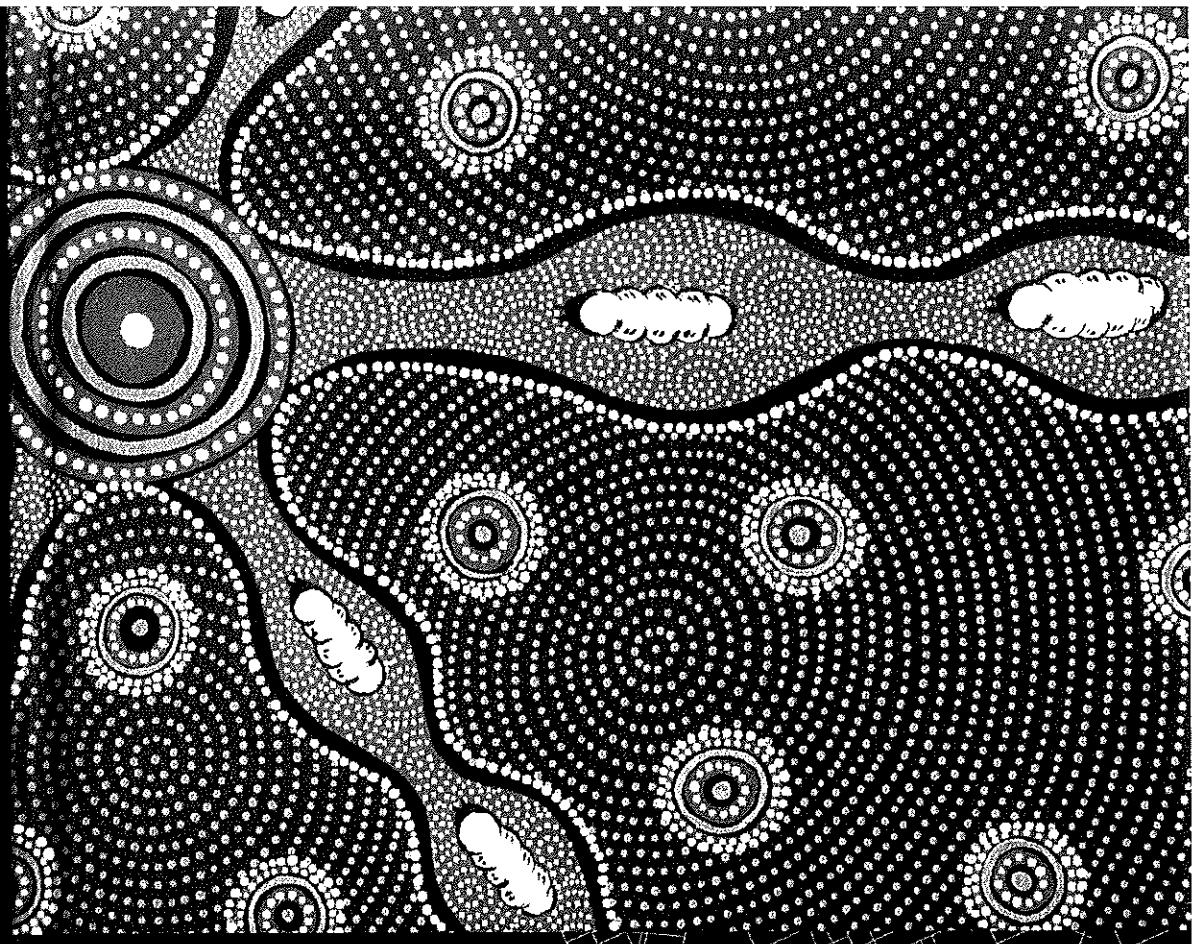

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COMPARATIVE PERSPECTIVES ON COMMUNAL LANDS AND INDIVIDUAL OWNERSHIP

SUSTAINABLE FUTURES

EDITED BY
LEE GODDEN AND MAUREEN TEHAN

ROUTLEDGE

Notes:
Total number of pages was 400.
Richard Baarsi chapter was from pp 145 - 167.

Comparative Perspectives on Communal Lands and Individual Ownership

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Routledge
Taylor & Francis Group

First published 2010
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
270 Madison Avenue, New York, NY 10016

A GlassHouse book

Routledge is an imprint of the Taylor & Francis Group, an informa business

Typeset in Sabon by Keyword Group
Printed and bound in Great Britain by
CPI Antony Rowe, Chippenham, Wiltshire

British Library Cataloguing in Publication Data

A catalogue record for this book is available
from the British Library

Library of Congress Cataloguing in Publication Data
Comparative perspectives on communal lands and individual ownership:
sustainable futures / Edited by Lee Godden and Maureen Tehan.
p. cm.
Includes index.
ISBN 978-0-415-45720-0
1. Commons. 2. Sustainable development–Law and legislation. 3. Land
use–Law and legislation. 4. Public lands. 5. Land
titles–Registration and transfer. 6. Natural resources, Communal. 7.
Indigenous peoples–Land tenure. 8. Land tenure–Law and legislation.
9. Land tenure–Government policy. 10. Land reform–Law and legislation. 11. Eminent domain. I. Godden, Lee. II. Tehan, Maureen.
K756.C66 2010
343'.0252–dc22 2009044982

ISBN10: 0-415-45720-3 (hbk)
ISBN13: 978-0-415-45720-0 (hbk)

ISBN10: 0-203-08956-1 (ebk)
ISBN13: 978-0-203-08956-9 (ebk)

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Chapter 6

Individualization – an idea whose time came, and went

The New Zealand experience[1]

Richard Boast

Introduction

This chapter is intended as a contribution to the recent debate on individualization of indigenous title in Australia by looking at the outcomes of individualization of Maori customary titles to land in nineteenth- and twentieth-century New Zealand.[2] Most historians would accept that the individualization project as it was carried out in nineteenth-century New Zealand had less than beneficial outcomes for the Maori people, a view shared by the Waitangi Tribunal, a judicial body set up by statute in 1975 to inquire into and report on Maori historic claims against the Crown.[3] The New Zealand variant of individualized titles resulted in the creation of a tenurial system that quickly became very complex and which poses considerable administrative problems and costs for the nation today, nearly 150 years after the first of the *Native Lands Acts* (NZ) was enacted in 1862.

