KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

BEFORE THE WAITANGI TRIBUNAL **WAI 2180**

IN THE MATTER OF	**the Treaty of Waitangi Act 1975**
AND	
IN THE MATTER OF	**THE TAIHAPE: RANGITĪKEI KI RANGIPŌ DISTRICT INQUIRY**

UPDATED SUMMARY OF EVIDENCE OF SAMUEL DAVID CARPENTER

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THE NATIVE LAND LAWS: GLOBAL CONTEXTS OF TENURE REFORM, INDIVIDUAL AND COLLECTIVE AGENCY, AND THE STRUCTURE OF 'THE MĀORI ECONOMY' – A 'LANDLESS BROWN PROLETARIAT'?

Part 1: Outline

Introductory Comments

1. A quote from Jane Austen:

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

2. This quote, from a well-known literary text, is a pointer to a world in which property was the preserve of a very few. This world was, however, coming under increasing pressure from a society in Britain that was democratising, and from related transformations in an economy that was orienting itself increasingly to market exchange. In other words, the nineteenth century saw the rise of a new middle-class and the loss of authority (albeit a gradual one) of the old regime.

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

4. The NLLs and the Native Land Court did not arrive in a complete form, or as some tried-and-true model simply imported into the New Zealand context. They were an attempt to deal with complex political, social and economic challenges in the New Zealand colony (or several colonies of settlement and many tribal polities).

5. At the same time, they drew upon various ideas in British metropolitan and imperial contexts about the optimal ways in which real property or land should be held, used and deployed in a 'modern' economy. There were institutional precedents in Britain and its empire that formed part of the Victorian economic and legal backdrop, notably the parliamentary enclosure movement in the eighteenth and nineteenth centuries, but also developments in trust law and the emergence of the limited liability company.

6. Equally importantly, the NLLs had to acknowledge and work with the realities of Māori social structures and tikanga or custom regarding land.

7. The report is an exploratory attempt to consider the NLLs in the context of New Zealand *realpolitik* and these wider contexts – intellectual, cultural, legal and economic.

8. The report also seeks to understand the NLLs on a broader scale still – in terms of global or world changes in land tenure and economies driven by nineteenth century exports of people, capital and ideas – many from Europe but not exclusively so. It attempts to frame a study of the NLLs in the 'global' terms described by Jerry Bentley:[1]

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

9. Sir Christopher Bayly argued along similar lines in his important work of global history, *The Birth of the Modern World, 1780-1914*, that the "interconnectedness and interdependence of political and social changes" that emerged across the world in the nineteenth century means that "all local, national, or regional histories must, in important ways" be "global histories. It is no longer really possible to write 'European' or 'American' history in a narrow sense …".[2]

10. The report carries a similar argument that it is no longer possible to write New Zealand history – including a history of the NLLs – in a narrow sense: without regard to globally-circulating ideas, institutions and economies.

The research questions

11. The research questions for the report were the following:

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

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

Structure of this Summary of Evidence

12. The structure of this summary follows that of the report.

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

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

13. In Part 2, I outline several contexts directly relevant to the development of the native land laws. As in the main report, I seek to show how these ideas or contexts affected the development of the NLLs. The contexts I discuss are:[3]

    13.1 the individualisation or 'privatization' of tenure through enclosure;

    13.2 the development of the law of trusts and joint-stock companies;

    13.3 the nature of the nineteenth-century state; and

    13.4 some recent literature on economic history and development. Part of this section discusses the idea of informal or customary norms that effect property rights, and I apply these insights to the Awarua narrative.

14. I then discuss, in Part 3, how the NLLs were in part a response to tensions between individual and collective agency as these manifested themselves in the contexts of tribal land management and alienation.[4]

15. I then discuss the concept of 'Structure of the Māori Economy', as a way of thinking about the trajectory of Māori economic futures in the nineteenth century and beyond.[5]

16. I finish by stating some 'conclusions' in response to the research questions.

Part 2, 'British-World and Global Contexts': Ideas and Institutions Relevant to the Development of the NLLs

17. The report seeks to highlight the relevance of contemporary legal, political, economic and cultural contexts in the British world, and globally. These are now described briefly.

Individualisation of tenure

18. A quote from John Stuart Mill:

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

19. The context in which J.S. Mill was writing was a radical movement in Britain advocating the freeing up of land tenure rules, especially those that kept the great landed estates out of the market.

20. The individualisation of land tenure – or rather, making land more susceptible to market exchange – was a British empire and global trend from the nineteenth century onwards. In Britain it had started centuries earlier with the

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3 Note, these contexts are dealt with in the main report in 'Part 2', beginning at 14.

4 The report discusses the evolution of the NLLs generally, including the trust and incorporation aspects, in Part 3; see especially at 68-71, 85-88, for the theoretical-empirical discussions.

5 This is discussed in Part 3 of the report, at 90-101.

'enclosure' of common lands, which, from the eighteenth century, was carried out under Parliamentary enactment.

