

RANGAHAUA WHANUI NATIONAL THEME G  
PUBLIC WORKS TAKINGS OF MAORI  
LAND, 1840–1981

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## LIST OF ABBREVIATIONS

|          |   |
|----------|---|
| AJHR     | <i>Appendices to the Journals of the House of Representatives</i> |
| app      | appendix  |
| ch       | chapter   |
| doc      | document  |
| encl     | enclosure   |
| MA       | Maori Affairs   |
| MA-MLP-W | Maori Affairs – Maori Land Purchase Department – Wellington       |
| NA       | National Archives   |
| NZPD     | <i>New Zealand Parliamentary Debates</i>                          |
| p, pp    | page, pages   |
| pt       | part  |
| s        | section (of an Act)   |
| sess     | session   |
| vol      | volume  |
| Wai      | Waitangi Tribunal claim   |

## CHAPTER 1

# INTRODUCTION

This report was commissioned to provide an overview of Crown legal and administrative policy in compulsorily taking Maori land for public works purposes from 1840 to 1981. The intention is to provide background information, in order to assist in the development of Crown policy in settling Treaty claims arising from public works takings. Where necessary, areas requiring further research are also highlighted. Due to time constraints, this report is only a preliminary introduction to the major policies and issues relevant to these claims. It does not attempt to cover every public works-related claim.

Although this report is concerned with public works takings of Maori land, it is recognised that there are often different understandings of what constitute compulsory ‘takings’ and in practice it is often difficult to separate out public works takings from other types of compulsory land loss. Claimants often refer to takings, for example, whenever land that was owned before 1840 has been lost through Crown action without having been willingly sold or gifted. This can involve issues such as compulsory vestings, punitive confiscations, compulsory perpetual leases, and disputed purchases.

For example, confiscations of Maori land following the New Zealand wars are excluded from this report as a separate research issue. However, they were originally very closely linked with the development of public works provisions, especially where Maori land was concerned. Public works provisions themselves were also commonly expected to play a major role for the ‘common good’ in civilising and pacifying Maori. The official terminology also often tends to blur distinctions with blanket terms such as Crown ‘acquisitions’ of Maori land or ‘alienations’ from Maori. As well as these types of losses, issues also arise of the Crown assumption of ownership of waterways, natural resources, and foreshores. In terms of rangatiratanga, there is also the question of the loss of control and management of land even if ownership remains.

However, while associated issues are briefly referred to as necessary, this report concentrates as much as possible on compulsory takings of Maori land under public works-related legislative authority. The public works principles in this legislation were originally developed in English law and then imported and developed further in New Zealand.

The whole area of public works land takings requires some care because public works legislation traditionally allowed purchase by willing agreement as well as ‘compulsory purchase’ or taking of land. This means that it cannot automatically be assumed that all public works land ‘takings’ were by definition ‘compulsory’.

Compulsory taking provisions could also be used, even if an owner was involved in a willing agreement, simply to overcome any possible problems with the land title. On the other hand, it cannot always be automatically assumed either that where land was taken by agreement, the owner was truly ‘willing’, as the Crown had considerable powers to pressure an owner to ‘agree’ to a taking, including the threat of resorting to compulsory provisions if negotiations failed.

For the purposes of this report, ‘Maori land’ is taken to mean Maori land held by both customary and freehold title. It is recognised that at times there have been fine legislative distinctions about at precisely what point customary land became Maori freehold or Crown-granted land, and for that matter then became European or general land. However, for the purposes of this report, broad definitions are used simply to indicate the status of land for public works purposes. The terms used are customary Maori land, and Crown-granted or freehold Maori land. The definitions of these terms are based on common definitions such as those given by Asher and Naulls.<sup>1</sup>

Customary Maori land is land held by Maori people in accordance with their traditional customs and usages. All land in New Zealand was originally Maori customary land. After 1840, the Crown not only pursued a policy of alienating land from Maori ownership, but also of converting land remaining in Maori hands from customary title into title derived from the Crown. This became known as Crown-granted or freehold Maori land. By the turn of the century most customary Maori land remaining in Maori ownership had been transferred into freehold title. By 1980, the amount of customary land left was regarded as ‘insignificant’ and thought to mostly consist of rocky barren islands and some tapu land excluded from Crown grants. Even by the turn of the century, Maori freehold land was only a little over 10 percent of the total area of New Zealand. This had dropped to 5 percent by 1980.<sup>2</sup>

Even land in freehold title might be effectively outside Maori control. For much of the time covered by this report, a significant amount of Maori land was also vested or reserved. Reserves could be made, for example, at the time land was sold, or may have been granted to prevent landlessness or as compensation for past injustice. A large amount of land ‘returned’ after the confiscations was also reserved and vested in the control of Crown agencies such as the Public or Maori Trustee on perpetual leases. The Crown eventually administered all reserved and vested lands in trust for Maori, with Maori excluded from management and control. Some of these lands were sold or used for public purposes such as universities. Others were leased in perpetuity. After the mid-1970s most reserved and vested land was converted into ordinary Maori freehold. A large amount was vested in Maori incorporations and trusts, although still subject to leasing. As a result, very little of this type of Maori land now remains.

It should be noted that the legal definition of ‘Native’ or Maori land changed according to various legislative purposes and to take account of different treatment

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1. George Asher and David Naulls, *Maori Land*, New Zealand Planning Council, Planning Paper no 29, March 1987, pp 49–53  
2. Asher and Naulls, pp 46–51



## *Introduction*

of customary and Crown-granted or freehold Maori land. 'Native' land originally meant all Maori land and this was generally also customary land. Within a dozen years, by 1852, a distinction had been drawn between 'Native' land held by traditional customs and usage, and Maori land derived from Crown grant or Crown title. Reserves made out of purchases for example were usually Crown-granted. The distinction was important because for some time customary land was protected from compulsory provisions such as rating and from local government authority to take land for public purposes. Public Works' definitions varied at different times as to whether 'Native land' meant customary land only or included Crown-granted Maori land as well. The prevailing definition, where relevant, will be noted in the report.

As Asher and Naulls have explained, Maori land also has a special significance to Maori and to New Zealand in a way that is quite separate from other general land that might be owned by either Maori or Pakeha. This special link transcends legal definitions and applies to land inherited from generation to generation that is the basis for *turangawaewae*, and traditional ownership rights in tribal lands. Maori land is the remaining remnant of Maori tribal lands, and as such it continues to play a central role in the development and maintenance of Maori tribal identity. Asher and Naulls describe Maori freehold lands as:

lands that the current owners' ancestors occupied, used and controlled for hundreds of years and numerous generations. Today's Maori owners of this land are the direct descendants of those ancestors, and their rights to ownership – and hence their connection with the life of the tribe, their *turangawaewae* – come from proving a continuous genealogical link. A piece of general land on the other hand, unless it provides ancestral connections, is just land – there may be pride of ownership, as there is for Pakeha, but that is all.<sup>3</sup>

The term 'Crown' does not generally include local authorities such as local councils or rivers or drainage boards. However, local authority powers and activities have been included in this report because in public works terms it does not make much sense to separate them. Any history of the development of public works takings in New Zealand must inevitably include local authorities, as they and their predecessor organisations such as provincial councils were thoroughly and inextricably involved in the history and evolution of public works takings. In later years the responsibilities and activities of central and local government were also often very closely linked. This report would present a very incomplete and misleading picture if some overview of the powers and activities of local authorities were not included.

The definition of 'public work' or 'public purpose' has traditionally been very broad in New Zealand, and many of the numerous public works-related Acts and amendments during the period covered have been concerned with extending the legislative definitions of these terms. As Government became increasingly involved in providing for public purposes, the definitions of public works for which land was required also widened and with it the concept of what was 'necessary', or in the

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3. Asher and Naulls, p 53

national or community interest. Developments resulted in compulsory takings being possible for every type of public purpose no matter how vague or mundane, with very little effective restriction until attempts were made to introduce the concept of ‘essential’ works in 1981. Some restrictions also applied through town planning processes in later years but these were often ineffective in protecting Maori interests until changes in legislation from the late 1970s.

Public works legislation in New Zealand has its origins in English public works principles and developments but these have also been modified and adapted and at times overturned to meet many of the different circumstances settlers found in New Zealand. In terms of land takings, the major concerns of public works provisions have traditionally been in the areas of powers and procedures related to land acquisition; compensation for land taken; and management, use, and disposal of land taken for public works purposes and no longer required.

There have been at least 20 major pieces of public works legislation passed in New Zealand, as well as numerous amendments that often contain important new or changed provisions. In addition, there have been a wide variety of literally hundreds of other Acts that include important land taking related provisions for public purposes. Public works takings provisions have traditionally been included in general legislation such as Maori land legislation, land Acts, finance Acts, and reserves and domains Acts; legislation empowering certain authorities such as roads boards and local councils, and legislation relating to particular types of works such as electricity, railways, scenic reserves, and roading. There have also been numerous special Acts relating to particular projects, or areas of land. Legislation such as the various town and country planning Acts have also had a significant influence on public works provisions. This report does not cover all legislation in detail but attempts to summarise the major legislative provisions and developments relating to public works provisions.

The historical background to legislative and administrative developments in the nineteenth century is generally based on the legislative research and the work of well-known New Zealand historians such as Peter Adams, Claudia Orange, M P K Sorrenson, Alan Ward, and Ian Wards. The preliminary report on public works takings by David Alexander and the Crown Forest Rental Trust Maori land legislation database have also proved to be invaluable starting points. Primary sources in official publications and archives have also been used.

Sources for twentieth-century developments have proved to be more problematic. Very little substantial material has been written on public works takings and even less on takings of Maori land for this period. Archival sources have therefore been used more heavily, but time constraints mean research in this area is very preliminary in nature. Unfortunately public works policy files obtained by National Archives were not made available for this research report. Research has therefore largely been based on Maori Affairs Department files for public works takings and on published sources for town planning developments.

A major problem in producing this report has been that statistical data related to takings of land for public works purposes is not readily available in a usable form. This is especially true for takings of Maori land. Data undoubtedly does exist in a very scattered and unprocessed form. It was a legal requirement, for example, that

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public works takings were recorded as evidence of legal ownership and the discharge of compensation requirements. Legal requirements changed over the years, but it appears as though district offices of organisations such as the Land Transfer Office were the most likely source, as well as the various Public Works Department records, for Crown takings. The Maori Land Court is also likely to have records for at least the last 30 years. Published data also exists, for example, the taking proclamation notices were published in the *New Zealand Gazette*.

Tracking down and collating this data was beyond the research scope of this report. There is also likely to be some difficulty in distinguishing Maori land takings from general takings in some sources. However, it seems likely that it would be possible to at least obtain sufficient data to indicate overall quantities and significant trends. This kind of information is likely to be extremely useful in developing policy on public works land takings.

It would be useful, for example, to be able to estimate the total amount of Maori land taken for public works purposes between 1840 and 1981, and to be able to break this down by time period, district, type of work, and taking authority. It would also be useful to be able to compare the total amounts taken for public works against the total amount confiscated. The relative amounts of Maori and non-Maori land taken could also be compared and the impact estimated of various Government policies on the amounts of Maori land being taken. Takings could also be compared between the North and South Island and between Crown agencies and local authorities. The impact of public works takings could also be calculated in tribal areas where considerable land had already been lost by other means. Takings of Maori land for 'essential' public purposes could also be compared with takings for lesser purposes such as camping grounds. It would be extremely useful to have data that even indicated trends in such areas. Accordingly, it is recommended that at least the feasibility of such an exercise is investigated by the Policy Unit, for example as a university research project.



## CHAPTER 2

# SUMMARY

The public works land taking provisions introduced into New Zealand after 1840 were based on principles developed in previous centuries in English law. Ironically the main principle, that the state had the right to take private land for public purposes, was not vastly different from traditional concepts of Maori land tenure where individual rights to the use of certain land and resources were subject to the greater needs of the hapu or iwi.

The right of the state to take private land for public purposes was in fact one of the few principles that cut across the high regard normally attached to private landownership in English law. As might be expected it was therefore balanced with protections that suited the interests and needs of the powerful landed class of the time. The protections included the general principle that, where land was taken, an owner was entitled to the payment of full and equivalent compensation. In English terms it suited landowners and the promoters of the works for the full land title to be taken and compensation to be paid, generally in money. This was because the type of land most commonly taken was regarded purely as an investment and the payment of full compensation allowed the immediate purchase of an equivalent investment elsewhere. Legally an owner's interest in the land ended when it was taken, but even so, the special rights of former owners were recognised in the preemptive right of first offer to buy back the land if it was no longer required. The land had to be bought back, however, because full compensation had originally been paid when the land was taken.

The English principles also required special Acts for each taking. This in effect resulted in a system of scrutiny and consultation in the landowners' own forum, Parliament. This was where takings were explained and a majority had to be persuaded to give them their support. As land takings for works such as railways and canals became more numerous, a consistent set of taking procedures, containing scrupulous protections for individual owners, was enacted in the Lands Clauses Consolidation Act 1845. Again these protections, such as the right to notice, to object, and to an independent hearing, met the needs of English landowners at the time.

Maori concepts of land tenure assumed somewhat different requirements. The overall concept, that individual or private land rights should give way to community need, appears to have fitted well with Maori views and was one that Maori leaders may well have been willing to accept if they had been co-opted into the new system of government in a meaningful way, and adequate accommodation was made to respect their rangatiratanga and their concerns about the taking process.

Kawharu has described traditional Maori concepts of land tenure as allowing individuals and families use and occupation rights to certain areas of tribal land or resources. These rights could not be taken away by anyone, even a chief, without the sanction of the community authority that assigned them. However, title was at all times subordinate to the general interests of the community and could be revoked on the authority of the elders. Traditional concepts also covered the provision of certain rights to outsiders. Individuals or groups from other tribes could also be given access rights and even allowed to live with the tribe. They could be permitted to use, cultivate, and occupy sufficient lands required for their livelihood, but in return donations of produce were usually made to the tangata whenua.<sup>1</sup>

Maori concepts therefore recognised a balance between individual and community rights, with the community taking precedence in times of necessity. Outsiders could also be given use and occupation rights in return for a form of compensation. There were also opportunities for participation and consensus in decision making over land and other matters. The concept of turangawaewae was based on rights in land and gave a right to members of the tangata whenua to take part in decision making on the marae.

Because of the importance of land to Maori, culturally, spiritually, and economically, and through such concepts as turangawaewae, Maori tended to favour the concept of use rights for public purposes rather than complete alienation of land. This was particularly true by the later years of the nineteenth century, when the full legal meaning of a sale became apparent, and when the amount of remaining Maori land was rapidly diminishing. This preference was also confirmed when it became apparent that it was very difficult to regain land when it was no longer required for a public work. In gifting land, Maori also often expected that it would be returned if it was no longer required for the purpose of the original gift.

Maori also raised consistent concerns that where Maori land was required for public works, the process should involve a commitment to negotiation and communication or consultation as much as possible. The Crown did follow this policy at certain times, and experience showed that it was a realistic means of meeting public purpose needs. In Maori eyes, such a policy also helped balance the guarantees and cessions in articles 1 and 2 of the Treaty. The policy implied more contact than was afforded through the traditional notification and objection process developed for English owners. The English processes did not suit Maori very well – they were better suited to individual landowners and involved written contact whereas Maori often preferred to negotiate face to face. The English processes were also developed at a time when English landowners made up a very small, homogeneous class with similar outlooks and priorities. A more effective form of contact was necessary in New Zealand, where two quite different cultures had to learn about each other's interests and concerns. Prior communication about public works proposals meant they could be properly explained to Maori and it also enabled the Crown and Maori to learn of each other's special cultural concerns.

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1. I H Kawharu, *Maori Land Tenure: Studies of a Changing Institution*, Oxford, Clarendon Press, 1977, pp 60–61

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The accommodation of these different outlooks, and especially their practical application in public works provisions, would have undoubtedly required some compromises and goodwill on both sides. In theory, however, the differences do not appear to have been so great that some form of accommodation would have been completely impossible. In fact, in many cases there appear to have been considerable similarities. For example, Maori expected land to be returned when it was no longer required, and the pre-emptive right of the former English owner, although weaker, expressed a similar view. Similarly, Maori wanted to be consulted as Treaty partners and the concept was not so dissimilar from English promoters having to place their proposed Acts before the scrutiny of other landowners in Parliament. Many of the protections and applications of the principles had been developed to meet the interests of landowners in England and what was required were modifications to suit new requirements in New Zealand, including the rights of the indigenous landowners.

The question of how these provisions may have been developed to meet Maori interests has never been properly answered however. At times the Crown did follow a policy of negotiation and consultation with Maori leaders that involved the purchase of land required for public provision rather than the imposition of compulsory provisions. However, in the end, settler governments chose to reject the opportunity to make accommodations in favour of the alternative option of using warfare to ensure their own domination and in the process to impose compulsory land-taking provisions on Maori land.

For almost the first 20 years of settlement, after a somewhat shaky start, the Crown embarked on a policy of extensive purchase of Maori land required for settlement and public purposes. As a result of this compulsory land-taking, provisions were generally not required. In addition, where the Crown wanted to make provision for future roading, a policy of negotiation was conducted with Maori, and the Crown 'right' to take land for roads was not generally imposed on Maori land. The Crown encouraged Maori to believe that this process of negotiation and consultation was evidence of a commitment to Treaty guarantees and in the process managed to avoid provoking confrontation that would have otherwise certainly occurred. This in turn helped ensure the survival of the early immigrant settlements when they relied on the protection and goodwill of Maori for their continued existence.

Significant public provisions were made during this time. Many were made on land purchased or gifted from Maori for such purposes and it is clear that Maori were keen to participate in the new society. Maori supported and encouraged public works such as roads, schools, and hospitals that would clearly provide economic and general community benefits. While it may be debatable what Maori really understood by land purchase in the early years, the process still involved negotiation and communication that recognised Maori rights and interests. A significant amount of public provision also appears to have been made during this time on land where the actual ownership remained unclear. This did not seem to matter unduly to Maori who were comfortable with the concept of use rights that did not require a change of underlying ownership. Settler authorities in many cases appear not to have pushed the matter with Maori either, in case an obvious public

benefit was endangered in the process. Most public works provisions during this time were also carried out at a local or provincial level. Although in theory, local authorities had some powers over Crown-granted Maori land, customary Maori land was protected. In practice, even Crown-granted Maori land appears to have been exempt compulsory provisions until the late 1850s.

At this time it seems possible that Maori could have been included in the power structures of the new society in a manner that took account of Maori interests as envisaged by the Treaty. Even as Maori became reluctant to sell more land by the late 1850s and they became increasingly suspicious of Government intentions, they still clearly wanted to see the continued development of the new society and associated opportunities for economic growth. Maori understood public works such as roads assisted in this and continued to support such works when they would clearly be of benefit to the whole community. They were increasingly suspicious of Government intentions, however, and wanted a commitment to a real share in the new power structures that were being developed. In terms of land required for public purposes it is clear that a major concern was that iwi leaders continued to be consulted and involved as Treaty partners on works proposals involving Maori land.

As historians have shown, the early Crown policy of negotiation and consultation with Maori over the acquisition of land required for public purposes was actually based more on the necessity of avoiding provocation and the resulting destruction of the new settlements than on a commitment to Treaty principles as Maori had been led to understand. By the 1860s, settlers outnumbered Maori and began to insist that previous accommodations of Maori interests were no longer required. Although in other areas modifications were made to public works provisions to adjust to new circumstances, the same flexibility was not shown to Maori.

The first legislation containing compulsory public works provisions that applied generally to Maori land was enacted in 1864, during a series of wars of domination and the provisions were very closely linked to the punitive land confiscations of the same time. The provisions were introduced at a time when Maori were still denied representation in Parliament and were also regarded as part of war policy. As such they were expected to be a prime means of pacifying and ‘civilising’ Maori. Although settler governments liked to refer to the imposition of the benefits of English law, in fact the circumstances in which the provisions were applied to Maori land was the antithesis of the careful protections for landowners, the assumption of balanced rights and interests, and careful parliamentary scrutiny that characterised the development of the English provisions. The provisions also reflected a policy of rejecting the major Maori concern that the Crown communicate with them as Treaty partners, in favour of the use of compulsion. Even normal protections such as notification provisions were in practice less effective for Maori land because of the features of Maori land title.

At almost the same time as the main public works provisions were applied to Maori land, a separate Crown right to take a certain percentage of Maori land without compensation, for roads and later railways, was introduced through the Native Lands Acts. This was based on the Crown right to make provisions for future roading in all Crown-granted land. However, the provisions were developed separately for Maori land and from 1865 in particular, their application became



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discriminatory. Normal protections were abandoned because it was claimed that the state of Maori title made them too difficult to apply. These provisions were also applied at a time when roads and railways were the major public works interests of many settler communities. They were developed in a complicated and often confused fashion and taking authorities were often able to take advantage of this. Maori land was regarded as easy land to take and it appears to have been easier to bend the rules and evade protections for Maori land taken under these provisions. Takings were also commonly made in settlers' interests while Maori needs were often ignored. This separate right was eventually abolished in 1927.

After the wars, in the early 1870s, the Government again reverted to a policy of negotiation with Maori over purchasing Maori land that was required. Again this was mainly to avoid provoking further conflict, when it was by no means clear the wars were completely over. However, it also showed once again that it was not impossibly difficult for the Crown to take part in realistic negotiations with Maori leaders when it chose to, and that Maori were willing to cooperate on such matters when approached as Treaty partners. This policy appears to have been restricted to 'sensitive' areas mainly in the North Island however. At the same time the Crown right to take certain land for roads and railways, without compensation and without normal protections such as notice, appears to have been widely used in other areas.

The public works legislation of the 1870s was concerned mainly with the application of general taking provisions in the pursuit of a massive national programme of public works. This was confidently expected to boost the flagging economy and at the same time solve the 'Native problem' by offering work opportunities to Maori communities on the new projects and by swamping the Maori population in the North Island with a vast increase in the numbers of new immigrants. The land taking provisions of this time, although still eurocentric, were much more neutral in their application to Maori land and, as they were expected to apply more generally, many of the traditional protections for landowners were reinstated.

By the late 1870s settler domination of Maori was more complete. Settler governments had achieved the full removal of early Crown protections of Maori land, including limitations previously placed on local authority powers. Although from this time governments continued to confer land-taking powers on local authorities, very little effort was made to require those authorities to have regard for Maori interests. Governments were typically dismissive of Maori concerns based on the Treaty. Where the Treaty was referred to as an authority, it was typically claimed that the full assumption of sovereignty, and therefore rights to use compulsory provisions, was granted by article 1 and this overrode any article 2 guarantees. In addition, article 3 required Maori to accept the obligations and duties of British citizenship, including the obligation to accept the taking of land required for public purposes.

From the 1870s a characteristic pattern was also set, of numerous amendments to the main public works legislation and the inclusion of land-taking powers in numerous other Acts for a wide variety of public purposes. At the same time, the definition of public works was increasingly widened and the scope of public works activity greatly expanded.

From this time, legislative and other developments also began to more clearly reflect settler interests and needs, while renewed Maori attempts to participate in political and economic power were rebuffed and Maori became increasingly marginalised. Settler governments were aggressively intolerant of any perceived Maori challenge to their sole authority and in the early 1880s met passive resistance at Parihaka with a combination of draconian legislation and the violent dispersal of the community. The attitudes of intolerance and superiority were reflected in subsequent public works legislation in 1882. This contained separate discriminatory provisions concerning the taking of Maori land. Some of the harshest provisions were soon modified, but the pattern was established of separate, often discriminatory, provisions in public works legislation for Maori land takings. Improvements to these were often not made until the 1960s and in some cases the 1970s. At the same time, public works legislation failed to include any provisions that actively protected Maori interests. This remained the case even in the new Public Works Act 1981.

As well as the discriminatory nature of the legal provisions themselves, their application in practice also commonly continued to discriminate against Maori land. In many cases this was because provisions continued to be made from the viewpoint of the majority settler community and in practice this did not effectively provide the same level of protection for Maori owners. Notification provisions that were adequate for individual landowners were often insufficient for land in multiple ownership for example. In addition, Maori interests often conflicted with settler interests and this was not acknowledged in provisions. As Maori became generally more marginalised, Maori interests were also correspondingly given less priority. In the absence of legal requirements, other interests and imperatives commonly took precedence over Maori concerns. As in the development of legislation, administrative convenience was often used as a reason to deny Maori common protections afforded to general landowners.

By 1928 the amount of Maori land remaining was already very small, at less than 10 percent of the total land area. Maori concern that this remaining ancestral land was steadily diminishing was deepened by continued steady encroachment from public works takings. Although politicians often recognised this concern and opposed further ‘unnecessary’ takings, very little was effectively done to provide legislative recognition of this. From 1928 a familiar pattern of legislative widening of powers and lack of requirements to take account of Maori interests continued. In addition, from the 1940s especially, town planning processes appear to have had a significant impact on the use of Maori land for public purposes.

From the 1960s, general public concern with the more draconian aspects of general public works land taking provisions began to become increasingly apparent. The view was widely expressed that taking authorities had accumulated too much power and not enough concern was paid to other public interests or to protections for landowners. The wide powers of taking authorities that had been acceptable to the general community when the country needed ‘opening up’ and developing, were no longer so acceptable by the 1960s. Other issues such as the environmental impact of major public works projects also began to cause concern. Governments responded in the 1970s with improved and more independent hearing processes for

## *Summary*

objections and with more liberal compensation provisions. These improvements also applied to Maori, although they were not specifically directed to meet Maori interests.

In addition, by the 1970s, there is evidence of a more responsive attitude to Maori concerns about compulsory land-taking provisions, particularly at a central government policy level, although this is uneven and is still much less obvious at a local authority level. In some cases, for example, Government agencies agreed to acquire interests in Maori land required for public purposes that did not involve taking the full title. For example, some scenic reserves were leased rather than taken, or they were made the subject of special legislation that required the land to be returned to the former owners if it was no longer required. In 1978 the Electricity Corporation also adopted a policy of leasing Maori land required for the Ohaaki power station instead of using compulsory provisions. Some changes were also made to public works provisions concerning Maori land in an effort to overcome some of the discriminatory effects that had become apparent. For example, in the 1960s, the Maori Trustee was given responsibility to negotiate compensation for multiple owners and in the 1970s notification procedures were improved for Maori land and the system of separate taking provisions was finally abolished. These did not stop all problems with Maori land takings however, and there were still no specific provisions requiring active protection of Maori interests.

The 1977 town planning legislation finally did include some requirements to take account of Maori concerns and this has apparently influenced the hearing of objections, although the effectiveness of the provisions is still not clear. The new Public Works Act 1981 also included attempts to strengthen general protections for landowners and to limit the powers of taking authorities; in particular the short-lived introduction of the concept of 'essential' works and the strengthened offerback provisions. While these improved the conditions for all landowners, including owners of Maori land, the 1981 Act still contained no specific requirements to take Treaty considerations into account when takings of Maori land for public works purposes were being considered, or when such land was being considered for disposal when it was no longer required for public purposes.

## CHAPTER 3

# THE RIGHT OF THE STATE TO TAKE LAND BEFORE 1840

The right of the state in New Zealand to take private land for public purposes is based on English legal tradition that in 1840 was already centuries old. The principles imported into New Zealand had evolved over previous centuries to reflect the balance of power between the English sovereign and the powerful English landed class and in 1840 that evolution was still continuing to meet new developments.

The accepted ancient prerogative power of the English sovereign to take private land had been increasingly restricted through the centuries as landowners became more powerful and ensured that the sovereign right was balanced by certain protections for landowners. Principles were developed that recognised certain obligations towards the owner whose land was taken. The most important of these were that full compensation had to be paid for land taken, and that takings could only be made under legislative authority.

The restrictions on the prerogative power of the English King have been traced back as early as 1215, when Magna Carta prohibited the deprivation of freehold interest by royal prerogative. 'No free man shall be . . . disseised of his freehold or liberties or free customs but . . . by the law of the land.'<sup>1</sup>

The development of the balance between prerogative power and individual rights was further described by the judges of England in 1606. The right of the sovereign power to take private property for the common good was balanced by necessity, such as in times of emergency and great danger:

by the common law every man may come upon my land for the defence of the realm . . . and for the commonwealth, a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire; and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action.<sup>2</sup>

The continuing development of public land takings principles confirmed the strict protections required for owners of private property when takings were made. In 1765, in his *Commentaries*, Blackstone described the high regard held for private property and the extraordinary care that had to be taken if private property had to

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1. *Magna Carta*, c 29

2. *The Saltpetre Case*, 12 Co Rep, p 12, quoted in J Else-Mitchell 'Do Existing Acquisition Acts Really Provide For Just Compensation in All Cases', *Valuer*, vol 23 (1974), p 2

be taken by compulsion – in particular the need for legislative authority, and for ‘full indemnification and equivalent’ for the land taken. He said:

So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the community. If a new road for instance were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land. . . . In this and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce . . . Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him full indemnification and equivalent for the injury thereby sustained . . . All that the legislature does, is to oblige the owner to alienate his possession for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.<sup>3</sup>

This right of the state to take privately owned land or interests in land for public purposes is commonly termed the right of ‘eminent domain’. A variety of alternatives to the word ‘taking’ have also developed in public works terminology. In English legislation it was common to have provisions for land to be either acquired by willing purchase or by ‘compulsory purchase’. Other terms variously used in commonwealth and North American countries are ‘appropriation’, ‘compulsory acquisition’, and ‘resumption’ (of the Crown right to the land). All these terms have been used at various times in New Zealand with ‘compulsory acquisition’, ‘compulsory taking’, or in later years simply ‘acquisition’ perhaps being the most common.

These major principles of public works takings were later imported into New Zealand including the important balancing principle of the right to compensation for land taken. The principle was also eventually affirmed that legislative authority was required before land could be taken for public purposes. The New Zealand authority, Hinde, McMorland, and Sim, notes for example that ‘compulsory acquisition is now invariably effected under statutory powers’. While there may still be some prerogative power of the Crown to take land, its extent is ‘uncertain’, and it is now likely to arise only in wartime and even then most cases will be dealt with under existing or special wartime legislation.<sup>4</sup>

When it came to the application of the principles, it seems that, in practice, the right to compulsorily take land for public purposes such as roads was relatively infrequently used in England until the great changes of the industrial revolution in the eighteenth and nineteenth centuries. Harold Perkin, in his book *The Age of the Railway*, notes that pre-industrial Britain was largely unchanged for centuries in its system of towns and roading. In 1760 for example, communications in Britain were little better than in the days of the Romans. Roads were being maintained rather than built, and repairs that were made were infrequent and largely inadequate.<sup>5</sup>

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3. Blackstone, *Commentaries* 1, 139

4. Hinde, McMorland, and Sim, *Introduction to Land Law*, Wellington, Butterworths, 1986, 2nd edition

5. Harold Perkin, *The Age of the Railway*, David & Charles, 1970, p 15

The taking of private land for public works really took off in the eighteenth and nineteenth centuries, with the great transformation of the industrial revolution. The English landowning class were a major influence in this as they took advantage of opportunities to increase their wealth. Perkins has described the English landowning class at the beginning of the industrial revolution as tiny, about 1.2 percent of the population. However they were not only the richest class but they were also in the strictest sense a ruling class. The King's Ministers were, with few exceptions, great landowners or their relations. The civil service consisted of their appointees from among their friends and relations, and the House of Lords was to all intents and purposes a House of Landlords. Four-fifths of the House of Commons comprised landowners and their relations, and the rest were chiefly their friends and dependants. It was only in the greater cities that men such as merchants and lawyers could control their affairs and even as their power grew, they too aspired to join the ranks of landowners.<sup>6</sup>

English landowners were also in a unique position to play a major role in the industrial revolution. Following the English Civil War in the mid-seventeenth century, feudal tenures were abolished and the English landed class turned lordship into landownership with the establishment of the modern freehold. As real owners of the land, the landed class were free to do what they liked with it and their keen interest in any kind of economic development helped enormously in the industrial and transport revolution.<sup>7</sup>

Although railways and other works were promoted as providing undoubted improvements for the general public, in England they were developed, promoted, and owned by private interests, in many cases until well into the twentieth century. These were typically combinations of wealthy entrepreneurial landowners and industrialists. In order to promote and build their works, and often to compulsorily obtain land required, they had to obtain the special Acts of Parliament required to authorise the work and the necessary taking of land. These Acts enabled them to set up a company, raise money from shareholders, and buy the required land, by compulsory purchase if necessary, to build their railways or similar works. The Stockton and Darlington Act 1825 and the Liverpool and Manchester Act 1826 were typical of these local Acts.<sup>8</sup>

Acts authorising takings were not always without opposition, especially from powerful landowners who might support rival canal companies and oppose having their land compulsorily 'purchased'. However, opposition was often based on support for a rival work, such as a canal as opposed to a railway, and could often be bought off or overcome by promises of shares in the new enterprise and seats on the board of directors.<sup>9</sup>

In fact, those promoting the works and those occasionally suffering compulsory purchase almost invariably belonged to the same numerically small landowning class with similar priorities and outlook. This class also owned most of the land. The vast majority of the population at this time was landless and there was no

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6. Ibid, pp 34–35

7. Ibid, pp 36–44

8. Ibid, pp 72–73

9. Ibid, re opposition of Marquess of Stafford to Liverpool and Manchester Railway Act, p 83

widespread landownership by the middle and working classes as happened later. It was this same small landed class therefore who were interested in using rights to take land where necessary for the works they were promoting, and who were occasionally subject to takings. The role of the state at this time has been described as being more like a neutral umpire, limited to laying down the general principles and procedures for taking land and determining compensation. This included providing machinery for resolving disputes between the private promoters who had obtained compulsory powers and the landowners subject to them.<sup>10</sup>

In general the land taken was strips of farm land for rail or canal works and it was this type of land that large landowners were willing to use for development purposes anyway. Takings did not generally affect land on which the owners had homes or to which they had strong emotional attachments. The land involved represented an income-producing investment or an item of an industrial or commercial enterprise of such a nature that compensation moneys could be used to replace it with the purchase of other land and the construction of other buildings. As Else-Mitchell has noted, 'The only effect on the expropriated owner was that the form of his investment was changed'. Even when there were instances where the land acquired would have included tenanted houses and buildings, tenants had few rights and little security of tenure, so any form of compensation to them would be minimal if they could afford to litigate the claim at all.<sup>11</sup>

One of the first areas landowners became interested in was the improvement of transport systems. As roads, and in particular horse traffic, increasingly proved inadequate, landowners, in partnership with industrialists, pioneered the revolution in transport and in doing so contributed enormously to the success of the wider industrial revolution. The two great forms of transport quickly became canals and railways, with railways eventually becoming most important. George Stephenson built his first steam locomotive in 1814 and in doing so turned crude colliery engines into a revolutionary means of public transport. In September 1825 the first steam-hauled public railway opened for freight only on a railway authorised by Parliament as a public line. The Liverpool and Manchester Railway Act 1826 enabled the first modern railway carrying freight and passengers to be built, and when it opened in 1830 it ushered in what Perkins calls the 'Railway Age'.<sup>12</sup>

The great railway 'boom' followed in the years from 1833 to 1837, with special acts enabling railways to be built throughout England. Railways continued to be a growth industry for many decades and passenger traffic continued to increase regardless of later booms or crises in the economy.<sup>13</sup>

The railways not only produced a revolution for freight traffic. They also had a direct impact on public passengers as they carried more people, faster and in more comfort, and before long at reduced fares, than was possible on the fastest of stage coaches. They created a new traffic for all classes, from businessmen to working

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10. Justice Else-Mitchell, 'Do Existing Acquisition Acts Really Provide For Just Compensation in All Cases', *Valuer*, vol 23 (1974), p 2

11. *Ibid*, pp 4–5

12. Perkin, p 73

13. G R Hawke, *Railways and Economic Growth in England and Wales, 1840–1870*, Oxford, Clarendon Press, 1970, p 37

people travelling to the new suburbs made possible by rail. Rail allowed the development of new leisure pursuits in day excursions and new associated enterprises, for example Thomas Cook's first excursion, which took place in 1841. Railways also enabled England to become more suburban and in doing so enabled the development of new towns and new services required for them.<sup>14</sup>

Improvements in town planning and town amenities had also begun by this time – a new development in public works. Once again, in England, landowners played a significant role. The joint initiatives of industrialists and landowners resulted in the creation of new towns and considerable expansion in many old ones. Much of this was made possible by the development of rail transport and by the efforts of landowners and industrialists in providing land and establishing new industries on it. They laid out streets and built public amenities such as churches, schools, shops, and waterworks, and they reaped the profits from the industries the towns serviced. An example is the town of Crewe, which was built by a railway company and included company-built houses, church, and school, as well as company-provided doctor, schoolmaster, curate, and policemen.<sup>15</sup>

The growth of urban areas also resulted in health and social problems associated with congregations of such large numbers of people, or the 'encamped hordes' of the 1840s as quoted by Perkins.<sup>16</sup> This in turn gave rise to initiatives in waterworks, sewerage, housing, and the provision of other public amenities from the late 1830s. Originally many of these were undertaken as private initiatives, again using authorities obtained under special Acts. However, responsibility was increasingly assumed by new boroughs, such as in Manchester and Liverpool.

In Manchester the new borough began obtaining a series of Improvement and Other Acts from 1838 that pioneered public and housing reform and began the development of many of the other amenities of modern urban life. For example, it established one of the first public parks in England in 1846 and the first municipal free library in 1852. The new borough in Liverpool obtained the Liverpool Sanitary Act in 1846 and over the next 12 years paved 258 new streets, built 146 miles of new sewers and reconstructed old ones, provided public baths, wash houses, and public conveniences, and adopted a town plan for reconstruction of streets and the provision of public parks. As noted by Perkins, at the time these community improvements were universally welcomed and greatly supported by ratepayers.<sup>17</sup>

As the industrial revolution brought a flood of special local Acts, many allowing land to be taken for a variety of works, two major consolidating Acts were passed in England in 1845. These were the Lands Clauses Consolidation Act 1845 and the Railways Clauses Consolidation Act 1845. It was intended that future Acts authorising particular land-taking powers could then ensure consistency in the actual taking procedures, such as in determining compensation and resolving any disputes, by incorporating the relevant provisions from these Acts.

The legislation also reflected the sensibilities of the landowners toward their own class. Rights to full compensation were scrupulously provided for, as were many of

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14. Perkin, pp 184–185

15. *Ibid*, pp 126–128

16. *Ibid*, p 140

17. *Ibid*, pp 137–138



the features that have been retained in modern legislation providing for compulsory acquisition for public purposes. For example, the right to receive notice, to have the opportunity to object, and to have an independent arbitration of disputes regarding compensation. Importantly, each special Act promoting a new work had to obtain the approval of the landowners' own forum, Parliament, where its merits could be fully debated and sufficient powerful support had to be obtained before it was successfully passed. Reflecting the outlook and circumstances of the time, the provisions for compensation were entirely limited to monetary and commercial value. As will be shown, many of these assumptions and provisions were imported into New Zealand.

It can be seen, therefore, that when the Treaty of Waitangi was first signed in 1840, colonists were bringing with them the experience of English public works traditions and principles developed to that date. By 1840, England was in the late years of the industrial revolution. The great railways boom had already begun and colonists arrived in New Zealand convinced that railways were vital to economic growth. Urbanisation was also well underway in Britain with associated social problems and the early beginnings of measures to counter these, such as borough responsibility for waterworks, sewerage, and other public amenities. New Zealand was often promoted as a means of escape from these problems and colonists also brought with them a desire to avoid such problems in their new settlements.

The tradition of obtaining special Acts for particular works was already well established in England by 1840, and the consolidating legislation of 1845 was only a few years away. The protections and procedures involved in land taking were also well established but had been designed to meet the needs and interests of a small homogeneous landowning group, who regarded the type of land normally taken above all as an investment commodity.

In a new society, with new conditions, it was inevitable that modifications would be made to these imported traditions to take account of new needs. For example, it soon became apparent in New Zealand that private enterprise was not able or willing to promote and develop public works in the same way as in England. The same opportunities to create great wealth were simply not available, and many of the physical difficulties involved in building a network of roads and railways took years to overcome. An early modification therefore was an increasing assumption of central, provincial, and local government responsibility for works that in Britain at the time were more often carried out by private enterprise. This was to have important implications for the role of the Crown in the development of New Zealand public works provisions. The early lessons of the problems associated with urban development also appear to have resulted in significant attempts to provide adequate land for public needs when the first settlements were planned.

The major new feature in the colonial situation however was the existence of the indigenous Maori people, with prior rights of landownership recognised by the British Crown, and with protections included in a Treaty that the Crown had declared itself honour-bound to uphold. This provided another opportunity for further modification of public works taking principles to meet the needs and include the interests of a new landowning group. This report essentially traces the major features in the rejection of this opportunity.

## CHAPTER 4

# PUBLIC WORKS TAKINGS AND THE TREATY OF WAITANGI

The Waitangi Tribunal has yet to make findings on all of the major issues raised by public works takings of Maori land. Public works-related issues have been raised and commented on as ancillary issues in various reports however, and recently the *Te Maunga Railways Land Claim Report* was concerned specifically with a relatively small public works claim. This claim was particularly concerned with issues related to compulsory taking and the return of land no longer required for public purposes. The Tribunal has also identified general overarching Treaty principles in various reports that appear to be relevant to public works-related claims.

The Treaty principles identified by the Tribunal, in general, attempt to balance the article 1 right of the Crown to exercise kawanatanga or governorship with the guarantee of protection of rangatiratanga to Maori in article 2, as well as the guarantee to Maori of all the rights and privileges of British citizens in article 3. These include the principle that the Crown authority, to make laws for the peace, order, and security of New Zealand, is subject to an undertaking to protect Maori interests.

For example, the *Manukau Report* found that kawanatanga means that the Crown has authority to make laws for the peace, good, order, and security of New Zealand, subject to an undertaking to protect Maori interests.<sup>1</sup> In the *Motunui Report* it was also found that the Treaty represents an exchange of gifts – the gift of the right to make laws, in return for the promise to do so in a way that accords the Maori interest an appropriate priority.<sup>2</sup>

In the *Mangonui Report*, comment was specifically made on the need to take account of Maori interests in carrying out public works projects. The Tribunal stated that:

It was a condition of the Treaty that the Maori possession of lands and fisheries would be guaranteed. The guarantee requires a high priority for Maori interests when works impact on Maori needs or particular fisheries, for their guarantee was a very small price to pay for the rights of sovereignty and settlement that Maori conferred.<sup>3</sup>

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1. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, Wellington, Government Printer, 1985, p 90
  2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1983, p 61

The requirement on the Crown to protect Maori interests extends to a duty to actively protect those interests. In the *Manukau Report* it was found that:

The Treaty of Waitangi obliges the Crown not only to recognise the Maori interests specified in the Treaty but actively to protect them . . . It follows that the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights.<sup>4</sup>

The Crown also has an obligation to recognise tribal rangatiratanga. ‘Te tino rangatiratanga’ includes the right of management as well as ownership of land, resources, and other taonga, according to Maori cultural preferences. In the *Mangonui Report* the Tribunal, in commenting on whether Ngati Kahu had been prejudiced in their ability to present their views and have them heard in the planning process, found that:

It was also clear [from the Treaty] that traditional mechanisms for tribal controls would continue to be respected and maintained. The main difficulty is that they were not. On the contrary . . . policies were introduced over a century ago to put an end to tribal powers. Criticism that a tribe has failed to object is largely to blame the victim of the historic process for its current condition. The nub of the problem is in the omission of the Crown to recognise the tribal position and to provide the legal foundation and resources for tribes to contribute more fully to local affairs and to take all necessary steps for the protection of tribal interests.<sup>5</sup>

Linked to this is the right of Maori to choose ‘to develop along customary lines and from a traditional base, or to assimilate into a new way . . . [or] to walk in two worlds’.<sup>6</sup> This also means that the guarantee in article 3 of the Treaty, conferring the same rights and privileges of citizenship, should not displace this principle of choice.

In the *Orakei Report* it was also recognised that:

In recognising ‘te tino rangatiratanga’ over their lands the Queen was acknowledging the right of the Maori people for as long as they wished, to hold their lands in accordance with long standing custom on a tribal and communal basis.<sup>7</sup>

Taonga includes all things highly prized by Maori, including tangibles such as fishing grounds, harbours, and land, and intangibles such as Maori language and the mauri or life force of a river.<sup>8</sup>

The Tribunal has also found that the Crown has an obligation to ‘ensure that [Maori] were left with sufficient land for their maintenance and support or

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3. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Mangonui Sewerage Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988, p 60

4. Waitangi Tribunal, *Manukau Claim*, p 95

5. Waitangi Tribunal, *Mangonui Sewerage Claim*, p 47

6. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988

7. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 1987, pp 134–135

8. For example, Waitangi Tribunal, *Manukau Report*, pp 93–95, and *Motunui Report*, p 59

livelihood'.<sup>9</sup> This finding is also supported by Lord Normanby's instructions to Captain Hobson when settlement was originally contemplated, that land necessary for the 'comfort and subsistence' of the Maori people was not to be purchased.

Another relevant general principle is that the Crown cannot evade its obligations under the Treaty by conferring authority on some other body. In the *Manukau Report*, for example, it was found that there is a duty on the Crown not to confer authority on an independent body without ensuring that the body's jurisdiction is consistent with the Crown's Treaty promises:

the Crown cannot divest itself of its Treaty obligations or confer an inconsistent jurisdiction on others. It is not any act or omission of the [Auckland Harbour] Board that is justiciable but any omission of the Crown to provide a proper assurance of its Treaty promises when vesting any responsibility in the Board.<sup>10</sup>

In the *Mangonui Report* the Tribunal found that this principle extended to the laying down of rules for local authorities and the Planning Tribunal.<sup>11</sup>

The Tribunal has found that there is some duty on the Crown to consult, or at least discuss, with Maori at the earliest possible opportunity, proposals that are likely to affect Maori interests. The comment was made in the *Manukau Report*, for example, that in relation to town planning processes, 'To achieve a reasonable compromise it is preferable that there be consultation with the tribe rather than have the tribe resort to objection processes, or even protests and demonstrations'.<sup>12</sup>

This was further amplified in the *Mangonui Report*:

Even at the outset there is a Maori complaint that the opportunity to be involved [in the planning process] is merely by an objection procedure which operates after the local authority's plans have been drawn and publicised. The procedure is available to the public as a whole. The tribes were given a special status by the Treaty however and the objection procedures were often inconsistent with their ways, compelling a confrontational stance. The complaint is valid in our view but not because there is a duty to consult in all cases. It is the prior opportunity to discuss that is most especially wanting. Early discussions build better understandings in an area of cultural contact where the potential for conflict is high. Agreements may not be reached but new insights may be obtained and the subsequent debate may at least be better informed.<sup>13</sup>

There have also been some Tribunal findings and observations specifically related to public works takings of Maori land. In earlier reports the Tribunal raised the major issue of whether compulsory takings of Maori land for public purposes were in themselves a breach of the Treaty. There was an issue of whether, given article 2 guarantees, all compulsory takings were a breach or whether there were some circumstances where takings might be justified. The Tribunal made no

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9. Waitangi Tribunal, *Orakei Report*,

10. Waitangi Tribunal, *Manukau Report*, p 99

11. Waitangi Tribunal, *Mangonui Report*, p 4

12. Waitangi Tribunal, *Manukau Report*, p 125

13. Waitangi Tribunal, *Mangonui Report*, pp 4-5

specific general findings but appeared to indicate that the taking had to be measured in some way, for example as only a ‘last resort’ or where there were clearly issues of peace, security, and good order involved. In addition, related issues were also raised such as prior negotiation being a prerequisite before compulsory takings could be made and the need to compensate for compulsory takings.

For example, in the *Orakei Report* the Tribunal commented on the taking of land for defence purposes:

the Crown’s action in compulsorily taking this land appears to be a breach of Article 2 of the Treaty which requires the consent of the Maori proprietors to any disposition of land. At the same time the Preamble to the Treaty speaks of the anxiety of the Crown not only to protect the just rights and property of the Maori but also to secure peace and good order. It is arguable that the sovereign act of the Crown in taking land for defence purposes with a view to securing peace and good order is acting for the benefit of all citizens, Maori and European alike, and is not inconsistent with the principles of the Treaty.<sup>14</sup>

In this the Tribunal appeared to believe that defence purposes might come under the description of peace and security and therefore might not be a breach. However, in the same report, the Tribunal found that in taking land for housing:

The Crown prejudicially affected. . . . Those Ngati Whatua owners whose land was compulsorily acquired against their wish and without their consent and thereby acted inconsistently with the principles of the Treaty which guaranteed the Maori families and individuals the undisturbed possession of lands they wished to retain.<sup>15</sup>

In the *Motunui Report*, the Tribunal found that the Treaty obliged the Crown to protect Maori fisheries from the consequences of settlement and development of the land. In the same way, in the *Orakei Report*, the Tribunal found that the Crown had an obligation to protect the papakainga and especially the site of the marae from the deleterious effects of a public work.<sup>16</sup> In the report summary, the Tribunal also referred to the 1912 taking of land for a sewer under the Auckland and Suburban Drainage Act 1908 that resulted in loss of shellfish beds and flooding, as being contrary to the Treaty.<sup>17</sup>

In the *Mangonui Report* the Tribunal also raised the issue of whether the Treaty forbids the compulsory acquisition of Maori land in any circumstances, but did not pursue it because in that case the land was not traditional Maori land. It had been purchased by Ngati Kahu after the land had been subject to a public works designation. The Tribunal had also received no legal argument on the issue.

In both the *Ngati Rangiteaorere Report* and the *Mohaka River Report*, the Tribunal considered the taking of lands for roads and railways. While it was acknowledged that there was a general public benefit from a road or railway, there was a related issue of the Crown failure to negotiate with Maori owners before using

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14. Waitangi Tribunal, *Orakei Report*, p 167

15. Ibid, p 162

16. Ibid, p 158

17. Ibid, p 3

compulsory provisions. In the *Mohaka River Report* the Tribunal considered that in taking land for roads and railways ‘apparently without any negotiations with Ngati Pahauwera, the Crown was ignoring their rights of rangatiratanga’.<sup>18</sup>

In the *Ngati Rangiteaorere Report*, part of the claim concerned the taking of a road under the provisions which enabled the Crown to take up to 5 percent of Maori land for a road without compensation. The Tribunal had also heard no legal argument on whether the compulsory taking of Maori land breached the Treaty and therefore made no finding on this issue but did make some general observations on public works issues for future legal argument.

The Tribunal felt that the concept of rangatiratanga guaranteed to Maori in the Treaty included the absolute dominion over their land. If they had been told in 1840 that kawatanga, as ceded to the Crown, would mean the limiting and eventual loss of rangatiratanga over their lands, they would not have signed the Treaty. Indeed, some who feared this, did refuse to sign.

The Tribunal observed that the English text could well be understood to include the Crown right to ensure free passage for all citizens under kawatanga. This could extend to the right to acquire land for public roads. The argument could also be extended to allow for compulsory acquisition ‘in the last resort’ of necessary public rights of way, on payment of fair compensation. But against this had to be balanced the guarantees in article 2 of the full, exclusive, and undisturbed possession of lands and the reservation to the Crown of a right of purchase of such land as Maori wished to sell. In the Maori version there was also the guarantee of ‘te tino rangatiratanga’ or chiefly control over as well as possession of their lands. The Tribunal noted that the question went right to the heart of the Treaty and it was insoluble unless one article could override another, or there was a compromise. The Tribunal also noted other reports that spoke of the need for compromise.

In the particular claim before it, the Tribunal expressed doubts over whether the Crown could properly assert its kawatanga over Ngati Rangiteaorere’s rangatiratanga by compulsorily acquiring their land for roads. In any case, the Crown failed to carry out the necessary prerequisites. It failed to consult about the need for a road, and it failed to genuinely negotiate over the purchase of the land. ‘The Crown therefore had no right to proceed to compulsory acquisition’. Further, the taking of land without compensation amounted to a confiscation. ‘Whatever the merits of compulsory acquisition as a last resort, there can be no justification of the failure to pay compensation’.<sup>19</sup>

The *Te Maunga Report* was specifically concerned with a public works land-taking and the return of the land to the former Maori owners when it was no longer required for public purposes. The Tribunal described the central issue of public works takings as the conflict between the obligation of kawatanga in article 1 and the guarantees of protection of rangatiratanga in article 2 of the Treaty. The question was, under what circumstances could the Crown right to govern in the public interest override the Crown obligation to protect Maori interests guaranteed in the

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18. Waitangi Tribunal, *The Mohaka River Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 70

19. Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report*, Wellington, Brooker and Friend Ltd, 1990, pp 46–48

Treaty? And even when an overriding public interest could be identified, if that public purpose for which the land was taken was no longer relevant, then what fiduciary obligation remains with the Crown to ensure that land compulsorily taken from unwilling sellers is returned to the original owners?<sup>20</sup>

The Tribunal, while not suggesting that Maori land should never be used for public purposes, did emphasise that compulsory taking provisions cut across the Treaty guarantee of rangatiratanga. The Tribunal did not believe that the Crown had to take freehold title in order to use Maori land for public works. The Tribunal gave the example of the Crown leasing land for the Ohaaki power station and stated there were numerous other examples of leasing land for public purposes. The Tribunal felt that there is therefore no need for the Crown to take the freehold because there are other alternatives that can be negotiated. This also means that when the land is no longer required for a particular use, it can more easily be returned and the status of any improvements negotiated.

In general terms, the Tribunal recommended that amendments be made to the Public Works Act 1981 so that provisions were made requiring all persons exercising public works related-functions and powers to act in a manner consistent with the Treaty of Waitangi. In addition, where Maori land is required for a public work and negotiation fails, provisions should enable a compulsory taking for a specific use of the land which is a partial interest such as a lease, not the full freehold title. When Maori land taken was no longer required for any public purpose, the Crown should also have discretion, depending on the circumstances of each case, to return the land at no cost or at less than the market value.<sup>21</sup>

The general Treaty principles as defined by the Waitangi Tribunal have in many cases been supported by the courts. The High Court found, for example, in 1987 that, although following established legal authority, the Treaty standing alone did not confer enforceable rights in a municipal court, it still had significance through its mention in various legislation. and the rulings of the Waitangi Tribunal as a specialist tribunal were to be given considerable weight by the High Court.<sup>22</sup>

A few days later this was confirmed by the Court of Appeal.<sup>23</sup> It held that Waitangi Tribunal reports were clearly to be considered authoritative unless otherwise found to be inaccurate. It also confirmed many of the principles identified by the Tribunal. These included that the acquisition of sovereignty was made in exchange for protection of rangatiratanga. As a result, the Treaty implied a partnership and the duty to act reasonably and in good faith.

Justice Cooke found that the principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. The test of reasonableness however is necessarily a broad one and the parties owe each other cooperation. Justice Cooke also agreed that ‘the duty of the Crown is not merely passive but extends to active protection of the Maori people in the use of their lands and waters to the fullest extent practicable’.

The Appeal Court also supported the Waitangi Tribunal finding that:

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20. Waitangi Tribunal, *Te Maunga Railways Land Report*, Wellington, Brookers Ltd, 1994, p 4

21. *Ibid*, p 81–82

22. *Huakina Development Trust v Waikato Valley Authority* (1987) 12 NZTPA 129

23. *The New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664

## *Public Works Takings and the Treaty of Waitangi*

if the Waitangi Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it – which would be only in very special circumstances if ever.

The Appeal Court was reluctant to find that there was an absolute requirement on the Crown to consult in every case, but felt this could be necessary in areas of importance and it was still the duty of the Crown to at least gather sufficient necessary information on Treaty implications. Consultation was also an obvious way of demonstrating good faith which was an accepted Treaty principle. The court also accepted the importance of honouring the Treaty and described the Treaty as creating ‘responsibilities analogous to fiduciary duties’.

The Privy Council has also recently found that foremost among the principles of the Treaty are the obligations which the Crown undertook of protecting and preserving Maori property, in return for being recognised as the legitimate government of the whole nation by Maori. The obligations are not absolute and unqualified, but rely on reasonableness, mutual cooperation, and trust. It was also stated that if a taonga was in ‘a vulnerable state’ (in that case the Maori language) then the Crown may well be required ‘to take especially vigorous action for its protection’. It concluded that ‘any previous default of the Crown could, far from reducing, increase the Crown’s responsibility’.<sup>24</sup>

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24. *The New Zealand Maori Council v Attorney-General* unreported, 13 December 1993, Privy Council PC14/93, p 5



## CHAPTER 5

# EARLY CROWN POLICY

The almost 20 years from 1840 until the late 1850s are notable in public works terms for the almost complete lack of legislation regarding compulsory public works land takings. This is especially true of Maori land, which was protected from such compulsory provisions at the insistence of the British Colonial Office. Instead, it was Crown policy for most of this time to acquire Maori land by a process of purchase and negotiation, and to make provision for public purposes well ahead of the needs of settlement. Public works legislation for this time reflects this policy.

It was only towards the end of the 1850s, as public works improvements began to require some compulsory land takings, that English law was relied on and incorporated into legislation authorising specific land takings. However, at this time these were generally limited to areas within European settlements, or where Maori land had already been sold. Crown policy, even for Crown-granted Maori land, was still generally that of purchase, negotiation, consultation, and the avoidance of confrontation. This undoubtedly led Maori to believe that the Crown did have some commitment to honouring Treaty guarantees. Although the Crown followed this policy for much more pragmatic reasons, the experience of these years also showed that it was possible to make provision for public works while following such a policy.

The definition of Maori or 'Native' land at this time needs to be treated with care. Maori land was increasingly defined by settlers and the British Crown as customary land. Maori land held by title derived from the Crown was, however, theoretically at least, subject to all the normal obligations and requirements imposed on all landowners. The Constitution Act 1852 confirmed this distinction. This distinction in the treatment of Maori land did not appear to make much real difference in early years, when governments could not afford to provoke Maori, and was probably not well appreciated by Maori either, but it did become increasingly important as governments were able to exert more power.

It was clearly Crown policy to encourage Maori to hold land by Crown grant and, if this was successful, customary land and its protections would gradually disappear. Maori were encouraged to believe, for example, that Crown-derived title was superior, and had more advantages, and in fact it was effectively given more legal protection than customary title. This policy was also promoted in other ways, such as the use of purchase arrangements where whole blocks of land were commonly purchased and then reserves were made of those areas the Maori owners wanted to keep. The reserves were then held by Crown grant. It is not at all clear that Maori were made aware of the real implications of moving to title by Crown

grant, especially the assumed obligations of landowners such as the compulsory acquisition of land for public purposes.

Although the Crown encouraged Maori to believe that the process of consultation and negotiation adopted in these years was evidence of Crown commitment to Treaty of Waitangi guarantees, in fact evidence shows that it was largely dictated by circumstances, especially when after some early violent incidents, the superior strength of Maori at the time had to be acknowledged.

The experiences of the first few years after 1840 decided the Crown on a policy of purchasing Maori land ahead of settlement. It is clear that initially the majority of settlers and Crown officials intended to apply currently fashionable theories of colonial settlement to New Zealand. These assumed the existence of large areas of ‘waste’ land that were neither needed nor wanted by Maori, and that could easily be made available for extensive European settlement. In particular, theories such as those of the Swiss jurist Vattel, and New Zealand Company investor of Rugby School, Dr Arnold, appear to have been favoured. These held that indigenous people such as Maori were only entitled to land they actually used and occupied on a permanent basis. This was in spite of the fact that missionaries and officials with local knowledge, such as Busby, had made it clear even before the Treaty was signed that ‘every acre of land in this country’ was claimed by some tribe.<sup>1</sup> It was also commonly assumed that extensive areas of ‘surplus’ land from land claimed to have been already purchased could be added to Crown land at the cession of sovereignty. This too could be used for settlement purposes.

In fact the difference between European theories and Maori practice led to what Adams has described as a ‘prolonged and vehement debate’ in both Britain and New Zealand about the proper interpretation of the second article of the Treaty of Waitangi.<sup>2</sup> For the first few years the British Colonial office was convinced that the Treaty guarantee actually referred to little more than ‘their potato patches, pa, and sacred places’.<sup>3</sup> Maori, however, believed that the Treaty offered a permanent and secure safeguard for their land as long as they wished to retain it. In Maori society ‘land’ also included all areas used for cultivation and hunting, and the collecting and gathering of resources and produce, as well as associated waterways and fisheries. Land, whether tamed or wild, provided the essentials of life and European distinctions between cultivated and ‘waste’ land were, according to Adams, ‘essentially inappropriate’.<sup>4</sup> Land also provided more than material subsistence. It was vital to Maori personal and community identity and social stability.

At first colonial officials acted on their beliefs and assumptions. It was assumed, for example, that provision for public purposes could be made out of ‘waste’ lands before they were re-sold for settlement. Lord Normanby’s instructions to Hobson of August 1839, assumed the existence of extensive ‘waste’ lands of no use to Maori, apart from those required for their safety, comfort, or subsistence. These lands could be ceded to the Crown in dealings which were to be conducted on principles of

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1. Busby in 1835, quoted in Claudia Orange, *The Treaty of Waitangi*, Allen & Unwin, 1990, p 38
  2. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847*, Auckland University Press, 1977, p 176
  3. Ibid, p 176
  4. Ibid, p 177

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‘sincerity, justice, and good faith’ but at the same time at an ‘exceedingly small proportion to the price for which the same lands will be re-sold by the Government to the settlers’. Some of the revenue from the resale of wastelands would then be used for surveys and for improvement, ‘by roads and otherwise’ of the unsold territory before it was resold for settlement.<sup>5</sup>

Lord Russell’s further instructions to Hobson of December 1840 confirmed that once the demesne lands of the Crown had been determined in New Zealand, they were to be prepared for sale and settlement by being surveyed as accurately as possible and by having reserves set aside ‘for the use of the public at large . . . which are likely to be required for purposes of public health, utility, convenience or enjoyment’.

Lord Russell also gave instructions on the application of English law to New Zealand. Legislative provisions were to proceed upon the ‘well established principle of law, that Her Majesty’s subjects, settled in a country acquired as New Zealand has been acquired, carry with them as their birthright so much of the law of England as is applicable to their altered circumstances’. This was to be qualified by the establishment of a legislature in New Zealand nominated by the Crown and a position of protector of aborigines ‘to watch over the execution of the laws . . . concerned with the rights and interests of the natives.’ The traditional customs and usages of natives were to be tolerated as long as they were not entirely in conflict with the principles of humanity. The law of England should not automatically be imposed as this would subject them ‘to much distress, and many unprofitable hardships’. One major method proposed of ‘civilizing’ Maori was to have them employed on public works, ‘such, for example, as opening roads’ under the special knowledge and skill of officers expressly assigned for the purpose.

The colony was also to be established on the principles of the ‘utmost possible parsimony’. This meant projects would have to be prioritised in order to conserve expenditure. For example, provision for the prevention and punishment of crime was to take precedence over improvements in internal communications. The establishment of municipal and district governments was also to be promoted to conduct local affairs such as ‘drainages, bye-roads, police, the erecting and repair of local prisons, court houses, and the like.’ Along with other advantages, this was also calculated to result in an ‘efficient and frugal expenditure of public money’. It was of the utmost importance to have the ‘innumerable petty details’ of local government removed from the responsibility of the Governor, along with relieving the public treasury from the ‘wasteful expenditure in which it must be involved, so long as it is burdened with the double charge of collecting local assessments, and of effecting local works’.<sup>6</sup>

In New South Wales, Governor Gipps passed the New Zealand Land Act 1840 that provided for investigations into pre-1840 New Zealand land purchase claims. This, and a later New Zealand Act, the Land Claims Act 1841 that supplanted it, both assumed there was wasteland in New Zealand that would automatically become Crown land.<sup>7</sup> Sections 5 and 6 of the New South Wales Act limited the

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5. Normanby’s instructions to Hobson, 14 August 1839, BPP, vol 3, pp 85–90

6. Dispatch from Lord Russell to Governor Hobson, 9 December 1840, BPP, vol 3, pp 146–153

amount of land in any one claim and excluded any grant from including any headland, promontory, bay, or island that might be required for defence or for the site of a town, or for any other purpose of public utility, or any land on the sea shore within 100 feet of high water mark.

Section 2 of the later 1841 Act also assumed that all unappropriated lands subject to the ‘rightful and necessary occupation and use thereof by the aboriginal inhabitants’ were Crown lands, and section 7 exempted from claims land that was likely to be required for public purposes. It was presumably as a result of these measures that certain headlands around Wellington were made reserves for public purposes, before Commissioner Spain had even arrived in New Zealand to investigate alleged purchases from Maori.<sup>8</sup>

The 1844 British Select Committee findings also supported the theory of wasteland where Maori only had rights to land in their actual use and possession in the sense of permanent cultivations. The 1846 Royal Instructions and the New Zealand Government Act 1846 all assumed the existence of ‘waste’ lands available for settlement and that Maori claims could be limited to areas in actual use and occupation.

Lord Russell’s requirement that British law was not to be automatically imposed but was to take account of altered circumstances and the interests of Maori, was obviously relevant to compulsory provisions, such as those concerning compulsory land takings for public purposes. However, it seems that initially at least, settlers and officials felt this was an obligation that could be imposed. For example, in 1841, Governor Hobson became aware of the dubious nature of the New Zealand Company purchase in Wellington and assured local Maori that the Crown would support them against attempts by the company to enforce its alleged purchases by compulsion. However, he noted that Porirua Maori were interrupting the ‘construction of a road through the disputed lands, and obstructing the communication between Wellington and Wanganui, by tapuing a river over which it was necessary to pass’. He informed the principal chief that ‘the right of constructing roads through the colony belonged to the Queen’. While he supported the natives in their just rights, he would as firmly maintain those of Her Majesty and ‘I trusted I should hear no more of such resistance to measures which were intended alike for the benefit of the native and European population’. According to Hobson, the chief ‘received this hint with perfect good feeling, and promised that in future no interruption should be offered’.<sup>9</sup> It was soon realised by the Colonial Office and its officials in New Zealand that the implementation of wasteland theories could only be enforced against Maori wishes by the use of significant force. Financial considerations, as noted in Russell’s instructions, meant that in the first decades of settlement sufficient force was not available in New Zealand. The Treaty was in fact signed at a time when Britain was reluctant to commit substantial financial support

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7. New Zealand Land Bill 1840, NSW 4 Vic no 7, BPP, vol 3, pp 175–177, and Land Claims Act (No 1) 1841, 4 V, no 2

8. Notice of portions of land in Port Nicholson reserved by the Crown for public purposes, including town belt; Points Jerningham, Halswell, and Waddell; Pencarrow Head; and Baring Head, *New Zealand Gazette*, 27 October 1841, no 15, p 94

9. Dispatch from Hobson to Secretary of State, 13 November 1841, BPP, vol 3, pp 520–521

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to a new colony. The first Governor was given only a small number of officials and a tiny military force. With missionary persuasion it was clearly hoped that Maori adherence to the Treaty would enable a quiet and inexpensive assumption of sovereignty and it was soon realised that without a substantial military force, a significant degree of Maori cooperation was required in obtaining sufficient land for settlers.<sup>10</sup> As a result the idea of imposing compulsory taking provisions was abandoned, in early years at least.

The superior position of Maori became evident when, within a few years, there were a number of violent incidents involving Maori and settlers – particularly around the more aggressive New Zealand Company settlements. These occurred, for example, at the Wairau in 1843 and the Hutt and Porirua in 1846, where settlers attempted to take land by force of possession; as well as the sacking of Korarareka in the north, inflamed by the publication of the findings of the 1844 committee report.

