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Compensation Models for Native Title

By Raewyn Fortes
Department of Finance, Banking and Property
Massey University
Palmerston North, New Zealand

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1. Abstract

This paper studies case law precedent in terms of compensation particularly for native title. While a clear precedent has recently been set in Australia in the *Mabo (Mabo and ors v The State of Queensland)* (1992) 175 CLR 1 case, there is still not one compensatory model adequate for native title. Each case needs to be assessed on its own merits and varying types of compensation awarded accordingly.

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2. Introduction

Indigenous peoples are occupiers of land prior to settlement and occupation of another culture. This paper investigates the loss of rights the indigenous peoples suffered as a direct result of European settlement. These rights do not relate just to the land, but may relate to the loss these people held in conjunction with the land such as the right to occupy the land, gather food, hold spiritual meetings, bury their family and other land uses of cultural significance.

With a change in the occupation of the land from indigenous peoples to a mix including Europeans, it is inevitable that certain rights will be removed from indigenous peoples, sometimes with and sometimes without adequate consideration or compensation upon settlement. This paper explores current statute predominantly in New Zealand and current case law internationally to examine any compensatory models.

This paper then proceeds to explore compensatory models of the future and the effect of remediation to indigenous people.

3. Native Title

Native title is land that is or has been occupied by indigenous people. From a New Zealand perspective indigenous people are referred to as Maori. Maori land can be owned or occupied via a range of methods in New Zealand.

There are three main types of Maori land in New Zealand which include:

1. General land owned by Maori;
2. Maori freehold land;
3. Maori customary; and
4. Land held in reserves by the Crown.

1. General land owned by Maori have the same rights as general land owned by other people, so 'native title' has not been impaired. General land can only be held by up to ten owners.
2. Maori freehold land under the Torrens System of New Zealand may have up to ten owners recorded on a certificate of title. Owing to the tribal nature of the Maori culture there are often hundreds of owners for a block of land. This creates many difficulties, and different ownership structures such as Incorporations and Trusts have been established to cater for the tribal type ownership. This has created some lack of flexibility in terms of transfer of ownership, raising funds, leasing and simply dealing in the land.
3. Maori customary land does not have a title issued under the Torrens System so is not transferable at all without approval from the Maori Land Court and can only be transferred to the Crown.
4. Maori Reserved Lands are managed by the Crown and were created upon the signing of the Treaty of Waitangi in 1840. These lands were to be held in Trust for the Chief's and their families forever. Over the passage of time, these lands have diminished in size considerably. Sometimes the lands were taken with fair compensation or consideration at the time, at other times the land was seized for the use of 'public good' such as for schools, hospitals or roads. Maori Reserved Lands are administered by the Crown and up until 1993 had 21 year perpetually renewable leases enforced upon the land. The implementation of the Maori Reserved Land Amendment Act 1988 enabled a change of terms to compensate both lessors and lessees.

New Zealand land tenure is comprised of predominantly freehold land, a smaller portion is Crown land and a smaller portion still is Customary land.

4. Existing Case Law

When discussing native title and compensation the average lay person would perceive compensation in terms of the land only that was taken and a simple model for compensation might be to offer alternative land or financial consideration representing

the market value of the land. However there are other rights which are very important to indigenous people who occupy native land that are also taken from them when the land is removed. Such as the right to gather food, to hold spiritual or cultural gatherings at certain sites, to gather minerals or other reasons related to the tribe in that location.

While there is little case law specific to native title, there are other cases which are related to compensation. The following case law relates not only to the loss of the land itself but also other related issues such as the use of any minerals or other rights associated with the land, and the spiritual and cultural attachment indigenous peoples have with the land.

John Sheehan¹ states that the recognition of native title seems to focus on two general themes, they are the physical and spiritual attachment to the land. The consideration of physical connection as a separate heading to spiritual relationship with country is entirely artificial as the spiritual relationship of Aboriginal people to country permeates their entire interaction with country. Under indigenous law there is no demarcation of these areas.

Land

Land is recognised as a compensatable entity and methodologies have traditionally been in place to assess value of land. In terms of indigenous land and the rights associated with land, few cases have set a benchmark in recent years.