In New Zealand, as in the United States, Hawai'i and Latin America, 'individualization' led also to massive land alienation. This is no longer an issue as Maori freehold land is now quite difficult to alienate under the current statute regulating Maori Land, *Te Ture Whenua Maori/Maori Land Act* 1993 (NZ) (*Maori Land Act*). Maori freehold land is also characterized by title fragmentation, which means that many blocks have thousands of owners, and many shares are too small to have economic value, posing formidable accounting and administrative problems. This should not be over-dramatized: many parcels of Maori freehold land are extremely valuable assets, encompassing vineyards, forest plantations or dairy farms. It is also the case that members of some Maori *iwi* (tribes) still own substantial areas of land, whereas members of other tribes have practically none, an inequality in distribution that arises from New Zealand's complicated history of engagement between Maori and Pakeha. Maori freehold land is not distributed at random around the country but rather is concentrated in only a few regions. There is for example very little Maori freehold land in the South Island, the larger of New Zealand's two main islands. This is due not only to the much smaller Maori population of the South Island but also to

the fact that Maori land in the South Island was alienated to the Crown at an early stage in the country's legal history by means of large-scale Crown purchases carried out a time when Crown pre-emption was still the law in New Zealand.

Title individualization, as practised in New Zealand, was in one sense an individualization of native title; however, the native titles that were individualized were not anything resembling native title as recognized by the Australian Native Title Tribunal, but rather were entire freeholds. Maori customary title – or more precisely, that part of New Zealand remaining in Maori customary ownership when the first *Native Lands Act* was enacted in 1862 – was both 'freeholded' and 'individualized' simultaneously by the process of individualization in the Native Land Court. Toohey J's suggestion in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, p 211 that Native Title was analogous to a freehold at common law, however novel in terms of orthodox native title law, in fact resembles New Zealand law and practice closely. Despite being similar societies in so many ways, the law and practice relating to customary indigenous titles in Australia and New Zealand have little in common. In particular, it has always been accepted in New Zealand – in contrast to Australia[4] – that Maori title to land has to be extinguished before the land can be granted by the Crown. Extinguishment of native title by mere inconsistent Crown grant is not recognized in New Zealand law (*Faulkner v Tauranga District Council* [1996] 1 NZLR 357, 363 (Blanchard J) following *Nireaha Tamaki v Baker* (1901) NZPCC 371) and was never standard practice in colonial New Zealand.[5]

Title individualization and nineteenth-century liberalism

Individualization of title to Maori land in New Zealand commenced with the *Native Lands Acts* of 1862 and 1865, which established the Native Land Court and which allowed Maori to apply for freehold titles and Crown grants to their remaining customary lands.[6] The *Native Lands Acts* and their keynote institution, the Native Land Court, do not have a favourable reputation in New Zealand historiography (see for example Binney 1990: 143; Williams 1999: 81–3).[7]

Individualizing customary titles to land is hardly a new idea. It has a rich and elaborate nineteenth-century genealogy. In fact it reaches beyond the nineteenth century to various reform projects of the eighteenth century and to parliamentary enclosure in England itself. Enclosure was a vast and complex process which extended over a period of 350 years, from about 1500 to 1850. Parliamentary enclosure is of course the subject of a very lively historiographical controversy.[8] Nor was it ancient history by the mid-nineteenth century. In the eighteenth century, enclosure was implemented by enclosure Acts targeted at individual parishes; there may have been as many

as 4,000 of these Acts. In the nineteenth century, however, enclosure legislation took the form of *General Enclosure Acts* (1801, 1836 and 1845), well within the living memory of New Zealand colonial politicians of the 1860s. Another important trend in the British Isles was the slow process of abolition of customary tenures in Ireland and the Highlands and Islands of Scotland and their replacement by fee simple Crown grants. Interestingly, some prominent nineteenth-century New Zealand politicians were themselves from rural Ireland and the Scottish Highlands, notably Liberal politicians John Ballance and John McKenzie, a background that turned them into radical land reformers in the colony (McIvor 1989; Brooking 1997).

The parallels between enclosure, international developments, and the *Native Lands Acts* are important as they demonstrate a consistent ideological and political stance held by colonial elites. Also, they show that explanations of such phenomena as the *Native Lands Acts* are inadequate if these explanations are founded only on circumstances unique to New Zealand. Yet it has to be admitted that there is remarkably little evidence as to what politicians and officials hoped to achieve with the *Native Lands Acts* in terms of social and economic policy, or to what extent they were influenced either by earlier British Isles precedents or by contemporary developments elsewhere. Further research may one day clarify the relationships between the *Native Lands Acts*, enclosure in England, the destruction of customary tenures in Ireland and Scotland, and the liberal reforms in Latin America and the United States that were taking place at around the same time that the *Native Lands Acts* were enacted.

Individualization of tenure in the Americas

Latin America

After the collapse of the Spanish colonial empire in the nineteenth century, the liberal regimes that took power in the newly-independent Latin American republics embarked on systematic policies of making 'formerly inalienable lands subject to private ownership and sale' (Weaver 2003: 34) in much the same way as colonial politicians in New Zealand did at the same time. The largest and best known assault on communal lands in the nineteenth century occurred in Mexico. Even before the outbreak of the wars of independence in Mexico in 1810, prominent liberal intellectuals and reformers such as Abad y Queipo had advocated the abolition of legal distinctions between Indians and other citizens and the individualization of church and communal lands (Brading 1991: 568). The main Mexican statutes, which built on the earlier *Ley Lerdo* or *Ley de Desamortizacion*[9] of 25 June 1856 (which in turn drew on earlier repartition laws in the Mexican states of Michoacan, Zacatecas and Guanajuato), were enacted in 1863, 1875, 1883, and 1894. The later statutes reflected the views of a group of

highly placed technocrats within the Diaz regime (Porfirio Diaz seized power in 1876), the so-called Cientificos, followers of Comtean positivism and strong believers in economic liberalism. Church lands and communal Indian lands were seen as archaic relics of the Spanish colonial empire and as obstacles to modernization, and the period of the liberal 'reforms' associated with the governments of Benito Juarez and Porfirio Diaz saw huge losses of Indian lands to private ownership during a period of rapid economic expansion.[10]

Guatemala, to take another example, achieved independence from Spain in 1821. More polarized than Mexico, the country was, and still is, characterized by sharp divisions between its large indigenous population, mostly ethnically Mayan and speaking various Mayan languages, and Ladinos, Spanish-speaking non-Indian Guatemalans. The Maya of the Guatemalan highlands, conquered by the Spaniards and their indigenous Mexican allies by Alvarado and other *conquistadores* from 1524–40, continued during the colonial period to live in their traditional communities, managing their communally-owned lands under the protection of Spanish colonial law. In independent Guatemala, however, a political rhetoric developed during the nineteenth century whereby the culture and values of the Mayan people came to be seen as antithetical to liberalism and economic progress. Mayan groups tended to support the conservative dictator Rafael Carrera, who defeated the liberals in 1839 and established an authoritarian regime which lasted for 26 years.

