TUKU WHENUA AS CUSTOMARY LAND ALLOCATION:
CONTEMPORARY FABRICATION OR HISTORICAL FACT?

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The significance of tuku whenua as a customary means of allocating land has been a matter for debate since the Waitangi Tribunal hearings for the Muriwhenua (Far North) land claim in the early and mid 1990s. There are a number of questions that underlie this ongoing debate. In the 1830s and beyond, did the leaders of hapū ‘clans’ allocate land to Pākehā (European) settlers according to their long-established practice of tuku whenua—granting a right to use land that did not alienate the land? Or is there little historical evidence for such a practice? Is it more correct that the leaders of hapū readily grasped the European notion of sale and entered into transactions with the new settlers on the understanding that land alienations were intended? Are the arguments for tuku whenua as a significant customary practice a contemporary construction of the past, generated for the advancing of Treaty claims?

I begin this article with a brief commentary on aspects of the contemporary debate about tuku whenua and particularly the arguments against accepting tuku whenua as a significant customary practice. The evidence for tuku whenua is then considered by examining works that deal with tuku whenua as a subject of enquiry on the basis of early written evidence. The first of these works was Frank Acheson’s 1913 thesis entitled “The Ancient Maori System of Land Tenures”. (Some consideration is given to the earlier writing on tuku whenua but a detailed investigation of original sources is beyond the scope of the present article.) As this article will show, there is a long history of writing that makes reference to the tuku of land (whenua) as a customary practice.

BACKGROUND TO THE TUKU WHENUA DEBATE

In the case of the hearings for the Muriwhenua (Far North) land claim, the claimant experts—speaking at different venues on behalf of various hapū—were consistent in their explanations that tuku whenua was an allocation of land for use by an outside group but not an alienation of land in the European understanding of a sale (New Zealand Waitangi Tribunal 1997: 68). They said that their forebears had granted the use of land for European settlement in the period leading up to 1840 and the years following according to their customary practice, namely tuku whenua. However, as the historian Michael
Belgrave has highlighted, there was division of opinion among the academics at the hearings about the evidence for *tuku whenua* and whether it provided a satisfactory basis for the land claim (Belgrave 2005: 92-95, 122-25). Two of the Crown historians, in particular, argued that the claimants’ argument was an innovation: an elevation of *tuku whenua* to an institution for which there was little or no historical evidence (New Zealand Waitangi Tribunal 1997: 73, Sinclair 1993: 5-6).

When considering the arguments about *tuku whenua* it is helpful to recognise that the debate belongs to the academic community and not to the Māori world. In the Māori world the explanations of *tuku whenua* as a customary allocation of land are consistent. As well as the evidence given by *kaumātua* ‘elders’ in the Muriwhenua land hearings, very similar understandings of *tuku whenua* have been conveyed by tribal experts in other hearings across the country. Particularly enlightening is the information that has been shared in the case of the Te Tau Ihu (Northern South Island) claim where issues around the *tuku* of land were central (Hopa 2001, Paul 2001). Ngāti Koata brought this case against the Crown because of its failure to recognise their rights in the land which had been gained through Tutepourangi’s *tuku* ‘allocation’ to their ancestors in the 1820s. From the evidence given by tribal experts and other witnesses at Tribunal hearings there is now a considerable body of information, historical and contemporary, that is available on *tuku whenua* as a customary practice. The oral presentations from claimant witnesses are not examined in this article even though there is a wealth of information contained in them. Rather, the focus is on the written material since the argument within the academic community is about whether the historical (written) record supports the understanding of *tuku whenua* that has been presented by tribal experts.

In his submission to the Waitangi Tribunal in the case of the Muriwhenua land claim Fergus Sinclair, Crown historian, expressed grave doubts about the understanding of *tuku whenua* presented by the claimant witnesses:

> In the academic world, the ‘tuku whenua’ hypothesis is a marked departure from what has previously been assumed about the nature of sales before annexation…. We are now told that the extensive sales of land before 1840 were construed in terms of a pre-European system of land transfer called ‘tuku whenua’—a custom which seems to have escaped the attention of the pakeha historical community until very recent times and which is certainly difficult to detect in the historical sources. (Sinclair 1993: 5-6)

His view was supported by another historian, Lyndsay Head (1992), and their stand was reinforced by leading New Zealand historian Bill Oliver when he was consulted late in the hearings. Oliver thought there was insufficient
empirical evidence to show that the leaders in the Far North allocated rather than sold land to early settlers (Belgrave 2005: 123-24).

A contrary view was held by a number of historians and other academics who made submissions to the Tribunal. Some of their works will be considered later. They argued for the understanding of *tuku whenua* as a conditional placement of outsiders on hapū land (Belgrave 2005: 94, 122-23). After weighing up the conflicting evidence, the Tribunal took heed of the advice given by the historians Lyndsay Head (1992) and Philippa Wyatt (1992) who, in spite of holding opposing views on the subject, were in agreement that *tuku whenua* needed to be understood in terms of the historical context in which it operated. On the basis of their consideration of the context, the Tribunal came to the decision that account must be taken of the intentions of the hapū in granting a place to Pākehā on their land and that these were best understood in terms of the customary practice of land allocation, namely *tuku whenua*.

The *tuku whenua* controversy did not end with the publication of the *Muriwhenua Land Report* (New Zealand Waitangi Tribunal 1997). In 1997 Bill Oliver wrote an article “Is bias one-sided?” in which he criticised the methodology the Tribunal used for the report and specifically questioned the basis on which the Tribunal came to its conclusions about Māori intentions in their land transactions with Pākehā. He contended that the Tribunal’s arguments on the matter were vulnerable because of the contestability of the evidence and believed that more research and debate was needed. Oliver’s criticisms of the Tribunal’s approach continue in his later writing. In a 2001 essay he asserted—without substantiation—that the methodology used by the Tribunal elevates “as less prone to error, the oral over the archival record” (Oliver 2001: 25); he thus reinforced a theme he introduced in his earlier criticism of the Tribunal’s position on *tuku whenua* in the *Muriwhenua Land Report*.