When Governor Grey first arrived in New Zealand he also began by resorting to force to quell outbreaks of violence. In the Wellington area in 1847 for example, he used force to secure, as he saw it, the survival of the Wellington settlements. In a foretaste of what was to happen much later, he declared martial law and embarked on a pacification programme of the Hutt district that drove many chiefs into opposition. Chiefs were seized and held without trial, five Maori were transported to Tasmania after a military court martial, and a Wanganui chief was hung, more to set an example than because he was believed to be personally guilty. According to Ward, while Grey's acts vastly increased his popularity with the settlers, they were widely regarded and remembered by North Island tribes as acts of oppression and treachery.<sup>11</sup> Grey also sought to provide increased protection at this time by extending roads to link up the settlements around Wellington, the Hutt, and Porirua districts. These early public works were clearly meant to have a military purpose as well as to provide general public benefit. Grey was well aware however that the defeat of 'rebel' Maori relied on the strength and support of 'friendly' tribes, as did support for road building, including the actual construction work.

This acknowledgement of Maori military strength led to a Colonial Office acceptance by the mid-1840s of what many officials and certainly Maori had understood at the signing of the Treaty. Maori did own all the land in New Zealand and it would have to be purchased before it was made available for European settlement. This in turn led to a renewed emphasis on a policy of extensive land purchase from cooperating Maori, rather than enforced acquisition. Although in many respects Grey pursued an aggressively assimilationist policy, after this time he stopped just short of provoking outright violent confrontation. In matters that would have provoked confrontation, such as compulsory measures affecting Maori land, a gradualist approach to the imposition of Crown authority and English law was confirmed. This has been described as letting 'the authority of the Crown grow

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10. For example, I Wards, *The Shadow of the Land: A Study of British Policy and Racial Conflict in New Zealand, 1832–1852*, Wellington, Department of Internal Affairs: Historical Publications Branch, 1968, ch 2

11. A Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, Oxford University Press, 1973, p 73; also Wards, ch 7

quietly in the land'.<sup>12</sup> Instead the Crown relied mainly on 'managing' and gaining the cooperation of iwi and of reassuring them of its commitment to Treaty guarantees and protections.<sup>13</sup>

In addition, the Colonial Office kept the responsibility for Maori affairs out of the hands of settlers during this time. Settler racism, particularly in New Zealand Company settlements, seemed to make them oblivious to the precariousness of their position. The attitude of Wellington settlers alarmed Richmond, the Superintendent of the Southern Division, for example. In a letter to FitzRoy in 1844 he declared:

the people are downright mad; the disastrous affair of the Wairau has proved no lesson; on the contrary they would not hesitate to risk a repetition of it . . . the constant cry since the natives would not leave the district the moment they were told has been, 'Make a demonstration', to which I invariably replied, 'What! with 50 against upwards of 300 well armed excited men, in a thickly-wooded country!'<sup>14</sup>

From the mid-1840s therefore, Governor Grey embarked on a policy of large-scale land purchase from Maori ahead of the needs of settlement, and he was assisted in this by a substantial increase in financial aid from the Colonial Office. This policy and assurances that the Crown was committed to upholding the Treaty were significant factors in allowing some 20 years of reasonably safe existence for 'a largely unarmed European minority amidst a well-armed Maori majority'.<sup>15</sup> Sale methods in the early years also tended to follow processes that were more acceptable to Maori with public negotiations and agreements and large numbers of signatures obtained for sale documents.

Reference to the Treaty also proved useful in carrying out this purchase policy, as the Crown relied on the Treaty right of pre-emption in making purchases. Ironically the more common meaning of pre-emption in English law can be found in early public works legislation. The Lands Clauses Consolidation Act 1845 required promoters of a work who found they had taken more land than required, to first offer it back to the original owners who had a pre-emptive first right of buying it before it could be sold to anyone else. In New Zealand pre-emption came to mean a Crown monopoly in purchasing Maori land. In theory this allowed the Crown some control over settlement, but mostly provided for extensive purchasing at cheap prices to provide sufficient land for settler needs.

Grey summarised his policy in an 1848 despatch to the Colonial Office. He wrote that he had found that the native population would resist enforcement of the broad principles maintained by Dr Arnold, but would cheerfully recognise the Crown's right of pre-emption. According to Grey, the natives would in nearly all cases sell lands that they did not actually require for subsistence for a merely nominal consideration. The only instances where natives resisted occupation or demanded

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12. Maori Land Court Judge N Smith, quoted in D V Williams, 'The Use of Law in the Process of Colonisation: An Historical and Comparative Study with particular reference to Tanzania (mainland) and New Zealand', PhD thesis, University of Dar es Salaam, 1983, p 173

13. For example, see Orange, *The Treaty of Waitangi*, Allen and Unwin, 1990 (reprint), pp 93–96, 131–132

14. Extract from letter from Superintendent of Southern Division to Fitzroy, 24 December 1844, BPP, vol 5, p 169

15. Orange, p 3

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‘exorbitant’ prices were on lands not validly purchased before a sizable European population settled on them. Then they became aware of the value that had been given to their lands and ‘actuated by motives of self interest’ refused to part with them for a nominal consideration. The obvious means of avoiding this difficulty was for the Government to keep its land purchases sufficiently in advance of the spread of the European population:

... I have taken care ... to keep the land purchases of the Government so far in advance of the wants of the European settlers as to be able to purchase the lands required by the Government for a trifling consideration.

Grey went on to state that he was making sure that Maori were aware that the sums the Government made from reselling the land was being put to bringing in more Europeans with increased opportunities for trade and in the execution of public works which gave employment to Maori and increased value to their property.<sup>16</sup>

By 1853, the Government had purchased some 32 million acres of land.<sup>17</sup> This was almost half the land area of New Zealand and at this time it enabled the Government to provide sufficient land to meet the public works needs of settlers without the need for compulsory land-taking legislation. Public works were constructed and improved during this time largely on land set aside from purchases and from Crown land, even if the purchases and the definition of Crown land were already the subject of dispute with Maori.

With varying degrees of success, settlers also tried to learn from old world mistakes and attempted to make adequate provision for enough land for public purposes when settlements were first planned. As already referred to, the Land Claims Commissioners were barred from granting claims to land such as headlands that might be required for public purposes. This land was assumed to be surplus Crown land. Provision was also made within purchased blocks for roads, public buildings, markets, cemeteries, and other public needs.<sup>18</sup>

The New Zealand Company also used generous provision for public purposes as a selling point in its plans of settlement, although this did not always translate into reality. For example, as early as 1841, the Surveyor General, Felton Mathew, was sharply critical of the way the New Zealand Company had translated planned provision for public purposes into reality in Wellington. He noted that the company had simply set aside portions of land that were not otherwise suitable for shareholders, and as a result they were insufficient in number, some were very limited in extent, and many were ill-adapted to the purposes for which they would probably be required. The site for the customhouse for example was occupied by a native pa, ‘which the Natives manifest the most decided determination to retain in their own hands’.<sup>19</sup>

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16. Dispatch from Governor Grey to Earl Grey, 15 May 1848, BPP, vol 6, pp 22–26

17. W J Gardner, ‘A Colonial Economy’, in W H Oliver and B R Williams (eds), *The Oxford History of New Zealand*, Oxford and Wellington, Clarendon Press/Oxford University Press, 1981, p 61

18. For example, see map of town of Auckland showing reserves for public purposes in 1841 in BPP, vol 3, facing p 484.

The New Zealand Company, and many other new settlements, were fortunate in that vacant unselected land often remained that could be taken over for public purposes. However, some of the company's activities in Wellington, such as the use of promised reserves to make up for insufficient public land, were to become the source of many long-standing grievances. Many of these involved land used for public purposes, but these again belong more to purchase and reserves issues than to legislative takings and have therefore been excluded from this report.

Grey and his chief of land purchase operations, Donald McLean, promoted the benefits that would come from community amenities such as roads, schools, and hospitals when trying to convince Maori to sell land and in setting a price for land sales. The Crown also tried to ensure that provisions for future road lines and other public purposes were made out of purchased blocks before onselling to settlers. In dealing with Maori during this time, in line with its general policy, the Crown appears to have tempered its 'right' with a policy of negotiating with Maori owners for future roading provision as part of the purchase agreement. This included negotiating for the future laying of road lines through Crown-granted reserves to be made out of purchases if necessary. David Alexander has quoted instructions from Eyre to Domett of 1849 for example, concerning McLean's purchase negotiations. McLean was to remember the importance of gaining Maori agreement to the Government having the power to carry any public roads through reserves whenever it might be found necessary to do so for the good of the community.<sup>20</sup> This too was explained as a future benefit for Maori.

Alexander has also given examples of this type of purchase agreement. For example, the Ahuriri purchase deed of 1851 contained a statement to the effect that the owners agreed that the Queen's line of road could be laid off and constructed through their reserves at such time as the Governor of New Zealand saw fit to commence such roads.<sup>21</sup> The effect of this type of agreement was that Maori cooperation and agreement was being sought before the Queen's 'right' of highway was put into effect.

The most obvious source of potential dispute at this time was the land between settlements required for overland communication but still in Maori ownership. However, even this was for the most part a minor problem in early years. The most convenient form of communication between settlements for many years was still by sea. Inland routes remained little more than the original Maori tracks and for the most part those intrepid enough to follow them were allowed to pass. At times Maori owners extracted large tolls for crossing tracks or using Maori-owned ferries, but although this form of entrepreneurship infuriated settlers it did provide the only means of inland travel for years. Some roads between settlements were constructed on Maori land with Maori support – for example some of the route between the New Zealand Company settlements of Wellington, Whanganui, and New Plymouth. Other roads were formed on land claimed to have already been purchased, for

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19. Report of Surveyor General Felton Mathew, 20 October 1841, BPP, vol 3, pp 533–537

20. Lieutenant Governor Eyre to A Domett, 5 March 1849, in M S papers 32, folder 3, ATL; quoted in D Alexander, 'Preliminary Research Report on Public Works Acts and the Treaty of Waitangi', report commissioned by the Treaty of Waitangi Policy Unit, 1994

21. Turton, *Deeds*, vol 2, p 491, quoted in D Alexander



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example in the South Island and between the early settlements in the Wellington, Porirua, and Hutt districts.

Some land was also gifted by Maori or made available for a public work even if ownership stayed with the iwi. Maori were keen to pursue participation in trade and economic growth and many works of the period such as harbour improvements, lighthouses, and roading had obvious benefits for economic growth. Maori were keen to negotiate over the provision of necessary public works when the benefits were obvious. It is not always clear what Maori understandings of purchases meant, and Maori also gifted land with expectations that were often misunderstood or ignored by settlers. As a result, in these early years the actual understandings of ownership of the land under a public work often seem confused.

In some cases this lack of clarity seems deliberate. The Crown's quiet approach to imposing British law seems to have assisted in this. Sometimes deliberately not pursuing with Maori the question of landownership under a public work was an advantage. At the time this seemed to suit all parties and no doubt helped many public works to be built. It was perfectly possible in Maori terms to have a public work built and still retain ownership of the land. The idea of allowing use rights for a public work while retaining underlying ownership fitted well into traditional ideas of tenure and it was often not until much later that disputes over actual ownership of the land would arise – often when the road or public work itself was no longer required. In settler terms, the ownership of the land technically went with the work, but at this time it seems as though there was little to be gained and possibly a lot to lose by pressing this point. This was especially true when the economic or social advantages of the work were obvious and insistence on ownership might only have provoked confrontation. Settlers referred to the 'Queen's highway' but for the most part, after the violent conflicts of the mid-1840s, Crown officials were not willing to push the matter and risk armed confrontation.

When matters were not pushed, different interpretations appear to have coexisted. In the matter of gifting land, for example, Maori were clearly willing to gift land in many circumstances, particularly where there was obvious benefit, but they also had expectations that land would be returned if it was no longer needed for that work. Settlers seem to have ignored or misunderstood this, especially when it often did not become an issue until many years later, when settlers were dominant. Many settlers on the other hand appeared supremely confident in the early years that Maori were automatically gifting land for works such as roads in return for the great advantages European civilisation would inevitably bring.

Although there were many instances where issues were simply allowed to lie, communications on the need for public works and their likely benefits remained important. Maori had to be persuaded of the benefit of works before supporting them and some that were obviously not in their interests were regarded with suspicion and occasionally obstructed. For example, the military roads in the Wellington district in the 1840s were regarded with suspicion by some Maori and some were obstructed to draw attention to problems with company purchases and to try and hurry the process of investigation.

However, for the most part Maori appear to have welcomed public works for the new opportunities they brought. There is abundant evidence that in the early years

at least, Maori participated successfully in the new economy and that Maori society was capable of change to new conditions as long as there was some ability to control that change. For some time Maori enterprise was crucial in the economy and the spending of the large amounts of cash earned from public works projects, such as roads, had a significant impact on the whole economy. Maori were also eager to have access to markets and to obtain cash from building roads and other works. The opportunity for work, the promises of public amenities, and access to new markets were undoubtedly a consideration when land was purchased for public purposes. In European terms, employment on projects such as road construction and other public works acted as part of the ‘civilizing’ influence on Maori. The influence of disciplined labour was seen to be particularly valuable. For example, Governor Grey informed the Colonial Office in 1849 that he was following a policy of employing Maori on public works projects and that the cash earned helped to maintain peace. He also believed that employment on public works had a similar effect to industrial schools in teaching natives sober and thrifty habits.<sup>22</sup>

There is also evidence that Maori quickly picked up, adopted, and modified to their needs, many imported public works concepts, such as improved village planning. By the late 1840s Grey was reporting on the eagerness of Maori to lay out modern villages, for example at Otaki.<sup>23</sup>

In summary, the issue of compulsorily taking land for public works purposes remained a background issue for most of this time. The Crown policy of purchasing ahead of settlement and making public provisions from Crown land meant that for most of this time land for public purposes did not need to be taken from anyone, Maori or Pakeha. When compulsory takings did start in the late 1850s, they were generally to improve amenities within settlements or on land such as in the South Island, that had already been purchased from Maori.

In spite of this, the origins of many long-term grievances can be traced to this time, such as the Crown assumption of ownership and control of harbours and waterways, and the dubious methods and assumptions involved in many land purchases. Grey seemed unable to see that his promises to Maori that the value of their land would increase under his policies was in fundamental conflict with his belief that Maori who wanted something closer to market value were ‘actuated by motives of self interest’, and deserving of condemnation. Public amenities were often built on land that was later subject to dispute and many promises concerning amenities such as schools and hospitals as part of purchase agreements never materialised. However, these grievances belong to issues such as purchases and reserves rather than legislative takings for public purposes.

Public works-related legislation of the years from 1840 to the late 1850s reflects Crown policy and the circumstances of the time. Early legislation was concerned with works at a local level and paying for them rather than taking land for them. In accordance with Crown policy, Maori land was generally protected from compulsory provisions concerning land and in the early years compulsory

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22. For example, see dispatch from Grey to Earl Grey, 20 April 1849, BPP, vol 6, pp 134–136 and dispatch from Grey to Earl Grey, 9 July 1849, BPP, vol 6, pp 190–197

23. For example, see dispatch of 25 June 1849, Grey to Earl Grey, BPP, vol 6, pp 197–201

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provisions normally meant rating. It was not until late in the 1850s that compulsory provisions were enacted relying on English legal authority and these also were largely not concerned with Maori land. The definition of Maori land was, however, being restricted to customary Maori land, and this was a type of landholding officials confidently expected would rapidly die out.

As Lord Russell advised, Crown officials were quick to encourage local responsibility for the construction and especially the payment of works programmes in an effort to save money. Early public works-related legislation was therefore not so much intended to provide authority to take land as to provide authority to levy rates to pay for the cost of construction, maintenance, and repair of works on land already acquired and settled.

Early attempts to provide for municipal corporations through legislation were not particularly successful. The Municipal Corporation Ordinance 1842 was disallowed and a similar one in 1844 was never implemented. The establishment of municipal corporations was then provided for in the Constitution Act 1852. The early Acts did however follow the policy of specifically excluding native and Crown reserves from land vested in the proposed boroughs and they did not provide authority for land taking. The concerns were local – construction, repair, and maintenance of roads, bridges, waterworks, sewers, and similar; cleaning, lighting, paving, and the establishment of markets. Where a borough extended to a harbour there were also concerns with docks, wharves, quays, buoys, landing places, beacons, and lighthouses.

The first Public Works Act, the Public Roads and Works Ordinance 1845, was also intended to encourage local works. According to Fitzroy, this was intended to give each settlement the machinery for carrying out public works of local utility without being dependent on the Government for the execution and means of defraying the expense of such works.<sup>24</sup> This ordinance was again more concerned with the power to levy rates rather than take land, and it reflected the public works concerns within settlements. Section 10 provided for boards of highway commissioners to be elected by ratepayers, with the power to make and repair roads, streets, causeways, and bridges; to excavate, construct, and maintain waterworks, conduits, sewers, and the like, and to provide for the setting up of toll gates or bars, the establishment and construction of markets, landing places, and other works of public utility. Under section 27, the boards were able to levy rates to defray expenses but Crown and native land were specifically excluded from rating.

The underlying assumption of this Act was that the land had already been acquired from Maori and the intention was to provide a means to pay for works. It was also meant to apply to already existing settlements. The preamble states that:

the owners and occupiers of land in certain districts should be empowered to make and levy rates upon land for the maintenance and repair of highways and other public works, and that the same should be under the direction and control of a certain number of such owners and occupiers to be elected as a Board of Commissioners for that purpose, with necessary powers . . .

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24. Dispatch from Fitzroy to Stanley, 18 July 1845, BPP, vol 5, p 226

In fact the electoral franchise required voters to own freehold land (s 1) and as such appears to have largely excluded Maori from the process.

It seems that the Colonial Office of the time did envisage some limited Maori inclusion and integration into local government.<sup>25</sup> However, it appears this was never adequately translated into practice and the unfortunate result, never properly corrected by the Crown, was a trend beginning in these early years, of marginalising Maori from local body activity, where for most of the time the majority of works programmes originated and where it seems likely that most public land takings have occurred.

Similar Acts were passed in 1847 and 1849. The Footpath Ordinance 1847, for example, was concerned with preventing obstructions and damage to public footpaths and the Town Roads Ordinance and New Munster Country Roads Ordinance, both of 1849, concerned powers of levying tolls and rates and keeping roads under repair. They also did not allow for takings of land and they specifically excluded native lands or reserves and Crown land.

The Constitution Act 1852 provided for the establishment in New Zealand of elected municipal corporations, provincial governments, and a General Assembly. The qualifications for voters to the General Assembly and provincial councils included a freehold property interest. Provision was made under section 71 for the maintenance of Maori laws, customs, and usages, as long as they were not repugnant to ‘the general principles of humanity’, and for separate districts for Maori where such traditional customs, laws, and usages could be observed, although these were never established. Section 19 stated that provincial councils were not to have the power to make legislation concerning Crown land or unextinguished Maori land, and could not inflict any disability on Maori to which persons of European birth would not also be subjected. The General Assembly had the right to make laws subject to the scrutiny and possible veto of the Governor and the Colonial Office under sections 56 to 59. The Act confirmed the Colonial Office policy of retaining control of native affairs and of excluding local government from power over customary Maori land. Following this Act, public works provisions continued to be generally enacted at a local provincial level and Maori land generally continued to be exempt in spite of continuing efforts by local settler bodies to gain increased control.

Examples of these types of Acts include the Wellington Province Roads Act 1853, which made provision, under section 19, for the management and building of roads and levying a rate for these purposes but excluded land belonging to an aboriginal inhabitant. Similarly, section 34 of the Taranaki Province Public Works Ordinance 1855 allowed for compensation for ditches and drains in making a public road, but again section 43 stated that land belonging to or occupied by any of the aboriginal inhabitants of the colony as the common property of the tribe or community was excluded from rates.

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25. The proposed corporations were not to include large bodies of natives but those few who were interspersed with Europeans were to have all the privileges and obligations of local laws and regulations. For example, see dispatch from Stanley to Grey, 27 June 1845, BPP, vol. 5, pp 232–235.

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Some provincial legislation appears to have been poorly drafted or assumed powers provincial governments did not have. There are many instances of later validating legislation to correct these problems. The Otago Public Roads Ordinance 1854, for example, allowed roads to be built on Crown lands or on private property with no specific exclusion of Maori land. Although further research may be required for such individual ordinances, it seems from preliminary research that the policy concerning protection of Maori land was still generally followed.

The Bay of Islands Settlement Act 1858 was much more remarkable in allowing the Governor to take by proclamation a site for settlement in the Bay of Islands of up to 250,000 acres and to pay compensation to those who had land claims in the area. The land could be sold for settlement as the Governor decided, with some of the proceeds to go to public works purposes for the settlement. The schedule attached to the Act describes land of about 15,000 acres. It appears this Act was an attempt to deal with some old land claims and may not have involved Maori land without the owners' consent. It is not clear from preliminary research how much, if any, of this Act was implemented. Although it allowed land to be taken and proceeds to be used for public works, it seems to belong to the issue of special settlements rather than public works takings. Further consideration of it has therefore been excluded from this report.

By the late 1850s, provincial governments were beginning to recognise that public amenities within many settlements such as lighting, sewerage systems, and water supplies required improvements and modernisation. In addition some of the larger and wealthier provincial governments, particularly in the South Island, were keen to encourage economic expansion in their areas and began promoting the development of better roading and railways. For the first time land was compulsorily required for these public works and the promoters of the works tended to be the provincial governments themselves.

The provincial governments looked to imperial legislation for guidance on taking land for public purposes. As already seen, Lord Russell had instructed that English law could not be automatically imposed in a colony but was to be applied according to circumstance. Some English legislation had been specifically held to apply in New Zealand by early legislative provision, but by the 1850s doubts had been expressed about what other English legislation could be considered to automatically apply. In 1858 the English Laws Act was passed to overcome these doubts. This Act declared that English laws in force on 14 January 1840 were declared to be in force from that day in New Zealand, as far as they were applicable to the circumstances of the colony. This seemed to confirm that provincial governments could rely on incorporating provisions in English public works legislation into their own taking legislation.

Provincial governments began to follow a pattern of sponsoring special Acts in the General Assembly for specific works incorporating provisions from the Imperial Lands Clauses and Railways Clauses Consolidation Acts of 1845 as necessary. Following the English pattern, these special Acts had schedules attached describing in detail the land to be taken. The Acts had a set time period in which land required had to be taken before the authority lapsed and they included many of

the features of the 1845 consolidations such as a disputes mechanism and procedures for determining compensation. The Acts generally applied within European settlements or to land already purchased from Maori. They do not specifically exclude Maori land, but from their application and the detailed descriptions in the schedules it seems unlikely that even Crown-granted Maori land was included.

Provincial governments either sponsored special legislation through the General Assembly as local Acts or passed their own ordinances. Examples of these types of Acts are the Auckland Improvement Act 1858, the Lyttelton and Christchurch Railway Act 1860, the Auckland Waterworks Act 1860, the Picton Railway Act 1861, the Dun Mountain Railway Act 1861 and the Auckland Provincial Improvement Act 1858.

The Auckland Improvement Act (local) of 1858, for example, was based on the English-style improvement Acts and incorporated provisions of the Imperial Lands Clauses Consolidation Act 1845 with appropriate changes for colonial terminology, such as the Province of Auckland instead of the ‘Promoters of the Undertaking’. The Act allowed the Superintendent of Auckland Province to enter and take possession of certain lands as specified in the attached schedule and upon payment of compensation the lands were to vest in the Superintendent in fee simple and were for the Superintendent and provincial council to dispose of. The schedule to the Act describes the affected allotments and sections in detail. Although more research is required for absolute certainty, it seems unlikely that Maori land was included in this schedule.

The changing attitude to the definition of native land is also reflected in legislation of this early period. Increasingly it is only customary Maori land that is being protected. While this seems to be an important acknowledgement that customary Maori land derived from aboriginal title rather than the Crown, it also had important implications for the application of compulsory provisions for the increasing amount of Maori land held by Crown grant. Early legislation normally extended protection to all Maori land. For example, section 27 of the Public Roads and Works Ordinance 1845 exempted all Crown land and all land belonging to ‘any of the aboriginal inhabitants of the colony’ from rating. The various 1849 roads ordinances also exempted any native lands or reserves from rating. However, the distinction between customary and Crown-granted Maori land was confirmed by the Constitution Act 1852. This excluded Maori lands from provincial authority where ‘the title of the aboriginal Native owners has never been extinguished’. Legislation after this tended to afford protections to customary land only. For example, section 43 of the New Plymouth Public Works Ordinance 1855 exempted aboriginal land from rating that was ‘the common property of a tribe or community . . .’, and section 50 of the later Roads and Bridges Ordinance 1858 excluded land from rating that was owned or occupied by aboriginal natives except where title was derived from the Crown. Section 6 of the Auckland Province Local Improvement Act 1858 also exempted rates from ‘any land in the occupation of any Aboriginal Inhabitants of New Zealand, unless the same is included within a grant from the Crown’.

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Legislative provision for public works purposes from 1840 to the late 1850s was therefore largely concerned with the construction, maintenance, and repair of works within local settler communities and in levying rates to pay for this. Legislative provision for the compulsory taking of land was apparently not even considered necessary at all until late in this period, and again Maori land appears not to have been included, with takings confined to special works often within settler communities or over land already purchased. The earliest trends in public works concerns were also directed at a local level within established settler communities where some form of local control was established. In keeping with Crown policy, Maori land was protected from local settler authority, usually rating, but the price paid was often the exclusion of Maori from the local government process.

The protection offered to Maori land was also being restricted. Rangatiratanga was still protected over customary Maori land but was increasingly qualified in theory, at least by English-style obligations over Crown-granted land in Maori ownership. However, even where Crown-granted Maori land may have been considered subject to such obligations, this seems to have largely not been implemented in practice, particularly if it was likely to cause confrontation. More research may turn up exceptions, but in the main, the Crown policy of negotiation appears to have prevailed. An example is the negotiations over the rights to put future roading through Maori land reserved out of purchases, rather than an attempt to enforce this as a Crown right.

Other legislation of these years gave some indication of Crown attempts to limit rangatiratanga in other ways. This often had a significant impact on public works provisions and from a Maori point of view often involved 'takings'. However, it is not strictly public works legislation and the issues raised really belong to other research papers. For example, the Highways and Watercourses Diversion Act 1858 gave provincial councils the power to divert or stop roads or waterways. The ownership of beds of creeks or waterways was simply assumed to vest in a council. The Public Reserves Act 1854 gave provincial councils management powers over lands that had been assumed to be Crown lands set aside for public purposes. Provincial governments were also given full authority over land reclaimed from the sea. The New Zealand Native Reserves Act 1856 also allowed the appointment of commissioners with full powers of management of reserves, thus taking control out of Maori hands. The interpretation of legislative provisions could also effectively turn gifts of Maori land for particular public purposes into practical confiscations from a Maori point of view. Often gifts of land were made for purposes such as schools, but according to Williams, because of the pre-emption rules and land ordinances it was impossible for Maori to gift the land directly. Instead, the gift was effected by the issuing of a Crown grant in favour of the Bishop or similar, who, under the Education Ordinance of 1847, was held to be the manager of the school. If the land ceased to be used for the purpose gifted, Maori expected it to be returned but instead the Crown grant gave the holder the legal right to dispose of the land without reference to iwi. This was seen as a direct confiscation by Maori but again belongs to an issue such as gifted lands rather than legislative taking for public works.<sup>26</sup>

In summary, for almost 20 years Crown policy regarding legislative takings for public purposes, appeared to give Maori reason to believe that there would be some real accommodation of their rights and concerns. The Crown appeared to be committed to consultation and negotiation, and Maori in return supported public works that were obviously beneficial to everyone, often gifting land as a means of assisting with the work. The experience showed that accommodation over public works requirements was possible but some modifications of the traditions and assumptions brought from England would be required to meet Maori concerns and to protect rangatiratanga guaranteed in the Treaty.

Maori had reason to be concerned about Crown commitment to the Treaty however, and by the late 1850s these concerns had become a major preoccupation. By the late 1850s many Maori had become extremely suspicious of growing settler power, of continued Crown attempts to limit protection of rangatiratanga and of the apparently insatiable desire of settlers for Maori land. Historians such as Adams, Orange, and Ward have shown that, in theory at least, the years from the mid-1840s until about 1852 were a crucial time, when there was some possibility of a general compromise between settler and Maori interests. Largely because of the superior strength of Maori, some concessions were in fact made in the imposition of English law to take account of Maori concerns. Not only were there protections for Maori land, but some modifications were made in the general imposition of English justice. Ward has shown, for example, that early magistrates were often in the position of mediators rather than authoritarian dispensers of British law. They often had to invite chiefs to sit with them to have hearings involving Maori taken seriously. In deference to Maori views they also tended to impose fines rather than imprisonment on Maori offenders. Some legislative concessions were also made, such as the Native Exemption Ordinance and the Unsworn Testimony Ordinance, both of 1844. The Constitution Act 1852 also allowed for separate districts where Maori custom could prevail but this was never implemented.

The most important factor in gaining Maori cooperation in applying English law was likely to be the extent to which Maori leaders were drawn into and given a stake in the new society. Maori showed themselves eager for this, but it was an area in which the Crown significantly failed to act. Ward has shown that instead Maori were denied any real participation in the new order except at a very menial level. Deep-seated notions of racial and cultural superiority, and Crown officials weakening in the face of settler criticism, resulted in the effective exclusion of Maori leadership from participation in state power. The Crown failed to use the experience gained when it had been forced to negotiate and consult with Maori, and firm Crown action required in the face of settler opposition was lacking in both New Zealand and London. By the late 1850s the opportunity to accommodate Maori interests had largely been lost.<sup>27</sup>

Ward has shown, for example, that it was Governor Grey's practice to try to draw Maori into the web of Government control by a variety of devices designed to manage and placate them without open discussion of fundamental questions about

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26. Williams, pp 258–259

27. Ward, pp 85–91



### *Early Crown Policy*

land, law, or political representation. Maori were unaware of the Government's intentions in this area, but were becoming increasingly suspicious. In addition, as land purchase became more difficult, Grey became more openly supportive of increasingly dubious purchases – confirming Maori suspicions that British law was being used in support of acquiring Maori land, often in disregard of the wishes and rights of non-sellers.<sup>28</sup>

The Constitution Act 1852 was passed without special provision for Maori enfranchisement because Grey persuaded the Colonial Office that Maori had or soon would have enough individual property to qualify for the electoral roll and a very large proportion would soon be enfranchised. The result was that Maori were in effect unenfranchised in the early to mid-1860s, when war was begun against them and compulsory land-taking public works provisions began to be enacted over their land.

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28. Ibid, p 86

## CHAPTER 6

# THE ORIGINS OF AUTHORITY FOR PUBLIC WORKS TAKINGS – THE 1860s

By the late 1850s it had become obvious that the Crown's policy of extensive land purchasing ahead of settlement was failing. Maori were becoming very concerned about the loss of their land and very suspicious of Government and settler intentions. Land sales slowed and the last large-scale purchase of the time took place in the late 1850s in the Wairarapa. Maori owners themselves now preferred alternatives, such as renting, that allowed them to derive an income but still retain ownership of the land. This was anathema to the New Zealand Company and to the Crown, both relying on profits to be made by cheap purchasing and resale at a higher price. In the Wairarapa sale the Crown used the Native Land Purchase Ordinance 1846 to force Maori owners to give up renting and part with their land. This Act was designed to protect Maori but was instead used against them. The Government also promised that 5 percent of the sales profit from this block would go to public provision for Maori, including schools, hospitals, and flour mills. However, after the sale these promises went largely unfulfilled.

Voluntary land sales by Maori virtually ceased after this. Land-hungry immigrants were still being encouraged into the colony however, and a move to pastoralism required even more land to be made available. Although by now Maori had sold almost half their land, most had been sold in the South Island. There was still prime land for farming in districts such as Taranaki, Waikato, and the Bay of Plenty, but by now Maori owners were refusing to sell. Increasingly concerned about loss of land and shut out from settler government activities, many Maori turned to the King movement and began to support a general anti-land selling policy. The King movement was designed to help achieve the Treaty goal of equal partnership between the Crown and Maori but it provoked the fury of settlers, who saw a threat to the success of continued colonisation in the anti-land selling 'combinations'.

At the same time settlers were becoming more assertive in their demands for domination of the colony and for more Maori land. By this time settlers had also begun to outnumber Maori. The European population increased sevenfold between 1843 and 1860, from about 11,000 to about 79,000.<sup>1</sup> Settlers in general also found the idea of Maori landlords intolerable. It had always been apparent that settlers preferred not to have to make any sort of accommodation with Maori. Even while

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1. George Asher and David Naulls, *Maori Land*, New Zealand Planning Council, Planning Paper no 29, March 1987, p 14

Crown officials assured Maori of Treaty guarantees, it was clear that settler politicians were concerned with assimilation on their terms rather than accommodation. Even the early ordinances that appeared to offer some concessions to Maori were given little practical effect but clearly revealed the assimilationist hopes of settlers. The Native Exemption Ordinance 1844, for example, expressed the hope that natives would be brought to ‘yield a ready obedience to the laws and customs of England’ and the Native Trust Ordinance 1844 preamble looked for assimilation as speedily as possible to the habits and usages of the European population. As Peter Adams has noted, assimilation was to be on settler terms, and ‘perfect equality’ would be accorded the Maoris ‘when they raised themselves to British standards’.<sup>2</sup>

As Adams has shown, British colonial policy, rather than attempting to accommodate Maori and settler interests, was aimed mainly at subverting land guarantees in the Treaty through the use of Crown pre-emption. The overriding concern was to acquire vast areas of Maori land as cheaply, quickly, and quietly as possible in order to facilitate extensive European colonisation. Adams gives examples of the belief at the time of the Protector of Aborigines and other officials that the Colonial Office was trying to neutralise the Treaty of Waitangi and many Acts of the Colonial Government were directly opposed to the spirit of the Treaty.<sup>3</sup>

One of the protections Maori might have gained from British sovereignty – controlled, limited, and orderly colonisation – was denied to them. Instead, even when land sales slowed right down, colonists were still encouraged to immigrate. At the same time, settlers became more confident of their strength and ability to use force to achieve their ends. Most regarded the full imposition of English law as an essential ingredient in their dominance of the colony, and justified it by the ‘civilising’ influence it would invariably have on Maori. The Treaty, which was originally supposed to protect Maori, was increasingly used by settlers, when it was referred to, as a justification for imposing English law on Maori. In settler eyes the ‘rights and privileges’ of British citizens bestowed on Maori by the Treaty had invariably become duties and obligations.

With the Constitution Act 1852, the settler Government was given increasing control over colonial affairs, and debate over the practical implementation of the Treaty moved to the colonial Parliament. While the British Colonial Office still retained some management of native affairs, effective control rapidly diminished in the face of settler pressure, until by the early 1860s the Colonial Office abandoned attempts to manage native affairs altogether.

The full imposition of English law obviously included compulsory provisions such as public works takings. As well as being essential to the civilisation of Maori however, it is clear that public works projects would also become an important part of war policy. Just as the British Government previously had found the growth of transport helped reduce civil unrest by allowing the speedy provision of law enforcement throughout that country,<sup>4</sup> the provision of public works such as roads

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2. Peter Adams, *Fatal Necessity: British Intervention in New Zealand, 1830–1847*, Auckland University Press, pp 226–227

3. Ibid, pp 238–245

4. Harold Perkin, *The Age of the Railway*, David & Charles, 1970, p 118

and telegraph lines throughout the North Island were an essential part of successful warfare and the ‘pacification’ of troublesome districts.

By the 1860s, it was clear that Grey and most settler politicians were in no mood for diplomacy and were determined to engage in warfare if it was required to ensure the success of colonisation and to crush Maori resistance to it. A disputed purchase sparked war in Taranaki in 1860, and by 1863 Government troops had invaded the Waikato. The construction of works aimed to facilitate war, such as military roads, were clearly an important part of war policy.

In 1860 settler politicians were still not free to determine native policy without the consent of the Colonial Office although by a variety of means, including their power over finances, they were asserting increasing power in this area. As late as 1861 the Government refused a request to introduce measures giving it the power to make roads through Maori land. The request was put as though it was a benefit to Maori, as Maori would be paid for the land and there were districts where they were anxious for roads through their land. In addition, however, ‘the importance of such works in a military point of view could not be overestimated’. The Government agreed about the importance of roads but ‘under present circumstances’ it was not considering any general measure, ‘nor did they believe a special measure necessary’.<sup>5</sup>

Military roads continued to be an important part of war policy, however. Governor Grey decided to build a military road from Auckland to the Waikato, ostensibly to protect Auckland from attack, and by 1862 he was reporting satisfactory progress on its construction.<sup>6</sup> In practice, however, the road was used to enable troops to invade the Waikato in 1863.

By this time settler politicians clearly felt they had the right to take land for works over Crown-granted Maori land. This was apparently based on the view that this land, as it was held by Crown grant, was therefore subject to British law, including public works takings. Wartime needs were now a catalyst in deciding politicians to reopen the question of whether the Crown had a legal right to take customary Maori land for roading. This was a direct result of the situation in Taranaki, where Te Atiawa were asserting their rights of landownership and refusing Europeans access over their land. The land in question lay between two European-owned blocks of land and had been used as a road between them. Te Atiawa refused access in an attempt to force the Government to release the findings of an investigation into the legality of the purchase of the Waitara block. Disputes over this purchase had already led to war in Taranaki and the road in question was part of the much longer road between Wellington, Wanganui, and New Plymouth. Parts of this road were on Maori-owned land and had been used with Maori consent since the 1840s. In Taranaki some soldiers attempting to use the Maori-owned part of the road, in defiance of Maori wishes, had also been killed.

Provoked by this, settler politicians sought a legal opinion from the Attorney-General, Henry Sewell, and sent this to the Colonial Office for further advice.

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5. 12 June 1861, NZPD, 1861, p 26

6. For example, dispatch from Grey to Newcastle, 20 May 1862, concerning the progress of the military road, BPP, vol 13, p 138

Sewell was asked what legal right the Government had to make roads through lands over which native title had not been extinguished, whether the Government had the complete legal right to take possession of land required for the road and what legal right the Government had to take similar land for permanent military positions, or other purposes of defence.

Sewell's opinion was that the question could not be answered by reference to ordinary rules of law. It was clear that customary Maori land could not legally be treated in the same way as wastelands of the Crown or other private lands for public purposes. Under the Constitution Act 1852, the General Assembly had no power over Maori land until it had been ceded to the Crown. However, Sewell believed that the right of passage through a country and the right of constructing works incidental to this, such as roads and bridges, were 'essential condition[s]' of sovereignty. Regardless of whether it was considered that Maori only had occupation rights to what were all properly Crown lands, or whether it was believed that Maori had some form of recognised private property rights, the Crown was sovereign. As a result of this it had rights of making roads through lands as part of its function of sovereignty. The Government intended to build roads on uncultivated land, but in the unlikely event there was damage to private property, it would be a matter for compensation. Sewell felt the same principle applied to land required for military or defence purposes.<sup>7</sup>

Assistant Law Officer Francis Fenton provided a further opinion because he felt Sewell was wrong at law. Fenton described the previous history of Crown policy towards customary Maori land. He described how originally it had been assumed that all those lands except those in actual use by Maori could be considered demesne or wastelands of the Crown. This view was reflected in the 1846 royal instructions for example; but it was objected to by the natives, and was never carried into practice, 'and in fact could not have been, in a peaceful manner'. A gradual change took place between the years 1846 and 1851, and the Constitution Act 1852 clearly provided for the exclusion of land in which the native interest was unextinguished from the category of 'waste' lands. Thus aboriginal land was admitted to be their distinct and admitted property, but inalienable to anyone other than the Crown. The Treaty guaranteed Maori territorial rights and admitted them as having equal rights and privileges as British subjects. These rights and privileges were summarised by Blackstone as rights of personal security, personal liberty, and private property. They could only be interfered with by sovereign power and as the Crown had limited its inherent power most importantly by the Constitution Act 1852, then it required parliamentary action to create a power of compulsory taking:

The principal of English law is clear, that a subject may not be disseized of his land . . . except by operation of the law, or under the authority of an Act of Parliament specially made.

Fenton found that the rule was clear, authority to compulsorily take land required for a public work had to emanate from the supreme legislature. The exercise of

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7. Opinion of H Sewell, 22 November 1862, AJHR, 1863, E-3, sec 1, p 6

taking lands required for public necessity from Maori as a prerogative power of the Crown would be ‘in derogation of the honor of the Crown and in contravention of its own promises, contained in the Treaty’. Moreover, if such a prerogative power existed it would not reside in the Governor of the colony, who only had such powers as were expressly given him by lawful authority. The General Assembly would have to take legislative action before the executive could ‘legally take compulsory possession of any person’s land’.<sup>8</sup>

Yet another opinion was added by Frederick Whitaker, who succeeded Henry Sewell. Whitaker was a land speculator and settler politician and represented the more common settler view that still relied on the early theories of colonisation. Whitaker felt that there was no doubt that native lands were part of the demesne lands of the Crown, subject to the rightful use and occupation of the natives. The Crown therefore had a right to take land for public purposes as long as there was no interference with the ‘rightful and necessary occupation and use thereof by the Aborigines’. Whitaker did not think this was contrary to the Treaty of Waitangi but in any case ‘a positive enactment of the legislature would prevail over the terms of the treaty if there was any conflict’ and:

without discussing the precise meaning of the second article . . . under the first article all the rights and powers of sovereignty . . . were ceded to Her Majesty; and it appears to me that a right of road through those territories . . . as well as a right of constructing works necessary for military defence, are essential and necessary incidents to . . . Sovereignty.<sup>9</sup>

All three opinions were sent to the British Colonial Office for legal advice. In the meantime the Colonial Office had decided to relinquish most of its authority over the management of native affairs. In early 1863, in a dispute over financing the wars, the Colonial Office ‘resigned’ control over the management of native affairs claiming that constant jealousy and encroachment by the Colonial Government had made its position impossible anyway. Even though the colony was on the verge of war the Colonial Office expressed a somewhat pious hope that the Colonial Government policy towards Maori would be ‘just, prudent and liberal’.<sup>10</sup>

From this time on the Colonial Office increasingly accepted New Zealand legislation, even while expressing concern about the effect it might have on Maori. For example, in 1863 Newcastle expressed some concerns about a proposed Land Bill, but it was clear the Colonial Government had no real intention of allowing the Home government, through the Governor, to dictate their course in respect of one of the most important branches of native policy. Therefore he would allow the Bill to go forward for the royal assent.<sup>11</sup>

In reply to Sewell’s opinion, which was received first, the Secretary of State, Newcastle, wrote that he understood that ministers wanted to make a road through lands belonging to natives without the consent of the native owners. The Attorney-

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8. Opinion of F Fenton, 28 November 1862, AJHR, 1863, E-3, sec 1, pp 13–16

9. Opinion of F Whitaker, 21 February 1863, AJHR, 1863, E-3, sec 1, p 16

10. Dispatch from Newcastle to Grey, 26 February 1863, BPP, vol 13, pp 120–128

11. Dispatch from Newcastle to Grey, 24 March 1863, BPP, vol 13, p 282

General had advised them that although the local legislature was powerless to authorise such a proceeding, the land could be appropriated by authority of the Crown. Although by now the Home Government had absolved itself of major responsibility for the management of native affairs, Newcastle was moved to offer an opinion on the matter. As a ‘matter of strict law’ he was doubtful that Her Majesty had the power ‘without any Legislative sanction, of appropriating for any purpose the acknowledged property of any of her subjects’. But even if it were true, as a matter of policy he thought that ‘application of this arbitrary principle’ was unwise at the present time in New Zealand. He said that:

With a large proportion of the Native Population either already in arms or prepared to take them up in defence of their supposed rights, and most especially of rights to land, policy not less than justice, requires that the course of the Government should be regulated with a view to the expectations the Maories have been allowed to base on the Treaty of Waitangi, and the apprehensions which they have been led to entertain respecting the observance of that Treaty.

Newcastle was convinced that the proposed appropriation would be considered a violation of native rights, would be resisted, and would provoke resentment and general distrust of British good faith. It would also be likely to cause renewed warfare. He did not want Imperial troops employed in such a war, and unless colonists were willing to pay for this war themselves they would have to be content to remain imperfectly provided with means of communication ‘until they can persuade their neighbours by peaceable means to submit to what is for the common good’. Newcastle ended by saying that he viewed ‘with more than regret’ the adoption of the course that appeared indicated in the documents sent to him. His response to the other opinions was to refer again to the above reply.<sup>12</sup>

Colonial politicians were not about to tolerate any attempts by the Colonial Office to provide policy guidance. They stiffly informed the Governor that the reason they had sought a legal opinion was to obtain the precise legal position regarding the right of the Government to take native lands for roads. They had sent this to Britain to have the legal opinion confirmed, revised, or reversed, not to be advised about policy. They claimed they agreed with Newcastle that wherever possible it was desirable to obtain concessions of rights of land from natives by peaceful means, even where these were ‘most necessary for the occupation by the settlers of their own lands’. However, in the present case the part of the road on native land was the only access road between the settlement of New Plymouth and the Tataraimaka block, and had ‘always’ been used by both settlers and natives since the block was purchased in 1847. It was also part of the only road between Wellington, Wanganui, and New Plymouth. In addition, it was the road on which murders had taken place which were justified by the prohibition on its use by Europeans. While ministers were aware of the necessity for obtaining the ‘real or pretended right’ of natives by peaceful means, the acknowledgement of such rights:

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12. Dispatch from Newcastle to Grey, 22 March 1863, AJHR, 1863, I, sec 2, pp 71–72

## *The Origins of Authority for Public Works Takings – the 1860s*

exercised so arbitrarily, and enforced with such barbarity, would . . . be equivalent to the abandonment of lands long ago bought and settled by Europeans, and to the recognition of a Maori sovereignty over these latter, of the most tyrannous, galling, and ruinous a character.<sup>13</sup>

The Ministers conveniently disregarded the fact that the whole dispute arose at a time of warfare when killings had taken place on both sides. The implication of their message was clear however. Settler interests equated with the ‘public good’ and Maori interests would not be allowed to interfere with these.

The 1863 General Assembly passed a series of legislative measures designed to provide authority and financing for the wars. These included a number of Loan Acts designed to help finance the wars and subsequent settlement on confiscated land; a Suppression of Rebellion Act designed to crush Maori resistance; and a New Zealand Settlements Act to provide for extensive confiscations of Maori land that in the end coincided neatly with the fertile districts coveted by settlers and speculators alike. The Settlements Act was also designed to help prevent further Maori resistance by ‘planting’ large numbers of settlers in the disaffected districts.

Public works projects such as road and electric telegraph networks were essential instruments of war policy and the confiscated lands required further public works such as roading to make them available and attractive for settlement. Settler politicians were therefore keen to update public works legislation. This included the clarification of land-taking powers and their extension where necessary, including to provincial governments. The same 1863 General Assembly therefore also passed a series of legislation concerned with public works.

The Provincial Councils Powers Extension Act 1863 sought to extend the powers of provincial councils to enable them to make laws affecting public roads and waterways on Crown land. This was in spite of restrictions on local authority powers contained in the Constitution Act 1852. It was explained in the House that the intention was not to contravene that Act but to provide councils with full powers over such roads and waterways.<sup>14</sup>

The procedures for taking land were updated by the passing of a New Zealand version of the English Lands Clauses Consolidation Act 1845. The Lands Clauses Consolidation Act 1863 was also intended to provide consistent procedures for land takings much as the Imperial Act 1845 had done and in fact the New Zealand version relied heavily on the English Act, incorporating the same wording for many of the same provisions and protections. The Act assumed, for example, that special Acts containing specific taking authorities would still need to be passed by Parliament and that they would incorporate the relevant provisions of the Consolidation Act within them. The New Zealand Act also contained very similar machinery for protecting the rights of landowners, resolving disputes, and determining compensation. Like the English Act, it allowed for both purchase by agreement and compulsory purchase, required records to be kept of land taken and compensation paid, specified an expiry period for the taking authority in special

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13. A Domett to Grey, 30 June 1863, AJHR, 1863, E-3, sec 1, pp 56–57

14. 12 November 1863, NZPD, 1863



Acts (three years if not otherwise provided for), and provided for surplus land to be offered back to original owners or adjoining owners in the first instance.

The 1863 General Assembly also sought to provide legislation to remove any legal quibbles about the right of settler Governments to build roads through Maori customary land. The Provincial Compulsory Land Taking Act authorised the provincial councils to take any land for public works and validated any earlier provincial Acts and Ordinances which had authorised the taking of land. Section 3 of the Act allowed the ‘compulsory purchase of any land for any work or undertaking of a public nature’, subject to payment of compensation as provided by the Lands Clauses Consolidation Act 1863.

In moving the second reading of this Bill, Whitaker said it was intended to authorise provincial councils under certain circumstances to take land for public works. He was in no doubt that provincial councils already had that power but doubts had been raised and it was considered desirable to pass a law to enable them to take land.<sup>15</sup> In later debate, supporters of the Bill referred to the necessity of local authorities such as Highways Boards having power to take native as well as other lands in their districts to make roads, and felt it was a ‘benefit’ of the rebellion that natives and their lands would be subject to English law in future. However, Fitzgerald reminded members that it was contrary at the time ‘to the whole spirit of the law of England for any Act to pass for the general taking of private land’. Instead, with due notice, Acts could be passed that took particular land if this was desirable, and therefore the Act ‘was repugnant to the spirit of English law’. Fox, in reply, took issue with this. He believed that there were a large class of Acts in England, ‘for drainage and other purposes’, dealing with lands generally and not specifying particular lands. He had no doubt of the legality of the present Act and he felt that the Lands Clauses Consolidation Act provided proper safeguards.<sup>16</sup>

However, even the Colonial Office in its retreat from the management of native affairs could not tolerate these measures. The Provincial Compulsory Land Taking Act was disallowed because it applied to native land over which customary title had not been extinguished. The Colonial Office, although relinquishing general management of Maori affairs, still insisted that taking powers over Maori land should be restricted to the General Assembly, and not be extended to local governments. Cardwell wrote to Grey that the Act was open to grave policy objection. The Home Government still felt it had the right under the present circumstances to require that laws ‘so seriously’ affecting the relationship between the races should be enacted on the responsibility and authority not of a local council, who can only represent local interests, but of the General Assembly, whose decisions are adopted with reference to the interests of the whole colony and were brought under the cognizance of the Home Government. However, if native lands were excluded from the Act it would not be considered objectionable.<sup>17</sup>

By this time, provincial councils were beginning to make use of the right to take roads through Crown-granted Maori land, even if they were still excluded from

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15. 12 November 1863, NZPD, 1863

16. 18 November 1863, NZPD, 1863, p 897

17. Dispatch from Cardwell to Grey, 26 May 1864, BPP, vol 13, p 560

authority over customary land. In 1863 the Taranaki provincial Omata Road Ordinance empowered the superintendent to construct the Omata Road and provided for compensation. The schedule attached to the Act described the road crossing through Native Reserve no 1. The Canterbury Great Northern Railway Act 1864 also listed in the schedule of lands the superintendent was empowered to take and construct a railway upon, the Kaiapoi Native Reserve. The General Assembly also acted on the apparent willingness of the Colonial Office to agree to the General Assembly having taking powers over customary land so long as these had legislative authority. In 1864 the Public Works Lands Act was passed. This Act provided the first specific legislative authority for central government to take Maori land, whether customary or Crown granted, for public works purposes. Section 2 named the ‘public works’ considered necessary for pacification – ‘roads bridges and ferries’. This section also stated that the term ‘lands’ in the Act included all lands whether held ‘by Native or other owners’ and by any form of title. Ostensibly the wording of the Act referred to all land, not just Maori land. However, the Lands Clauses Consolidation Act 1863 and special Acts already covered non-Maori land takings. It seems clear that the 1864 Act was really aimed at Maori, as part of the Government’s wartime measures, and ministers were quite open about this.

The preamble to the Act clearly revealed the motives behind it. The taking authority was necessary for ‘the civilization of certain parts of the Colony’. It was clear that public works takings were to be a central part of the policy of ‘civilization’. It was also clear what was ‘civilized’ and what was not. Compensation for those having land taken where title was derived from Crown grant were to have compensation determined under the provisions of the Lands Clauses Consolidation Act 1863, with all its protections. For those holding lands where native title had not been extinguished, for example customary Maori land, compensation was to be determined under the provisions of the wartime confiscatory legislation, the New Zealand Settlements Act 1863. Those deemed ‘rebel’ under that Act would therefore be ineligible for any compensation at all. As a result, for Maori customary land there was very little difference in practice between punitive confiscations and compulsory taking for public works. This was especially true as ‘public works’ at this time were of a military nature, such as military roads and telegraph lines, obviously intended to help crush Maori resistance.

In addition, the Act contained very few protections for land takings that might have been expected in an Act supposedly based on English public works principles. Section 3 said that the Governor could simply define a public work by Order in Council, and after such publication could ‘compulsorily take and permanently hold’ all such lands as may be necessary for the construction of the work, and could enter upon lands, occupy them, and, in section 4, temporarily use them ‘without giving any notice or making any application to any person owning such lands’. This applied to all Maori lands whether customary or held by Crown grant. Section 6 stated that all public works and the land under them became Crown lands. There were no protections for lands in use or occupation, or for wahi tapu, and there was no pre-emption right for the return of surplus lands. Specific projects did not need parliamentary approval, in fact Maori had no voice in Parliament at all even though

the Act was clearly aimed at their land. There was also none of the other protections such as a time limit on takings. Virtually all the standard protections of the time were excluded, even of compensation, given the nature of the land the ministers obviously intended to take. Significantly, there was also no provision for purchase by agreement, already a traditional provision in general public works legislation such as the Lands Clauses Consolidation Acts.

The debates in the House clearly revealed the motives of ministers.<sup>18</sup> Weld, in sponsoring the Bill, described it as a necessary means of establishing civilization:

history and experience showed that the civilization of a barbarous country mainly depended on road making, and that was the first means by which they could penetrate into the wildest country, and open it up to the influences of civilization. The Government ought to have the right to take roads through the country by buying the land . . . from friends, whether European or Natives; and . . . if they should be opposed, they should now use force to repel force.

There was also severe criticism of the Bill however, particularly because it flew so much in the face of established legal principles, let alone the guarantees in the Treaty. In debate, critics claimed the Bill was repugnant to the law of England because it gave taking powers over private property without giving individuals an opportunity to appear before Parliament to state their objections to the confiscation of their property. It was also claimed that as the Act was essentially an ‘emergency Act’ it should have similar time limits to the New Zealand Settlements Act. Mr G Graham opposed the Bill because it would infringe the Treaty of Waitangi. He also reminded members that Maori had wahi tapu sites such as graveyards and it would be ‘manifestly unjust’ to make roads through this type of land.

Majority opinion, however, supported the Bill. It was claimed that any such rights were of little importance compared to ‘great public works’. Mr Jollie urged that when the necessities of state required, they had to dispense with those ‘nice formalities’ which might be requisite in dealing with a ‘more civilized nation than they had at present to deal with’. Weld also rejected concerns about the Treaty or wahi tapu. The Treaty gave sovereign rights to take land and ‘even of taking a road through a graveyard’. He claimed this was even done in England, ‘although certainly objectionable when it could be avoided’.

In their memo describing the Act for the Governor, ministers declared that it involved an important matter of principle. It had been questioned whether the Government had the right to carry roads through native lands, or to take such lands for public purposes. The Act established this principle. The same practical rule was to apply to native lands as to those of Europeans, namely, that land may be taken for such purposes, the owners receiving compensation. The court established under the New Zealand Settlements Act (which for the purposes of this Act would be continued in operation notwithstanding the Act itself might expire) would give the ‘most convenient tribunal’ for assessing compensation. In the case of land taken from rebels, no compensation would be paid. The recent Native Lands Act 1862 had placed native ownership rights on a footing established by law, and the native owner

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18. NZPD, 1864–1866, p 154

would now be able ‘to sell and dispose of his land’ like an ordinary proprietor. That being so, ‘it is just and necessary that he should be placed in other respects on the footing of ordinary proprietors’ and that his land should be subject to the ‘ordinary legal liabilities’; a primary one being ‘that the State may take what land it requires for roads, or other like purposes of a public nature, making compensation to the owners’. The ministers seemed unconcerned however that Maori were not being given the balancing protections of ‘ordinary proprietors’. This was passed off with the excuse that from the ‘intermixed state of Native titles, it would be impossible to apply the ordinary rules of notices etc’.<sup>19</sup> The ministers also seemed unconcerned that the same difficulties in providing notice might also have applied in paying compensation, assuming any owners qualified for this.

In 1865 the Electric Telegraph Act provided further powers of compulsory entry and taking of land as required for the purposes of establishing an electric telegraph network, another vital part of the war effort. Compensation was to be in terms of the Lands Clauses Consolidation Act 1863. The mid-1860s also saw the establishment of the Native Land Court under the Native Lands Act 1865. While this was designed to facilitate the purchase of Maori land, the history of the court and its legislative provisions are often closely linked to public taking provisions concerning Maori land. This will be explained further in later chapters, but for the present it is enough to note the verdict of historians that the court began a process of alienation of Maori land that was in the end far more effective and far reaching than the punitive confiscations following the wars. For example, Alan Ward has described the court as establishing a system that exposed Maori to a predatory horde of storekeepers, grog sellers, surveyors, lawyers, land agents, and money lenders. The laws of succession established by the court resulted in enormous problems for Maori in the land they managed to retain, particularly in the fragmentation of ownership into vast numbers of tiny uneconomic shares, that made any economic use of the land almost impossible. This process was also to have considerable impact on the way future procedures for the taking of Maori land for public purposes developed.

The final major legislative push of the 1860s concerning land taking for public purposes was the continued attempts by the General Assembly to enable provincial governments to pass their own laws to take land. Attempts were made to pass similar Provincial Compulsory Land Taking Acts in 1864 and 1865, but this time native lands were exempt, to satisfy the Colonial Office. In debate in 1864 Whitaker declared that he still believed provincial councils should have the same powers of taking lands as the General Assembly. Even apart from Maori land, however, reservations were still expressed about the Bill and whether provincial councils subject to local pressures should be entrusted with taking powers for any private land.<sup>20</sup> The legislation was revived again in 1866. Native lands were still exempt, much to the displeasure of members and it was suggested that by then as they were sending away Imperial troops they would have more independence in legislation.<sup>21</sup>

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19. Memo by Ministers on Public Works Land, AJHR, 1865, A-2, p 1, Act 1864

20. NZPD, 1864, pp 62–65

21. NZPD, 1866, p 780

However, Imperial troops were to stay for much longer and the Provincial Compulsory Land Taking Act passed in 1866 still exempted customary Maori land. Section 2 of this Act allowed provincial governments to pass laws or ordinances authorising the compulsory taking of land for public works as long as they conformed with the provisions of the Lands Clauses Consolidation Act 1863. However, native land over which title was unextinguished was exempt under section 6. Maori land held by Crown grant and Maori reserves were, however, covered by the Act.

An example of provincial legislation passed subsequently was the Wellington Province District Highways Act 1867. Following the lead of the General Assembly, this too, under section 17, continued to exempt land set apart for aboriginal natives unoccupied or in their occupation.

In summary, by the mid-1860s, central government had the legislative power to take all Maori land for public works purposes, whether customary or where title was derived from Crown grant. The power was contained in wartime legislation, the Public Works Lands Act 1864, that contained few of the protections that might have been expected in traditional public works legislation, and that were in fact available at the same time for non-Maori land.

The land-taking provisions for all Maori land were clearly discriminatory when compared with the protections for taking other land in general legislation, such as the Land Clauses Consolidation Act. The reasons given, that the 'intermixed' state of native titles made giving the protections too difficult, is a particularly poor one. Past experience had shown that it was possible to negotiate successfully with Maori leaders. It was the settler insistence on dealing at an individual level that caused the difficulties. Ministers were also admitting that administrative convenience was being put before Treaty and ordinary legal rights. It is also difficult to believe that the heat of war and the belief in the inherent superiority of British title had nothing to do with this. Ministers also seemed unconcerned that the same difficulties in giving notice might stand in the way of giving proper compensation. It was clear however that if traditional protections were 'too difficult' to apply, the answer was they would be dropped; there would be no attempt to make modifications that might meet Maori interests. The 'state of Native title' was to become a perennial excuse for failing to provide adequate protections for Maori land well into the next century. In terms of compensation, Crown-granted Maori land was to be treated the same as other land. However, customary Maori land was brought under the harsh compensation provisions of the confiscatory New Zealand Settlements Act.

By the 1860s, the power of provincial governments to take Crown-granted Maori land for public purposes was confirmed and provincial governments had begun to use this power. However, in spite of the efforts of colonial politicians, provincial governments still did not have legislative authority over customary Maori land.

It is clear that politicians regarded public works as an essential part of war strategy as a means to civilise and pacify Maori. Public works were clearly to be used for settler interests, regardless of Maori rights and concerns. Even administrative convenience was sufficient reason to deny Maori even ordinary legal, let alone Treaty, rights. It was also clear by this time that Maori were regarded as a 'barbarous' race, clearly inferior to Europeans, and therefore undeserving of

civilised ‘niceties’. In the area of public works land takings, Treaty guarantees of equality, respect for rangatiratanga, and protections for land, had been replaced by discriminatory legislative provisions that punished rather than protected Maori land, especially that held by customary traditional title.

Although settler politicians frequently spoke of the superiority of English justice and the benefits of English legal traditions, they showed these could be disregarded or perverted to suit their own interests. It was an essential principle of English law concerning public works land takings that takings had to be subject to parliamentary scrutiny. In English terms this meant that land takings were scrutinised by a forum of landowners. This was especially hollow in New Zealand, where Maori were still excluded from Parliament when important legislation was enacted concerning the taking of Maori land. It was not until 1867 that four Maori seats were eventually established. However, as Ward has pointed out, this was done largely to balance out increased West Coast mining representation and was not expected to be a really democratic exercise. On a population basis, even then Maori should have been given more seats, as they made up almost 50 percent of population. According to Ward, Maori members were sometimes appointed to the Executive or Legislative Council when their political support was required by ministries with precarious majorities, but they were only expected to advise when called upon. It was considered ‘absurd that they should enter into a Cabinet and take part in the administration of the ordinary affairs of the Colony’.<sup>22</sup>

In pursuit of the wars, settler politicians also showed themselves willing to rely on measures such as wartime proclamations rather than legislative authority; and when legislation was passed it was often to give extraordinary powers well in excess of ordinary English legal principles. For example, the preamble to the Suppression of Rebellion Act declared that ‘the ordinary course of the law is wholly inadequate for the suppression of the said rebellion’, and the Act itself went on to remove or suspend basic rights such as habeas corpus. Ward described the 1864 legislation in the following manner, ‘As was often the case, the great argument used to justify British imperialism – that it introduced the rule of law – was brought into disrepute by the prostitution of that law to the interests of the colonising race’.<sup>23</sup>

The lack of respect for established legal traditions appalled even some settler politicians, as well as those traditionally more sympathetic to Maori. Even allowing for some of the histrionics expected of opposition members, criticism on these grounds was especially trenchant. For example, Henry Sewell, who had supported the Crown right to take Maori land for public purposes, was appalled by the provisions of the Suppression of Rebellion Bill, which he described as ‘an eternal disgrace to the colony’. The proposed law was a subversion of all law – ‘it was intended to legalize beforehand whatever might be done, no matter how barbarous or atrocious . . .’, and he accused the Minister of digging precedent for the measure out of the ‘charnel-house of Irish history’.<sup>24</sup>

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22. Alan Ward, *A Show of Justice: Racial Amalgamation in Nineteenth Century New Zealand*, Auckland, Oxford University Press, 1973, pp 209, 270

23. *Ibid*, p 169

24. NZPD, 1863, pp 859–861

The New Zealand Settlements Bill was similarly criticised for authorising the taking of land from Maori who were not in rebellion but who were living quietly and in peace, and of confiscating more land than was necessary for military settlements, in order to profit from its sale. Dr Pollen criticised the Bill as being ‘politically immoral’ and financially ‘utterly delusive and unsound’. He also declared that the measure was an abrogation of the Treaty of Waitangi and of the good faith of the Government. Another member warned that the only way to achieve lasting peace was to secure the confidence of the natives and not to enforce their submission by such stringent measures.<sup>25</sup>

However, the various measures prevailed and were summed up by Fox in his defence of confiscation. Simply put, the needs of settlers outweighed the rights of Maori. In 1864 he wrote that the ministers believed ‘that nothing has been or can be more pernicious to the native race than the possession of large territories under tribal title, which they neither use, know how to use, or can be induced to use’.<sup>26</sup> In a further memo he wrote:

if we are to hold the Northern Island of New Zealand as a British possession, if its colonization is to go on, if the Maori race itself is not to be gradually exterminated by repeated conflicts with a superior power, the proposal of the Government to take the lands of the rebels as an indemnity for the past, and a material guarantee for the future, must be adopted.

He went on to claim that there was nothing in the proposal contrary to the first principles of justice, or unusual in the history of national conflicts the world over, and it was strictly in conformity with the customs of the Maoris themselves:

Mere technical difficulties (. . . such as . . . the necessity of conferring political franchise, which is alleged to be a condition precedent to the right to enforce submission to the law) however interesting as abstract questions for discussion, cannot be entertained by a government on which the responsibility rests of saving to the British Crown a dependence in imminent peril, and preventing for the future the renewal of a similar crisis.<sup>27</sup>

The New Zealand colonial experience added another dimension to the English experience of public works takings. However, it was not one of accommodating the rights and concerns of Maori landowners in a colonial version of public takings principles. In England, public works land-taking principles had developed reflecting the balance of power between the Crown and a relatively small group of wealthy politically powerful landowners. There was a sense of neutrality in takings in that the only motive was to create further wealth through the development of public works by which incidentally the whole community received some benefit. The procedures surrounding the taking and payment of compensation were carefully developed to protect the interests of landowners. The result by 1840 at

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25. NZPD, 1863, pp 869–873

26. Fox to Governor, 5 May 1864, BPP, vol 13, p 597

27. AJHR, 1864, E-2, p 18

least was a minimal sense of injustice among landowners. In New Zealand, however, public works takings of Maori land originated largely in a war of domination where Maori landowning interests were subordinated to those of settlers. Public works land-taking principles were an instrument of this policy and the ‘public good’ that justified these takings was increasingly seen in terms of settler interests, regardless of Maori concerns and rights.

The history of the extension of compulsory taking principles to Maori land began with warfare and as a result, for Maori, public takings are inextricably linked with the legacy of bitterness and betrayal brought about by war and wartime measures such as land confiscations and imprisonment without trial. As described by Asher and Naulls:

The land confiscations are the single greatest injustice in our history and the worst possible precedent for future government acquisition of Maori land, whether for public works or other activities in the ‘national interest’.<sup>28</sup>

The result has been that instead of being drawn into a system of cooperating in land taking for the community good, Maori leaders were faced with public takings as an alien imposition begun as part of a confiscatory wartime policy. Principles of law designed to balance private land rights with the common public good were imposed on Maori as an instrument of furthering settler interests. The rejection of any process of consultation and negotiation either through Parliament or direct with Maori leaders further undermined any possibility of drawing Maori leaders into the community and cooperating over public needs. This possibility was rejected in favour of a process of compulsory land taking that paid little heed to Maori needs or interests and too often seemed designed to serve the interests of settlers alone. This began a legacy that has continued to embitter the process of public works takings of Maori land to this day.