21. It may be more accurate to represent the enclosure process in commercial terms – rather than land tenure terms – as the need to 'fix' tenure in land by identifying its owners and granting them titles that were transferrable in a land market. That is, it was 'market' forces or the profit motive, as well as scientific and technological shifts in agriculture, that drove the fixing of tenure.

22. In many parts of the globe this involved converting communal tenures into individual tenures, although the form this took in fact varied widely. Even in British India, some areas fixed tenure in 'landlords' who then collected rents from tenants for the British administration; in other areas, tenure was fixed at the individual cultivator level. Interestingly, a study cited in the report shows that those cultivator tenure areas (many in the south of India, the 'ryotwari' system) are today more economically progressive than the 'landlord' tenure areas (in Bengal, the 'zamindar' system).[6] **I argue that the conversion of Māori tribal tenure into a fixed – though not necessarily individual – tenure system reflected these global trends.**

23. While reflecting these global trends, the NLLs were worked out and evolved in a particular context. In the NLLs, the transition to a strongly individual system of land rights took at least 15 years from the Native Land Act 1862. This was from 1877-78 when firstly the Crown and then an individual third party could apply to the NLC to partition out interests they had acquired. Those amendments supported the idea of individual dealing over collective control or collective dealing.

24. Thus, the amendments in the NLLs 1862-78 show that individualisation was not instantly created by statute, but that it was a process of bringing a communal tenure into a 'fixed' form by identifying owners and enabling them to deal. Their ability to deal freely was only attained once the land had been partitioned out to ten owners or less and (in most versions) had received a Crown Grant. Until then, land remained in a form of collective ownership, in which a named 'tribe' (1862, 1865) or any number of interested parties (1867, 1873) could be listed as owners, and retained collective control in law over selling, leasing, mortgaging, and any other use. For completeness, it can be added that in the 1873 Act, a majority of owners in a block could force a partition in order to sell or lease (and possibly mortgage).

25. Even then, the concept of individual dealing was not seen by European agents in isolation from the tribal nature of tenure, and the ability of the chief to act as a 'representative owner'. Consistent with this picture, the 1865 Act allowed grantees to not only act as tribal trustees *de facto* but also *declare themselves as trustees by deed*. Certainly, it did not positively prohibit such representation or agency. In fact, there is no reason why a representative owner could not have declared themselves a trustee for others under standard trust concepts under most of the NLLs tenure models – including a Crown Grant obtained under the 1873 legislation. William Rees and Wi Pere used the trust for their land settlement schemes. Case law affirmed it as a real mechanism of ownership.

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6 Abhijit Banerjee and Lakshmi Iyer, 'History, Institutions, and Economic Performance: the Legacy of Colonial Land Tenure Systems in India', *The American Economic Review*, vol. 95, no. 4 (2005), at 1190-1213; see Report, at 113-114.

Hence, the trust was one way to achieve agency of many owners through delegation to one or a few. More context for this argument is now outlined.

Trusts and Trustees

26. The report explores the way in which trusts and trustees were part of the 'mental furniture' (or *mentalité*/worldview) and general life experience of propertied Victorians and operated with or without explicit provision in legislation. Settlors, trustees and beneficiaries usually operated as part of the fabric of family or close social relationships. Trustees were particularly involved with the inter-generational management of family land and estates. Although aspects of trust law became subject to public reform in the Victorian period, Chantal Stebbings has elaborated on this essentially private context of trusts and trust law:[7]

> Since the trust was a purely private arrangement, with no requirements of registration and with significant fluctuations in the value of trust funds, it is impossible to state with accuracy how much property was held in trust in the nineteenth century. It was widely believed by contemporaries to be considerable, and to be increasing as the country became wealthier with more money available to be settled. In 1895 it was said that an 'enormous amount of personal property, as well as a great deal of land', was held in trust, and some believed it was as much as one-tenth of the property in Great Britain…. As a result Lord St Leonards could say that there were 'few social questions of more importance' than the trust relationship in Victorian England, and as early as 1857 the trust could accurately be described as 'one of the most ordinary relations of life', and the positions of trustee and beneficiary as 'among the most common and the most necessary'. Writing in the early years of the next century, Frederic Maitland observed that the trust 'seems to us almost essential to civilization'.

27. This social context explains**, I argue, why New Zealand parliamentarians and Crown agents assumed that trust concepts would operate within or alongside the scheme of the NLLs** – until it was shown by experience that this was inadequate to protect a wider ownership group where title grantees acted without reference to them.

28. Hypothetically, the NLLs could have more explicitly imposed trust obligations on grantees; in fact, there is some suggestion this was considered in 1867, before the s 17 amendment provided for all interested owners to be 'registered' in Court (which in theory would have meant that a third party had 'notice' of their existence). However, there are good contextual reasons for why explicit 'deeming' or imposition of trustee status would have mired Māori in English trust law and litigation arising therefrom. I argue, *inter alia*, that rangatira grantees would have resisted the idea that tribal members could sue them for breaches of trust – this would have been both unsavoury, according to English notions of social hierarchy, and inconsistent with tikanga.