More recently, Michael Belgrave has shown sympathy for the positions taken by Sinclair, Head and Oliver at the time of the Muriwhenua land hearings and has indicted the historiography of the claimants and the Tribunal in regard to *tuku whenua* (Belgrave 2005: 92-95, 122-25). Of the claimants (for the Muriwhenua land claim), Belgrave (2005: 124) wrote, “In making a case, the claimants were reprocessing their own history and creating a popular version for the 1990s…. The tuku whenua argument had all the hallmarks of an appropriate explanation for Maori loss…. ” With regard to the Tribunal he said, “The Tribunal’s acceptance of the claimants’ arguments was based more on its belief that it could still, in the 1990s, see in the claimants the legal principles and expectations that would have governed the actions of their ancestors a century and a half earlier” (Belgrave 2005: 95). By contrast, Belgrave (2005: 123) wrote of the Crown’s evidence, “The Crown’s more
detailed research showed also that Maori did appear to understand the idea of a sale…. The market in goods and land had by the 1830s developed to the extent that sellers and buyers were seeking finality in each transaction….”

In coming to these conclusions Belgrave overlooked some important matters. While he properly questioned the Tribunal’s use of anthropologist Joan Metge’s idea about the Māori and Pākehā worlds talking past each other (Belgrave 2005: 94-96, Healy 2006: 133-35), he made no reference to Metge’s critique of Sinclair’s evidence. In this critique, Metge pointed out that the main problems with Sinclair’s conclusions regarding tuku whenua lay in his ignorance of “the rich store of Maori language texts available” and his failure to take account of the Māori world view (Metge 1993). This is a significant observation. As will be discussed later, it is reasonable to expect that the most reliable early evidence on tuku whenua as a customary practice will be found in the records of tribal spokespersons speaking in the presence of other Māori about the experience of their communities before there was significant impact from the European world. In making his case, Sinclair was largely reliant on the writing of 19th century European interpreters of the Māori world.

Belgrave similarly paid no attention to the evidence advanced to the Tribunal by Philippa Wyatt. This oversight is notable because the Tribunal named her as the one who alerted them to the importance of understanding Māori motives in land agreements: “We have thus adopted the approach of claimant historian Philippa Wyatt, who urged that the identification of Maori kaupapa and the expectation of settlement benefits were pivotal to understanding the period” (New Zealand Waitangi Tribunal 1997: 190). Wyatt’s evidence was based on her investigation (1991) of two major land transactions in the 1830s between rangatira representing hapū from the Bay of Islands and two early European traders. A pertinent point arising from her study is that, while at the time there were Europeans who referred to the transactions as “sales”, it was quite clear to the two traders as well as the hapū that the arrangements were not alienations of land in the common meaning of “sale”. The hapū, for example, continued to occupy and use the “sold” land and insisted on their freedom of movement across it. This pattern of continued occupation and use is seen in the cases of land “sold” to early missionaries (New Zealand Waitangi Tribunal 1997: 66-68). Wyatt’s 1991 work has shown that just because the word “sale” is quite often used in the European writing about land transactions between Māori and Europeans in the 1830s, it does not follow from this that actual sales, as in alienations, took place.

Besides these oversights, Belgrave stepped into muddied waters when he assumed that tuku whenua has been equated by its proponents with “gift exchange”, which is a theory about trading in “archaic societies” that was
first put forward by the anthropologist Marcel Mauss in 1925 (Belgrave 2005: 123, Mauss 1990). While the Tribunal for the Muriwihenua land claim ill-advisedly used this theoretical model when talking about Māori trade in another part of its report, it did not do so in its discussion of tuku whenua (New Zealand Waitangi Tribunal 1997: 27-30, see also Healy 2006: 131-38).

It may be assumed that this was because “gift exchange” was not referred to by the kaumātua when they talked about tuku whenua at the Tribunal hearings (Edwards 1992, Gregory 1991, Marsden 1991). Maori Marsden, for instance, stressed the fact that a rangatira ‘leader’ could only grant a conditional use of a hapū’s land to an outsider (1991: 6-7); the Tribunal reflected his and the other kaumātua opinions when it said that for the hapū concerned the land transactions were much more like a lease than a sale (New Zealand Waitangi Tribunal 1997: 173). Tuku whenua, as explained by the kaumātua, involved granting the use of land with mutuality of benefit for the home community and the outsider who was granted the use. As Wyatt (1991: 92ff.) and others have explained, while those receiving the grant were likely to offer gifts at the time and/or much later, the grant was not treated as an exchange of goods or property; it was completely conditional on the grantee fulfilling the conditions of the grant. In most cases, as will be noted later in this article, land returned to the grantor because the reason for the grant had come to an end.

Belgrave was correct when he observed that counter to “gift exchange” theory Māori had long been involved in trading relationships where there was “finality in each transaction” (2005: 123). His mistake was to use this information as if transactions using objects were the same as with land. While objects might have been alienated through trade it cannot be assumed that the same was true for land (Healy 2006: 125-33). The evidence suggests that such an assumption is indeed open to question.

Belgrave’s assumption that tuku whenua was being equated with “gift exchange” also surfaced when he commented on the linguistic evidence given to the Tribunal in support of tuku whenua. He cited Margaret Mutu, an academic who belongs to one of the claimant hapū, as arguing that Māori “had no notion of a sale, not even a word for it, and the use of the term ‘tuku’ implied a conditional gift rooted in Maori understandings of gift exchange” (Belgrave 2004: 122-23). In fact, Mutu’s work on the subject which was published at the time of the hearings makes no mention of “gift exchange” (Mutu 1992). Instead she is clear that the tuku whenua in the 1830s and through to the present have been “conducted in terms of a very old, Maori and Polynesian custom for allocating land use rights” (Mutu 1992: 58, 62-65). The superficial reader of Mutu’s article could mistakenly think that “gift exchange” is implied where she quotes Norman Smith, former Māori Land
Court judge. While Smith, along with others, uses ‘gift’ as a gloss for *tuku*, his explanations (discussed below) show that the ‘gift’ is as Mutu described it: a conditional right to use land (Mutu 1992: 63, citing Smith 1960: 102-3). Belgrave’s mistaken understanding that claimant experts were equating *tuku whenua* with “gift exchange” highlights the importance of coming to a careful understanding of the evidence of tribal experts—whether in the 19th century (Metge’s concern regarding Sinclair’s evidence) or the present day.

This brief background to the ongoing controversy about *tuku whenua* has focused on the positions taken by those who have questioned *tuku whenua* as a significant customary practice and tended to depict *tuku whenua* as a fabrication brought forth in the interests of claims to the Waitangi Tribunal. Their main argument has been that there is insufficient historical evidence to support the meaning of *tuku whenua* that was advanced by the tribal experts in the Muriwhenua land hearings. There is more recorded on the subject than has commonly been recognised.