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28. Asher and Naulls, p 28





## CHAPTER 7

# **THE LEGISLATIVE RIGHT TO TAKE LAND WITHOUT COMPENSATION, 1862–1927**

A parallel legislative development in the taking of Maori land for public purposes began in 1862, and lasted for over 60 years until it was finally abolished in 1927. This was the legislative authority for the Crown to take up to 5 percent of Maori land for roads, and within a few years also for railways, without compensation. This development began at about the same time as wartime measures. However, it was based on a much older tradition of the Crown reserving the right to make provision for future roading needs when ordinary Crown-granted land was purchased. This earlier tradition had developed from the beginning of European settlement in New Zealand and applied mainly to the most outlying areas held by settlers by Crown grant. In previous years, as already noted, it appears to have been normally applied to Crown-granted Maori land only after a process of consultation at the time of purchase. The new legislative provisions, however, replaced consultation with compulsion and developed separately and in a discriminatory manner for Maori land, eventually including even customary Maori land.

In New Zealand, the Crown appears to have retained some prerogative right from the earliest years of settlement to make future provision for roading in Crown-granted land sold to settlers. This right was reserved in the Crown grants when the land was sold. Although provisions occasionally changed, the general rule was that compensation was payable where land had been properly surveyed and the land was in reasonably close use by the owners or occupiers. This land was generally within settlements or in the farmed outlying areas. For land well outside existing European settlements, where generally large blocks had been Crown granted but proper surveys other than the outside boundaries had not been made, the right was reserved in the grant for a percentage of land to be taken if required for future roading. Sometimes compensation was also payable in this situation but gradually a rule developed where it normally was not. This land was generally not closely occupied or used and little disturbance took place if some land was taken for roads. In fact, it was generally agreed that for settlers, the provision of roading and proper surveys actually increased the value of this land. The amount of this land, as settlement increased, was always becoming a relatively smaller percentage of all land settled and settlers could avoid the provisions where no compensation was payable if they wished by simply avoiding the most outlying land. Most small settlers were also least interested in this type of land.

The Crown also made provision for extending this right to pre-1840 land claims derived from direct purchase from Maori rather than from Crown grant. In terms of old land claims, the Land Claims Act 1841 (s 7) required commissioners investigating pre-1840 purchase claims to exclude land likely to be required for public purposes from grants they issued and to compensate by awarding other land. For title to land purchased direct from Maori by the New Zealand Company and similar companies, the New Zealand Company's Land Claimants Ordinance 1851 provided for investigations and the issue of valid Crown grants. These grants did not have to take account of old surveys and lines of road but when new roads were required that ran through existing cultivations, the damage and value of land taken was to be independently assessed and Government scrip offered to that value as compensation (s 13).

The Constitution Act 1852 devolved the royal powers to regulate the sale, letting, occupation, and disposal of Crown land and 'all lands where the title of Natives shall be extinguished' to the General Assembly (s 72). These royal powers could also be delegated to the Governor and the provinces. Based on this authority, a series of Acts and regulations were made governing the sale and disposal of Crown lands. In a proclamation dated 4 March 1853, for example, the Governor issued regulations 'governing the sale, disposal and occupation of waste lands of the Crown in New Zealand'.<sup>1</sup> Regulation 12 directed that in districts where lands were purchased in which all future lines of road had not been determined and laid out, a right of road would be reserved in the Crown grant and an allowance made to the purchaser in compensation for such reserves. The compensation was to be in accordance with a scale from 3 to 5 percent according to the amount of land purchased. This regulation did not apply to town and suburban allotments or land within the 'hundreds' around settlements. As the regulation implies, it was only meant for 'outlying' land outside the hundreds where European settlement was very sparse and surveys had not been carried out.

Soon afterwards, provincial councils were empowered to make similar regulations, for example in the Provincial Waste Lands Act 1854 and Waste Lands Act 1856. A variety of provincial regulations and ordinances were passed before the powers were returned to the Governor in Council in the Waste Lands Act 1858. This Act, however, allowed the Governor to delegate his powers to the provinces with whatever restrictions he saw fit to apply. If he chose, he could also release Crown grants from the right to make road lines reserved in them (s 14). The general right to reserve road lines in Crown grants was acknowledged and at times amended in various Crown Grants Acts and Lands Acts. The Crown Grants Act 1866 validated the general reservation of road lines in grants even if they were not described in the grant or shown on the attached survey plan (s 9). However the general right of taking a road was limited to five years after the issue of the grant or three years after the Act came into operation. The land taken was to be equivalent to the compensation paid in land or money (s 10). Once roads were taken and laid out they were deemed to belong to the Crown (s 11).

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1. *New Zealand Gazette*, 10 March 1853, vol 1, no 1, pp 13–18

The Lands Act 1877 confirmed a move to allow the Crown the right to take roads in rural land that was still unsurveyed without paying compensation. This Act continued the right of the Crown ‘to take all necessary roads through any unsurveyed rural or pastoral lands’ after any sale or other disposal, ‘at any time previous to the survey of the same, without paying compensation for the land taken for any such roads’. After such lands had been surveyed and sold, the right to take necessary roads could only be exercised within five years of the survey and on the Crown paying twice the original purchase price for the land taken (s 160). The Governor could, by agreement with the owner, exchange land reserved for a road with land required for any deviation of the road (s 162). The Governor could also reserve from sale any Crown lands that might be required for a variety of public purposes (s 144). Licences could be issued to occupy such reserves but nothing in the licence was to affect the right of the Governor to take any part of such lands for roads, railways, and tramroads, not exceeding 5 percent of the land. The licensee was to have no claim for compensation for such taking except a reduction in rent in proportion to the extent of land taken (s 151).

More research is required to establish the precise legislative history of this right and the exact nature and timing of all the amendments. It is clear, however, that the general right to take lands for future roading was retained through a variety of subsequent legislation with some changes in the provisions. The Crown Grants Act 1883, for example, enabled the right of road reserved in a Crown grant to be held to include a right to make railways over such reserved roadways (s 45). The Land Act 1892 allowed the Governor the right to take road lines on any unsurveyed rural or pastoral land and to reserve certain lands on the seashore, margin of lakes, or on riverbanks without compensation (s 15). After rural or pastoral lands were surveyed and sold the right of taking roads was restricted according to certain conditions. For example, if the land was sold for cash, any taking was limited to five years after the sale and the Crown had to pay twice the purchase price for the land taken. For leased land for example, the compensation related to the rental. Altering the position of a road required the consent of the owner (s 16).

The general right still remained in the Land Act 1924. However, by this time road lines that might be required on unsurveyed and pastoral lands and reserved lands on the seashore, lake edges, and so on, were to be reserved from sale (s 14). The Governor could still take roads by proclamation at any time from rural lands that had been surveyed and alienated. This was also subject to similar restrictions. If the land was sold for cash, for example, the taking right ceased seven years after the sale. Compensation also had to be paid for land taken.

In applying this right to Maori land, the Crown originally exempted customary Maori land from the general ‘right’ to take land required for roading. That is, customary Maori land at least was regarded as exempt from normal Crown prerogative until such customary title was extinguished. In the early years of settlement, the Crown purchased Maori land and such land was then considered to be part of the wastelands of the Crown. This land was then onsold to settlers and rights to take future roads were reserved in the Crown grant. The protection of customary Maori land was confirmed by the Constitution Act 1852, which held that customary Maori land could not be considered the same as waste lands of the

Crown. It has already been shown in chapter 3 that for most of the first two decades after 1840, the Crown instead sought to provide for future roading needs by a process of consultation and negotiation with Maori and for the most part this policy even extended to Crown-granted Maori land during this time. This process was generally successful and, most importantly from the Crown view, helped avoid provoking warfare when settlements relied on Maori goodwill for survival.

By 1860, as settlers became more aggressive in removing protections for Maori land, the debate was reopened about the Crown right to take land required for roads. When it became clear legislative authority would be required, general legislation was passed as described in the previous chapter. In addition to this, in 1862, settler politicians had already legislatively confirmed the Crown right to take Crown granted Maori land for future roading requirements similar to the right exercised in other Crown grants. The major difference was that there was no compensation for such takings.

The provision was enacted as part of the Native Lands Act 1862. This Act created conditions that appeared to make the provision more necessary from a Government point of view and the establishment of the Native Land Court also provided a convenient means of having the right put into effect through Crown grants. In 1862 the Government intended to effectively replace the Crown right of pre-emption in purchasing Maori land with a 'free market'. A Native Land Court was to be established to determine individual ownership and to convert customary title into that held by Crown grant. This would enable land to be sold more easily and thus assist colonisation. In addition, for land retained by Maori, customary title would rapidly be replaced by title derived from Crown grant. This would effectively move Maori land out of the protections that the Colonial Office was still insisting on for customary land, and make it subject to the full imposition of obligations and duties and settler government authority now implied by ownership by Crown grant. As a consequence of removing the Crown monopoly on purchasing Maori land, the opportunity to negotiate agreements with Maori owners concerning future roading provisions would also be replaced by legal compulsion.

A provision was included in the Native Lands Act 1862 allowing the Governor, at any time, to take and lay off one or more lines of public road for public purposes. Up to 5 percent of any lands purchased from native owners under the provisions of the Act could be taken, without compensation (s 27). The process of reserving rights of road was also simplified because the Native Land Court could ensure that such rights were automatically included in Crown grants when they were issued. There was no provision for compensation and no time limit. This provision appeared relatively innocent at the time as it referred only to land purchased from Maori. The intention seemed to be to place land purchasers in a similar position whether they bought wastelands of the Crown or land directly from Maori. As Maori land was generally the most 'outlying' land from European settlements and lowest in value, then the rule of no compensation also made sense from a settler viewpoint.

The establishment of the Native Land Court was delayed for a variety of reasons and it was eventually established under the Native Lands Act 1865. This Act also contained a provision allowing the taking of up to 5 percent of Maori land for

roading without compensation. Now, however, instead of referring to land purchased, the clause simply referred to land granted under the Act (s 76). This was a major change as the provision now applied to all Maori land investigated by the court and Crown granted, whether sold or not. In theory this provision could also have been used to assist with Maori roading needs. However, given the circumstances of the time, it was obviously intended to assist settler interests by helping to ‘open up’ land whether or not Maori wanted to sell it, and was therefore a further attack on rangatiratanga. Once Maori land was transferred from customary to Crown-derived title, it was not only easier to sell but was removed from the protections still afforded to customary land. Once again the provision also rejected the previous process of consultation over roading and there was no requirement for any communication over the need to take land. There were some additional minimal protections, similar to those applying generally. For example, the Governor could discharge the land from this liability if he chose to by endorsing the deed or grant to that effect. Lands that contained buildings, gardens, orchards, plantations, or ornamental grounds could also not be taken.

However, there were important differences to the general provisions regarding future roading provision and these were the beginning of a quite separate development that resulted in the process becoming increasingly discriminatory towards Maori. The right to take land was to extend for a blanket 10 years after the date of the Crown grant for example and this was clearly a much longer period than applied to other Crown-granted land. There was also no provision for compensation to be paid for some types of Maori land taken as was the case for other land. At a practical level this was because Maori land was unsurveyed and in the eyes of Europeans it was generally still in the ‘outlying’ category. The assumption behind this however was clear. The interests and viewpoints of settlers were to take precedence. In fact, the entire provision is clearly concerned with meeting settler needs while there is no corresponding accommodation of Maori concerns.

Even where the provisions for taking without compensation appeared similar for both Crown-granted Maori land and for wasteland of the Crown, they were effectively discriminatory towards Maori in practice. For example, general provisions only effectively applied to a minority of settlers and in the majority of these cases compensation was payable because the majority lived within settled areas. The circumstances where no compensation was payable applied in even fewer cases in outlying areas. The provisions therefore affected only a relatively small number of settlers, and the circumstances where the provisions applied were always diminishing. With regard to Maori land, the Native Land Court was rapidly transforming title into that held by Crown grant, therefore increasing quantities of Maori land were becoming subject to the provisions. Unlike the case for general provisions, there were also no circumstances in which compensation applied.

The general right to provide for future roading seemed perfectly acceptable in theory, as it not only provided for the future benefit for the whole community but it also assisted in increasing land values once roads were provided. This was particularly true of land that was to be opened up for settlement. However, for Maori, the possibility of increased settlement often meant the further loss of land as the Native Land Court began its operations in an area. Maori also found that the

application of the provision was invariably in settler interests and Maori roading needs were generally ignored. In some situations, notably in Taranaki, roading, including the use of compulsory provisions by the late 1870s, was also used to ‘open up’ an area for settlement in direct opposition to Maori wishes and the honouring of previous agreements concerning the provision of reserves. Even the protections for land subject to this right were eurocentric initially. Only ‘civilised’ uses such as gardens, orchards, and ornamental grounds were protected. Sites of traditional importance to Maori, such as wahi tapu sites and traditional snaring and hunting areas were not included.

The Native Lands Acts of 1862 and 1865 were also passed when Maori were still excluded from parliamentary representation. It was not until 1867 that there was representation by the four Maori members, even then they had very little real influence. The Government rejection of earlier policies of consultation, its refusal to open up new means of communication through representation in Parliament and its eagerness for war all led to an abandonment of any opportunity whereby Maori could be brought into the general community and persuaded that such provisions could apply to the general benefit of everyone. Again takings were enacted in a manner and in circumstances that only led to a long-standing legacy of suspicion and bitterness.

The myriad of Acts and amendments that continued this legislative provision until 1927 provide a good example of the general entanglement and confusion of legislation concerned with Maori land. Provisions can be found in various Public Works Acts and amendments, as well as numerous types of Maori land legislation including Native Land Acts, Native Land Amendment and Native Land Claims Adjustment Acts, and Native Land Court Acts and their amendments. Important changes are often made in amendments and at times provisions in the Native Land Acts and Public Works do not always appear to coincide. Very careful reading of all the legislation together can still result in uncertainty about the precise provisions applying at any one time. Some of this confusion and poorly drafted legislation was confirmed by subsequent court decisions.

Some Public Works Acts tended to simply acknowledge and confirm the right that existed in other legislation to take certain Maori land without compensation and to exclude land taken under this right from general public works compensation provisions. For example, the Immigration and Public Works Act 1870 provided that nothing in the Act could be deemed to give the right to compensation for land taken where none was payable under other Acts (s 50). The Public Works Act 1876 contained a similar provision (s 73).

Other public works legislation amended and added provisions to the general right, while at the same time it was continued and also amended in various native land legislation. The Immigration and Public Works Act 1872, for example, provided that in any case where a road or right of road was reserved in a Crown grant or in any case where the Crown had a right to take land for roads such as under the Native Land Acts, after such road line had been surveyed, it was lawful to construct a railway on that road line or part of a road line, even though the road may not have been made (s 36).

*The Legislative Right to Take Land without Compensation, 1862–1927*

The specific legislative right provided in the Native Lands Acts of 1862 and 1865 was continued in section 106 of the Native Land Act 1873. This enabled the Governor to take and lay off for public purposes one or more lines of road up to a maximum of 5 percent through Crown-granted Maori land without compensation. However, there was no authority to take any lands occupied by ‘pahs, Native villages or cultivations’ as well as buildings, gardens, orchards, plantations, burial, or ornamental grounds, except where this was authorised for public works takings by the Lands Clauses Consolidation Act 1863. Land could also be taken for railway purposes under the same conditions as applied to land taken for roads. The Governor could release the land from this liability and the taking power ceased 10 years from the date of the grant. The new additions to the restrictions on taking were an improvement in meeting Maori concerns. However, they only applied to land taken for roads and railways under this Crown right to take a certain percentage without compensation. They did not apply to ordinary public works takings of Maori land. No survey of native lands could be made without the written sanction and authority of the Inspector of Surveys (s 74).

This time limit was too short for settlers. In 1878 it was extended to 15 years in section 14 of the Native Land Amendment Act 1878 (no 2), after pressure from European members of the General Assembly.<sup>2</sup> According to Alexander, this extension applied not just to lands passing through the court after the amendment was passed. A Court of Appeal judgment held that it applied to all lands that had passed through the court since 1868, where the 10-year time period had not yet lapsed.<sup>3</sup>

By 1880, when the Government was again using public works legislation to help crush Maori resistance, the Crown right to take certain land without compensation was specifically also included in public works legislation, not just referred to as previously. Amendments also continued to be made in public works legislation, while the provision and amendments also continued in Native Land and similar Acts. From this time, therefore, relevant provisions can be found in native land and public works legislation and they do not always appear to coincide. With the concurrent separate provisions concerning general public works takings for roads and railways, this seems to have caused considerable confusion among landowners, taking authorities, and even legislators about what was intended to apply at any one time.

The Public Works Act 1880 extended the power to take certain land without compensation to include all lands that had gone through the Native Land Court for which certificates of title or memorials of ownership had been issued by the court, rather than having to wait for a Crown grant. The same limitations such as a maximum of 5 percent still applied (s 20). This extended power was confirmed in section 23 of the Public Works Act 1882.

The Native Land Court Act 1886 repealed the Native Land Act 1873. This Act also allowed for private road access to partitioned Maori land. In terms of public roads, the 1886 Act confirmed the Crown right to take up to 5 percent of Maori land

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2. NZPD, 1878, pp 54, 1173, 1224–1225

3. *Fabian v The Borough of Greytown North* 10 NZLR 514



held under Crown-derived title, whether by certificate or grant, for roads without compensation. The Governor could still release land from this liability if he chose and land exempted from taking included that occupied by pa, village, or cultivation, or any buildings, gardens, orchards, plantations, or any burial or ornamental grounds. However, again this did not apply to land taken under the Public Works Act 1882 and amendments. The taking power was to cease 15 years from the date of a grant or certificate issued under the 1886 Act, and at the time stated in previous repealed Acts for grants issued under them. Roads taken and laid off were deemed to belong to the Crown (ss 93–96). These provisions did not specifically refer to land for railways, but presumably this right, contained in public works legislation, still held.

The Public Works Act 1894 was especially poorly drafted but appeared to confirm that Maori land for roads and railways could be taken and laid off without compensation. In addition, the provisions were extended to include not only Maori land derived from the Crown but Maori land ‘of which the ownership had not at the time of the taking’ been determined by the Native Land Court, but which ‘in the opinion of the Native Land Court’ did not exceed the 5 percent the Governor was allowed to take had the ownership been determined. The Governor could still release the land from this liability if he chose, and the limit remained at 5 percent. The previous consent of the Governor in Council was still required for the taking of any land occupied by any ‘pa, village, or cultivation, or any buildings, gardens, orchards, plantations, or any burial or ornamental grounds’. Again public works takings were excepted from these protections. Roads taken were vested in the Crown and in addition where any road was laid off on the boundary between European and native land the road was to be taken equally from both parties where applicable (ss 91–95).

The earlier provision was also continued requiring the prior consent of the Governor in Council before any surveyor could enter a native cultivation when entering native land to make roads. A native cultivation was defined as ‘any land regularly used by natives for the growth of food crops for their own consumption’ (s 98).

The taking powers were limited to 15 years for land that was granted under the Native Land Court Act 1886 or any amendments and for any previous Act repealed by the 1886 Act, to the time when such powers would have ceased under that Act. This provision was poorly drafted and the Supreme Court found in 1912 that because not all previous legislation had been repealed by the 1886 Act, early Crown grants between 1865 and 1873 effectively had their time limit reopened from 1894 and made indefinite even though at the time they had been limited to 10 years. Chief Justice Stout found that although it ‘seems a very hard case’ it had to be assumed that a mistake had been made and ‘no doubt the Governor or Parliament will take steps to remedy the slip that has taken place’. However, as far as the court was concerned, there was now no limitation for the taking of such land.<sup>4</sup> This error appears to have been corrected in the Native Land Act 1913.

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4. *The Solicitor General v Cave and Others* 31 NZLR 614

*The Legislative Right to Take Land without Compensation, 1862–1927*

The Native Land Court Act 1894 contained similar provisions to the Public Works Act, although again only roads were specified. In addition, the right to take land within the time limit was confirmed, no matter who owned the land during this time. The provision regarding taking land equally for roads from both European and Maori owners on a boundary, was amended to apply only when the Governor had the right to lay off roads from the lands of both owners (ss 70–72). The Public Works Acts of 1905 and 1908 were simply compilations and consolidations of previous legislation and amendments and continued similar provisions.

The Public Works Amendment Act 1909 tidied up some general anomalies that had become apparent in the main Act and as the result of court decisions. The provisions concerning the right to take certain Maori land for roads or railways without paying compensation were also tidied up. The relevant sections in the Public Works Act 1894 (ss 92–96) were repealed and replaced by sections 387 to 394 in the Native Land Act 1909. These consolidated and clarified the various provisions that had developed and added some new ones.

The Governor could now ‘at any time by proclamation’ and ‘without the consent of any person, and without liability to pay compensation to any person’ lay out and set apart such roads as he thought fit on any customary land and those roads would become public highways vested in the Crown free from native customary title (s 387). The Governor could also ‘without the consent of any person, and without liability to pay compensation to any person’ lay out and take roads on customary land where the Native Land Court had issued a freehold order within 15 years from the date of the order. The provisions concerning the time limit however contained the same error as in the 1894 Act. The maximum quantity that could be taken in this way was still 5 percent, although for land divided into parcels or partitioned it was 5 percent of each piece. The Governor could exercise this right up to the time limit regardless of any changes in the ownership of the land. Land occupied by any building, garden, orchard, plantation, village, or burial ground was still exempt, although the words pa and ornamental ground in previous definitions were dropped. Existing rights to take native land were preserved and the Governor could release any land ‘other than customary land’ from these liabilities. When any land that could be taken for a road under this authority was taken for a railway, no compensation was payable either (ss 387–392).

The Native Land Amendment Act 1913 confirmed the right to take land for roads and railways as specified in the 1909 Act. It also appeared to correct the drafting error concerning time limitations that had begun in the Public Works Act 1894. The right was now not exercisable after 15 years from the date title was ascertained on investigation ‘by the Native Land Court or otherwise’ (s 127).

The provisions remained largely unchanged until 1927, when the right of taking such land without compensation was finally abolished in the Native Land Amendment and Native Land Claims Adjustment Act 1927 (s 30). In introducing the Act, Native Minister Coates remarked that the time had arrived when Parliament could be asked to forgo this right and that:

all Natives as far as compensation is concerned should in future be treated in the same manner as the pakeha . . . [with] . . . the same right to claim compensation as the pakeha for the taking of land.

This particular provision was passed without debate.<sup>5</sup> The decision to abolish the right was made by Cabinet in November 1927.<sup>6</sup> It was also possibly a result of Sir Apirana Ngata's considerable influence at the time.

The administration of this legislative right to take certain Maori land without compensation requires a great deal more research. It seems that this right ran like an undercurrent to main public works provisions. It was essentially separate from them and at times, such as immediately after the wars, its harsh and discriminatory provisions ran counter to main public works policy towards Maori land, at least at a national level. Given that roading and railways works were so important for most of this time and it was mostly Maori land being 'opened up', it also had the potential to be enormously significant in terms of land takings.

Many of the issues that arise from this right are the same as for general public works takings for roads and these have been covered in a later chapter. The issues arising specifically from this right seem to be more in the nature of the climate of opinion created among taking authorities especially, that Maori land was easy to take, that it was 'free' and that any restrictions could easily be avoided.

The main characteristics of the right as it applied to Maori land appear to be that it was discriminatory and above all that it contributed immensely to the confusion surrounding public works taking provisions for Maori land. The legal provisions themselves were immensely confusing. Maori land could be taken for roads and railways essentially under two sets of provisions, the main public works provisions and the Crown right to take certain lands without compensation. Different protections and requirements then applied in each case in addition to the often contradictory provisions concerning the Crown right itself. Protections applied for land taken under the Crown right, such as for buildings, gardens, and orchards, for example, but these protections did not apply to land taken for roads under ordinary public works provisions. Compensation was due under some circumstances for land taken under ordinary provisions but not at all under the Crown right. There were some restrictions on the Crown right such as a 5 percent maximum and a time limit that was in itself often confusing, but these appear to have been widely misunderstood or ignored. It would have taken careful supervision by Government, which did not happen, to ensure these protections were properly followed, or regular recourse to court action by the owners, which was often simply not possible.

The Crown right to take certain land without compensation was one which the Crown was supposed to exercise. However, it seems that much of the roading was constructed and required at a local level and local authorities simply had central Government departments take the land on their behalf. The Government again appears to have failed to use this opportunity to exercise some supervision over the proper use of the taking provisions and to have lacked the political will to properly

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5. NZPD, 1927, vol 216, p 537

6. MA, 19 April 1848, AAMK 869/696f

remedy matters that clearly revealed a disregard of protections. By the same token, it took many years before the Government recognised that the right itself as applied to Maori was essentially unjust and discriminatory.

It is not easy to research the impact of this right on Maori land, as it is not always clear under what provisions land for roads and railways was being taken. Sometimes the same land was taken under both and when the 5 percent was reached the other provisions such as compensation were then held to apply. It is clear however that circumstances had been set up in two of the areas that land was most likely to be required at the time, roads, and railways, that encouraged taking authorities to believe that they could take Maori land easily and without paying for it. This encouraged evasion of compensation even when it was due and the confusion surrounding various provisions provided a tempting means of evading what little protections and restrictions applied.

An example of some of the issues that arose from this is the case, the Maori owners who petitioned Parliament about land in a Motatau block taken for railway purposes for the Kawakawa–Kaikohe railway in 1912 and 1913. The Maori Land Court found in 1913 that because the block had been investigated before 1909, the court could allow the Crown 5 percent of a whole block for roads or railways without compensation. This meant that the Crown could keep on taking up to its limit and the owners affected by this could suffer proportionately more if their land happened to be among the first taken. The court was fully aware that ‘cases of hardship may arise where a person has lost more than his fair quantum of area’ but could see no other equitable way of meeting the legislative requirements. The Native Land Act 1909 made some attempt to rectify this by restricting takings to 5 percent of each partition or parcel within a block (s 388).

The court also relied on the very wide legislative meaning of ‘railway’, for example, rather than the original intention which had been to provide a line of road or railway. This meant that Railways could take large areas of land and use them for ballast pits, water reserves and such like, and as long as this was less than 5 percent of the total area no compensation was paid. There was no supervision over how much land was really required and the often good land taken could then be sold on by railways at a profit as soon as it was no longer required, or if it was apparent that more land than required had been taken. In addition, the court found that because the wording of what land was exempt was slightly different in the Public Works Act 1908 and the Native Land Act 1909 (the 1909 Act omitting the words ‘pa’ ‘cultivation’ and ‘ornamental grounds’) then in this case the taking of land containing burial grounds, orchards, and cultivations without consent or compensation was lawful. The hardships caused by the application of this legislative right were sometimes recognised. In this case the owners petitioned Parliament and after a favourable recommendation by a parliamentary committee, in 1914 the Minister of Works agreed to pay them £50 because of the hardship they had suffered – ‘not because they have any legal right to compensation, but on equitable grounds in satisfaction of their claim’.<sup>7</sup>

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7. Correspondence in MA 1, 5/13/231

The discriminatory impact on Maori land and the rejection of consultation inherent in the compulsory right provoked considerable criticism from Maori. This became more apparent as Maori were given representation in Parliament. The excessive and discriminatory use of the power at a local level also caused immense concern and suspicion of Government intentions. The Government responded weakly to requests to exert firmer control over local authorities. Intervention generally only came when trouble threatened or discrimination was so blatant that the Government felt obliged to act. However, remedies were generally ineffective and for the most part the Government refused to intervene to protect Maori interests, while actively assisting local bodies in the taking process.

In 1872 for example, the Colonial Secretary wrote to provincial superintendents reminding them of the desirability of having roads laid down as soon as possible to take advantage of the right to take roads through granted Maori land and European land without compensation before the time period expired. The Superintendent of Auckland province replied that there were still numerous areas of Crown-granted Maori land and European land over which such powers had not been exercised. However, it would be expensive and wasteful to do it now while roading needs were still not clearly known and he criticised the time periods as being too short. He suggested that the highway boards and local authorities be asked to provide information on likely roads so that these could be marked on Crown grants. Later, when actual roading needs were known, surveys could be made, and if necessary exchanges could be made with the lines of road on Crown grants.<sup>8</sup> This system seems to have been widely practised. The Maori Land Court, for example, seems to have been conscientious in ensuring rights to road lines were entered on Crown grants of Maori land.

While there was considerable cooperation between central and local government over the provision of general roading needs, their different responsibilities were often also used as a convenient means for both to evade accepting responsibility for meeting Maori roading needs. In parliamentary debates in 1872, the member for Southern Maori, Taiaroa, asked for a Government grant for a few miles of main road Otago Maoris wanted built between Portobello and the Otago heads. Both local and central government had failed to act in this matter and now he wanted a grant from the General Assembly, as Maori paid considerable taxes in customs dues levied by the Assembly and had received little back. He told the House that Maori had seen proceedings in the Native Land Court when the Government was able to take roads over Maori land whenever it liked. He had objected to a road at Papanui, but he was overruled and a road was made. When he had petitioned Parliament, the committee reported that under the Native Land Acts the Government could take roads over Maori lands. Now when Maori wanted a road they were told to rate themselves for it. That was accepted for branch roads, but this was a main road.

Taiaroa warned that the compulsory provisions in the Native Land Acts were going to cause serious trouble and that he would use his authority to prevent further roads being built by those means. If the House objected to the grant then he wanted the provisions in the Native Lands Acts repealed. It was much better that the land

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8. AP 2/2, 72/4287, and attachments

be paid for or that it was freely given by Maori. In this case, Maori were willing to gift the land in return for a grant to assist in having the road built.

Taiaroa also revealed two very common understandings among Maori concerning roads. He referred to former days when the Government paid for the land required for roads. The payment he believed was ‘not for the land occupied by the road, but for allowing the road to be taken over the land’. He also referred to early land purchase agreements and negotiations over roading, for example purchases by Mantell. The understanding was that future provision for roading meant that future Maori roading needs would also be provided for.

Taiaroa received some support. A European member seconding his motion reminded the House that lands in Otago had been acquired for a very small price and ‘no money had ever been expended for making roads through native lands in the province of Otago’, and also that no defence expenditure had ever been necessary. In fairness, some assistance should be given. McLean also supported the request and argued that it would be a ‘graceful act on the part of the House to meet the reasonable claim of the principal chief of the Middle Island’. Various members also pointed out that there could still be trouble if the ‘greatest precaution’ was not exercised in taking Maori land and that £400,000 was already being expended by central government on roading in the North Island. However, there was also a strong feeling that this road should be left to the responsibility of the provincial government. Many argued that this relied on Maori paying rates but Rolleston also argued that it was the responsibility of the province to assist the natives as they were as much inhabitants and had the same rights as other people in the province in the making of roads.<sup>9</sup>

In reality, it seems apparent that Maori were not generally treated the same as other inhabitants of a province. Settler interests invariably took precedence over Maori rights. In terms of roading, it became a very common complaint, for example, that where local authorities had a choice, they tended to take Maori land before European-owned land. Even where a required road ran along the boundary between Maori and European-owned land, it was often only taken from Maori land. In 1888 this issue was raised in the House and freely acknowledged by the Minister of Works. The Member for Western Maori complained about this practice and asked that the Government would give some instruction to local bodies so that the making of roads was carried out more fairly to the natives. ‘The roads were for the benefit of both races and should not be taken entirely at the expense of the Natives’.

The Minister of Public Works was in complete agreement. He had recently received many complaints from Otaki natives and had been shown sketches showing lands through which roads had been taken from which he was quite convinced that wrong had been done. When he inquired at the Survey department he found that proper care was often not taken to ascertain the facts before issuing a warrant to take such roads. He was informed that local bodies surveyed roads through native lands:

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9. NZPD, 1872, vol 13, pp 268–270, 336–341

without the slightest consideration for the Native interests'. In cases where a European owned land adjoining a Native's land the whole width of the road was taken from the Native's land and none from the European's land.

He thought this was decidedly unfair. It was the practice of the Public Works department to pay compensation and to first consult with the Native department. 'If local bodies would only do that, a great deal of friction would be saved; but they never did it.' They acted entirely on their own responsibility except so far as they might make representations to the Survey department to have the land taken under the Act which enabled 5 percent of land to be taken for road purposes within 15 years after the issue of a Crown grant. 'The Government would consider what could be done to remedy this evil'.<sup>10</sup>

The Government remedy appears to have been the provision in the Public Works Act 1894 that when a road was laid off between lands owned by natives and lands owned by Europeans, the road was to be taken equally from both 'where practicable' (s 95(2)). This was amended in the very next Act passed by the House. The Native Land Court Act 1894 included the same provision but added 'provided that the Governor shall have the right to lay off or take roads on or from the lands of both owners' (s 72). This seemed to acknowledge that the legislation itself encouraged discrimination against Maori land.

By the late 1870s, political attitudes towards Maori had hardened and compulsory land taking was increasingly accepted by Government as a prime means of acquiring Maori land for roads and railways. The idea of consultation with Maori and taking account of Maori concerns over roading needs was correspondingly rejected. In 1879, as Maori resistance to roading in Taranaki was becoming a major concern, the Member for Western Maori requested that new legislation be enacted that would prevent future roads from being enforced through Crown-granted Maori land. The legislation allowing roading to be enforced through Maori land without paying compensation was likely to cause very serious trouble. Major Te Wheoro asked the Government to devise some practical way of dealing with this matter. Bryce replied that the Government 'could not possibly' bring in the legislation requested because 'manifestly, a little reflection would convince the honorable member that it might have the effect of preventing the construction of roads altogether'.<sup>11</sup>

The case of Matene Tauwhare, a Maori leader at Pito-one, provides a good illustration of the way in which the Crown right to take land for roads was used as an excuse to evade compensation wherever possible and the confusion over provisions was exploited to take land in contravention of the protections that did exist. The case also reveals the lack of supervision at a local level and the lack of political will on the part of the Government to remedy injustices when Maori had effectively been marginalised.

The local authority, then the local town board, decided to take some of Matene's land for a road in the late 1880s. Problems arose from the very beginning when the

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10. NZPD, 1888, vol 56, p 609

11. NZPD, 1879, vol 34, pp 809–810

Native department was informed that this seemed to be another case where the town board wanted to take native land even when the European land nearby was more conveniently sited for roading purposes. A memo of 1887 from the Under-Secretary of the Native department to this effect resulted in an investigation that apparently achieved very little. A further letter from lawyers for the owner in 1887 complained that the town board was refusing to deal with the owners ‘. . . in a reasonable manner or to offer them reasonable compensation . . .’. Eventually Matene himself wrote to the Minister, complaining that the land had been taken and the road built, but no compensation had been offered. However, as the Public Works department was not involved and it was the town board who took the land, the Government refused to interfere other than by sending a copy of the complaint to the town board.

It then turned out that the town board’s lawyer, who was also town clerk at the time, had knowingly taken advantage of a clause in the Crown grant held by Matene that had provided for a right of road. This right had been made by Judge Mackay, as he was entitled to do under native land legislation, to give private access between the native parcels of land when the block was partitioned. It was never intended to give a public right of access. The town board was aware of this as, according to his signed statement, the judge had personally contacted the lawyer and informed him of the intention of the clause and asked him not to take advantage of it. The lawyer had however gone ahead and used the clause as though it reserved the general right to take a percentage of lands for public roads without compensation. On this basis, and without checking, the Minister of Lands had issued the warrant taking the road without compensation. The town board then insisted that as the Government had given them the legal right to take the road without compensation, they saw no reason to do anything to rectify the matter.

Matene continued to pressure the Government for justice, on his own account and through various lawyers and agents and eventually by petitioning Parliament. As a result of his petition Judge Mackay wrote his 1888 supporting statement. Mackay was forthright in his condemnation of the town board and the dishonesty of its lawyer. He argued that the town board should have paid compensation instead of taking advantage of Matene. In spite of all this the Native department still could not see that it was a ‘matter for Government interference’. The Native Minister himself intervened however, and in 1889 directed that the department draw attention to the town board that the clause in the Crown grant was not intended to give a general right of road. He felt that Matene was entitled to consideration and directed that the Government would be willing to assist in settling the matter in a reasonable manner.

What was by then the Petone Borough Council simply refused to reply to the Native department’s letters. It also informed Matene’s lawyer that it intended to do nothing – as far as it was concerned, the Government had given the right of road and there the matter ended. The Native department was quite willing to let the matter drop at this stage but Matene persisted in trying to have the matter remedied. His lawyer informed the Minister of the council’s refusal to budge, and also pointed out that Matene was suffering considerable hardship as a result of the taking. He had been disadvantaged instead of benefiting from the road because his remaining land was no longer big enough for legal building sites. When the council did respond in 1890, the mayor, who had originally been the board lawyer behind the taking in the



first place, again refused to acknowledge any problem. He claimed that the board had simply used its legal right and anyway Matene had benefited from the road. Once again the Native department was willing to simply accept this explanation.

The agent for Matene however kept pursuing the matter. He had been informed by the previous Native Minister that the right to take land without compensation only applied to one-fifth of the land (it was actually one-twentieth) but almost half had been taken from Matene. Matene was now at a disadvantage from the road because his sites were now too small to build on. Once again the Native department attitude was that nothing further could be done although the case was a 'hard one'. Matene persisted however with another petition. The parliamentary committee reported in 1890 that Matene had suffered an injustice and should be paid compensation either by the Petone Town Board or by the Government and that compensation should be assessed in terms of the Public Works Act 1882. However officials found that legally, compensation could only be assessed under this Act if land had been taken under the Act. Apparently the only possibility was that both sides had to agree to an informal hearing by a resident magistrate and assessors and there was a maximum limit on what could be claimed. In 1891, in order to have the claim heard, Matene reduced his claim from £1000 to £480. However, for some reason not entirely clear from the file papers, the Public Works department ended up deciding the compensation, and in 1892 found that Matene had 'not really suffered any injury at all by the construction of the road'.

After five years, therefore, of determined effort and considerable expense, Matene was still no further ahead in obtaining a remedy for what was clearly a misuse of the taking provisions. The response of the Government and officials was weak and even a favourable response to a petition achieved nothing.<sup>12</sup>

The whole case is a clear example of the problems besetting Maori landowners. Councils could act illegally, knowing there was little supervision of their actions. Government departments routinely issued land taking warrants on the word of the local authority alone, even when it was disputed. There was no real check on whether the amount of land taken was more than the 5 percent allowed before compensation had to be paid and there was considerable confusion about the exact provisions relating to Maori land. Importantly, there was a lack of political will in remedying admitted injustices and in improving the situation. This only encouraged taking authorities to push the limits even further.

In summary, the provisions allowing certain Maori land to be taken for roads and railways without compensation developed separately to those concerning general land and quickly became discriminatory in both the legal provisions and their practical effect. For example, the time period during which the right could be exercised was generally greater for Maori land and the provisions applied to ever-increasing amounts of Maori land, while the similar right for general land was applying to ever-diminishing amounts of land. The complete lack of rights to compensation in the provisions also contravened widely recognised requirements for public works takings at the time.

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12. MA 1, 92/2163, and attachments

*The Legislative Right to Take Land without Compensation, 1862–1927*

The provisions also appear to have had a wider impact because of the attitudes they encouraged in taking authorities where Maori land was concerned. Maori land inevitably became a prime target when it was known that at least some of it could be had for free and without the formalities such as notice and objections involved in other land takings. The general confusion and complications surrounding the development of the provisions and the confusion between them and the general taking provisions operating at the same time appears to have provided plenty of opportunity and encouragement for taking authorities to bend the rules and to avoid protections and evade compensation even when these provisions applied.

Importantly, this legislative development also failed to place any requirement on the Crown to ensure even basic protections for Maori. For example, there was no requirement to show that compulsory takings were really necessary or that roads were really being built in the interests of the whole community. Little effort was made to supervise or restrain taking authorities and, although Crown policy at a national level showed that consultation with Maori could work, this too was dropped as soon as settler domination seemed complete. The possibility of consultation and negotiation was explicitly rejected and replaced by compulsion without even the normal protections such as the right to notice, let alone any attempts to explain the necessity for the proposed taking or to hear and consider Maori concerns. The tangle of legislation and amendments itself was also an indication of the low regard in which Treaty protections for Maori were held. By 1927 when the right was abolished, the Native Minister of the time openly acknowledged, and was unchallenged, that the right had operated in a discriminatory way towards Maori.



## CHAPTER 8

# THE BEGINNING OF THE GREAT PUBLIC WORKS BOOM – THE 1870s

The 1870s saw the beginning of the great ‘public works boom’, when massive public works programmes were established at a national level to provide an improved infrastructure and to attract immigration in an attempt to encourage sustained economic development. The major public works legislation during this time was the Immigration and Public Works Act 1870 and the Public Works Act 1876. The tradition of numerous amendments to public works legislation as new needs or problems arose also became established.

The legislation was clearly aimed at furthering settler interests and the needs of colonisation and in the process Maori interests were marginalised. However, in terms of takings of Maori land, most provisions enacted during this period appeared, on the surface at least, to apply equally to all land, whatever the ownership. As the provisions assumed more extensive application to European-owned land, they also included many of the protections so noticeably absent from the 1864 Act. The major exception was for land required for railways. As railway ‘mania’ swept the country, and a railway through a district was widely believed to almost guarantee economic prosperity, the protections for taking land for railways were significantly reduced. Once again this applied regardless of who the land was taken from.

Crown policy towards the taking of Maori land at a national level was also noticeably less aggressive, although the Crown right to take certain land without compensation was also operating in less sensitive areas throughout this time. This policy concerning land for national works was largely due to circumstances immediately following the wars, but resulted during the immediate post-war years and at a national level at least, in a return to the pre-war policy of consultation and negotiation with Maori leaders to purchase land required for public works. The situation at a local level, and in the South Island, is more confused and requires further research. However, in general it appears that where the need to avoid provoking further warfare was not so great, compulsory powers such as those discussed in the previous chapter, were used more often. In addition it seems that central government assisted local authorities to circumvent restrictions on their power to take Maori customary land until their power to do so was confirmed in the 1876 Act.

As historians have noted, by 1870 the colony was ‘war weary’ and peace was still by no means assured. It had been much more difficult to defeat hostile Maori than

settlers had at first believed, and at British insistence the extra support of Imperial troops was being withdrawn. Crown policy for the next few years therefore recognised the necessity of avoiding provoking more trouble. At the same time the economy was stagnating and it was recognised that continuing warfare was a major reason for this. There was also concern that little real progress was being made in developing the necessary national infrastructure required as a basis for economic prosperity.

According to Noonan, in 1870 most European settlements were still struggling to provide basic facilities, and were incapable of developing the hinterland. Coastal shipping was still the major form of communication and while work had been carried out improving harbours and lighthouses for example, little real progress had been made on internal communications. The creation of the provinces recognised that communications between regions was minimal but provinces in turn were exclusively concerned with the internal development of their own areas. Little progress had been made on improving colony-wide communications. The southern provinces had made most progress reflecting their greater wealth. By 1869, for example, Otago had many metaled and paved roads and both Otago and Canterbury had railway lines operating before 1870. Most districts were much further behind. On the West Coast by 1871, for example, there was not a single dray road leading out of Greymouth. Apart from the fine roads largely built by troops for strategic military purposes, the North Island had also made little progress. With the slump, even Otago and Canterbury faced depression. The New Zealand economy was still basically unstable, with little cooperation between the provinces. It also still lacked a reliable export trade and an adequate system of internal transport on which to build a united economy.<sup>1</sup>

It was felt that public works on a much larger, national scale, were necessary to stimulate the country and to encourage immigration. At the same time, money spent on warfare could be better spent on employing Maori on public works construction which would at the same time assist in their pacification and civilisation. The Government accepted therefore that forceful acquisition, in ‘sensitive’ areas anyway, and the continuance of the wars was holding back the continued development of the country. In addition, the withdrawal of Imperial troops meant the colony had to avoid provoking further serious confrontation.

The public works legislation of the 1870s provided authority for the massive new national programme of public works. In addition it reflected the Crown policy of purchasing Maori land required for public works in the North Island at least, and the hopes of politicians that public works would be more effective than warfare in solving the ‘native problem’. The 1870s public works legislation acknowledged and continued discriminatory land-taking provisions in other Acts such as the right to take certain Maori land for roading and railways without compensation in the Native Lands Acts. However, the legislation itself was remarkably neutral, on the surface at least, when compared to the 1864 Act.

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1. R J Noonan, *By Design: A Brief History of the Public Works Department, Ministry of Works, 1870–1970*, Crown copyright, 1975, ch 1, pp 1–6

## *The Beginning of the Great Public Works Boom – the 1870s*

The Immigration and Public Works Act 1870 authorised the adoption of the massive public works programme devised by Julius Vogel. It was described as an ‘Act to provide for immigration and the construction of railways and other public works and also to promote settlement’, and it was intended to solve both the economic woes of the colony and the ‘native problem’ at the same time. Large-scale borrowing would enable a massive programme of immigration and public works which it was hoped would provide the stimulation the economy needed. At the same time, by ‘opening up’ the country it was confidently predicted that Maori could be civilised and any further resistance broken down. The works of particular concern in the Act were those believed to be essential in developing the economy and in encouraging further settlement; in particular railways, the supply of water to goldfields, and the construction of roads, bridges, and ferries in the North Island.

The works were to be provided at a national level where it had become obvious they were beyond the capacity of individual provincial councils to finance and carry out. However, it was still envisaged that the cooperation of provincial governments would be necessary for the success of the scheme and they were still expected to continue with their own local works programmes.

The first five parts of the 1870 Act dealt mainly with the authority of the Governor and the means of financing the works as well as acquiring necessary land in the North Island by purchase and financing immigration. As part of the powers relating to railways, confiscated lands could be deemed wastelands of the Crown (s 22). The next three parts (Parts 6–8), dealt with provisions ‘specially applicable’ to the three major types of works; roads (Part 6), railways (Part 7), and water supplies (Part 8). These provisions included procedures for taking land and paying compensation. The final miscellaneous Part 9 included provisions to appoint a Minister of Public Works and to establish a public works department.

The provisions under Part 6, dealing with roads in the North Island, gave the Governor power to enter and take land for roads subject to many of the traditional public works protections for landowners. For example, a plan of the area to be taken was required and the proposed taking had to be publicly notified. There was provision for ‘well grounded’ objections to be heard, if made in writing within 40 days of the notice. The Governor was required to give ‘due consideration’ to such objections. If he still found it expedient to go ahead, and paid compensation to those entitled, he could then make an order directing the work to proceed. Provided that no compensation was payable in cases where under any other Act or ordinance still in force, ‘the Governor has power to make or take the road . . . without compensation’. Consent in writing of the owner was required before any road or highway could be made through any orchard, vineyard, garden, yard, or any park, planted walk, or avenue to a house or planted and set apart as a nursery for trees (ss 49–53).

Materials such as gravel or stone required in construction could be removed from the land but not in such a way as to cause damage to any building, bridge, or similar thing. Compensation was also payable for damages to land incurred in the removal of material (s 59). If any owner was dissatisfied with the compensation offered, there was also provision for an independent assessment (s 61).

Under Part 7, in relation to railways, private land could be entered for survey and taken for railways provided that owners could claim compensation for land taken or damages to land in terms of the Lands Clauses Consolidation Act 1863 (ss 70–71). Certain clauses of the Imperial Railways Clauses Consolidation Act 1845 were also incorporated (s 73).

Under Part 8 relating to works for the supply of water to goldfields, the Governor had power to enter, survey, and take lands required and divert or ‘impound’ water from streams as required (s 83). Compensation was payable to landowners for damages to land but no compensation was payable for diverting or taking water from rivers, streams, or natural watercourses (s 87). Appropriate sections of the Lands Clauses Consolidation Act 1863 were incorporated (s 85).

The 1870 Act continued many of the protections and provisions inherited from the English tradition and previously incorporated into the Lands Clauses Consolidation Act. It also allowed for the continuation of taking provisions in other legislation such as the right to take certain Maori land for roads without compensation. Confiscated lands were also deemed to be wastelands of the Crown. However, the taking and compensation provisions themselves appeared to deal equally with all land taken under the Act, regardless of the landownership. The discriminatory effect of the Act was most apparent in the lack of concern for special Maori interests. For example the protections were eurocentric. While European-style gardens and orchards were protected there was no corresponding protection for urupa or other wahi tapu, although these were known to be important to Maori. Later amendments containing specific provisions relating to native land also tended to be most concerned with assisting European settlement. In 1871, for example, the Governor was allowed to enter negotiations for land required for goldmining, railways, and special settlements, before it had been investigated by the Native Land Court.<sup>2</sup>

What was to become a familiar pattern of numerous amendments to public works legislation soon followed. The Immigration and Public Works Act 1872 amended and reorganised provisions with more emphasis on railways, reflecting the railway ‘mania’ sweeping the country. It was divided into parts concerned with surveys; acquisition of lands for railways; compensation; conveyance of land for railways and roads; construction and maintenance of railways; financing of roads in the Nelson South West goldfields; water supply on goldfields; and immigration. The survey and compensation provisions were made more general rather than referring just to land required for roads in the North Island as in the 1870 Act. Other provisions were made more detailed, for example, the owner’s consent was now also required before branches could be cut off a tree or shrub. The major change was in regard to railways, where previous protections were removed or restricted. The relevant provisions from the Lands Clauses Consolidation Act were no longer considered incorporated. Protections were considerably less than for other takings. Now, for example, land for railways could be entered and taken 21 days after the publication of a taking proclamation in the *Gazette* and in a newspaper of the district. This could happen even if there was no prior arrangement or agreement

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2. Immigration and Public Works Amendment Act 1871, s 42

regarding compensation (ss 14, 16). The Governor's powers of proclaiming lines of railway were also extended. In addition, as described in the previous chapter, general provisions enabling the Crown to reserve the right to take roads in Crown grants was extended to railways. The right to take Maori land for roads without compensation was also extended to railways (s 36).

The parliamentary debates on the 1870 Act reflected the Government's policy that now 'bloodless conquest' by peaceful public works projects was preferred to force of arms. In fact it was intended that Maori land would be purchased by agreement where possible. It was expected that the public works themselves, and the increased settlement they generated, as well as the provision of employment for Maori on their construction, would now be the agents of pacification and civilisation.

In sponsoring the Act, Gisborne described it as the 'centrepiece of the financial policy of the Government'.<sup>3</sup> The policy was designed to extricate the whole colony from a state of depression and to give it a 'fresh opportunity to enter into a course of prosperity and wealth'. In addition it would strengthen the Government's power in the North Island and now was a favourable time to begin implementing the policy, while native affairs in the North Island were in a state of comparative quiet.

A major part of the Act was concerned with the construction of roads in the North Island. This was 'an essential element' in the pacification of the island and an 'essential element' in the 'restoration and maintenance of peace' would be:

the employment of the Natives themselves for this purpose, as great power will thereby be given to restrain them from falling into evil habits or joining hostile tribes who may wish to attack the Europeans. It will at the same time open up the country, and also enable the settlers to form settlements in the interior, and if, unfortunately, we should again fall into war, it will greatly facilitate our defensive or aggressive operations, as the case may be.

Some £400,000 was set apart for making roads in the North Island over a four year period. The Minister was unable to state exactly what lines of roads would be made on account of the 'variable state of Native feeling'. For this reason also the Governor would have the power to spend the sum as 'favourable opportunities' arose without the General Assembly insisting on appropriation in advance. The Minister also stated that 'arrangements will be made for the purchase of land from the Natives and others, and this land can be handed over by the Governor to the provincial authorities . . .'. A similar sum would be made available for railways in the middle island. Before any sums would be spent on railways, however, special Acts authorising individual works would have to be approved by the General Assembly. The responsibility would then be the General Assembly's, 'immediate, certain and absolute'.

A sum was also to be made available for the extension of the telegraph. In the interior of the North Island the usefulness of this was 'obvious'. It was 'a most potent civilizer and colonizer of the country'. In fact the three stages, 'roads first, railways next and telegraph third' together did more than any 'instruments which

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3. NZPD, 1870, pp 179–185



the human mind can devise for the settlement of the country'. The Minister went on to state that the Act was inseparably connected with native affairs. The alternative of peace or war was still hanging in the balance and the Act offered a means of restoring 'not by force of arms, but by the progress of settlement' order and tranquillity throughout the North Island. It would achieve a 'bloodless conquest of peace' and make the 'recurrence of any serious Native insurrection impossible'.

Later, in response to criticism that the policy was intended to supersede the public works programmes of provincial governments, Fox denied this and claimed instead that it was intended that provinces should go on with their own works programmes. The policy was that the national schemes that provinces could not manage on their own would be carried on alongside them, not overshadowing them.<sup>4</sup>

Provincial governments were abolished in 1876 and as a result a Public Works Act was passed in 1876 with the intention of tidying up and consolidating relevant public works legislation for both central government and the local authority successors to provincial governments. However, the Act did more than this in that provisions relating to takings and compensation were more detailed and the power of local bodies to take Maori customary land was finally confirmed.

The Act was divided into eight parts and followed the pattern of the 1870 Act in many respects. There were general parts on taking land, compensation, and surveys, and also separate parts relating to roads, railways, drainage, and water supplies for goldfields. As a general principle, written consent was required before entering or taking land occupied by such things as any building, yard, garden, or orchard. In addition, written consent was required before material such as stone could be removed from a quarry or similar place commonly used for taking such material. The exception to this requirement were railways and other works made under the authority of a special Act of Parliament (s 15).

Land could be taken for either Government works or county or district works (s 21). The procedures for taking land for public works generally contained the normal public works protections. Surveys and plans had to be made public, and well-grounded written objections received within 40 days had to be heard (ss 21–24). If after 'due consideration' of objections, the Minister or County Council or Roads Board decided to go ahead with the work and was sure that no private injury would be done for which compensation was not provided by the Act, a procedure was set down for taking the land. The taking authority had to issue the Governor with an accurate description of the lands to be taken with an accompanying map, signed by the Surveyor General or a certificated surveyor. The Governor could then, if he thought fit, have the taking proclaimed, gazetted, and publicly notified. The land then became vested in the Crown in fee simple, free of any interests, claims, charges, and so on, 'for the public use named in the said proclamation' (s 25). The taking was to be recorded, and an owner could require severed or temporarily occupied land to be taken in certain cases (ss 27–28).

Any land taken but then not required could be sold by Order in Council. However, the land had to be independently valued first and then offered at that price to the person it was originally taken from and then adjacent owner(s). If these offers

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4. NZPD, 1872, p 575

were not taken up, then the land was to be sold at public auction (s 29). Lands taken but not required immediately could also be leased by the taking authority (s 30).

In terms of compensation, the general principle was that full compensation would be paid to any person owning or having an interest in land taken, or suffering injurious affection from the public works, or any damage from the exercise of powers conferred by the Act (s 33). All claims for compensation were to be heard by a newly established Compensation Court (s 35). In order to claim compensation, the claimant had to make a claim in writing, in the form specified, describing lands about which claim was made, the nature of the interest in such lands, the nature of the loss or injury claimed and the amount claimed as compensation. The claims had to be lodged at an office of the Minister or county council or road board (s 37). A procedure was also outlined for having the claim responded to, heard, and determined (ss 38–71). There was also a five-year time limit on compensation claims (s 72). The right already reserved to the Crown, to take land without compensation for a road or railway, was retained unless the right had already lapsed or become barred (s 73).

A surveyor could enter any land during daytime, for making authorised surveys and associated work such as setting up survey pegs. Where possible, reasonable notice had to be given to the occupier of the land (s 75). In the case of native land, a surveyor could not enter without a special authority signed by the Minister (s 78).

All roads were declared to be vested in the Crown (s 80). Roads other than Government roads were to be under the control of the district road boards or county councils. The powers of district road boards were set out, including the power to make surveys for new roads, to alter the width or level of a road, to take land to make a new road or alter the width of a road, to enter lands to construct drains to protect roads, to stop roads, to take material from land for roads under certain conditions and to use any uncultivated and unfenced land adjacent to a road as a temporary road while a road was being constructed or repaired (s 87). County councils had the same powers for roads under their management (s 90). Procedures were set down for stopping roads (ss 92–93). Where a road was stopped, the land could be disposed of in the same way as for surplus land taken for public works (that is to say, offered back to the original owner then adjacent owner(s), then sold at auction (s 94)). In addition, a landowner could exchange the land under the old stopped road for land required for a new road, and where the stoppage was for private benefit the owner had to pay all costs incurred (ss 95–96).

Railways could only be made under special Acts of Parliament (s 122). The Governor then had to issue a proclamation defining the middle line of the railway or any part of it and could amend the proclamation as found necessary during the construction of the railway. Plans and maps of the railway and the land to be taken formed part of the proclamation and had to be made available for public inspection (ss 124–125). After the publication of such a proclamation, the Minister could at any time give 21 days notice to the occupier of the land and then enter on the land and carry out any necessary work. The exact limits of the land required for the railway had to be determined within three years of the publication of the proclamation or powers contained in the proclamation ceased (s 127). None of the rights of notice to owners, rights of objection and hearing available in sections 22

to 25 with regard to taking other land, were to apply to railways made under special Acts and subject to such proclamations (s 128). Certain powers regarding railways were listed and no compensation was payable for railways made on public reserves.

In summary, the 1876 Act retained many of the same principles as the 1870 and 1872 Acts and amendments. Traditional protections were available, and in many cases strengthened, for most land required for public works. The major exception to this continued to be land required for railways purposes where some protections such as the right of objection did not apply and others such as rights of notice were considerably reduced. The general provisions relating to land taking, survey, and compensation also continued, and made no special distinction between Maori and European-owned land. Maori customary land, however, could not be entered by a surveyor without the written authority of the Minister. This provision seemed to confirm McLean's view that some tact was required and that this might help avoid situations where Maori resisted roads by removing survey pegs.

The Act also continued to acknowledge the Crown right in other legislation to take certain Maori land for roads without compensation. The 1876 Act also confirmed that now local bodies had general legislative authority to take Maori land including customary Maori land. This finally did away with the previous restrictions on local authorities with regard to general powers to take customary Maori land. In addition, all roads being used by the public were now considered to be vested in the Crown.

Although most other provisions seemed neutral, some were likely to have a significant impact on Maori. The declaration that all roads were vested in the Crown meant that many routes that Maori had allowed Europeans to use on a regular basis, including those from pre-European times, were now declared to be public roads vested in the Crown. 'Road' was defined as a public highway, whether a carriage way, bridle path, or footpath. In many cases no payment had ever been made for these and it seems clear that in many cases Maori had thought they were only allowing rights of passage not rights of landownership. There is evidence that this section was used to simply take roads without compensation if it was clear the public had been allowed to use them at all prior to this Act.

For example, in the Wairoa area, an ancient track was used for many years as a public road when the district was first being settled. It was still customary land when it was taken in 1916 for railway purposes. There had been an agreement that the old road would be incorporated into Maori land blocks, and while this had happened in other blocks it had never been carried out for the block in question. When later action was taken to investigate the situation regarding compensation, the Ministry of Works refused compensation on the grounds that the taking merely tidied up the situation and the road was already Crown land. When the proclamation had been made, the then Public Works department relied on sections 79 and 80 of the 1876 Act as substituted by sections 101 and 102 of the 1908 Act, in an effort to have any application for compensation declared *ultra vires* and struck out. As the 1876 Act declared that all existing roads used by the public were vested in the Crown, the department held that this road was therefore already legally public land in 1916.<sup>5</sup>

*The Beginning of the Great Public Works Boom – the 1870s*

Other protections were still eurocentric. Objections had to be made in writing, within a set time period, following a very formal set format. Lands requiring written consent for entry continued to be lands occupied by orchards, gardens, or vineyards, for example. No mention was made of urupa, traditional hunting areas, or other wahi tapu.

In debate on the 1876 Act, it was explained that at first it was simply intended to consolidate the various public works and railways Acts legislation but then it was found necessary to go further and provide powers for various bodies, particularly the county councils and roads boards. Most criticism of the Act from European members was that the general protections were not strong enough and in many cases the public good had suffered. For example, there was now a right to encroach on public reserves without having to pay compensation. Other members also criticised the ‘pernicious’ practice that had grown up of ‘stealthy’ amendments or repeals every year, many of which ‘very seriously prejudiced’ public rights. There were also concerns that members of county councils and roads boards, ‘all men of influence’, would be able to bring undue political pressure on the House.

In parliamentary debates in 1872, member for Southern Maori, Tairaroa, highlighted problems Maori were experiencing even though the provisions of the 1870 and 1876 Acts in theory did not discriminate. He seemed to confirm that the national policy of consultation was limited to the more sensitive districts of the North Island. He was concerned about takings for railways in Greymouth. In particular the evasion of compensation and the impact of lack of consultation for railways takings on Maori, who had great difficulty finding out what was going on and what their rights were anyway. Tairaroa thought the Act was intended only for the benefit of Europeans – ‘that was to say, of the strong side’. Maori in Greymouth were unable to obtain compensation and were told that the department of Public Works had decided that the railway brought more value than the compensation was worth. The Minister had told them that large amounts of money had been spent developing the quay, which would be a benefit and that the railway would also benefit the town.

However Tairaroa pointed out that this value was largely to the Government and to Europeans not to the Maoris, who had lost houses and land. He thought the protections and compensation provisions of the Act only seemed to be meant for Europeans, and the Government did not obey them in dealing with Maoris. ‘The law ought to be carried out exactly the same with both races, and, if Europeans were compensated, the Natives should be compensated also’. If the Government wanted land from Maori it should also confer with Maori first and settle a price for the land before work began on the railway.<sup>6</sup>

As had become normal practice, there were numerous amendments to the 1876 Act. For example, the Public Works Act 1876 Amendment Act 1878 excluded all protections regarding notice, objections, and public notice of taking (ss 21–25 of the 1876 Act) from land taken for railways (s 5). Land for railways could be taken by proclamation alone (s 6). Notice was only required before or after the

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5. Correspondence in MA 1, 5/5/70

6. NZPD, 1876, vol 23, pp 514–519

proclamation to advise owners of land taken so they could claim compensation (s 8). Mines and minerals were also to be excluded from land taken (s 25), and land could be taken for a work after that work was completed (s 4). Land required for works, including railways, could also be purchased by agreement (s 21). The Governor could also sell surplus land taken for a work to any education board without complying with normal procedures (such as offering back to the original owner first) (s 24). The Boards of Conservators of rivers were also given the same taking powers as roads boards for the purposes of protective or other works concerning rivers (s 35).

The Public Works Act 1879 authorised the alteration or diversion of rivers streams and watercourses when desirable for the safety or maintenance of a public work (s 16). The Act also validated previous orders in council and proclamations made under public works legislation that may have been defective (s 14). The Public Works Act 1880 provided that in any claim for compensation for lands taken for public works out of native reserves, the Governor was to act as claimant and the Minister as respondent (s 12). The power of the Crown to take roads through native lands without compensation was also extended in many of these Acts, as already described in chapter 5.

The 1870s also saw a series of separate railway Acts. The Railways Construction Act 1878, for example, allowed the Governor to purchase lands from native owners required for certain railways (s 4). These included a line proposed to run through the King Country through land still in Maori ownership, and depended on successful purchase negotiations.

Although most Acts of this time reflected the Crown policy of negotiation with Maori, local authorities were still acquiring increasing powers, often in ways that Maori felt encroached on traditional land and resource rights. For example, the Highway Boards Act 1871 gave roads boards increased rating and taking powers, the Municipal Corporations Waterworks Act 1872 simply vested water rights in corporations without regard to prior Maori rights, and the Harbours Act 1878 extended the powers of harbour boards including the granting of land-taking powers (ss 166–170).

Perhaps one of the last attempts to provide for colonisation in a way that allowed Maori some theoretical control and opportunity for cooperation with the Crown was the Thermal Springs Districts Act 1881. This provided for certain districts where the Governor could provide for European settlement and use of mineral and hot springs areas by cession, purchase or lease of native land. The preamble to the Act stated that it would be:

advantageous to the Colony, and beneficial to the Maori owners of land in which natural mineral springs and thermal waters exists, that such localities should be opened to colonization and made available for settlement . . .

Among the powers of the Governor under the Act, were those of treating and agreeing with the native owners for the use and enjoyment by the public of all mineral or other springs, lakes, rivers, and waters; lay out and survey towns allotments and farms; make, stop up, divert, widen, or alter any bridges, ways, or

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watercourses; and to exercise the powers of compulsorily taking land under the Public Works Act 1876 for the purposes of water supply and sewerage (s 5). With the consent of native owners, the Governor could also undertake other public works such as the setting apart of land for such things as parks, schools, churches, and gardens, and manage and control mineral and hot springs, and build pump rooms, baths, and similar things, for the convenient use of springs, baths, and lakes (s 6).

The attempt at providing for European colonisation by leasing lands and retaining Maori ownership eventually failed in the face of settler pressure and lack of political will on the part of the Government. A later Thermal Springs Act 1910 reflected the situation that had resulted from Government mismanagement of leases and the pressure to allow lessees to purchase the lands. The whole issue of various land settlement schemes requires a separate research paper. However, it needs to be noted that public works provisions were an important part of this scheme and apart from necessary sewerage and water supplies which were provided for under the 1876 Act, the provision for public needs was to be by negotiation and agreement with the native owners.

The administration of public works land takings during most of the 1870s reflected the Crown policy of negotiation with Maori at least at a national level. From 1869 to 1870 the Native department was revitalised under Donald McLean.<sup>7</sup> McLean had responsibility for public works as well as for Maori affairs, defence, and land purchase. The various means of extending colonisation were therefore coordinated. McLean followed a policy very reminiscent of the one he had followed under Grey before the wars. Instead of using compulsory powers to take roads, for example, he extended roads into Maori territory only with the owners' consent. This was in essence a continuation of Grey's policy of 'managing' Maori and taking colonisation including public works as far as possible but just short of provoking confrontation.

The extension of roads and telegraphs by negotiation and purchase depended considerably on respect for Maori values usually more readily found in Native department officers than in the new Public Works department. McLean arranged with the Minister of Public Works that surveyors and engineers would wait for the permission of the district officer of the Native department before they proceeded with their work, unless they were especially accredited by McLean to act alone. McLean circularised an agreement to this effect to his officers in 1872. In it he warned that it would not be wise to leave negotiations, sometimes of a delicate character for opening and constructing new lines of roads, entirely in the hands of engineers or other persons who from inexperience or ignorance of local matters might cause misunderstandings and perhaps future trouble. District engineers were to consult with and obtain the advice of native officers in a district before beginning new road works or resuming works stopped because of native difficulty. This would be found to be satisfactory and would avoid the chances of collision.<sup>8</sup>

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7. A Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, Oxford University Press, 1973, pp 229–231

8. Memo circularised by D McLean, 8 November 1872, in MA 4/66, p 664

Frequently it was Native department officers themselves who both negotiated permission to make a road in Maori territory and supervised the making of it. Although the Government was in a position to exert powerful pressure there was a sense of real negotiation and some give and take on both sides. Importantly, the process involved consultation with Maori before work took place. For example in 1871 H T Clarke reported on the complex negotiations for the construction of the main road line on the western side of Lake Rotorua between Tauranga and Taupo, known as the Mangorewa Forest road. The area was considered highly tapu because of numerous ancient battles that had resulted in enormous loss of life. More recently, losses by Government forces had been blamed on the troops' violation of this tapu. The main hapu of the area were also divided in their support for the Government.