29. An additional point on British-world context is that trust or trustee law was reformed in various ways in the 19th century. The Settled Land Act 1882 (UK) enabled landed estates to be more easily dealt with commercially, but notwithstanding this freeing up of land, there was a strong presumption against

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

permanent alienation, and leasing to 'capitalists' was a common use, thus maintaining the estate in the family's ownership. Justice Richmond drew an analogy between Māori collective property under the 1873 Act Memorials of ownership, and the settled estates in English legal tradition – the common idea being that land was maintained through the generations, and no one generation or person could alienate it permanently.[8]

30. This situation altered from 1877-78 in New Zealand, at least with respect to individual shares in a block. Note, however, that this was individual shares in multiply-owned land; it did not prevent a majority of owners acting together to maintain the land, including lease it.

Joint Stock Companies or incorporated forms of business

31. Company law underwent major transformations in the United Kingdom in the nineteenth century, but not until the 1850s did legislation provide for the 'modern' limited liability joint stock company – where liability of shareholders was limited to the share value held. Creating this legal form through statute did not however precipitate a huge rush of incorporations. Rather, private ownership of business continued to predominate until at least the end of the century.

32. The cultural and political setting helps to explain this slow uptake of the company model. There was widespread resistance to the idea of companies or incorporated entities with limited liability as it was feared that business would be irresponsible. The reasons for this were partly due to the history of speculation and investment 'bubbles' fuelled by joint stock companies. (Most of the most well-known, disastrous investment schemes of the eighteenth century were in Britain's New World colonies.) There was also resistance to the idea of company management separated from and unaccountable to owners. These perceptions are reflected in the 1881 statement of the Australian wool-merchant, F. G. Dalgety:

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

33. One way to read this statement is that a business run by the owners is much more accountable and profitable. Philosopher and social critic, Herbert Spencer, wrote in the *Edinburgh Review* in 1854 that the real problem with companies was "the familiar fact that the corporate conscience is ever inferior to the individual conscience – that a body of men will commit as a joint act, that which every individual of them would shrink from, did he feel personally responsible".[9] One way to read this statement is that the corporate veil allows individuals to make decisions about other people's assets that they wouldn't make with their own. This is arguably an issue with any type of agency or trust arrangement.

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8 See *Hobson v Sheehan & ORS* (1884) 3 NZLR (SC) 230 and report discussion at 74-75.

9 Cited in James Taylor, *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture, 1800-1870* (Woodbridge: Boydell Press, 2006).

34. Given this British-world context (and wider European context, as Britain was the first to invent the company and others followed), **I argue any assumption that incorporated models should have been applied to tribal land ownership is a shaky one.**

35. The rejection by the legislature of the William Rees and Wi Pere company schemes in the 1880s can be seen in this light (as well as Rees' mixed reputation as a lawyer and man of business).

36. It is perhaps not coincidental that it was not until the mid-1890s that the New Zealand legislature created the first incorporated scheme for Māori land – by this time, incorporation was becoming more socially or commercially acceptable in the British metropole and empire. (For completeness, it can be noted that New Zealand Joint Stock Companies Act 1860 adopted the English provisions for incorporation of a joint stock company by registration, 'with or without limited liability'. But enabling legislation did not mean use by business-people, as Michael Lobban shows for England, and Phillip Lipton shows for Australia[10]).

37. Regarding the detail of whether incorporated models could be applied to tribal land ownership, **I argue that the agency issues with companies are not too dissimilar from trusts**: company directors usually have real scope to make managerial decisions for the company (as that is their role), and tribal memberships would not necessarily be able to assert the control or supervision over director decisions that they might wish; likewise with beneficiaries of discretionary trusts. By the time property has been mismanaged, overburdened with credit/mortgages, or invested and lost, it is very difficult to get it back (even if fraud could be proven).

38. **I also make the point that companies are more suited to some purposes than others**: in the case of land, they seem more suited to larger land areas with many owners run on a commercial basis (for example, larger leasehold blocks like Oruamatua and Owhaoko with multiple ownership) rather than land suitable for close settlement and family-run farming operations (for example, parts of Awarua block and southern blocks). On smaller or partitioned whānau allotments, intended in part for occupation, there would be no need to incorporate – unless of course there was a decision to consolidate holdings into a commercial operation. The latter was possible in Awarua and Motukawa blocks post-1896 Crown purchasing – by utilizing the 'committee' provisions in the 1894 Act – but the pattern of partitioning there was decidedly a whānau allotment one. (An underlying tension of a practical economic nature is one discussed by Daunton, cited in the report: between land used for occupation and land for commercial purposes.)