**SOURCES OF EARLY RECORDED MATERIAL ON TUKU WHENUA**

A good deal of information on *tuku whenua* can be culled from 19th century records. Some of this information has been researched and systematically presented, from Frank Acheson’s 1913 thesis through to the more recent writing of Angela Ballara (1998, 2001). Comment is made here on the sources of early recorded material on *tuku whenua* because later writing draws extensively on these sources and the reliability of the some of the early records is questionable.

Of the 19th century material, the records of the Native Land Court are almost certainly the major source of detailed written information on *tuku whenua*. Richard Boast, legal historian, explained that the Minute Books of the Native Land Court are the most extensive written source on Māori customary law, containing as they do volumes of “statements of evidence from Maori advancing claims to particular blocks of land and the response to questions from others pressing the claims of rival groups”. While Boast acknowledged that the quality of this evidence in giving a complete picture of traditional Māori land tenure is debateable, he regarded the Minute Books a rich source that had only begun to be exploited (2001: 127-28).

The value of the Minute Books of the Native Land Court as a source of information on Māori land tenure had been highlighted earlier in a discussion document entitled *Customary Māori Land and Sea Tenure: Ngā Tikanga Tiaki Taonga o Neherā*. This document was published in 1991 by Manatū Māori (the Department of Māori Affairs) with the aim of identifying the sources of Māori opinion on customary tenure. Its authors (Rei and Young along with staff of Ngā Kairangahau and Manatū Māori) found that the records up to 1890
were of particular value to their research. They noted that their research in the
records after 1890 proved largely fruitless because, from that time, most of
the dialogue between Māori and Government related to post-European tenure
(Rei et al. 1991: 6). Although Rei et al. expressed caution about the material
in the Land Court records they challenged the criticism that the value of the
records was undermined because claimants had constructed their accounts
to satisfy the requirements of the Court. While recognising that there might
have been some tailored evidence, they did not think that took away from the
overall value of the information about customary land tenure. They pointed
out that claimants had to face rival claimants and large Māori audiences and
that this was probably a more demanding trial of their evidence than facing
a (Pākehā) judge. “False claims were subject to intense questioning and, no
doubt, much ridicule” (p. 7). However, the main reason for the researchers’
confidence in the information from the Minute Books was that “similar types
of statements appear again and again from different parts of the country”
along with some regional variations (p. 7). It was these broadly consistent
patterns that led the Manatū Māori authors to emphasise the importance of
the Native Land Court minute books, especially those from 1866 to 1890, as
a source of information on customary land and sea tenure.

The Native Land Court’s records provide both direct and indirect evidence
of the practice of tuku whenua. As the next section of this article will show,
most of the writers who have researched tuku whenua give examples that
are recorded in the Native Land Court Minute Books, many of which are
pre-1840 and some as early as the 17th century (Alemann 1998: 31-32).
What is noticeable is that there is almost no overlap from author to author
in the examples given, so that taken together they provide a wide range of
illustrative cases. The Native Land Court’s records also show that there was
a common understanding among and between hapū throughout the country
of what the tuku of land involved (Ballara 2001: 85, Rei et al. 1991: 7),
although there appear to have been some regional differences in specific
aspects of the practice.

Besides providing minuted evidence about tuku whenua, there is another
less obvious way in which the work of the Native Land Court points to the
significance of the practice. Norman Smith, a senior Māori Land Court Judge,
explained how the Court had “laid down the principle that the Maori customary
titles to land were deemed to have been stabilised in 1840” (1960: 8), meaning
that boundaries between blocks of tribal land were to be regarded as fixed at
their 1840 positions. In spite of that, he said an exception was allowed in the
cases of “take tuku” (where “take tuku” refers to the source of rights in the
land that derive from a tuku ‘gift’). Smith wrote: “The donees under a gift
should be able to show occupation down to the time of British sovereignty
(1840); but gifts originating since 1840 and admitted and recognised by Māori interested have been frequently given effect to by the Crown upon investigation of title” (Smith 1960: 105). Smith’s observation, which was made well before the recent debates about the status of tuku whenua as a customary practice, shows that before and after 1840 the practice of the tuku of land was well established and that this was recognised as such by the Crown.

As well as the Native Land Court Minute Books there are other sources of information on tuku whenua that contain direct communication from tribal experts, made both earlier and later in the 19th century. Once again, there is a great deal of research yet to be done into these sources. Important are the many old Māori manuscripts which are either written by Māori or are the transcriptions of information imparted by Māori. George Graham (1948: 268-78), for example, cited an 1842 manuscript based on “the accounts of the two old-time chieftains” that provides valuable insight into the working of a tuku in the case of a whāngai ‘adopted child’. There is also some information from tribal representatives in submissions made to Royal Commissions and in the Appendices to the Journals of the House of Representatives (AJHR) (Rei et al. 1991: 6). A further resource worthy of investigation is the Māori language newspapers and especially those that were tribally owned (Curnow, Hopa and McRae 2002). The latter published Māori opinion addressed to Māori on a wide range of topics.

In addition to the information that comes more or less directly from Māori (Boast 2001: 128), there is the writing of the early European observers of the Māori tribal world. This appears in personal journals, books about Māori life and custom, records of court judgments and in evidence given to the Crown. There is also a good deal of opinion expressed on Māori land tenure in the Appendices to the Journals of the House of Representatives and the older records of the Native Department, reflecting the fact that the nature of Māori land tenure was the subject of much public debate in the period from 1850 to 1890 (Rei et al. 1991: 5-6). This opinion mainly comes from Pākehā who were officially regarded as authorities on the matter.

A particular barrier to the European (mainly British) observers fully appreciating the rationale and practice of tuku whenua was because the practice did not have an equivalent in the contemporary British system of land tenure. By that time, British land transactions were premised on an understanding of exclusive ownership of land and this precluded the holding of diverse interests in the land as was the case for Māori. The English language, moreover, did not have an exact word for tuku, especially when applied to land. Many of the 19th century European observers, as well as later writers, use the word “gift” interchangeably with tuku. As I will show, there was a fair measure of understanding among them that “gift” in this context
did not mean “something given away”. However, especially for today’s readers, their repetitive use of the word “gift” can reinforce the concept of alienation which almost certainly was not the intention of hapū in granting a place for outsiders on their land. Because the common gloss for tuku has become ‘gift’, I shall use it but always in single quotes to signal that it is not the direct equivalent of English “gift”.