Clarke reported that negotiations involved a great deal of argument over who was really going to benefit from the road. The chiefs pointed out the great advantages to Europeans, while Clarke insisted that Maori would greatly benefit from having their villages made accessible to the sea port as well as having lands opened to 'beneficial occupation by Europeans'. At last he got them to give a hesitant agreement to a survey being made. On reopening negotiations, he found the chiefs had more objections, many of them 'frivolous and absurd'. Finally, the road was agreed to under a number of conditions, including contract work on the road for each hapu at an agreed rate, the Government to provide the necessary equipment, and the Government agreed to assist in preventing trespass by Europeans in the pigeon-trapping season. The contract rate to be paid for the work was also the subject of much haggling and the opportunity to earn cash was obviously a major incentive in agreeing to the road.<sup>9</sup> The first annual report of the Public Works department also acknowledged that 'great tact' was required in negotiating the passage of roads through native land.<sup>10</sup>

Maori generally welcomed the opportunity for consultation and took every opportunity to emphasise the importance they placed on this process. They also generally welcomed opportunities to come to grips with the post-war society and to participate in new opportunities for economic development. It is clear that even after the bitterness of warfare, Maori were prepared to cooperate when they were consulted, and when works such as roads were clearly likely to be beneficial to both races, they often responded generously by continuing to gift land to enable roads and other works to be built. At a national level at least, once again they had reason to believe that the Crown would respect their wishes for consultation and negotiation. Reports of numerous negotiations over roads show, for example, that where there seemed to be obvious economic benefit, Maori were keen for roads and often competed among themselves over where the roads should go. The first Public Works annual report noted that some delays in obtaining consent for roads arose from arguments among Maori as to whose land the roads would go through.<sup>11</sup>

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9. AJHR, 1871, D-1, pp 19–20

10. AJHR, 1871, B-2A, p 3

11. Ibid

## *The Beginning of the Great Public Works Boom – the 1870s*

As well as providing much-needed employment after crops and harvests had been disrupted by war, Maori were encouraged to accept roads by promises that they would provide better access to markets and the cash to revive economic enterprises. McLean also supplemented his policy of diplomacy with gifts and loans to various iwi and hapu to help rebuild after the wars. For example, in 1872 the Resident Magistrate at Napier was informed that the Native department would supply an advance to the natives to assist in repairing their flour mill.<sup>12</sup>

It is clear that Maori also provided a valuable contribution to roading. As noted by Ward, as the roading system was greatly expanded in the North Island, it was Maori workmen who were almost always the pioneers. Contract prices were cheaper than that paid for European labour and efforts were made to hold rates down by the use of military labour. Reports of the time are full of complaints about the ‘absurdly high prices’ Maori wanted to charge for work, and delays and stoppages if Maori cooperation could not be obtained. There are also numerous descriptions of the Armed Constabulary and the Native Contingent being used to build roads and bridges in the North Island where native demands were considered too high. For example, on the Whakatane–Te Teko road it was felt that native demands were ‘in excess of the value of the work’ and it ‘was therefore commenced by the Native Contingent’. However ‘the Natives objected, and the work has since been stopped’.<sup>13</sup>

McLean continued slowly opening up areas by his policy of purchase negotiations, supported where necessary by advances and gifts to obtain cooperation. He avoided pressing areas such as the King Country where he met determined resistance and simply attempted to wear objections down and slowly encroach on ‘hostile’ areas. In his policy of diplomacy McLean often appeared to be more sensitive to Maori concerns than the average settler. According to Ward his policies were also largely responsible for keeping the peace in the post-war years and opening up the way for further colonisation. However, as Ward has also noted, McLean was at heart convinced that further colonisation was inevitable and in the country’s best interests, and his land purchase methods were often dubious.

In terms of public works purposes, such as making agreements over roads, some of the problems with McLean’s methods are readily apparent. McLean and his staff for example often entered agreements where it seems Maori had quite different understandings of the terms, but the confusion was allowed to remain if it helped the deal go ahead. For example, an essential part of McLean’s pacification policy was to award construction contracts to all hapu with an interest in the land, even though Pakeha engineers might frequently complain of the difficulty and delay in having to organise new gangs as the road passed through the territory of each successive hapu. In 1870 McLean instructed Parris in Taranaki that in constructing road works in the districts between Waingongoro and Stoney River, ‘In every case contracts should be made with each hapu through whose land the road goes, to complete the work within their respective boundaries’.<sup>14</sup>

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12. Letter to R M Napier, 22 November 1872, MA 4/66, p 668

13. AJHR, 1873, E-2B, p 5

14. Memo from McLean to Parris, 18 October 1870, AJHR, 1871, D-1, p 51



McLean's purchase negotiations linked rights for roads to pass over land so closely to the contracts for construction of the work, however, that at times it seems clear that Maori may well have understood they were being offered work and sometimes gifts in return for agreeing to rights of use and passage of roads over their land rather than to a change in actual landownership, much as they had understood earlier pre-war agreements. For example, in a report by Public Works staff in 1871, mention was made of the problems incurred as different owners claimed the right of having their people employed as the road line was 'crossing their property'.<sup>15</sup> Legally roads that were constructed became vested in the Crown, but it is not clear if this was properly explained to Maori.

McLean also apparently allowed his land purchase officers to make deals concerning land takings that contained terms and conditions not provided for in the legislation. For example, there is evidence that land purchase officers agreed to conditions that took Maori concerns into account knowing this would win Maori cooperation and prevent serious disruption to construction and survey activity. However these terms had no legal standing and were rarely included with the legal documentation of the acquisition. It is also likely that many of the agreements may have been verbal and unrecorded. However, evidence does exist that the practice of making such agreements continued for some time and at least some agreements were recorded. On rare occasions departments did keep them and uphold them, although there was no strict legal obligation to do so.

An example is land taken for a ballast reserve on the Foxton Manawatu railway in 1888. The land purchase officer and the Maori owners agreed to the taking on a number of terms. These were that payment was made for the land at a set rate, the owners retained the right to use land not actually being worked for ballast, a grave in the centre of the site was to be protected, and the land was to be returned when Railways no longer required it for ballast. This agreement, although made in good faith, had no legal standing and was not entered on any official record. It was only through luck that it survived in Railways papers on the taking but it was overlooked when Railways no longer needed the land. Instead, in 1911, Railways leased the land to a European. It was only when the owners reminded Railways of the terms that a search was made and the agreement found. Technically, the legal title vested in the Crown with the taking proclamation and this contained no terms. However in this case Railways eventually decided it was morally bound to uphold the agreement and the land was re-vested in the owners by the Native Land Amendment and Native Land Claims Adjustment Act 1915 (s 11).<sup>16</sup>

The land purchases in the Taranaki district during the 1870s also provide a good example of McLean's policy and some of the problems associated with it. Because of the confusion that had occurred over implementing confiscation on the ground, McLean followed a policy of yielding a 'tacit consent' to Maori reoccupation of certain areas. As part of this, McLean's officers then negotiated purchases and agreements for roading with hapu on land that was already supposed to have been confiscated. McLean did this while biding his time until confiscations could be

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15. Letter from Turner to Blakett, 3 March 1871, AJHR, 1871, D-1, p 15

16. Correspondence, MA 1, 21/2/4

properly enforced, according to the second report of the West Coast Commission.<sup>17</sup> As a result, however, Maori thought some confiscations had been officially abandoned and this was confirmed when McLean's officers began purchasing. When this kind of purchase was frowned on, officers instituted the 'secret bribery' system of takoha or gratuities for land. This simply led to increased confusion about the implementation of the confiscations, but in the meantime road building was carried on.

Maori were well aware that roading was being used to pacify and open up the Taranaki district. In 1872, Parata, the member for Western Maori, told the House that the road the Government was attempting to build near Parihaka would 'never be completed while the Government hold lands belonging to the Natives'.<sup>18</sup> In practical terms, however, McLean just continued his policy of negotiating with iwi and hapu where possible and encroaching gradually as far he was able. Roads were pushed through where possible and temporarily abandoned where opposition was too strong. While McLean was in charge he managed to avoid provoking outright resistance as happened later with more aggressive tactics.

While McLean's policies were welcomed by Maori in so far as they appeared to confirm a Crown policy of consultation and negotiation, it is clear that the overriding objective was to facilitate European settlement and to provide works that catered for European needs. Maori were involved because their land was often required and because construction work not only helped seal purchase agreements but would help assimilate Maori into European values and customs. For example, in a report on roads north of Auckland, J J Wilson noted a general improvement in the native people. They were acquiring habits of industry, appeared to better appreciate 'the value of time' and generally clothed themselves better since they were 'able to earn money by roadwork'. As always however, Europeans were much more ambivalent when Maori appeared to pick up values and attitudes too well. Wilson also noted that their increased contact with Europeans had 'increased their love of gain' and they were 'always on the alert to obtain some advantage in their work, or to sell at high rates the timber needed for the bridges and culverts'.<sup>19</sup> Observers of the time also noted the bleaker side of the influence of 'civilisation'. The absence of able-bodied men on work gangs for long periods tended to undermine traditional social structures in villages left behind. The works camps were at the mercy of shopkeepers selling often poor quality food at high prices, so that cash earned was quickly spent on food. In addition, liquor was always easily available in camps to further the process of demoralisation and dissipation.<sup>20</sup>

In spite of the advantages claimed for Maori in purchase negotiations; roads were consistently described in official reports in terms of their suitability for European settlement. For example, a road described as running completely through native land was of a standard that would 'suffice until European settlers are introduced'. It

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17. Second Report of West Coast Commission, BPP, vol 16, p 403

18. NZPD, 1872, p 595

19. AJHR, 1874, E-3, app B, p 40

20. Quoted from the diary of Thomas Grace, 'A Pioneer Missionary Among the Maoris', in Waitangi Tribunal, *The Pouakani Report 1993*, Wellington, Brookers Ltd, 1993, p 219

was also hoped that other roading improvements would ‘lead to the early settlement of the surrounding country.’<sup>21</sup>

At the same time engineers and settlers in general were often resentful of the need to gain Maori cooperation and the need to approach the Native department to achieve this. This became more apparent further into the 1870s as the possibility of renewed war seemed to become more remote. Ward has quoted H T Clarke of the Native department declaring in a letter to McLean in 1874 that if Native department staff did not become involved in negotiations to construct a telegraph line then difficulties would be sure to arise. Clarke complained that Public Works staff knew ‘whom to come to, to help them out of their difficulties – and then abuse them soundly afterwards’.<sup>22</sup>

The Crown also appears to have used the possibility of compulsory land takings to force purchase prices down. In 1874 one of the Maori members asked whether any steps had been taken to ascertain and settle claims of Maori owners of lands taken for railways and other purposes under the Immigration and Public Works Acts. Maori had at first thought land for railways would be paid for and they were willing to give it for railways if it was. Now, however, they had been told it would not be paid for. The Minister replied that exactly the same process was followed for Maori and European-owned land. Lands were surveyed and valued and a price offered to the natives. If that price was not accepted by them, the matter was dealt with under the Railways Act.<sup>23</sup>

At a local level and in the South Island, the pattern of public works takings of Maori land is much less clear. While major works and works in sensitive areas were undertaken at a national level, provincial governments were still expected to carry on with their own works programmes. After the provinces were abolished in 1876, this responsibility moved to successor organisations such as county councils and road boards. More research is required in this area, but it appears as though compulsory powers were more likely to be used in these circumstances. Until 1876, there were presumably still legal restrictions on the powers of local authorities with regard to the taking of customary Maori land, although this may not have been too much of a concern as it was mostly outside European settlements. Central government also actively assisted local authorities to get around any restrictions by passing various Acts that gave piecemeal taking powers, such as to roads boards, and by taking land on behalf of local authorities. While central government dealt with land acquisition in sensitive areas therefore, local authorities often operated in areas where Maori were in a minority or the threat of resistance was much less. In these circumstances the use of compulsory powers such as having the Government take certain land required for roads without having to pay compensation, appears to have been more widely used.

The major factor at a local level seems to have been whether taking authorities thought they could ‘get away’ with not consulting Maori. The strong views of local personalities both for and against consultation could also influence policy in this

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21. AJHR, 1874, E-3, app B, p 41

22. H T Clarke to McLean, 27 November 1874, (ATL) McLean Papers MS 32, f 218, no 74,

23. NZPD, 1874, vol 16, p 749

kind of situation. There was also confusion about the extent of taking powers and whether compensation ever had to be paid. This was partly the result of taking powers being incorporated in various types of legislation. For example, roads could be taken under the right to take 5 percent in the Native Lands Acts or under general public works provisions. There were also clearly attempts to evade compensation and to bend provisions to suit local authority requirements. In addition, local authorities were characteristically reluctant to provide public works required by Maori. Policy at this level is therefore very much more confused and documentation available appears to show that both consultation and compulsory powers were used at various times and in various circumstances.

For example, an 1873 letter reveals that the Wharehine District Road Board in Auckland entered into negotiations and gained agreement from Maori owners to buy land required for a road. However the provincial treasurer questioned why this was necessary when the right had existed for the last seven years to have roads taken without paying compensation.<sup>24</sup>

Maori, not surprisingly, found the whole process extremely confusing when land required for works at a national level could involve consultation and purchase while at a local level land could simply be taken. Adding to the confusion was Maori willingness to gift land if they were consulted and the work was obviously required. This process of gifting was much less likely from Europeans, who tended to expect fair compensation. It obviously involved cultural differences as well, which require further research. For example, Maori clearly had different expectations arising from gifting. While Europeans expected compensation they also accepted that they no longer had an interest in the land, whereas for Maori gifting seemed to imply a continued interest in the land should the need for the public work cease. The expectation of eventual return may also have been a reason why Maori chose to gift land so often and forgo short-term compensation. However these differences in expectation were rarely acknowledged by Europeans. Sometimes the gifts themselves were acknowledged but at other times Maori appear to have been left thinking they had gifted land while local authorities acted as though the right to take land had been exercised.

Maori also appeared to use gifting to emphasise the importance they attached to the process of consultation, often gifting land if genuine efforts at consultation were made. These initiatives were also often ignored by settlers once the objective of obtaining land as cheaply as possible had been achieved. For example, it was reported to the Superintendent of Auckland province in 1874 that problems had arisen when native owners were not asked for their consent for a main line of road. The owners did not object to giving the land but they saw the survey ‘very much in the light of *taking land* and . . . unless this little difficulty is promptly explained to them officially it will lead to their refusing to give the land’ (emphasis added). The assistance of the Reverend Gitto was requested and authorised to use his good offices to explain.<sup>25</sup>

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24. AP 2/2, 1873/1716

25. Letter from John Shepherd to Superintendent Auckland Province, 14 January 1874, AP 2/13, 74/230

Maori also found that road building, especially at a local level, rarely took their interests into account, even when they were prepared to gift the land. While provincial governments would have land taken and built roads to encourage settlement, they rarely responded positively to Maori requests for roading assistance. Some of these problems were highlighted by the Member for Southern Maori in 1872, when a grant was being considered to assist in the building of the Portobello–Otago Heads road, as cited in chapter 5. Both provincial and central government had failed to help and both attempted to lay responsibility for assistance on the other. The continuing refusal of local governments to respond to Maori roading needs brought continuing criticism. In 1879, for example, Maori members complained that little Public Works money was spent on roads required by Maori in the North Auckland area. The only roads the people there had were simply those left to them by their ancestors.<sup>26</sup>

The issue of rating was a major local issue that is in theory separate from public works takings and requires its own research. However, in practical terms, rating and public works issues were often closely linked, as it was rating at a local level that was supposed to pay for and maintain public works. Ward has noted that in the 1870s Maori were heavily involved in local administration, but it was almost entirely within the ambit of the Native department, for example as native assessors or police, or on native school committees. Maori had almost nothing to do with the machinery of local settler administration such as highways and harbour boards, or provincial councils or their successor local bodies. This alienation reflected an increasing separation of the races. Ward has shown that in the aftermath of the wars settler hostility to Maori also became increasingly evident, particularly in urban areas where by now Maori were often refused access to public amenities. Settler hostility was also a major reason behind Maori moving out of urban areas that had grown up around traditional pa sites, for example in Wellington, New Plymouth, and Greymouth. The separation of the races at a local level also had long-standing legislative encouragement when in early years local franchise was limited to those with freehold property, effectively excluding Maori.

Antagonisms were reflected in relations between Maori and local settler government. Maori infuriated local authorities by their inability and unwillingness to pay rates. Provincial governments and their successor local bodies antagonised Maori by aggressively continuing the alienation of Maori land through the use of local public works takings. They also used the non-payment of rates as a reason to neglect public works concerns of Maori. The move towards less and less consultation as soon as circumstances allowed only aggravated the problems. Increasing lack of communication meant local authorities were increasingly unaware of Maori concerns, even if they were willing to take them into account. As antagonisms became more deeply entrenched the Crown did little to try and ensure accommodations were made that would take Maori concerns into account.

In rating terms, many Maori for example could not see why land they had held for centuries that had been passed to them by their ancestors should suddenly become subject to taxes, often when they saw no benefit from them. They also saw

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26. NZPD, 1879, vol 33, p 476

rates as an imposition forced on Maori without consultation or a chance to be modified to address Maori concerns. For example, many Maori still lived largely outside the cash economy and while they may have been willing to give free labour and materials to maintain a road for example, they often simply did not have the money to pay rates. Other circumstances often created by Government institutions also caused difficulties in paying rates. The fragmentation of ownership created by the Native Land Court, for example, not only made it difficult to use land economically but it was also almost impossible to get every owner to pay their share of rates when many might not even live in the district. Local body insistence that rates had to be paid in cash and rejection of suggested alternatives meant the only option of paying rates was to sell yet more land. This only increased Maori suspicion that the imposition of rating was simply another device to part them from their land.

Local bodies, however, were generally unsympathetic to these problems and regarded non-payment as a failure of one of the duties of property ownership. They were generally not willing to negotiate possible alternatives to rates such as the offer of regular free Maori labour in maintaining roads. Instead they preferred to use the non-payment of rates as an excuse to neglect Maori needs and as yet another reason for preferring Maori land in takings for public works purposes.

The Crown had to take some responsibility for allowing this situation to develop, as it was Crown involvement, or lack of it, that contributed to the situation. For example, the Maori Land Court that caused fragmentation of title was a Crown creation and local bodies were not required to take Maori concerns into account or reach accommodations over alternatives to rates. A number of other circumstances also encouraged local bodies to regard Maori land as a prime target for public works takings and these too often resulted from Crown action. The legislative provisions regarding taking land for roading for example were much less protective of Maori land and therefore made it an easier target. Other legislation not directly related to public works takings also had an inevitable impact when it discriminated against Maori in being able to economically use their land. For example, the Native Land Amendment Act 1878 (no 2) made it illegal to advance a loan as a mortgage over any land held by a Maori by Crown grant or memorial of ownership. The result was that Maori were not able to use their land as security to raise finance to develop it or use it more economically. Until the 1920s, in fact, there was little encouragement for Maori to use their own land. The resulting underdeveloped and underutilised Maori land only confirmed European prejudices that it would be better out of Maori hands. Local authorities responded to this by regarding Maori land as a prime target for public works takings.

Because local bodies were able to act almost exclusively in the interests of settlers, projects were also undertaken to further settler requirements while little or no attention was paid to the impact this might have on Maori rights and concerns. As local authorities increased their powers in the 1870s, especially in areas such as drainage and river control, works of benefit to farmers were carried out without any concern that they were also destroying ancient Maori food traps and fisheries, and in these cases there was also no requirement for consultation or compensation.

The attitude of most settlers was reflected in debate on the Highway Boards Act 1871. The very long preamble to this Act sought to remove the restrictions imposed on provincial councils by the Constitution Act, including over lands where aboriginal title had not been extinguished. It was also deemed expedient that highway boards should have powers to take land compulsorily for certain purposes without first obtaining a special Act or ordinance. The Act allowed customary Maori land and Maori land where a Native Land Court certificate of title had been issued to be rated 'if in the occupation of any other than an aboriginal Native' (s 5). The boards also had powers to take land for works concerned with making or altering roads and building and bridges and drains in connection with roads. The taking had certain traditional protections for landowners, such as a requirement for notice, the opportunity for objections and the right to compensation (ss 28–34). Written consent was also required before lands occupied by buildings, gardens, and so on, could be taken or used (s 35) and the Lands Clauses Consolidation Act 1863 was incorporated (s 36).

The proposed Bill was described as giving highway boards the necessary powers to fulfil their functions and to remove any doubt as to the legality of their acts by granting them powers that could only be conferred by the General Assembly. The doubts included the power to rate property owned by the Crown or native land and the Bill would give that power. There was also no general power for highway boards to take land for certain purposes. Provincial councils could pass special Acts to take roads or land for certain purposes but there was no general power to do so. The Bill gave that power with certain restrictions to protect private property.

While European members of the House were divided on almost every other issue, they were unanimous when it came to native land. The highway boards with their responsibility for local roading were described as doing the 'great work of colonizing the country, and preparing it for the reception of a large population, by making roads.'

Reference was made to Taranaki and the large number of Crown grants issued to Maori there. It was claimed that it was only 'just and equitable' therefore that they should be rated like other people. The member neglected to mention that the Crown grants in Taranaki were almost all the result of confiscated land 'returns' where land had to be returned by Crown grant.

European members were also adamant that Maori would have to accept the duties and responsibilities of property ownership as Europeans saw them. The Maori members were severely lectured by a number of European members on this point. They were told that Maori had been asking for equality with Europeans for a long time, including having a share in the legislation and governing power of the colony. As a 'necessary consequence, they must share in the burdens and responsibilities of the Europeans'. Another member added that the sooner Maori members:

learnt the lesson that they were sent there to assist in the general government of the country, to act for the benefit of all, and the sooner they became aware of the responsibility of the position they occupied, the better would it be for themselves and for the country.

## *The Beginning of the Great Public Works Boom – the 1870s*

They had the great privilege of living in a free country and of participating in the making of laws and they should not forget that natives owned large amounts of land, ‘the ownership of which entailed large responsibilities’.

In a later debate the Maori members were told that they should remember that:

property had its duties as well as its rights, and that they had come to that Assembly for the good of the Colony at large. They should not suppose that they were there to represent exclusively their own race.

The treaty stated that Maori were to have the same rights and privileges as English subjects and on that principle, wherever English subjects were affected the Maoris should be treated similarly. European members also complained that the measures were too lenient on Maori:

the Maoris had always been exclaiming against not having equal rights with the Europeans, but now they wished a great deal more, and not only desired the same rights and privileges, but laid claim to be exempt from the burden others had to sustain.

For their part the Maori members protested against the extension of rating powers but also sought to make constructive suggestions about cooperating in a way that would take Maori views into account while still enabling the purposes for which rating was required to be served. This could either be by allowing Maori the opportunity to discuss and agree to rating or to provide an alternative equivalent to rating for example in the form of materials and labour.

Taiaroa criticised the passing of a law when Maori still did not know about many laws. He had already proposed to the House that a Maori council be established to consider and advise on laws affecting Maori. Maori would support them if they had been considered and agreed to by such a council. He wanted the whole issue of rating to be put to a council. He also reminded members of the Treaty of Waitangi and the guarantees in it of Maori rights to lands, forests, and fisheries. Parata was concerned that Maori would be unable to pay rates. He preferred that the Government ask the chiefs for the land through which the roads were to run, and they would give it. He also asked for time and cooperation over the making of laws.

Katene was also concerned that Maori would be unable to pay rates and then they would lose the land they left. With no land left they would have no means of livelihood. He also told members that Maori were often unaware of matters dealt with by the Assembly, and warned against pressing the measure too hastily. He felt it would be better for members to turn their attention to the troubles still existing in the North Island and attempt to end them before passing laws of this nature that would equally affect both races. He gave an example of a possible alternative to rating. The Ngapuhi people had worked out a system of regularly working for a set time on the roads without payment and that was their contribution to road rates. He explained that Maori did not object to the principle of sharing the expenses of maintenance of roads but they wanted the opportunity to have a say on the matter and have such measures agreed to together.



The suggestions of the Maori members were generally ignored in favour of lecturing them on their duties and responsibilities. The only marginal support came from the member for the Bay of Islands, McLeod, who assumed completely unrealistically, that highway boards would have to take notice of Maori concerns because in a community where the natives were so numerous:

they would naturally form a portion of those Boards, and possibly, have a majority of voices; but in any case, with their numberless claims to land, they would have numberless votes, and therefore be in a position to regulate the taxation accordingly.

He was also the only European member to point out that Maori already paid large taxes through duties on goods and received very little in return. In the Bay of Islands for example, he calculated that they paid between £40,000 and £50,000 per year in this way but received almost nothing back. He asked why some of this revenue could not be made available for making roads ‘instead of bringing in a new tax to squeeze still more out of them?’ He also pointed out that out of the tax revenue given to the Auckland provincial government, most was spent in the city area and very little in the outlying area (where most Maori lived). For example, that year the Bay of Islands and Mongonui had received only £27 out of £12,400. Other members also admitted that Maori had shown a desire to contribute to the construction of roads, and had always contributed to them, much to their credit. However, this was still not considered sufficient, as rates were required for ongoing maintenance.<sup>27</sup>

While McLean was in charge of the Native department he attempted to mediate in conflicts between Maori and local government. He sponsored the Native District Road Boards Act 1871, whose object was to assist in the ‘settlement and pacification of the Colony’ by authorising and encouraging Maori to build roads and other public works through the establishment of road boards controlled by Maori. The proposed boards could only be established after a written request to the Governor and where the majority of the population in a district was Maori. Papers published on the working of the Act show that the Government then interpreted the Act to mean that the boards would only have authority over customary land. Crown-granted land, including European land, was excluded and was still to come under the ordinary Highways Acts with separate roads boards. In effect the Act was simply being used to extend rating to customary land. Not unnaturally, Maori thought that boards that excluded Crown-granted land would be unworkable in a community. They made it clear that they wanted an organisation that included both natives and Europeans to cooperate together, ‘. . . a Native and European Runanga, which should be empowered by the Government to settle disputes, and to assist the Magistrates in enforcing the law . . .’, and they rejected the boards ‘unless the property belonging to both races is amenable under the same Act . . .’<sup>28</sup> The Act lapsed through lack of support and Maori requests for more equal consultation also fell on deaf ears.

McLean fell back on urging cooperation between local bodies and Maori communities, and he appears to have accepted that the Maori contribution to

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27. NZPD, 1871, pp 358–385

28. AJHR, 1872, vol 2, F-4, pp 4–6

roading for the time being at least could be regarded as offsetting rates. He was also willing to assist provincial councils at times by contributing the equivalent rate liability from the general fund. However, this was clearly not regarded as a matter of general policy. There appears to have been no real Government acknowledgement that central funds could be generally used in this way in recognition of the often-made point that Maori paid very high customs dues but received very little back in return.

In a letter to the Superintendent of Taranaki province for example, H T Clarke, the Under-Secretary of the Native department, wrote that in response to problems about collecting rates from Maori, it had been worked out that their annual liability in the district was about £73. It had been decided that this sum would be defrayed this year on the distinct understanding that it was not to be regarded as a precedent. It was a matter of regret that the Taranaki natives had not fallen sufficiently into European ways to make them understand the principle of local taxation. Mr Parris had been instructed to instil in them the necessity of contributing to the formation and repair of roads from which they gained so much benefit.

The letter also urged that the provincial government revert to the former practice in Taranaki of electing native chiefs of influence as members of various road boards. They would assist at discussions and participate in the levying of rates. They would then be able to point out to their friends and relatives the advantages they reap from roads and would most probably advise them to view the matter in its proper light. 'The principle of associating chiefs with Europeans on Roads Boards would be found to have a beneficial influence'.<sup>29</sup>

The urging to cooperate with and coopt chiefs if necessary seems to have largely fallen on deaf ears, and another opportunity for including Maori in the process of local government rejected. Local authorities much preferred the option of compulsion and instead generally supported coercive measures such as the right to take land if rates accumulated and were persistently unpaid.

Even McLean's efforts were directed as an interim measure until Maori had 'fallen sufficiently' into European ways. He also seems to have been motivated by the fact that local antagonisms were beginning to have an impact on his national purchasing programme. Reports he was receiving at the time reveal that Maori concerns about rating were becoming a major impediment in negotiating over land for roading. For example in 1875 McLean received a report from James Mackay on negotiations regarding a road line between Hamilton and the Thames River or Waihou. Most of the line was completed, but the natives were opposing a survey over a small part that ran over their land on the grounds that they would become liable to highway rates. Mackay reported that there were many objections of this kind and they were not confined to one district. The reason given for refusing right of way was constantly 'that conceding a right of road gives the Government power to rate the owner of the land over which the road passes'. In the present case, the owners had agreed to give permission to construct a road at once if they were guaranteed highway rates would not be levied on them:

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29. H T Clarke to Superintendent Taranaki, 14 October 1874, MA 4/20

*Public Works Takings of Maori Land, 1840–1981*

Maoris, as a rule, do not damage the roads by heavy traffic. The small amount they contribute to the rates is of trifling importance compared with the difficulties they cause through stopping the construction of roads and other public works by their refusal to allow entry on their lands.

Mackay went on to describe this refusal because of rates as a 'growing evil' that should not be lightly disregarded. He recommended that legislative measures should be taken to exempt all lands held by natives, whether derived from Crown grant or not, from rating under any Highway Act; except for those lands within townships. In addition he pointed out that in some places the natives were unable to pay highway rates 'from absolute want of means'.

The Under-Secretary H T Clarke supported this in an accompanying memo:

The Natives allege, and no argument will disabuse their minds, that once they allow roads to be made through their property, so surely do they become liable to pay rates.

This was the reason why they stopped the survey of the Cambridge and Tauranga road. It was also one of the reasons they did not like the operations of the Native Land Court. They did not realise that when title was investigated and then derived from Crown grant, they were subjecting themselves to burdens never understood. Instead of being the great advantage that was promised, holding land by Crown grant led to a great burden never explained or contemplated. He suggested that natives should be relieved of these taxes, and if they were holding land and not disposing of it, they should not be subject to rates.<sup>30</sup> A further letter from Mackay also warned of the great dissatisfaction being caused by highway boards rating native reserves. He believed that it was the root of a great deal of opposition in carrying out the great scheme of public works in native districts or upon lands held by natives.<sup>31</sup>

However, in the end the Native department could offer Maori very little help in the face of settler demands for public works that suited their needs regardless of Maori concerns. This was particularly true of local works such as drainage operations. In the same 1874 letter cited previously, H T Clarke told McLean of problems faced in helping a hapu save their eel fishery from drainage works. The hapu had chosen the site of the reserve so they could continue to have access to eeling. However drainage works threatened to destroy the eel fishery and therefore make the reserve useless. It was a real pity the hapu did not have access to legal advice but :

It would never do for a government officer and especially for one of this wretched Native department to tender such advice. It would directly be stated that we were opposing the opening up of the country.<sup>32</sup>

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30. J Mackay to Native Minister, 18 June 1876, and accompanying memo from H T Clarke, AJHR, 1875, G-10, p 1

31. J Mackay to Native Minister 6 August 1875 in AJHR, 1875, G-10, p 1

32. H T Clarke to McLean, 27 November 1874, (ATL) McLean papers, MS 32, f 218, no 74

## CHAPTER 9

# PUBLIC WORKS TAKINGS, 1880–1928

Crown policy concerning public works takings of Maori land began to reflect a more hardline policy by the late 1870s and certainly by the 1880s. This was largely as a result of settler and Government perceptions that Maori resistance was no longer such a serious threat. This more hardline policy inevitably did provoke some Maori resistance. This happened especially in Taranaki, where there was still considerable confusion over the implementation of land confiscations and proper reserves for Maori, and where previous Government promises seemed to have been disregarded. Maori resistance at Taranaki was peaceful and concentrated largely on disrupting public works projects being used to open up disputed land for settlement. However this was still intolerable to settler politicians, who responded by enacting a series of legislative measures that denied even basic legal rights and then ordered Government forces into Parihaka village to violently disperse the people living there and arrest their leaders.

The events at Parihaka were bound up in the process of public works takings. It was Government insistence in pushing roads through without consultation that hardened Maori resistance and this itself often took the form of obstructing roading. Subsequent major public works legislation also clearly reflected settler reaction to Parihaka. The Public Works Act 1882 began a new pattern of having separate taking provisions for Maori land and the 1882 measures were harsh and vindictive. Although some of the harshest provisions were amended within a few years, some of the discriminations begun in 1882 survived in some form for almost a century. The traditions established in 1882 also helped to create entrenched attitudes in taking authorities that were to have a profound legacy on takings of Maori land for many years and also affected Maori attitudes to public works takings.

The 1882 legislation was preceded by a noticeable change in Government attitudes to Maori land takings. By the late 1870s the general feeling of war weariness was beginning to fade and settlers were becoming increasingly impatient with what they regarded as unnecessary time spent in acquiring land. McLean retired in late 1876 and died shortly afterwards. At the same time settlers were more confident that Maori resistance had been largely broken down and consultative measures were no longer so necessary. Ward has described how native policy became much less sympathetic to Maori from the late 1870s, and especially after the departure of McLean was much more inclined to rely on the imposition of state might. In 1877, for example, the Native Affairs committee heard a petition urging that road board laws should not be applied in the Waikato as Maori could not pay their rates, and therefore would have to sell their land and impoverish their

descendants. The chairman, John Bryce, reported that the committee did not deem it necessary or desirable to recommend any alteration in the law in the direction of further exemption of native lands from local rates.<sup>1</sup>

The shift towards a more hardline attitude to dealings with Maori is well illustrated by events in Taranaki in the late 1870s and early 1880s. Previous Governments had vacillated over whether some of the confiscated land in the district should be abandoned and over what lands were to be returned to Maori. Administrative practices on the ground had also led Maori to believe that some confiscations had been abandoned and they had returned and reoccupied certain lands. Now the Government attempted to push through necessary roads in order to go ahead with land sales without having made adequate reserves for Maori. Te Whiti and his supporters at Parihaka attempted to highlight this failure with passive resistance to road construction and the settlement of disputed lands.

Politicians initially hoped that road building would pacify the district. As late as 1879, the Native Minister declared that if it was a question of keeping up a small standing army or making roads, he preferred road making. He was supported by the member for Western Maori, as long as roads were not built against the wishes of Maori owners and Maori were offered employment in construction work.<sup>2</sup>

However, it wasn't long before Te Whiti's campaign of passive resistance came to be regarded as an intolerable challenge that had to be crushed. The new Native Minister John Bryce began a much more aggressive policy aimed at forcing Maori submission to Government policies. In 1880 Bryce reported on progress with roads and telegraph lines being constructed in spite of opposition from Te Whiti and his followers. He reported that the Armed Constabulary had found it necessary to destroy some small Maori cultivations and the fences surrounding them to put the road through. Since then Maori from Parihaka had come down, dug up the road and sown wheat. They had persisted in erecting fences across the road and 'appear rather to rejoice in being arrested'. The only solution Bryce could see was that the country generally, with the exception of some reserves set apart for natives, 'must be occupied by a close European population'.<sup>3</sup>

The Government reacted to the campaign of passive resistance at Parihaka with a series of legislative measures that were reminiscent of the 1863 wartime measures in their lack of concern for basic ordinary human rights and the often-quoted principles of English law. As had happened in the wars, public works legislation was again inevitably caught up in this process as an instrument of Government policy to crush resistance. Legislation directly concerned with the situation in Taranaki included the Confiscated lands Inquiry and Maori Prisoners Trials Act 1879, the Maori Prisoners Act 1880, the Maori Prisoners Detention Act 1880 and the West Coast Settlement Act 1880. This legislation breached many of the principles of English justice and included, for example, provision for indefinite imprisonment without trial. Obstructing a highway was also made a criminal offence, with harsh penalties. The West Coast Settlement Act was described as

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1. Report of Committee, 18 September 1877, AJHR, 1877, I-3

2. NZPD, 1879, pp 932–933

3. Report by John Bryce, 13 August 1880, BPP, vol 16, pp 361–362

allowing Maori malcontents obstructing the work of settlement to be dealt with as criminals.<sup>4</sup> Prisoners tried under this Act for obstructing the highway were sentenced to a harsh two years of hard labour at Lyttelton, then faced with a surety of £50 to keep the peace for six months after that.

At the same time, the Public Works Bill 1880 apparently initially contained clauses that allowed for the taking of Maori land in a similar manner to the old 1864 Act, and these clauses were presumably aimed at the people of Parihaka. The Maori members complained about the proposed clauses 14 and 15, in debate on the Bill, saying they were similar to the old confiscated land provisions. The clauses could also be used to take Maori land in other districts and it was implied that resistance there might be more violent than in Taranaki. The word ‘take’, while it may not mean much in English, had a ‘very deep meaning’ for Maori. Even loyal tribes would oppose the clauses. Maori members also wanted the Government to consult them about such proposals before such Bills were brought to the House. The Government promised that all modifications urged would be considered and clauses likely to lead to much discussion or felt to be of not such great importance would be abandoned in order to save time.<sup>5</sup> In the end, for reasons that are not entirely clear, the 1880 Act did not contain the clauses the Maori members had complained about.

That was not the end of the matter however. Government forces invaded the settlement of Parihaka in November 1881 on the orders of John Bryce. In the face of passive resistance, Te Whiti and others were arrested, the people were dispersed, women were abused, and property was looted and destroyed. Once again settlers showed that when their interests were perceived to be at stake, the much-vaunted principles of English justice could be easily bent in pursuit of their aims.

Although the 1880 measures were dropped, the next major public works Act, the Public Works Act 1882, clearly bore the influence of the Parihaka troubles. As had happened before in the 1860s in response to war, the 1882 public works legislation was again used as a means of discriminating against ‘uncivilised’ Maori, who by implication did not deserve the traditional protections afforded to more civilised European landowners. The new Act treated Maori holding land by customary title even more harshly when it came to compensation. Once again traditional Maori land attracted punishment rather than the protections that had been guaranteed in the Treaty.

The Public Works Act 1882 incorporated many provisions of previous Public Works Acts and their amendments relating to general takings of land for public works purposes. The major difference was in the introduction of distinctly separate provisions for taking and paying compensation for Maori land, as opposed to European-owned land. These were not only separate but they were explicitly discriminatory towards Maori land and in particular customary Maori land. The impact was not only a short-term vindictiveness in response to Parihaka, but the Act began what was to become a long-standing custom in public works legislation of

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4. Report, BPP, vol 16, p 375

5. NZPD, 1880, vol 37, pp 712–713

separate and discriminatory provisions relating to Maori land, some of which lasted well into the twentieth century.

The 1882 Act defined a ‘public work’ as any survey, railway, tramway, road, street, bridge, drain, harbour, dock, canal, waterwork, and mining work, electric telegraph, lighthouse, building, and every undertaking previously authorised by any Act of the General Assembly or provincial ordinance.

The general procedure for taking lands was contained in Part 2 of the Act, and was much the same as in previous Acts and amendments. The protections were also very similar. These included requirements for the Minister or local authority to prepare plans and make them public, to serve separate notice on owners and occupiers, and to hear and give due consideration to well-grounded written objections made within 40 days. As in 1876, Railways were exempted from these provisions when constructed under special Acts that had been scrutinised by Parliament. Land not required could be sold after first being independently valued and offered at that price to the original owner and then to adjacent owner(s). The exception being surplus land sold to an education board (ss 10–14).

As in previous enactments, land taken but not required immediately could be leased. Land could also be taken after a public work had been built if it was found that there were still private interests in land public works had been built on, or where it was desirable for the public ‘use, convenience, or enjoyment’ of any public work that further land needed to be taken. Written consent was also required before taking or entering land occupied by any building, garden, orchard, or similar, except if it was for railway purposes. The Minister or local authority could also make an agreement to purchase land required for a public work (ss 17–22).

The 1882 Act also had a separate series of provisions within Part 2, dealing with special power to take native lands by the Governor for any Government work. Presumably these powers did not therefore extend to local authorities. The provisions included the now long-standing right to take certain Maori land for roads without compensation, which had originated in the Native Lands Acts (s 23). In a new set of taking powers, the Crown could now take any Maori land whatever title it was held under, for a Government work by order of the Governor in Council ‘without complying with any of the provisions hereinbefore contained’ (s 24). All that was required was a gazetting for two months of any such order and the Governor could enter and take any lands necessary for a work. The Governor could also enter such lands to make surveys or levels without giving any notice or making any application to any person owning or occupying such lands other than the already published *Gazette* notice (s 25). The only restriction was that the consent of the person *occupying* (emphasis added) the land was required for entering cultivated land where crops might be damaged or where buildings of any kind were erected (s 25). Land taken or injuriously affected was to be made according to the following provisions. In the case of unextinguished native title, the Minister ‘may’ cause application to be made to the Native Land Court to ascertain what compensation should be paid, what persons were entitled to be paid and what land was affected by the Order in Council. After hearing such evidence as may be brought before it or as may be thought necessary, the court could make such orders as it thought fit. The court was to have all the powers of a compensation court for

this purpose, and compensation was to be paid to owners or occupiers as soon as practicable after the making of the court order. Interest not exceeding 7 percent per annum was payable from the date of the order (s 26).

Where title to Maori land was derived from the Crown, then compensation was payable as for European-owned land. There were also penalties for moving or destroying survey pegs or obstructing authorised workers, or for damaging or destroying bridges or buildings. Anyone obstructing a surveyor or anyone else involved in this work, or damaging or destroying associated pegs or survey marks, was liable to a fine of not more than £50 (s 26(3)). Anyone destroying damaging or removing any building or bridge on land taken was liable to be imprisoned for up to two years with or without hard labour (s 26(4)). These were the same as the penalties for the same offences under the general provisions in Part 10 of the Act. They seem to have been included again in the provisions dealing with native land as an extra warning and because that was the area where most offences were expected.

The general provisions in Part 3 of the Act relating to compensation for European-owned land or Maori land held by Crown grant were similar to those in previous Acts and amendments. The principle was that full compensation would be paid. Claims were to be determined by a compensation court, and there was a time limit of five years. The procedures for having claims heard and assessed were also similar. The clause retaining the right of the Crown under other legislation to take land for a road without compensation and to use the land for roads or railway purposes was also retained (s 72).

The powers relating to surveys in Part 4 were also similar to previous Acts and amendments. The clause requiring a surveyor to have permission to enter Maori lands was, however, amended. Now the permission of the Minister was required, or entry could be made under the authority of orders in council issued under the special provisions of Part 2 respecting the power to take native lands (s 77). This meant for Government works the requirement for permission had effectively been done away with. Provisions under Part 5 on roads were similar to previous legislation.

However, there were additional ‘special powers as to construction of roads in certain cases’. These were intended to allow the construction of Government roads in sparsely populated areas where the land had not yet been surveyed. Where the Governor was authorised to construct a Government road in such an area, he could issue a proclamation setting out the two termini of the proposed road and its general direction and width. He could then authorise survey work and at any time after the proclamation could take the land as though it had been duly taken under the Act. The road was to be deemed a Government road even though the provisions in Part 2 had not been complied with. The Governor then had one year to tidy up the survey and proclaim the exact land required taken. Compensation was payable under the provisions in Part 3 (s 123). This section seems to have been included because of the convenience similar provisions were found to have in constructing railways. However it represented a major loss of protection for landowners, and as it was designed for Government roads in sparsely populated areas it is likely once again to have had a considerable impact on Maori. The powers of river boards were similar to previous legislation.



The provisions concerning railways in Part 6 were also similar to those in previous enactments. In general, takings of land for railways were still exempt from many of the protections available for other public works takings.

The special provisions dealing with Maori land required for Government works in the 1882 Act turned the clock back to the war years of the 1860s, but this time the intended discrimination against Maori was even more explicit. These measures were clearly influenced by the Parihaka troubles and had an air of vindictiveness. In terms of takings, all Maori land, whether Crown-granted or customary, was stripped of traditional protections that had been theoretically available to owners of all land in the 1870s and was still available for European-owned land. Even consent for entry onto cultivated land was only required from persons occupying the land which in many cases, especially in Taranaki, would be European lessees. The old requirement for permission for a surveyor to enter customary land was also removed in the case of land required for Government works.

The special provisions applied only to Government works and in theory were not available to local authorities. It is not clear how significant a protection this really was. As already seen, the protections and consultation had only really been taking place at a national level anyway. In addition, by having central government take land for them, local authorities could easily circumvent these restrictions.

In terms of compensation, while Maori land held by Crown grant was treated the same as European-owned land, customary Maori land was treated quite differently. It was up to the Minister rather than owners to make application for compensation and the important word was that the Minister 'may'. This seemed to allow the Minister discretion rather than require application to be made. Compensation was then to be decided by the Native Land Court as it saw fit. There were obviously some practical reasons for these provisions. Unextinguished Maori title by its nature was communal, and exact individual ownership and description of land was still undetermined. Therefore if it was to be taken and compensation awarded on an individual basis, the court had to be involved. The insistence on dealing at an individual level rather than with *iwi* was however yet another attack on the *mana* of *iwi* supposedly protected by the Treaty. The provisions gave great power to the court to decide 'as it saw fit' on these matters. The court was also possibly at a disadvantage in determining the value of compensation compared with the expertise built up in a compensation court especially established for the purpose.

A series of rating Acts were also passed in 1882. The Crown and Native Lands Rating Act 1882 provided for the rating of Maori-owned land, whether held by title derived from the Crown or by customary title, within five miles of a public road in order to contribute towards the maintenance of the road and other public works. Notice of the rates demand for native owners was to be made in the *Gazette*, and if the rates were not paid within the required period, the Colonial Treasurer would pay them and make them a charge against the land. The owners of land where rates were paid could nominate one of their number to be a voter on the ratepayer's roll.

The extension of rating was precisely what Maori had feared would happen if they agreed to roads on their land. All Maori members took the opportunity to criticise the Bill in the House. They also reminded the House that in many cases the

roads and railways that were brought within five miles of Maori land were made by compulsion and they had not been asked for by Maori.<sup>6</sup>

As usual there were numerous amendments to the Public Works Acts. Those concerning the Crown right to take certain Maori land for roads and railways without compensation have already been covered in chapter 5. Apart from this, one of the major amendments of the 1880s was concerned with land taking for defence purposes. The recent ‘Russian scare’ prompted the Government to become concerned about external defences. The annual public works report printed in 1885 referred to the recent threatened outbreak of war with Russia and the decision to place the chief ports of the colony in a state of defence. This consisted of beginning necessary works for the reception of guns. Within three months all the guns available in the colony were mounted and preparations were well underway for finishing associated works such as magazines, stores, barracks, and parapets as well as necessary access roads.<sup>7</sup>

The Government took some land under the Public Works Act 1882 for defence purposes, but then questions were raised as to whether the Act did provide sufficient powers for the purpose. The Public Works 1882 Amendment Act 1885 therefore extended the definition of public works to include any fortification for the purposes of defence (s 2) and validated the previous taking (s 10). The Act also placed defence takings on the same footing as for railways and therefore normal protections such as hearing of objections did not apply (s 4). Compensation provisions were the same as in Part 3 of the 1882 Act and were limited to matters concerning land taken (s 6).

The second amendment of 1885 was the Public Works Act 1882 Amendment 1885 (no 2). This was concerned mainly with extra powers concerning railways, including the power to acquire land for the purposes of supplying water to railways (s 16). Section 20 of the 1882 Act regarding consent before certain land or materials could be taken was repealed and replaced by new provisions. The consent of the owner was still required for the removal of bricks or stone from commercial sites but the consent of the Governor in Council was now required for the taking of land occupied by any building, orchard, or vineyard, or the cutting of any ornamental shrub (s 4). Land required for railways continued to be exempted from these provisions. The protections also remained eurocentric and there were still no similar protections in the provisions concerning Maori land.

The Public Works Act Amendment Act 1887 retained the harsh 1882 provisions for taking customary Maori land for Government works but made takings of Maori land derived from Crown title subject to the general provisions of Part 2 of the 1882 Act. Section 13 of the 1887 Amendment repealed and replaced sections 23 to 25 of the 1882 Act containing the special powers to take native lands. The replacement provisions in section 13 allowed the Governor to take any native land (namely customary land) and any land owned, held, or occupied by natives where title was derived from the Crown. For customary land, the provisions were the same as in 1882. For works, except railways, all that was required was an Order in Council to

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6. NZPD, 1882, vol 43, pp 703, 716, 829

7. AJHR, 1885, vol 2, D-1, p 20

be gazetted defining the land needed in ‘general terms’. Two months after this the Governor could enter and take the lands required without giving any notice to the owners or occupiers other than what had been given in the Order in Council. Subject to these requirements there was no need to comply with ‘any of the provisions’ concerning general takings in the 1882 Act (s 13(1)).

Section 13 however also provided that native land, where title was derived from the Crown, had to be taken under the general provisions of Part 2 of the 1882 Act and its amendments. This at least restored some protections for Maori land where title was derived from the Crown (s 13(2)). For example, the protections concerning orchards, and so on, now also applied to Crown-granted Maori land, although these definitions remained eurocentric.

All Maori land taken for railways, however title was derived, was subject to the taking provisions of Part 6 of the 1882 Act and its amendments (s 13(3)). This placed Maori land on the same footing as other land taken for railways, and in all cases the protections for land taken for railways were considerably weaker. As the special provisions regarding taking Maori land were now repealed, this presumably meant surveyors still had to obtain permission of the Minister before entering native land.

In terms of compensation, the provision requiring the Native Land Court to hear cases concerning compensation for customary land was repealed. Instead, where any Maori land was taken for public purposes, whether originally held by customary title or by title derived from the Crown, the owners were required to rely on the Minister who ‘may’ make application for compensation to the Native Land Court. The court was to ascertain the amount of compensation to be paid and the individuals to whom it was to be paid, and the exact land affected by the Order in Council. The court could hear any evidence thought necessary and make such order ‘as to it shall seem fit’ (s 14).

The Public Works Acts Amendment Act 1889 contained provisions that generally continued to extend the powers of local authorities. For example, land taken by the Government for railways could be vested in a local authority for a road (s 5) and county councils could delegate certain powers to road boards (s 14). Drainage powers were also extended so that outlets to lakes could be considered drains (s 18). There were also extended powers relating to railways, for example regarding land taken (s 10) and leasing land (s 22). Compensation provisions were more detailed, for example the valuation of land taken was to be determined at the time the land was first entered (s 11). The Crown could also set apart land for fortifications from Crown lands, public reserves, and public domains, and land vested in local authorities or trustees for public purposes could be taken for fortifications and no compensation paid (ss 30–31). In terms of Maori land, the Native Land Court was now to determine all compensation claims regarding native land regardless of who had an interest in it, including Europeans. The Compensation Court was to have no jurisdiction at all for Maori land and sittings of the land court for compensation were to be notified in the *Kahiti* as well as the *Gazette* (s 16).

The Public Works Act 1894 was largely a consolidation Act incorporating the provisions and amendments of previous years. A major change however was that

the separate section on takings of native lands now appeared to be no longer restricted to just Government works, but to now apply to all local authority takings as well. The old requirement that the provisions referred only to Government works was dropped and they now related to any taking of land for a public work apart from that taken for railway and defence purposes (ss 87–88). The definition of a ‘public work’ was a consolidation of previous definitions. It included any survey, railway, tramway, road, street, gravel pit, quarry, bridge, drain, harbour, dock, canal, river work, water work, and mining work. Also included were any electric telegraph, fortification, rifle range, artillery range, lighthouse, or any building or structure required for any public purpose or use, including lands that might be necessary for the use, convenience, or enjoyment of the same. In addition, a public work now included lands for any lunatic asylum or associated use or for any public school or associated use. The definition of ‘native land’ was ‘land held by Natives under their customs or usages, whether the ownership thereof has been determined by the Native Land Court or not’. The Act continued the trend of separate provisions for taking native lands (Part 4) as well as separate provisions for areas such as surveys, roads, rivers, and general land takings.

Takings of lands for railways and defence, and takings of customary native lands were, as usual by now, excluded from the ordinary provisions of general takings of land for public works. The general provisions contained the usual protections for landowners such as the requirement for notice, the restriction on entering orchards, or similar places, without written consent, and the right to have objections heard. The provisions also allowed for purchase by agreement as well as compulsory taking. The procedures for disposing of surplus land also contained traditional provisions such as in most circumstances, the offer back at valuation price to the original owner, then adjacent owner(s), then sale at public auction (ss 10–33).

The principle for compensation for general land takings continued to be that of full compensation for land taken or damaged. The exception was for the traditional Crown right to take certain land for roads or railways without compensation under some other legislative authority, or for Crown lands taken for a public work. Where the Crown had rights to resume land under some Act, the compensation was also to be in terms of that Act. Compensation claims also retained their five-year limit for takings and had a one-year limit for damages (ss 34–36).

The general compensation procedures were updated but basically similar in principle to previous legislation. These included requirements that the claim be made in writing and detailed particulars given of the land and compensation claimed. Claims were to be determined by the Compensation Court. Provisions were made for estimating compensation including valuing land and compensation could be offered in land as well as money (ss 37–86).

Native lands were dealt with separately in Part 4 of the 1894 Act. The provisions in this part were also basically a consolidation of previous legislation. The distinction between customary land and that derived from the Crown was retained with harsher provisions for customary land. The general protections applying to general land takings still did not apply to Maori customary land taken.

The 1894 compensation provisions were also similar to previous legislation. For Maori land taken, all compensation claims had to be heard by the Native Land

Court. The Minister in the case of a Government work ‘may at any time’, and the local authority in the case of a local work, ‘shall, not later than six months after the date of the first gazetting’ of the Order in Council or proclamation taking the land, cause application to be made to the Native Land Court to ascertain compensation payable, persons entitled, and the exact land involved (s 90(1)). Anyone having an interest in native land taken, including any European, still had to have the claim heard by the Native Land Court. Other provisions regarding notice in the *Kahiti and Gazette*, and the paying of compensation were the same.

Where roads were surveyed and laid off on or over native land under the direction of the Surveyor General, the site of such a road was to be deemed a public road and was to vest in the Crown. Where roads were made on the boundary between land owned by natives and Europeans, the road was to be taken equally from both lands where practicable (s 95). Under Part 5 of the Act related to surveys, the old requirement was retained whereby the previous consent of the Governor in council was required before entering a native cultivation to make a road (s 98).

Other parts of the 1894 Act, relating to roads and rivers, railways, defence, drainage, and water supplies, were mainly a consolidation of previous legislation with some extensions of powers. For example, a landowner who bought Crown land could now require access through adjoining Crown land where possible and otherwise through private land under certain conditions (s 112). Land takings for railways and defence purposes also remained exempt from most of the general protections required for other land takings.

As usual numerous other amending Acts were passed in succeeding years. For example, the Public Works Act 1903 contained provisions regarding the setting back of frontages and road access (ss 2–3), the definition of public works was extended to include works for which money had been appropriated by Parliament (s 6), the definition of defence purposes was extended (s 15), and land could be taken for forest plantations, recreation grounds, or for the preservation of scenery as if such purposes were public works within the meaning of the 1894 Act (s 16). The Public Works Acts of 1905 and 1908 were compilations and consolidations of previous Acts and amendments.

It soon became clear that there were difficulties in defining what was ‘native land’ held by customary title and therefore under what part of the Public Works Act Maori land could be taken. The definition of ‘native land’ already differed according to the purpose of various statutes, and there was considerable argument over at what point customary title ceased, for example, at investigation, at registration in the land transfer system, at the issuing of a grant, or by statutory decree.

Questions were raised on this point in the case of the Te Taheke block, taken for electric lighting purposes in 1899. This was another of those confusing cases where the owner had ‘gifted’ land to the Crown, the Crown had paid money in ‘acknowledgement’ of the ‘gift’, and had also taken the land by proclamation under the Public Works Act. However, it had been taken as if it were ‘native land’ when in fact it had been investigated by the Native Land Court. The Supreme Court found that under the Native Land Court Act 1894, Maori land ceased to be customary land as soon as ownership had been determined by the Native Land Court. Therefore the

definition of ‘native land’ in the Public Works Act was ‘insensible’. Although it may have been correct at the time, as the Native Land Court Act 1894 had not then been enacted, it was made insensible by the passing of that Act. The compiler of the 1905 Act repeated the definition without noticing the change required. The only operative part of the definition now, therefore, was lands owned by natives under their customs and usages. The lands in question therefore were found not to be native lands and should have been taken under the general provisions of the Act and compensation paid.<sup>8</sup> This left open the real possibility that the Crown had incorrectly taken other Maori lands in the same manner in the years 1894 to 1909. However the Rotoiti Validation Act 1909 was then passed, which validated the erroneous Order in Council for the blocks in question and also validated and declared immune from legal challenge all similar Orders in Council relating to the compulsory acquisition of native land (s 5). This retrospective validation was not unusual in public works legislation where doubts were raised about the legality of takings. However, in debates at least, the blanket nature of the validation was challenged.<sup>9</sup>

In the Public Works Amendment Act 1909, the definition of ‘native land’ was tidied up to mean land held by natives under their customs and usages. The time for the gazetted taking was also tidied up as it had also been questioned in court. The section concerning compensation was expanded to cover native land held by a body corporate or a Maori Land Board (s 91). The section concerning notice (s 18) was amended so that the provisions requiring the names of the owners and occupiers of land to be taken did not apply to natives, unless the title was registered under the Land Transfer Act. Where it was not, a notice was to be published in the *Maori Gazette*, but failure to do so would not invalidate the taking (s 4). The Native Land Act 1909 also repealed the old safeguard requiring the prior consent of the Governor in Council before surveyors could enter Maori-owned cultivations (s 403).

There were various other amendments up until 1928. For example a public works amendment in 1910 made the Native Land Court compensation award final for the amount awarded and the Public Works Act 1924 extended the definition of ‘bed’ of river or stream for the purposes of the principal Act, to include all land within stopbanks in order to allow for the removal of trees and other obstructions (s 6).

There were also many other legislative developments besides the actual Public Works Acts and amendments, that enabled Maori land to be taken for public purposes. The term ‘luxuriant legal jungle’<sup>10</sup> applied to Maori land legislation in general also well describes the various public works taking legislation that was clearly developing in the years up to 1928. It is not surprising that Maori were often unsure what legislation their land was being taken under, even assuming they were aware of or understood all the relevant provisions. Lawyers and even legislators themselves were frequently confounded as well.

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8. *In re Rotomahana and Taheke blocks* (1909) 29 NZLR 203

9. NZPD, 1908, vol 148, p 1501

10. G Asher and D Naulls, *Maori Land*, New Zealand Planning Council, Planning paper no 29, March 1987, p 38

The explanation for such a legislative tangle appears to be that measures were simply passed as settler needs required and little thought was given to the consequences for Maori. It is beyond the scope of this report to analyse every one of the numerous amendments to various legislation concerned with compulsory public works takings. Instead major trends in legislative and administrative policy are identified with particular regard to those having most importance for Maori land. It must be borne in mind that for individual claims however, it may be necessary to work out the exact legislative provisions applying at the time.

The legislative pattern already becoming evident by the late 1870s continued until 1928. There were increasingly wider definitions of public works purposes and more extensive legislation dealing with particular types of public works. Various Maori land legislation continued to allow general public works takings, such as the right to take up to 5 percent of land for roads and railways without compensation. This right was finally abolished by the Native Land Amendment and Native Land Claims Adjustment Act 1927 (s 30). The Maori Land Claims Adjustment and Laws Amendment Act 1907 also enabled Maori reserves to be taken for scenic purposes. Any Maori land set apart as a reserve other than a papakainga reserve could, if suitable for scenic purposes, be sold as a scenic reserve by agreement between the Minister and the Maori Land Board and with 'due regard to the interests of the beneficiaries' (s 29). The 1907 Act also dealt with the payment of compensation to owners by the court (s 3).

In addition, Maori land legislation often dealt with particular blocks of land for public works purposes. For example, the Native Land Amendment and Native Land Claims Adjustment Act 1916 enabled a portion of Tawhiti block to be taken under the Public Works Act 1908 as residential sites for the Tokomaru sheep farmers' freezing company (s 23). The Otago Heads Native Reserve Road Act 1908 vested part of the reserve in the Crown for roading and provided compensation for land taken. The Taumutu Native Commonage Act 1883 and amendments excluded 700 acres at Lake Ellesmere from the operation of the Railways Construction Act 1878 and vested the land for the support of native residents. The Governor, however, had the power of resumption if any of the lands were required for public works (s 5). The Westland and Nelson Native Reserves Act 1887 mainly protected European leaseholders by providing for perpetual leasing of Maori reserves in the districts (s 14). The Act also made the reserves subject to the Mining Act 1886 (s 18) and provided that the taking of native land for mining was to be a taking under the Public Works Act 1882 (s 19).

Some of the problems evident in trying to revest Maori land taken for public works in former owners also became more apparent during this time and special legislation was required allowing revestings. The Waipuka Block Road Revesting Act 1908, for example, concerned native land that had been taken for a road in Hawke's Bay. A more suitable line of road had then been found and therefore the old road land was revested in the former owners. This case, which could only be remedied by legislation, highlighted some of the problems experienced by the Native Land Court in dealing with land taken, but no longer required, for public works purposes. The Native Land Amendment and Native Land Claims Adjustment Act 1920 provided that Maori land taken for roading but no longer required where

the road was stopped could be vested in the former owners by the Native Land Court and the land would become Maori freehold title (s 7). This solved reversioning problems for land taken for roads but not for other public works purposes.

Some general legislation also began to routinely contain provisions relevant to public works purposes. For example, the various Reserves and Domains Acts often contained provisions about particular pieces of land, where disposal or alternative use required a legislative enactment. The Reserves and Other Lands Disposal and Public Bodies Empowering Act 1910, for example, cancelled some reserves allowing certain blocks to be re-vested or reconveyed to Maori owners (ss 7, 20, 22). Some of these reserves were originally taken for public purposes. The Act also enabled roads to be closed and the land taken to be re-vested or exchanged (s 23). These Acts also often dealt with foreshores and harbour land, which were often still subject to Maori claims. For example, the 1910 Act vested a portion of the Napier foreshore in the local authority for municipal purposes (s 26).

A tradition also began during these years of including public works provisions and authorisations in various Finance Acts. The Finance Act 1918 (no 2) included authorisation for the extension of the Paeroa–Pokeno railway. For this purpose the Act was deemed to be a special Act authorising a railway within the purposes of the Public Works Act 1908.

Numerous Railway Acts also continued to be passed, such as the Railways Construction and Land Act 1881, which allowed land to be entered and taken for authorised railway purposes (ss 23–29) and gave powers concerning construction (s 34) and vesting of native ceded land (s 121). Numerous Railways Authorisation Acts were also passed, such as those between 1911 and 1914. These enabled specific railways to be built or extended and in many cases provided for the taking of land required. Special railways authorisations were also routinely made in schedules to the main Public Works Acts, for example the Public Works Act 1879.

Governments recognised the possibilities of electrical power in the late nineteenth century and the Electric Lines Act 1884 dealt with the control, construction, and maintenance of electric lines for telegraph, telephones, and electric lighting. The Act contained additional powers concerning electric lines (ss 7–8) as well as incorporating powers under the Public Works Act 1882, including compensation provisions.

Mining continued to be an important industry in the later years of the nineteenth century. The Coal Mines Act 1886 incorporated relevant provisions of the Public Works Act 1882 regarding the taking or use of private land for works. However the land was to vest in the applicant for a licence rather than the Crown. The Act also included compensation provisions, also to apply to the applicant rather than the Crown (s 54). The Mining Act Amendment Act 1887 (no 2) assumed that the Crown had the right to grant mining rights on the foreshore and under the sea. It also did away with riparian rights in mining districts. The Act also gave the Governor power to vary the terms of the contract without the consent of Maori in cases where Maori land had been ceded for mining purposes (s 5). Native lands within mining districts were deemed Crown lands for mining purposes (s 6).

The Mining Act 1891 was basically a consolidation of previous legislation, although coal mining was excluded. It contained various provisions regarding



mining and associated activities. These included procedures concerning compensation, miners' licences, prospecting, and constructing necessary works such as water races. Many provisions of the relevant Public Works Acts were incorporated. The Act also included special sections on prospecting on native land (ss 94–97) and mining districts on native lands (ss 205–211). There were also sections on 'resumption' of land for mining purposes, including native land that had been alienated (ss 212–219). The Mining Act 1926 retained some sense of the old agreements over cessions of Maori land for mining made between the Crown and Maori. On investigating title of native land, the Native Land Court could, on the application of the Governor-General, declare the whole or any portion of such land open for prospecting. This did not require the consent of the owners and occupiers. However agreement between the owners and the Crown was required before the land could be declared ceded for mining purposes (s 30). Native reserves were also to be made available for mining purposes in some cases (s 31). All ceded native lands were declared to be opened for mining but the agreements at ceding were to be upheld for as long as they continued in force (s 32). Until the freehold of such ceded land was acquired by the Crown, all fees, royalties, and rents would continue to be payable to the native owners (s 33). Alienated Crown or native lands were open for prospecting and could be resumed by the Crown for mining purposes under the same provisions as for takings for public works (ss 52–53).

The Government also continued attempts to gain ownership of natural resources in legislation such as the Rotorua Town Lands Act 1920 where any geothermal rights were retained by the Crown (s 15).

The intense interest in New Zealand as a tourist destination in the last two decades of the nineteenth century appear to have stimulated Government interest in the development of tourist areas, scenic reserves, and national parks, although more research is required on this. The Tongariro National Park Act 1894 authorised the establishment of Tongariro National Park from lands gifted by Te Heuheu Tukino of Ngati Tuwharetoa in 1887. Some lands the Government wanted to include in the park were still owned by Maori and although the Government had purchased most shares there were still some outstanding and the owners refused to sell. The Act gave the Government power to take the remaining 'residue of lands' which were of 'no benefit to the native owners' and to pay compensation.

The Scenery Preservation Act 1903 extended powers to take land for scenery preservation in the main Public Works Act. The 1903 Act provided for the establishment of a commission which could investigate areas of possible scenic or historic interest or containing thermal springs. Regardless of whether they were Crown, private, or native lands, the council could then recommend those that were worthy of permanent reservation as scenic thermal or historic reserves (s 3). Once these reserves were proclaimed they were inalienable except by Act of Parliament and were not to be damaged in any way (s 4). The land required for these reserves could be taken under the provisions of the Public Works Act. Compensation was, however, to be paid to the Public Trustee who was to invest it and pay the income from it to the persons entitled (s 5(2)). The Act was amended in 1906 but this time only referred to Crown or private land and this was continued in the later 1908 Act.

An amendment Act of 1910 however specifically stated that private land included native land (s 3).

In addition, the Governor could from time to time, by notice in the *Gazette*, grant Maori the right to take or kill birds that were not protected in any reserve that was previously native land. Where such reserves contained ancestral urupa, the Governor could also give permission to continue the burial of deceased Maori there. These rights could be varied or withdrawn at any time, also by notice in the *Gazette* (s 7). All Maori land taken for scenic purposes under the Public Works Act 1908, 1905, or 1894 prior to this Act were also deemed to have been validly taken (s 10). Where land taken for a reserve was considered to be no longer suitable, for example the timber had been cut down, the reserve could be revoked, the land disposed of as Crown land and the proceeds applied to the acquisition of other reserves (s 8). The Governor could also by mutual agreement, exchange Crown land for land required for scenery preservation (s 11).