The *Mabo*² case in Australia is a benchmark case which will have far reaching consequences for indigenous peoples in Australia, New Zealand, the Pacific Islands, Canada and England. The anglo-Australian law was utilised to recognise the rights of the Meriam people. *Mabo*² was able to define the boundaries which his family had traditionally occupied and verified the rights their family had over land and sea. The *Mabo*² decision remedied the lack of recognition of native title in the Canadian case in *Calder v A-G*³.

¹Sheehan, J. (2002) *Native Title: Issues for Local Government* Paper presented at the Environmental Development and Allied Professionals Western Group Conference, Broken Hill, Australia

²*Mabo v Queensland (Mabo No 2)* (1992) 175 CLR1

³*Calder v A-G (British Columbia)* (1973) 34 DLR (3d) 145, 200 (SC(Can))

Settlement of indigenous land claims in New Zealand have also occurred such as the Ngai Tahu Settlement which was reached in 1991⁴.

Indigenous rights have only been awarded rights of compensation in New Zealand and Australia some 160 years following a change in sovereignty. In some common law countries the time period from settlement to compensation is greater and indigenous peoples may have lost not only the elder's memories of dispossession but also their culture such as occurred in the *Chippewa*⁵ case in Canada. In this case wrongful dispossession did occur but a claim against the Crown was unsuccessful due to the lack of knowledge over time. If however, sufficient knowledge still exists and reliable evidence can be provided, a claim for compensation, or a claim for the protection or management for a natural resource may be more successful as occurred in the *Takamore*⁶ Case in New Zealand where oral evidence of indigenous peoples is acceptable for native title claimants.

In some common law countries co-existence of European title and native title occurs with a varying degree of success. Types of co-existence may include an Easement, which may be granted to enable the transmission through a native title without compulsory acquisition. Another form of co-existence comprises long term leases which may be granted where the land still remains under control of the indigenous people.

Co-existence through Statute encourages negotiation and flexibility which may prevent lengthy and avoidable litigation. Facilities are in place under the Native Titles Act 1993 in Australia, Resource Management Act 1991 and Local Government Act 2002 in New Zealand to encourage negotiation between Europeans and indigenous people.

⁴Oliver.W.H.(1991) Reclaiming the Land: Part Two – Ngai Tahu. Waitangi Tribunal Division. Department of Justice and Daphne Brasell Associates Press.

⁵*The Chippewas of Sarnia Band v Attorney General of Canada*, Her Majesty the Queen in Right of Ontario & Others 95-CU-92484

⁶*Takamore Trustees v Kapiti Coast District Council* [2003] AP191/02 HC (unreported judgment)

In Australia there are co-existing property rights and the *Wik People's*⁷ case has highlighted the need for developing new approaches to the management of land.

Minerals

Sheehan⁸ states that when fee simple title is issued this extinguishes native title but the native title rights may extend to a subsurface rights and interests given the *Miriuwung Gajerrong*⁹ decision in the federal Court of Australia.

Other cases relating to compensation of mineral rights include *Alberta – Lubicon Lake Band v Canada*¹⁰ where land was taken with little or no compensation. The land was found to contain oil/petrol reserves and the Government was required to pay \$45 million plus a land compensation.

In *Newrest Mining in 1997*¹¹, land was confiscated without compensation in Kakadoo National Park. This case recognises the immunity of private and provincial property from interference from the federal authority, except on fair and equitable terms.

In New Zealand, the right to sea access and the use of sand and shells had been extinguished in *Smale v Takapuna Council*¹² and this was deemed a proper subject for compensation. In 1982, a New Zealand court held that the right to sea access, and the use and sale of sand and shells, which had been extinguished, was a proper subject for compensation¹³.

⁷*Wik Peoples v The State of Queensland & Ors* (1996) 141 ALR 129 (Wik)

⁸Sheehan, J. (undated) *Understanding Landuse Planning and Indigenous Property Rights* Paper presented at TransGrid Property Seminar: "Land Acquisitions", Sydney.

⁹*State of Western Australia and Ors v Ward & Ors* (2000) 170 ALR 159 (*Miriuwung Gajerrong*) at 376 per North J.