39. An additional point about incorporation is that fragmentation of ownership still occurs with each generation passing, in that there are an increasing number of owners, which (depending on succession rules) reduces the share of each owner in the assets and income of the incorporation. Each passing generation also adds communication issues, especially with a far-flung membership not

10 See report discussion at 27-32; and Phillip Lipton, 'The Introduction of Limited Liability into the English and Australian Colonial Companies Acts: Inevitable Progression or Chaotic History?', *Melbourne University Law Review* (advance), vol. 41, no. 3 (2018); Michael Lobban, 'Joint Stock Companies', in the *Oxford History of the Laws of England*: Vol XII, at 613-73.

resident locally (which I understand is the case with most of the larger Māori land incorporations today). The main advantage of incorporation is that it enables the management of large asset bases with multiple shareholders – a key reason why the joint stock company was created in the first place. However, the separation of this large and growing shareholder base from the management of the land, and the land itself, means this picture is a decidedly different one from customary tikanga (as at least one Treaty settlement deed has acknowledged).[11]

The Role of the (Nineteenth-Century) State in Economic Development

40. The powers, capacity and pervasiveness of the state in nineteenth century New Zealand are often overstated or misunderstood. Most commonly, expectations are placed on what the state 'should have done' in that era that were simply incapable of being achieved by the New Zealand settler government at the time – not only due to its size and revenue base which were a small fraction of the current New Zealand state - but also due to the prevailing ideologies that informed the roles to be undertaken by the state.[12]

41. The smallness of the nineteenth century state is a good indication of its institutional and bureaucratic reach. Consistent with European state figures from a similar period, the New Zealand state's spending in the 1890s was around 13% of GDP.[13] This contrasts with the OECD average in 2009 of 45%.[14] These figures are illustrated graphically, for New Zealand, by recent Victoria Business School research, and by the World Data project, for the global picture.[15]

42. In general, the nineteenth-century state in the Western world was mostly concerned with facilitating economic development through the development of law and property institutions (including tenure reform and company law reform), through infrastructural development – railways, roads, the telegraph, and, in the colonies, the facilitation of immigration (which had its own drivers but was also thought to encourage economic growth through creating new economies and markets).

Engaging with the Literature on Institutions and Economic Development

43. The report notes that Tribunal historiography has not generally engaged with an economics and economic history literature concerning the causes of economic growth, and the role of legal systems in creating the conditions for growth. Simply put, this literature shows (at least, argues) that legal systems that provide for the protection of property rights encourage economic growth. More broadly, political and legal systems that provide a proper institutional

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

12 See also, Richard Boast, 'The Native Land Court at Cambridge, Māori Land Alienation and the Private Sector', *Waikato Law Review* 25/26 (2017): 26-40: this article, not cited in main report, argues for a fresh look at the role of private sector and international capital (banks and financiers) in the alienation of Māori land – moving outside the Tribunal's almost sole focus on 'the Crown' and the legislative mechanisms.

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

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

15 See N. Gemmell et. al., 'The Changing Size of the State in New Zealand, 1900-2015', Victoria Business School working paper (2016); and https://ourworldindata.org/government-spending [as extracted in powerpoint slides filed with this summary].

framework and incentives to invest create the conditions for economic growth. This includes political systems that constrain political power itself so that citizen's property interests are secure from state coercion (hence 'coercion-constraining' institutions).[16] It also includes public infrastructure such as transport routes and communications, as well as monetary policy, share market regulation, and avenues for the export of goods to foreign markets.

44. Most of the New Institutional Economics (**NIE**) literature emphasizes how legal and property institutions affect the rights of *individuals* to use, sell and bequeath an asset, and to deal in the market knowing that contracts will be legally enforceable if necessary. However, it does not ignore groups or collective values, and has also invested considerable thought in the role of corporations in the market.

45. NIE scholars like Douglass North have also argued that informal norms affect the realities of property rights, and I argue that his analysis is applicable to the NLLs in the mid-to-late nineteenth century.[17] It should be obvious that what the law provided or delineated by way of a property right was not the whole picture of Māori property rights: custom or tikanga, or a 'collective principle', as I have termed it, should have continued to operate where it was operating effectively before the NLLs commenced. In other words, individualism *at law* could not readily or entirely displace collective norms *at tikanga*.

46. What do I mean here, exactly? For example, *if* we start with the premise that there were reasonably strong hapū structures or communal cohesion as at the inception of the 1873 Act, then it defies reason that those same hapū/community members would suddenly change their cultural norms and behaviour just because they held an individual property interest – that is, deal with their individual interests immediately without reference to the rest of the community of which they were a part. As Douglass North has argued re informal norms:[18]

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

47. In order to adequately interpret Māori engagement with colonial (or Crown) law and policy, we need a theory more like this one, namely, that takes account of strongly-held customary norms or 'culture',[19] but yet also sees these norms as themselves constituted by history, making them to a degree malleable and able to be reconstructed by individuals and communities to make way for other 'introduced' ideas – such as, for example, individual transferrable property rights – but *not necessarily* their associated values of individuality.