In parliamentary debates on the Scenery Preservation Amendment Act 1910, the Attorney-General explained that the power to take Maori land had been included in the original 1903 Act but removed in 1906 as the relevant provisions had not been translated into Maori and therefore could not be passed. Owing to the pressure of time, the matter had been allowed to lie, and the amended Act passed anyway. In addition the Government thought there was still sufficient power under the Public Works Act 1905 (s 14) and the 1908 Act (s 14). However, recent Crown legal opinion had held that fresh statutory power should be given to give the Crown the undoubted right to take native land for scenery preservation. Some of the most attractive scenery in the Dominion was on native land and it was desirable that power be given to the state to obtain these beauty spots for the people of the Dominion for all time. In particular, at the moment it was intended to preserve the Wanganui River. Full compensation was paid to native owners for the land taken and they would not be rigidly excluded from the reserves as long as they did not make any use of them contrary to scenery protection. They would also have some limited user rights. One of the Maori members of Parliament, Pere, had a number of concerns with the Act. He believed that some land previously taken had been allowed to deteriorate and if this was to happen, it would be better to return it to its original owners, Maori or European. He also thought that the assessment of value for compensation was unsatisfactory. The Act required some definite method of determining the value of such land. He also wanted a clause inserted in the Bill that required mutual agreement between owners and the Government before the land could be taken. He withdrew this when the Attorney-General assured him that 'it must be by mutual agreement – so that nothing can be done unless the Natives agree'.<sup>11</sup>

The Minister of Agriculture also explained that the 1910 Bill was intended to secure certain beauty spots and to give the Government certain powers which it was believed they had already possessed under Acts of Parliament. It was necessary chiefly on account of the Wanganui River, which it was desired to conserve as it was very beautiful and would in future no doubt attract many tourists. In reply to

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11. NZPD, 1910, vol 153, pp 890–891

criticism of retrospective validations, the Minister denied that this was happening – it was simply intended to ‘validate straight business transactions done with the Natives . . .’. The Minister also claimed that his critics did not know or were unable to show a single transaction where the natives were not compensated or had not themselves given the land. In spite of this there was some criticism of the way the Crown had acted in the past where it was quite possible that natives had not been aware the land was being taken and had no opportunity of objecting or claiming compensation. The chief critic was the then member for Tauranga, Herries, who also criticised the practice of retrospective general validations.<sup>12</sup>

The legislative tangle over scenery preservation reveals again that the Crown may well have been involved in invalid takings and was forced to validate previous actions much as had happened after the Te Taheke case. The assurance from the Attorney-General that the agreement of Maori owners was sought before any land was taken for scenic purposes is remarkable and possibly requires further research. This was certainly not a legislative requirement and in fact Maori land, and customary land in particular, had fewer legal protections than European-owned land. It is perhaps more indicative of the general lack of Pakeha knowledge about the actual public works provisions with regard to Maori land by this stage. Pakeha often assumed by now that Maori land was treated the same as other land, when this was clearly not so.

It seems clear that the assurances of the Attorney-General did not make much difference in practical terms anyway. In 1916 Ngata took the opportunity in parliamentary debates to strongly criticise the administration of the taking of land for scenic purposes. He informed the House that the administration of the Act had caused a considerable amount of friction. The major error had been in not approaching the native owners of the lands when it was proposed to make the reserves. The first the owners often knew of it was the taking proclamation in the *Gazette*. This was the worst approach that could be taken as Maori then felt – and rightly so – that they had a grievance. Ngata gave examples of such action in the hot lakes district and around Lake Waikaremoana. He believed that what tended to happen was that local bodies, those keenly interested in conservation, or bodies such as the Chambers of Commerce, made representations to the Scenery Preservation Board or to members of Parliament on proposed reserves and the owner of the land was often the last to know about it. If it was European-owned land then the owners tended to be consulted first and asked about it and only when this failed then the compulsory provisions of the Public Works Act might be resorted to. Ngata insisted that the Minister had to consult with native owners first.<sup>13</sup>

Hydro power was also seen as an important future development by the early twentieth century. In anticipation of this, the Water Power Act 1903 provided for the vesting in the Crown of waters for electrical purposes and for utilising such waters for those purposes. The Act was to form part of the Public Works Act 1894 (s 1). The sole right to use water in lakes, falls, rivers, or streams for the purposes of generating or storing electricity vested in the Crown. The Governor had the

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12. NZPD, 1910, vol 153, p 837–838

13. NZPD, 1916, vol 177, p 742–743

power to acquire any existing rights for such purposes and any land required for such purposes (s 2). These powers could be delegated to local authorities (s 3). The Minister, outside a mining district, could also grant rights for generating and using electricity and for driving any machinery by such means to anyone thought fit (s 4).

The Government also became involved in a number of settlement schemes, most of which were further attempts to ‘open up’ the country and to promote further European settlement. Many of these schemes were of course particularly directed at Maori-owned land. These schemes, starting with the Bay of Islands Settlement Act 1858 and including, for example, the thermal springs districts and Native Townships Acts, require a separate research paper. They were often established for the ‘public’ (namely, settler) good and often had a strong public works element, including land-taking powers. However, in many cases they appear wider in scope than the normal public works project, and require their own research. An example is the establishment of native townships.

The Native Townships Act 1895 preamble claimed the Act was intended to promote settlement and the opening up of the interior of the North Island. In some instances it appears such townships were also designed to assist the Government to provide facilities in tourist areas such as the Wanganui River. It was held that in many cases native title could not be extinguished in the ordinary way by Crown purchase and there were other difficulties impeding settlement. Therefore the Government could by proclamation declare any parcel of native land set apart as a site for a native township (s 3). This declaration could be made whether or not the land had been investigated by the Native Land Court. There were certain restrictions, such as the area could not exceed 500 acres, but there appears to have been no requirement to consult with or obtain the consent of Maori owners.

The Surveyor General was to survey the township site and lay off streets, reserves, and allotments. The reserves included public reserves, such as for school sites and recreation areas. The native owners were to be consulted in the selection of allotments made for them, but they were not to exceed 20 percent of the total site and were to include all existing urupa and buildings already built by owners. The relevant provisions of the Public Works Act were incorporated. For example, all roads were to vest in the Crown under the terms of section 12 of the Public Works Act. Compensation was payable to all persons having encumbrances over land. The rest of the allotments were to be leased and the rents were to be paid into the public account and then paid out to the Maori owners. In practice, the Government did not carry this out properly and soon succumbed to pressure to allow the lessees to purchase the freehold. The lands also became entangled in a nightmare of legal requirements and restrictions. A variety of often not very effective means of solving these problems often worked in settler or lessee interests rather than those of the owners. This report will only refer to those aspects of township lands directly involved in public works provisions, such as the disposal of land not required for public purposes.

Other more general settlement schemes also contained compulsory land-taking powers and require further research particularly as to their impact on Maori land. For example the Land for Settlements Act 1908 and 1925 provided for compulsory land taking under certain conditions and for compensation to be paid. Land could

also be taken to provide workers' homes. There was a special procedure for taking land and the provisions of the relevant Public Works Act were to apply for compensation, with certain extra provisions particularly applying to land taken for the purposes of this Act. The owners or agents of owners of any Maori freehold land could also enter into agreements for the sale or lease of such land if required under the Act (s 97). The various Land Acts provided the other main way of acquiring land, including by compulsion. However the purpose was for settlement rather than public works and therefore these Acts are only referred to in this report where they have a direct impact on public works takings.

Forestry was also beginning to become a significant industry by the 1920s. Forestry Acts had been passed as early as 1874 and were mainly concerned with the management and control of Crown land set aside for forestry. The Forests Act 1921 was also concerned with the management rather than taking of Maori land in connection with forestry. Maori could by agreement transfer land to the control of the State Forest Service but it remained Maori land and could not be alienated by the service (s 35). However there were limitations in certain circumstances on the sale of timber which did become an important lever for the Crown in applying pressure on landowners for various purposes. The Native Land Court and the Maori land boards also required the consent of the Minister of Forests before they could grant timber cutting rights (s 35). As will be seen in later chapters, the power to place restrictions on the sale of timber was later used to pressure owners to 'agree' to purchases of land for public purposes such as scenic reserves.

The public works powers and responsibilities of local authorities were also significantly extended in the years up to 1928. Land-taking powers were provided for works such as irrigation, water supplies, river control and soil conservation and drainage as well as the many areas already traditionally under local control, such as local roading. As well as extending local authority powers within the main public works legislation, there were numerous Acts specifically designed to extend the public works powers of local authorities. Many of these powers up to 1928 were in the area of further development of lands for settlement and again were passed in settler interests.

The Counties Act Amendment Act 1883, for example, gave powers to county councils to control and supply water for irrigation purposes for farming. Powers included taking lands under the Public Works Act, making surveys, and the power to construct dams and associated works (s 37). County councils could also take streams to supply water races (s 32). The definition of water race included dams and reservoirs (s 31). The Counties Act 1886 further extended county council powers regarding irrigation and drainage (ss 266–289) while also extending county council control of roads to those running through native lands (s 245). The Water Supply Act 1891 also updated the powers of county councils with regard to constructing, controlling, and maintaining water races for irrigation, including powers to take lands and requirements regarding the payment of compensation.

The River Boards Act 1884 gave control of all rivers, streams, and watercourses in a district to the local river board (s 74). The river boards were also given additional powers to those provided in the Public Works Act 1882 (s 76). The boards were also entitled to construct works on tidal waters with the consent of the

Governor (s 87). The Sand Drift Act 1903 gave the Governor on the petition of a local authority or two or more interested persons, the power to proclaim districts under the Act for the purpose of controlling sand drift and preventing further encroachment of sand on to farm land. The Minister of Lands was then required to develop a scheme for controlling sand drift that applied to all land in the proclaimed area and this could include Maori land. The Act appears to be more concerned with the control of land rather than actually taking land. There was also provision for objections to land being included in the scheme. However, it did allow for rating to cover the costs of the scheme and presumably land could be sold if such rates could not be paid. Where the proclaimed area contained Maori land, the public notice was also to be in Maori as well as English (s 2).

There were already considerable drainage powers for local authorities within the main Public Works Act. However separate drainage legislation was also enacted. These could contain general powers and some also related to particular districts or operations. The Land Drainage Act 1893 established drainage districts and drainage boards and attempted to classify land according to drainage requirements, all in an effort to provide for the drainage of agricultural and pastoral lands. There was special reference in the Act to the taking of Maori land for drainage purposes. Maori land could be taken the same as other land for drainage purposes and the taking was to be under the provisions of the Public Works Act 1882 and amendments. The Land Drainage Act 1908 was a consolidation of previous drainage legislation. The Swamp Drainage Act 1915 was especially enacted to provide for the drainage of large swamp areas to make such land available for settlement. Again there was power to take land under the Public Works Act (s 7) or land could be purchased. Land used exclusively for Maori settlement could not be taken unless in the opinion of the Governor-General it was necessary for the successful conduct of drainage operations.

There was other legislation and special Acts for special areas, for example the Hauraki Plains Acts 1908 and 1926. The 1926 Act for example increased the powers of the Minister of Lands to facilitate work on the Hauraki drainage scheme. This included the power to purchase or take any native land or other land necessary for the more effective carrying out of drainage (s 7).

Local authorities were also given extended town planning responsibilities, for example in the Town Planning Act 1926. The impact of town planning on public works taking is covered in more detail in later chapters. However the 1926 Act provided for the preparation of planning schemes by local authorities to cover town and rural areas. Compensation was payable under the Public Works Act for damage done or for land taken. Betterment was also to be assessed by the Compensation Court established under the Public Works Act. The planning schemes were to deal with matters including roads, streets, and footpaths, buildings, reserves, recreation grounds, and open spaces, objects of historical interest or natural beauty, sewerage, drainage, and water supply, amenities, and ancillary or consequential works in relation to these.

The administration of public works takings during the late nineteenth century requires more research. In terms of Maori land takings, the sheer variety and complexity of legislation that was being added to the old legislative traditions

created considerable confusion and many opportunities to bend provisions to advantage or to simply evade compensation. Disentangling all this in any detail is a very large research task. However some issues are apparent from even preliminary research.

It is clear that in the 1880s and 1890s the aggressive attitude towards Maori rights shown at Parihaka was continued. For some time any threat of Maori resistance was met with a show of force. Ward has described how Bryce continued using displays of force to overcome Maori opposition to public works projects. In the Thames district, for example, road and river clearing works were pushed through with a strong force of Armed Constabulary nearby.<sup>14</sup>

Historians have noted that, in general, by the 1880s and 1890s legislative and administrative policies were clearly designed to further settler, particularly farmer, interests; while little attention was paid to the impact on Maori values and concerns. The policies of cooperation and negotiation were once again abandoned when they no longer seemed necessary and Maori resistance seemed to have been crushed. At the same time, Maori efforts to take a real part in the machinery of state were continually blocked and rebuffed, with resulting disillusionment.<sup>15</sup> For example, according to Ward, Bryce found Maori proposals for increased powers of local government 'original and amusing'.<sup>16</sup> By the early 1890s, the once crucial role of the Native department was over and no longer needed as Maori had been effectively marginalised. The process of subordination to the settler political and legal system was also well underway. The rule of law was also shaped to suit the majority settler convenience. Old protections were now very narrowly interpreted and the Treaty of Waitangi was increasingly dismissed or ignored. For example, the 1877 *Wi Parata* case denied previously accepted colonial law principles and the Native Land Act 1909 ensured that customary Maori title could not prevail against the Crown. These new policies explicitly rejected Maori claims to Treaty guarantees. At the same time the Crown continued to try and roll back previous understandings of Treaty guarantees through, for example, assuming control of geothermal and foreshore rights for various purposes. Many of these were linked to public works activities. For example, many drainage and reclamation works destroyed traditional fisheries and encroached on disputed areas such as foreshores.

The marginalisation of Maori from participation in economic growth was achieved by a number of means and the operation of the Maori Land Court and continued land purchase was probably the most significant of these. However it is clear that public works programmes were also important, in that development was geared to meet settler interests while Maori concerns and needs were largely ignored.

Public works provisions reflect the overall pattern of the times. Roading and drainage projects, for example, favoured European settlement and farming while little attempt was made to prevent the resulting encroachment on reserves favoured by Maori as food sources or destruction of fishing grounds. There are many now

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14. A Ward, *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, Auckland, Oxford University Press, 1973, p 285

15. *Ibid*, pp 274–275

16. *Ibid*, p 293

famous cases that occurred during these times. An example is the long fight by the Maori owners of Lake Wairarapa to prevent the destruction of their traditional fishery in the interests of providing more farm land. As in many other cases, attempts by local Maori to reach a compromise with farmers were also rejected.<sup>17</sup>

Public works also began to encroach on reserves set aside for Maori as the result of previous large-scale loss of land and on the last remaining tribal lands in many areas. Governments did not recognise any need to preserve remaining tribal land from public works takings or to ensure successive takings for different purposes were not having the effect of steadily encroaching on remaining land or reserves. As the scope of public works changed, Maori land also came under new threats. For example, in many areas Maori had chosen reserves that allowed them access to traditional food supplies such as coastal strips. These were often originally agreed to as they were not good farm land. However, when scenic reserves became a public works concern, many of these reserves were compulsorily taken for this purpose and the justification was often that the land was not suited to farming anyway.

The public works takings also reveal a notable lack of consultation and communication with Maori. In part this was encouraged by legislation. Notification provisions were less protective for Maori land than for other land. However the separation of Pakeha and Maori communities and to a significant extent, racism, also often resulted in a lack of even informal communication, as often happened where European-owned land was required for public works. There was often no attempt to explain the need for projects to Maori or to find out Maori views, especially at a local level. Ward points out, for example, that taking authorities were unconcerned about destroying ancient eel weirs that may have been used for generations in the course of river or harbour works. The destruction was commonly not explained, there was no prior attempt to investigate alternatives and in these cases there was no compensation.<sup>18</sup>

Officials and politicians often made the excuse that protections such as serving notice were impossible for Maori land, whether customary or Crown-granted, owing to the large number of owners, many of whom were scattered throughout the country. This continued to be a favourite excuse well into the twentieth century. However this was largely a problem created by the Crown. Previous experience both before and after the wars had shown that, when forced to by circumstance, it was possible for the Crown to obtain Maori land or cooperation for public works by dealing at the level of iwi or hapu leaders through a process of negotiation and consultation. The Native department had also built up a great deal of expertise on this. It was largely European insistence on breaking down the traditional authority of iwi and dealing at an individual level that had caused the problems that were now obvious in dealing with individual owners. The Government creation, the Maori Land Court itself, was largely responsible for making the problem much worse by creating a system that resulted in vast fragmentation of Maori title.

However, instead of accommodating Maori needs by modifying or creating new protections, even the ordinary protections offered to non-Maori, were sacrificed in

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17. For example re Lake Wairarapa, MA 13/94

18. Ward, p 284



the name of administrative convenience. Many ordinary protections, while appearing neutral, also had the effect of discriminating against owners of Maori land in practice. The special problems caused by fragmentation of title, for example, would have required accommodations just to make protections effectively equal with those for non-Maori. However, provisions were traditionally only made from a Pakeha viewpoint, and features such as multiple ownership, which were common to Maori title, were commonly regarded as anomalies or exceptions to the general rule and therefore not requiring special concern.

Had it wished to use it, the Crown already had access to a legislative system of communication with Maori owners that was developed for when the Crown wished to purchase Maori land. In those cases the owners had to be consulted and a system was developed of calling meetings of owners to consider and vote on proposals to sell land. Although this system may have had flaws, at least it offered some means of communication with owners. In addition, the Crown had the expertise of the court to draw on in determining owners. However, taking authorities were noticeably reluctant to use this system. It was regarded as too slow and cumbersome and it also seems to have simply been too tempting to automatically assume that if Maori land was required for public works then it was 'too difficult' to contact the owners and to rely instead on compulsory powers. The result was a failure to not only offer the same protections as for general land but also to modify provisions to take into account the special features of Maori title.

It was also true, as some argued, that in certain cases such as for railways, everyone lost their normal protections in order to make railway building feasible for the benefit of the whole community. However, railway building did not single out a special class of the community and it also required special Acts of Parliament where each proposal could be individually scrutinised and, in theory, rejected. This alternative protection was not available for Maori land generally and even where Parliament did scrutinise railway takings involving Maori land, the few Maori members were effectively powerless to insist on a real accommodation of Maori concerns. It is also difficult to believe that many of these discriminatory provisions were the result of carefully weighed decision making when the circumstances in which they were enacted are taken into account. Settler politicians were clearly determined to crush even passive resistance such as that offered by Te Whiti and his supporters. They clearly felt that remaining protections for Maori land had to be dismantled as quickly as possible and they openly believed that traditional Maori usages and tenure should give way to 'superior' European traditions.

The 1882 Act and later amendments not only had considerable impact at the time but assisted in creating entrenched attitudes towards the treatment of Maori land for public works taking, many of which lasted well into the twentieth century. The idea, for example, that it was too difficult to notify owners persisted in discriminatory notification provisions that were not constructively improved until the 1970s. The fewer protections for Maori land, especially regarding compensation, also inevitably helped make Maori land a prime target for takings. The fact that the Minister was responsible for applying for compensation also set up conflicts of interest and inevitably led to delays or failures to apply for compensation. The provisions that meant once Maori land was taken, the aftermath was the problem of

the Maori Land Court to deal with and there were none of the processes such as the hearing of objections to be gone through, also made Maori land an easy target.

The ease with which Maori land could be taken, and other circumstances that created difficulties for Maori owners in economically using their land, contributed to European convictions that Maori land was worth little in Maori hands and would be better off used more efficiently for settler purposes. It was only one step further to decide that because Maori land was worth so little, and compensation was so marginal, then most public works would automatically be worth more than any compensation due. It became a notable and long-standing practice that many compensation applications were not even made because it was decided the 'betterment' was worth more than any compensation due and therefore everyone should be saved the trouble of the application.

The problem was aired in parliamentary debates in 1887. Criticism was made by Maori members of the procedure where the Minister had to be relied on to initiate compensation claims. In this case a private company had built the Kaihu Valley railway through Maori land and had paid for fencing but no compensation for damage to the land. The Minister of Works was asked to explain. After at first denying any Government responsibility for a private company, the Minister explained that no compensation was paid because, as the value of the land was greatly enhanced by the construction of the railway, it was thought that the owner had no intention of making any claim for money for the land taken.<sup>19</sup> The problems of having applications for compensation made and prosecuted for Maori land remained long-standing issues well into the next century and will be discussed in more detail in later chapters.

Williams has shown that legislation in general by the late 1870s and 1880s was increasingly designed to protect settler interests, regardless of the impact it might have on the Maori way of life. By then Maori were effectively relegated to the periphery of economic life. They were successfully marginalised and were increasingly subject to effectively discriminatory legislation. Williams cites the Impounding Act 1884 as a general example of this. This Act provided that damages for trespass could only be recovered by occupiers of fenced land (s 6), except for most of the South Island. South Island graziers therefore had their economic position on unfenced lands protected, while North Island Maori communities had no protection for unfenced vegetable cultivations.<sup>20</sup> The increasingly discriminatory provisions in public works legislation were a reflection of this overall trend.

In many cases public works projects were influenced by political pressures and local interests, particularly in the late nineteenth century when works such as railways were expected to result in economic prosperity for a district. Noonan has explained how, prior to 1920, public works were characterised by political priorities as much as anything else. There was considerable political pressure on the Government to supply public works to districts in return for political support and there was a strong political influence on decisions regarding the construction of

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19. NZPD, 1887, p 120

20. D V Williams, 'The Use of Law in the Process of Colonisation: An Historical and Comparative Study with Particular Reference to Tanzania (mainland) and New Zealand', PhD thesis, University of Dar es Salaam, 1983, p 322

roads and rail in particular.<sup>21</sup> Political pressures could result in railways being built in areas where it was clear they were not required and in the routes being diverted to particular towns or in particular directions where engineering requirements suggested quite different decisions should have been made. In the end quite deliberate, although not always successful, attempts were made to ensure railways escaped such blatant political interference. Maori were largely marginalised outside this system of political patronage but found that when they opposed certain works the absolute necessity of siting them on Maori land was not a matter for debate.

In the absence of clear protections for Maori interests, other imperatives naturally began to take precedence. It seems clear, for example, that financial considerations and administrative convenience often took priority over Maori interests. In 1884, land was required near Greymouth for a quarry in connection with harbour works being carried out by the public works department. The land was a native reserve and although the Works department had already carried out extensive works on the land it decided to try and get guaranteed possession for a few more years. The owners agreed to lease the land rent free and promised they would not ask for any rent or compensation for the land or metal, on the understanding that the land would be returned to them when the Government no longer needed it. The problem for Works was that the land was a reserve and under the law on reserves any lease had to go to public tender. This would mean the department might have to compete with private interests and might therefore have to pay a high price while the owners were willing to let them use the land for free. When the Public Trustee was approached on the matter he told Works they could either take the land under the Public Works Act or come to an agreement about undisturbed possession for a few more years. The agreement was the preferred option because there was considerable concern from Maori that they were rapidly losing their reserved land and if the land was taken the owners would have to buy it back – something they were unlikely to be able to do. In the end the Greymouth Harbour Board, who would inherit the works, presumably on Works department advice, decided to simply take the land and so ensure the land would be acquired cheaply. The land was taken by proclamation in a *Gazette* notice of May 1886. Maori interests and concerns, even though they were well known to the Crown agencies involved, were simply ignored.<sup>22</sup>

Native reserve land takings for public purposes at Greymouth also reveal common problems concerning compensation. Local bodies and the Works department commonly decided on compensation values themselves and these often, in the early years at least, appear to have been accepted by the Native Land Court. In the case of reserves however the Public Trustee was obliged to act and had the resources to dispute the amount offered. In this case the Greymouth Harbour Board offered £200 compensation for land taken and after taking the case to court, the Public Trustee was awarded £500 plus costs. However compensation payments also reveal many of the problems faced by owners as a result of Native Land Court decisions. In this case there was a dispute over who the money should be paid too.

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21. R J Noonan, *By Design: A Brief History of the Public Works Department, Ministry of Works, 1870–1970*, Crown copyright, 1975, pp 108–109

22. Correspondence, MA 1, 6/10/7

Many local Maori felt the land had been awarded to chiefs on behalf of the hapu. However the judge involved and the family claimed the land was solely awarded to individual chiefs for their own benefit and could be willed to direct family members to the exclusion of everyone else. The Public Trustee was unsure for some years who to pay compensation to and eventually kept the capital and only distributed income from it. It was also added to the moneys paid to all beneficiaries for a variety of other public works takings and damages to reserves in the area. This resulted in a long running dispute and many petitions to Parliament.

Maori were also routinely asked to accept takings on the grounds they were 'necessary' for the good of the whole country but at the same time the definition of public works was being continually extended to include almost any purpose required by settlers. At the same time, Maori requests for works were rarely accorded the same importance. The taking powers were often also extended in an ad hoc fashion, with considerable resulting confusion. The lack of concern for Maori rights is perhaps reflected in the number of takings where the legality was questioned and validating legislation had to be subsequently enacted.

The changing definition of 'public works' underlined the trend in public works provisions which seemed to increase when local and central government became the most common taking authorities and in a new colony that required considerable development. The inherited English principle had emphasised the need for special Acts for particular takings each requiring parliamentary scrutiny. This was considered appropriate when private enterprise was doing most of the taking and it was retained to some degree in New Zealand, especially for railways. However, Government taking authorities found it increasingly more convenient to also extend the definition of public works to provide more general taking powers. This was probably inevitable in a new society requiring considerable public works. However, at the same time in the rush for development there were few alternative protections put in place, the only check being political and public pressure.

This may not have been such a problem where works were clearly of benefit to the whole community but Maori were by now often on the outside and the 'necessity' of many works seemed questionable. For example, a rifle range may have seemed a valid necessity for defence purposes when external threats seemed imminent, but when these faded the general authorisation remained, even if the main purpose of the rifle range was now more to provide for the recreational hobby of local farmers. For Maori, increasingly outside the settler community, the compulsory taking of rapidly diminishing ancestral land for a rifle range that in effect catered to the hobbies of local farmers, seemed extremely unfair. In other cases, drainage works seemed to enhance a few farms while destroying food sources for a whole hapu and birds were slaughtered while traditional Maori hunting seasons were ignored. The refusal to accommodate Maori concerns and the destruction of often significant areas for often seemingly petty reasons helped create a legacy of bitterness as far as Maori were concerned to the whole concept of public works takings.

During this time Maori made many attempts to express concern through petitions and through the Maori members of Parliament. While some small changes were made, in general they had little success in changing the major provisions. An

example is the concern expressed about the lack of communication with Maori owners about public works takings. In 1889 the member for Western Maori was successful in having the sittings of the court regarding compensation notified in the *Gazette* and the *Kahiti*.<sup>23</sup> However, his additional request, that native burial grounds and other places of great value to natives be protected from takings, was not acted upon.<sup>24</sup>

The destruction of burial grounds was a common cause of Maori complaints. In 1888 the member for Western Maori asked the Government to take steps to prevent the Public Works department and local bodies from desecrating native graveyards as these were on land being taken for roads and railways.<sup>25</sup> However legislative protection for burial grounds was not enacted until 1948. This was in spite of the fact that exemptions for other places of value to non-Maori were always available. Although the Public Works department insisted that it routinely inquired about possible burial sites, this procedure was clearly not adequate. It relied on administrative policies that could be neglected or changed at any time. It also neglected to take into account the practice of other taking agencies such as local authorities. The destruction and desecration of burial sites was another issue that continued to cause concern well into the twentieth century.

Concern was also expressed about the expertise of the Native Land Court in assessing compensation for land taken. The court was clearly originally involved to determine the individuals who were entitled to compensation and in early years to determine the title of land involved in a taking. The responsibility for assessing compensation was clearly given out of administrative convenience and there was concern from Maori leaders that land court judges were not as expert in assessing compensation as those appointed to the Compensation Court for that specific purpose.

In the 1903 debates on the Scenery Preservation Act, Heke agreed that the Northland Kauri forests should be protected, but objected to takings under the Public Works Act, as he objected to compensation for Maori land being assessed by a separate tribunal.<sup>26</sup> In 1905 the member for Northern Maori also complained that the judges of the Native Land Court might know nothing at all about deciding the value of property, whereas Europeans had a specialist court and he asked that the provisions be made the same as for Europeans in determining compensation.<sup>27</sup> As the Native Land Court judges gradually became more protective of Maori interests this situation changed slightly and there was a more mixed attitude to the Maori Land Court judges assessing compensation. While concern was still expressed about their expertise in the area, their understanding of the special problems facing Maori land was by then also often acknowledged.

Ironically the more protective attitudes of judges caused the Crown some concern. In 1910, a public works amendment made the Native Land Court award final with no right of further appeal. By 1927 the right of appeal to the appellate

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23. Public Works Amendment Act 1889, s 16

24. NZPD, 1889, p 497

25. NZPD, 1888, p 305

26. NZPD, 1903, vol 126, pp 710–711

27. NZPD, 1905, p 537

court had been restored.<sup>28</sup> This was at the request of the Crown because of concern that some judgments were too generous.<sup>29</sup> The issue of whether the Maori Land Court should hear compensation was yet another concern that lasted well into the twentieth century.

The taking practices of local authorities appear to have continued to be a low point in the takings of Maori land. It is often very difficult to clearly disentangle central and local government responsibilities and administrative practice when public works takings were involved. As can be seen in the legislation described, local authorities often had to rely on ministers or Government departments to consent to, or to take land on their behalf. There were often theoretical divisions in responsibility, for example local authorities often had responsibility for local or secondary roads while central government was concerned with main highways. However in practice this was often blurred. The Public Works department could develop roads and then hand them over to local authorities, and powers regarding main highways, for example, could be delegated to local authorities. The provisions of the Main Highways Act 1922 are a good example of this. Local authorities had also already developed a practice of having central authorities take land on their behalf, often to avoid the extra restrictions or requirements that local body takings involved. The same procedure often applied when authorities wanted to dispose of land taken. It is quite clear that local bodies also exerted considerable political pressure on Government on behalf of what they saw as the interests of their communities.

Other issues apparent in general public works takings of Maori land during this time have already been referred to in chapter 5. These include the often unscrupulous activities of taking authorities and the lack of political will to properly supervise takings or remedy obvious injustices. It was clear, for example, that the Government was not prepared to interfere with the activities of local bodies other than to occasionally act as mediator. In 1888, the Native Minister explained the background to a case in Otaki, where Maori had erected a fence over a road built by the local body because compensation was still in dispute. The late Native Minister had intervened and promised that native rights would be protected. He sent his under-secretary to bring about an agreement between the natives and the local body. In the end £100 was paid to the owners. The Minister explained that the Government had no responsibility in the matter beyond that of mediation. The responsibility rested entirely with the local body.<sup>30</sup>

It seems clear that during this time some erroneous assumptions became entrenched that also lasted well into the twentieth century. These included the beliefs that public works provisions basically treated Maori landowners the same as everyone else and that Maori were informed before land was taken. The closest administrative procedure to this was the public works policy to notify the Native department of takings of Maori land but not only was this policy only intermittently

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28. Native Land Amendment 1927 and Native Land Claims 1927 Adjustment Act, s 15

29. Complaint was made that the values were being assessed by some judges far too highly and upon no fixed principle, Under-Secretary of Maori Affairs to Under-Secretary of Public Works, 15 December 1927, MA 19/4/48, AAMK 869/696f

30. NZPD, 1888, p 541

*Public Works Takings, 1840–1981*

followed but it became increasingly ineffective as the influence of the department waned from the 1890s. It is clear that, for the most part, Maori attempted to participate in economic developments during this time and continued to support public projects where they were of obvious benefit to all. It is equally apparent however that now dominant Pakeha interests intended to find no place for Maori in the new scheme of things. In the public works area, while Maori land continued to be taken with scant regard for Maori interests, the same taking authorities commonly evaded responsibility in areas where public works would have benefited Maori. Given their experiences with public works takings in the late nineteenth and early twentieth century it is not surprising that Maori often regarded the whole concept of public works land takings as little different than a continuation of land confiscations.

## CHAPTER 10

# THE PUBLIC WORKS ACTS AND RELATED LEGISLATION, 1928–1981

The Public Works Act 1928 became the principal Public Works Act, although with numerous amendments, for over half a century, until revised and replaced by a new Public Works Act in 1981. The 1928 Act continued most of the principles and policies developed in previous years, including many of the inheritances of the 1882 Act regarding Maori land. The 1928 Act was passed without debate and in fact the Minister of Public Works described it at the time as ‘entirely a consolidating measure’.<sup>1</sup> The Act was also arranged into by now traditional divisions, including separate parts for general land takings and for takings of Maori land.

While the 1928 Act was the main Public Works Act, Parliament also continued the legislative tradition of passing numerous other Acts that contained land taking powers for specific purposes or types of organisation. As previously, these Acts could incorporate provisions from the 1928 Act and could also include new or extended powers or amended provisions according to the requirements of the particular work or authority they empowered. Local and special Acts also often incorporated land taking powers.

The inclusion of significant public works provisions continued in general Acts such as Finance Acts, Reserves and Domains Acts, and various Land Acts. Public works provisions specifically related to Maori land also continued to appear in other general Maori Affairs-related legislation, either in general terms or relating to specific blocks of land, especially in Maori Purposes Acts, land laws, and Claim Adjustment Acts, and Maori Affairs and Maori Trustee Acts. From the 1940s, town planning legislation also had an important impact on public works provisions, including land takings.

Although the Public Works Act 1928 was a consolidation of previous legislation, a summary of provisions as they had developed to this date is useful, because the assumptions and most of the general principles in this Act remained relevant for many years. There were also a very large number of amendments in succeeding years, often at the rate of more than one a year. Only a brief overview of what appear to be some of the most important amendments is attempted here.

The 1928 Act was divided into 14 parts, many similar to earlier years including, for example, separate parts concerned with general takings of land for public works purposes (Part 2), compensation (Part 3), taking of native lands (Part 4), surveys (Part 5), roads and rivers (Part 6), railways (Part 7), defence (Part 9), and drainage,

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1. NZPD, 1928, vol 219, p 651



irrigation, water supplies and water power, and electrical energy (Parts 10–13). In general, the provisions specifically concerned with land required for public purposes covered the power to take land, land-taking methods and procedures, compensation, and the disposal of surplus land acquired for public works.

The 1928 definition of ‘native land’ also continued to mean land held by natives under their customs and usages (s 2), or Maori customary land. The 1928 Act continued the tradition begun in 1882 of separate treatment for Maori land including generally lesser protections, especially for customary land. Maori freehold land was included under general takings but even so, some lesser protections still applied. This continuation of separate provisions for taking Maori land helped shape attitudes of taking authorities for almost another 50 years and was not finally abolished until 1974.<sup>2</sup>

In terms of taking powers, the 1928 Act confirmed that both the Crown and local authorities had the power to take land for public purposes. This included Maori land, whatever title it was held by. It was also a well-accepted principle by now that public works takings had to be based on some statutory authority or that Parliament had already appropriated money for the work. The definition of ‘public work’ was similar to previous public works legislation and included any survey, railway, tramway, road, street, gravel pit, quarry, bridge, drain, harbour, dock, canal, river-work, water-work, and mining and associated work. It also included electric telegraph, fortification, rifle range, artillery range, lighthouse, or any building or structure required for any public purpose or use including lands necessary for the use convenience or enjoyment of the same. The definition also included buildings and associated lands used for mental health and educational purposes and all ministerial and other public buildings and associated land (s 2). The various other separate parts of the Act relating to particular types of works, surveys, roads and rivers, railways, defence, drainage, irrigation, water supply for mining districts, and water power and electrical energy also had particular provisions and powers relevant to those types of works.

In later years, the definition of ‘public work’ continued to be widely extended as the need arose. Just a few examples include aerodromes owned by the Crown or local authorities (ss 2–4, Public Works Amendment Act 1935), local body provision of recreational and associated social facilities (Physical Welfare and Recreation Act 1937), river and soil control works undertaken by a Council or Catchment Board (Soil Conservation and Rivers Control Act 1941), housing improvement, safety, and associated land subdivision and development work (1945 Finance Act (no 2)), motorways (Public Works Amendment Act 1947), geothermal works (Geothermal Steam Act 1952), various local authority powers (Housing Improvement Act 1945, Municipal Corporations Act 1954 and Counties Act 1956), noxious weeds (Noxious Weeds Act 1950), works associated with town and country planning (Town and Country Planning Act 1953), and reserves (Reserves Act 1977). As well as general powers, special taking powers were also enacted in special circumstances, for example the 1944 powers to take land for the removal of Tokaanu township and other settlements affected by the control of Lake Taupo

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2. Section 12 of the Maori Purposes Act 1974

(section 33 of Finance Act 1944 (no 3)). Amendments and revisions were also made to legislation concerning long-standing public works concerns such as mining, harbours, and national parks.

In the 1928 Act, the Governor or a local authority also had taking powers regarding any land, whether private, native, or otherwise, required for forest plantation purposes, recreation grounds, or for agricultural show grounds or for paddocking driven cattle as if such purpose were a public work (s 15). However no native land (customary Maori land) could be taken under this section without the consent of the Native Minister. Local authorities could also take land and carry out works necessary for the provision of public swimming baths (s 16). The Crown could take land for a quarry or gravel pit required for the construction of public works or take materials such as stone or gravel from land under certain conditions including 24 hours notice and on paying reasonable compensation (s 17). In general, mines and minerals were excluded from land taken (s 19).

In Part 5 of the 1928 Act, concerning surveys, the right to enter any land not used for a garden, or similar thing, to remove gravel and similar material after 24 hours notice, was extended to customary native lands which had not been partitioned and to any land that was unfenced, uncultivated, unoccupied, and the owner of which was unknown or difficult to find (s 122). Compensation was payable. In the case of native land, it was sufficient to post a notice signed by the appropriate officials at or near the place where the material was to be taken (s 122). A purchaser of Crown land where there was no access could also require the Crown to have access provided either through Crown land or other land under certain conditions (s 124).

As the variety and scope of public works increased during the twentieth century, the definition of public works also continued to expand. For example, by 1945, land could be taken for subdivision, development, improvement, provision, or preservation of amenities, public safety in respect of any public work and for 'regrouping or better utilisation'.<sup>3</sup> Just in case, the Governor-General also had the power under the same Act, to declare by Order in Council that any work or undertaking was a public work for the purposes of the Act (s 29).

The Public Works Act 1928 also continued the general tradition of enabling land required for public works purposes to be acquired either by agreement or by compulsory taking. However this did not apply to all Maori land. The possibility of acquisition by agreement, as provided in Part 2 of the Act, only applied to Maori land where title was derived from the Crown. Customary Maori land was excluded from this provision until 1962, by which time of course there was very little customary land left to reach agreement about.<sup>4</sup>

The provisions concerning acquisition by agreement were contained in Part 2 of the 1928 Act in section 32 and enabled the Minister or local authority to enter into an agreement for the taking or purchase with the person owning or having an interest in the land required for public works. In such cases the normal provisions requiring notice and objections were not applicable. Compensation in such cases could also be determined by either agreement or by leaving it to the determination

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3. Section 30 of the Finance Act 1945 (no 2)

4. Section 6 of the Public Works Amendment Act 1962

of the Compensation Court under Part 3 of the Act. On being satisfied that the agreement was sufficient, the Governor-General could go ahead and issue a proclamation taking the land, also without complying with normal requirements. Land taken by agreement was to be deemed land ‘taken’ under the Public Works Act, but normal provisions regarding compensation did not apply unless specially provided for (s 32).

There were some changes to these provisions in later years. For example, in 1948, compensation certificates were introduced. These were to be registered and included details of the agreement and the amount of compensation.<sup>5</sup> When Maori customary land was finally brought under the provisions concerning agreements in 1962, the procedures were slightly different. Instead of section 32(4) applying (regarding the issuing of a taking proclamation) in the case of an agreement regarding customary Maori land, the Crown or local authority had to apply to the Native Land Court for compensation to be assessed and an Order in Council taking the land was issued under section 103(1)(a)(ii) as for compulsory takings of customary land. The 1962 Amendment also gave the Maori Trustee responsibility for claiming compensation for Maori land in multiple ownership. However the Maori Trustee only had authority to enter agreements for the taking of Maori land where he owned an interest in the land, he had no authority to enter taking agreements on behalf of Maori owners.<sup>6</sup>

It is unfortunate that a lack of data means it is impossible at present to draw any accurate conclusions about the impact of provisions where public works land takings could be made by agreement. It is not clear, for example, whether most general public works takings were by agreement, although the impressions of experienced legal practitioners in this area indicate that this may well be so.<sup>7</sup> It is also not clear whether takings of Crown-granted Maori land followed a similar pattern or for example whether most were taken by compulsion. Until 1962 of course, provisions concerning customary Maori land only catered for takings by compulsion. Even after that, it may well be difficult to identify takings of customary land by agreement as the procedures were the same as for ordinary takings.

The other method of acquiring land required for public purposes was by compulsory taking. The 1928 provisions regarding compulsory land taking were again very similar to previous legislation with separate taking provisions for Maori land. In general, land taking provisions were divided into those where normal protections applied and those with fewer protections. Maori customary land was included in this latter class. However even for Crown-granted Maori land, where for the most part normal protections applied, there were some significant differences that resulted in lesser protections.

In terms of taking procedures, Part 2 of the Act covered general takings of land. These procedures included all the normal protections by now associated with public works land takings, in particular the right to receive notice and the right to object to takings. These provisions covered European-owned land in general and Crown-

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5. Section 17 of the Public Works Amendment Act 1948

6. Section 6 of the Public Works Amendment Act 1962

7. For example, see R I Barker, ‘Private Right vs Public Interest – Compulsory Acquisition and Compensation under Public Works Act 1928’, *New Zealand Law Journal*, vol 4, 1969, p 253

granted Maori land by virtue of section 103(2). There were some significant exclusions from these general protections however. Most were for particular works purposes. These were railways and defence, and roads in connection with such purposes, and water power and irrigation purposes (s 10). Middle line proclamations for the purposes of constructing roads over land not previously acquired or set apart for the purpose were also excluded (s 30(1)). However, in addition, all native land (customary Maori land) was also excluded from Part 2 protections (s 10). In 1947 land required for motorways was added to the list of exclusions.<sup>8</sup> The term ‘water power’ was replaced by ‘electricity generation’ in 1970 and ‘all purposes under the Electricity Act 1968’ in 1975.<sup>9</sup> The exclusion of customary Maori land from Part 2 protections was not remedied until 1974.<sup>10</sup>

In general, the compulsory taking procedures in Part 2 of the 1928 Act required the Minister or local body to have a survey made and a plan prepared showing the lands to be taken with the names of the owners and occupiers. The plan had to be lodged for inspection in the relevant district in some convenient place. A notice had to be published in the *New Zealand Gazette* and twice in local newspapers stating where the plan was open for inspection, with a general description of the proposed works and of the lands to be taken. Notice also had to be served on all persons having an interest in the land. All persons affected could make ‘well grounded’ objections in writing within 40 days from the first publication of the notice. The objector could be heard by the Minister or local authority and could present supporting evidence (s 22).

If no objections were made, or if after due consideration of objections, the Minister or local authority was still of the opinion that it was ‘expedient’ to go ahead with the proposed works and that no private injury would be done whereby compensation was not available under the Act, then after completing certain formalities the Governor-General could issue a taking proclamation. Once registered, this proclamation vested the land in the Crown or local authority discharged from all claims or interests for the public use named in the proclamation (s 23).

Other provisions under Part 2 included that a taking proclamation for a local body work was not to be issued until the Governor-General was satisfied that the local body had made sufficient provision for the payment of likely compensation (s 24). A proclamation was also not to take effect until it had been gazetted. A proclamation could be revoked after land was taken but before compensation was awarded, if the land or part of it was found to be no longer required for the work (s 27). An owner could require severed land to be taken or added to adjoining land in certain circumstances (s 31) and a copy of every taking proclamation and map had to be deposited in the relevant land district registry office (s 28). Land could also be taken in some cases where it was found necessary after the work had been constructed, or where it would be desirable for the use, convenience, or enjoyment of any public work (s 34).

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8. Public Works Amendment Act 1947

9. Public Works Amendment Acts 1970 and 1975

10. Section 12 of the Maori Purposes Act 1974

There were numerous later amendments to the 1928 Part 2 compulsory taking procedures. For example, improvements included a 1952 amendment that if a notice of intention to take land was not followed up by confirmation within a specified time (generally from nine months to one year) the notice of intent would cease to have effect. A notice of intent could also be withdrawn at any time by notice or a letter to the owners and occupiers.<sup>11</sup> Further improvements were made after increasing criticism in the 1960s. In response to criticism that the hearing process allowed taking authorities to be judges in their own cause and that objectors were disadvantaged in not having sufficient information or opportunity to present an adequate case at hearings, for example, a 1973 Public Works amendment transferred the right of objection away from the taking authority (Crown or local authority) to an independent Planning Appeal Board.<sup>12</sup>

In general, Crown-granted Maori land came under the general provisions of Part 2. However even then there were some important differences. For example, where Maori owned or had interests in land required that was not registered under the Land Transfer Act, the provisions in section 22 requiring the names of owners and occupiers to be shown on the plan and requiring copies of the notice and description to be served on owners and occupiers did not apply. Instead, the 1928 Act required a notice to be published in the *Kahiti*, although no proceedings would be invalidated if there was any failure to do this (s 22(4)). Later changes were made to this. When publication of the *Kahiti* stopped, publication of a notice in the *Gazette* was taken as equivalent.<sup>13</sup> Later it was decided that notice in the Maori Land Court panui was sufficient and likely to reach more Maori, and the *Gazette* requirement was dropped altogether. The practical effect of the provisions regarding notice was that for a large proportion of even Crown-granted Maori land, notification procedures were much less effective than for non-Maori land and this of course had a large bearing on the ability to make objections. Even in 1959, it was acknowledged that there was still a large proportion of Maori land where title was not surveyed and therefore not on the Land Transfer register.<sup>14</sup>

General notice rights for owners of Maori freehold land in multiple ownership were not improved until 1974 when an effort was made to provide for ‘more effective and direct representation of the owners of Maori land in multiple ownership’.<sup>15</sup> The 1974 Act provided for notice to be served on a registrar of the relevant Maori Land Court. A meeting of owners was to be summoned or in cases of urgency agents or trustees could be appointed to negotiate and otherwise act on behalf of landowners.

The 1928 Act also continued the general protections developed in earlier legislation concerning entry onto land required for public purposes. In most cases, the prior written consent of the owner was required before any stone or other material could be taken from a quarry, brickfield, or similar, used for commercial

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11. Section 3 of the Public Works Amendment Act 1952

12. Section 6 of the Public Works Amendment Act 1973

13. Section 47 of the Finance Act 1931 (no 2)

14. For example, memo from Secretary of Maori Affairs to Solicitor General, 1 April 1959, MA 38/1/1 vol 1, accn 2490

15. Maori Affairs Amendment Act 1974 pt 9

purposes. The prior written consent of the owner or the Governor in Council was required before any land could be taken occupied by any building, yard, garden, orchard, or vineyard, or used as an ornamental park or pleasure ground (s 18). This section was contained in Part 2 of the Act and presumably also therefore applied to Crown-granted Maori land even though the exemptions were eurocentric. In a belated correction in 1948, the words ‘cemetery, burial ground’ were added after ‘yard’ in section 18 of Part 2.<sup>16</sup> Again Maori customary land was excluded from Part 2 provisions and therefore no exemptions at all applied.

The land takings excluded from Part 2 of the 1928 Act had their own taking procedures, and in general these offered fewer protections than applied under Part 2. For example, taking procedures for railways (and later motorway) purposes were contained in Part 7 of the Act. The Governor-General could issue a middle line proclamation for a railway, issue plans showing the land through which it passed and at any time after the publication of the proclamation enter and construct the railway, including all necessary works involved. The gazetted proclamation was sufficient proof that the land now vested in the Crown. The Crown had to give notice to owners describing the land taken so that applications for compensation could be made, but the usual rights of notice, objection, and formalities regarding taking proclamations did not apply (s 216). Similar provisions applied for land required for defence purposes (pt 9, s 254). ‘Native land’ or customary Maori land was also excluded from Part 2. Apart from native land required for railways and defence where those particular taking procedures applied, takings of native land were covered by Part 4 of the 1928 Act.

Where the title to Maori land was not derived from the Crown a map of the lands to be taken had to be prepared by an authorised surveyor accurately showing the position and extent of the lands to be taken. At any time afterwards the Governor by Order in Council could declare the lands deemed taken for public works purposes. The lands then vested in the taking authority as from the date named in the Order in Council, unless revoked in the meantime. This date had to be at least one month after the *Gazette* notice. A record of the taking was to be shown on the maps of the district in the office of the Surveyor General (s 103).

Apart from the gazetting, there was no other provision for notifying owners of customary Maori land when land was required for public works. In addition there was no provision for objecting to *any* takings of customary land and of course all takes were assumed to be compulsory as there was no similar provision to that in Part 2 for agreements over acquiring such land. While Part 2 provisions also placed some restrictions on entering and taking land occupied by such things as gardens, there were also no similar exemptions for customary Maori land.

These provisions were not improved until 1962 when sections 104 to 106 of the 1928 Act dealing with Maori customary land were repealed and replaced (s 6). The new section 104 applied the provisions of section 32 (enabling willing agreements to be entered into for land required) and Part 3 (compensation) as though customary land were European land. In 1974, the distinctions in taking provisions between Maori and European-owned land were finally removed by omitting all references to

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16. Section 14 of the Public Works Amendment Act 1948

Maori land in the relevant provisions. For example, Maori land was removed from the exclusions to Part 2 in section 10. Sections 102 to 104 of the 1928 Act and their various amendments were also finally repealed.<sup>17</sup>

In terms of compensation, the 1928 Act again contained similar provisions to previous legislation, including significantly different compensation provisions applying to Maori land. Once again there was an excluded class of land takings where compensation provisions were quite different from those applying generally. The general compensation provisions were contained in Part 3 of the 1928 Act. These continued the general principle that full compensation was payable for any person with an interest or estate in land taken for a public work, injuriously affected by the work or suffering any damage from the exercise of powers under the Act. The only exceptions were for Crown lands and for lands where the Crown right to take land for a road or railway without compensation had not yet lapsed or become barred (s 42). The general time limit for making a claim for compensation was five years from the date of the proclamation taking the land. In the case of a claim for damage it was 12 months from the execution of the works in respect of which the claim arose (s 45).

A number of later amendments were made to this general time limit in response to circumstances arising from particular works and where more flexible limits seemed necessary. For example, time limits were amended in relation to airport requirements in 1935,<sup>18</sup> and in 1939 the Supreme Court was also allowed to extend the time limit for damages on application to not more than five years.<sup>19</sup> Various types of work also had altered claim time limits, for example irrigation works (s 30, Finance Act 1944 (no 3)) and limited access roads (s 4, Public Works Amendment Act 1963).

In general, where land was acquired by the Crown, the 1928 provisions required the Minister to offer such sums in compensation as he thought fit. If that offer was not accepted, compensation was to be determined by the Compensation Court (s 46). A local authority, or the Crown, could make an offer of compensation after a copy of a compensation claim had been received. A 1952 Amendment provided for the accelerated hearing of compensation claims in certain circumstances.<sup>20</sup>

The general procedures for obtaining compensation in 1928 were that the claimant had to complete certain specified forms giving full details of the land taken or damaged, the nature and particulars of the claimant's interest in the land, full details of the basis for the claim, and the nature, extent, and amount of the claim. The total amount claimed and separate details of each item claimed had to be listed separately. The claim had to be served on the Minister or the local authority concerned (s 51).

There were a number of other procedural requirements for submitting and responding to a claim. The claim was heard by the Compensation Court and Part 3 also contained detailed provisions concerning the hearing of compensation claims by the court. In the case of native reserves, a claim for compensation for lands taken

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17. Section 12 of the Maori Purposes Act 1974

18. Sections 4–5 of the Public Works Amendment Act 1935

19. Section 63 of the Statutes Amendment Act 1939

20. Section 7 of the Public Works Amendment Act 1952

was to be made by the Native Trustee on behalf of those interested in the reserve (s 48). In making payment or other satisfaction of compensation, the Minister or the Compensation Court could grant easements in lieu of compensation or the Governor-General could grant surplus land in lieu of compensation (ss 97–99).

In later amendments the Compensation Court was replaced by the Land Valuation Court from 1948<sup>21</sup> and this later became the Land Valuation Tribunal.

The 1928 Act also contained some variations from the general compensation provisions. Again Maori land was treated separately in this regard. All Maori land, whether customary or Crown-granted, and regardless of who held an interest in the land, was covered by separate compensation provisions. The Compensation Court was barred from hearing such claims and they were all to be heard instead by the Native Land Court. The procedure for making claims for Maori land taken was that the Minister ‘may at any time’ in the case of a Government work, and the local authority ‘shall not later than six months after the gazetting of the Order in Council or Proclamation taking the land’ in the case of a local work, cause application to be made to the Native Land Court (later the Maori Land Court) to ascertain the amount of compensation to be paid, and the persons entitled. On hearing evidence produced and any other evidence thought necessary, the court could make orders as it saw fit (s 104).

This put the legal onus for making a claim on the taking authority rather than the owner as for general claims. The Minister also appeared to have discretion in the case of Crown takings about making a claim at all. Where Maori land was taken by the Crown there was also no time limit on the Minister in making an application.

The Maori Land Court had the full authority and jurisdiction of the Compensation Court in compensation matters, and the amount of its award was to be regarded as final. Every sitting of the court for compensation matters was to be notified in the *Gazette* and *Kahiti*, although the lack of notification was not to stop any hearing applied for (s 104). Presumably this meant the Maori Land Court also had powers to grant easements in lieu of compensation although more research is required to determine this and if such powers were used. More research is also required to determine whether the Minister’s and Governor-General’s powers to grant easements and surplus land in lieu of compensation applied to Maori land, and if they did, to what extent they were used.

The requirements for notice concerning compensation hearings were similar to those concerning notice of land takings. The requirement for notice in the *Kahiti* was also dropped in 1931.<sup>22</sup> The requirement for notice in the *Gazette* was also dropped in 1955 as it was felt that inclusion of notices in the Maori Land Court panui gave sufficient notification.<sup>23</sup>

The Maori Land Court could pay the whole or part of any compensation awarded to one or more owners to the exclusion or partial exclusion of the others. This could be made retrospective on orders already made by the court and the court could amend or vary title accordingly (s 105). Notwithstanding anything else in the Act,

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21. Land Valuation Court Act 1948

22. Section 47 of the Finance Act 1931 (no 2)

23. See internal Maori Affairs memo, December 1955, MA 1, 38/1/1, accn 2490, and section 4, Public Works Amendment Act 1955



appeals could be made to the Native Appellate Court from any final order of the court both regarding the amount of compensation and the right or title of any person to be paid such compensation (s 106).

Later amendments were made to compensation provisions. A 1953 amendment provided that compensation could also be paid in whole or part to the Maori Trustee (s 47). The Finance Act 1944 (no 3) also provided for a special compensation court to hear Maori and European claims arising out of control of Lake Taupo (s 34).

In summary, all takings of Maori land whether customary or Crown-granted were covered by these compensation provisions and there were some significant differences when compared to general compensation provisions. For example, when Maori land was taken, it was up to the taking authority, not the owner, to make application for compensation. Compensation was also heard by a different court, the Maori Land Court, instead of the Land Valuation Court. The court was very powerful in making decisions not only on compensation but on persons entitled, although an appeal to the appellate court was reinstated in 1927. As noted in the previous chapter, the expertise of the court in assessing valuations was a matter of concern for some time, although in later years the court's more protective attitude and better understanding of Maori land issues was also appreciated by many Maori. For different reasons both Maori and the Crown were concerned about the court assessing compensation and a right of appeal was eventually reinstated and confirmed in 1928 because the Crown was concerned that assessments might be too high. The lack of expertise of the court in assessing compensation became an issue again as compensation law became increasingly complex and again there were concerns that Maori land might be suffering a disability as a result. More documentation of the officials' debate on this issue can be found on the relevant Maori Affairs department files.<sup>24</sup>

Major changes to these compensation provisions were finally made in 1962 when a new section 104 was enacted.<sup>25</sup> Under this amendment, the provisions regarding compensation for European land (Part 3) and the provision regarding purchase by agreement (s 32) were to apply to Maori land (s 104(1)). This in effect meant that the Maori Land Court no longer assessed compensation but claims were now heard by the Land Valuation Court as for European-owned land. The Maori Trustee was also required to negotiate compensation on behalf of owners of Maori land held in multiple ownership. For Maori land held by a single owner or body corporate however, the Maori Trustee still had to be appointed by the owners to act for them. The Maori Trustee could also only act after the land had been taken and only act in respect of the freehold interest in the land.

The amendment was interpreted to mean that as the Maori Trustee could only act when land was taken, then the Trustee had no power to enter into agreements or negotiations regarding the taking or purchase of land. There was also no power to enter negotiations for compensation prior to the land being taken (which was the most common practice for takings of non-Maori land), unless the trustee owned the land. Notice of the taking was to be served on the Maori Trustee by the taking

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24. MA1, 38/1/1, vol 1, accn 2490

25. Section 6 of the Public Works Amendment Act 1962

authority. Where the Maori Trustee did act, compensation money was paid to that office for distribution to the persons entitled to it. The Maori Trustee could apply to the Maori Land Court to determine to whom and in what proportions compensation or purchase money should be paid. The court was to make an order based on what it considered just and equitable in the circumstances and the Maori Trustee was to distribute according to the award. The decisions of the Maori Trustee in these responsibilities were binding and not subject to legal action. These provisions came into effect on 1 April 1963.

There were some later amendments to the powers of the Maori Trustee when technical problems became apparent. For example a 1964 amendment (section 104 (2))<sup>26</sup> slightly altered the Maori Trustee's powers regarding compensation and a 1967 amendment remedied the problem whereby it was found that the Maori Trustee had no power to act if one of the owners in a block was European.<sup>27</sup> In 1974, under the Maori Purposes Act of that year, the Maori Trustee's responsibilities for negotiating compensation continued for land taken prior to 1975 but ceased after that (s 12).

The whole issue of assessment of compensation is very complicated and quickly became the subject of a large body of case law. It is beyond the scope of this report to go into this in any great detail. (A useful summary of general compensation principles is provided in S L Speedy, *Compensation for Land Taken and Severed*.) The following is a very brief summary of some of the most important rules applied to the assessment of compensation, as these appear to have had a significant impact on compensation for Maori land. There is no doubt that there were problems and criticisms of compensation provisions for all public works land takings. However even so, compensation provisions appear to have had a relatively harsher impact on Maori land taken for public works purposes and this is another issue requiring further research.

Under 1928 provisions regarding the assessment of compensation, the Compensation Court and the Maori Land Court initially had to take into account the value of the land or interests in the land taken, including riparian rights and any injurious affection either by severance or the nature of the works. The courts were also required to deduct from compensation any increase in value or 'betterment' as a result of the works (s 79). The value of the land was to be assessed for compensation as at the time it was first entered (s 80). If the claimant's acts made the execution of the work more costly the court was entitled to take this into account (s 81). There were also provisions about assessing costs and the formal notice of the award, and about assessing compensation in special circumstances such as in the case of limited interests.

The subject of compensation assessment not unnaturally became subject to a large amount of case law. In 1941, the courts described their interpretation of the legislation concerned with compensation assessment as being based on the underlying principle that all the court was concerned with was:

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26. Section 2 of the Public Works Amendment Act 1964

27. Maori Trustee to Minister of Maori Affairs, 12 July 1967, MA 1, 54/19

to do justice according to the law and to the best of its ability by making an award which shall be just to both parties. On the one hand the respondent must not be required to pay more than the land is worth on a fair consideration of all the evidence before the Court, while, on the other, the Court must see that the claimant receives the fair value of the property taken. In other words anything in the nature of confiscation must be avoided.<sup>28</sup>

Further research is required on the application of these principles to compensation for Maori land takings.

The 1928 provisions for assessing compensation were repealed and replaced in 1936 in section 28 of the Finance Act 1936 (no 2) and again in 1944 by way of section 20 of the Finance Act 1944 (no 3). The rules laid down in 1944 lasted in essence for many years. These required the Compensation Court (later the Land Valuation Court) and the Maori Land Court to take into account the following considerations when assessing compensation:

- (a) no allowance was to be made on account of the taking of any land being compulsory (prior to this the court could add up to 10 percent because the taking was compulsory);
- (b) in general, the value of land was to be taken as the amount that a willing seller might be expected to realise if the land was sold on the open market on the specified date;
- (c) the special suitability or adaptability of the land for any purpose was not to be taken into account if that purpose was one that only applied in the pursuit of statutory powers, or for which there was no market apart from the special needs of a particular purchaser or the requirements of the Crown or any local or public authority;
- (d) where the value of the land taken had on or before the specified date, been increased or reduced by the work or the prospect of the work, the amount of the increase or reduction was not to be taken into account; and
- (e) where the work or prospect of the work increased the value of the land or any other land in which the claimant had an interest or the land injuriously affected, this increase was to be deducted from the amount of compensation awarded. In other words, a deduction had to be made for any betterment caused to remaining land by the public work.

The definition of ‘specified date’ was exhaustively defined and, in general, it was either the date on which the land by proclamation became vested in the taking authority or the date on which the land was first entered for construction purposes or injuriously affected, whichever was the earliest. The taking authority had to have publicly notified details of the work before the assessment rules regarding compensation applied.

These general rules were still subject to interpretation through case law. In addition, some statutory provisions specifically amended assessment provisions. For example, the Public Works Act 1928 provision regarding the setting back of certain frontages on narrow streets had specific requirements concerning the

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28. *Napier Harbour Board v Minister of Public Works* (1941) NZLR 186

assessment of compensation (s 128(5)). The Soil Conservation and Rivers Control Act 1941 also had qualifications on compensation assessed for land taken or damaged for purposes of flood control (s 22(4)). Increasingly complicated case law also developed about the taking into account of elements in assessing compensation such as costs and fencing.

According to Barker, the whole principle of full compensation and equivalent value for land taken was gradually whittled down not only by numerous legislative amendments but also by case law.<sup>29</sup> After increasingly strong criticism in 1960s, more liberal general compensation provisions were made during the 1970s. These included compensation provisions inserted in 1970 concerning the acquisition of designated land, additional compensation to assist in the purchase of a dwelling, the refund of expenses in compensation negotiations, and compensation for the tenants of residential and business premises (s 6, Public Works Amendment Act 1970). The 1975 and 1976 Public Works amendments also added more liberal provisions, for example assistance in the purchase of farms, commercial, and industrial property 1975 (s 30).

The 1928 Act also continued provisions developed in earlier legislation for the disposal of land taken for a public work and then found to be not required. Many of these were based on ancient English principles. For example, the very old tradition of offering surplus land back to the original owner was continued. Where land had been taken and was then found to be surplus it was to be valued and then first offered back to the original owners and then adjacent owners at the valuation price. If these offers were not taken up, the land could then be sold at public auction. The exception was that surplus land could be sold to education boards without going through this procedure. In addition the Governor-General had the alternative of declaring such land Crown land subject to various land Acts and it could then be administered and disposed of under those Acts (s 35). Surplus land resulting from stopped or altered roads could also be treated in the same way. The Governor-General could also revoke the proclamation taking the land and re-vest it in the owner if the land or part of it not required for the purpose for which it was taken and if no award or payment of compensation had been made (s 27). In later years many legislative exclusions were made to the offerback provisions. In 1945, for example, land required for housing subdivisions and associated developments and improvements was excluded from these provisions.<sup>30</sup>

As in previous public works legislation, the 1928 Act provided that lands taken but not required immediately for a public work could be leased (s 39). The Crown or a local authority, with the Minister's consent, could also grant easements over land taken for public works and impose conditions on this including rental requirements, subject to revocation when the land was required for public purposes or for a breach of any conditions imposed (s 41).

Another ancient principle was also recognised in the 1928 Act whereby there was at least some obligation that land taken by compulsion should be used for the

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29. For more detail see Barker, 'Private Right vs Public Interest', and S L Speedy, *Compensation for Land Taken and Severed*, no 13 occasional pamphlet, Auckland, Legal Research Foundation Inc, School of Law, 1978

30. Sections 17, 21 of the Housing Improvement Act 1945, and section 30 of the Finance Act 1945 (no 2)

purpose for which it was taken. This presumption was carried into early New Zealand public works legislation. For example, the Public Works Act 1894 provided that lands proclaimed taken for public works became vested in fee simple in the Crown or local authority free of all claims and charges ‘for the public use named in the said Proclamation’ (s 18(4)). A similar provision was carried into the 1928 Act. Once a taking proclamation was made, the land became vested in the taking authority free of charges claims or interests of any kind ‘for the public use named in the proclamation’ (s 23).

Later legislative amendments diluted this principle. A 1948 amendment provided that land taken for a public work could be used for secondary purposes under certain conditions.<sup>31</sup> The Crown was also able to use land for purposes other than those for which it was originally taken, by having surplus land declared Crown land under various Land Acts and then using it for other purposes or disposing of it. There were stricter requirements for local bodies who wished to change the use of the land from the purpose for which it was originally taken. A 1952 amendment allowed local authorities to change the purpose from the one the land was initially acquired under but they had to follow certain formalities first. They had to gazette and publicly notify the intention to change the use of the land from the original purpose twice. There was also provision for hearing written objections to the proposed change. On a statutory declaration from the responsible local authority officer that these requirements had been complied with, a proclamation could then be made changing the public purpose to which the land could be put.<sup>32</sup>

In 1954 the whole of section 35 of the 1928 Act was repealed and new provisions substituted.<sup>33</sup> Under these provisions the taking authority was required to provide the Governor-General with a map of the surplus land and the reasons for the proposed disposal. Then the authority could sell the land either by private contract to the owner of any adjacent lands at a price fixed by an independent valuer, or by public auction or public tender. Notice of the proposed public sale had to be publicly notified and served on adjacent owners as far as they could be ascertained before the sale took place.

The Governor-General could still sell land to an education board without going through this process, or by notice in the *Gazette* declare the land to be Crown land subject to the Land Act. In addition, if land had been acquired for a local work and was not required, ‘or if for any other reason the Minister and the local authority agree that it is expedient to do so’, the Governor-General could, without complying with any of the other requirements, declare the land Crown land subject to the Land Act by proclamation. This effectively abolished the old right of offerback to the original owner unless, presumably, that owner still held adjacent lands.

Various amendments were also made concerning the disposal of land held for a work of national and local importance where the Crown and one or more local authorities agreed to combine to carry out the work.<sup>34</sup> Any land taken, acquired or used for any such work where such an agreement was made could be transferred,

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31. Section 37 of the Public Works Amendment Act 1948

32. Section 20 of the Public Works Amendment Act 1952

33. Section 4(1) of the Public Works Amendment Act 1954

34. For example, section 31 of the Finance Act 1944 (no 3)

leased to any party by agreement, or sold or otherwise disposed of and the proceeds shared or distributed in accordance with provisions of agreement.<sup>35</sup> It was not until 1981 that some effort was made to restore and strengthen the original principles concerning offerback and the use to which taken land could be put.

The situation regarding the control and disposal of Maori land taken for public works and then no longer required also requires further research. The provisions concerning offerback were contained in Part 2 of the 1928 Act and presumably therefore did not apply to Maori customary land. Crown-granted Maori land was presumably covered by the provisions in theory but in practice, as taken land became European or general land, it was very difficult in practical terms to revest land as Maori freehold land. It is questionable, given the lack of provision for meeting such difficulties, whether legislators contemplated returning much Maori land anyway. There was also always the alternative of avoiding offerbacks altogether by having the land proclaimed Crown land. Again there are unfortunately no statistics available for comparing offerback rates of Maori and non-Maori land.

