms of making decisions.
- Loveridge There was almost invariably a translator attached to the court to deal with evidence and also presumably to assist the judges and the assessor in their proceedings. I can't answer that question, I am sorry.
- 35 Milroy Yes, okay. Thank you very much. And I'd like to add my congratulations for a very interesting document.

Dame Augusta Wallace questions Don Loveridge

- Dame Augusta Well, I still do have one little question left, and it really relates to the matter of franchise. Because as I understand it, under Article 3, Maori were granted the rights and privileges of British subjects. I mean that's probably a paraphrase but that's the essence of it?
- 5 Loveridge Yes.
- Dame Augusta And there was some discussion between you and Mr Powell about this matter of franchise and I am not a historian so don't smile at my ignorance. But I was under the impression, that at the time the Treaty of Waitangi was signed, not every male in Britain was entitled to exercise a franchise. It was related to the value of land was it, or something like that?
- 10
- Loveridge It was a property franchise. You could either, you had to own land of a certain value or pay rent of a certain value on land or pay, I can't remember but its basically that. The point was, that it only gave you a franchise if the land in question was under a Crown title, either the land you were renting or the land you were buying. So if there wasn't a Crown title, you didn't have a franchise.
- 15
- Dame Augusta Somewhat complicated. The essence of it is, of course, that at the time of the signing of the Treaty, it could not be said that every British subject, every British male subject I would stress ...
- 20 **Tape 13 Side B**
- Dame Augusta ... right to vote?
- Loveridge I couldn't give you a proportion but it certainly wasn't the – but there was no universal franchise at all.
- Dame Augusta That's, yes, now that did change?
- 25 Loveridge Oh yes.
- Dame Augusta When? You're a historian you should know.
- Loveridge I am not a historian of electoral proceedings. I'm sorry I can't give, it's later in the century, I believe 1870 is probably not too far off.
- Dame Augusta The change was made in Britain but the change was also made in New Zealand, wasn't it?
- 30
- Loveridge Yes.
- Dame Augusta It wasn't made pursuant to the change in Britain, it was made here independently?
- Loveridge I can't answer that. You're getting into an area I am just not that familiar with. I will say that one comment I do recall is that, when the four Maori seats were created in 1867 and Maori males were given a universal franchise for the election of those seats, the Maori at that point, Maori
- 35

men at least, had much more of a universal franchise than anyone else in the British Empire.

Dame Augusta What about other males in New Zealand?

5 Loveridge The best I can say there, is that there was a fairly quick move to a universal male franchise in New Zealand and as I say, from memory it in the 1870s, but I can't swear to that.

Dame Augusta You can't remember either?

Loveridge It's in the 1870s, I am fairly sure.

Dame Evelyn 1893 is when they gave it to women, I remember that one.

10 Dame Augusta And I know that that was given without regard to size, race or anything else.

Dame Evelyn That was the universal franchise, yes.

15 Loveridge Yes I'm afraid that's the best I could do. But all of this that I am discussing here takes place in a context of something less than the universal franchise.

Dame Augusta Yes I appreciate that, now I was just trying to clear my mind on it. I say thank you very much indeed, for the patience you've shown us all, and I suppose it may well be that you have some re-examination I have forgotten which of you is ...

20 Andrew Yes Ma'am I was going to suggest we take a break.

[Adjournment]

Peter Andrew re-examines Don Loveridge

25 Andrew ... arising out of Mr Powell's cross examination of pages 46 and 47 of the main report P1. Mr Powell asked you a question about the Board of Native Affairs Inquiry 1856, and its understanding of the nature of Maori land tenure, and in particular he drew your attention to your conclusions on this issue or the observations in the last sentence of paragraph 3.4.3 on page 47 and in the first sentence of the next paragraph 3.4.4, where you note that the understanding, the perception was, that there was no such thing as an individual title but rather it was a communal or a tribal one.

30 Mr Powell suggested to you that because of this perception, this understanding, that any system for breaking up tribal title and moving towards individualisation would be artificial. What was the expectation of the legislators, the Crown officials, and perhaps Bell in particular, of the

35 first priority of the Court under the 1862 Act?

Loveridge Under the 1862 Act, as Bell laid out at fair length in the minute he wrote for the Colonial Office in 1862, which I have reproduced in my appendix at Appendix 14 of my report, was in essence that the expectation was that the Act would be used in the first instance by tribes to get certificates of

5 title for the whole of their lands. That in other words it was anticipated
 that tribes would go to the Land Court in order to get all of their land
 defined, the boundaries marked and the certificate of title to the tribe
 issue, and that subsequent to that – I am sorry I should make one
 10 exception - they also said that they thought that in some cases there might
 be other hapu or individuals who might have clear claims that might also
 do that, but they didn't anticipate that that would be a significant element
 - and that then once a certificate had been issued for the whole of the
 tribal lands that thereafter pieces would be taken out of that and
 15 individualised, in order to get Crown grants, in order that sales and this
 sort of thing could proceed. So certainly as far as you can tell from what
 Bell is explaining to the Colonial Office how it is anticipated that the Act
 would work, it is based in the first instance on providing clear boundaries
 and clear title for tribes.

15 Andrew Thank you. Mr Ambler asked you a question about the extent to which
 Maori views on the new land tenure system were ascertained prior to the
 enactment of the legislation. You have concluded, and this is paragraph
 7.1.9, page 33 of P4, your summary. You've referred there, the first line
 20 of 7.1.9 to the extent to which Maori embraced the court. To what extent
 does the Maori enthusiasm for the court you've referred to there inform
 on a judgment of Maori views of the new system?

Loveridge Well as I said, this is based, on this particular criteria it tends to suggest
 that a great many Maori accepted the court as an institution and were
 25 prepared to work within it, and to that extent you have to assume I think
 accepted what it was meant to do. As I also said, it appears that a lot of the
 land brought to the court in the first few years was brought there
 specifically for sale, in order that a grant could be received and it could be
 sold or leased.

Andrew In response to one of Mr Powell's questions about the legislation, you
 30 refer to the fact that the legislators were of the view that the new system
 was imperfect and would at some stage require remedial change. You've
 referred to the number of changes, number of legislative amendments to
 the native land laws in the 1860s and 1870s. To what extent are those
 35 subsequent changes a response to complaints from Maori about the native
 land laws?

Loveridge I have to confine myself to 1862 and '65 which are the only ones I have
 gone into in a lot of detail. In those two cases, I don't think the changes in
 the 1865 Act were in any way attributable to complaints by Maori. I am
 40 not aware of any complaints being made. Further along I have a general –
 my understanding of what was going on later in the decade and early in
 the 1870s is much more general. My impression is certainly that a fair
 number of the changes were in response to complaints but that's again,
 not a very well informed opinion, perhaps.

Andrew Professor Dame Evelyn asked you a question with reference to page 61 of
 45 the main report, P1, about Fenton – he wasn't a judge at that stage -
 Fenton comments about the destruction of the old Maori law, that's
 paragraph 3.6.4 on p 61 of the main report. To what extent was it