¹⁰*Lubicon Lake Bank v Canada* 1984 (HRC)

¹¹*Newrest Mining (WA) v BHP Minerals* (1997)

¹²*Smale v Takapuna Council* (1932) NZLR 35

¹³Sheehan, J. (2000b) *The Provocative Challenge of Calculating the Incalculable*. Paper presented at the Native Title Representatives Bodies Legal Conference "Native Title in the New Millenium", Mirimbiak Nations Aboriginal Corporation, Chifley on Flemington, North Melbourne, 17 April 2000.

While these cases provide evidence that indigenous peoples have rights to minerals and other rights associated with the land or sea, indigenous peoples do not have overriding rights or control. In *Kakaiawaro Fishing Co*¹⁴ the sustainable management of the environment overrode the indigenous peoples rights according to the Treaty of Waitangi.

Other Rights

Sheehan¹⁵ states that in 1867 an English court held that diminution of natural light to an owner's property was a compensable matter, and was to be assessed.

Spiritual and Cultural

In the *Miriuwung Gajerrong*¹⁶ case in Australia “the secular and spiritual aspects of the aboriginal connection with the land are twin elements of the rights to the land. Thus the obligations to care for country has a secular aspect – burning the land – and a spiritual aspect, acquiring knowledge of ritual”.

In *Hayes v Northern Territory* the control and management of spiritual forces was identified as a valid incident of native title¹⁷.

The above cases recognise in case law that spiritual connections of indigenous people can not be ignored. Sheehan (2002b)¹⁸ states that compensation may be far reaching, assessing losses from social, spiritual and broader cultural deprivation which will necessitate relationships with valuation, anthropological and archaeological disciplines. Spiritual interaction has deep psychological connotations that are difficult to measure.

¹⁴*Kakaiawaro Fishing Co v Marlborough District Council* 1999

¹⁵Sheehan, J. (2000b) The Provocative Challenge of Calculating the Incalculable. Paper presented at the Native Title Representatives Bodies Legal Conference “Native Title in the New Millennium”, Mirimbiak Nations Aboriginal Corporation, North Melbourne, 17 April 2000.

¹⁶State of Western Australia and Ors v Ward & Ors (2000) 170 ALR 159 (*Miriuwung Gajerrong*) at 376 per North J

¹⁷*Hayes v Northern Territory* (1999) FCA 1248

¹⁸Sheehan, J. (2002b) Native Title: Issues for Local Government. Paper presented at the Environmental Development and Allied Professionals Western Group Conference, Entertainment Centre Broken Hill, Australia, 10 May 2002.

5. Existing Statute

All counties have governmental powers of compulsory acquisition such as a Public Works Act, also there is often a constitutional or legal guarantee that land held in private ownership can only be acquired compulsorily for state purposes if adequate compensation is paid (Sheehan, 2002c)¹⁹.

Local Governments may have obligations under statute to consider native title i.e. in Australia obligations arise under the Native Title Act 1993 (Cth) (NTA) and in New Zealand obligations arise under the Resource Management Act 1991, the Local Government Act 2002 and a plethora of other Acts. These statutes place an obligation on local government to respect the principles of indigenous people and to increase contribution and participation in decision making.

Following the signing of the Treaty of Waitangi in New Zealand Commissioners were appointed to manage and lease land held in reserves for the Maori under the Native Reserves Act 1856. Following this Act all Maori reserve land were also subject to The Maori Reserves Act 1882 or the Westland and Maori Reserves Act 1887, West Coast Settlement Reserves Act 1892, and the Maori Townships Act 1910.

In 1920 the Maori Trustee was established and since that time still administers the reserved land on behalf of the beneficiaries. The Maori Reserved Land Act 1955 and the latter 1997 amendment then applied. Today the Te Ture Whenua Maori Land Act 1993 provides guidance for native land within New Zealand.

While not statute – a case law *Sparrow v The Queen* [1990]²⁰ resulted in a constitutional change in Australia to provide indigenous people more property rights.

¹⁹ Sheehan, J. (2002c) Towards Compensation for the Compulsory Acquisition of Native Title Rights and Interests in Australia. Paper presented at the FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, University of the South Pacific, Suva, Fiji 10-12 April 2002.

²⁰ *Sparrow v The Queen* [1990]

6. Compensation Methodology

It is important to note that land owned by private individuals which is called general land is not able to be taken for compensatory purposes in New Zealand. This is a protection within the Torrens System. Similarly, in Australia the United States and Malaysia their Constitutions provide a guarantee that any citizen may not be dispossessed except on 'just' terms of compensation²¹. The Public Works Act for example provides for compulsory acquisition of private land, however compensation for 'fair' or 'just' terms is payable by the Crown.