48. In the report, I suggest that the picture of Crown purchasing and Māori land retention in the key Awarua block is more nuanced than a simple paradigm of individualism vs collectivism (or Crown imposition of individualism), because a reasonable interpretation of the available evidence is that, while selling (some

16 For this concept, see Report, Appendix, at 111-113.

17 See diagram from L. J. Ashton, 'New Institutional Economics', *The New Palgrave Dictionary of Economics* (2018) [**see** report (Wai 2180, #M29) at 37 and powerpoint slides filed with this summary]

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

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

of) their shares in what seems like an individual fashion in many cases, many of the owners were still working towards an objective of obtaining whānau partitions in desired locations. This is a reasonable interpretation, I suggest, because some result like this seems to have occurred.[20] Moreover, all the land around the Moawhango township settlement was retained.[21]

49. To repeat, individualism *at law* could not readily or entirely displace collective norms *at tikanga*.

50. Tribunal historiography could benefit from the insights provided by this economics literature, and other bodies of literature that attempt to understand the broad sweep of the origins of industrialisation, or world trade, or capitalism, or, indeed, the whole debate over why Western Europe, in particular Britain, became economically dominant globally at the period it did (essentially, in the eighteenth and nineteenth centuries). I have been able to engage with only a small fraction of these immense and varied bodies of literature in the time available.

51. While we are talking about economic development, and state spending as part of this picture, what about distributions of global poverty over time?. This is another big picture issue that must be seen in a longer-term perspective. As world data statisticians have shown:[22]

> The trend [on global poverty] over time becomes more clear if one compares the availability of necessities like food, housing, clothing, and energy. As more and more countries industrialized and increased the productivity of work, their economies started to grow and poverty began to decline. According to Bourguignon and Morrison—and as seen in the graph[23] —only a little more than a quarter of the world population was not living in poverty by 1950.
>
> From 1981 onwards, we have better empirical data on global extreme poverty. The Bourguignon and Morrison estimates for the past are based on national accounts and additional information on the level of inequality within countries. The data from 1981 onwards come from the World Bank, which bases their estimates on household surveys.
>
> According to these household surveys, 44% of the world population lived in extreme poverty in 1981. Since then, the share of extremely poor people in the world has declined very fast—in fact, faster than ever

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

21 See T. Walzl, 'Twentieth Century Overview', at 626 [and power point slide].

22 Max Roser and Esteban Ortiz-Ospina, 'Global Extreme Poverty', https://ourworldindata.org/extreme-poverty#note-16 (accessed Sep 2019).The authors/compilers notes that the data from 1820 to 1992 is taken from Bourguignon and Morrisson, 'Inequality Among World Citizens: 1820–1992', *American Economic Review* 92/4 (2002): 727–744. These definitions 'correspond to poverty lines equal to consumption per capita of $2 and $1 a day, expressed in 1985 PPP [purchasing power parity].'; Data from 1981 onward are from the World Bank (Povcal Net).

23 See powerpoint filed with this summary.

> before in world history. In 32 years, the share of people living in extreme poverty was divided by 4, reaching levels below 10% in 2015.[24]

52. Extreme poverty has reduced in 'rich countries' (as it has generally for the world population), from high percentages in the nineteenth century to practically negligible proportions today (that is, for 'rich countries'). In other words, first world countries, such as the United States, Britain, and New Zealand, still had not insignificant rates of extreme poverty until about 1900.[25]

Part 3, 'New Zealand Contexts':

(1) The NLLs a response to issues of individual and collective agency in Māori tribal society (in the broader context of the colonial economy)

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

54. Native Minister in 1862, Dillon Bell, described the 'chief design' of His Excellency's Advisers (that is, the Government):[26]

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

55. I suggest in the report that this quotation identifies the core immediate objectives of the legislation, namely that:

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

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

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

55.4 the focus was on Māori owners being able to deal with land either by sale or lease.

56. I also add that it does not seem that at this point (1862) that the use of land as security for lending and agricultural development was much thought of – at

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[24] See powerpoint filed with this summary which includes a slide illustrating these figures.

[25] Graphic, 'The reduction of extreme poverty in countries that are rich today, 1820-2000', www.OurWorldinData.org [in powerpoint filed with this summary].

least on the evidence of the parliamentary debates and Government memoranda.[27]

57. In summary, I would describe the original general intent of the NLLs to convert the fluid and indeterminate forms of native tenure (as it was perceived by Europeans) into fixed and certain tenure to enable market dealing and avoid more wars. The NLLs themselves did not *intend* to remove Māori from land ownership or, in particular, produce a 'landless brown proletariat'. They rather intended to facilitate tenure reform and thus provide a secure basis for land transactions of all kinds – including selling, leasing and mortgaging.