Attempts were made to return some taken land to Maori ownership but for many years these required special Acts of Parliament before title could be returned. The difficulties associated with this (which did not generally occur in returns of non-Maori land) may have also simply encouraged authorities to dispose of the land by other means.

Prior to 1928 it had already become clear that many revestings of Maori land would require special parliamentary authority. Sometimes this was done by special Act and sometimes by clauses contained in various Native Land Claim Adjustment Acts or Reserves Disposal Acts. Examples given in the previous chapter include the Waipuka Block Road Revesting Act 1908 and the various blocks revested in the Reserves and Other Lands Disposal and Public Bodies Empowering Act 1910. The Native Land Amendment And Native Land Claims Adjustment Act 1920 enabled the Native Land Court to revest land taken for roads in the former owners as Maori freehold title (s 7).

The revesting problems continued for many years until eventually the Native Purposes Act 1943 did away with the need for special legislation in individual cases where land was to be revested in the original owners (s 7). By this time however the rights of previous owners were well down the list of priorities for disposal. The 1943 provision provided that land taken, purchased, set aside, or acquired by way of gift or otherwise for a public work and no longer required for that work or 'for any other public purpose' could be returned or revested in the native owners by the Native Land Court where it was 'deemed expedient' to do so. The application for return also had to be made by the taking or controlling authority. Application could be made to the court notwithstanding provisions of any other Act to which the land was subject or to any terms or conditions imposed by any Act on the sale or disposal of the land. The court could make any orders it saw fit or amend any other order or partition to include the returned land. The land was to be deemed freehold Maori land unless otherwise expressly ordered by the court (s 7).

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35. Section 9 of the Public Works Amendment Act 1962

A similar provision was continued into the Maori Affairs Act 1953 concerning any land owned by Maori and taken for public works purposes (s 436, Maori Affairs Act 1953). The Minister of Works or other minister in charge of the land could apply to the Maori Land Court to have the land revested. The Minister or other applicant could also nominate the person or persons in whom the land should be vested, and could stipulate the price to be paid for the land, the terms and conditions of payment, and any other conditions to be attached to the revesting, or all such matters could be left to the discretion of the court. The court had freedom to determine the way the land would be vested and whether any existing title should be amended instead. Land revested in this manner became Maori freehold land unless the court expressly ordered otherwise.

By the 1960s there was increasing criticism of public works provisions in general, as it was felt that taking authorities had accumulated too much power at the expense of landowners and the general public. To some extent criticisms were fuelled by environmental concerns and also works such as motorways began to affect a lot more people with compulsory takings. A review of provisions was carried out by an interdepartmental committee and, following its report in 1969, extensive amendments were made in 1970 in the way of liberalised compensation payments for land taken. These included the possibility of additional compensation to assist in the purchase of another dwelling and compensation for tenants. These were reviewed and extended in 1975, and in 1976 provision was made for granting a home for a home, a business for a business, and a farm for a farm.

Further reviews of public works provisions were carried out in the 1970s. In 1976 another interdepartmental committee, led by a retired office solicitor of the Ministry of Works and Development, investigated the need for further improvements and reported to the Government in 1977. This eight-person committee was made up of two Ministry of Works representatives, including the chairman, three local authority representatives and a surveyor, lawyer, and accountant. The accountant was H K Ngata of Gisborne, who presumably could give some Maori input, but the findings of the committee reflected a strong emphasis on the viewpoint of taking authorities.

The committee recommended a number of improvements, including compensation and objection provisions. The committee also recommended updating procedures for certain works such as electricity generation where no right of objection was possible. The committee felt that these special exemptions were no longer required. It was also agreed that delays in the payment of compensation were unfair and caused hardship.

The review committee received public submissions from the New Zealand Maori Council and the Maori Affairs department on the issue of the offerback of surplus land to the original Maori owners or their heirs. If this could not be done, then it was submitted that the land should be offered to other Maori or sold and the profits distributed to the original owners or their heirs. The committee felt this was impractical but agreed that more information should be made available about disposals and the Governor-General should be able to impose conditions in cases where this was thought advisable. The committee also agreed that there should be some possibility of profits from sales going to the original owner or heirs. The committee rejected suggestions of any legislative restrictions on compulsory land

takings as at times these were required to overcome title problems, but suggested instead that the Government could control compulsory takings by policy directions to ministers and departments. The committee was silent on how this would affect the takings by local authorities.

The New Zealand Maori Council also submitted that no Maori land or interest in Maori land should be taken except with the consent of the Minister of Maori Affairs, much the same as provisions in the Reserves Act 1977 in respect of land taken for a reserve. The committee also rejected this suggestion on the grounds that the Town and Country Planning Act 1977 placed restrictions on where public works could be placed and ample provision was available for bodies such as the New Zealand Maori Council to object and appeal against the designation under that Act. Accordingly, 'insistence on the consent of the Minister of Maori Affairs could not be justified'. The committee was also concerned about the possibility of delays if such a requirement were included in the Public Works Act and the committee took into account the 'close liaison' between the Ministers of Works and Maori Affairs where Maori land was to be taken.<sup>36</sup>

Public works provisions were eventually consolidated and in some cases revised in the Public Works Act 1981. Following improvements made in earlier amendments, the new 1981 Act no longer contained a separate part dealing with the takings of Maori land. Improvements to requirements such as notification for Maori owners were also continued into the new Act (s 17). Other provisions specifically dealing with Maori land followed the general trend of the 1981 Act for all takings. For example, the new Act gave greater emphasis to making agreements for purchase, and in the case of Maori land in multiple ownership the Minister had to apply to the Maori Land Court to supervise such negotiations for purchase agreements (s 17). The Act also strengthened the principle that where compulsory takings were possible for essential works, the taking authority still had to try and reach agreement first. In the case of Maori land such acquisition also had to be under the supervision of the Maori Land Court (s 18). General offerback provisions for surplus land taken for public works were also strengthened, including for Maori land (s 41).

The major changes in the 1981 Act actually took place in response to criticisms about general land takings in an effort to strengthen the protections for landowners and requirements for taking authorities. In many respects the changes reflected concerns that traditional protections and balances had been eroded over the years and no longer provided sufficient protection. In doing so they also moved towards addressing some of the major concerns of Maori landowners with public works taking provisions. However there were still no specific requirements to take account of Maori interests or Treaty considerations when land taking, control, and disposal decisions were made. The Public Works Act 1981 has been analysed in detail by Peter Salmon.<sup>37</sup> Therefore this report contains only a brief overview of the most important changes.

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36. Copy of report of Public Works Act Review Committee 1977, MA 1, 19/1/441, accn 2459

37. P Salmon, *The Compulsory Acquisition of Land in New Zealand*, Wellington, Butterworths, 1982



A major change in the 1981 legislation was the requirement that land could only be taken compulsorily for an ‘essential work’ (s 22). This was an attempt to reintroduce some standard of necessity before compulsory provisions could be used. If a work was not ‘essential’ then the taking authority had to negotiate a purchase in the ordinary way and could not force an acquisition. This had long been a concern of Maori owners where land of great importance to Maori could be taken for something such as a camping ground or works depot that could easily have been located elsewhere.

There was some debate about the workability of this concept at the time. It was pointed out that the same thing might happen as had happened with the definition of public works previously. That definition had been broadened so much it eventually included almost anything. The 1981 Act itself also offered an escape clause in that the Governor-General could declare any specific public work to be an ‘essential work’ for the purposes of the Act (s 3). The concept did not last long and was repealed in a 1987 amendment.<sup>38</sup> Although an improvement, the concept of essential work also did not specifically address Maori concerns.

The other major change was an improvement in the offerback provisions by reintroducing and strengthening the concept of the first right of pre-emption or repurchase by the original owner. The original owner was to have the first opportunity to buy back land no longer required for a public work, unless it would be clearly impracticable, unreasonable, or unfair to do so. The offerback also applied to former Maori land (ss 40–41). The 1981 Act required the land to be offered back at the current market value, although a 1982 amendment introduced a discretion whereby the Commissioner of Lands or a local authority could offer back at a lower price if it felt it was reasonable to do so. It is not clear how this discretion has been used in practice and there appears to be no specific requirement to take Maori concerns into account.

By 1981 there were strong links between town planning legislation and public works provisions. The 1981 Act assumed, for example, that the planning processes would give adequate public notice of proposed public works, although this was not essential, and that good town planning would ensure that appropriate provision was made for public purposes in district schemes. The 1981 Act also improved both the initial planning scheme designation and subsequent land acquisition objection rights to include a mandatory assessment by the Planning Tribunal of such factors as ‘the extent to which adequate consideration has been given to alternative sites, routes, or other methods of achieving the objectives of the Minister of local authority’ (s 24). Although presumably the relationship of Maori people to their land could be regarded as a relevant factor in this assessment, there was no specific requirement to take this into account.

When the 1981 Bill was introduced in Parliament, the Minister of Works and Development described the introduction of the concept of essential works as perhaps the ‘most significant’ provision in the Bill. Improvements had also been made to protect landowners in provisions concerning entry onto land and in compensation provisions. In particular, compensation was to be made far more

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38. Public Works Amendment Act 1987 (no 2)

flexible to suit individual circumstances than had previously been the case. Compensation was also to be available where substantial injurious affection had been caused, although no land was taken and compensation was to be available for equivalent reinstatement for special purposes such as churches.

In debate on the Bill, the concept of essential works was attacked by opposition members as being basically inflexible and probably unworkable. It was pointed out that extra works had been added to the list during committee hearings and this process was likely to continue weakening any proposed safeguards. In addition there was the major loophole that the Government could, by passing Orders in Council declaring works to be essential, bypass Parliament and remove at any time the safeguards the public thought it had against the compulsory taking of land.

The parliamentary opposition referred to recommendations of the review committee that rather than limiting compulsory provisions by legislation, the Government should control their use through policy directions to ministers and departments. The opposition also referred to submissions on the Bill that had opposed the concept of restricting takings to essential works. The opposition claimed there had been no complaints or evidence of abuse of public works powers by taking authorities. It was also suggested that the time and place for considering the merits or problems with takings was with the Planning Tribunal hearing and deciding on objections.

While there was a great deal of debate about whether local authorities would be unnecessarily restricted by the new provisions, there was very little debate about Maori interests with regard to compulsory takings. The general assumption was in fact that there were few complaints about the use of compulsory takings provisions and even fewer of abuse of such powers. This of course was not the case at all as far as Maori owners at least were concerned. Although the Minister claimed that provisions in the Bill gave extra protection to 'our Maori friends', there was in fact remarkably little recognition of Maori concerns over issues that had been the cause of so much distress and resentment. Passing reference was made to Bastion Point and Wetere referred to submissions by the New Zealand Maori Council and the Maori Affairs department. However, he also felt that there had not been nearly enough consultation with a wide range of Maori groups on what was probably one of 'the most controversial pieces of legislation' to affect Maori people for many years. He also indicated that there was concern with compulsory taking provisions for Maori land at all and instead there was support for developments such as the leasing of the Ohaaki power station. However, these issues were not picked up in debate on the Bill.<sup>39</sup>

More research is required on the impact of the 1981 legislation, although the absence of any specific requirements to consider Maori interests is of concern given the past history of public works takings. There were also provisions requiring the Planning Tribunal to take account of alternative sites when considering objections to public works takings for example, and these obviously had potential for considering Maori interests, although this was not specifically required. In 1985, for example, the Planning Tribunal refused to approve a designation of land for

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39. NZPD, 1981, pp 1478–1487, 3165–3182, 5920–5923

cemetery purposes where Maori fishing was likely to be detrimentally affected and alternative site investigations were inadequate.<sup>40</sup>

Nevertheless the lack of any specific requirement to take account of Maori interests in the 1981 Act appears to have created some problems. In a 1980 case the Planning Tribunal found that a district planning scheme could not prevent the exercise of statutory powers such as in the Public Works Act. Therefore the appellants in the case could not protect their lease against all comers. This followed the agreement with the Ministry of Energy over leasing instead of taking land for the Ohaaki power station.<sup>41</sup>

The assumption that Cabinet policy directives could adequately control compulsory land takings has been shown to be false historically. This was confirmed again as late as 1981, when the High Court found that there was no residual discretion under the old Public Works Act 1928 for Cabinet to refuse to issue a proclamation taking land (in this case Maori land was required for a rubbish dump) upon the broader political view that it would be undesirable to take such land.<sup>42</sup> It seems as though this lack of discretion also continued into the 1981 Act.

As well as the provisions in the main public works Acts and their numerous amendments, many other Acts passed between 1928 and 1981 contained or incorporated land taking and associated provisions. This followed the trend set in the previous century and included a wide variety of types of legislation as well as numerous amendments to take account of new needs, often as circumstances arose. Maori land is specifically mentioned in some of these provisions but in many cases the legislation simply incorporates provisions of the Public Works Act and Maori land is included by virtue of this, whether it is specifically mentioned or not. It is beyond the scope of this report to analyse all the legislation between these years. However general trends can be identified. Maori land was also taken for other purposes during this time – such as because of uneconomic interests and the compulsory designation of Maori land as European land under certain circumstances. The right of Maori to control and use their own land or exert rangatiratanga over it also became an important issue during this time. However this report concentrates on land takings for public works purposes.

As in earlier years, a variety of general legislation continued to contain either general taking provisions or provisions related to specific districts, projects, or blocks of land. This continued to include a variety of Maori land legislation, as well as legislation such as the reserves and domains Acts, land Acts, and finance Acts, which all continued to contain provisions related to either specific or general public works takings. The practice also continued of special Acts for particular purposes, many of which contained taking powers. For example, the Invercargill Licensing Trust Act 1944 contained land-taking powers under the Public Works Act, although the land taken was to vest in the Trust (s 16).

The scope and powers of public works authorities also continued to be extended through a variety of legislation for most of this time. Public works concerns

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40. *Abbot v Lower Hutt City* (1985) 11 NZTPA 65

41. *Maori Land Trust v Ministry of Works and Development* (1980) 7 NZPTA 108

42. *Dannevirke Borough Council v Governor-General* (1981) 1 NZLR 129

continued in many now-traditional areas such as roads, land development, railways, telegraph and electric lines, defence, irrigation, drainage, and national parks and scenic reserves. Traditional industries such as forestry, mining, and tourism also continued to be important.

With railways legislation, the tradition also continued of separate legislative provisions as well as the main railways provisions within the Public Works Act. Specific railways also continued to be authorised in numerous railways authorisation Acts, such as the Railways Authorisation Acts of 1929 and 1936. Individual railways were also authorised by numerous finance Acts such as the Finance Act 1946 (no 2) and the Finance Act 1950. There were also general railways Acts such as the Government Railways Act 1949. This contained extra land-taking powers for the purposes of railways, housing, and transport, and associated railways requirements such as water supplies.

The issues raised by the exploitation of natural resources require a separate research paper. However, where rights were acquired to take, use, or prospect on land, public works taking provisions were also often involved. The development of Crown policy in areas such as mining and the acquisition of natural resources also appears to have followed a similar history to that involved in compulsory land taking. Initially it appears as though the Crown agreed to respect Maori ownership rights on customary land. As a result, in the early years of settlement, the Crown agreed to abide by Treaty guarantees by making agreements over cessions of Maori land for mining purposes. No Maori-owned land was therefore declared a mining area unless the Crown and iwi had made agreements which were recorded and often validated by later legislation. Examples are the agreements over land cessions for goldmining purposes in the Coromandel and Hauraki districts and later validations such as the Auckland Goldfields Proclamations Validation Act 1869 and the Ohinemuri Goldfields Agricultural Leases Validation Act 1876. As seems to have been common at the time, the agreements were often ambiguous and interpreted quite differently by Maori and the Crown. The result was often numerous petitions and complaints from Maori owners. However, in spite of the problems, the cessions did acknowledge Maori customary rights. Early mining legislation reflected this. The Mining Act 1878 for example appeared to assume Maori land had already been ceded for mining and was concerned more with the operations and working of goldfields. The Act also provided the Maori Land Court with a method of dealing with ceded Maori land.

The later Mining Act 1926 also provided for negotiations between the Crown and Maori over cessions. The Maori Land Court could declare any Maori land to be open for prospecting or ceded for mining purposes on such terms and conditions as were agreed between the majority of Maori owners and the Governor-General (s 30). All fees, royalties, and rents from Maori ceded lands were to be payable by the Crown to the Maori owners (s 33). The Act did have problems. It provided for licences which in effect granted virtually perpetual licences for nominal rent (s 34). There were also discriminatory provisions as anyone mining on Maori land or Maori ceded land without authority was liable to a fine of £50 (s 35) whereas the same acts on Crown land were liable to fine of £200 plus £5 per day for each day the offence continued (s 431). In addition the Crown did not properly carry out the

payment of rentals and royalties to Maori owners. An inquiry into revenues from the ceded lands revealed that the Crown was unable to give any satisfactory account of the revenue received and expended for example.<sup>43</sup>

The 1926 provisions remained law for many years but were apparently rarely used. Instead legislation was increasingly passed that vested rights in the Crown with little regard for Maori rights. For example, in the 1950s, an attempt was made to use the 1926 provisions with regard to the Taharoa ironsands. After preliminary meetings with the Maori owners, the Minister lodged an application with the Maori Land Court to have an order made opening the area and for a cession by agreement. At the same time the owners formed themselves into an incorporation and appointed a management committee to facilitate the negotiations. However the Iron and Steel Industry Act 1959 declared iron sand areas and within them the Crown was given the sole right to prospect and mine for iron sand. The Minister of Mines was also given the power to give mining rights to others.

A similar Act intended to circumvent the 1926 provisions was the Bauxite Act 1959 which also excluded bauxite areas from the cession provisions. Mining Acts and amendments continued to be passed into the 1970s affecting rights of Maori landowners. For example the Mining Act 1971 required the consent of owners before Maori land could be used for mining and prospecting. However the land could legally be declared open for such purposes upon a refusal if it was held to be in the national interest (s 7).

The Crown passed similar legislation acquiring other disputed resources and areas such as beds of rivers. Many of these were subsequently subject to public works provisions. The Petroleum Act 1937, for example, was intended to open the way for large-scale prospecting just before the war. The Act declared that all petroleum in a natural condition on or below the surface of any land in New Zealand was the property of the Crown and any royalties payable became payable to the Crown. The landowner or occupier was only protected by compensation for damages to the surface of any land. There were some protections for Maori landowners. The licensee had to give the land court 28 days notice before entering Maori land (s 24) and the Maori Trustee could represent owners concerning consents and agreements (s 30).

In parliamentary debates, the Bill was strongly criticised by Ngata as an attack on the protections in the Treaty and as a confiscation. The Government argued however that the discovery of oil was of national importance, and if it was discovered, Maori and Pakeha would benefit equally. Ngata's main concern was over royalties. Ngata invited the Minister of Mines, Webb, to the East Coast to talk about the issue but the trip was cancelled because of flooding. Instead Ngata translated the now famous haka especially composed for the occasion to the House. The Bill was given urgency and passed on the understanding that later in the session the House would be given the opportunity to discuss the question of royalties including a proposed sharing with Maori. In March 1938 the House discussed the royalty question. Ngata traced the history of oil exploration on the East Coast. In 1881 when the Southern Cross Petroleum Company was established, he claimed

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43. AJHR, 1940, G-6A, and MA 19/10/3, AAMK, 869/704h

that searches were already underway for oil in the area. The Southern Cross Company failed and others began to take an interest with options secured over large amounts of land and a royalty of 5 percent agreed for the owners. In 1938, an amendment was proposed that would have allowed sharing oil royalties with landowners but this was defeated.<sup>44</sup>

The Coal Mines Act 1925 was a consolidation of previous legislation and confirmed that the beds of navigable rivers and the rights to minerals under them were considered to be vested in the Crown (s 206). This continued the major disputes with Wanganui Maori for example, and remains an issue to this day. The Coal Act 1948 vested coal in the Crown with a short time period for claiming compensation. This immediately brought protests from Waikato leaders such as Te Puea. In response to urgent telegrams criticising the proposed confiscation, Peter Fraser assured them he would consider their concerns. A later 1950 amendment under a new Government re-vested coal in landowners. Other legislation such as the Maori Purposes Act 1952 reserved the Crown right to all minerals, with a right of entry on to land, to mine and to erect all necessary buildings and equipment (s 8(4)).

Maori rights regarding minerals and natural resources on customary land were gradually rolled back or even rejected during these years. However in some circumstances remnants of earlier rights lingered on. For many years for example, the Maori Land Court routinely exempted all mineral rights when approving leases of Maori land. Later the matter became the subject of debate between land court judges and Lands department solicitors as to the existence of mineral rights on customary Maori land.

Public Works provisions were also often used in conjunction with special legislation to reject customary Maori land rights. For example the Napier Harbour Board Empowering Act 1932–1933 was passed to facilitate the compulsory acquisition of what had been islands in the Napier inner harbour after the land was raised during the 1931 earthquake.

Legislation, including land entry and taking provisions, also often accompanied new developments in the exploitation of natural resources. Throughout the 1940s there were investigations into thermal power and work at Wairakei began in the 1950s. The Geothermal Steam Act 1952 vested the rights to such energy in the Crown (s 3). Provisions also included the power to enter land and make surveys and construct bores (s 5) and to take land under the Public Works Act as for a water power work (s 6). There were also compensation provisions as under the Public Works Act (s 9). The development of natural gas also began in the 1950s.

Land development and improving farm land in particular, continued to be an important concern in the years after 1928. Many of these concerns involved drainage and river control. By the 1920s there were a variety of river control schemes in place throughout New Zealand. The Soil Conservation and Water Control Act 1941 and subsequent amendments brought together soil conservation, river control, and drainage under one unified system of administration. The Act also contained taking provisions including for native lands. Other provisions concerned the construction of works (s 131), notice (s 137), compensation (ss 145–148), and

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44. NZPD, 1937, vol 249, pp 1037–1075, 1174–1175, 1230–1236, and MA 19/10/3, AAMK, 869/704h

supervision of local body drainage and river works (s 143). In 1966 the National Water and Soil Conservation authority was also established. Provisions for farm improvements were also made in legislation such as the Statutes Amendment Act 1939 that enabled improvement works by arrangement with owners as well as powers to take or purchase land on payment of compensation for damages and loss of land (ss 60–64). The various land Acts such as the Land Act 1948 also continued to make provisions for land settlement, including land taking as well as provisions for the control and disposal of surplus land no longer required for public purposes.

Legislation was also often passed covering public works land taking for specific projects or districts. For example section 30 of the Finance Act 1936 (no 2) contained provisions regarding drainage and reclamation in connection with Lake Ellesmere. Similarly the Finance Act 1944 (no 3) contained provisions concerning the power to take land for the removal of Tokaanu and other settlements affected by control of the levels of Lake Taupo. Special compensation provisions were also made for Maori and European claims in relation to this. The Finance Act 1950 also contained provisions concerning the control of the Kawerau Falls dam (s 45).

As had happened after the First World War, after the Second World War, programmes were established for servicemen's resettlement on the assumption that most would want farms. The Servicemen's Settlement and Land Sales Act 1943 for example, and a later 1950 enactment, included compulsory acquisition of land for the purpose. More research is required but it appears as though Maori land could only be purchased under these Acts and Maori land was separately acquired for Maori servicemen's resettlement.

Some programmes and provisions were aimed specifically at Maori land. By 1929 for example, Sir Apirana Ngata was establishing the first programmes aimed at developing Maori land for Maori farmers. These land settlement programmes involved much consolidation and reorganisation of titles and have their own issues. They are only referred to in this report as they are directly involved in public works takings. Some legislation, while not specifically taking Maori land outright, provided for the removal of effective control if land was not used 'properly'. The Maori Purposes Act 1950 for example contained provisions on idle and unoccupied Maori lands. In such cases and under certain conditions Maori land could be compulsorily leased by the Maori Trustee (Part 3).

Local authorities also continued to acquire extended powers concerning land improvement and other general public purposes. Their powers of land taking, as for central government, also became increasingly general and all-purpose. As well as general powers in the main public works legislation and a variety of local authority legislation such as the Municipal Corporations Act 1954, local authorities also gained extra powers such as under the Noxious Weeds Act 1950, where land could be taken and disposed of by a local authority for the purpose of controlling noxious weeds (s 27). Traditional concerns such as the provision of amenities including camping grounds, rubbish dumps, and recreation reserves accounted for many land takings. Taking powers were also expanded in legislation such as the Physical Welfare and Recreation Act 1937 that enabled local authorities to provide relevant facilities and associated social facilities and included land-taking powers (s 12).

Local authorities were also given increased responsibilities through the Housing Improvement Act 1945 and the Subdivision in Counties Act 1961 for example.

Some non-territorial local authorities such as harbour boards also had expanded powers through special Acts such as particular vesting and empowering Acts and the Harbours Act 1950. These provisions also had a significant impact on Maori land.

In many respects local authorities worked closely with central government land-taking authorities. In many cases, as for aerodromes and many roads, the Public Works department was responsible for the initial location of suitable land and the construction of the work, and then the local body took over control and ownership. Legislation often encouraged close cooperation, such as the Finance Act 1944 (no 3), where the Government and local authorities could combine for certain works. Central government also had considerable supervision and funding controls over local authorities, also ensuring some influence. For example, roading funding and Ministry of Works supervision of soil and river conservation, administration of town planning, and roading works. In this way, and by having central government agencies take land for them, local authorities also effectively increased their powers.

A variety of legislation that included land-taking powers for public purposes was also passed in response to new developments and new public requirements. For example with the development of the motorcar, roading became increasingly important once more and began to eclipse railways construction from the 1920s. As well as the construction of new roads, the heavier vehicles and faster speeds meant existing roads also had to be improved with land required for numerous realignments, widenings, and road straightenings. In addition, land and materials such as gravel quarries were taken for associated road construction work. The first stretch of motorway was built in the 1950s and the great era of motorway building took place in the 1960s.

The Government recognised the need for establishing aerodromes in the 1930s and the Public Works Amendment Act 1935 contained provisions concerned with the development and control of aerodromes, including land-taking powers and the control of land in the vicinity of aerodromes for the safe use of airfields (ss 2–6). The 1930s also saw the use of public works projects as a means of countering unemployment during the depression, many of which involved land drainage and reclamation works and other public works involving land takings. With the new Labour Government, works projects also became larger scale and increasingly mechanised, allowing land not previously suitable to be brought into use.

During wartime, public works again turned to defence requirements. In March 1942 a Defence Construction Council was established to assist with emergency defence construction. Normal protections for public works land takings such as notification and objections, were often abandoned during this time, in case the process gave vital information to the enemy. However promises were made that proper remedies would be undertaken after the war. Special emergency needs also saw an increase in the number of certain types of works, for example airfields.



After the war, the major public works activities were hydro works, housing, and other construction work such as schools, hospitals, and universities, and highways construction.

Hydro works had been undertaken from early in the century but assumed increasing importance from the 1920s and boomed from the 1940s. Earlier legislation such as the Water Act 1903, the Electric Lines Act 1884 and the Electrical Motive Power Act 1896 had vested water power rights in the Crown. Large undertakings such as the Waikato power developments were built between the 1940s and 1960s. These involved taking land for construction needs as well as when land was flooded as a result of works. By the 1950s, intensive investigations were being made for further sources of hydro power. Preliminary investigations for the large Tongariro power scheme for example began in the mid-1950s. Various general taking provisions were included in the Public Works and Electricity Acts. Special legislation dealing with particular projects was also often passed such as the Manapouri Te Anau Development Act 1963 and the Turangi Township Act 1964. Land was also often taken for the townships and associated facilities built in association with some of the big hydro projects and for other industries such as forestry.

The provision of state housing was fairly small scale before the war but became increasingly important from the 1940s. By the 1960s the serviced land in cities and boroughs was increasingly exhausted and it became Works department policy to acquire large areas of undeveloped land. In some cases, such as at Porirua, extensive earthworks were also required to make suitable housing sites. Various finance Acts in the 1940s gave land-taking powers for the purposes of housing and subdivision. For example, Part 4 of the Finance Act 1945 (no 2) allowed for the acquisition of land for subdivision and similar purposes (ss 28, 30–35). The Housing Improvement Act 1945 also allowed local bodies to take land for slum clearance activities. Many of the taking provisions of the Public Works Act were incorporated in this Act, although some compensation provisions were more directly related to housing removal.

In the 1970s, there was another burst of ‘Think Big’ construction projects with associated legislation such as the National Development Act 1979. Other traditional concerns were continued in the Historic Places Act 1980, which continued protection for archeological sites. The Act recognised the need to consult with Maori in investigating Maori sites, although the Minister could override the decision of the Trust or Maori Council (ss 2, 41–44, 46). The Act also recognised the desirability of protection through district planning schemes (s 50). The Reserves Act 1977 also continued to provide for compulsory acquisition of Maori land for reserves but required the prior consent of the Minister of Maori Affairs (s 12).

Town planning legislation also appears to have had a significant impact on Maori land, including land takings for public purposes. It is clear that planning legislation became increasingly important in decisions on the taking, control, and use of land for public purposes. Processes such as designated uses, zoning, subdivision requirements, and public reserves contributions all had a significant impact on Maori land. Planning processes also affected harbours, waterways, and fisheries. Many of the detrimental results for Maori land did not begin to be addressed until

the 1970s. This whole area requires a great deal more research, and only a brief outline and what appear to be some of the major issues are covered in this report.

As seen in previous chapters, some legislation concerned with what was later termed town planning was enacted from the very early years of settlement. This was generally through municipal corporations legislation and all local authorities had Acts of this type by 1866. Municipal corporation legislation enacted by both provincial and central government was generally concerned with such things as the width and protection of streets, the provision of sewerage, lighting, water supplies, and fire prevention and amenities such as markets, community buildings and reserves. Gradually these powers began to include land-taking powers for such purposes, including Maori land takings. Limited attempts to provide for town planning continued in legislation before 1928 such as the Plans for Towns Regulations 1875 and the Town Planning Act 1926.

Both before and after 1928, various Maori land legislation also provided for some planning purposes specifically concerned with Maori land, for example, for roading provisions in various Maori purposes Acts. The Maori Social and Economic Advancement Act 1945, for example, also provided for the taking of easements over Maori land, and over European land with consent, for the purposes of providing facilities such as water and sewerage in Maori communities.

More far-reaching town planning legislation began to be enacted from the 1940s. The Finance Act 1944 (no 3) provided for the Ministry of Works or local authority to prepare or promulgate schemes of development or reconstruction for specified areas. At the same time the Ministry of Works acquired a planning division including a town planning section with advisory powers. The Housing Improvement Act 1945 contained slum clearance provisions. The Land Subdivision in Counties Act 1946 contained provisions enabling substantial suburban development in the post-war years and this Act and numerous amendments had a profound effect on town and country planning. This type of legislation began to have an impact on Maori land through the requirements for waterfront reserves for example. At first in the 1946 Act, Maori land received some protection by being exempt at the discretion of the Minister, but this protection did not last.

The Town Planning Amendment Act 1948 removed the responsibility for the administration of town planning from the Department of Internal Affairs to the Ministry of Works, and the Town Planning Act 1953 consolidated and revised previous legislation. The 1953 Act and its numerous amendments also had a profound impact on Maori land. The Town Planning Act 1953 contained no special acknowledgement of Maori interests. The application of the Act to public works provisions was also limited because the Crown was not bound by the Act and could therefore build national works such as motorways without following normal requirements such as designation, notification, and appeal procedures.

The Maori Affairs Amendment Act 1967 also made the partition of Maori land in counties subject to county council approval. In addition to the need to comply with strict zoning requirements, counties could require a 10 percent reserve contribution and a 20-metre reserve where land fronted a lake or waterway. The local body use of zoning and reserves designations was often cited as a major new source of Maori land loss, and brought strong criticism from Maori leaders and

eventually Government agencies. According to Walker, the reserve contributions appeared to many Maori to prejudice land rights and to amount to an unfair acquisition of land for public use contrary to Treaty promises.<sup>45</sup>

According to Tamihere, Government legislation such as the Public Works Act, in conjunction with planning legislation and regulations, effectively enabled the removal of much remaining Maori land, that was often by now concentrated in coastal areas and the marginal strips of lakes and rivers, out of the control, and at times ownership, of Maori people. Tamihere gives an example where, in 1974, the Whangarei City Council announced its proposed reviewed district planning scheme. The scheme rezoned all remaining Ngati Wai coastal lands as proposed public reserve and open space. In the Ngati Wai tribal area, seven-eighths of the coastal strip was owned by Pakeha but of the land zoned for public reserve and open space, only 800 acres was Pakeha land and over 5500 acres were demanded from Maori, including the Whangaruru Marae and ancestral burial grounds. In contrast, 2000 acres of land owned by New Zealand breweries and an American-owned island in the area were not subject to the designation.<sup>46</sup>

The proposed reserves around Lake Taupo raised similar Maori concerns and in many cases it seems as though local authorities were using town planning processes to continue the attack on remaining Maori land begun through the use of scenic reserve takings in earlier years. Town planning also affected the control and management powers or rangatiratanga of Maori over their own land by limiting the uses to which the land could be put. In many cases for example, subdivision rules in rural areas prevented Maori from building near marae or using plots of land of less than 5 acres for building a family home on remaining ancestral land. The value of the land could also be affected by measures such as zoning. According to Salmon, by the 1980s it had become recognised that there was an increasing tendency to zone land to restrict its use to some nominated or indicated purposes regarded as beneficial to the public. A common example was the zoning of privately owned land for recreational or educational purposes.<sup>47</sup> This had the advantage for local authorities that land was kept available and the price of acquisition was reduced. However, it often had severe effects on the landowners.

The planning aspects of other legislation such as the Water and Soil Conservation Act 1967 also contained no specific requirements to take Maori interests and concerns into account when applying for water rights for example. Thus public works projects could be undertaken that took no particular account of the discharge of effluent onto Maori fisheries or the offence caused by the pollution of significant waterways.

Legislation was also passed concerned with planning provisions for particular areas such as harbours. The Harbours Act 1950 for example, applied to all tidal lands, and the bed and waters of any harbour, sea, navigable lake, or river. Control of those resources was vested in either a harbour board or a local authority. The Minister of Transport could approve plans for works such as harbour works and

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45. See R Walker, *Nga Tau Tohetohe: Years of Anger*, Penguin, 1987, pp 57–58

46. J Tamihere, 'Te Take Maori – A Maori Perspective of Legislation and Its Interpretations with an Emphasis on Planning Law', (1984) 5 AULR 137, p 139

47. Salmon, p 7

pipelines where they were required in tidal lands, harbour beds, or navigable lakes or rivers, if the Minister was satisfied they would not unduly interfere with or adversely affect the public interest. The Minister's discretion was very broad and comments on proposals were generally only sought from the local authority, the harbour board, and technical advisers. Harbour boards were not only responsible for administering the Harbours Act but were later also the maritime planning authorities under the town planning Acts. According to Kenderdine, there was 'little doubt' that as a result they could sometimes become 'a vehicle for vested development interests to the exclusion of other interests.'<sup>48</sup>

Town planning matters and public works provisions were also more closely linked when the Public Works Amendment Act 1973 made the Planning Appeal Board the authority for hearing objections to public works land takings in an effort to improve hearings and stop the previous position of taking authorities being the judges of their own cause.

By the 1970s, as a result of a change in general public opinion, the success of Maori protests such as the Maori Land March, and a more sympathetic Government, legislation finally began to take some account of Maori interests. The Town and Country Planning Act 1977 and regulations required that some account be taken of Maori concerns when making town planning decisions including for public purposes, although this too provided only a partial remedy. Following submissions from the New Zealand Maori Council, the Act gave legislative recognition to Maori interests and attempted to remedy the lack of communication between Maori people and the planning authorities. Included in matters of national importance to be 'recognised and provided for' (s 3) were 'the relationship of the Maori people and their culture and traditions with their ancestral land' (s 3(1)). Cultural factors were to be taken into account in planning (s 4) and regional authorities had discretion to coopt a Maori representative on to their committees where there were 'significant' Maori land holdings in the region (s 6(2)(e),(3)). In addition, in the first schedule dealing with regional schemes, provision was made to indicate the needs for 'marae and ancillary uses, urupa reserves, pa, and other traditional and cultural Maori uses' (clause 9(d)). The second schedule dealing with district schemes referred to the need to plan for the interests of minority groups (clause 1) and for 'provision for marae and ancillary uses, urupa reserves, pa, and other traditional and cultural Maori uses' (clause 3). The 1978 regulations stated that the local district Maori council concerned was to be notified should a planning scheme affect any known Maori land in a district.

Other legislation involving public works and land takings was also made subject to planning provisions. For example the Mining Amendment Act 1981 made matters of national importance in section 3 relevant to the assessment of exploration, prospecting, or mineral licence applications, where an objection was made to the Planning Tribunal. The National Development Act 1979 also gave some status to environmental impact reports in the planning process. One of the major environmental impact reports concerning issues arising from Maori land

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48. S E Kenderdine, 'Statutory Separateness (1): Maaori Issues in the Planning Process and the Social Responsibility of Industry', *New Zealand Law Journal*, 249, 1985, p 256

taking was the report on the Ohaaki geothermal power station in 1978, where the commission preferred leasing to acquisition of land by the Crown. This was then adopted as the policy of the Ministry of Energy. The environmental impact report on the synthetic fuels petrol plant at Motunui in 1981 also provided data useful for the Planning Tribunal hearing on the discharge of effluent. Audits on the New Zealand steel expansion at Glenbrook in 1982 and the Kaituna River pipeline also took into account Maori spiritual values about the mixing of river waters, and Maori concerns about the protection of traditional fisheries and burial grounds. The impact reports however only had the status of recommendations.

There were also criticisms of the Town Planning Act itself, including concerns that many protective requirements were not strong enough and too ambiguous. This became clear when local authorities and the Planning Tribunal began interpreting some of the provisions. Some inconsistencies also occurred in decisions as to the weight that ought to be given to the need to take Maori interests into account. For example there was some uncertainty over the meaning of ‘significant’ land holdings before a Maori representative needed to be appointed and whether ‘significant’ meant quantity only or importance to Maori as well. This was amended in 1978 when a right to representation was provided.

By the late 1970s, some town planning cases began to recognise the importance of Maori interests in planning decisions. For example, a 1977 Appeal Board case recognised the cultural needs of Maori people to possibly live on a marae as being relevant to a town planning decision.<sup>49</sup> Another case applied section 3(1)(g) of the Town Planning Act 1977 to prevent the acquisition of remaining Maori ancestral land for a public esplanade.<sup>50</sup> However it was also established that section 3 did not apply where land had passed from Maori ownership, thus greatly limiting the definition of ‘ancestral land’ to only that still in Maori ownership.<sup>51</sup> It was not until 1987 that the High Court found the Planning Tribunal had erred in limiting ancestral land to land remaining in Maori tenure or ownership. However the court found that it was not sufficient to claim the whole of New Zealand as ancestral land. There had to be some ‘factor or nexus’ linking the people to the land.<sup>52</sup>

Some discrepancies also became obvious, where for example, the Town Planning Act required district planning authorities to take account of principles and objectives of the Water and Soil Conservation Act 1967 (s 4(3)) but that Act did not refer to Maori interests at all. In 1982, Mrs Minhinnick objected to a water right for the Glenbrook steel mill to discharge into the Manukau as offensive to Maori spiritual beliefs and as pollution of shellfish beds. The tribunal rejected the concerns as purely ‘metaphysical’ and of no greater relevance than the spiritual views of the community at large.<sup>53</sup> The issue arose again in the Motunui petroleum discharge rights involving Court of Appeal approval of the Planning Tribunal decision in granting water rights. This was later rejected by the Waitangi Tribunal and

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49. *Morris v Hawkes Bay County Council* (1977) 6 NZTPA 219

50. *Knuckey v Taranaki County Council* (1978) 6 NZTPA 609

51. *Quilter v Mangonui County Council* (1978) and later *In Re Application by NZ Synthetic Fuels Corp Ltd* (1981) 8 NZTPA 138, p 157

52. *Royal Forest and Bird Protection Society Inc v WA Habgood Ltd* (1987) 12 NZTPA 76

53. *Minhinnick v Auckland Regional Water Board* (1982) NZ Recent Law 190

subsequently altered by legislative action. Eventually a High Court ruling in 1987 found that the Minhinnick decisions were incorrect and that Maori spiritual values were important in assessing water right applications.<sup>54</sup>

Town planning legislation therefore did include some requirements to take Maori interests into account by the late 1970s. While it is clear that town planning processes did have a significant impact on public works planning and land takings, more research is required as to how effective these were in actually protecting Maori interests when public works takings were made. As already seen, the new Public Works Act 1981 itself contained no specific requirements concerning adequate consideration of, or active protection of, Maori interests.

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54. *Huakina Development Trust v Waikato Valley Authority* (1987) 12 NZPTA 129



## CHAPTER 11

# **POLICIES AND PROCEDURES, 1928–1981**

It seems clear that the relatively harsh impact of legislative provisions concerning public works takings of Maori land were also reflected in the administrative procedures and policies of taking authorities between 1928 and 1981. This chapter provides an overview of what appear to be the main developments in policies and procedures and the major issues arising from these, based on preliminary research. Unfortunately Public Works policy files were not made available by National Archives when this research was undertaken and the chapter has therefore been based on a sample of a few hundred Maori Affairs department general and case files on public works takings of Maori land. More detailed research is still required on these issues.

The framework of this chapter follows the same pattern as the major legislative concerns associated with public works takings. Major issues and developments have been summarised according to land-taking decisions and taking procedures, compensation issues, and issues relating to the control and disposal of land no longer required for public purposes.

In general, many issues of this period, such as the low priority given to Maori interests, were already apparent in earlier years and this chapter therefore traces the continuation of these issues. It is also clear that many of the issues arising from taking policies and procedures were universal for all landowners, for example, the delays in the payment of compensation. However it still seems apparent that policies and procedures seemed to have resulted in relatively harsher treatment for owners of Maori land. This is apparent over all areas associated with public works provisions from the initial decision making to the disposal of land no longer required. From the 1940s especially, the application of town planning processes also appear to have had a significant impact on Maori land. At the same time, until in relatively recent years, taking authorities typically attached little weight to concerns of special importance to Maori, such as the continued taking of remaining ancestral land or wahi tapu.

One of the main features of this period appears to be the continuation of the development of policies and procedures almost solely from the viewpoint of their impact on general or European land takings. As a result many issues relating to Maori land takings arise from this specific lack of consideration of the impact of policies and procedures on Maori land. For example, protections that may have been adequate where individual title was the norm, proved to be less effective for owners where land was held in multiple ownership, as was common for most Maori land. Taking authorities also appear to have followed legislative assumptions that



administrative difficulties were a justification for abandoning even normal protections for Maori land and that no alternative accommodations were required to take account of the special features of Maori title.

The development and application of taking policies and procedures also reflected the general marginalisation of Maori caused by other Crown policies. Maori were less likely than general landowners to challenge decisions or procedures through official or legal processes. Maori also had generally less effective political power or influence at either local or central government level, such as through access to networks such as powerful interest or lobby groups, the media, or influential members of Parliament. This often meant that Maori land was easier to take and that protections and compensation could be more easily avoided.

Maori also had special interests, such as the need to preserve remaining ancestral land and the system of Maori freehold title itself, as well as sites of special importance such as urupa and wahi tapu. The separation of Maori and Pakeha communities and the lack of adequate communication in the taking process often meant that Pakeha planners and engineers did not know of or understand many of these concerns. Even when they were acknowledged, in the absence of any special legislative requirements, they simply tended to be accorded a lower priority than other concerns.

Because taking authorities generally regarded public works takings from the viewpoint of their impact on general or European land, their generalisations on how well their procedures and policies were working and what effects they were having have to be treated with some care where Maori land takings are concerned. It appears as though takings of Maori land were often regarded as being in the category of ‘difficult’ cases or ‘anomalies’ to the general pattern. As a result, particular problems associated with takings of Maori land such as those caused by multiple ownership, or the special concerns of Maori such as for preservation of wahi tapu, also often appear to have been treated as matters of relatively little importance when compared to the need for a particular public work.

There is evidence of political concern at times during these years, about issues such as the effect compulsory taking provisions were having on remaining Maori land. In the absence of legislative requirements, however, the concerns of political leaders appear to have had little effective impact on the entrenched attitudes of taking authorities. Increasing awareness and consideration of Maori interests also often happened slowly and unevenly. For example, sometimes there were improvements in communications with Maori owners where large projects or particularly sensitive issues were involved, but these were often abandoned for much smaller works, where other imperatives took priority. Even into the 1970s, there were still many criticisms of the impact of taking policies and procedures on Maori land for works such as road realignments, while in other areas such as town planning the Ministry of Works was beginning to take a much more responsive attitude. A more flexible policy approach was also sometimes evident at central government level where leasing for example was at times used as an alternative to taking Maori land. This was less evident at a local authority level however.

## **11.1 LAND-TAKING DECISIONS AND THE APPLICATION OF TAKING PROCEDURES**

The Public Works department (later the Ministry of Works) continued to be the main Government department responsible for public works takings in the years between 1928 and 1981. For the sake of brevity this agency is simply termed ‘Works’ throughout this chapter. To a lesser extent the Lands and Survey department was involved in takings, where it had administrative responsibility for the public use required of the land, such as for scenic reserves. The Lands and Survey department also had responsibility for the control and disposal of a large proportion of land taken for public purposes and then declared to be Crown land for the purpose of disposal.

Although many Government departments were interested in acquiring land for public purposes, Works increasingly exercised a centralised role on behalf of most of them. The major exception was Railways, which largely handled land acquisition for itself and other business-oriented departments such as State Coal. In times of special needs such as wartime, organisations such as the defence forces also seem to have taken a larger role in finding suitable land and negotiating acquisition, although Works often undertook the final legal formalities. Agencies sometimes differed as to when Works was called in. For example, some departments favoured locating the land and negotiating for it first. However, Works increasingly gained Government support to take over the whole process of acquisition from the initial land investigation to the final taking or purchase.

A 1946 memorandum from Works to all Government departments set out land-taking policy for public purposes and requested that departments hand the whole process over to Works as soon as possible, rather than conducting land acquisitions on their own. According to the memo, such independent action had led to many problems in the past and had at times necessitated special legislation to complete or validate what should have been simple transactions.<sup>1</sup> Cabinet decisions and public service instructions in later years continued to support this policy. A 1950 public service circular instructed Works to obtain financial approvals and settle payments directly with landowners where it was acquiring land or settling compensation on behalf of other departments. This was to avoid delays and duplication in referring settlements to other departments, as these had been a fruitful source of criticism by lawyers, landowners, and other interested parties. The same circular also concentrated taking responsibility in the Works and Lands and Survey departments.<sup>2</sup>

A 1961 Cabinet decision approved a similar policy to improve the coordination of the acquisition, control, and disposal of land for Crown purposes. This was again intended to meet public dissatisfaction with delays. The acquisition of most land was to be controlled by the Works and Lands departments. The exceptions were the business-oriented departments: Railways, State Coalmines, Government Life, and State Fire Insurance, as well as State Advances for some house properties. Railways

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1. Memo from Public Works to all Government departments, 4 September 1946, MA 1, 19/1/441

2. In PSC 20/0/21, 21 August 1950, s 18(b), MA 19/1/441

had its own statutory powers to acquire land for rail lines, transport services, housing, and for works associated with railways such as for water rights. State Coal Mines also had powers to acquire land and mining rights. Other businesses such as State Fire tended to purchase their own properties, and the Department of Maori Affairs had special powers for land purchase, consolidation, and development schemes.

Otherwise, land acquisition responsibilities were divided between Works and Lands, roughly along the lines that Works was involved where the acquisition of land involved construction and the settlement of compensation claims, the acquisition of land for state housing and subdivision, and the acquisition of land for most other Government departments. Lands and Survey was involved where land was acquired for farm settlement, or farm development under the various Land Acts, where rural land was purchased by agreement for agriculture or forestry or for any purpose other than a public work. Most long-term leasing was also controlled by Lands and Survey. When land was no longer required for the public work for which it was acquired, the first priority was to circularise other departments likely to be interested, then to transfer the land to Lands and Survey for disposal.<sup>3</sup> In effect this meant that there was at least some centralised control and coordination of policies and procedures for Government land takings and that those developed by Works were likely to have a significant impact on all Crown takings.

The other major players in public works land takings were local authorities. These were naturally much more independent in setting policies and procedures but the links with central government remained quite close. Works exercised significant influence through such factors as the control of funding for many projects such as roads, and through legislative responsibilities such as a supervisory role over road boards and requirements in some circumstances to cooperate on certain public projects. However although local bodies were given increasing land-taking powers, there was apparently little effort made to require them to take Maori interests into consideration when exercising these powers. At the same time, there is ample evidence of central government refusing to ‘interfere’ even when ministers were advised of Maori concern and accepted the validity of that concern by directing Government departments not to become involved in the taking. The end result however, was often that the local authority simply went ahead and took the land on its own.

As legislative powers increased, the only real restrictions on taking authorities were that they required legislative authority or prior appropriation of funding by Parliament before land could be taken for a public purpose. No real distinction was made between the relative importance of various works or where land was required for a work such as a works depot where the siting of the work was not crucial or that required for a major works project of obvious public benefit where there were strict engineering requirements as to the location required. There were differences in opportunities for objection signifying some level of importance. Takings of land for works of ‘national importance’ such as railways and motorways afforded no right

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3. Cabinet Office decision, 21 August 1961, in Cabinet Office Circular CO (61) 31 August 1961, and Cabinet Minute CM (61) 37, MA 1, 19/1/441

of objection while lesser works did. However in practice this distinction often meant little, particularly while taking authorities remained the judges of objections and in the case of Maori land, opportunities for objections were even weaker. The actual administrative response to this situation was summarised in the 1946 Public Works department memo, that 'Practically every purpose for which a Government department requires land is a public work'.<sup>4</sup>

Taking authorities therefore had wide powers and very few legal requirements affecting their decision making in choosing land to be taken for public works. Evidence suggests that the combination of weaker legal protections, the absence of any legal requirements to actively protect Maori interests, the special features of Maori title and the general marginalisation of Maori by this time all produced a climate where it was simply easier for taking authorities to decide to take Maori land.

It is often not enough to simply assume that land-taking policies for public purposes were always based on objective criteria such as engineering requirements. There is ample evidence that other factors such as entrenched attitudes, financial and administrative imperatives, sector interests, and the relative political clout of those landowners likely to be affected were often just as important. Political motives such as the need to provide employment in a particular area or the ambitions and rivalries of particular authorities also continued to be significant. This was particularly true of many public works where engineering considerations were not so vital to the choice of land, for example for public buildings, works depots, quarries, camping grounds, and rubbish dumps. These factors influenced all land-taking decisions but features such as the marginalisation of Maori and the difficulties associated with Maori title appear to have resulted in a significantly harsher impact on Maori land.

Other factors also caused Maori land to be a prime target for takings. Many of these were the result of other Crown policies. As already seen by this time, Maori were generally economically and politically marginalised, without the same means to challenge unacceptable takings as were generally available to Pakeha landowners. The increasing separation of Maori and Pakeha communities meant that Maori concerns could go unheeded or unknown and engineers found it easier to identify with Pakeha interests. In many cases Maori interests were also often more in conflict with public works projects than was the case in the general community, but Maori protests could be more easily ignored. Drainage operations to improve farmland or reclamation works for example, might raise few complaints from the general community but might in the process destroy traditional Maori food sources and fisheries.

Another important factor influencing decision making was the enormous fragmentation of Maori title developed by the Crown-created Maori Land Court. Maori title was an alternative system of land holding guaranteed in the Treaty and in theory entitled to the same respect as the general land holding system. However, in the absence of any provisions to overcome the problems associated with fragmented title for most of this time, taking authorities were able to simply

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4. Memo from Public Works to all Government departments, 4 September 1946, MA 1, 19/1/441

abandon the procedures routinely applied for general land. They could move straight to applying compulsory provisions for Maori land on the grounds that procedures such as negotiation and notification were ‘too difficult’ where there were multiple owners. This in effect made Maori land taking much easier and the fact that taking authorities could use this justification so easily, appears to have been an influence in their decision making.

Where compulsory powers could be so easily justified, and opposition was also likely to be ineffective, the climate was established where takings could take place for a variety of less acceptable motives such as racism, private profit, or the advantage of a particular interest group. The normal tendency of taking officials to avoid legal and administrative requirements and to place all their energies into construction of the work was often easier to get away with for Maori land takings. Relevant data is unfortunately not available but it seems apparent from official documents that relatively more Maori land was taken for public purposes for most of this time and the required procedures and protections were less likely to be properly carried out. Other imperatives, such as administrative and financial concerns, simply took precedence over Maori landowners’ rights.

Fragmentation of title also caused problems for Maori in the use and development of their land. Capital for development was often very difficult to obtain for land held by multiple ownership and this hindered efforts to use the land effectively. This often resulted in land that lay ‘idle’ and unproductive, regarded by Pakeha as an ‘eyesore’ and therefore a tempting target for taking authorities looking for land for public purposes. This attitude to Maori land became entrenched and often appears to have prevailed even when land was being used constructively or when attempts were being made to enable it to be farmed or otherwise developed. Takings were also tempting because Maori land often meant less compensation had to be paid. Title problems causing land to be idle or underutilised also often meant it was worth less than similar land nearby. It was therefore also easier to avoid compensation costs, as will be seen later in the chapter.

It is very common to find documentation of attitudes that Maori land could be taken because it obviously was not being used properly or the owners did not really care about it and it was of little ‘value’ or not ‘needed’ anyway. The reasoning for this was that the land was often overgrown, and apparently neglected. There were also sometimes cultural differences, for example in the treatment of burial grounds, where Maori often deliberately left them overgrown and unmarked to prevent desecration, but Pakeha took this as a sign they were not cared about or not used, or even did not exist. Although it appears that Maori attachment to ancestral land was well known, this too was often disregarded as grounds for objection.

The problems caused by the Maori land title system were also often used as a positive reason for taking. It was often reasoned, for example, that Maori owners were likely to have interests elsewhere so the particular piece of land required was not ‘needed’ and taking the land would positively ‘free it’ for some more useful purpose. It is also common to find some implication that ‘most’ of the owners really agreed to the taking and was therefore only required to get around legal title difficulties. This was in spite of an equally firm resistance to contacting owners to

ascertain their views because the same title problems made such action ‘too difficult’.

The fact that much Maori land was also effectively controlled by impersonal organisations such as the Maori Trustee or Maori Land Boards may have also made the concerns of Maori owners seem less visible. Various legislative requirements on Maori reserved and leased land, while intended to provide some protections, may also have prompted many compulsory takes in an effort to shortcut the legal processes involved in transferring title in these situations. There are also many comments on file complaining that Works had developed an attitude that Maori land was simply another type of public land available for public purposes use when required.<sup>5</sup>

It seems clear from the many examples of decision making on files, that in the absence of any Crown-imposed restrictions or protections to counteract these attitudes and difficulties, the interests of Maori owners were often overridden by other priorities and this is also reflected in the treatment of their objections to takings. Takings were commonly made from the majority Pakeha viewpoint without taking into account the special problems and concerns of Maori. This included the concern that the remaining land held by Maori title was already very small by 1928 and was still under threat of alienation, mainly through pressures to sell and through other legislative activity such as the Maori Affairs Amendment Act 1967 that made for much easier alienation of Maori land.

Accurate statistics concerning Maori land are notoriously difficult to calculate accurately. The total land area of New Zealand is about 66 million acres or almost 27 million hectares. By 1891 Maori freehold land was estimated at some 10,829,486 acres of Maori land remaining in the North Island, while the amount left in the South Island was ‘very small’. By 1911 the remaining Maori land had already dropped to just over seven million acres (just under three million hectares) or about 11 percent of the total. By 1920 this was further reduced to about 4.7 million acres. Of this, nearly three-quarters of a million acres were leased to Europeans, including perpetual long-term leases. Much of the remaining land was marginal and difficult to farm or use productively. In the years since 1920, the rate of loss slowed but Maori land continued to diminish steadily. In 1955 there were estimated to be 3,872,359 acres of Maori land in the North Island and only about 200,000 acres in the South Island (roughly 1.6 million hectares), or about 6 percent of the total area. By 1987 the total amount of Maori land was estimated to be just under three million acres (1.3 million hectares) or about 5 percent of the total.<sup>6</sup>

By 1980 there was also virtually no customary Maori land left.<sup>7</sup> It is not clear exactly when this happened but there was certainly more freehold land than customary land by the turn of the century. According to reports there may still be

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5. For example, Maori Affairs department complaint in submission on public works provisions in MA 22/2, AAMK 869/739c

6. Sources: Asher and Naulls, *Maori Land*, New Zealand Planning Council, Planning paper no 29, March 1987, p 41; Hunn, ‘Report on Department of Maori Affairs 1961’, AJHR, 1961, G-10, p 58; Statistics Department, *1990 Yearbook*, p 417

7. Asher and Naulls, p 49

tiny pockets of customary land left. However, even by the 1950s, official reports confirmed that Maori customary land had ‘virtually’ disappeared.<sup>8</sup>

It can be seen therefore that during the period between 1928 and 1981 the total amount of Maori freehold land left was less than 10 percent and steadily diminishing. This was a factor that made the compulsory loss of remaining Maori freehold land of even more concern to Maori. This concern increased when Government policies and major reports in the 1960s such as the Hunn and Prichard–Waetford reports, assumed Maori freehold title would and probably should eventually be extinguished. This concern by Maori led to increasing assertiveness by the 1960s in demanding land in exchange for land taken, and to the land protests of the 1970s including concerns about public works and town planning provisions. Public works takings were probably not the major cause of Maori land loss for most of this time. However they were a constant source of concern as they continued to encroach on remaining Maori land, especially as other protections such as the prevention of alienation through sales of leasehold land, for example, could be overturned through compulsory public works provisions. In addition many of the reasons for taking remaining land, such as for rubbish dumps, sewerage facilities, or camping grounds, seemed to be only adding insult to injury.

In addition, Maori often complained that public works takings not only diminished the total amount of Maori freehold left but also contributed to or caused the loss of the remaining ancestral land of an iwi or hapu or family group. This was a continuing issue of concern, especially as a stake in Maori land was culturally, politically, and socially important in Maori society as a source of turangawaewae or rights to speak on a marae, and as Treaty guarantees and the initial instructions by the British Crown required that Maori were not left landless. When the Crown was purchasing Maori land there was a requirement in the Native Land Acts and similar legislation (for example section 373 of the Native Land Act 1909) that Maori not be left landless, but there were no such requirements for public works takings of Maori land.

Some land taken also contained wahi tapu, including urupa, that were of special significance to Maori. Protections for these were non-existent or often ineffective and were commonly simply given a lower priority than other concerns. In addition, many public works projects caused flow-on problems for Maori rights that were also rarely considered. In fact in some areas such as rights to traditional fisheries, public works seem to have been a very convenient method of destroying the whole problem. Many of these issues, and the practices and policies of taking authorities concerning decision making on land required for public purposes are demonstrated in the case files concerning Maori land takings.

There are many documented cases, for example, of the low priority given to Maori landowners’ interests by taking authorities when decisions on land takings were made. Typically other interests, such as the possible needs of other Government agencies, were given more weight than the interests of Maori owners. For example, in 1950, Works took 27 acres of Maori land on the banks of the

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8. For example, memo from Under-Secretary of Maori Affairs to Crown Law Office, on advice of Chief Judge of the Maori Land Court, 1 April 1959, MA 1, 38/1/1, pt 1

Wanganui River for river diversion work. The work was undertaken but formal surveys and the official taking proclamation were delayed because Works officials felt that the State Forest Service and Railways might be interested in some of the land and they did not want to make a final decision on the amount to be taken until the other departments had decided if they needed any. This was in spite of the fact that the Maori owner was suffering hardship because compensation could not be assessed until a formal proclamation was made. In addition, Works told the owner that an application could not be made to the Maori Land Court to assess compensation as the land was not yet surveyed nor taken by proclamation.

The land court was powerless to act until a formal taking was made. However Judge Beechey was quoted as describing the situation as ‘monstrous’. He asked that the practice where ‘The department takes land before survey and before proclamation and pleads its own wrongdoing as the reason for non-assessment of compensation’ be reported to the Minister and stopped. The judge also observed that even if Works would consult with the owners before doing such things it would not be so bad, ‘. . . as it is we might as well live in Russia’.<sup>9</sup>

Works also often used the excuse that normal procedures and care did not have to be taken where the land seemed to be poorly used. In the 1950s for example, the Ministry apparently accidentally included about three acres of Maori land in a sports field at Mana College in Porirua. The boundary was not properly surveyed when the land was included and according to Works this was partly because the land was unoccupied, unfenced, and heavily gorse covered.<sup>10</sup>

It is clear that local authorities also often made taking decisions with more regard for the local non-Maori community and for financial advantage than for the concerns of Maori landowners. For example, there is evidence that local bodies used land-taking powers for public purposes for a variety of reasons often quite different to those stated in the taking proclamations. This practice was not confined to Maori land and was frowned on by the courts.<sup>11</sup> However there were no real legal restrictions on this and it seems to have been that much easier to get away with where Maori land was concerned. This was apparently because Maori were more likely to lack the means to pursue legal action and were less able to put political pressure on taking authorities. Fragmentation of title and notice problems also often meant owners could be unaware of the taking until it was safely made.

In 1963 for example, the Wairoa Borough Council issued a taking proclamation with the stated purpose being ‘to execute a certain Public Work – namely a Borough Depot and yard. . . .’ However the Maori Affairs department office in Gisborne was informed that:

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9. Auckland office of Maori Affairs to Head Office, 15 February 1950, MA 1, 38/2, pt 1

10. See correspondence in MA 1, 5/5/59, vol 3

11. For example, in *The Compulsory Acquisition of land in New Zealand*, P Salmon quotes *Melanesian Trust Board v Tamaki Road Board* (1925) NZLR 415, where taking powers have been used for purposes other than for which the legislation has given the taking power, and *Adams v Hutt County* (1957) NZLR 772 and *Bartrum v Manurewa Borough* (1962) NZLR 415, where power given for the public interest has been used to promote private benefit.



*Public Works Takings of Maori Land, 1840–1981*

Although not officially stated by the Council . . . the probable intentions of the Council are to use this strip as a road to open up back land when this becomes necessary.<sup>12</sup>

Accusations were often made by Maori owners that local authorities sometimes used public works provisions to simply shift them out of town. There is some evidence to support this. For example, in Kaikohe in 1947, Maori owners complained that a proposed taking for a hospital site would leave them virtually landless and deprived of the only suitable house sites they had for themselves and their families. The Maori owners believed that the proposed land taking was part of a policy of Pakeha local body politicians to instigate the taking of Maori land for public purposes in order to eliminate all Maori land from the new borough area of Kaikohe. The Maori Affairs department land consolidation officers believed that there was some truth in this claim and pointed to the fact that there was ample European-owned land in the town more suitable for the purpose.<sup>13</sup> In the Otorohanga native township in the 1950s, Maori owners also complained that they were being asked to move to sections more than a mile out of town when they owned land within 500 yards of the main street, which the council wanted subdivided and sold on the open market.<sup>14</sup>

The attitude that Maori land was there for the taking continued into the 1970s in some cases, and this was often associated with a belief that where land was easy to take, there was little to stop taking authorities taking much more than was really necessary for the public purposes involved. In many cases the organisations brought in to improve matters, such as the Maori Trustee, were appalled at the attitudes they encountered. In 1973 an Auckland officer inspected Maori land taken by the Auckland Regional Authority. The authority had taken land for a recreation reserve in a new subdivision developed by the Maori Trustee and had then taken another 294 acres of the hinterland. The officer complained that:

I have viewed the property personally and cannot understand their reasons for having taken the land. I cannot help but feel that it was taken because it was Maori land and there would probably be less public outcry.<sup>15</sup>

The pressure from local interest groups was often also more compelling than the concerns of landowners. In Dannevirke for example, some Maori land was rented by private operators as an airfield carrying out mostly topdressing work for local farms. When the lease was about to come due in the late 1940s, the local authorities and aviation interests in the area pressured Civil Aviation and the Government to ‘protect’ the lease or acquire the land. The department of Maori Affairs was brought in and explained that it could not try and influence the proprietor on how to deal with his own property, but ‘if he should ask’ officials promised to suggest that the

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12. Memo to Head Office, 21 August 1963, MA 1, 54/19

13. Memo and enclosure from Under-Secretary for Maori Affairs to the Under-Secretary of the Public Works department, 29 September 1947, MA 1, 38/2, pt 1

14. Notes of meeting, October 1961, MA 1, 54/16/5

15. Memo from Hamilton district office to Head office, 26 September 1973, MA 1, 38/2, vol 6

lease be renewed or the land sold to the borough. The concerned owner however required the land for her grown up family to farm and wrote to the Minister asking for assistance.

The owner complained that the local borough and county councils wanted to purchase the land for an airfield, not for their needs, but to keep it in use for top dressing farms in the surrounding district. This view was apparently correct as it was not challenged. The owner reminded the Minister that public works takings were supposed to be for the public benefit but in this case it was local farmers and not the general public who stood to gain. The Government apparently had some sympathy for the owners' viewpoint and directed Government departments not to invoke the Public Works Act to acquire the land in this case. The Minister even wrote to the owner to assure her that the Government had no intention of taking her land. However, as happened so often in these cases, the Government also made no attempt to influence the local authorities. Within three months of the Minister's assurance as to central government intentions, the local county council had issued a notice of intention to take the land under the Public Works Act and the Local Authorities Empowering (Aviation Encouragement) Act 1929.

The Minister's only response to claims that the taking was not really for a public purpose was to express his regret that 'neither I nor the Government has any legal power to intervene'. The county council acted within its powers and these 'sometimes bear hardly on the individual, as in your case, but were created to serve the general welfare'. His only suggestion was for her to object and try and find neighbours and others 'who would join in the objection to the location of the aerodrome'. This hardly seemed realistic if, as she claimed, it was the neighbouring farmers who stood to benefit from continued topdressing.<sup>16</sup>

Official documents also reveal the influence non-Maori were able to bring to bear on Government compared with many Maori owners. For example, in the 1940s a group of Pakeha farmers formed a company and successfully applied for a mining licence over Maori land in order to obtain lime for their farms. The licence was granted on the basis that the land was within Maori land ceded to the Government many years previously for goldmining purposes. The Maori owners were not informed of the application and only found out about it after it had been granted and mining equipment was set up on their land. As it happened, they had also been intending to set up a quarry and it was only after they pursued the matter themselves that officials decided the licence was invalid because the cession only referred to goldmining. The company refused to surrender the licence on the grounds that it had already set up equipment and buildings and spent money on the business.

Crown legal advice was to do nothing to rectify the matter for the owners but to leave them to take court action to have the company removed, even though the licence had originally been issued by a Government official. The owners were not in a position to take the matter to court and appealed to the Government for help. Finally Peter Fraser intervened because he felt it was unfair that the Maori owners were obliged to begin costly court action to enforce rights which were violated by an error of the Crown, 'This appears to be most inequitable'.

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16. Correspondence 1948–1955, MA 1, 5/5/111

In the meantime, the company was able to exert considerable pressure to try and have the land taken for public purposes because of the ‘national importance’ of farming. The file contains evidence of pressure on their local member of Parliament and various Government officials and ministers, although the farmers remained very reluctant to talk to the Maori owners. The farmers also managed to arrange supporting letters from a variety of sources to the Government, including the local branch of Federated Farmers and the Aid for Britain National Council, all arguing that the proposed supply of lime was vital in the interests of farming and the country. The department of Maori Affairs and Mines department officials also set about trying to persuade the Maori owners to agree to the company going ahead.