While Acheson gathers and collates evidence from 19th century European observers and the Native Land Court records to build a fairly solid picture of what was involved in the tuku of land, it is notable that scarcely any of his European sources looked deeply into the practice (Rei et al. 1991: 13). This might partly be because the question that preoccupied so many observers was the implications of Māori land tenure for the validity of land sales to Europeans rather than a desire to understand the Māori land law in its entirety. This preoccupation is certainly evident in the Opinions of Various Authorities on Native Tenure which was presented to both Houses of the General Assembly in 1890 (New Zealand House of Representatives 1890). There is, nevertheless, a consensus in this significant collection of opinion that Māori title to land derives from ancestry, occupation, conquest and ‘gift’ (MacKay 1890: 1).

A further difficulty European observers had in understanding the underlying principles of Māori land law lay in their convictions about the primitiveness of the tribal world. This bias is reflected in a mantra that is used by a number of contributors to the 1890 Opinions... that the ultimate principle of Māori land tenure is “might is right”. It is interesting that of the 28 statements of opinion in the 1890 document only one is a Māori statement and this mentions no such principle. The “might is right” position is, in fact, challenged by Acheson on the basis of considerable evidence to the contrary (Acheson 1913: 9-27). However, although the writing of the 19th century European commentators might not provide the best starting point for understanding tuku whenua as a customary practice, it does bear witness to tuku as a basis for rights in the land. In addition, a collation of the information contained in this writing helps to substantiate and even fill out the evidence that is available from the records citing Māori more directly.

FORMAL STUDIES OF TUKU WHENUA

The first systematic consideration of tuku whenua appears in a chapter of F.O.V. Acheson’s 1913 thesis on the Māori system of land tenures. Besides Acheson’s thesis, the main works that deal with the subject of tuku whenua with primary reference to 19th century records are Norman Smith’s Maori Land Law (1960), the document on customary Māori land and sea tenure produced by Manatū Māori (Rei et al. 1991), the theses of Philippa Wyatt
(1991) and Maurice Alemann (1992, 1998), and Angela Ballara’s works (1998, 2001). Below I will discuss the contribution that each of these makes to an understanding of tuku whenua, and will also briefly consider the works of some notable anthropologists who touch on the subject.

In his thesis, Acheson sought to elucidate the “Maori system of land tenures” as it existed in New Zealand before European contact (1913: 1). Following a general introduction, he considered particular aspects of the Māori land tenure system, one of which is that of ‘gifts’. Acheson opened his section on “Gifts” by stating that “Among the varied sources of title in the Maori system of land tenures, that of “tuku” or gifts stands out prominently as one of the most common” (p. 81-82). He noted that the Native Land Courts frequently upheld claims to land derived solely through ‘gifts’. However, while recognising this importance of ‘gifts’, he counted discovery, ancestry, occupation and conquest as the more important bases for rights in the land (p. 82).

Acheson then detailed the conditions that must hold for a ‘gift’ of land to have validity. Firstly, the right to make such a ‘gift’ must reside in the donor. Then, for the ‘gift’ to be complete, the recipients must enter on and occupy the land. A further essential ingredient for a valid ‘gift’ was publicity. While leaders were authorised to ‘gift’ hapū land they must have the support of their people—in general through explicit consent or at the very least by tacit acquiescence. This public knowledge and acceptance of the ‘gifting’ of land was important in averting false claims to the acquisition of land through ‘gift’ (p. 82-83).

Acheson reported it was common after a conquest for a victor to “offer gifts” of the seized land to allies in return for services rendered. He went on to explain what was needed to validate these ‘gifts’. Firstly, the recipients would need to establish themselves in residence on the land in question. Secondly, “in the course of time, unless ousted by the real owners, these intruders would gradually get a valid title to the land they occupied, but their title would be derived not from gift, but from actual occupation tacitly acquiesced in or not put an end to by the original owners” (pp. 82-83).

Acheson’s observations thus highlight two important principles regarding rights to land: that the primary source of rights to land comes from ancestral heritage (“the original owners”) and that a necessary condition for claim to land is residence on the land. In terms of the tuku of land the basic power to validate a place on the land lay with those with established ancestral title to the land, not with an outside victor.

As part of demonstrating “the extensive part which gifts played in the everyday life of the Maoris” Acheson listed a range of situations that commonly led to the tuku of land. These included compensation for various damages and offences, rewards for services, and the fortifying of the strength of a tribe (p.
84). Acheson then devoted several pages to detailing a whole range of examples that illustrate the tuku of land as a customary practice. These examples were taken from official records and the writing of European observers.

In the course of his consideration, Acheson discussed whether the ‘gifting’ involved a conditional giving or a permanent alienation of a group’s land. He first considered this in relation to a marriage dowry:

> It seems to have been quite a common thing among the Maoris to make a gift of land as a marriage dowry. The persons who received such gifts, however, would require to occupy the land and to assist the donor’s tribe in time of need. It would appear, also, that such gifts were not given unconditionally. The land would return to the donors ‘in the event of the wife dying without leaving issue. (p. 83)

If there were children, they would be descendants of the tribe and thus through them the land would stay with the tribe.

Further on, Acheson cited various commentators who indicated that ‘gifts’ of land were made conditionally. Dr A.S. Thomson was of the opinion that while land was sometimes granted by one tribe to another for purpose of cultivation the land was never given away for ever (p. 91). Similarly the Rev. James W. Stack held that land given as a place of residence by one hapū to another was probably not “so given in perpetuity” (p. 91); and Dr E. Dieffenbach stated “that land was sometimes given to a strange tribe, either as pay, or from other considerations; but that the donor reserved certain rights in the land” (p. 93). Acheson himself did not believe that these statements could be taken as being of general application and affirmed that there were numerous cases in which a ‘gift’ of land passed the whole title therein to the recipient, no interest whatever being retained by the donor (pp. 91, 93). Unfortunately, Acheson did not give references for this opinion or otherwise explain how he reached this conclusion.