In 1871, liberal groups regained control of the new republic and embarked on a comprehensive programme of title individualization and related changes to labour and revenue law principally in order to encourage foreign investment in the coffee industry. In 1877, the Rufino Barrios administration ended the colonial system of rent payments by municipalities and at the same time enacted legislation requiring all landowners to prove ownership by means of recognized legal titles. According to one historian (Lovell 1992), these steps led to a reduction of Indian communal lands by at least half by the early twentieth century. Those who benefited included coffee planters or 'ambitious Ladinos capitalizing on the general ignorance and political vulnerability of the Indian' (Lovell 1992: 33). Communal lands have continued to decline during the twentieth century, although some Indian municipalities have managed to retain their lands to the present day.[11] As in Mexico, issues relating to indigenous lands and identity remain important in national politics. Many Indian communities suffered appallingly during an era of governmental repression which was at its height from 1978–84.

United States

In Hawai'i, the decisive events were the Great Mahele (division) of 1848 and the Hawaiian kingdom's *Kuleana Act* of 1850. Both were part of a massive individualization of communal lands undertaken by the Hawai'ian government at the prompting of American advisers who wished to see lands become available for plantation crops (Levy 1975: 848; Cohen 1982: 987; Wilkinson 1989: 227; Lâm 1989: 223). The experience of Hawai'i is of particular interest from a New Zealand perspective because both indigenous societies are Polynesian with a very similar social structure, economy, and material culture. In the continental United States the key statute was the well known *Dawes Act (General Allotment Act)* of 1887 (Act of Feb 8, 1887, 24 Stat. 388). This was the first general allotment act enacted in the United States, although some pre-1887 treaties had made provision for allotment of ceded lands to tribal individuals. The 1887 Act, named after Massachusetts Senator Henry L. Dawes, applied to all Indian reservations and made provision for 'allotted' (individualized) land titles (24 USC §§ 338).[12] The *Dawes Act* linked land individualization and citizenship: Indians who took up individualized titles were granted citizenship of the United States (Act of Feb 8, 1887, 24 Stat. 388, s. 6). The *Dawes Act* is estimated to have caused the loss of 90,000,000 acres (36.4 million ha) of Indian land (Hoxie 2000: 200) before it was repealed by the *Indian Reorganisation Act* (IRA) of 1934 (Act of June 18, 1934, 48 Stat. 984 (25 USC §§ 461–479). One textbook calculates that 'more than 60 per cent of the 1887 tribal land base had passed into nonmember ownership by 1934' (Mazurek et al. 1998: 21).

Canada

There was no comprehensive individualization policy in Canada, but the *Indian Act* of 1869 did allow the Canadian government to issue Crown grants to individual Indians within reserve boundaries, and the provisions were implemented to some extent in southern Ontario (Hoxie 2000: 200). Individualization of customary tenures influenced policy even in the remote colony of British Honduras (now Belize). Under the *British Honduras Crown Lands Ordinance* of 1872, which provided for the survey and individualization of Maya reservation lands, some villages near the Guatemalan border were surveyed and broken up into individualized lots for the Icaiche Maya Indians (Toledo Maya Cultural Council 1994).

Summary

Individualization, in short, was the norm; and if New Zealand was unique in jettisoning Crown pre-emption, in other respects the New Zealand policies had much in common with programmes in other parts of the British Empire, Latin America, and in the United States. Individualization was simply the contemporary mood and the liberal orthodoxy of the time, a very natural and entirely predictable approach to land tenure reform that

one might expect from colonial politicians. To what extent New Zealand legislators were aware of developments in Mexico, Hawai'i, and so on is unknown, although some degree of awareness may safely be assumed.

Individualization was halted in the United States in the twentieth century with the *Indian Reorganization Act* of 1934. Sections 1 and 2 of that Act prohibited any further individualization of reservation lands. In Mexico during the twentieth century, following the revolutionary constitution of Queretaro (1917), large areas of land were returned to Indian communities under communal title, especially during the governments of Lazaro Cárdenas (1934–8) and Adolfo Lopez Mateos (1958–64). Indeed in Mexico, especially during the Cardenas administration, there was an effort to re-establish collective tenures in a new guise, the famous *ejidos*, which is a very significant political issue in Mexico at the present time (Zamora et al. 2004: 437).[13]

In New Zealand, however, the system was never halted at any stage and individualization has been complete. Furthermore, the remaining stock of Maori freehold land has never been *de*-individualized at any time, and such a project would now be politically impossible in the face of owner opposition. In terms of investigation of titles, in fact, the Native Land Court had largely completed its work by around 1900. Few large-scale investigations took place after this time (ignoring, for present purposes, the rather large issue of titles to the foreshore and seabed), and the court thereafter focused on routine partitions and successions although there were some late investigations of title. However, some special regimes, such as that in place in the Urewera region from 1896–1921, delayed complete individualization to some extent.

This brief survey, therefore, shows that, in individualizing customary lands during the nineteenth century, New Zealand was certainly not unique. However, the particular form that individualization took in New Zealand – that is, by means of a formal abandonment of pre-emption, title investigation by an independent court, and a right of free sale – seems to have no precise parallels elsewhere.