In this case however, Fraser refused to involve the Government in a compulsory land taking, insisting that the land was the private property of the owners and they had the right to decide what to do with it. However departmental officials continued to apply pressure to get the owners to agree to the company having the licence. As it turned out, when Fraser had an independent investigation done, the owners’ proposition was unlikely to be economic. However officials had not even been willing to consider it and were scathing that the Maori owners could even think of going into such a business. One official described the idea as ‘fantastic’ even though the owners claimed they had sought expert advice and had arranged the necessary capital. The attitude of officials so annoyed the owners that in turn they refused to consider the company proposals for some time. Finally, in 1950, the owners agreed to allow the company to continue with a licence.<sup>17</sup>

There are cases where taking authorities also appear to have used taking powers to ensure the acquisition of land where purchasing on the open market may have meant the authority failed to acquire the land or had to pay too high a price (or a true market price). This approach may have been reasonable where important public interests were at stake. However it seems to have been commonly used for much lesser matters, thereby depriving Maori owners of the opportunity of taking advantage of market prices even if they did decide to sell.

In the 1960s the Raglan County Council wanted to acquire some Maori land to give access to the beach at Manu Bay. The public was already allowed to use the beach by the owners, but the council wanted to improve road access and provide more public facilities. The council was not the only party interested in buying the land; the owners were approached at about the same time by other private interests to lease or buy the land. At a meeting of owners, all the proposals were rejected. Some owners were concerned to ensure continued access to fishing and others considered the prices offered too low anyway. The council then pressured the Government to acquire the land for it. This was apparently because it was under the mistaken impression that it required permission to have the land taken, although ministerial consent was only required for customary land. A deputation was sent to the Minister of Maori Affairs. As a result Maori Affairs department officials were instructed to find out the views of owners and when the purchase proposal was rejected to seek another meeting to see if the owners would change their minds.

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17. Correspondence, MA 1, 19/1/650

Following this, some owners suggested a sale might be considered for £1500 compared with a special valuation of the land of £940. The council was outraged that ‘an area of land such as this should be denied to the people of New Zealand, both Maori and Pakeha because Council is not in a position to pay such an exorbitant figure for this section of land’.<sup>18</sup> This was in spite of the fact that there was obviously some competition for the land pushing up prices and the public already had access. The council appeared to make no real attempt to meet owners’ concerns regarding fishing but seemed confident that an appeal to take the land because the price was too high would succeed. In this case, however, the Minister replied that unless the council could persuade the owners to sell the land, he was unable to assist further.<sup>19</sup>

Taking authorities also often seemed unconcerned that their interests might conflict with long-standing Maori attempts to develop the land required. The army had a long-standing interest in land in the central volcanic plateau area for training purposes. The land was of interest precisely because it was sparsely populated and underdeveloped and it was mostly held in Crown and Maori title with little European interests. The army gained Maori owners’ agreements to shooting rights over a large area of the Maori land in the 1920s. The army then claimed that it could not afford to purchase the land and that it wanted a chance to see if the area was really suitable. As a result it sought continuing restrictions on alienations of the land into the 1930s.

By the 1930s, however, with increasing forestry development and the implementation of Maori land development schemes in the area, the army became concerned about its continued free access to large areas of the land. In 1933 the Minister of Defence asked the Native Minister to come up with some alternative to his farm development schemes in the area which ‘while satisfying the requirements of the Native Land department, would, at the same time, not interfere with the use of the land for artillery shooting’. In reply, Ngata pointed out that if the Defence requirements were insisted upon it would mean the halting of any further development of 14,000 acres of Maori land. He explained that it was misleading to simply suggest that there was plenty of Maori land elsewhere to develop. In fact particular tribes in the area had vested land specifically for development purposes and that was what the department was required to do. Government funding had also been provided to assist with the development work and spending so far would be wasted if the development was not completed. The developments were also providing important employment opportunities for unemployed Maori. Ngata also reminded the Defence Minister that the Maori owners had every right to develop their own lands, especially as the Government had provided them with the necessary assistance.

Officials of both Maori Affairs and the Defence departments took part in negotiations over possible accommodations but these failed at first when Defence department officials refused to compromise. The Defence department only required shooting rights to practice a few times a year but the interests of Maori owners in

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18. County Clerk to Minister of Maori Affairs, 25 August 1964, MA 1, 5/3/8

19. Correspondence, MA 1, 5/3/8

developing their land did not seem to make much difference. It seems it was only because of Ngata's firm resistance and his political influence at the time that the Defence department was forced to take a more reasonable position. Eventually it was agreed that both departments could cooperate with roads and fencing built to accommodate both needs and the army would advise owners to move stock before shooting took place.

The conflicts did not end there however. Later, after Ngata had left the political scene, the army again began to push for the compulsory acquisition of land in the area for a rifle range while the owners wanted to develop the same land for a dairy factory and farming.<sup>20</sup> In the 1950s the Defence department also began new attempts to acquire land for extensions to Waiouru camp. Once again Defence wanted to take the simplest way out and simply have the land taken by proclamation. Even the alternatives of gaining a licence to shoot at various times or an easement over the land were thought to be too difficult.<sup>21</sup>

Land development schemes also took second place to the railway constructed for the Murupara project. Works decided to change the railway route without consulting or giving much consideration to the effect this would have on the local farm development scheme. According to the local office of Maori Affairs, this meant the railway would now go through the best farming land in the scheme, disrupting the work programme already in place. As a result work on the scheme would have to be reconsidered and probably kept to a bare minimum while a decision was made on the exact land to be taken.<sup>22</sup>

Sometimes planning simply failed to take account of community needs, and lack of consultation in the planning process meant this was more likely to happen. In the 1940s a proposed highway deviation at Hicks Bay and closure of the old road brought complaints from the local Maori community that their interests had not been properly considered when the proposal was planned. While the new deviation would benefit users of the main highway, it would only cause problems for the local community. The old road which was to be closed was the quickest route to the school, post office, stores, and wharf, as well as to other parts of their land. Without it they would have to make a much longer journey and ford the creek at its deepest part. The locals asked for assistance in having the old road retained and legalised if the deviation went ahead.<sup>23</sup>

It is very common to find taking decisions justified on the basis that land was not properly kept and therefore probably of little concern to the owners. In addition, the land required was not 'needed' because the owners had an interest in land elsewhere. For example, in the 1950s, Maori owners objected to the compulsory taking of their land for a postmaster's residence in Tokomaru Bay. The objections included that it was the last remaining link to the area for the family and that it was lived in by a family member and used for cultivating food crops. The objectors asked the taking authority to consider using other Crown land in the area instead. The Director-General of the Post Office advised that the objections should be

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20. Correspondence, including between Ministers in 1933, MA 1, 5/5/8

21. MA 1, 5/5/72

22. Memo from Rotorua District office of 19 August 1953, MA 1, 5/10/120

23. Correspondence, 1941, MA 1, 38/2, pt 1

rejected on the grounds that he was ‘informed’ that all the objectors had farms of their own in other parts of the East Coast and made ‘very little use of the area under notice’. The section was at present ‘neglected’ and last season was covered in long grass and the hedges grew wild. The land left after the taking ‘should be sufficient’ for the owners’ requirements and furthermore the local postmaster had been told by some of the objectors that they would sell. All suggested alternatives were unsuitable and ‘. . . It appears in the circumstances that the objections are not well founded and that little hardship would be caused by the taking of the land’.<sup>24</sup> Such conflicting accounts were rarely investigated further and the objections were commonly disregarded.

Similar reasons were given when it was proposed to take Maori land for Kaihu Public School after the owners had rejected an offer to purchase. The report for the Minister of Education for Cabinet consideration in November 1951 explained that no suitable European-owned land was available, the land required was used for some grazing but was ‘mostly idle’ and:

Compulsory acquisition would not devolve any hardship on the owners as there is apparently no occupation of the property in the sense that any return is being obtained from the land, nor does anyone live on the property.

In addition, it was understood the owners possessed alternative land elsewhere.<sup>25</sup>

Even when the attachment of Maori to ancestral land was acknowledged, it was rarely treated as an important ground for objection. This was the case even where the public work involved seemed relatively mundane. For example, a workman’s cottage was proposed for a site at Te Kaha where the owners complained that other acquisitions had already greatly diminished the amount of their ancestral land.<sup>26</sup>

Public works takings involving wahi tapu and urupa in particular appear to have been a major source of Maori concern and resentment. Such takings were regularly brought to the attention of Parliament by Maori members well before the turn of the century and continued to be of concern through the time under consideration. Maori concern was widely acknowledged although for a long time there were no particular legislative protections, as there were for ornamental gardens or orchards.

This was one of many issues where Maori owners consistently expressed great concern and evidence points to continued problems, but Works insisted that it had a policy in place to meet concerns and it knew of no problems with it being carried out. In this case Works had a long-standing policy of making inquiries about the existence of possible burial sites on land it proposed to take. In practice, this almost always meant contacting the department of Maori Affairs to see if it knew of sites, rather than the owners or other Maori leaders in the locality. It often turned out that the department did not always know of urupa sites. There was a procedure for having burial grounds gazetted as reserves but not all burial grounds were reserved and Maori were often reluctant to reveal their location to avoid looting and desecration. This was a very old custom but Pakeha desecration of graves only

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24. Correspondence in 1950s, MA 1, 38/2, pt 1

25. Report on proposed school site referred to Cabinet, 5 November 1951, MA 1, 38/2, pt 2

26. T Wi Repa to Prime Minister, and associated correspondence, 17 August 1948, MA 1, 38/2, pt 1

served to confirm it. This reluctance was well known and at times encouraged. For example in 1948 Prime Minister Peter Fraser, in response to concern about milling on an ancient burial site, advised the owners that:

So long as the presence of the relics is unknown, they will probably remain undisturbed, but if their location is known they may be the object of sacrilege by some unsympathetic pakeha.<sup>27</sup>

Maori also often followed a custom of not marking graves and allowing urupa sites to grow wild, again to prevent desecration. However this was often taken by Pakeha engineers to mean that the site was uncared for or forgotten about and therefore a taking would cause no harm. Once again the lack of communication meant engineers were not fully informed on these matters. There is evidence that in some cases engineers did consult properly. An example is a case in the Christchurch district in the 1930s where the Works engineer consulted with the local runanga over burial sites.<sup>28</sup> However there is much more evidence that Works failed to even follow its own policy consistently. In many cases adherence to the policy relied on the goodwill of local engineers and it is apparent that often other imperatives such as time constraints, simply took priority. There are numerous cases where even the Maori Affairs department was not informed, including even cases where burial reserves were properly gazetted. In addition, Works was not the only taking authority and many local authorities seem to have rejected even the idea of making inquiries about possible burial sites.

Maori concern about the treatment of urupa continued in spite of Works' protests. As a result of continued pressure the words 'cemetery and burial ground' were finally added to the types of land protected from takings without consent, in a 1948 amendment. In agreeing to this the Minister of Works conceded that it seemed reasonable 'to accord cemeteries and burial grounds similar consideration as gardens and orchards when land is being acquired for a public work'. This amendment, because it was in Part 2 of the Act, still did not apply to customary Maori land. Even while agreeing to the amendment, the Minister still insisted that officials always made specific inquiries about possible burial grounds. 'While this is not a statutory obligation it is standard practice and has been found to operate satisfactorily and without detriment to the proper treatment of burial places'.<sup>29</sup>

In spite of that claim and the amendment, there still appear to have been continued incidents where taking authorities used every means possible to evade their responsibilities to protect urupa, or simply afforded their protection a much lower priority than other concerns. An example is a burial ground on the Kaihu block, which according to local Maori had been used as an important burial site for centuries. According to Maori custom, the whole site was used for burials but graves were not neatly kept or marked. Instead the dead were often scattered and the exact whereabouts only known to a few in order to prevent desecration. As a result the whole area was considered tapu. In this case an earlier proposal to take

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27. MA 1, 5/5/36

28. MA 1, 21/1/1

29. Minister of Works to Minister of Maori Affairs, 8 February 1948, MA 1, 38/2/2

some of the land for a railway had been dropped in response to Maori concerns about the importance of the site. However later, part of the land was taken for a street with no notice given to the owners. The owners applied for the land to be made a burial reserve but the Maori Land Court refused while the local body decided what land it needed for the street. The Maori Land Court itself had no information on the burial ground and had no record of any burials on the actual land required for the street, so did not oppose the taking. The owners did protest, and even offered alternative land at no cost and offered to fence it themselves, but this was rejected.

An engineer's report of 1952 revealed that the land had indeed been used for burials and evidence of graves was found. However the report was inconclusive about the particular piece of land required for the street:

As permanent markings over the graves does not appear to be customary, it is not possible to state definitely whether graves exist on the area proposed for street or not. None however are plainly visible and no record of burials on this land are kept by the local authority.

It was of course most unlikely that records would have been held by the local body and the difficulty in finding graves was a normal feature of such urupa. However although the owners' claims that it was a burial site could no longer be denied, the taking authorities used the inconclusive findings in the report to insist that the land required for the street could still be taken. By 1953 the land was vested in the borough council and the taking could not be revoked unless the council formally applied for this to be done. A petition from the owners was again rejected based on the inconclusive findings of the report.<sup>30</sup>

Taking authorities often also used legal technicalities to avoid requirements concerning burial sites. In the 1960s the Taranaki County Council wanted to take some Maori land for a sewage treatment station. The block concerned was known to have graves on it and had been used until quite recently for burials. The owners were very concerned to stop the taking or to have the graves located and removed. As was usual, however, it was very difficult to establish where exactly all the graves might be. The council lawyers appeared to be unsympathetic to these concerns and maintained that if there was no record of any order in council creating a Maori reserve for a burial ground over the land, then they had met their statutory obligations and were required to do no more. The Maori Affairs department could do little to assist, as the taking proclamation had already been made before they were informed of the matter. They could only suggest that the council lawyers be asked to have the earth works held over until something could be done to locate the graves.<sup>31</sup>

The taking of burial grounds was also often associated with other issues of special concern, such as the loss of the last remaining land and cultural conflicts. The Taiwhakaea people of Paroa in the Bay of Plenty had already lost most of their ancestral land in the confiscations following the New Zealand wars. They had been

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30. MA 1, 38/2/2

31. Correspondence, August to October 1968, MA 1, 38/2, vol 4



left with only about 300 acres from the thousands they had previously claimed. In the 1960s, the Whakatane County Council decided it wanted more land for a cemetery and the most suitable area appeared to be 40 acres of Maori land, including an already existing Maori cemetery of about 15 acres. According to the council, this was because the Maori land had suitable access and was not useful agricultural land. The Maori cemetery was still being used for burials as the department of Maori Affairs found out to its surprise. Although the owners were under the impression that it had been set apart as a burial reserve by the Maori Land Court many years before, in fact it had never legally been designated a burial reserve.

In 1969 the council decided to take the land and issued the notices of intention. The matter only received major attention because a local Pakeha journalist happened to be the son of a lessee of the land and had married into the hapu. Through him and his newspaper articles it became clear that the Maori community was very unhappy about the taking. It was not only encroaching on their last remaining land while thousands of acres of Crown land confiscated from them lay just over the road. The people were also unhappy about the incorporation of their cemetery into a council one, as it would then be subject to council bylaws that were in many cases considered offensive to the religious beliefs and customs of the local Maori.<sup>32</sup>

Critics of the proposal claimed that apart from sounding out possible opposition, the council had done its best to bypass Maori concerns. As the burial ground was not officially registered, the council had also told local Maori that it could do what it liked with it. Council protests that there were too many owners to consult and therefore the land should be taken, were also criticised in such a small community where it was not hard to discover the right people to contact. After considerable local publicity, mainly through the local journalist, the Maori members of Parliament became involved and a local councillor also began to oppose the taking. At this point the council reluctantly began further attempts to find an alternative site.<sup>33</sup>

Maori reserved land was also another special issue of concern to Maori. It had often been reserved for Maori in an effort to prevent landlessness, or in an attempt to correct past injustice. Reserves had also often been chosen out of sales because of their special significance or because they were, or provided access to, traditionally rich sources of food or resources. In many cases reserves had also often been granted precisely because at the time they were not useful farm land and were only of value to Maori. However, apart from those destroyed or made useless by farm improvement operations such as drainage, in later years many of the reserves that had been confined to inaccessible or marginal areas became the subject of public purpose proposals because of their scenic or recreational value. Compulsory taking provisions also meant that many of the supposed ‘protections’ given to such reserves could easily be overturned. As a result, although there were areas protected from alienation by sale, they could simply be acquired by public works taking

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32. Correspondence and newspaper clippings, May to June 1969, MA 1, 38/2, vol 4

33. Correspondence and newspaper clippings, June 1969, MA 1, 38/2, vol 5

provisions. Once again the special nature of the reserve and the fact that it might be the last remaining link to ancestral land or traditional food sources rarely appears to have been taken into account in decision making. Protections for the most part appear to have been ineffective. At the same time the marginal nature of the land and the low value for farming purposes, even though this was not what the land was required for, was often used as a reason to pay low or nil compensation.

In the 1930s, the Clutha County Council wanted to acquire some Maori land at Kaka Point, as it was becoming a popular summer holiday area. This area had been made a native reserve originally because it had been a favoured living area for many generations and local Maori had close ancestral affiliations with the area. It had coastal access which was valuable to Maori but was poor farm land and not of much concern to the local Pakeha community until the beach became a favoured recreation spot. The usual processes had occurred with the land including fragmented title and most of the owners having to move away to earn a living. Before long the land became the target of scenic and recreation purposes.

In 1909, 122 acres of mostly bush land were taken for a scenic reserve. Compensation was assessed on the basis that road access would be made to the sea but this was never done. In 1939, as the beach became more popular, the county council sought to have the beach included in the scenic reserve as well. Although it was willing to pay rent in the short term, the council wanted the land made public so it could provide facilities on the beach. The justification for the taking was that the land was not good grazing land. The council already owned a reserve of 559 acres in the locality which had been leased out for grazing, and it was intended to put the considerable revenue earned from this towards improving the new domain. There was no suggestion that there might be an exchange of land. The new proposal would have left the Maori owners with a small strip between the bush and the beach without access to the sea.

At this point the council discovered that the 1910 requirement to make a road had never been carried out, and agreed to undertake this as part of the new taking. The department of Maori Affairs was informed of the proposal but was under a considerable handicap because at the time it had no officers in the South Island and therefore no access to local knowledge and contacts among South Island Maori communities. When they went to notify owners, officials found that most of those listed were deceased and the process of obtaining successions would take too long and cause too many problems. They therefore abandoned the attempt to notify owners and find out their views and instead the council went ahead and successfully obtained the Minister's approval for the taking.

The Maori Land Court assessed compensation in 1941 with no owners or representatives of owners present. It is not clear why, or even if the owners had been properly contacted. The judge simply observed that it was unfortunate the owners were not there to make their views known. The court was asked to accept the valuation of the taking authority as the only one presented. The judge did so, but was concerned that it was not clear what the valuation was based on, whether as farm land or popular seaside sections for example.

The remaining reserve continued to be a target for public purpose requirements. In 1946 a local residents' improvement society sought to obtain more of the land,

again for recreation. The society claimed the area required was ‘more or less waste land’ and it wanted to make it a beauty spot and build recreational facilities. The society approached the Government in an effort to ‘secure control’ over the area. It claimed there were not more than four natives left in the area as the rest had moved away with descendants scattered all over New Zealand and ‘It is therefore not possible to negotiate with the owners’. The society had also approached the Lands department and received a favourable response because the land was ‘of no grazing value’. It was only when one of the local owners tried to have the taking stopped that the society proposed to at least meet the local owners to discuss the matter with them.

The first documented views of the Maori owners were received at this time in a letter from one young woman to her local member of Parliament, Tirikatene, asking for help to oppose the proposed taking. She had discovered the intentions of the society from the local paper. There were only two Maori families still living in the area and they were concerned that the Pakeha were again trying to take their remaining land. Officials at least now knew of opposition from owners. The department of Maori Affairs seemed unable to provide much assistance however and simply got tangled up in the old problems of whether to try and have a meeting of owners given the problems of lack of successions, the fragmentation of title, and the expense scattered owners would be put to in attending a meeting. The alternatives of long-term leasing or exchange of land were apparently not considered.<sup>34</sup>

This file is also an example of the practical exclusion of Maori from the Pakeha community and the whole objections process for land takings. Although the owners were apparently upset over previous takings, the first documented views of their concerns only reached officials in 1946 when a young woman was literate enough to read about Pakeha intentions in her local paper and familiar enough with political and official processes to write to her local member of Parliament for assistance. The ‘protections’ offered by the public works provisions had clearly been ineffective for these owners.

Another area of special concern to Maori was where the taking of land and the construction of works projects resulted in the loss or infringement of other Treaty rights such as to traditional fisheries. It is clear, for example, that many coastal takings for purposes such as scenic reserves and recreation areas resulted in the destruction or loss of access to important fisheries. Construction of works such as sewerage plants could also destroy fisheries, and river and drainage works often destroyed traditional food traps such as eel weirs. Other takings could result in the destruction of wahi tapu and important natural resources. Flooding from hydro works for example could destroy important hot springs or ancient urupa. Careless land takings could also have a significant impact in other not so obvious ways, for example by causing remaining land to become landlocked so that access to it could be effectively denied. Many of these problems were foreseeable, it was simply that public works decision making did not have to take them into account.

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34. Correspondence, MA 1, 5/5/38

Many of these losses could not be compensated for even if it was possible to do so. However even where compensation may have helped, the legal principles and rules relating to damages and injurious effect were applied very narrowly and generally failed to take this type of concern into account.

It was very common, for example, for harbour boards to have vesting Acts which gave them land around harbours and powers to reclaim and take land and carry out construction works. In addition the Crown could continue to take land and construct public works on harbour board land. Such works rarely took account of Maori interests and even where they did, in earlier years there was a significant move to retract previous protections in the years under consideration. For example, early Whangarei Harbour Board vesting legislation did make some acknowledgement of customary Maori fishing rights. The Vesting Act 1917 protected any customary native land and any native fishing grounds and fisheries from harbour board rights. The vesting Act did however allow the Crown the right to take and proclaim unoccupied land for railways or roads without paying compensation. The vestings were also not meant to interfere with riparian rights. The protections were gradually whittled away in later Acts while the public works undertaken helped to ensure there was little left to protect. The Whangarei Harbour Board Vesting and Empowering Act 1923 retained the exception for native land but the fishing protection now referred to reserves set apart for the purposes of native fishing grounds or fisheries. This was quite different as the existence of such fisheries were now dependent on the existence of reserves. A similar vesting Act was passed in 1927.

By the late 1940s, the harbour board began to pressure the Government to remove any title restrictions in an effort to encourage industrial development at the port. It was claimed that by this time Maori had few rights left in the harbour worth protecting. There was apparently no customary land left, and as no fishing reserves had ever been made for Maori, it was claimed none existed and the provisions of the 1923 and 1927 Acts were therefore not required. Developments in case law were also relied on to declare that any land below highwater mark 'could not be Maori land' and that exclusive sea fishing rights could only be conferred by legislation.<sup>35</sup>

Previous public works had also been a major contributor to the loss of Maori fishing rights. Extensive reclamation works and land takings for road and railway lines along the foreshore had effectively extinguished riparian rights and construction and reclamation work had also destroyed any inshore fisheries such as shellfish beds. As a result, on the basis that in effect few rights now existed, approval was sought for the Whangarei Harbour Board Vesting Amendment Bill 1951, which specifically removed all the clauses and references relating to the protections for Maori contained in previous vesting Acts.<sup>36</sup>

The powers given to other harbour boards resulted in similar concerns. In the 1920s and 1930s, Maori complained about the powers over harbour land given to the Whakatane Harbour Board and proposals to extend these further. The board's actions as a result of these powers including reclamation and harbour works were

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35. For example, *Waipapakura v Hempton* (1914) 17 GLR 82

36. MA 1, 5/13/223

threatening access to fishing grounds from a reserve set aside to provide access to traditional fisheries near Whareotoroa pa. The works were beginning to effectively extinguish Maori riparian rights and continued access to fishing also seemed to be under threat. In 1933 when another Bill was being considered to vest even more land in the board, local Maori asked Ngata for assistance in defending their rights. They pointed out that continued fishing was an essential means of providing a livelihood for many, especially in times of economic depression.<sup>37</sup>

The reclamation of mudflat areas through public works projects also raised issues of riparian rights, access to, and loss of fisheries, and ownership of the reclaimed land and foreshore land in general. During the 1930s and 1940s for example, the Marine department undertook the reclamation of mudflat areas in the Hokianga. Maori claimed that they had never given up rights to the mudflat areas but when reclamations took place they were normally offered to the nearest, often Pakeha, farmer while the small Maori communities in the area missed out. Reclaimed land was also used for public purposes such as airfields and recreation areas also without consultation. The reclamation work itself could not only destroy shellfish beds, but Maori were also concerned that the transfer of reclaimed areas to private farms meant access to fisheries could be lost. The response of officials to these concerns was mixed. At times Maori fishing rights were acknowledged. For example some mudflats were apparently left unreclaimed to protect fisheries after Maori protests. The attitude to rights to fisheries as such was also confusing. A 1940 letter from the Native Minister to a local Maori owner read in part, 'As to fishing rights within the Hokianga Harbour being reserved solely to the Natives, it does appear reasonable that this should be agreed to'. However the draft of this letter had completely the opposite meaning in that it read that it '. . . does not appear reasonable.'<sup>38</sup> The issue of foreshore land was generally not admitted but some acknowledgement was made that Maori communities were at a disadvantage through the system of allocation of reclaimed land. Maori viewed the reclamation and disposal of the land as a taking and public works issues were involved, although the foreshore ownership issue itself is a separate research issue.

During discussions of a possible housing development in Porirua, the issue of the destruction of shellfish beds along the foreshore as the result of public works takings for rail and road construction was raised as a major concern, and a reason for a reluctance to agree to further public works projects. In this case, in the 1950s the Crown refused to admit any liability for the destruction of the fisheries or any Maori rights to fisheries at all. An official report declared that Maori had '. . . no greater rights to fish in the harbour than any other members of the public' and the Crown could not recognise such a claim unless the loss was so great as to 'shock the conscience'. Nevertheless, without admitting any liability it was suggested that the Crown could use pending improvements to housing as a means of settling complaints about the loss of fisheries.<sup>39</sup>

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37. MA 1, 5/13/46

38. Native Minister to E Wikitahi Omanaia, 25 July 1940, MA 1, 19/1/217

39. MA 1, 5/5/59

Other resources could also be lost or destroyed through land takings and subsequent works construction. Wahi tapu and urupa sites also often fared badly through this process. The flooding of rivers in the course of hydro projects for example, often caused damage and loss. Sometimes these were unavoidable but often much of the distress and resentment caused could have been avoided by a process of prior communication. In some cases losses or damage may well have been avoided altogether if concerns had been seriously considered at the planning stage. In other cases it was the arrogance of the actions and apparent lack of concern for the importance of the loss that appeared to cause the most anger and concern.

When the Karapiro Dam was flooded an important ancient burial site that had already been designated a burial reserve was flooded. In response to criticism the Electricity department initially claimed it had made a few inquiries among local Maori, but none knew of any important sites. In addition, although they were aware the burial ground was gazetted, they did not see any evidence of graves so decided there was no problem. When the owners challenged the department to produce the names of those they had contacted, as they found it hard to believe local Maori would not have known about such an important site, the department backed down and a consensus emerged that the flooding took place without any real attempt to notify or consult with the owners. The first the owners knew of the situation was when the flooding occurred.

Afterwards the Electricity and Works departments showed no particular concern or regret for the action. Work involving the blocks was taking place when Maori complained in 1947. The Works district engineer did not get around to informing Maori Affairs of the flooding until 1949, when it was belatedly decided to take the already submerged land and ask if the department knew of any objections to it. The department replied that as the land was already under water, it seemed 'pointless to raise any objection to the taking of it'.<sup>40</sup>

Another less obvious way in which public works takings contributed to interference with other Maori rights was the situation where careless takings resulted in remaining Maori land being landlocked. Takings for public purposes were not the only cause of this situation but were apparently a significant contributor. The Maori Land Court had some rights of making legal access to Maori land but these had certain time limitations. Local bodies refused to use the Public Works Act to take land to provide access because they insisted that the Act could not be used to take land for private benefit. Negotiations over access also often failed because surrounding landowners had free use of the landlocked land or could use the situation to force a cheap sale. In the 1970s it was admitted that the Public Works Act could be used to take land for access because powers existed to declare any work a public work if money was appropriated for the purpose by Parliament. There were also powers to declare a road a public work by Order in Council. However, it was decided 'those courses seem scarcely supportable' and other legislative measures had to be considered.<sup>41</sup>

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40. MA 1, 5/13/200

41. Maori Affairs to Departments of Lands and Survey and Works, 17 March 1972, MA 22/2

Agencies such as the department of Maori Affairs, the Maori Land Court, the Maori or Public Trustee and Maori Land Boards often became involved in takings of Maori land for public purposes. Sometimes this was in an effort to assist Maori landowners in an informal way and was also often because of legislative requirements and responsibilities concerning the management and control of Maori land. In some cases these agencies did provide real assistance to owners and tended to take a more protective attitude in later years. However there are some issues that appear to arise when the attitudes and actions of these agencies appear to have been more in tune with the concerns of taking authorities than the owners.

There is some evidence for example that the Public Trustee had a very narrow view of the interests of Maori owners in reserve land he was responsible for. In one case, where Works department wanted to take some South Island tenths land for example, the Public Trustee took the attitude that as the land was perpetually leased, the Maori owners' interests in the land were minimal and the lessees who had perpetual rights of renewal 'will to all intents and purposes be in much the same position as a freehold. Their interest will be paramount'.<sup>42</sup>

In 1937 when the Nelson City Council began renting Maori reserve land for basketball courts it was informed that the land was in perpetual lease and there was no right of acquiring the freehold. The council had the benefit of cheap rentals for many years but when the lease came due for renewal in 1963, it put pressure on the Government to have the land taken as it did not want to pay higher rents. The council also complained that the recreational zoning meant it could not use the land for commercial purposes. This was in spite of the fact that it was the first time in years the owners could expect something like an economic return on rents. The reasoning convinced both the Minister and the Maori Trustee however. The Minister expressed regret that legislation prevented the Maori Trustee from selling the land to the council. Therefore it was 'necessary' for the council to take the land. He assured the council that the Maori Trustee would not object to the taking because the land was being used for non-profit sporting activities, but would wait until the land was taken and then negotiate compensation. The interests of the owners and the reasons why the reserves were protected from sales in the first place do not appear to have been considered.<sup>43</sup>

In an effort to stop public works encroachment on Maori land and to avoid the situation where it was very difficult to regain land no longer required for public purposes, Maori owners made determined efforts to persuade the Government and taking authorities to consider alternatives to taking land when they were making decisions on land required for public purposes. However, for many years even when the special problems and concerns of Maori were admitted, taking authorities rejected these possibilities simply as a matter of policy.

In many cases this was because the process was simply considered too difficult or inconvenient. In the 1950s, for example, in the case cited earlier where the Army was considering a proposed extension to the Waiouru army camp, it refused to consider compromises such as licences to shoot over the land at certain times or

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42. Memo from deputy Maori Trustee, 18 July 1972, MA 1, 38/2, vol 6

43. Minister to Town Clerk, Nelson, 9 April 1963, MA 1, 54/19/13

easements which would still have left the ownership of the land with Maori. Instead it argued that in view of the ‘procedural and practical difficulties’ in obtaining some form of licence or easement to shoot over the land at intervals, administratively the easiest course of action would be to simply take the land.<sup>44</sup>

In 1945 the Soil Conservation and Rivers Control Council wanted to acquire areas of land in the Maungapohatu north block for soil and river control purposes. The Maori owners agreed to bush areas along the river being made reserves but wanted the exchange of land with an important burial site in return for other land. The council refused as it wanted full control of all the land.<sup>45</sup> In this case, as the owners only wanted to reclaim an ancient urupa rather than use the land, it seems as though some kind of compromise agreement should have been possible, but this was apparently not considered. There were many other cases, such as land taken for scenic reserves where long-term leasing may have been an acceptable compromise. However, it was only from the 1970s that in some circumstances taking authorities showed some willingness to consider this a viable possibility instead of simply insisting on taking the land.

In the 1940s, political leaders such as Peter Fraser were in many respects more responsive to Maori concerns. As well as attempting to finally settle old grievances he was also sympathetic to Maori concerns about the use of compulsory public works provisions and that land taking for public purposes was steadily encroaching on remaining Maori land. In the 1940s Peter Fraser informed departments that he was very reluctant to take Maori land by compulsion. Instead he preferred meeting Maori leaders face to face and negotiating arrangements. He was also sympathetic to proposals to exchange land if land had to be taken. For example he held meetings with the Ngati Manawa people over the proposed Murupara mill site in the 1940s. The terms of the agreement included that land for farming would be provided in exchange for land taken for those who wanted it, and that the Crown would meet reasonable costs for valuations for compensation assessment. Following this the new National Government promised to honour the agreements made when it gained office in 1949. Sites would also be made available to owners who wished to live in the new town.<sup>46</sup>

Mason, the Native Minister of the time, also had sympathy with concerns about the loss of Maori freehold land through public works provisions. In response to Maori complaints that Hastings Borough Council wanted to take Maori land for an airport he informed Government departments that might be involved that:

it would appear that the time has arrived, if it is not already overdue, when the Crown should not take any further Native lands for public purposes except in cases of strict necessity. . . . In Hawkes Bay there is ample European and Crown land available for the purposes of an aerodrome every whit as suitable as these Karamu sections . . .<sup>47</sup>

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44. MA 1, 5/5/68

45. MA 1, 5/5/36

46. For example, memo listing terms of agreement, 24 August 1953; and letter from Corbett to lawyers for owners, 9 October 1951, MA 1, 5/10/120

47. Mason to Ministers in charge of Civil Aviation and Works, 22 June 1944, MA 1, 19/1/506



In 1959 Walter Nash made efforts to avoid compulsory takings and to offer land in exchange where takings seemed unavoidable:

With the great diminution in the area of land owned by the Maori people I am anxious that all possible avenues are explored before agreeing to any further depletion particularly as in this case where some of the leading owners have asked for their interests, if taken, to be compensated for in Crown lands which they could farm.

In the end he was persuaded however that the taking was necessary and no land was available to exchange. He had to be content with insisting that notices of intention to take were issued as widely as possible to give owners a better chance to object if they wished.<sup>48</sup>

The idea of land in exchange for land taken was considered as a serious possibility by some politicians but in many cases the more entrenched attitudes of departmental officials seem to have prevailed. In many cases ministers were persuaded there was simply no land available to exchange. However an investigation of file documents reveals that this was often because in considering possible uses for such land, offering any to Maori was simply given the lowest possible priority. When Walter Nash requested that land be sought in exchange for land proposed taken for defence purposes in the 1950s for example, none suitable could be found. This was because the department of Lands and Survey regarded almost any other use as more important. All available Crown land in the area was required for general farm development schemes, or for the prison farm, or for forestry, or army training, or public amenities such as camping areas, or for subdividing for holiday homes, or it was too rough to be usable at all. Although the owners suggested they would consider rougher land suitable for forestry this was apparently not taken up by the department.<sup>49</sup>

More research is required into how effectively the concerns of ministers that remaining Maori land should be protected except in cases of 'strict necessity', were translated into practice. Preliminary research suggests political concern alone was largely ineffective without legislation to back it up as the entrenched attitudes of taking authorities often prevailed. Governments were also traditionally very reluctant to interfere in takings by local authorities, even where, as in the case of the Karamu sections, the Minister clearly felt the taking would do an injustice to Maori interests. There are many documented cases where although ministers agreed that taking decisions were having a detrimental effect on Maori interests and they directed Government departments not to become involved, they still refused to interfere if local authorities were taking the land. For example in the Dannevirke airfield case already cited, Minister Corbett typically refused to interfere, '... neither I nor the Government has the legal power to intervene'.<sup>50</sup>

By the 1960s, Maori owners were becoming more assertive in demanding land in exchange for land taken as a way of avoiding overall losses of Maori land and by

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48. Nash to Minister of Defence, 16 June 1959, MA 1, 5/5/68

49. MA 1, 5/5/68

50. MA 1, 5/5/111

the 1970s Government agencies and ministers were becoming more responsive to the idea that land could be used for public purposes without having to take the actual ownership. For example, special legislation was passed enabling the Mercury Islands and Alderman Islands to be used for scenic and wildlife reserves but on certain terms written into the legislation, including that the land would revert to Maori ownership if it was no longer required for such purposes.<sup>51</sup> In addition, in 1978 the Electricity department adopted a policy of leasing rather than taking land required for the Ohaaki geothermal power station.

By the 1970s the Government was also willing in some instances to negotiate long-term leases for scenic reserves required and to include representatives of Maori owners on the boards of management. For example, the Acting Minister of Lands described his views on the proposed scenic reserve for Lake Tarawera and Mount Tarawera in 1974:

I do not consider that it is necessary for the Government to purchase the Maori land as I consider it should be left in Maori ownership and leased in perpetuity as a reserve.<sup>52</sup>

Without legal requirements, however, this change in attitude was often inconsistent and haphazard. As had been the case historically, the Government also continued to find that its influence on the decision-making policy of taking authorities was also limited without legislative backup. As late as 1981, in the case already cited, the High Court found that there was no legislative discretion for Cabinet to refuse to issue a taking proclamation on the grounds of policy that public works takings of Maori land should be more restricted.<sup>53</sup>

The Public Works Acts allowed ‘takings’ by agreement and purchase, as well as by compulsion. Works consistently claimed that it had adopted a policy of negotiating with owners to reach agreement before land was taken. Land-taking procedures were simply used to simplify matters especially where there might be complicated legal transfers. Works claimed in the 1946 memo already cited for example, that contrary to popular notion, most land acquired under the Public Works Act was not acquired by compulsion. The Act allowed a ‘take’ by proclamation either by agreement or compulsory transfer and also gave power to purchase by transfer. ‘Taking’ by proclamation by agreement with the landowner was the most common procedure and was the most preferred by the department. This was because it was usually less expensive, it conferred an indefeasible title on the Crown whatever the defects in the former owner’s title, and it gave a right of possession before payment was made and automatically freed the land from all encumbrances. In some cases the proprietor did not have clear authority to sell and in those cases also it was necessary to take by agreement or by compulsion to overcome the lack of authority to sell. The clear implication was that the department gained a willing agreement from a landowner but went through the process of

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51. Letter from Secretary of Maori Affairs, 6 June 1972, MA 19/1/759, vol 1, AAMK 869/683a

52. Acting Minister of Lands to P B Reweti MP, 8 March 1974, MA 1, 19/1/759, vol 2

53. *Dannevirke Borough Council v Governor-General* (1981) 1 NZLR 129

taking by proclamation in order to avoid administrative and legal difficulties and to avoid extra expense.

The term ‘willing agreement’ in itself needs to be treated with care. Experienced lawyers such as Barker have shown how even in the context of general public works takings, section 32 agreements were often heavily influenced by the perceived lack of real alternatives. Where there was no right of objection for example, anything other than an ‘agreement’ could well have been regarded as pointless. Delays and uncertainty in the objection process as well as the powerful position of taking authorities with a consequent delay in compensation could also be a factor in deciding owners to enter an agreement. Finally, the taking authority had the backup of using compulsory provisions and the possibility that this might leave an owner even worse off may well have contributed significantly to decisions to enter agreements. All taking ‘agreements’ therefore need to be treated with some care and it cannot be automatically assumed that they were made on a truly willing basis.<sup>54</sup>

These factors applied to Maori owners, as well as to general landowners, in cases where Maori owners were in a position to make agreements. There is ample documentary evidence that Maori were told in many cases that if they did not agree to a purchase, then the land would be taken. For example, the owners of Whataroa Maori reserve were called to a meeting to discuss a Crown proposal to buy the land. When one of the owners asked if they were obliged to sell they were told, ‘No, but the Government can place a proclamation over the land and take it . . .’<sup>55</sup> It seems that Maori may also have been at a disadvantage because of the lack of informal opportunities to negotiate and discuss options as compared with general landowners. In addition the extra problems with compensation faced by Maori owners may have decided some to take the possibly better option of a sale.

It seems clear that the Crown was also willing to apply pressure to reach an ‘agreement’ or ‘settlement’. This could take the form of Government officials and agents pressuring individual landowners or the use of the powerful position of the Crown to invoke measures intended to apply pressure to force an agreement. In addition, although Crown officials at times agreed to terms in order to effect an agreement and these were entered into in good faith by Maori owners, the Crown was noticeably reluctant to uphold the terms once the work had been constructed and the land acquired.

In 1947 the owner of the majority of interests in some Maori land in Te Kuiti received formal notice that the Public Works department needed to use her land as access to a nearby quarry. The concerned owner was then infuriated to find that the department took more than just access. Fences were cut, letting out stock, and a stone crusher began operating on her land. As a result she decided to prevent trucks from crossing the land. In an effort to calm things down the land court judge was approached and a native interpreter and native agent were sent with the works engineer to have a conference with her after which a ‘settlement’ was reached. In an unofficial note that was filed anyway, the native agent reported that the

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54. R I Barker, ‘Private Right vs Public Interest – Compulsory Acquisition and Compensation Under Public Works Act 1928’, *New Zealand Law Journal*, vol 45, 1969, p 253

55. MA 1, 5/5/86

conference actually consisted of three hours of ‘explanation and persuasion’ as she raised all kinds of barriers ‘one by one of which we managed to break down’. After this and another two-hour session the next day, she finally agreed to sign the agreement ‘dictated to us over the phone from Wellington’.

The ‘settlement’ gave Works officials rights of entry and use of the property in return for an agreed payment, part of which was paid immediately and the balance was to be paid as soon as possible. Four months later the land court judge had to request some action from the department himself as the balance was still unpaid. He noted that it was not fair to delay the payment and the delay might also imperil the settlement as ‘Te Tau is difficult to control when she feels she is not being treated fairly and she seems to have justification here’.<sup>56</sup>

The Crown could also use legislative powers to try and force agreements. In the 1950s, the Maori owners of the Rotorua Runanga 202A block agreed to sell the timber on it to private interests or to the New Zealand Forest Service, whoever offered the best price. The Lands and Survey department also wanted the block for a scenic reserve and offered to buy the land for the combined value of the land and timber. The land itself was worth about £55 while the millable timber was worth nearly £2000. By selling the timber the owners earned much-needed income but retained their land. The owners therefore refused to sell. Under the Forests Act 1949 however, the Minister’s consent was required for the sale of the timber. In 1953 the Lands and Survey department requested the Minister to refuse approval to the sale as ‘Refusal of consent would permit the re-opening of negotiations to purchase by the Crown’. The department kept arranging meetings of owners in an attempt to gain agreement to a sale and the owners just as determinedly refused to attend the meetings or opposed the proposal. In one case the department had to send cars to pick up two owners to get the necessary quorum for a meeting. In 1954 the department was still trying to have fresh meetings called and in the meantime the position was described as ‘. . . while the Maoris will not sell the land to the Crown for a scenic reserve, the Minister of Forests will not permit the sale of the timber’.<sup>57</sup>

The Crown could also place restrictions on the alienation of land to ensure competition from other buyers did not push prices too high. In the 1960s owners of land near Lake Taupo were warned off making private deals over land the Crown wanted for reserves. The owners were warned of the restrictions and the penalties for breaching them.<sup>58</sup> Similarly, in the 1920s and 1930s the Defence department kept applying to have restrictions rolled over on about 22,000 acres of Maori land that it wanted to use but could not afford to buy.<sup>59</sup>

However the opportunity for agreements before land was taken appear to have been much more limited for Maori land than for general land. This was simply because the ‘problems’ of multiple ownership of Maori land seem to have resulted in a widely used policy that contacting and negotiating with Maori owners was too difficult and therefore in the case of Maori land a taking authority could move straight to compulsory provisions.

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56. Correspondence, MA 1, 21/2/6

57. Correspondence, 1953–1954, MA 5/5/91

58. MA 1, 5/5/1

59. MA 1, 5/5/8

It is undoubtedly true that contacting owners of freehold Maori land was often different to and could be more difficult than contacting owners of general land. However instead of making accommodations to meet this problem while still maintaining owners' rights, until relatively recently it seems to have been much more convenient to simply use this as a convenient excuse to go straight to compulsory provisions. In these cases legal protections were even weaker for Maori land and it seems likely therefore that Maori owners were much more commonly effectively denied this important protection afforded to owners of general land. In terms of the principles of Treaty partnership, this lack of effort or evasion of responsibility to make prior contact was also of immense concern to Maori owners. The general assumptions in the legislative provisions that Maori land could be subject to weaker protections for administrative convenience were therefore also reflected in administrative practice.

The policy of evading contact with Maori owners also had other implications. For example, where taking authorities could move to compulsory procedures so easily and the possibility of protracted negotiations could therefore be evaded, once again Maori land became a prime target for takings. The use of compulsory provisions also meant that in combination with the effect of other provisions, the protections concerning notice and compensation could also be more ineffective. In some cases, for example the bigger works projects, Works at least did communicate more with Maori owners about major proposals. However even into the 1970s, on projects considered too small to worry about it, was quite common for Works to ignore all the normal protections under the guise of it being 'necessary' to use compulsory provisions because of multiple ownership.

Crown officials also at times entered agreements with owners that involved terms imposed by owners, but although they were entered into in good faith, Maori owners were often unaware that the subsequent 'taking' procedure meant the Crown did not legally have to honour them and was often reluctant to admit any moral obligation. In these cases, it is clear that the use of the taking procedure was more important than simply an administrative device to shortcut difficult title problems.

It is often difficult to research these claims as there is often no record, apart from the owners' claims, that such agreements were made. Because the taking procedure vested the land without any conditions, even if such agreements were recorded, as the terms had no legal status, they were often not treated with the same care as the legal record of the taking and many apparently did not survive.

There is some documentation however that shows such agreements were made. One of the most well known is probably that concerning Maori land acquired for Raglan airport during the Second World War. In the mid-1930s the Air department made an effort to locate emergency landing grounds for the use of light aircraft on the main air routes. It was the duty of Mr Edmond Gibson, who was a senior official at the time, to locate possible sites. In February 1936 he found one near Raglan but was told by locals that it was Maori land and they would never agree to the use of it as it had important historical links and was the site of important burial grounds. By chance, Gibson met two local Maori men who confirmed that any agreement would be most unlikely. However, he persevered in trying to explain to them why

the land was needed, that it might be a Maori pilot who needed to use the field and that it was only required for emergencies and would be returned after the war. One of the men was a returned serviceman from the First World War and both became more sympathetic after listening to Gibson. They asked for a request to be sent to local elders and promised they would support the request on the understanding that, as promised, the land would only be used as an emergency airfield and it would be returned when it was no longer needed. Gibson reported back to his superiors on the deal and heard later that an agreement had been reached on the terms suggested.

Whatever records were made of such an agreement were later lost, possibly as the result of a series of restructurings of what was then the Air department. The land was taken for an aerodrome on 2 October 1941 and compensation awarded by the Maori Land Court. Part of the terms were that the Works department was to move the meeting house and associated buildings and re-erect them at another site. In 1953 this still had not happened so the court revised the compensation award and ordered a cash payment towards a new meeting house. The land stopped being used as a landing field about 1953. The aviation authorities began leasing the land but in 1969 decided to have it declared Crown land to be disposed of by the department of Lands and Survey. The land was then vested in the local county under the Reserves and Domains Act as an aerodrome reserve. The county leased the land to the local golf club on a long-term lease with rights of renewal. The lease did not exclude urupa and no requirement was made for their protection. The golf club also refused requests to fence urupa off. The lease itself also turned out to be invalid. The lease effectively took the land out of the owners' control, in spite of requests to have the land returned. The owners pursued the issue and it became one of the best-known cases of the land protests of the 1970s.

As it turned out, when Gibson read of the continuing dispute in 1979 he contacted the Government to confirm the owners' claims that the original agreement was subject to the return of the land. He also swore an affidavit to that effect in an attempt to uphold the honour of the Crown. He was a reputable man and the Government was obliged to take notice of him. He had been Director of Civil Aviation in 1949 and was held in high community regard. Eventually the Government did decide to uphold the terms of the agreement, although there were still differences over the payment required for the land for some time.<sup>60</sup>

Other similar agreements were also made. Waharoa aerodrome was also established for emergency use during the war. In this case the Air department was not certain that it wanted the land and decided to rent it, although it initially took some effort by the owners and the Maori Land Court to ensure the rent was paid. It was also agreed that the land would be returned after the war. It was apparently put to the owners that the land was required because of the war emergency and would be returned after the emergency was over. The owners agreed because as one later put it, '... if the Germans came and overran the land, it would be of no use to me. That is why I agreed'. If there was ever a written record of this agreement it was lost as early as 1944. However, the land court judge had been present when the matter was being discussed, although not in a formal role.

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60. Correspondence, MA 19/1/671, AAMK 869/678a

In 1944 the Air department informed the Native Minister that it would not require the land for airforce or civil purposes after the war. However the local bodies and aero clubs in the area began to apply intensive pressure to have the field retained. By 1946 the now Civil Aviation department had been influenced by this and argued that the land should not be returned unless there was no reasonable possibility that anyone else might want it:

From the viewpoint of this department, the fact that an eminently suitable airfield has been developed at Waharoa at public expense makes it most undesirable that the land (or any portion of it) comprising the runways should be released until it has been definitely established that there is no reasonable demand for it as an aerodrome.<sup>61</sup>

The upholding of the agreement was clearly not a major priority.

This was a contravention of the terms of the agreement as the judge understood them, and in 1946 he wrote a memo outlining his understanding of the agreement. This was that if the land was no longer required for war purposes it would be returned to the owners. If the land was wanted for other flying purposes then he felt that should be a separate matter between those authorities and the owners:

It would I think be a breach of faith with the owners for the Government to take any step other than to carry out the bargain to reinstate and return the land.<sup>62</sup>

Matters were delayed throughout 1947 in order to give aviation interests time to consider various proposals. The position was summarised in a 1947 Maori Affairs report. The National Airways Corporation, which was responsible for initiating and operating commercial air services throughout the country after the war, did not consider Waharoa would ever be used for commercial services and it was not required as an alternative or emergency field. However there was a strong local demand for the retention of Waharoa ‘firstly for club and training purposes and secondly in the hope that at a later date, it may be used by commercial services’. The report recommended that any further negotiations should be left to local authorities.<sup>63</sup>

At this point it may have been expected that central government would return the land as agreed and allow local authorities or others to begin their own negotiations for the purchase of the field. However this was not the case. Intensive lobbying from local authorities, chambers of commerce, and aero clubs resulted in continued Civil Aviation support for retaining the land. The National Airways Corporation was also persuaded to agree that the aerodrome ‘may be useful as an alternate to Rotorua’ and that at a much later date ‘it might be of some value to serve feeder and sub feeder services’. The Maori Affairs department was also persuaded by mid-1947 that commitments to Maori were now having to be balanced by matters of ‘national

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61. Acting Controller of Civil Aviation to Secretary of Native department, 9 September 1946, MA 1, 19/1/610, vol 1

62. Correspondence, MA 1, 19/1/610, vol 1

63. Maori Affairs to Prime Minister, 29 January 1947, MA 1, 19/1/610, vol 2

importance'. Although the department was concerned that the Crown was obliged in good faith to return the land and then seek fresh negotiations, it was persuaded that because runways and fences had already been constructed, then the owners could be approached with new proposals without first handing the land back:

While seeking to fulfil the promises made to the Maori owners, we must, on the other hand, give full consideration to the country's future air services . . . as the matter has now assumed what might be described as national importance . . .<sup>64</sup>

The department therefore continued to discuss possible proposals with other departments. Civil Aviation continued involvement on behalf of aviation interests and Works began making plans for a smaller local airfield.

Civil Aviation was also responsible for establishing a committee to consider future civilian airport needs. In spite of a less than enthusiastic commitment from NAC, the committee decided on 23 January 1948 that the Waharoa aerodrome with shortened airstrips would be maintained as a civil aerodrome and requested that negotiations begin with the Maori owners for the acquisition of the land required. The first formal meeting with the original Maori owners was called just five days later on 28 January. Although the meeting was described as a consultation, it was clear that the decision to acquire the land was not a matter for discussion. Notes of the meeting show that the owners were completely opposed to the taking and wanted the land returned as originally agreed. They referred to the original agreement and the promise that the land would be returned when the emergency was over. As the emergency no longer existed, they wanted the land back. They also pointed out that the land had important ancestral links and burial sites. However, at the beginning of the meeting, a Works land purchase officer told them that it was his duty to inform them that 'the land is to be taken permanently for an aerodrome'. The Government was agreeable to giving some other land in compensation but 'the Government is definitely going to take the land'. Therefore discussion would only be accepted on the matter of compensation.<sup>65</sup> The owners were later described as 'satisfied' once the proposals concerning compensation including exchange of land were explained to them, although this was clearly not the case.

The airport was already a going concern and as so often happened the tidying up of details such as the actual formal taking of the land and the exact compensation details including the land to be included was a long drawn-out process. The transfer of land in compensation appears to have caused major problems and at one stage owners even threatened direct action to move matters along. The processes of finalising the formal taking and compensation details were still taking place in 1953.<sup>66</sup>

In other cases, the Crown agreed to terms requested by owners when land was taken, where it felt the intent of owners could easily be avoided. In 1948 the Crown offered to purchase land from Maori owners required as an addition to a local park and school playground. The owners were willing to gift the land on condition that

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64. Maori Affairs to Civil Aviation, 9 October 1947, MA 1, 19/1/610

65. Notes of meeting held at Waharoa, 28 January 1948, MA 1, 19/1/610, vol 2

66. Correspondence, MA 1, 19/1/610, vol 3



members of the original owners' families were included on the Domain Board administering the park. The department of Lands and Survey agreed because the terms in reality meant little. The department explained that Maori members would actually be appointed to the Domain Committee not to the more powerful Domain Board.<sup>67</sup>

Crown policy in other areas also often influenced agreements so the intentions of Maori were undermined. In Porirua, in the case already cited, the Government proposed taking undeveloped land behind the pa for a housing development. The whole area was badly serviced, largely as a result of antagonism between the county council and Maori over payment of rates. Fragmentation of title was behind many problems, including the issue of paying rates and in effectively using the land. The land also needed extensive earthworks to be made suitable for housing and this was beyond the investment capacity of the Maori owners. The Government proposed to solve these problems by developing the land itself. The problems of poor services such as roading and water supplies would be improved for the whole area and it was promised that the Maori township at the front of the area would be improved at the same time. It was also decided to take the land under the Public Works Act to circumvent all the title problems. By the 1950s it was Government policy to try and reach agreement with owners before taking any land, especially where big projects were concerned. In this case, meetings were held at the pa, including with the Ministers of Maori Affairs and Works. At the same time, any new housing mortgages were denied for the land, effectively preventing the building or improvement of new homes while attempts were made to gain agreement to the proposal. It was also proposed that the expected improvements could be considered a means of remedying claims arising from the destruction of fisheries through other public works activities in the area.

The Maori owners were generally supportive of plans to redevelop and improve their land and to provide extra housing. However they were less enthusiastic about the compulsory taking of land. They made it clear that the land was important as a last remnant of ancestral land and that they wanted any housing to go to Maori needs in the area. Government officials rejected this however. A report claimed that 'It is questionable whether this proposition has much to commend it' while noting that the pa area itself was not a 'striking example of planned subdivision'. In addition, it was decided that '. . . The aggregation of further Maori families in or about the Pa area is really against policy' and it was better to 'avoid undue concentrations of Maori in the area. . . .' It was decided instead that the land would be taken to overcome title problems and would be used for mixed housing. An equivalent number of other sections would be made available to Maori throughout the various state housing areas in Wellington to make up for the ones used for non-Maori housing in the block.<sup>68</sup>

In many cases where Maori land was taken, it seems clear that compulsory provisions were used because it was simply considered too difficult or too time consuming to contact owners. The habit of moving straight to compulsory

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67. MA 1, 5/5/52

68. MA 1, 5/5/59, vol 3

provisions where Maori land was concerned apparently became part of the entrenched attitudes of taking officials. For example, when Works was brought in to help acquire a new school site on Maori land in Pipiriki township, the response from the local engineer was:

to follow the usual practise where Maori land is involved and take the land under the Public Works Act 1928, leaving the Court to make an award as to compensation.<sup>69</sup>

In the case cited where the army wanted extra Maori land at Waiouru camp, the same attitude prevailed:

In view of the multiplicity of owners and the number of blocks of land involved it has proved difficult to make much headway in negotiations for the acquisition of this land. The most satisfactory course in the circumstances appears to be to take the Maori land by proclamation under the Public Works Act . . .<sup>70</sup>

Other departments, such as Lands and Survey, and local authorities also seem to have adopted similar attitudes. For example, when the Lands and Survey department wanted land for a proposed scenic reserve and discovered it was held by a considerable number of Maori owners, the automatic response was that ‘probably it will be advisable to take the land under the Public Works Act’.<sup>71</sup>

As noted in previous chapters, Works did have methods available for contacting Maori owners such as those involving calling of meetings of owners used when purchasing land. These were developed well before this time period. For example, section 370 of the Native Land Act 1909 contained this kind of provision. The difficulties of contacting all owners were also recognised by rules that only required a quorum of owners to attend and enabled majority decisions to be made. No doubt there were some flaws in this process but at least it provided a means of contact with owners. However, taking authorities appear to have been very reluctant to use it. There is evidence that the Maori Affairs department tried to use such meetings for land takings right through this period and at times it was successful in informing owners of proposals, but except for big projects and takings requiring some cooperation, taking authorities appear to have given little support to such meetings. It was also often possible to contact leaders among landowners and hold useful talks with them. This was a traditional and acceptable means of contact for many Maori but again taking authorities were reluctant to even do this.

Instead Works often insisted on very technical formalities that almost ensured agreements would be impossible. For many years for example, Works insisted on the need to obtain ‘proper’ consents from all owners, even though this wasn’t even required for a Crown purchase. For example, in 1955 when land was required for Meremere power station the District Commissioner of Works requested the names and addresses of owners and informed the registrar of the land court that:

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69. District Commissioner of Works Wanganui to Registrar Maori Land Court Wanganui, 9 February 1953, MA 1, 5/5/78

70. Maori Affairs to Army department, 6 September 1950, MA 1, 5/5/72

71. Lands and Survey to Maori Affairs, 27 September 1938, MA 1, 19/1/151

If however it is not possible to obtain properly attested and certified consents from the owners or if there is doubt as to the Maoris now entitled to the land, or numerous Maoris affected, it will be necessary to take the land under the compulsory provisions of the Public Works Act.<sup>72</sup>

For many years the department of Maori Affairs also followed a similar although not so inflexible policy and agonised about calling meetings of large numbers of owners who might have to travel long distances to discuss land of very little value. At the same time the department neglected to consult those owners in the locality for even an indication of opinion. By the 1950s however, the department was beginning to advise taking authorities to at least contact owners in the locality for their views. When the Wairarapa South County Council wanted to take land for a road deviation it asked the department and the Minister for assistance because it felt that there were too many owners to contact itself. The department replied that at least the council could contact owners living in the locality for their views.<sup>73</sup>

Works did have some genuine concerns about the process of calling meetings of owners. The process of calling such meetings was often complicated and subject to delays, especially if successions had to be decided first. Works also complained that the relative lack of land value meant the landowners were being put to more expense in attending a meeting than the land was worth. However these were problems imposed on Maori owners by the system developed by the land court. They were now being used to deny Maori normal rights in the taking process. Costs for such expenses as attending meetings were difficult to extract from taking authorities for all landowners and proper recognition of this problem was not made until legislative changes in the 1970s. However it is clear again that this problem fell relatively more heavily on Maori owners because of extra costs where title was so fragmented and owners with interests could be scattered over a wide distance. Sometimes, especially where big projects were involved, departments assisted with the costs of attending meetings, but this was apparently not a common occurrence.

Taking authorities also had the expertise of the Maori Land Court in assisting with determinations of ownership. Although this was used more often in later years, again most authorities were reluctant to get into the complexities involved. They were, however, noticeably keen to leave the same complexities to the court when compensation had to be paid out. In fact there is a noticeable reluctance for taking authorities to come to terms with the Maori land title system at all, even though in theory it should have treated it with equal respect to the general land system. This reluctance and unfamiliarity may have caused further problems for Maori landowners and certainly helped convince taking authorities to rely on compulsory provisions.

In Napier in the 1950s for example, the District Commissioner of Works informed the registrar of the Maori Land Court that on investigation of land required for a post office site, a search in the Napier Land Transfer Office had shown no title to the land 'and accordingly it appears that procedure under the

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72. District Commissioner of Works to Registrar Waikato Maniapoto Maori Land Court, 22 August 1955, MA 38/2, pt 3

73. Correspondence, 1953, MA 1, 38/2, vol 2

Public Works Act 1928 is the only convenient method of acquisition'.<sup>74</sup> In 1975, following improved notice provisions, it was realised that Works had previously failed in practice to treat the Maori Land Court title records with the same importance as those in the main land transfer system. This may well have caused problems to landowners when taking notices were issued as well as causing difficulties when compensation was awarded. A Maori Affairs department solicitor noted that Works should have ascertained the correct descriptions of Maori land taken, by referring both to the land transfer system and the Maori Land Court title records, but in most cases they had completely failed to have any regard to the Maori Land Court title system.<sup>75</sup>

In later years, it became policy for Works to attempt to purchase Maori land before resorting to taking, but issues arise of how effective this policy was when moving to compulsory provisions because of title difficulties was so easy. There were also other attempted improvements. It was policy for many years to contact the department of Maori Affairs for advice and assistance and the Maori Land Court was also contacted for names and addresses of owners. Again issues arise of how effective these policies were and how well they were followed and this requires more extensive research. Preliminary research indicates, for example, that the department of Maori Affairs and the Maori Trustee had great difficulty in persuading Works to keep to its policy of informing them about every proposed taking of Maori land.

For example, the Works and Maori Affairs departments appear to have made regular formal agreements for Maori Affairs to be notified of all proposed takings of Maori land. However, just as regularly Maori Affairs appears to have been forced to complain that the policy was obviously not being followed. In 1947, for example, just such an agreement was made between the under-secretaries of the two departments. It was intended that the Under-Secretary of Maori Affairs would then inform the registrar of the appropriate Maori Land Court to see if there were any objections to the takings as a matter of policy or expediency. For example the land might contain burial sites or there might be some blocks which the Maori owners considered reserves or papakainga, but which had not been officially gazetted as such. There might also be reasons why certain owners or certain land should not be the subject of a taking. 'Generally speaking' the under-secretary did not feel there was a need to contact owners about the information as they would have the statutory 40 days to make their own objections. However, where leading owners could easily be contacted, he thought it may be as well to discuss the information with them before passing on any views.<sup>76</sup>

By 1948 Maori Affairs was complaining that the policy clearly was not being followed. The under-secretary pointed out that if Works would cooperate they might well save themselves considerable embarrassment by obtaining information they might be unaware of, such as the existence of important burial sites. They might also avoid unnecessary delays caused by aggrieved Maori.<sup>77</sup> This pattern of

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74. District Commissioner of Works Napier to Registrar Maori Land Court, 4 April 1952, MA 1, 38/2, pt 2

75. Internal Maori Affairs memo, 26 February 1975; and other correspondence, MA 1, 38/2, vol 7

76. Under-Secretary Maori Affairs to all Maori Land Court Registrars, 11 September 1947, MA 1, 38/2, vol 3

77. Maori Affairs to Commissioner of Works, 15 December 1948, MA 1, 38/2, pt 1

making agreements and then complaints that they were not being properly kept to appeared to continue until legislative changes in the 1970s required proper notification.

Works often did routinely contact Maori Affairs about takings, but the policy relied largely on the goodwill of local district commissioners. While the policy was often adhered to for big projects, it was often overlooked for many smaller takings. The policy also needs to be treated with some care, as in many instances Works appears to have used a routine contact with Maori Affairs as a replacement for trying to contact the actual owners. While the department of Maori Affairs obviously felt its role in advising of possible problems was clearly separate from the requirements to notify owners, it seems that in many cases Works regarded the notification as a reasonable alternative and no objections therefore meant agreement. When the Maori Trustee was given the responsibility of negotiating compensation in 1962, Works was required to notify that office so it knew of upcoming compensation claims. The district offices of Maori Affairs noted at the time that Works appeared to feel that this was an adequate substitute for giving notice to owners.<sup>78</sup>

While the department of Maori Affairs was often helpful in assisting owners, there were other cases where it seemed more concerned with smoothing the way of the taking authority than advocating owners' concerns and interests. The department was concerned to avoid unnecessary delays in takings and to help taking authorities to avoid embarrassment, but the readiness with which it often accepted takings and held meetings to change owners' minds or to persuade them to accept proposals often caused resentment. For example, in the case already cited, concerning a group of farmers and their invalid licence to mine limestone on Maori land, it is obvious that the initial failure of officials to properly challenge the licence and then their determination in trying to persuade the owners to agree to ratifying it, only made the owners more 'desperate' and resentful that the department was more interested in the plight of the farmers than the interests of the owners.<sup>79</sup>

In addition, the department often did not have enough information to adequately answer owners' queries when meetings of owners were called to discuss proposed purchases of land required for public purposes. For example, when Maori land was required for a school site in Pipiriki the department called a meeting of owners to discuss a possible purchase. Departmental officials were unable to answer owners' questions and could not properly explain the reasons why the Education Board wanted all the land required, or why other Crown land in the area could not be used. In addition, although they were authorised to offer up to £30 they only offered £10. As a result, opposition to the proposal was so strong the chairman of the meeting decided the opposition was obvious and declared the motion lost. Works was then brought in and advised taking the land under the Public Works Act.<sup>80</sup>

There were other attempts to improve takings procedures when it came to Maori land. It is clear that attempts were made to improve communications between

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78. Wanganui District Office memo, 17 July 1964, MA 1, 54/19

79. MA 1, 19/1/650

80. MA 1, 5/5/78

departments, and that at times politicians insisted that compulsory takings of Maori land required Cabinet approval, particularly where the Maori Affairs department objected to the taking. For example, in 1952 Works reiterated the policy of contacting Maori Affairs. In a memo it was noted that it was customary to notify the department of proposals to take Maori land and this was done partly out of courtesy and partly in case the department had any knowledge of possible objections to the taking apart from any objections the owners themselves might want to make.<sup>81</sup> In 1952 the Education department also reported to Cabinet seeking approval for a proposal to take some Maori land for a school.<sup>82</sup> However more research is required into how effective these measures were. There is ample documentation for example that appears to reveal that Works officials could be quite haphazard in their notifications and communications with the Maori Affairs department. The issue also arises of how adequate a substitute notifying the department was as a means of improving communication with owners.

It seems clear that in spite of a general government policy by the 1950s to attempt to acquire land by agreement before any compulsory provisions were used, it was often simply too easy to go straight to compulsory provisions as being more 'expeditious' where Maori title was concerned. Documents also often leave the impression that this was an easy way out of what might prove to be 'protracted' negotiations over agreements, particularly in later years when Maori were more assertive in requiring land for land and in cases where Maori were in a position to hire expert assistance in negotiations. For example in the Murupara project concerning negotiations over the acquisition of land for a rail transfer unit in 1953, officials were clearly concerned when the owners hired a Queen's Counsel and an expert valuer to assist them.