Acheson also claimed Māori had some idea of the value of land as an interchangeable commodity long before the Europeans arrived in New Zealand (p. 93). This was on the basis of Sir William Martin’s statement: “Land was occasionally transferred as payment for losses in war. Where a chief of superior rank had been slain on one side, land was yielded up by the other to end the war on fair terms” (p. 93). Acheson’s conclusion seems rather sweeping on the basis of the evidence given. It is questionable whether Martin was using the word “payment” in a strictly commercial sense. Nevertheless, while a couple of these extrapolations by Acheson are open to question, many elements of his description of the tuku of land are reinforced in other writing on the subject.
Following Acheson, the anthropologists Te Rangi Hiroa and Raymond Firth each made brief comment on *tuku whenua* in books first published in 1929 (Firth 1959: 388-90, Te Rangi Hiroa 1950: 380-81). Both wrote that the transfer of land by way of *tuku* was comparatively rare. They also defined *tuku* or ‘gift’ as a cession of land although the detail given in some of their examples suggests that less than an outright cession was involved. Firth, for example, reported how Ngāti Tamaoho gave land at Rangiriri to a section of the Waiohua people “for settlement purposes”\(^{12}\), for a restricted use, and in discussing “take tuku” Te Rangi Hiroa related how the British were seen by a Ngāpuhi chief to be at fault because of their failure to return land to Māori as the original owners.

It was not till 1960 that the first book on Māori land law was published. The author was the aforementioned Norman Smith whose knowledge was based on his work as Judge of the Māori Land Court. In a chapter on “Customary (Papatipu) Land” Smith spelled out the *take* or sources of rights to *papatipu* land. He listed these sources as “(1) Discovery, (2) Ancestry or ‘Take Tupuna’, (3) Conquest or ‘Take Rau Patu’, and (iv) Gift or ‘Take Tuku’”. The section on *take tuku* opens by outlining the three conditions necessary to constitute a complete ‘gift’ of land according to Māori custom: “a) the donor must have sufficient right to make it; b) the gift must be widely known and publicly assented to or tacitly acquiesced in by the tribe; c) the donee or his direct descendants must have continued to occupy the portion gifted” (Smith 1960: 102-3). These, of course, are almost identical to Acheson’s principles for the validation of a *tuku*.

Like Acheson, Smith stated that ordinary ‘gifts’ of land were made for many reasons and proceeded to discuss some of these. He differed from Acheson, however, about the extent to which the ‘gifting’ of land involved a permanent alienation. Early in his section on “Gift or Take Tuku” Smith makes a general statement regarding ‘gifted’ land: “Where the donee died without issue, or, having issue, they or their descendants failed to occupy or perform any conditions attached to the gift, the land reverted to the donors” (Smith 1960: 103). Later he referred to “the customary principle that land reverted to the source [donor] once the purpose of its giving had been fulfilled”; this is where he was making the point that there have been “instances, not particularly common” of a variation from this principle (p. 104). Smith was thus clear that the norm for the *tuku* of land was the retention by the original owners of an interest in the land and the return to them of the land if the donees did not fulfil the conditions attached to the *tuku* or the purpose for the *tuku* had come to an end.

Smith’s writing on *tuku whenua* within the broader topic of Māori land law has been influential. Recently, however, the categorisation of the four *take*
as the basis for rights in the land has been criticised by Grant Young in his thesis, *Nga Kooti Whenua* (2003), on the Native/Māori Land Court. Young’s particular criticism, in line with his focus on the working of the Court, is that Smith holds that this model of the four *take* had guided the decision-making of the Court throughout its history. Young’s evidence shows that this was not the case (2003: 159-68). The difficulty with Young’s thesis lies in his wider argument that Māori customary rights were not based on a “model” but rather were a “metaphor” for dealing with inter-tribal relationships (p. 6). In creating this either/or dichotomy between model and metaphor, he effectively denies that there were any underlying customary principles for determining rights in the land. Relationships were the sole determinant. While Young is no doubt correct in understanding that Māori rights in the land cannot be codified as in a rigid legal model and that the negotiation of relationships was of major importance, his dismissal of any customary guiding principles goes too far. Further he referred to Alan Ward in support of his view that “rather than fixed abstractions, these [customary] rights were constantly in flux as relationships between tribes and kinship groups evolved” (p. 7). Ward’s actual words, quoted by Young in a footnote, are: “Through discussion, rights were constantly adjusted within the various levels of Maori society, according to commonly agreed priorities of rights” (p. 7, citing Ward 1999: 74-75). Ward’s writing shows that he understood that the determination of rights in the land by Māori was guided by generally recognised principles, and in this he is in agreement with Smith.13

Hugh Kawharu’s *Maori Land Tenure: Studies of a Changing Institution* (1977) 14 is an anthropological study which focuses on the changes resulting from colonisation rather than traditional land tenure. There are, nonetheless, references in it to the *tuku* of land (pp. 41, 59). Research by the Manatū Māori staff resulted in the 1991 publication entitled *Customary Māori Land and Sea Tenure: Ngā Tikanga Tiaki Taonga ō Neherā*. As has been noted, this project was particularly directed towards the search of early records containing Māori statements on customary land and sea tenure because, in the authors’ view, “there appears to have been no attempt made by anyone to draw together opinions provided by Māori on numerous occasions from 1840 onwards” (Rei et al. 1991: 2). The first sources used in the research were the early Minute Books of the Native Land Court, the *Appendices to the Journals of the House of Representatives*, the older records of the Native Department and evidence presented to the Waitangi Tribunal (p. 4).15 This publication relied heavily on 19th century material which accorded with its aim of looking into traditional Māori rights over land and water (p. 2).

The first part of *Customary Māori Land and Sea Tenure* identifies the different sources of information on Māori land tenure and offers some
assessments of them, in particular explaining the difficulties in determining what
the customary practices actually were. While early European commentators
recognised that the Māori land tenure system differed from their own, few
“were interested in exploring all the ramifications of such a system” (p. 13).16
Then, in the second half of the 19th century when the Pākehā demand for land
increased there was little tolerance for the complexities of Māori land law and
a tendency for Pākehā commentators to force-fit Māori land law into English
patterns (pp. 12-13). The authors judged that the most reliable recorded Māori
opinion was that of the period before 1860. As earlier noted, they did however
consider the Minute Books of the Native Land Court, especially those through
to 1890, a valuable source of information on Māori land tenure because of the
broad consistency in the evidence from across the country.