The New Zealand variant: the concept of Maori freehold land

In theory, the Maori land system in New Zealand is subordinate to the Land Transfer system, as New Zealand is an archetypal Torrens jurisdiction and also is the source of much of the Privy Council case law on indefeasibility. In practice, there is often a mismatch between the unofficial title records held by the Maori Land Court and the information set out on the relevant *Land Transfer Act* certificate of title. It can also happen that no *Land Transfer Act* title exists, and the only title record is the information held by the Maori Land Court. Leaving this aside, the system was designed to work

as follows. First, the Native (subsequently Maori) Land Court would conduct its investigation of title into a surveyed parcel of land that had been brought before it. Following its determination of who the customary owners were, the Court would then issue its 'certificate of title' relating to the block. But that was only the first stage of the process. Before the Land Transfer system became established in New Zealand, the successful owners recognized in the Native Land Court would then, armed with their Native Land Court determination, seek a Crown grant for the parcel. That obtained, the Court-recognized owners became Crown grantees, and the feudalization of the title was completed. Later, instead of a Crown grant as such, the winners in the courtroom would apply for and obtain a Land Transfer Act certificate of title to the parcel, although of course, in a chain of title, a Crown grant and the first Land Transfer Act certificate of title have the same effect.

Land that has been through the Maori land court and 'feudalized' in this manner is known, as a term of art in New Zealand real property law, as *Maori freehold land*. The current statutory definition is land 'the beneficial ownership of which has been determined by the Maori Land Court by freehold order' (*Maori Land Act* s. 129(2)(b)).[14] It covers about five per cent of the country (Maori Land Court n.d. 2008). That may not sound like much, but given that there is virtually no Maori freehold land in the South Island at all – as the Maori population was concentrated in the North Island, and Maori title to the South was extinguished by pre-emptive purchase before the establishment of the Native Land Court in 1862 – it in fact amounts to about 12 per cent of the North Island. It is not, therefore, an insignificant category of land in New Zealand. Nor is it evenly distributed around the North Island, but is concentrated in certain regions, such as the central North Island, the east coast region (Eastland) north of the city of Gisborne, and in the Far North of the North Island. In some rural counties, Maori freehold is a major land category and can be a headache for local bodies because of endless complexities with land development and management, and the collection of rates.

Maori freehold land, although subject to the *Land Transfer Act* 1952 (NZ), is governed additionally by its own particular Act, the successor to the first *Native Lands Acts* (1862). The current *Act*, renowned for its complexity, is only one of the three main real property statutes in New Zealand. The others are the *Land Transfer Act* 1952 (NZ) and the *Land Act* 1948 (NZ), the latter being the equivalent of the various Crown Lands Acts in the Australian states. Maori freehold land is now restricted by many well meaning provisions. There are, for example, complex restrictions on freedom of alienation, both by testamentary disposition and by sale. The Native Land Court is still in existence and is now known as the Maori Land Court, which has had its own Maori Appellate Court since 1894. The Maori Land Court is a busy institution, which shows no sign of fading

away; in fact in recent years its jurisdiction has been widened substantially. Many of those now sitting as judges are Maori themselves. A large part of the court's work in practice is concerned with Maori landowning legal entities, corporations, and various kinds of statutory trusts which have been set up under the legislation to circumvent the administrative problems caused by the endless proliferation of owners' lists. It should be emphasized that the Maori Land Court has nothing to do with the resolution of Maori historic grievances, which are dealt with separately by the Waitangi Tribunal and by direct negotiations with the government. It is a binding court of record and an established part of the New Zealand legal system. The law it applies is statute-based Maori land law, not the common law of native title, which is of minor significance in New Zealand law today, as it has been largely superseded by statute.

It is important to realise that 'individualization' occurred at a particular time in New Zealand when it was a major goal of government policy to acquire land from Maori at the lowest possible cost to taxpayers and then grant it in turn to European settlers. Individualization and land alienation were interconnected. This is something that New Zealand has in common with jurisdictions such as the United States and Hawai'i, but probably makes the New Zealand experience less directly relevant to recent projects to 'individualize' land and interests in land held by Aboriginal Australians. While it is unclear that individualization in nineteenth-century New Zealand was *designed* to encourage freedom of alienation it undoubtedly had that *effect*. The results have been significant both in terms of ownership – large areas have been sold – and in terms of tenure (fragmentation and consequential problems of land management).

Individualization, the Native Land Court, and land loss

New Zealand demonstrates, as a classic test case, the links between title individualization and land alienation, which is equally a characteristic of general allotment in the United States or of the *desamortización* laws in Mexico. Maori freehold land is a type of tenancy in common, so, as in any tenancy in common, owners become clothed with an alienable undivided share. A purchaser can thus obtain as many such shares as possible before proceeding to a partition in court – in the New Zealand case, in the Native Land Court. Such purchasing was standard following the enactment of the *Native Lands Acts*, and both private buyers and the Crown participated. Partition orders were an important part of the Native Land Court's work, which routinely partitioned blocks between purchaser's and non-sellers' sections, or between Maori owners *inter se*. Of course by the time the *Native Lands Acts* were enacted, about two-thirds of the country had already been purchased by the Crown under the old pre-emptive deed

system, and even after the *Native Lands Acts* the largest purchaser by far continued to be the Crown. But certainly the ability of the individual owner to freely alienate his or her undivided share was a very important factor in Maori land alienation following the enactment of the *Native Lands Acts* and the establishment of the Native Land Court. Such a free right of alienation made it very difficult for community leaders to ensure that blocks remained in Maori hands. Titles were subject to constant attrition from the Crown's land purchase officers and from private buyers, creating the attendant risks of costly partition hearings in the Native Land Court and the need for fresh surveys.

From the New Zealand side of the Tasman, one can only wonder whether this is the real reason for the recent interest in individualization in Australia: to make the interests marketable and saleable. Freeholded individualized interests immediately become subject to the economic circumstances of individual owners. In nineteenth-century New Zealand, those circumstances were almost invariably appalling. The counter-argument is, of course, that it is an individual's right to sell his property if he or she wishes: selling something is, after all, simply a matter of turning the thing sold into something that is more needed at the time (cash, in other words).