58. I also ask, somewhat provocatively perhaps, whether the NLLs were more about 'assimilating' Māori tenure to British tenure, or 'destroying tribal communism'? The assimilation language Sewell used in 1862, in a debate about the original legislation.[28] The tribal communism language he used in 1870 – to explain the original intent of the 1862/65 legislation – but in a debate on the Native Land Frauds Prevention Act 1870.[29] This was designed to allow for situations in which title grantees were holding land as representatives for others – ostensibly to prevent them defrauding those others of their interests. Ironically, this seemed to recognise the tribal communism that the 1862/65 legislation was supposedly designed to eradicate. (There is a sense in which these mid-nineteenth century Englishmen did not have an instrumental view of culture, *or* a mechanistic view of legislation: Māori could not, or would not, simply change their cultural modalities just because some tenure legislation provided for it.)

59. Thus, the report explores the way in which the amendments to the central title provisions of the NLLs were in part a response to actual issues encountered with the laws in practise – including the important shift from the 'ten owner' rule of the 1865 Act to the 'democratic' principle in the 1873 Act of all owners being listed; the latter was at least partly driven by the rationale to protect those who had been 'outside the title' under the ten owner regime.

60. There is a real argument that the 1873 Memorial or 'democratic' regime made purchase or lease from Māori more difficult, even for the simple reason that 40 or 100 owners now had to be contracted with rather than ten.

61. In part, the NLLs were a response to the realities of Māori tikanga or tribal organisation – especially the tensions between individual and collective agency. Such tensions were evident in the way tribal groups and leaderships actually operated in the new economy or land market.

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28 'I can perceive nothing which remains to us but to set aside, for the present at least, theories of systematic colonisation, which are no longer practicable, and, under properly-guarded conditions, to admit the rights of Native ownership, **transmuting them carefully into rights founded on British law and assimilated as nearly as may be to our own.** And we must trust to other remedial agencies for correcting or mitigating the possible mischiefs to which this may lead.' H. Sewell, *NZPDs*, 9 Sep. 1862.

29 'The other great object [besides bringing the native estate 'within the reach of colonization'] was, the detribalization of the Natives, - to destroy, if it were possible, the principle of communism which ran through the whole of their institutions, upon which their social system was based, and which stood as a barrier in the way of all attempts to amalgamate the Native race into our own social and political system…' H. Sewell, *NZPDs*, 19 Aug. 1870.

62. To illustrate this point about the way the NLLs sought to respond to Māori agency (and tikanga also), we could sketch a schematic narrative of the first decade of the NLLs that focusses on the role of chiefs:

62.1 Pre-1862: Crown purchase agents mostly dealt with chiefs, often but certainly not always in a 'public hui' context;

62.2 The 1862 legislation: 'tribal title' was possible, but 'tribes' could not deal freely with land; it needed to be partitioned to 'twenty owners' first or an application made "to have a new certificate issued in the names of trustees" – perhaps chiefs?; the trustee concept was present from the very beginning;

62.3 The 1865 legislation: the 'ten owner rule' meant that, where chiefs were still influential, they got on titles and thus continued to represent the group in land transactions; but this led to problems where decisions were made or funds dealt with without reference to the group;

62.4 The 1867 amendment – chiefs were among the grantees on the face of titles, with other interested tribal members 'registered' in Court to protect their interests; these amendments did not however prevent the types of problems just described;

62.5 The 1873 Act – all group members were listed in order to protect all interests. However, chiefs could still exert influence in arranging ten or less grantees by consent – see Renata Kawepo in the case of *Ani Kanara v Mair* (1885) re 1873 Memorial title. Kawepo was the only grantee (of the particular hapū) by arrangement in Court.

63. It is a debatable point, of course, whether the actions of 'ten owner' grantees in dealing with 'tribal' land expressed tikanga or tended towards new values of 'individualism' – that can only be an argument made in individual cases. A comprehensive study of such dealings is necessary. However, it is clear on the existing historiography that human volition or individual agency – whether in obedience to collective or individual norms – was important in the way that Māori actively utilized the land laws.

64. Much of the historiography has emphasized the 'fragmenting' effects of the 1873 Memorial of ownership; however chiefs such as Kawepo could still arrange for themselves to be on these titles as representative owners. These types of arrangements, and the Crown Grants (to ten or less owners) still possible under the 1873 Act system, meant that individual grantees could still act as agents or trustees for wider ownership groups. And they could, *if they chose to do so*, make their customary representation subject to *trustee duties at law* by entering into declarations of trust after receipt of a Crown Grant. (Accordingly, as I read it, if Kawepo had made a written declaration of trust, rather than that trust being asserted by others on the basis of a verbal agreement, then a trust could have been upheld. Of course, Kawepo could have chosen to uphold a tribal or hapū trust anyway – with or without a written declaration under English law.)

(2) 'Structure of the Māori economy': market diversification and a 'landless brown proletariat'?