In the next part of their publication, using a schema rather similar to that of
Smith, the Manatū Māori authors outlined three take as the main sources of
rights to land: take tupuna ‘ancestral right’, take raupatu ‘right by conquest’
and take whenua tuku ‘right by gift’. They then explained that each of these
rights derives “from the action of the Putake [original source of the right]
(who might have been one individual or a group), the original discoverer, or
conqueror or donor” (p. 14). This explanation refined those given by Smith
and Acheson. Bringing further light to the subject, the authors considered
the concept of mana and its pervasive influence throughout Māori society
and hence in Māori land transactions. Inherent in the concept of mana is the
reciprocity of obligation: “The recipient of a gift or service… was under a duty
to repay in some way at some time in the future. One’s mana was at stake.…
Generosity was not just a virtue; it increased one’s mana and improved the
chances of receiving help in some later emergency” (p.15). This reciprocal
obligation has particular relevance to the tuku of land.

Having clarified that the usual way for a person or group to acquire land
was through ancestral rights, the authors explained that the other common
method was through the tuku of land. For those who were the recipients of the
tuku, it was essential that they respect the mana of the tribe whose goodwill
made the ‘gift’ possible:

At all times, the mana of the donor would be expected to be upheld by the
other tribe who might reciprocate by setting aside produce such as crops for
the donor, allowing right of passage by the donor upon the land at any time,
acknowledging the gift on appropriate occasions and in times of war become
an ally. (Rei et al. 1991: 20)

In turn, there were obligations on the donor towards the donee and this
generally included the duty to provide protection from threatening tribes.
The tribe which accepted the land would immediately become allied to their benefactors.17

The Manatū Māori authors were even more emphatic than Smith regarding the continuing obligations of reciprocity that applied to tuku whenua: “In all cases, the donor maintained an interest in the land. If the donees could not for any reason fulfill their obligations, the land in the absence of any other takeover would revert to the donor” (p. 20). This continuing interest of the donor in the land and the relationship of reciprocity owed to the donor meant that the land could not be transferred to a third party without obtaining the permission of the original donors or their descendants (p. 22). As the authors stated: “A right to occupy and use was not a right to alienate” (p. 22). This last statement is a telling one. In the authors’ judgment tuku whenua was granting a right to occupy and use, and not a surrender of ownership as might be implied in the English notion of “gift”. Behind any tuku of land was the intention of establishing an on-going and mutually beneficial relationship between the parties to the tuku. The authors commented on how alien land sales were to Māori, saying that “the concept of a complete and final alienation of land with no further interaction intended or needed was a complete departure from Māori ideas of land tenure” (pp. 23, 27).

Besides building on Smith’s schema for the sources (take) of rights in the land, the Manatū Māori authors quoted directly his three conditions for completing a ‘gift’ of land according to Māori custom: the right of the donor to make the ‘gift’, publicity in the making of the ‘gift’ and occupation of the land by the donee (p. 29). And, like Smith and Acheson, they offered a list of common reasons for the tuku of land (p. 24). However, their analysis of what underlies the practice moved to a level beyond that of Norman and Acheson. This is in line with their stated aim of uncovering a coherent set of principles for traditional land tenure (p. 26). By clarifying that the source of rights to land lies in the action of the pūtake, by outlining the significance of mana as a fundamental principle at work in all land transactions and by explaining that the underlying intention in the tuku of land was establishing an on-going and mutually beneficial relationship between the parties concerned, the Manatū Māori authors offered new depths of insight into traditional Māori land tenure, in general, and the practice of tuku whenua, in particular. Put forward as a discussion document, Customary Māori Land and Sea Tenure would benefit from more research and refinement. It remains, however, a valuable pioneering study for elucidating the values and concepts underpinning Māori land law.

In 1991, the year the Manatū Māori document was published, Philippa Wyatt completed her Master’s thesis, “The Old Land Claims and the Concept
of ‘Sale’: A Case Study”, which treats the issue of *tuku whenua* with a specific focus on the investigation of two land agreements made in 1830 by Ngā Puhi chiefs from the southern Bay of Islands with the traders Gilbert Mair and James Clendon. Wyatt’s aim was to discover whether the chiefs intended land sales in the European sense or not. As a result of her research she concluded that the agreements, like those made with various missionaries, allowed the traders to settle on *hapū* lands according to an arrangement that was more like the European system of leasing (Wyatt 1991: 72). She gave a number of reasons for this conclusion. In each case “the donative group” continued in occupation and use of the land and insisted on their freedom of movement across and through the land that had been “gifted” (pp. 72, 104-5). Also, the new settlers were clearly regarded as becoming part of the established community who assumed duties of protecting those sheltering in their lands. By way of return the new settlers took on obligations to the community that had received them; these included a “continued presentation of gifts” (p. 73). The records showed, too, that the chiefs regarded the placement of the Europeans as a means of strengthening their *hapū*’s hold on the land, which would not have been the case if there had been an alienation of the land. On the basis of this evidence Wyatt concluded that the chiefs understood the land transactions not as sales in the European sense but as constituting “the transfer of use rights alone” (p. iii).

Wyatt made it clear that she was discussing the land arrangement that is named in Māori as *tuku whenua* (p. 59). In developing a picture of what was involved in the *tuku* arranged by *hapū* leaders with European settlers in the 1830s and even later, Wyatt took much of her evidence from the accounts of early European observers and participants in Māori life, especially those of early missionaries. She looked not only at their descriptions of Māori custom but also at what the journals and diaries revealed about the nature of the relationships that the first European settlers had with the Māori communities around them (p. 92). These accounts showed how dependent the settlers were on the support of the *hapū* on whose land they settled, that their settlement on the land was conditional on the maintenance of a relationship of reciprocity with the *hapū* and that they did not have a right of ownership in the land that was independent of the *hapū*’s authority over the land (p. 92ff.). Wyatt cited, for instance, Robert FitzRoy who visited the missions at the end of 1835: “They [the missionaries] clearly understood that the Sovereign Authority still rests with the Tribes of which they purchased their Land, that they held their lands on ‘Sufferance’…. It was a Sort of conditional Sale” (p. 97). The use by Wyatt of material from the early European observers provides an interesting and complementary source of knowledge about Māori intentions in the *tuku* of land to that derived from records such as those of the Native Land Court.
Wyatt’s conclusions regarding the customary Māori understanding of land transactions are similar to those reached by Margaret Mutu in her 1992 article “Cultural misunderstanding or deliberate mistranslation? Deeds in Maori of pre-Treaty land transactions in Muriwhenua and their English translations”. Mutu’s starting point was the tribal evidence made available to her by the *kuia* and *kaumātua* of Ngāti Kahu and Te Rarawa. The article is very useful for anyone seeking insight into the practice of *tuku whenua* by the detail it provides and by Mutu’s demonstration of how *tuku whenua* aligns with equivalent practices in other parts of the Pacific.