In New Zealand, at any rate, the immediate pressures of debt and poverty that confronted the Maori population in the second half of the nineteenth century were so pressing that there were strong incentives to sell at less than market values. Moreover, the Maori land market was structured in various ways to favour the interests of the purchasers rather than the vendors; the principal purchaser being the Crown. Statutory provisions allowed the government to exclude private purchasers from a targeted block and thus drive down values, and there was at the time no transparent system of land valuation in place by which Maori vendors were able to challenge the government's own assessments of a block's value. One sold at the Crown's price, or not at all. Capital transfers as a result of land purchasing by the Crown were very low, so much so that it is no exaggeration to say that Maori may as well have given their land to the government for nothing, for all the economic difference it would have made. Similar arguments relating to land alienation in North America have been developed by Stuart Banner, a talented American legal historian with a thorough grasp of the law and economics literature, who has also written about New Zealand (Banner 2000: 37).

There was a turning point at the beginning of the twentieth century as the *Native Lands Act* of 1909 introduced a major change: land alienation was to be controlled by resolutions of meetings carried out under the supervision of the Native Land Court, rather than by individualized sale. The meeting had to approve a resolution to purchase before any one interest could be sold to a private purchaser or to the Crown. This is basically the position at the present day, supplemented by further restrictions among

Maori *inter se*. Nevertheless, arguments that individualization necessarily leads to a maximization of wealth, at least in the case of customary tenures, need to be viewed with some scepticism.

Individualization and transaction costs

The particular model of title individualization followed in New Zealand was punitively costly, and advocates of native title individualization need to think about this problem very carefully. Specifically, what will the methodology be, and who is going to pay for it? The New Zealand model required the identification of named individuals ('lists of owners') and their insertion into Land Transfer Act titles relating to discrete surveyed blocks. This was an expensive and *trying* business both for the Native Land Court and for the Maori owners, given that it was the policy of the New Zealand government and of the *Native Lands Acts* that Maori owners had to bear the costs of surveys themselves.

The process of determining the owners could be extremely time-consuming. Maori customary tenure is not a simple matter. It is almost intractably complex, involving many overlapping rights in land belonging sometimes to different descent groups. The point of complexity emerges when the translation of customary ownership into a freehold tenure has to take place, as this requires careful definition of owners and blocks. Major cases in the Native Land Court were frequently – although not necessarily – contested, with Maori traditional history and genealogy (*whakapapa*) themselves being highly contestable. In these circumstances, sifting out the claims of competing groups and working through competing ownership lists put up by representatives of rival *iwi*, *hapu* (sub-tribes, clans) and *whānau* (extended families) could take the Native Land Court months of hearing time. One well known case involving a single block at Maketu on the Bay of Plenty Coast occupied one of the judges full time for over a year, leading to complaints in parliament in 1900 ([1900] 113 *New Zealand Parliamentary Debates* 635). This was unusually long, but major investigations of title could readily take several months. In 1891, a royal commission set up to review the Native Lands issue heard plenty of evidence from Maori complaining about the expense of the process – not so much the direct costs of hearing fees and surveys, although these were punitive enough, but rather the indirect costs of attending the hearings and paying for food and lodging in the various court towns (see Sorrenson 1956: 103). Wi Pere, for example, a prominent East Coast Maori leader and also a member of parliament, had this to say to the commissioners:

> The expense the Natives are put to is very great. I am aware of instances where the Natives have come a long distance to attend sittings of the Court held in the neighbourhood of European settlements. In the case of the Native Land Court sitting at Cambridge, the Natives had to come from Taupo and Rotorua, and other distant places. The expenses were so great that the value of the land was absorbed in the outlay incurred in attending the sittings of the Court. A company that supplied the Natives with provisions charged for it, and the amount they had to pay equalled the value of the land. There was nothing left for the Natives.
>
> (Report of the Native Land Laws Commission 1891: 9)

To put the matter into the jargon of law and economics, value was absorbed by transaction costs, the transaction being that of obtaining the clear individualized freehold title that the law required as a prerequisite to alienation.

The direct costs included the irksome court hearing fees and the substantial cost of surveys. It is not surprising that survey costs and survey liens figure rather prominently in contemporary claims relating to historic grievances before the Waitangi Tribunal, as a great deal of Maori land was swallowed up in having to pay for them. From the beginning the *Native Lands Acts* allowed the Court to only investigate surveyed blocks (*Native Lands Act* 1862 (NZ)) s. 13; *Native Lands Act* 1865 (NZ) s. 13). The title to s. 33 of the *Native Lands Act* 1873 was explicit: 'Surveys imperative in every case'. If the applicants were unable to produce a survey plan the case was simply struck out of the court list.

Claimants had two options: they could have their land surveyed by a private surveyor; or they could ask the government to do the work. Section 68 of the *Native Lands Act* 1865 allowed the Native Land Court to grant survey liens, and this was repeated in the *Native Lands Act* 1873. Section 69 of that Act allowed the government to survey lands coming before the Court, although applicants could commission private surveyors if they wanted to. All surveys had to comply with the survey regulations and be certified by an inspector of surveys. No person could recover survey costs as a debt unless the survey had been approved (s. 74). Section 73 allowed the Crown to take land in payment for surveys. This basic structure was repeated in all the subsequent Native Lands Acts, with some fine tuning.

The requirements of the Survey Regulations were strict. Lines usually had to be cut on the ground; compiled plans would not do. The system of national triangulation, moreover, was still being constructed in the 1880s and 1890s. All this meant that surveys were very expensive. Moreover, blocks had to be repeatedly re-surveyed. When a block such as Matahina was first taken through the Land Court in 1881, the exterior boundary of the block had to be surveyed.[15] The original investigation had to be reheard, as was not uncommon, and the land was then partitioned out among various claimant groups, mostly going to Ngati Awa, with small awards to Ngati Rangitihi and other groups. The Court created a special block known as Matahina A6 of 8,500 acres, which was allocated by the Court to the

Crown as payment for conducting the exterior survey. But now of course the subdivisions themselves also had to be surveyed. The partition surveys were carried out privately by HW Mitchell on contract in 1885, and survey liens were attached to the block in favour of Mitchell by the Native Land Court in 1891, the liens bearing interest at the statutory rate of five per cent. The liens were then taken over by the Crown, perhaps with protective intentions, which paid off Mr Mitchell's debts and which in turn sought further survey awards in 1907. The survey costs now included not only interest but the costs of surveying the land to be taken for survey costs! – survey costs on survey costs. On this occasion, the Crown took 513 acres of Matahina B, 667 acres of Matahina C, 667 acres of Matahina C1 and 920 acres of Matahina D. By the end of this rather involved process, 11,267 acres of the block, 13 per cent of the total acreage (85,834 acres) had been swallowed up by survey costs. Many other examples of similar losses can be found.