65. Under the rubric 'structure of the Māori economy' I construct in the report a partly theoretical and partly empirical model of the trajectory of the Māori economy through the nineteenth century and beyond. As William Martin said, in 1871:[30]

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

66. And William FitzHerbert's statement in 1873 showed that at least some people were thinking about whether Māori would live from land, from labour, or from other trades and professions (or a mixture of the above):[31]

> 'He strongly believed that the Natives would continue to be an important portion of our population; if so, **what an extraordinary thing it was that they should teach an important portion of the people of the country simply to depend upon the cultivation of the land!** He would say that it was as retrog[r]ade a practice and theory as was ever propounded in any country of the world. **Were they all to live simply by the land of New Zealand; was that to be their future?** If so, he did not know how they were going to bear the burdens that would be imposed on them: he was at a loss to know how they were to work up to those high ideas of what New Zealand should become if they were to be all sheepowners, flockowners, farmers, and agriculturists. Was that all New Zealand was destined to become?...'

67. In this section of the report, I highlight and discuss:

    67.1 the diversification of work or possible livelihoods in the evolving colonial economy (or economies);

    67.2 the challenges of deriving an income directly from agriculture, which meant that a mixed economy of farm ownership, leasing and 'proletarian' labour would have (and did) develop; and

    67.3 that other opportunities in the skilled trades and professions were developing at the least by the early 1900s.

68. As part of this discussion, I question the focus on land and agriculture in the Tribunal literature, as it is clear that the Pākehā economy itself was not an agricultural economy, even by 1870 (at least with respect to a majority of the workforce).[32]

69. The school commissions of 1905-06 are fascinating glimpses into the different projections of Māori economic futures – from those advocating Māori in the

30 Sir Wm. Martin to the Hon. D. McLean, 29 July 1871.

31 William FitzHerbert, *NZPDs*, 25 Aug. 1873.

32 See graphic from Gary Hawke, *The Making of New Zealand*, at 43 [in powerpoint filed with this summary].

professions (Williams and Thornton), to those advocating for trades training, to those advocating for more extensive agricultural training reflecting the new agricultural economies.

70. None of these are mutually exclusive pictures, and nor do they exclude the project to maintain and develop Māori land and farming – the project of course that Ngata and others were so keen to promote. My point is that we need to complicate our view of what the Māori economy involved or could have involved as at, say, the first decade of the 1900s. But this is a question that requires more primary research and analysis.

71. In general, on the 'proletarian' aspect of the equation 'landless brown proletariat', I am inclined to say that these processes towards market diversification, including the proliferation of both labouring and skilled trades (or in Adam Smithian terms – the 'division of labour') in the Māori economy was largely inevitable given the structure of the Pākehā economy. And that economy was arguably a predominantly proletarian or working-class economy. It would be surprising if the Māori economic trajectory could entirely diverge from such a pattern given general economic pressures and trends. As Douglass North has described the 'stage' at which Western societies have reached:[33]

> … the one we observe in modern Western societies, specialization has increased, agriculture is a small percentage of the labour force, and gigantic markets that are national and international characterize economies. Economies of scale imply large-scale organization, not only in manufacturing but also in agriculture. Everyone lives by undertaking a specialized function and relying on the vast network of interconnected parts to provide the necessary multitude of goods and services. The occupational distribution of the labour force shifts gradually from dominance by manufacturing to dominance, eventually, by what are characterized as services. It is an overwhelmingly urban society.

72. This is illustrated graphically by Max Roser: his data visualization shows that the share of the workforce in agriculture in Europe dropped dramatically from around the year 1800 – where it was anywhere between 30% and 60% - to the smallest fractions today.[34]

73. In summary on this question of a 'landless brown proletariat', the maintenance of at least a reserve of land for Māori was a common feature of European political discourse, and the assimilation of Māori with the European economy that some promoted did not involve just labouring or proletarian employment but also the skilled trades and professional occupations, which shade into the category of a property-owing *bourgeois* or middle-class.

Conclusions:

74. I now attempt to concisely state some conclusions in response to the research questions.

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33 North, *Institutional Change*, at 119-20 **[SC-21, at 371-72]**; for the growth of cities and urbanisation generally see also Hobsbawm, *The Age of Capital*, ch. 12; and Lynn Hollen Lees, 'World urbanisation, 1750 to the present', in the *Cambridge World History*, vol. 7, eds., J. R. McNeill and Kenneth Pomeranz (Cambridge University Press, May 2015 (online)).

34 Max Roser, 'Share of the Labour Force Working in Agriculture, since 1300', www.OurWorldinData.org.

Research questions 1

75. The first set of research questions were the following:

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

76. The NLLs were a response to real-world concerns at many points. As I argue, the NLLs attempted to individualise tribal title, but not without regard to the customary or communal contexts. The idea of trust (or equity) was recognised, including in 1867 when other beneficial/equitable interests could be 'registered' in Court'; when that did not resolve matters, the 1873 Act stipulated for the listing of all ownership interests. In 1894, the legislature provided for an incorporated structure for Māori land.

77. I argue that, whether it was the English-law mechanisms of trust or incorporation, or a tikanga context, similar issues of agency and accountability would arise, including the question of 'how do chiefs represent or act for the group?' and 'how do chiefs remain accountable to the group?'.