Further academic research into customary Māori land transactions and Māori intentions in their early land agreements with European settlers is contained in Maurice Alemann’s MA (1992) and PhD (1998) theses. Alemann identified these transactions as *tuku whenua*, which he defined as an allocation of land by the leader(s) of a *hapū* to an outside group so that the group could have the benefits of the use of the land. He wrote (1992: 148):

> In essence ‘tuku-ing’ meant that the usufruct of land was given over to strangers to the tribal community, the land was theirs to use but the underlying ownership of the land was not theirs. And it was expected from time to time presents, or help in warfare would be forthcoming for the donees.

Alemann based this understanding on his reading of a wide range of material, most notably the Minute Books of the Native Land Court, but also the writing of Paora Tuhaere in manuscripts from the mid 19th century, other official 19th century records, the work of Norman Smith and Hugh Kawharu, and material from the Muriwhenua Land hearings.21

Like Wyatt, Alemann was concerned with how the Ngāti Whātua and Tai Tokerau *hapū* understood the land transactions they entered into with Europeans, particularly in the period before the signing of the Treaty of Waitangi. He was convinced that these were not seen as sales in the European sense but as *tuku whenua* or land allocations in the traditional manner (Alemann 1998: 36-38). Alemann even placed the 1840 agreement of Apihai Te Kawau (Ngāti Whātua *rangatira*) with Governor Hobson in the context of a *tuku* arrangement. He asserted that “Apihai Te Kawau entered into the sale agreement with Governor Hobson for the first purchase in Auckland with the clear understanding that this sale was for the benefit of both parties, a treaty so to speak, and that he did not relinquish the underlying ownership of the land…” (1992: 150). As Alemann elsewhere explained that this so-called “sale” was different from a customary European sale: “The main difference with a land sale in the European sense is that the *tuku whenua* custom never completely relinquishes the *mana whenua* (‘ownership’) whereas a land sale
in the European sense does. If the land is not occupied or used, it goes back to

While Alemann was generally consistent in describing *tuku whenua* as an
allocation of land, he does write at one point that “[t]he author argues that
depending on the surrounding circumstances the *tuku whenua* system could
either mean a gift, a cession or the simple allocation of land” (1998: 34), but
he does not provide a rationale for this statement. Overall, however, Alemann
offered explanations of *tuku whenua* that are similar to those in Smith’s book
and the Manatū Māori document. One practical point he noted (1998: 29,
34) is that the “tuku’ed” land had a name and definite boundaries. This is
significant because it illustrates the specific and concrete nature of the *tuku
whenua* arrangements.

More recent academic contributions to an understanding of *tuku whenua*
include two from an anthropological perspective and one which is a
dissertation in law. Merata Kawharu’s 1998 thesis on *kaitiakitanga* included
a consideration of the *tuku* of land in which she emphasised the reciprocity
involved in *tuku* arrangements (M. Kawharu 1998: 38-43). She also noted
that short-term *tuku* were common but *tuku* made for the longer term were
less so, which may explain the divergence of opinion as to whether *tuku* were
in Tamaki: A Ngati Whatua Perspective”, provides a particularly interesting
insight into the continuity of the practice of *tuku whenua*, tracing the *tuku*
made by Ngāti Whātua to neighbouring hapū in the 1820s to that made to Hobson
in 1840. The third contribution is Daniel Arapere’s 2002 dissertation, “An
Analysis of Tuku Whenua According to Tikanga Maori, and its Implications
for Claimants before the Waitangi Tribunal”, which is particularly useful
because it makes reference to a very wide range of source material.

Finally, there is Angela Ballara’s book *Iwi* (1998) and her evidence to the
Waitangi Tribunal (2001), both of which use extensive evidence from the
Native Land Court records. While there are several explicit references to *tuku
whenua* in her book, there are considerably more in her Waitangi Tribunal
research paper because issues round the *tuku* of land are very central to the
Te Tau Ihu claim. The value of Ballara’s work lies in the references in her
book to the experience of so many hapū and iwi throughout the country and
the detailed attention in her research paper to the history of the peoples of
Te Tau Ihu, which is generally less well known.

Many points made by Ballara are broadly similar to those made by Smith,
the Manatū Māori authors, and Alemann and Wyatt. Ballara emphasised
that chiefs with *mana* had the right to ‘gift land’ (*tuku whenua*) temporarily
or permanently (1998: 206, 261-62) and she explained the nature of the
‘gifting’ thus: “Such gifted land was normally not permanently alienated; if
the recipient failed to acknowledge the mana of the giver by suitable tribute, or if the recipient died or moved away, abandoning the gift, it reverted to the giver” (1998: 206, 2001: 7). Like Wyatt, she asserted that by the tuku of land a chief reinforced his mana over the land and the people living on it (Ballara 1998: 206). The tuku was not an alienation of the hapū’s land. This is illustrated in the important case of Tutepourangi’s tuku of land in Te Tau Ihu to Ngāti Koata and Ngāti Toa; as Ballara explained,

But in the usual manner of such gifts, Tutepourangi did not expect to lose his mana over the land through this gift; the extent of the gift was the visible sign of his great mana.... In giving the land he was not alienating it; the expected result of such a gift in the time of customary land tenure before contact was that both groups, the donor and the donee, would utilize the land and its resources together. (Ballara 2001: 80)22

Ballara’s conclusions are of interest in the controversy about the intentions of hapū and their rangatira in their early land transactions with Europeans. In Iwi, speaking with reference to the practice of tuku whenua, she noted that in most areas Māori “relatively rapidly came to understand that when Europeans purchased land, the deal meant that, contrary to Māori practice, the former owners lost their rights in it for ever” (1998: 261). She was referring here of land purchases subsequent to 1840 and she immediately qualified her statement as follows: “Nevertheless—particularly during the first three decades of land purchasing, but to some extent throughout the 19th century—Māori norms of land exchange continued to affect their understanding of the deals struck by Europeans”, adding that this was especially the case for the chiefs who had had the right to tuku land and had been accustomed to retaining their authority over land and people (Ballara 1998: 261-62).23 Her observations lend support to the arguments put forward by Wyatt and others that the rangatira in the Bay of Islands and the Far North would have seen the pre-Treaty land transactions with Europeans in traditional terms, namely as tuku whenua.