Succession to individualized freehold interests

Another aspect of any individualization regime that needs careful thought is the effect of the ordinary law of succession. Undivided shares in a tenancy in common are, of course, a type of incorporeal hereditament and pass by will or on intestacy. Early Native Land Court decisions established the principle that on intestacy, heirs of owners of undivided shares passed their interests in equal shares from the mother or the father, as the case may be. A father who owned a 1/8 share would pass a 1/40 share to each of his five children, who would receive similar fractioned interests from their mother, usually in a different block. And, of course, so on and so on. On initial investigation in, for example the 1870s, it was not unusual for a block to have several hundred owners at the *start* of its tenurial history. The effects of this by the year 2006 do not need to be spelt out: blocks can have thousands of owners, tens of thousands in a few cases, although each individual share may be worth next to nothing. Many interests have become so small that owners do not bother to register successions with the Maori Land Court. Most Maori people today do not own large interests in one or two blocks but instead have many small interests in dozens of blocks. If things continue in this way, in a century from now probably everyone in New Zealand will own shares in Maori freehold land, none of which will be worth anything.

Title fragmentation is not simply a matter of a block ending up with a large number of owners. It has also meant a growing divergence between *owners* and *resident owners*. Maori people will have inherited interests from blocks all over the country. Furthermore, most Maori people have left their traditional areas for large cities: Auckland and Wellington, as well as Melbourne and Sydney. Quite a few Maori Australian citizens will be owners

of shares of Maori freehold land in New Zealand. This divergence between residents and resident owners had important implications for land alienation, in that it seems clear that owners were more likely to alienate interests in blocks they did not live on, or had no connection with. That had some significant effects during the period of active acquisition of Maori freehold interests by the New Zealand government in the period from 1870–1920. Today, because of restrictions on alienation and because many Maori people take pride in the *tūrangawaewae* ('place to stand') value of shareholding, there is not much of a market in undivided shares. Many people find it comforting and valuable to know that they are owners, even in a small sense, of interests in a block of land with strong cultural and historical ties to one's own family.

Maori freehold land as security

One of the anticipated benefits of individualization is that the newly-created clear property rights are able to attract development credit, in particular mortgage finance. Customary titles cannot attract capital, but individualized or freeholded ones can, at least in theory. However, in New Zealand this singularly failed to happen. Private banks proved very unwilling to lend money on the security of Maori freehold land, even though it was now a freehold and included within the Land Transfer system. Banks are still reluctant to invest in Maori freehold land today, which is why much of it is underdeveloped or simply leased out. Where did this attitude come from?

One factor is simply racism. Nineteenth-century bank managers may have been unwilling to lend to Maori, whatever title they held. But banks will lend where it is worthwhile for them to do so. Owners of general land in New Zealand have no trouble getting mortgage finance whatever their ethnicity. The real issues are tenurial. Banks are unwilling to lend on the security of Maori freehold land because it is too risky to do so. A tenancy in common is troublesome as a security. The owners have to be organized into some kind of representative structure, able to agree to the terms and conditions of a mortgage that is binding on all. In the case of Maori land, that is often far from easy to do, although the law does provide for various kinds of corporations and trusts, which are able to form binding agreements with lenders. But there remains a risk for the lender in the event of default. A mortgagee sale of a parcel of Maori freehold will inevitably be a troublesome affair. Banks would rather avoid the bother, and one cannot really blame them. Well meaning restrictions on alienation characteristic of contemporary Maori land law will not have helped matters in this respect.

This reality meant that Maori leaders in the nineteenth- and early twentieth-centuries tried hard to interest the government in providing cheap credit for Maori land development. The New Zealand government was, after all, more than willing to do this for non-Maori owners. The Liberal government's

Advances to Settlers Act 1894 (NZ), amended in 1895 and 1899, created a system of cheap credit for rural settlers. The Act set up a Government Advances to Settlers Office, empowered to advance money on first mortgage. By 1901 the government had loaned £2,679,520 to settlers under this legislation (New Zealand Yearbook 1901: 392). Note that the Liberal government spent less than half of this amount – £1,010,140 – on buying 3.2 million acres of Maori land in the same period. Settlers, in short, had access to considerably more development finance from the state for land settlement than did Maori for alienating the land in the first place.

Maori were effectively excluded from the Advances to Settlers scheme. The legislation did not discriminate on the basis of race as such. The problem lay rather in the categories of land available for assistance as defined by s. 25 of the 1894 Act. These included all freehold land held under the *Land Transfer Act* 1885 (NZ), various categories of Crown leasehold, and certain types of leases of Maori reserved land (see *West Coast Settlement Reserves Act* 1892 (NZ); *Westland and Nelson Native Reserves Act* 1887 (NZ); *Thermal Springs Districts Act* 1881 (NZ)), where the lessees, however, were much more likely to be European rather than Maori. To be eligible, Maori owners had to obtain a *Land Transfer Act* certificate of title to their land, certainly a daunting goal although not an impossible one.[16] It is in fact possible that some Maori who managed to stay the course and obtain a *Land Transfer Act* title did receive mortgage assistance from the Crown under the *Advances to Settlers Act*, but it is unlikely that this would have helped very many Maori families. Multiply owned Maori freehold *simpliciter* was ineligible, the state not wanting to risk loans for exactly the same reasons as the private sector: the land was useless as a security. Moreover, where a block was owned by hundreds of owners, organizing the collectivity of owners in such a way as to put together a proposal either to the state or a private lending agency, such as a trading bank or a stock and station agency firm such as Dalgetys, was extraordinarily difficult.