78. The context of European settlement meant that tribal tenure had to be recognised in some way by the Kāwanatanga legal system. Tribal tenures would (and did) inevitably raise issues of agency/representation of the group, and the authority of the group over the individual, including the authority of a high-ranking chief to control land sale (Waitara is, perhaps, a paradigmatic case). Neither was this simply a case of group-vs-individual or chief-vs-'lesser chiefs'; it was as much a test of the nature of the group, the 'boundaries' or 'intersections' of the group vis-à-vis constituent or related hapū inclined to act apart from the group (howsoever defined).

79. Legal mechanisms of the trust and the incorporation could only inadequately seek to represent customary or tikanga relationships – both *intra*-group and *inter*-group. Moreover, to automatically impose trust obligations on legal grantees (often rangatira in the early decades) or automatically 'incorporate' land-owning groups through legislative fiat was not obvious or sound policy.

80. In the case of incorporations, a settler-dominated parliament of the 1860s-80s period was simply not favourable to – if it was even thinking about – the concept of incorporating tribes. The refusal to legislatively empower the Rees-Pere company schemes (that, it should be recalled, were for Pākehā settlers as well) in the 1880s is one indicator only that incorporated forms of business – especially for groups, and especially for customary groups – was not seen as the thing to do.

81. The British political and cultural contexts of joint stock company 'bubbles' and the issues of agency by a few managers from often distant (and relatively powerless) shareholders are critical to understanding why providing the 'committee' model for Māori land, even in 1894, was a profoundly 'progressive' or far-sighted step. Nevertheless, even incorporated committees

did not (nor have not) solved all issues of collective agency or ownership of land. Agency mechanisms inevitably had (and have) their limitations.

Research questions 2

82. The second set of research questions were the following:

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

83. Concerning the question of 'intent' of the NLLs, I argue that the basic intent was to assimilate ('make similar') Māori customary property to English tenure – that is, make it fixed and certain and able to be transacted in a land market. The ultimate objective was to facilitate a peaceful or orderly process of colonisation in conditions where Crown pre-emptive purchasing had become problematic for various reasons – including leading to intra-tribal wars (Pakiaha, for example) and native-colonial wars (Waitara, for example). I argue that, although the NLLs better enabled market dealings in land (including leasing and mortgaging) they were not some *formula* to deprive Māori of all, or a certain percentage, of their land.

84. Indeed, mechanisms can be pointed to that express a legislative intention to preserve land in Māori ownership through, for example, making reserves, providing a second independent check on transactions (the Trust Commissioner), restricting mortgaging, and providing for alienation restrictions to be imposed by the Court on individual blocks.

85. But more critical than particular mechanisms, the amendments to the central title provisions of the NLLs can be understood as a response to actual issues encountered with the laws in practice – including the important shift from the 'ten owner' rule to the 'democratic' principle of all owners being listed – partly to protect the wider interested group. On this basis, the Tūranga Tribunal argument (reiterated by later Tribunals) that Crown or settler legislators "foresaw the risk" of Māori landlessness "but took no real steps to guard against it" is highly contestable if not demonstrably incorrect.[35]

86. In addition, I have explored the notion that I have called 'the structure of the Māori economy'. Here I question the focus on land and agriculture in the Tribunal literature, as it is clear that the Pākehā economy itself was not an agricultural economy, even by 1870. In addition, some contemporary thinkers, especially from the early twentieth century (see the school land commissions) were asking whether the Māori economic future was to be agriculture-based or more integrated with a settler economy. That economy comprised many other kinds of work in trades, services and manufacturing.

87. Within this rubric – 'structure of the Māori economy' – I also argue that the connection between land and economic success needs to be queried. This is because the success factors for successful farming ventures were (and are) many and varied, whereas leasing or wage-labour in an increasingly diversified

35 Waitangi Tribunal *Tūranga Tangata, Tūranga Whenua* (Wai 814, 2004) at 532.

colonial economy carried significantly less risk – including the risk of losing land itself through over-extensions of credit on farming operations (that is, bankruptcy or mortgagee sale).

88. Finally, if Māori were, to some extent at least, adopting and adapting Western ideas and social forms, including the concept of individual private property – or at least, the mechanism of title or Crown Grant, as well as the almost brand new 'technology' of the limited liability corporation – then Government policy makers and officials were bending Western ideas and institutions to suit a tribal context. The adaption went both ways. Although the greater flow was, by the end of the nineteenth century, in the direction of the bourgeois property-owning individual and 'citizen' of a modern state, there were significant exceptions in the use of trust concepts and the corporate model – the latter in places like the East Coast but certainly not confined to there.

89. The pursuit of property-owning 'citizenship' was true of the greater mass of British colonial subjects – seeking to find their place within the state through property ownership, the franchise and representative government – as well as it was true of many, although by no means all, Māori individuals, whānau and hapū/iwi.

90. Despite individualising or fragmenting pressures, the 'collective principle' maintained its existence, if not its vibrancy, in Māori or tribal society, only to find new expression in more recent times.

Signed: _____

Samuel David Carpenter

Date: 7.10.19