As discovered in the Waitangi Tribunal and following settlement of the Ngai Tahu Case²² in 1991, pecuniary compensation is not the only form of compensation indigenous peoples may desire.

Remedies provided in the Ngai Tahu settlement included:

1. An apology from the Crown;
2. Return of a mountain and a change of name of the mountain;
3. Economic redress (financial);
4. Cultural redress to restore mana.

Redress reflects a variety of land resources affected by the Crown, historical breaches of the Treaty of Waitangi and the extent of the loss by Ngai Tahu. Some forms of redress include notations of the District Plan of sites of cultural significance, future consultation in any consent process and a change of place names helped with the redress.

It is not the quantum of compensation that is important but the quality and meaning or empathy provided with the compensation.

²¹ Sheehan, J (2000a) The Economic Cost of Dispossession, Newspaper article LRQ p6 November 2000.

²² Ibid 4.

Sheehan (2002c)²³ states that while compensation has been made for customary lands, to date these have been very arbitrary. In a Court of Appeal decision in *Kerajaan*²⁴ a quantum of monetary compensation appears to have been adopted, which whether or not is reasonable, is not founded in any recognisable valuation methodology or compensation case law.

Sheehan (2002c)²⁵ demonstrates a financial model based on many statutes throughout the common law world which is briefly described below:

1. Provide lawful compensation based on:
 - a. Highest and best use
 - b. Not limited to the value of the land itself (i.e. some added value?)
 - c. Potentiality
 - d. Exclude enhancement or reduction in value due to purpose for which the land is acquired
 - e. Market value plus loss of profits/goodwill
 - f. Losses incurred due to enhancement

A compensation model for a lessor and lessees interest in reserved land in New Zealand has been incorporated in the Maori Reserve Land Amendment Act 1997. The compensation model is to cover the move to market rents, more frequent rent reviews, and the right of first refusal. The compensation payable is determined in accordance with a formula set out in Schedule 2 of The Maori Affairs Amendment Act 1997 plus a 1% solatium payment for the new condition imposed on assignment.

²³ Sheehan, J. (2002c) Towards Compensation for the Compulsory Acquisition of Native Title Rights and Interests in Australia. Paper presented at the FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, University of the South Pacific, Suva, Fiji 10-12 April 2002.

²⁴ *Kerajaan Negri Johor & Anor v Adong bin Kawau & Ors* (1998) 2 Malaysian Law Journal, 158

²⁵ *Ibid* 4.

The compensation model according to John Larmer²⁶ is a present value model involving numerous inputs such as the compensation period, the actual rent, the rental value as at 31 December 1995, the discount rate, the land inflation rate and the market rent rate. These are set out in the Act. Larmer also stated that a financial modelling approach to value loss, which is mathematically robust, may deliver theoretically correct outcomes provided realistic inputs are used and appropriate discounts rates used.

In a Land Valuation Tribunal summary of the West Coast (Taranaki) Maori Reserved Land Leases Burgess²⁷ indicated that he would adopt a sales comparison as well as a discounted cash flow approach to determine market value. The Land Valuation Tribunal placed more emphasis on the comparative market approach.

Two related decisions within the Australian High Court in the *Mabo*²⁸ and *Wik Peoples*²⁹ cases highlighted the pressing need for the development of field techniques and valuation methodologies for the assessment of compensation when customary land tenures are impaired, diminished or extinguished. Compensation should be measured in terms of modern land law.

Most importantly valuers trained ‘traditionally’ to deal with freehold land with plenty of land sales and comparisons may not be able to cope with valuing the rights of compensation for native titles. Economic, archaeological and anthropological aspects may need to be considered which is outside the skill set of a trained valuer.

Other available methods of compensation may include granting ‘rights’ i.e. profits-a-prendre, solatiums, easements, reservations and leases which are discussed below.

²⁶ Kelliher D, & Lanning, G. (2003) New Zealand Property Institute Maori Land Valuation Statutes and Case Discussion. Simpson Grierson.

²⁷ Burgess IJ (2001) Market Value Contested in Taranaki Lease Case. Property Investor, New Zealand. 10.9.2001.