The need for development finance for Maori land slowly came to be appreciated. The *Maori Land Administration Act* 1900 (NZ) did make some finance available for Maori land development. The Minister of Lands was empowered to lend up to £10,000 per annum to any one Maori Land Council on the same terms as was provided for in the government *Advances to Settlers Act*. Theoretically this should have provided a substantial amount of public credit for Maori land development (at least £60,000 per annum), going some way to remedy the capital shortage, but it does not appear to have done so in reality. The main problem was that the Councils were able to lend money only for title-related expenses incurred in the preceding six years (*Maori Land Administration Act* ss. 29(3)). Another problem may have been indifference or reluctance on the part of the Department of Lands, although this is yet to be established. Later legislation also provided some scope for state lending. It was not, however, until the establishment of the Native Trustee Office by William Herbert Herries in 1920 – which only pooled money owned by Maori in any event – and, more especially, with Sir Apirana Ngata's legislation in 1929 (*Native Lands Amendment and Native Land Claims Adjustment Act* 1929 (NZ), s. 23) that finance from the state for Maori land development became available on any significant scale.

The history of Maori land law in twentieth-century New Zealand has largely been one of attempting to creatively develop measures to ameliorate the effects of title individualization introduced in the nineteenth century. Various devices have been experimented with. The first, historically, was 'consolidation', by which adjoining blocks were grouped together, resurveyed, and shares reallocated among owners – and, typically, the Crown as purchaser – in order to create manageable farming units. This was a difficult and laborious process. Many of these 'consolidation schemes' took place in the first decades of the twentieth century, of which the biggest was the colossal Urewera consolidation which lasted from 1920–6.

Other devices include the establishment by statute of various types of landowning units clothed with legal personality which are able to manage the land, borrow, enter into contracts, and carry out other necessary functions on behalf of and for the benefit of the owners. The first attempts to establish such bodies leaned towards a corporate model, the 'Maori incorporation';[17] more recently the focus has been on establishing various kinds of statutory trusts.[18] These models have been successful, especially the statutory trusts, but about 50 per cent of Maori freehold land today remains 'unincorporated' – that is, not vested in a corporation or trust. Where such unincorporated parcels have large numbers of owners, effective land management can be very difficult. Nor, obviously, do these bodies remedy in any way the rapid loss of ownership which was the principal outcome of the individualization project in the first place.

Current trends in New Zealand

In light of this history, New Zealand policymakers of today show no inclination to repeat its mistakes. Allocations of fishing quota, cash, and property rights as redress for historic grievances today are invariably granted to Maori *collectivities*, which are corporate entities required to meet strict standards in terms of structure and accountability under fisheries legislation or the Crown's treaty settlements policy. Of course, the distributed assets and cash have to be managed by the settlement entity on behalf of its membership, a group of individuals affiliating to a particular descent group, but this is not 'individualization' as I understand the term. How those assets are managed among Maori communities *inter se* are for each group to decide for itself. Certainly the state has demonstrated no interest in allocating

redress assets to Maori *individually*, and it is not difficult to imagine the political reaction if this idea was suggested.

In New Zealand Maori *iwi* ('tribes') and *hapu* ('sub-tribes' or 'clans') do not have legal personality as such. There is a host of legal entities routinely utilized by Maori for a range of collective purposes, including land ownership, through special corporations and statutory trusts provided for in the *Maori Land Act*, and the management of *iwi* affairs using Maori trust boards (*Maori Trust Boards Act* 1955 (NZ)). Legal entities have also been set up to manage fisheries assets by mandated *iwi* organizations MIOs), under the *Maori Fisheries Act* 2004 (NZ); and, of course, there are ordinary companies, trusts (including charitable trusts), and incorporated societies, which are widely used by Maori groups for a range of purposes (governed by the *Incorporated Societies Act* 1908 (NZ)).

The New Zealand Law Commission, in a recent report (New Zealand Law Commission/Te Aka Matua o Te Ture, *Waka Umanga: A proposed law for Maori governance entities* 2006) has proposed the establishment of a new multipurpose Maori entity to be known as a *waka umanga* (roughly, 'vehicle for managing community affairs') to be set up under a new *Waka Umanga/Maori Corporations Act*. Use of this new model entity would be optional, although of course the Law Commission's hope is that its use will become widespread. The Commission has noted that with the development of settlements 'Maori organizations are likely to manage assets from several sources, including land claim settlements, fisheries settlements and possibly aquaculture allocations' (*Waka Umanga* 2006: 19). No one option currently available from the existing smorgasbord of legal entities is suitable for all purposes, hence the need for the new multipurpose governance entity. The new body will allow groups:

- to adopt a structure which promotes transparency, accountability, stewardship of assets and internal dispute resolution;
- to gain corporate status and perpetual succession;
- to gain recognition that its charter meets the requirements for legitimacy and credibility with third parties and is appropriate for running business operations; and
- to gain recognition as the legitimate representative of a specified group for prescribed purposes.

(Waka Umanga 2006: 20)

In New Zealand the focus is on devising better forms of legal entities that can represent Maori collectivities and act as recipients for collective settlements. Of course, these entities will have to devise means of recording their membership in order to assess eligibility for the distribution of benefits, but no *iwi* has to date opted for individualized payment of settlement benefits directly to their members by way of an annual cash payment or anything similar. Much of the redress transferred in the various settlements would not lend itself to such an allocation in any case. With respect to Maori freehold land, however, the damage has been done. It belongs to its individualized owners, not to Maori *iwi* and *hapu*, and there appears to be no intention to change this or any proposal to do so.

Reflections and conclusions

This chapter is not written in a spirit of dogmatic opposition to title individualization as such. Hernando de Soto's (2000) proposal that the people of the *favelas* and *barrios* of the great Latin American cities be given clear titles to the properties they occupy seems to have a great deal of force. The New Zealand experience does contain some lessons for Australia. It illustrates most clearly that individualization – which in the New Zealand context meant investigation of title to a surveyed parcel of land formerly held under customary title, the identification of named customary owners, and clothing them with an English law freehold title as tenants in common – can be an expensive process. Surveys, court hearings, listing of owners, legal partitions of blocks: all these cost money. Who should pay? The *Native Lands Acts* threw most of the substantial costs of individualization onto the indigenous owners themselves. These burdensome transaction costs inevitably led to loss of property entitlements. In New Zealand, also, the state was the primary purchaser of the individualized land interests, and did not hesitate before distorting the Maori land market in favour of itself to drive down prices and exclude private sector buyers. The net result was an inability on the part of rights holders to achieve much in the way of significant capital transfers from land alienation to the Crown at a time when their general economic situation created strong pressures to sell.