* * *

In conclusion, it needs to be said in fairness to the historian, Fergus Sinclair, that he stated that his “Issues Arising from Pre-Treaty Land Transactions” (1993) paper had been hastily put together, and that he argued, as did Oliver, that the subjects of customary land practices and what Māori intended in their early land agreements with Europeans needed further research. This article has surveyed works written both before and after the Muriwhenua Land hearings that consider tuku whenua as a customary practice, mainly on the basis of material contained in early written records. While there are some differences,
these works have a good deal in common. They all regard *tuku whenua* to be a customary Māori practice. They agree that *tuku whenua* arrangements could not be simply equated with the final alienation of land that typified the European land sales. They all give instances where the original donors retained an interest in the land, so that the land would be returned to them when the conditions of the *tuku* came to an end or were not fulfilled. There is, however, a range of opinion as to whether conditionality applied to all *tuku* or only to some: Acheson’s takes the position that there were numerous cases where *tuku* involved the cession of all interest in the land while the Manatū Māori authors hold that the donor always maintained an interest in the land. Those works that consider the issue of how the early land transactions with Europeans were seen by Māori all indicate that these agreements would have been seen in customary terms, that is, as *tuku whenua*.

A final word needs to be said about the evidence given by tribal experts to the Waitangi Tribunal and the weight that might be given to such evidence. In his presentation to the Waitangi Tribunal, Sinclair said he accepted “that the idea of ‘tuku whenua’ occupies a very real place in the tribal lore of the Muriwhenua people of the present day”, but he joined with Lyndsay Head in seeing this sort of evidence as occupying a very different terrain from academic history (Sinclair 1993: 5). Belgrave (2005: 92-95, 122-25) similarly casts doubt on the historical worth of the evidence of the tribal experts in the Far North land claim. The question needs to be asked as to the wisdom of discounting the contribution of the tribal experts with regard to the concept and practice of *tuku whenua*. Some of these informants are only one or two generations removed from elders who appeared before the Native Land Court in the mid and later 19th century and have grown up in environments where Māori language and *tikanga* prevail. Moreover, the evidence given by the claimant witnesses in both the Muriwhenua Land and Te Tau Ihu hearings is closely aligned with that which comes from the studies considered in this essay. Read along with these studies, the evidence of the tribal experts offers an enhanced understanding of the subject. It shows, also, how *tuku* made in previous centuries continue to be influential in the present-day relationships between groups, which follows the observation of the Manatū Māori authors that behind any *tuku* of land was the intention to establish an on-going and mutually beneficial relationship between the parties to the *tuku*. Indeed, it could well be argued that the tribal experts who have been directly instructed by informed elders are likely to have a fuller understanding of the customary practice of *tuku whenua* than most of the 19th century European observers. Certainly, it would seem that to develop the fullest possible understanding of *tuku whenua* as a customary practice and the intentions of *rangatira* and *hapū* in granting a place for Europeans on their land, both oral and written evidence need to be investigated and assessed.
NOTES

1. *Tuku* = allow, let; *whenua* = land. *Tuku* has a wide range of meanings (according to context), including allow, offer, send, leave, let go of and evade.

2. When, from the 1930s, the gift given by the grantee was monetary, this was interpreted by the grantor of the *tuku as koha* for use of the land (H. Kawharu 2001: 4).

3. Smith, like a number of other writers, uses the English term “gift” interchangeably with *tuku* or *take tuku*.

4. It was the agreement among the different Māori parties involved in a disputed area of land that a certain part had been the subject of a *tuku*, which led the Crown to recognise the boundary changes that resulted from the post-1840 *tuku*.

5. Boast points out that there are problems of interpretation where there is the transcription (in Māori) of information given by Māori, and especially where this information has been translated into English.

6. Alan Ward has pointed out that historically rights to land have generally been distributed at various levels in very complex ways, both in Europe and the Pacific, and that the concept of an individual owning virtually all rights in a given piece of land is relatively recent, even in Europe (1991: 120). See also Crocombe 1974.

7. See also Wyatt 1991: 9, who cites George Clarke, “No mistake could be greater than the notion that the Maori were without law in their relations with one another” (Clarke 1903: 45). For further comment on customary land tenure as “a framework of rules for claiming land”, see Ballara 2001: 84-85.


11. Citing a “Pamphlet frequently quoted in N.Z. Parliamentary Papers”.

12. This *tuku* would have been made in the mid-18th century; it came about when Waiohua were made refugees by Ngāti Whātua’s conquest of Tamaki.

13. Ward’s understanding of multiple rights in the same piece of land (see note 5 above) fits exactly with arguments that *rangatira* did not intend outright alienations of land when they entered into “land sales” (1991: 120-21) and conforms to the explanations of *tuku whenua* as allowing different layers of right in the same land.


15. The authors note (p. 5) that, in addition to the oral presentations, the Tribunal evidence includes significant early written material, some of which is little known.

16. William Colenso is named as an exception.

17. For further detail on these reciprocal obligations, see Rei et al. 1991: 20-23.

18. In her discussion of what was involved in the land transactions Wyatt, like the Manatū Māori authors and others, explained how failure by the recipients to fulfil the conditions under which the use of the land was granted to them “rendered them liable to be turned out” (p. 73).
While Wyatt’s broad conclusions regarding tuku in relation to land coincide with those put forward by Smith and the Manatū Māori authors, some of her discussion of terms is rather circuitous, and at times she shows an uncritical reliance on Raymond Firth’s work for her interpretation.


See Alemann 1998, Chapter 2 for his main exposition on tuku whenua, and details of the sources he uses.

A significant difference in these cases is that the tuku to Ngāti Koata became validated because they settled on the land and set about establishing themselves in relationship to the local tangata whenua, whereas Ngāti Toa did not settle and hence the tuku was not validated.

The Manatū Māori authors found that the Native Land records, which start in the mid-1860s, show not only the attitudes and values that Māori had towards land but also the difficulty they had in comprehending the introduced concepts that were completely foreign to them, namely the exclusive nature of land ownership and the finality of alienation (pp. 26-27).

REFERENCES