²⁸ Ibid 2

²⁹ Ibid 7

Profits-a-prendre

Sheehan (2002c)³⁰ describes profits quite well as follows. Profits allowed the holders in common with others to graze stock, to cut grass, to cut and remove wood and more importantly the right to take fish and deer. Modern property rights of this type are called ‘Profits-a-prendre’ and are strongly analogous to a large number of indigenous property rights and interests.

Quite useful for the use of items on the land such as forestry, grazing or otherwise. In Australia profits-a-prendre for indigenous property rights co-exist with the Crown’s proprietary rights.

Indigenous peoples traditionally use the land for the production of food and to provide shelter. So the natural resources upon the land can still provide a benefit to the indigenous peoples still residing on the land, however ownership may still vest in the Crown. Effectively the indigenous peoples have ‘the right’ to use the land at a market price reflecting the worth of the resources on the land.

In New Zealand the *Smale v Takapuna City Council*³¹ case granted rights for the taking of shells which is a form of profit-a-prendre.

Solatium

Explained in *March v City of Frankston*³² (No.1) (1969) VR 350 at 356 as:

An expression apt to describe an award of some amount to cover inconvenience and in a proper case, distress caused by compulsory taking. It is quite inapt to describe an amount awarded for provable loss to which the claimant is entitled.

³⁰ Sheehan, J. (2002c) Towards Compensation for the Compulsory Acquisition of Native Title Rights and Interests in Australia. Paper presented at the FAO/USP/RICS Foundation South Pacific Land Tenure Conflict Symposium, University of the South Pacific, Suva, Fiji 10-12 April 2002.

³¹ Ibid 12

³² *March v City of Frankston* (No.1) (1969) VR 350 at 356

The courts have described solatium as a loading, or percentage based additional sum to be awarded to the dispossessed owner ‘... merely by reason of the fact that the compensation was compulsory’ *Re Wilson and State Electricity Commission of Victoria* (1921) VLR 459³³.

While it is difficult to quantify an amount to recompense for loss of indigenous spiritual and cultural rights associated with the land, Awards of 2% and 3% loading by the Courts in Australia strongly suggest that if they are to succeed, solatium claims must be founded on strong evidence concerning this type of loss³⁴.

In Australia the Public Works Act 1902 (WA) provides that any compensatory sum awarded may be increased by up to 10% if evidence before the court supports it. In New Zealand a review of the Public Works Act carried out in 2000 while not implemented to date recommends an ability to award a solatium payment for the intrinsic value of the land to the landowner.

Incorporations/Trusts

While not recognised as Maori customary land, Incorporations and Trusts have been formed to recognise multiple owners of Maori land. When Maori land is owned with multiple owners, this limits the flexibility of being able to transfer, lease, mortgage (alienate) the land. To enable comparison with general land there must be some type of discount to recognise the lack of flexibility.

The implications of the *Mangatu*, *Houpoto* and *Tahorakuri* cases have been considered by the Valuer General³⁵ in New Zealand and guidelines for a discount in comparison to general land have been recommended. However, each case really needs to be considered on its own merits.

³³ *Re Wilson and State Electricity Commission of Victoria* (1921) VLR 459

³⁴ *Ibid* 19

³⁵ Valuer-General (2000) *Deductions for Maori Owned Land*

7. Looking Forward

While a compensatory model might be developed by case law or by statute in one country or another, each case needs to be considered on its own merits. John Sheehan(2000a)³⁶ states that one of the things that struck him most, was the urgent need of developing countries for a legally defensible method of assessing compensation for traditional lands required for development, which is acceptable not only to the community at large but also to indigenous people.

Sheehan (2000a)³⁷ also states that the Courts may be swayed by the belief that the rights and interests contained within a particular native title claim can never be successfully quantified and hence adequate compensation ever paid. There is another view that suggests that a new paradigm will have to be constructed by the Courts completely outside of the current anglo-Australian property compensation case law. This view suggests that quite unfamiliar and even unknown notions of property might have to be conceived by the Courts, utilising case law another principles from quite diverse areas. There is a third view, ‘bundle of rights’ of native title can be compared to anglo-Australian bundle of rights – freehold and leasehold ownership may have legally limited our thinking. i.e. profits-a-prendre while not actual ownership were valuable and recognisable property rights i.e. take soil, natural produce of land, right to pasture, hew timber, extract minerals and the right to forestry – might be exclusive or shared with others, granted in perpetuity or for a fixed term.