Another problem was that the type of individualization applied in New Zealand created individually alienable property rights but was ineffective as a means of providing a useful security likely to attract lenders. Individualization led to a breakdown of community controls on land alienation and management, largely because the operation of the law of succession, in combination with individualization, resulted in an increasing disassociation between legal and resident owners. It is possible to combine individualization with community controls on alienation, as the *Native Lands Act* 1909 shows, but this was certainly introduced too late in the process to have much impact on the rate of land loss in New Zealand.

In conclusion, the system adopted in New Zealand meant that Maori owners received most of the disadvantages and none of the hoped-for benefits of title individualization. From 1920 onwards, a great deal of legal ingenuity has gone into devising various types of statutory incorporations and landowning trusts designed to ameliorate or circumvent the problem of

title fragmentation which was a direct consequence of the nineteenth-century individualization project. To some extent these recent changes have ameliorated the worst effects of Maori land individualization. Nevertheless the long-term effects of the changes made in the nineteenth century continue to be of considerable practical significance in contemporary New Zealand, and the effects of the Native Lands Acts are a major focus in current negotiations between Maori and the Crown on the resolution of historic grievances.

Notes

1 See *Maori Land Act (Te Ture Whenua Maori Act)* 1993 ss. 145-50.
2 Some of the text of this chapter is drawn from my *Buying the Land, Selling the Land: Governments and Māori Land in the North Island 1865–1921*, published by Victoria University Press in association with the Victoria University of Wellington Law Review (VUWLR).
3 The Waitangi Tribunal was set up by and derives its jurisdiction from the *Treaty of Waitangi Act* 1975 (NZ). The tribunal was given power to adjudicate on claims made by 'any Maori' that acts or omissions of the Crown are contrary to the 'principles' of the Treaty of Waitangi.
4 See Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 68; 107 ALR 1, 49. See also *Fejo v Northern Territory of Australia* (1998) 195 CLR 96 at 128 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) and 151 (Kirby J).
5 However, native title interests could not, in my view, prevail against *Land Transfer Act* 1952 (NZ) titles as a consequence of ordinary indefeasibility law. The interest would not so much be extinguished as unenforceable against a registered proprietor. Should the land become once again Crown land and not subject to the *Land Transfer Act* 1952 (NZ), any unextinguished native title interest could perhaps revive.
6 On the origins of the *Native Land Acts* in New Zealand, the best discussion by far is in an unpublished report to the Crown Law Office by DM Loveridge (Crown Law Office, New Zealand 2000). This report was prepared as part of the Crown evidence for the Waitangi Tribunal's Hauraki Regional Inquiry. Loveridge cites the evolution of the *Native Lands Acts* convincingly in the context of the broader struggle between colonial governors and local politicians over the control of Native Affairs.
7 For an attempt at a slightly revisionist view, see Boast (2001). For an important recent discussion by the Waitangi Tribunal see Waitangi Tribunal (2004, especially 395–471).
8 The most famous discussion is Tawney (1912), which is a true classic from the greatest of all economic historians. The key modern study is Neeson (1993).
9 The principal target of this statute was the vast endowed lands held by the Catholic Church. Much of this land was worked by peasant tenant farmers. One consequence of the law was that many of the endowed church lands came into the hands of wealthy ranchers and owners of haciendas, leading in turn to far worse conditions for the rural peasantry. For a useful introduction to Mexican legal history in English, see Zamora et al. (2004: 1–42); for full accounts see Margadant (1988); Barney (1999).
10 There is a vast literature on land policies and the assault on communal lands in later nineteenth-century Mexico and Central America, most of it in Spanish. For an introductory discussion and a guide to further reading, see McLeod (2000: 1–43).
11 For a detailed analysis of developments in nineteenth- and twentieth-century Guatemala, see Grandin (2000). The report of the Comision Para el Esclarecimiento Historico, *Guatemala: Memoria Del Silencio* (1999) contains a thorough analysis of the historical background to the *violencia*, the period of massacres and killings that was at its worst between 1978 and 1984, and of land and tenurial issues in Guatemala generally.
12 For general overviews of US Federal Indian policy, see the chapters by R Horsman, FP Prucha, W Hagan and L Kelly in Washburn (1988); and Hoxie (2000).
13 The legal foundation for the *ejido* is Section VII of Article 27 of the *Mexican Constitution* of 1917. The land expropriations and redistributions during the presidency of Lazaro Cardenas were carried out pursuant to the *Codigo Agrario* of 1934. The *ejidos* represent a fascinating attempt to recreate and revitalize customary tenures in a large and economically significant modern country. Some *ejidos* predate the Mexican revolution; others have been newly created by operation of law. Issues such as whether those living in *ejidos* should be able to buy, sell, or mortgage properties, and the future of the *ejidos* generally, are key issues in contemporary Mexican politics. One illuminating regional study is de Vos (2002).
14 This can be contrasted with *Maori customary land*, defined in *Te Ture Whenua Maori/Maori Land Act* 1993 (NZ) ss. 129(2)(a) as land 'still held by Maori in accordance with tikanga Maori'. Such land is, and always was, alienable only to the Crown in accordance with ordinary principles of native title law. There is no *Maori customary land* of any significance remaining in New Zealand today.
15 On Matahina, see Cleaver (1999); Nikora (1995). Other well documented examples include the Tuararangaia Block in the Bay of Plenty (see Clayworth 2001), and the huge Tahora block on the eastern side of Te Urewera (on which see Boston & Oliver (2002) and Binney (2002: 68–107).
16 For a discussion of the relationship between the Maori land legislation and the Land Transfer Acts, see Boast, Erueti, McPhail & Smith (2004: 249–55).
17 Incorporations are currently covered by Part XIII of *Te Ture Whenua/Maori Land Act* 1993 (NZ). They were first pioneered by the Ngati Porou people of the East Coast region of the North Island in the 1890s. See generally Boast, Erueti, McPhail & Smith (2004: 107–8, 207–15).
18 On Maori Land Trusts, see Boast, Erueti, McPhail & Smith (2004: 163–92).

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Chapter 7

One step forward, two steps back

Peru's approach to indigenous land and resources and the law

Lila Barrera-Hernández

Figure 7.1 Peru: case study location.