A statement by Pulea M (1984) cited in Sheehan(2000a)³⁸ states that traditional management practices incorporated into the legal system are not only complimentary to modern management practices but... [should] be effectively integrated, as both systems achieve the same goals.

³⁶ Sheehan, J (2000a) The Economic Cost of Dispossession, Newspaper article LRQ p6 November 2000.

³⁷ Ibid 21

³⁸ Ibid 21

While many authors disagree with Whipple's (1997) methodology cited in Sheehan J (2002a)³⁹ that the compensation model might separate material from non material rights, the author considers a model on this basis may be reasonable.

A model is likely to incorporate both traditional valuation techniques for the land itself, but will also need to consider the loss of a right to the land and/or a spiritual loss. The Ngai Tahu settlement which has been reached in New Zealand balances all these issues after lengthy and considerable negotiation. To have empathy with the indigenous peoples, a settlement can not be reached on anything less. If there is not empathy with indigenous peoples on behalf of the Crown then a higher weighting must be placed on a physical or monetary compensation rather than providing some compensation for loss of mana which will have little meaning.

The models incorporated in this paper certainly contains methods of compensation that should be acceptable with both European land law and indigenous property rights, particularly profits-a-prendre, changing a name, and particularly apologising!

Sheehan⁴⁰ recognises that any methodology for assessment of compensation for customary lands will almost certainly produce a formulaic approach, which will please neither Governments or landowners. NZ, Canada and Papua New Guinea appear to have 'dealt' with compensation by way of ad hoc negotiated agreements.

The author does not dispute Sheehan's methodology – in fact a weighting system based on some sort of formula may be quite sensible. However, in both constitution and statute there is a right of negotiation and consultation for the indigenous people and the formula may have to be adjusted depending on the extent of the loss.

³⁹ Sheehan, J. (2002a) Towards an Understanding of Indigenous Property Rights. Paper presented at the New Zealand Property Institute – Annual Conference, Millenium Hotel, Rotorua, 17 May 2002.

⁴⁰ Ibid 1

The reader must keep in mind that it has taken at least 150 years for New Zealanders to consider the issue of compensation, and longer for most other established countries. The author believes it is unlikely that the issue of compensation can be resolved adequately in the likes of one generation. If compensatory models were ‘rushed’ it may create more problems than anticipated. For example, if the settlers of any country felt they had lost too many rights to either land, water, biota, minerals or other rights, then in perhaps another one or even two generations there may be more reverse type compensatory claims from the settlers to the indigenous people. Whether these claims will be successful or not is another matter.

8. Conclusion

The *Mabo*⁴¹ case in Australia is the ground breaking case on compensating indigenous peoples for a loss of their rights which will have wide reaching effect in Common Law countries.

After many generations of loss of rights from indigenous peoples, the European settlers will be compensating not just for the loss of land but for the loss of identity and loss of culture. With population growth the compensatory models may be exponentially unrealistic and each case needs to be considered on its own merits. Depending on whether the land was confiscated by blood and war or whether it was by unfair or unreasonable trade or terms of some sort.

A compensatory model will not be achievable over night, after many generations of loss, it may take a generation or more to negotiate reasonable terms and conditions to ensure the survival of a culture. A one off monetary payment or provision of a piece of land is unlikely to suffice. Indigenous peoples want recognition of their culture – not pecuniary

⁴¹ Ibid 2

gain. Profits-a-prendre, leases, reservations or other sources of compensation with rights to use the land, soil, sea, water, air, plants or other substance perhaps in perpetuity under specific terms and conditions depending on the needs of that particular culture seem like adequate compensatory tools. For example perhaps a tribe meets annually at a specific spot to have a hui, a profit-a-prendre may co-exist with a private landowner for the annual right to use this land at a specified market rate.

Following enrolment on the Maori Land Valuation course in New Zealand, expectation of 'an answer' of how to value Maori Land was half expected. That there is no answer is little surprise. Each case has to be valued on its own merits, perhaps using previous precedents as a guide but more likely to incorporate a new formulaic model balancing the needs of indigenous people with European land law.

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