The big projects such as Tongariro also require their own research. It is clear even from preliminary research that the initial goodwill and attempts to properly inform and negotiate with owners often simply got overrun by other imperatives once the land was in use and new needs became evident. The complicated nature of the issues involved often means that owners often appear sidelined by the enormous number of officials, valuers, lawyers, and others who become involved in such projects. The whole process appeared to become very complicated, bureaucratic, and paternalistic.<sup>83</sup>

However, in spite of the good intentions of the Works policy statements it seems clear that right into the 1960s and 1970s, it was still common for Works to undertake smaller public works projects such as road alignments without bothering to inform either the department or the owners. It was often not until agencies were given legislative responsibility to improve matters that the scope of some of these problems became apparent in official documentation.

In the 1960s the Maori Trustee was legislatively required to negotiate compensation for Maori land taken for public works that was held in multiple ownership. As a result, the Maori Affairs department made yet another effort to

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81. Memo from Works to Maori Affairs, 13 March 1952, MA 1, 38/2, pt 2

82. Cabinet papers 1951–52 re Kaihu school, MA 1, 38/2, vol 2

83. For example, MA 1, 54/19/24/1

ensure it was being notified of all takings so that it could alert the Maori Trustee and maintain accurate records of proposed takings. The department requested information from its district offices as to whether such notifications were being made available and the results were revealing. The Rotorua district office replied that:

The main problem in dealing with the Ministry of Works seems to be that they will go ahead and do the job and leave the formalities of proclamation etc to be followed up years later after the job has been completed. . . . We have one case in the Matahina dam area where the Ministry of Works just went ahead and helped themselves to the use of Maori land and we did not hear about this until one of the owners complained. Our impression is that the technical staff in the Ministry of Works goes ahead and gets a job done without regard to ‘administrative niceties’.<sup>84</sup>

The district officer in Gisborne also commented that the majority of cases concerned land taken some years ago for road straightening or widening purposes where Works in the past overlooked the necessity of proclaiming the land, not to mention the assessment of compensation as required previously through the Maori Land Court.<sup>85</sup>

The Auckland office did not have problems with notifications but was concerned at the ready use of compulsory provisions for Maori land. The office had recently tried to persuade the Ministry to negotiate with the owners first (there were only six owners in each of two recent cases of Maori land required). However, the Ministry seemed to take the view that the Public Works Amendment Act 1962 absolved them of any obligation to deal with owners and that settlement of any claim for compensation would be with the Maori Trustee. The office told Works that it should only be called upon in matters of dispute and that where it was convenient to deal with a small number of owners it should do so and acquire the land by transfer. The office had offered to cooperate fully in assisting Works to do this but had not received a reply and asked for further advice.<sup>86</sup>

The Maori Trustee responded that while it was desirable for the taking authority to negotiate, it was not obliged to do so and in some cases where there were large numbers of owners, negotiations were ‘out of the question’. The Maori Trustee could not ‘thrust negotiation down the throat of the taking authority’. At best it could only make a suggestion that negotiations were tried where there were few owners and they lived within reach. The Trustee also had no legal authority to conduct negotiations for an agreement to take land unless he was an owner.<sup>87</sup> The Maori Trustee also informed local authorities of the new responsibilities for negotiating compensation and asked that the authorities also notify him of any intentions to take land.<sup>88</sup> It is not clear from preliminary research how well local authorities followed up on this request.

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84. District Officer Rotorua to Maori Affairs Head Office, 5 June 1964, MA 1, 54/19

85. Memo, 25 May 1964, MA 1, 54/19

86. Memo from District Office Auckland, 29 May 1964, MA 1, 54/19

87. Memo, 25 June 1964, MA 1, 54/19

88. Letter to New Zealand Counties Association, 26 June 1964, MA 1, 54/19

The continuing delays in notices and formal proclamations also prompted the New Zealand Maori Council in 1965 to seek an amendment to the Maori Affairs Act 1953 on the basis that any taking authority should have to state the legal basis for any occupation of Maori land and if this was not forthcoming within 30 days then the Maori Trustee should be able to sue. This suggestion was rejected by the Under-Secretary of Maori Affairs as not being ‘appropriate’, as if taking authorities exceeded their rights of entry, then anyone who had suffered could seek a legal remedy for trespass.<sup>89</sup> In 1969 the department was still trying to seek ways to overcome lack of notification problems.<sup>90</sup> It was also realised that the past failures of Works to refer to Maori Land Court titles properly in making land-taking proclamations may also have caused problems in proper notifications and in payment of compensation where, for example, partitions had not been properly taken into account.<sup>91</sup>

As late as 1974 there was still evidence of failures by Works to properly notify owners of Maori land for works such as road realignments. The Hamilton district office complained for example, that in one case road widening had been carried out and was in use for a number of years before Works got around to giving notice of intention to take the land for a road and for better utilisation. The office complained that this practice made:

a farce of the whole statutory procedure which gives the owners the right to object. . . . A lot of ill feeling has arisen amongst Maoris in this district over what they have regarded as the unfair proportion of Maori land being taken for public works etc and the sort of situation that has arisen in this case does nothing to improve their temper.<sup>92</sup>

In the 1960s public works takings attracted increasing criticism. There was a less uncritical acceptance of the need for more big hydro projects for example, and opposition to takings for a proposed hydro dam on the Wanganui River resulted in an early alliance between Maori and environmentalists.<sup>93</sup> This kind of pressure and a renewed call to allow the public more input into decision making caused the Government and Works to begin re-examining some of their taking policies. With more takings affecting relatively more people, as the result of works such as motorways, there was also pressure to strengthen the procedural protections for landowners. General improvements were made in response to this, such as the removal of hearings of objections to the planning process in 1973. At the same time, the discriminatory effects of many of the applications of the provisions such as those concerning notice for Maori land, were recognised and improved in the 1970s and these improvements were continued into the 1981 Act.

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89. Correspondence, May 1965, MA 1, 54/19

90. Correspondence, 1969, MA 1, 54/19

91. For example see memo of 14 November 1974, MA 1, 38/2, vol 7

92. Memo, 1 October 1974, MA 1, 38/2, vol 7

93. MA 1, 19/1/39, vol 1, AAMK, 869/657d



## 11.2 COMPENSATION – POLICIES AND PROCEDURES

As already seen, the ancient principles of public works land takings assumed that full and prompt payment of compensation was the vital balance that prevented such takings from being no more than outright confiscations. Similar principles were described in the New Zealand courts in 1941. The aim of awarding compensation was to do justice to both the taking authority and the landowner in order that ‘anything in the nature of confiscation must be avoided’.<sup>94</sup>

There is no doubt that many issues arising from the application of compensation provisions affected owners of all land taken for public purposes. In practice, as Barker and others have shown, the principles of full and equivalent compensation were whittled away to a large extent in New Zealand by legislative rules and case law and this applied generally to all land takings for public purposes. Eventually, increasingly stringent criticism by the 1960s produced some redress in various amendments in the 1970s. For example, the reinstatement of equivalent compensation in the concept of a business for a business or a house for a house. It seems however from even preliminary research that in many cases, compensation provisions were generally even more ineffective when applied to Maori land takings than to land takings in general.

For example, the harsher treatment of Maori land takings when it came to compensation, often stemmed from discriminatory legal requirements. These included generally weaker notification provisions that also affected the owners’ ability to seek proper compensation. The fact that compensation hearings had to be heard by the Maori Land Court for much of this time may also have worked to the detriment of Maori interests in receiving proper compensation. The requirement that for Maori land takings, the taking authority had to make the application for compensation, also appears to have caused enormous problems in practice.

In addition, many rules and provisions concerned with compensation in general appear to have operated less effectively or in a more detrimental fashion when applied to Maori land takings. This was often again because proper allowance was not made for the problems of land held in multiple ownership. For example, the same difficulties taking authorities complained of in finding all owners to notify when a taking was proposed, were also present when compensation had to be paid out. In addition while an individual owner of general land might complain compensation was inadequate to buy equivalent land, an owner in Maori land held by multiple ownership was much less likely to gain a payment that was enough to buy other land once compensation had been divided up to pay all owners their shares. Many case files illustrate these issues. For example, when Puketapu E block was taken for New Plymouth airport in 1968, there were over 200 beneficial owners with interests in the land and compensation worked out at less than 20 cents per share.<sup>95</sup>

The special significance of Maori land was also not recognised in compensation provisions. This was especially important when the payment of compensation was

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94. *Napier Harbour Board v Minister of Public Works* (1941) NZLR 186

95. Letter from Maori Trustee Wanganui, 25 July 1968, MA 1, 54/19/6

used to reject any continuing concerns Maori might have about the land and its ultimate return. It is very common to see comments in official documentation that Maori land was taken but compensation was awarded so there could be no grievance, or that it was proposed to take land and have compensation awarded so objections could safely be overruled. The assumption that because compensation was awarded the issue was solved needs to be treated with some care, especially where Maori land is involved. When land was only assumed to have a commercial value, it was common to assume that if compensation was paid then the former owners had no further interest in the land. However this took no account of other values such as the emotional and cultural attachment to land that meant an interest remained for Maori, regardless of the present legal ownership.

Compensation payments for Maori land also often reflected the marginal economic position of Maori and problems with the fragmentation of Maori title. It seems to have become an entrenched attitude that Maori land was rarely worth much compensation or any improvements would automatically outweigh any possible compensation. The relative powerlessness and poverty of Maori compared to general landowners also appears to have made evasion and delays in paying compensation that much easier for taking authorities.

The whole issue of assessment of compensation is extremely complicated and subject to a great deal of often intricate case law, and it is well beyond the scope of this report to go into this in any detail. In many cases, it is also probably impossible to go back and determine whether compensation was assessed fairly at the time for an individual case. In addition, the valuation of land is not an exact science and is influenced by attitudes, experience, and who the valuer is working for, as well as more objective criteria. However, there are indications that assessments need to be treated with some care and that Maori land takings could have suffered in the applications of various rules in comparison to the situation with general land.

Maori land often appears to have been valued at very low rates for compensation purposes. This is no doubt partly because Maori land was often marginal and had often been allowed to revert or was never developed because of the problems of title fragmentation. In addition there are other factors that may have had an influence. In spite of denials it seems to have been common for example to view Maori title as an obstacle which once removed almost automatically increased the value of the land. In addition taking authorities often had the means to provide valuations which supported their position in court while Maori owners were not in a position to produce opposing evidence. For example it seems to have been common for taking authorities to value beach land and sandhills as poor farmland when in fact they were required for camping grounds and they had been used by Maori as access to fisheries and traditional food sources, not as farmland.

There were also problems with Maori owners even knowing the land was taken and compensation awarded. It was quite possible for owners not to be represented when awards were determined and for them not to realise compensation had been paid. Often compensation only worked out at a few pennies or cents for an individual and this could be added to other moneys being distributed for leased land for example, without any indication that compensation was included. It is common to read of complaints from Maori that they were unaware of the land being taken

and compensation made and this could easily happen. It is not surprising then, that many Maori felt that public works takings were little different from confiscations.

There appear to have been a number of other issues arising from the special problems of valuing Maori land for compensation. For example, valuations were often based on other sales in the area and the assumption that land was being bought and sold on the open market. However this was often not the case with Maori land. Maori land often by definition had been kept out of the open market. The Government valuation of land might therefore have been well out of date or not particularly useful at all when land was taken. Special Government valuations were often made to get a better market value but these were often inadequate and difficult to calculate. Issues also arose of whether to use a Government agency to make the special valuation when it was the Crown often involved in the taking. When the Maori Trustee became involved in negotiating compensation in the 1960s for example, accusations of possible collusion convinced the office to abandon having special Government valuations. Instead it was decided to go for an outside valuer in principle in cases where there were 'big issues' or where the going was likely to be 'sticky'.<sup>96</sup>

Incidents such as negotiations over the Hairini blocks taken for motorway land near Tauranga also caused the Maori Trustee some concern that Works and the Valuation department were colluding to manipulate figures. The Trustee questioned for example how valuations could be agreed at \$29,000 for one block and \$5000 for another but then a joint valuation for both could be \$30,500. The Maori Trustee was also concerned by the Works threat that the office should reconsider going to court because it would incur costs if it lost.<sup>97</sup>

Issues also often arose from the Maori Land Court jurisdiction over compensation for Maori land while compensation for general land was awarded by a Land Valuation Court run by experts and specialists in compensation law familiar with the latest developments in the area. There was some concern for example, that the Maori Land Court may not have picked up on trends in awarding compensation or on case law where an apparently unjust rule was avoided by judges of the Land Valuation Court. There was also some debate about the application of compensation provisions concerning Maori land. Sometimes issues arose of whether general legislative amendments to compensation rules were also meant to apply to the section 104 concerning compensation for Maori land and over the exact jurisdiction of the Maori Land Court.<sup>98</sup>

In addition there were concerns that while the Crown was able to appeal Maori Land Court decisions it felt were too generous, Maori owners did not generally have the means to contest awards that they felt were too low. This provided an uneven result and may also have swayed the court to make awards on the low side. The whole area of assessment was very complex and often required court litigation. It appeared to assume that landowners had sufficient means to protect their interests

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96. Letter, July 1965, MA 1, 54/19

97. File note, 21 March 1972, MA 1, 38/2, vol 6

98. For example, see issues raised in 1959–1961, MA 1, 38/1/1, vol 1

but this was rarely the case with Maori owners and much more difficult with fragmented title.

The issue of the basis of compensation awards by the Maori Land Court also needs more research. It seems clear that many awards were made to take into account some future benefit the taking authority assured the court would happen, but there was apparently little supervision of whether this did in fact occur. For example, compensation for land taken for roads was often very low or nil because the taking authority argued the road would provide improved access to remaining land. However, besides the fact that Maori may not have wanted to subdivide or lacked the capital to do so, subsequent zoning restrictions and often later takings could also prevent any subdivisions actually taking place. The supposed advantage, taken into account in determining compensation, therefore never materialised. For example in a case in Gisborne, the court awarded no compensation on the basis that the road being built would open up other land for profitable subdivision. The council then later tried to take the other land for a rubbish dump, preventing subdivision anyway.<sup>99</sup>

Sometimes the court also appears to have made awards on the understanding that the taking authority would carry out certain arrangements. Again these were often not undertaken and there seems to have been little supervision over this. An example of this is the Kaka Point case already cited. In that case a 1910 compensation award had been made on the basis that road access would be made to the beach. When the county went to take more land in 1939, it was discovered that the road had never been formed. Maori rarely had the means to go to court to ensure these kinds of terms were upheld.

In 1962, possibly in response to these issues, and also to simplify the administration of the compensation process, the Maori Trustee was made the mandatory agent for negotiating compensations for Maori land taken that was in multiple ownership. Even this agency found difficulties with the complexity of much of the law surrounding assessments. At this time the jurisdiction over compensation awards was also moved from the Maori Land Court to the Land Valuation Court.

It was in the interests of taking authorities such as Works to minimise the costs of compensation. They became very adept at taking advantage of all technicalities and in challenging all efforts to gain compensation. In many cases the only remedy was in going to court, but Maori owners were often not in a position to do this. Even agencies such as the Maori Land Boards had great trouble in dealing with the intricacies of compensation rules and their application by Works often seemed to produce unfair results. If these agencies wilted in challenging the powerful Works department it is not surprising that Maori owners found it difficult to challenge the practices of taking authorities on their own.

An example of this type of difficulty is illustrated in the experience of the Wanganui Maori Land Board in 1932. At this time Works decided that it wanted to remove metal from Maori land that was leased under the control of the Maori Land Board. Works issued a proclamation taking the land and made a routine application

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99. MA 1, 38/2/1

to the Maori Land Court for compensation. It then moved on to the land and helped itself to 10,000 cubic yards of metal. Having achieved this, it then revoked the proclamation and asked the court to dismiss the compensation application on the basis of the revocation.

The Maori Land Board queried this and asked Works to at least pay a royalty for the metal taken. The board reminded Works that although the board controlled the lease, there were actually the interests of beneficial Maori owners to be taken into account. Works assumed a totally uncompromising attitude and refused to consider any compensation. In a series of letters, Works claimed on the one hand that it had caused betterment to the land worth more than any compensation due, as it had built a road to the quarry and had developed the quarry and left it as a going concern for someone else to take on. On the other hand, Works refused to pay royalties on the metal because it claimed there was no market for the metal other than itself. Therefore the metal had absolutely no commercial value and no compensation could therefore be due. In addition Works claimed that the royalty rate claimed by the board was outrageous.

The Maori Land Board persisted, pointing out that the rate had been suggested as the going rate in the area and that as Works had not consulted before taking the metal there had been no opportunity to discuss payments. In addition the land was leased so the advantage of any betterment (which was challenged by the lessee) would go to the lessee not to the beneficial owners. Works remained adamant and insisted that betterment meant no compensation was payable and that anyway the application was for land taken, not damages. When the board appeared likely to take the matter to court, Works resorted to a common tactic in threatening that it would insist on costs if the board lost. This was quite serious as the actions of Government, funded agencies were not well received if they incurred costs losing court cases. At this point the bemused board sought the assistance of Maori Affairs Head Office but apparently the matter was not pursued further.<sup>100</sup>

The issue of royalties for material taken from land illustrates the way in which compensation assessment rules often appeared to apply harshly to Maori landowners. The general rule in assessing compensation for material was that compensation was payable if there was a ready market for the material outside the taking authority and therefore the landowner was losing out from such a taking. An example would be the taking of an already established metal quarry. In a case where there was no other market than the taking authority however, it was held that a landowner should not be able to take advantage of the situation and make a gain that would not otherwise have been possible. This seemed reasonable, but the application of this rule often appeared to penalise Maori owners unduly.

Part of the problem was that Maori owners were often not in a position to develop a commercial quarry because of a lack of capital and because of title problems. It was often therefore more open to question whether their metal had a market or not. There were also issues of the interpretation of a market. Even if two or more local bodies and Works were interested in metal for example, Works insisted this was one Crown market because it provided roading funding to the local authorities. In

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100. Correspondence, MA 1, 21/2/5

addition Maori owners already struggling financially often suffered more from the loss of royalties and were less able to challenge a taking authority over payments. Sometimes the legislative requirements concerning Maori land also hindered the development of such business opportunities. Initially the Maori Land Court seems to have simply accepted the viewpoint of taking authorities on these issues but as more cases of apparent injustice arose the court began taking a more assertive role from about the 1940s and began investigating the existence of a market itself.

A good example of this issue is the case of a proposed quarry on Maori land in the Waimaha development scheme in the 1940s. A private roading contractor had run out of metal at his previous quarry and approached the Maori owners to lease some of their land to open a new quarry. He was willing to pay a reasonable rental and to put in all necessary roads and bridges and maintain them while he used the site. He was also willing to employ returned Maori servicemen on the work. It seemed an ideal situation to the owners who badly needed the royalty payments to help meet land development costs. The land would also remain theirs and the roading would be useful for the development scheme.

Because the land came under Part 1 of the Native Land Amendment Act 1936, the owners were also required to gain the consent of the Board of Native Affairs before the agreement could be finalised. The board approved the owners' request subject to Works approving the proposed royalty rate. At this stage, Works did not know of the existence of the metal. However the local engineer, in spite of being given samples of metal, refused to consider the request until he had seen the quarry. The owners allowed him to enter the land on condition he did nothing to jeopardise their interests. The Works engineer then told the contractor that the department was not interested in metal from the site and it would not be suitable for Government road and railways work.

The contractor had already also shown samples to two local bodies however and they had shown an interest in the metal so he decided to go ahead and develop the quarry. As a consequence he again had to ask Works for approval for the royalty rate so his agreement with the owners could go ahead. On finding out the quarry was to go ahead anyway, the Works official then set in motion procedures to have the land taken under the Public Works Act. The owners and the contractor complained and the matter was put to Native Affairs Minister Mason. He did not favour a compulsory taking in the circumstances, as he felt any saving in royalty to the Crown would be at the expense of the Maori owners and he informed the Minister of Works of this.

In response however, Works expressed concern about saving taxpayers' money and claimed the land had to be taken as the metal was 'essential in the public interest' as it was required for road construction works. However it seems obvious that gravel would have been available elsewhere, it may just have been more expensive or difficult to obtain. Works also objected to a private contractor having a 'monopoly' over the metal. The 'only satisfactory method' in such cases was to acquire the land and pay compensation in accordance with the Public Works Act. In this case compensation would have been tiny as only the land would have been involved. Works also insisted that the 'Crown', including the two local authorities was the only market. On the other hand, under the agreement with the contractor,

the owners stood to gain royalties, improvements such as roads, and to keep their land.

Works insisted that it was policy not to pay royalties for both European and Maori land and that if the Maori owners received more in royalty than in compensation then they would have received a payment out of public funds to which they were not entitled 'either by law or by true principles of compensation for their loss'. It was simply following policy and 'This department has for many years endeavoured to combat the payment of royalty for metal on account of the unjustifiable expenditure of both Government and local body funds involved'.

Mason continued to object to the taking however and argued that the original agreement should be allowed to stand. He relied on his own previous experience in contracting to agree that the proposed royalty was reasonable. He also rejected the claims of monopoly. If Works was prepared to offer the same terms, the Maori owners were quite prepared to deal direct with it instead of the contractor. In the end, Prime Minister Fraser agreed to allow the taking to go ahead and to have the Maori Land Court assess compensation. At that time the Maori Land Court was involved in cases where it had become more assertive in determining such compensation, although the Crown was also appealing awards it considered too high.<sup>101</sup>

The larger works projects have even more complicated issues arising from compensation assessment. Examples are contained on the files dealing with land taken for New Plymouth airport for example and big projects such as the Tongariro power project.<sup>102</sup> These often involve very complicated assessments with large numbers of valuers and others involved. One major feature seems to be that the concerns of Maori owners rarely appear in all the paperwork coordinating and paying numerous valuers, lawyers, and other experts, as well as all the Government officials involved from a variety of agencies. The actual concerns of owners, for example, that they receive land instead of money, are often treated as simply a nuisance or as an attempt to 'muscle in on the Crown land'.<sup>103</sup>

The issue of land instead of cash in compensation also needs more research. As already seen, political leaders were often much more sympathetic to this than Government officials. Although it was possible to offer land, it appears to have been very difficult in practice, not only because departments could always find a better use for almost any Crown land but in the mechanics of vesting. The Maori Trustee appears to have also had some difficulty with the concept when the office was required to negotiate compensation after 1962. As late as 1966, for example, the office debated over whether 'compensation' could mean land as well as cash and whether a land offer from a local authority as opposed to the Crown was covered by the office's powers of negotiation.<sup>104</sup> The fact that the Maori Trustee had no power of negotiation before land was formally taken also possibly prevented opportunities for making more flexible compensation deals in negotiations before taking, as was

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101. Correspondence, MA 1, 21/2/5

102. MA 1, 54/19/6; MA 1, 54/19/24/1, vols 1–4; and general compensation files such as MA 1, 38/1/1

103. As described in Maori Affairs memo to District Office Wanganui, 18 March 1965, MA 1, 54/19/24/1, vol 1

104. District Office Hamilton memo, 23 March 1966, MA 1, 54/19

apparently more common with other land. Informal negotiations may have also resulted in more acceptable amendments to takings.<sup>105</sup>

Works continued to be reluctant to deal with Maori owners and to become familiar with Maori land titles. As already seen this may also have had an impact on whether compensation was properly awarded. Works also continued to only register compensation certificates against title in the District Land Registry but not in the Maori Land Court. This meant the Maori Trustee continued to have problems in chasing up compensation and in knowing about agreements, and the Maori Land Court also lacked proper records making it much more difficult to establish for example whether the terms of compensation awards were properly carried out.

It is clear that when owners were in a generally poor position to enforce proper compensation, then evasion was easier. There are many recorded instances of compensation evaded or not properly paid to the actual Maori owners. For example, irregularities were discovered in Otorohanga township when titles were investigated when lessees wanted to gain the freehold. In one case the local council came to an agreement over compensation with the lessee and also paid the compensation to the lessee on the promise that the lessee would forward an unstipulated amount to the actual owners. This of course was illegal and there was no record of the owners receiving anything.<sup>106</sup> As already seen, proper compensation could also be avoided by making promises such as road access which were never implemented.

Documents also reveal an apparently widespread use of legal technicalities to avoid paying compensation. One of the most common was to carry out work or take material but not actually take land, and until land was formally taken, compensation could not be assessed. For example river and drainage boards had extensive powers to carry out major works. However if they did not actually take land they did not have to undertake any associated requirements such as giving notice or paying compensation. Some compensation might be due for damages but this was very difficult to prove as the boards insisted any work was a betterment, even if it was unwanted by the actual owners or damaged food traps or burial sites the owners were concerned about. In 1970 a local drainage and river board entered Maori land near Morrinsville in this way and carried out extensive works, including the construction of a large dam and extensive stopbanks and river diversion channels. The view of the local office of Works was that the land should have been taken. However the board insisted it had sufficient powers to carry out the works without any takings.<sup>107</sup>

Sometimes special circumstances also meant that ordinary notice and compensation provisions for all land takings did not apply. For example, during the war it was decided that normal procedures might provide important information to the enemy. Action was taken to ensure that the Minister could delay formal takings and applications for assessment of compensation in order to prevent important information being made public. The Government also took steps to ensure that the

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105. Letter written by J E Cater for Maori Trustee, 7 December 1965, MA 1, 54/19

106. MA 1, 54/16/5

107. MA 1, 38/2, vol 5



Maori Land Court would not accept independent applications from owners or initiate action itself. Assurances were made that ‘at the proper time’ action would be taken to address these matters and have them properly remedied. More research is required as to whether these assurances were carried out.<sup>108</sup>

Issues also arise out of the actions and attitudes of Government agencies legislatively imposed in positions of responsibility regarding Maori land. These responsibilities included the negotiation of compensation for land taken or damage caused. In many cases the agencies were helpful and were often more powerful in negotiations and pursuing matters in court. However, there are also occasions, particularly in earlier years, when they appear to have failed to adequately pursue proper compensation for Maori owners. There were times when agencies failed to pursue compensation within the specified time limits especially if taking notices were not properly issued, but also if files were lost or new officers were unfamiliar with requirements. The Maori Trustee was also often paternalistic and conservative in compensation negotiations. Maori owners themselves often appear to have been regarded as a nuisance if they tried to ‘interfere’ in negotiations and in many cases there was a marked reluctance to seek their views. For example in the 1960s, after explaining all the technical problems in negotiating compensation with Works, an official complained that the owners had not as yet been consulted because they would want the ‘the Maori Trustee to claim the moon whereas the Maori Trustee should claim only such amount as he can substantiate in court’.<sup>109</sup>

Nevertheless it was often only when the Maori Trustee became involved, that many of the compensation practices of taking authorities really came to light. For example an official was appalled at the actions of the Auckland Regional Authority in the 1970s in taking land for a recreation reserve. The compensation offered was described as a ‘public scandal’ and the ‘impertinence’ of any public authority in offering it ‘an outrage and something should be done about it’.<sup>110</sup> The Maori Trustee did at times become outraged enough to threaten to take, and in some cases to pursue, compensation cases through the courts, much to the fury of taking authorities. Although early compensation awards are very brief where owners had no assistance, after the Maori Trustee became involved, the files are full of the intricacies and protracted negotiations of the office in compensation negotiations.<sup>111</sup>

However the old problem also remained that in many cases the owners and the Maori Trustee simply never knew of takings until well after they occurred. The same problems already referred to in the lack of notification for many takings also had an impact on compensation as both the Maori Trustee and owners had to know about a taking before seeking compensation, and assessment of compensation could not even begin until a formal taking was made. It is clear that in many cases where the Works department was taking often small pieces of land for road widenings and realignments for example, it simply assumed that compensation applications were not worth the effort and expense. While the department claimed this saved the

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108. For example, memo sent to all Maori Land Court registrars, 23 June 1942, MA 1, 38/1/1, vol 1

109. Memo from District office Rotorua, 5 June 1964, MA 1, 54/19/14

110. Memo from District Office Hamilton, 26 September 1973 in MA 1, 38/2, vol 6

111. For example, see MA 1, 38/2, vols 5–6, and MA 1, 38/1/1

taxpayer the cost of the process, it did nothing to show respect for Maori rights or to allay Maori resentment of the whole process.

As late as the 1970s this attitude appears to have still been firmly entrenched. For example in 1974 a district office of Maori Affairs was still complaining that where Works took land for a road and felt the betterment far outweighed the value, it was still in the habit of taking the land and doing work without notifying the owners or going through any of the legal processes until well after the work was carried out or until complaints started being made.<sup>112</sup>

The attitude of Works is also likely to have influenced local authorities. Not only did Works have influence through the provision and supervision of funding for example, but it seems as though Works could act on behalf of local authorities and was used on occasions as an agent to negotiate compensation for local bodies with the Maori Trustee.<sup>113</sup> Although Works often claimed that with European land, in perhaps the majority of cases the question of compensation was settled by agreement with no necessity to go to court, the situation was quite different for Maori land. There was much less opportunity for informal discussions, and agreements and compensation had to be determined by the Maori Land Court for many years, thus ensuring a more protracted and adversarial situation.<sup>114</sup> If, as Works claimed, the majority of European land takings did not need to go to court, it was even more unfair as it appears Maori land cases generally did have to. Again many Maori owners simply were not in a position to bear the legal costs involved.

Perhaps the major and certainly the most common issue arising in documentation of compensation for public works land takings, is the long delays that occurred before compensation was paid. This was a common criticism all landowners by not just owners of Maori land, but even given this, the delays with Maori land seem to have often been inordinately long and protracted.

There are numerous examples of these long delays on files. In many cases there are often delays between beginning a work and in making the formal taking, before which compensation could not be assessed. After this, in the case of Maori land there could also be delays or failures to make applications for compensation by the taking authority and then delays or failures to prosecute the applications for compensation once they were made. Even when compensation was awarded there were often further difficulties in having the taking authority pay out. There were also cases where the delay in compensation seemed to result in clear financial advantage to the Crown. For example, when land was taken in 1949 in connection with hydroelectric work at Maraetai and for roading access, compensation was delayed but at the same time the Crown sub-leased and derived a profit from the land taken. Compensation was only eventually awarded in 1955.<sup>115</sup>

The delays in compensation were often the subject of complaints to ministers. For example, in 1950 the then Minister of Maori Affairs, Corbett, attended a meeting at Te Kuiti concerning delays by the public works department in paying compensation. He was told of instances where the Crown or local bodies had taken

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112. For example, letter of 26 June 1974, MA 1, 38/2, vol 7

113. For example, memo from District Office Hamilton, 11 August 1970, MA 1, 38/2, vol 5

114. Maori Affairs to Works, 1961, MA 1, 38/1/1, vol 1

115. Newspaper clipping, 6 January 1956, MA 1, 38/1/1, vol 1

Maori land and worked it for years without Maori people receiving any compensation. It was suggested that applications should have to be lodged and compensation assessed before land could be taken. Works rejected this and declared that the idea of assessing compensation and paying it before the taking authority took possession was 'quite impracticable'. Works claimed that it would mean that no work could be carried out on road deviations until a survey was done, title acquired by proclamation and compensation assessed by the Maori Land Court and paid. The delay in obtaining survey plans alone 'would probably delay the project for several years' and it would in fact be 'almost impossible' to work to any construction programme.<sup>116</sup>

After the Maori Trustee became involved the district offices of Maori Affairs often reported that delays were common. In the 1960s, for example, Works realigned the state highway near Rotorua. One realignment cut through a Maori development scheme. The local officer noted that 'The area taken has not yet been surveyed, nor has the proclamation been gazetted, and our experience is that the Ministry of Works will take its time over this'.<sup>117</sup>

In work on the Tauranga–Te Maunga highway, Works entered land in the Hairini blocks at various times between 1959 and 1966. The formal takings were not formally gazetted until December 1971 in one case and February 1972 in another. In 1973 the Maori Trustee responded to criticism of long delays in negotiating compensation by reminding owners that it had only been involved since the formal takings in 1971, not since 1966 as was assumed. Negotiations were also made more protracted by all the issues such as interest that arose from the long delays. In addition, Works had promised in 1971 that every effort would be made to effect an early settlement or make a substantial advance payment. However there had been long delays and no offers of advance payments.<sup>118</sup>

Entry was made into the Hairini A2 block in 1959 to construct a temporary deviation that at the time was considered to be needed for about three years. However, occupation continued and in 1971 it was decided the land would be taken permanently. Even after the formal taking there were protracted negotiations over issues caused by the delay, such as interest payments and the time the valuation should be taken from. It appears that progress was only made in pushing things along when the local school teacher and social worker wrote to the Minister to see if anything could be done about the hardship suffered by the owners. In this case the owners lost their ancestral land and the family home was demolished and they were still waiting for compensation after more than 10 years.<sup>119</sup>

This case also illustrated that as well as delays being an injustice in themselves, they caused further problems in assessing compensation as some account had to be taken of the effect of the delay. This often resulted in even further protracted negotiations. Many details including interest, the date at which compensation was to be assessed, lost rentals, and what date betterment was to be calculated from, all had to be included in negotiations following long delays. The original

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116. Memo from Works, 19 April 1950, MA 1, 19/1/441

117. Memo from Rotorua District Office, 5 June 1964, MA 1, 54/19/14

118. Correspondence, 1972–73, MA 1, 38/2, vol 6

119. MA 1, 38/2, vol 6

compensation provisions also did not take the results of inflation into account but this could also prove enormously damaging to owners where long delays were involved. Maori Affairs department officers felt the Hairini case illustrated the 'rank injustice' of the whole procedure where delays had become commonplace. In addition, 'This is not an isolated case and approaches to the Ministry of Works on the subject are simply brushed aside'.<sup>120</sup>

In 1962 a proclamation was made defining the middle line of a northern motorway through Maori land in Christchurch. In 1969 the Ministry of Works notified the Christchurch office of Maori Affairs that it intended to enter the land and begin construction. As was usual no formal procedures were carried out until the land was surveyed and the exact land required was known. However, in 1974 the Ministry still had not completed the survey. (In 1981 when the new Public Works Bill was debated, work still had not begun on the motorway.) Maori Affairs department officials noted that this was very hard on the owners and the delays would cause even more protracted negotiations over compensation when the land was finally taken.<sup>121</sup>

Although the taking authority had to make the application for compensation when Maori land was taken, there are also many examples of cases where Works made no attempt to start proceedings until or even when pressured by owners and lawyers. For example the Ministry only made an application for compensation in 1954 for a block of land taken for works in connection with the Karapiro Dam in 1950, and only after lawyers began to apply pressure on Works and on the Minister for information. Even then, Works made no reply to initial requests until several letters had been written and the Minister approached.<sup>122</sup>

A major part of this problem appears to have been the provisions that required the taking authority to make the application for compensation when Maori land was taken. This may have appeared reasonable in overcoming title problems, but in practice this requirement clearly worked against the interests of Maori owners. The main reason for this was that the requirement clearly set up a conflict of interest for taking authorities. They were interested in saving money and once land was available for use, their main concern became the construction of the work. There was very little incentive for them to initiate proceedings that required going back to all the paperwork involved in compensation. In fact there were obvious disincentives because compensation was likely to cost money, not to mention all the time and paperwork involved. It is not surprising that taking authorities were in no hurry to initiate compensation and routinely comment that compensation procedures were 'overlooked' at the time.

At various times the issue was raised as to whether the Maori Land Court or the owners could also initiate compensation applications if the taking authority failed to do so. However this possibility was generally rejected by the Crown. In 1942, a Maori Land Court judge argued, for instance, that as section 104 applications only referred to land takings then the court could initiate proceedings for compensation

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120. Memo in reply to ministerial regarding takings in Tauranga area, 20 October 1972, MA 38/2, vol 6

121. Secretary Maori Affairs to Minister, 12 June 1974, MA 1, 38/2, vol 7

122. MA 1, 5/13/200

for damages or for material taken from the land and should not have to wait until Works saw fit to act in the matter. However Crown law opinion firmly rejected this and the Crown solicitor argued that the proper course would be for owners to seek a writ compelling the authority to take action to make an application. He also argued that the Maori Land Court had no authority to compel a taking authority. Its jurisdiction to assess compensation arose only when an application for compensation was before it and the application had to be one such as section 104 described, that is, the application of a public authority:

The application of a native owner or, say, the registrar of the Court acting on the judge's direction, would not be an application of the kind necessary to confer jurisdiction.<sup>123</sup>

The requirement to go to court to force a taking authority to even make an application was clearly unfair and a burden not faced by general landowners. Most Maori owners were also not in a position to do this. In spite of the difficulties raised, no remedying legislative amendments were made for many years.

In later years Works claimed that it did have a policy of making a routine application for compensation as soon as Maori land was taken. It is questionable how well that policy was followed given the file documentation. Even so, another issue then arose as to the prosecution of the application after it had been made. While Works agreed it would make routine applications, it then refused to take responsibility to prosecute them in court. Again Maori owners were left in a legal loophole. The courts clearly expected the applicant to make the prosecution for compensation and often delayed cases if there was no representative of the taking authority to make the case. However Works insisted that the owners and especially their counsel were responsible for seeing a case was heard. Possibly this was because Works was used to such procedures for general land takings but it neglected to take account of the difficulties Maori owners faced with this. It also placed Works in a relative position of power in negotiating compensation because if the owners agreed to its view then it would take steps to ensure the application was properly pursued, but if they did not, then it could delay the process as long as possible. In effect, Maori owners were being asked to hire lawyers to put pressure on taking authorities to prosecute applications.

The refusal of taking authorities to make proper applications and then to prosecute them was often an issue of contention between the departments of Maori Affairs and Works. For example, the matter was raised by the Under-Secretary for Maori Affairs in 1953 after a series of complaints about long delays. He noted that while there was a time limit on local authorities making an application for compensation, the Minister could make application at any time. Problems were being caused by long delays in making applications and in prosecuting them. It was not uncommon for applications to remain pending for many years and this was most unfair on the owners. They already resented compulsory takings and then they had to wait indefinitely for the payment of compensation. In effect they were being

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123. Crown solicitor legal opinion for Assistant Under-Secretary, Public Works department, 30 March 1942, 38/1/1, vol 1

denied compensation for lengthy periods and as a result ‘. . . they are liable to show a distinct and increasing lack of enthusiasm towards the whole subject of public works’. The under-secretary gave examples such as the Pouakani block where the Crown took the freehold interest in some land and rented other land in 1949 and 1950 in connection with the Maraetai hydro scheme. Applications for compensation were lodged reasonably promptly but since then no move had been made to prosecute them. In the meantime the Crown was receiving rental from subleasing the land taken. All this hardly reflected on the honour of the Crown, which according to the old maxim was supposed to prefer honour to profit and convenience. The under-secretary was also concerned that the Maori Affairs department was taking a lot of the resentment caused by the delays by Works.

The under-secretary knew there were possible ways around the situation. For example the Maori Land Court could go ahead without representation from the Crown, or the Maori owners could seek to force the Works to act. However the court was naturally reluctant to proceed without representation from the Crown and the legal proceedings would be expensive for the owners. He believed that the real problem was the fact that it was the Crown or debtor who was legally required to initiate the matter instead of the true creditor or claimant. The under-secretary felt that legislative action was required to make it clear that the action for settling compensation was not dependant on the action of Works. A suggested amendment was to have a time limit as for local bodies after which the owners could ask the court to make an assessment without further ado.<sup>124</sup>

Works flatly rejected the idea of any legislative changes. The Works under-secretary insisted that applications for compensation were routinely made in every land taking. While there were sometimes delays in prosecuting the applications, he claimed that there were usually very good reasons for this. Some years ago the Maori Land Court had instituted a policy of requiring Maori owners to be represented by counsel in all cases except where very small amounts were involved. Works supported this policy and had adopted a policy of negotiating with counsel for Maori owners in an endeavour to reach agreement for submission to the court for approval. If negotiations were unsuccessful then counsel could bring the case for hearing at any time. It was up to counsel to come to an agreement with the department about the time for a hearing and it was considered improper to prosecute an application without the agreement of counsel for the owners. In the case of the Pouakani block and the Maraetai hydro scheme it was up to counsel for the owners to press negotiations or to arrange for a hearing at court. There were also delays due to the illness of the district valuer and the ‘pressure of work’. In small cases Works did not see the need for an officer to attend the court hearing and would prefer an arrangement with the judge to submit evidence without having to attend. The under-secretary also claimed that delays were caused when Maori owners did not attend.<sup>125</sup> The Department of Maori Affairs failed to get the suggested amendment in the 1953 Bill and was forced instead to continue to try and persuade Works that it had a significant responsibility in making and prosecuting applications.<sup>126</sup>

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124. Maori Affairs to Works, 9 April 1953, MA 1, 38/1/1, vol 1

125. Works to Maori Affairs, 15 May 1953, MA 1,38/1/1, vol 1

Failures to make applications for compensation for Maori land taken, or even to issue formal notices of takings and then failure to prosecute applications, continued to be a major issue right into the 1970s. In spite of the long-standing claim by Works that delays were the fault of lawyers in not pressing the issue, after the Maori Trustee became involved and did just that, there were still enormous difficulties in negotiating compensation.

In 1974 the Christchurch office asked for assistance from the head office in negotiating a compensation case because of the difficulties in getting any response from Works. Maori land had been taken for road widening in Nelson in 1972 but Works would not even respond to letters in the two years since then, let alone discuss compensation. It took from December 1972 until September 1973 for Works to even reply to a letter requesting a beginning to negotiations about compensation. Works claimed there were delays with valuations, but from September 1973 until July 1974, in spite of further attempts at correspondence from Maori Affairs, there was no further response from Works. The office asked for the matter to be taken up at a higher level with Works head office as they needed to be informed that:

delays of this sort make it difficult for the Government to refute the charge that taking authorities are prepared to ride rough shod over the rights of individuals and, it is often alleged, especially over Maori individuals.<sup>127</sup>

In 1975 when the matter had still not been taken up, the district office complained that it was enough to:

shock the public conscience and raise serious doubts in the minds of the owners as to the sincerity of the Crown in its desire to bring the matter to a conclusion. It is perhaps just as well for everybody that few, if any, of the Maori owners know anything about it.

The office felt that the situation was likely to be very different if, as recently recommended, control of the South Island tenths is handed over to trustees.<sup>128</sup>

The Christchurch office of Maori Affairs also complained about delays after land was taken for state highway roading in Marlborough county in 1971 and early 1972. Taking procedures began as early as March 1968 and in 1971 the owners were told by Works that when land was formally taken, compensation would be the responsibility of the Maori Trustee to settle on behalf of the owners. When the *Gazette* notices appeared taking the land, the district office went to a great deal of trouble finding out exactly what land was involved and in having it valued for compensation. It then sought negotiations as soon as possible and entered a claim in August 1972. Since then it had not been able to get an adequate response from Works. One letter of 8 June 1973 from Works had stated that they were still trying to get sufficient information on the land and a valuation. Nothing had been received

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126. Correspondence, November 1953, MA 1,38/1/1, vol 1

127. Memo from District Office Christchurch, 25 March 1974, MA 1, 38/2, vol 7

128. Memo, 17 June 1975, MA 1, 38/2, vol 7

in the following six months. Again it was requested that the matter be taken up at a higher level to avoid blame falling on the Maori Trustee.<sup>129</sup>

However there were some improvements by the 1970s as Works began to respond to changes in public opinion and to complaints from Maori leaders. In 1973 for example Works decided that in a case where the land had been entered in 1955 but not taken until 1967, instead of insisting on the date of entry as it had previously done when assessing compensation, it would recognise the problems of legal representation resulting from multiple ownership, and the long delays that had occurred, and agree to take the date of the formal taking proclamation as the basis for assessing compensation. Works still blamed legal counsel for allowing the matter to lapse since 1967 but agreed it was not the fault of the owners.<sup>130</sup>

### **11.3 THE APPLICATION OF PROVISIONS CONCERNING THE CONTROL AND DISPOSAL OF LAND NO LONGER REQUIRED FOR PUBLIC PURPOSES**

As already seen, traditional disposal principles such as the right of first purchase for the original owners and an assumption that land should only be used for the purpose for which it was taken, were gradually weakened in subsequent legislative developments. The 1981 Act strengthened offerback provisions but these still did not meet all Maori concerns. Maori have consistently required land to be returned if it was no longer needed for the original purpose for which it was required. This was partly because of traditional concepts that place more value on land than simply a commercial value that can be compensated for in equivalent cash. In addition, as Maori land has steadily diminished any possible returns of land to Maori freehold title were considered crucially important.

Even in terms of general land takings, Barker pointed out in his criticisms of the Public Works Act in 1969, that resentment against public works takings was most likely to occur at the lesser level of public works and where the land was taken for a vague purpose such as ‘subdivision development or regrouping’ and then sold on at a considerable profit.<sup>131</sup> Although there was no legal sanction to ensure that a taking authority used the land for the purposes for which it was taken and the only requirement really was compensation, there was still a widespread public feeling that not to do so was morally wrong. Barker referred to a 1968 case where the Upper Hutt borough acquired some general land and then several years later sold it at large profit. The previous owner petitioned Parliament and the select committee found that while legally right, it was ‘morally wrong’.<sup>132</sup>

The criticisms about lack of accountability in the use and disposal of land taken for public purposes applied to all land taken, but once again it appears as though in many cases the application of these provisions often posed relatively greater problems for owners of Maori land. Many of the reasons for this have already been

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129. Memo, 29 January 1974, MA 1, 38/2, vol 6

130. Works letter to Secretary Opawa–Rangitoto Incorporated, 13 March 1973, MA 1, 38/2, vol 7

131. Barker, p 253

132. NZPD, 1968, pp 1743, 1748; and Barker, p 258



covered. For most of this time Maori were generally less able to challenge disposal decisions for example, or proposed changes in the public use of land taken. As has been seen in previous examples from files, Maori interests were also generally given a very low priority when it came to deciding alternative uses for surplus land. It was generally only after all other departments had been approached and all other possible public purposes were considered, that reversion in the original Maori owners was considered.

In addition, in practical terms it was also simply a much more difficult process for many years, to return land or reversion land in Maori owners than it was to return general land. The adoption of policies that required offerbacks to be made at market prices without considering mitigating factors also resulted in a greater barrier to return, given the lower general economic position of many Maori.

In the absence of relevant data it is difficult to compare returns of Maori land with returns of general land. However, from preliminary research it seems as though reversionings were generally limited to areas still largely in Maori ownership such as when a road was rerouted and the old road reversioned. At times, it was agreed that a sufficient case had been made for reversioning land of special value such as an urupa, although even this was by no means assured. In many cases reversionings also only seemed to be considered when an authority such as a Maori Land Court judge became interested and began advocating on behalf of what was considered a particularly meritorious case.

There appears to have been no particular legislative or policy requirements to give reversionings priority for land of special value to Maori such as urupa that had been lost by a public works taking or through some oversight. For example in one case, Maori owners found that a burial ground had not been excluded from a sale as agreed when legal documents were drawn up, although it was shown as a reserve on some maps. The other part of the burial ground was then taken for road purposes. When the owners asked for at least the road land to be reversioned, their request was refused as the land might be required for future roading needs and the interests of the local authority came first, 'Any such return would seriously embarrass the local authority'. In spite of the owners' protests, the official attitude was that because the land had either been sold or taken, 'The Natives therefore have now no interest in the land'. The best they could expect was to be allowed to remove any remains they might find.<sup>133</sup>

The financial gain or the administrative convenience of the taking authority was also commonly given priority over Maori interests when decisions were being made on land taken for public purposes but no longer required for the original purpose. For example, in the Gisborne district, the Uawa County Council had taken Maori land in 1918 and 1931. The land was close to the inlet of Tolaga Bay and it was taken as a sanitary reserve for the town of Tolaga for the dumping of nightsoil. The land was taken under compulsory provisions but the owners had apparently consented because the reserve was to be used for the general well being of the community. There had also been public works takings of other Maori land in the vicinity, for example by the Tolaga Bay Harbour Board.

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133. MA 1, 21/1/6

The reserve was not used for nightsoil for many years and then in 1954, as legally required, the local council gave notice of intent to change the public purpose to one of recreation reserve. At the time, the council chairman openly admitted that the real intention was then to declare the land not in the meantime required as a recreation reserve and to lease it to private individuals to set up a motor camp. The East Coast Commissioner, who was legally responsible for Maori land in the area, objected to the proposed change and the attempt was abandoned. In late 1955, the council then issued a new notice of intention to change the reserve to one of 'general county purposes' under the Public Works Amendment Act 1952. Once again the council openly admitted it really intended to lease the land for a motor camp. The commissioner objected again and after a hearing the objection was rejected. The commissioner then approached the Minister for assistance and informed him of the same objections. The objections were based on the claim that the proposed use was not a bona fide 'general county purpose' as the intention was to allow the land to be used by private individuals for personal profit. The commissioner argued that instead the land would be better used being farmed as part of the Maori owners' adjoining farm. The owners wanted the opportunity to have the land offered back to them first and were prepared to pay a reasonable price for it. When the Minister of Maori Affairs approached the Minister of Works about this, no assistance was forthcoming. He was told that the council was acting legally under the provisions of the Public Works Act and that:

It is only in extreme cases that interference with the statutory powers of a local authority is warranted, and in this instance it is noted that the only objectors appear to be the owners from whom the Council acquired the land . . .<sup>134</sup>

In many cases disposals were also made where it was simply administratively easier to ignore the interests of the original Maori owners. The Hawke's Bay River Board decided to dispose of some land taken in 1938 and no longer required for river control. The land had originally been taken from Maori owners using compulsory provisions and compensation had been paid. Within a few years the taking authority had found it did not need all the land taken and in 1944 sold the surplus land to the man who had been lessee of the land at the time without offering it back to the original owners. In 1973 the original owners were still seeking to have the matter properly investigated. They sought a remedy or at least a provision preventing similar actions in future. On investigation, officials decided that the main reason the land was sold without being offered back was that it had been the easiest solution at the time. The land had been severed from the original owners' land at the time and therefore lacked legal access. The person it was sold to had adjoining lands and the sale was therefore the easiest solution. In reply to continued complaints in 1974 it was acknowledged that 'It does seem that the element of practicality over-rode all other considerations at the time . . .' and it was decided no further action was required.<sup>135</sup>

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134. Lawyers to Minister of Maori Affairs, 28 February 1956; and Minister of Works to Minister of Maori Affairs, 28 March 1956, and associated correspondence, MA 1, 38/2, pt 3

135. Draft letter replying to 1974 complaint, MA 1, 38/2, vol 6

In many respects it was also much more difficult, complicated, and time consuming to return or re-vest Maori land and this may also have been a factor in deciding taking and controlling authorities not to bother. When Crown-granted Maori land was first included under the provisions relating to the return of surplus general land back to the original owners, no special allowances were made for the fact that such land would be returned as European or general land and this would create difficulties in joining it with what was still Maori freehold land. In cases of trusts or incorporations it also seems as though their powers only extended to Maori land therefore a return under general title also posed considerable problems. It has already been shown in the legislative overview that it required special legislation to correct this, a much more prolonged matter than was involved in offering back general land. General legislative provision was not made for most proposed re-vestings of Maori land until 1943. This only appears to have been made after Maori Land Court judges complained of the difficulties encountered when they had to create partitions and when they were dealing with two classes of land. In many cases in early years, these difficulties resulted in the land having to be declared Crown land and sold under the Land Act rather than being re-vested in the original Maori owners.<sup>136</sup>

Other difficulties also often made it easier to dispose of surplus land to almost anyone other than the original Maori owners. For example the legal and administrative restrictions covering a great deal of Maori land often made disposal that much more complicated. In numerous cases the Government responded to pressure to make Maori land easier to alienate. However there was little legislative encouragement to make returns of surplus land back to the original Maori owners any easier, even when problems became apparent.

The problems concerning native township land provide a good example of this. The native townships were originally established on Maori land. The Government soon responded to pressure from lessees however, with a 1910 amendment that enabled the Crown to assist lessees in gaining freehold title. When it seemed some reserve land might be re-vested in the original Maori owners all sorts of legal difficulties were discovered. It seems that it was much easier to dispose of such land to lessees than to the original Maori owners.

In Pipiriki native township in 1897, for example, two sections were originally set aside as municipal reserves. In fact they were never used for this purposes, but came under the control of the Lands and Survey department as reserves. This department then leased them out to local businesses in the town and took the rentals. In 1937 the local Maori Land Board discovered this and tried to have the rent paid to the native owners. The Lands department refused on the grounds that under the reserves and domains legislation there was no provision to credit revenue to anywhere other than the consolidated fund. The department continued to take the rentals paid.<sup>137</sup>

When moves were made by the department of Maori Affairs to have surplus sections returned to Maori owners in later years all sorts of difficulties arose. The Minister of Education took a personal interest in the use of an old school site as a

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136. For example, comments regarding Whakapau block, MA 1, 5/13/154

137. Correspondence, MA 1, 21/3/46

community centre and directed that this use was not to be ‘disturbed by any action designed to return back the site to its former owners’. Officials were also directed to inform the Minister ‘immediately if there is any move to restore the site to its former owners’.

When it came to re-vesting sections originally set aside for public purposes a debate immediately began as to the exact legal situation and the legal difficulties that might arise. It was not clear for example, whether the reserves came under the Maori Affairs Act 1953 as Maori reserved land or whether they were Crown reserves covered by domains and reserves legislation. Although this decision had not been a problem when the Lands department had refused to turn over rentals it was agonised over for some time by officials of the Maori Land Court and the Lands and Survey department, as were the consequent problems of re-vesting under various title. It was then discovered that two of the sections under consideration had been sold to the business leasing the land and then to the local county council apparently without difficulty. It was therefore now privately owned European land and unavailable for return. The arguments about how to re-vest continued with the remaining sections until 1965 when the Commissioner of Lands decided not to go ahead anyway as the land might be required for the proposed Wanganui River hydro scheme.<sup>138</sup>

Another major barrier to returning the land was the adoption of a policy of requiring the land to be offered at the current market price. Particularly in years of high inflation and given the often many years between the original taking and the final decision to offer back this price was often impossibly high for many former Maori owners. The land also often had a non-commercial value to Maori so could not be regarded as a commodity owners were likely to realise a profit on in later years. While the land may have realised a low compensation in the first place it could also often greatly increase in value over the intervening years. In some cases, incorporations were in a position to pay market value but often low income families struggling to regain ancestral land were in a very difficult position. At times this was allowed for by making repayments easier or offering low interest loans. In some cases the market value was also backdated to when the public use actually ceased, although this could have been years before the actual return. However the requirement to buy back the land still often appears to have posed the final barrier to the return of land.

This was not only a problem for owners of Maori land although it may have occurred more often given the generally low economic position of Maori. As the scope and extent of public works widened and as more generations of Pakeha had links with family land, the problems of offerbacks at market values were also recognised for general landowners. In his 1969 article, one of Barker’s suggested improvements was an independent authority that would oversee disposal decisions and have the flexibility to be able to take into account differing circumstances of the landowner. For example, whether the land had a value apart from a pure commercial investment, such as a family home for example, and taking into account the circumstances of the acquisition, the authority would have the flexibility to

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138. Correspondence, MA 1, 5/5/78

recommend a figure somewhere between the original amount of compensation and the current market value.<sup>139</sup>

The Public Works Act 1981, while it required land to be offered back to the original owners unless it was clearly impracticable, unreasonable, or unfair to do so, initially required land to be offered back at current market value. A 1982 amendment however introduced a discretion whereby the Commissioner of Lands or a local authority could offer back at a lower price if it was felt reasonable to do so. It is not clear how this discretion has worked in practice and whether specific consideration is required of Maori interests.

A possible precedent is the Raglan golf course case where it was recognised that requiring the former Maori owners to pay the current market value for the land placed an unfair burden on them. Suggestions were made that it was possibly fairer to calculate a price based on 1953 values when the land should have been returned. However, eventually it was agreed in 1987 that in view of all the circumstances, the land could be returned without requiring payment.<sup>140</sup>

Given the difficulties in having land returned, it is not surprising that Maori owners have tried very hard to have alternatives considered seriously, whereby the land is made available for public purpose uses, but the title stays in Maori hands. As seen in previous examples, such as the Ohaaki power station, this process has been found to be quite feasible in many cases once taking authorities began to take a more flexible view of the issue. The recent *Te Maunga Report* has also referred to the possibility of taking compulsory use rights for public purposes rather than the Maori freehold.

#### **11.4 THE APPLICATION OF TOWN PLANNING PROCESSES**

The final group of issues associated with the taking and use of Maori land for public purposes are those arising from the administration and application of town planning processes. This whole area probably requires a separate research paper but a brief overview reveals some of the main issues.

Town planning processes are often bound up with other issues but the application of planning designations and processes such as zoning and reserves requirements appears to have had a detrimental impact on Maori land both in affecting rangatiratanga over Maori land and in the further loss of such land for public purposes. In more recent years, town planning processes have also become more closely linked to public works provisions, for example since 1973, through the process of hearing objections to land takings.

Some of the major issues for Maori arising from town planning processes have already been briefly touched on in the overview of town planning legislation. The designation of Maori land for public purposes such as recreation reserves and rubbish dumps for example, have clearly had a significant impact on the use and acquisition of Maori land for public purposes.

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139. Barker, p 259

140. MA 19/1/671, AAMK 869/678a

Many town planning hearings also reveal that the hearing process itself has often been a difficult and expensive barrier for Maori. In addition, it is clear that there was often a lack of communication between Maori and Government agencies in the whole process. For example, as late as 1982, in a hearing involving the building of oxidation ponds for a sewage scheme on an environmentally sensitive headland of a coastal area that was also an ancient pa site, the Planning Tribunal noted that the Board of Health, the local council, the Historic Places Trust, and the Ministries of Works and Transport had all been involved, but none had consulted directly with the local Maori people.<sup>141</sup>

Maori Affairs case files also reveal some of the problems encountered in the use of the planning process. An example is the Karamu blocks of Maori land on the outskirts of Hastings. These were the subject of numerous attempts by local authorities to acquire the land for public purposes. In the 1940s, the blocks of about 200 acres were the last remaining land of what had once been extensive ancestral lands and local Maori decided to try and keep them in Maori title as a heritage for future generations. The land was very good horticultural land and was used for market gardening and to provide a livelihood for many families. There were also some family homes on the land.

In the 1940s the then Hastings Borough Council made strenuous efforts to have the land taken for an aerodrome. The proposal was resisted by Maori at the time. They claimed that the proposed airport was not really needed as there were already sufficient airports in the district, but was prompted by local rivalry with Napier. They also pointed out that the land was first-class horticultural land wasted on an airport and ‘These lands are our inheritance . . . and of great sentimental value to us’. They had the support of Native Affairs Minister Mason who agreed that local rivalry was a probable cause behind the proposed taking and he recognised the concern about remaining ancestral land. He instructed Government agencies not to become involved in the taking although the local body remained interested. The proposal was shelved during the war and then appears to have been finally abandoned.<sup>142</sup>

A few years later, the Maori Affairs department was interested in developing a small subdivision in the area to make properly planned housing for the local Maori families there. The borough council strongly objected to the proposal on the grounds that housing would mean taking some of the best horticultural lands on the plains and the proposal was abandoned. In the mid-1950s the City of Hastings then applied to have the land included in the urban boundaries of the city. The Maori owners protested strongly, complaining that this was likely to destroy their own plans for a special settlement. In spite of their objections, the land was included in the city. The Maori owners were concerned that being included in the city offered them no advantage but that higher rates would force them to sell some of the land and continued horticulture would become uneconomic. In addition they were concerned that the city already had proposals to develop the land for housing and

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141. *Adamson Taipa Limited v Mongonui County* (1982) 8 NZTPA 379

142. Correspondence, MA 1, 19/1/506

subdivision. They asked the Minister for assistance in staying out of the urban area but were told that the Minister could not interfere.<sup>143</sup>

In another case in 1970, the Gisborne City Council wanted to acquire some 321 acres of the Paokahu blocks of Maori land on the outskirts of the city. The land was between the main road and the beach and the council announced that it intended to have all the land designated as a refuse tip and then to take it for that purpose under the Public Works Act. It also announced that the ultimate intention was to use the land as a recreation area for a boating and rowing lagoon, golf courses and camping sites. It is not clear from file documents, but there is some indication that it was thought that because the land was swampy in parts and partly sand-dunes, it did not comply with requirements for takings under scenic or recreation purposes, and hence the tip zoning.

The Maori owners called a meeting at which strong objection was made to the plan and arrangements were made to have trustees appointed to represent their interests. The Mangatu Incorporation had some interests in the land and also acted on the request of owners who wished to see the land remain in Maori ownership. On behalf of owners, the incorporation complained to the Minister about the council proposal. The incorporation also suspected that the council wanted to designate the area as a tip in order to depress the value of the land for compensation. It was obvious the tip was not intended to be more than a temporary use and the quantity of land involved was much more than would normally be required for a tip. The owners also informed the Minister that there was very little Maori land remaining in and around Gisborne and they asked for assistance in opposing the designation and the taking. They also offered to lease the land the council actually required for a tip.<sup>144</sup>

Maori Affairs officials held a meeting with council and reported that they had informed them it 'was extremely bad tactics' for the council to publicise the fact that they intended to take the land so early and before having a meeting with owners. The Maori owners were now so 'emotionally upset' over the publicity about using the Public Works Act that it was unlikely a meeting of owners would ever agree to a sale. Officials were also surprised that the council wanted a tip site so close to the city and beach and suggested leasing the land if it was the only possible site. The council informed the officials that it wanted the land in public ownership for eventual recreational purposes and that the extra land was required so it could lease the land not in immediate use to help offset the outlay required in establishing the tip. The council wanted ownership rather than a lease so it could have the 'required freedom of action in effectively using the land for rubbish tip purposes'.<sup>145</sup>

The Minister agreed to ask Government departments to take no action that would prejudice the position of the Maori owners. However there was not much he could do regarding the council. The proposal to designate the land as a rubbish tip however still had to go through the normal planning processes.

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143. Correspondence, November 1956, MA 1, 38/2, vol 3

144. Letter to Minister, 27 November 1970, MA 1, 32/2/1, vol 1

145. District Office Gisborne to Maori Affairs Head Office, 7 December 1970, MA 1, 32/2/1, vol 1

Lawyers for the incorporation described many of the problems Maori had with the town planning process. The blocks in question were near the beach and what was happening to them was also happening to similar Maori land through the use of town planning processes throughout the district. For a variety of reasons Maori still owned coastal areas in the district in an unimproved state. Their land was now almost the only land left in favoured areas that was not already subdivided or used for holiday homes. It had therefore become a prime target for planners for reserves or proposed reserves. The incorporation had some beautiful bays which would make ideal coastal townships and be of great value if subdivided but they were being covered by designations for carparks and proposed reserves and no compensation was payable for proposed reserves. The blocks under consideration at present would have been desirable subdivisions by now if they were not owned by Maori because they were so close to the city and the beach. However they were now part of an area proposed for recreational use. This was a classic example of what town planners and local bodies were doing to remaining Maori land. According to the lawyers, the situation was becoming a worse 'land grab' than in the old days. They complained that the situation was beginning to cause rumblings among Maori and with good reason.<sup>146</sup> The Minister agreed that town planning issues were having an adverse impact on Maori land and he was concerned at the absence of 'real consultation and communication between those concerned'.<sup>147</sup>

The council continued in its efforts to have the land taken. In a deputation to the Minister in 1971 the mayor also confirmed that the council needed the freehold of the land because it planned to develop the whole foreshore. The council claimed the Maori owners had shown little interest in the land and it had been on a long lease not due to end until 1984 at a small rental so they were receiving very little from the land anyway. The council was also emphatic that it would not consider a lease or spend money on the land if it then had to return it to the Maori owners at a later date.<sup>148</sup>

In the meantime the Maori owners did make an effort to compromise by offering to lease the land needed for a tip including an offer to lease the land rent free for up to 10 years if it was returned in a reasonable state and a strip was reserved near the beach for residential sites. The owners then began to reconsider this when they learned that recent planning rulings suggested that if even a small part was leased, this could open the way for the whole area to be designated for a tip on the grounds of predominant use. The owners then decided to wait until the question of zoning was settled at a planning hearing.

The council up to this time had been adamant that leasing was unacceptable but then used the delay to insist that the taking had to go ahead. The change in public attitude by the 1970s appears to have had some impact on the issue. The Maori Affairs department officials for example, became very concerned about a 'very serious' public uproar and tried hard to persuade the council and the owners to reach agreement over the use of the land for a tip at least. The Maori members of

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146. Letter to Minister, 8 April 1971, MA 1, 32/2/1, vol 1

147. Letter of Minister, 1 June 1971, MA 1, 32/2/1, vol 1

148. Notes of deputation to Minister by Mayor and others, 7 August 1971, MA 1, 32/2/1, vol 1



Parliament also became involved and gained press coverage over the issue highlighting the fact that there were possible alternatives to public works land takings.

The Gisborne City Council applied to the Cook County Council for planning permission to zone the whole area as a rubbish tip. As a result of a defect in the initial application the city council then changed the application to one for a specified departure. Hearings began in 1972, when submissions were heard by a number of parties opposed to the zoning of the land for a rubbish dump.

During the process of preparing objections for the hearing, other issues of concern to Maori also became apparent. There was concern that public works takings had already encroached on Maori land in the area. In 1944 the Cook County Council had taken adjoining land under the Public Works Act for what was now Centennial Drive road. No compensation had been awarded because the council had persuaded the court that the road would provide protection and open up access to other Maori land that could in the future be developed as seaside allotments. Much of that subdividable land was now required for the rubbish tip site and the owners wanted at least protection for a strip of land near the beach for future residential development if the council went ahead with the rubbish tip site. The owners protested that the land taken for a road and now this proposal amounted to a massive land grab of remaining Maori land in the area. In a later newspaper report, councillors were reported as rejecting this proposal and as believing the proposed site would annoy the fewest possible people and that it was 'Maori land, useless for production and an objection would therefore be unreasonable'.

Other Maori concerns also became evident. The area had previously been an important pa site, with burial sites and other important wahi tapu because it had been an important food-gathering area and was closely settled. There was already a grievance about the nearby Awapuni lagoon where the Crown had reclaimed land without consulting the people and without compensation and the lagoon had been destroyed. There were objections that such an historically important area including wahi tapu was now going to be turned into a rubbish dump. There were also complaints that over 300 acres was a massive land grab when no more than 50 acres would suffice for a rubbish tip for many years. Besides being an offensive use of the land there would also be very little remaining land left to the owners. There were also objections that the proposed tip would cause pollution to the streams and beach nearby and would cause inconvenience to nearby residents.

The Cook County Council eventually approved the zoning of 50 acres of Maori land at the rear of the blocks for a dump. In addition a strip of sand-dune at the front was set aside as a future reserve and was not to be used as cover for the rubbish dump. The hearing was apparently more concerned with environmental aspects and public reserves needs than Maori concerns. The argument of other suitable alternatives also carried little legal weight at that time. The Gisborne City Council then appealed the decision to the Planning Appeal Board in an attempt to have the whole 321 acres including the front strip included in the zoning.

The Town and Country Planning Appeal Board eventually dismissed the city council appeal in 1973. Once again the reasoning was more concerned with environmental and recreational concerns than with Maori interests. In its decision

the board said that the sand dunes were an important recreational and environmental resource and it was desirable that they were preserved.

The Maori owners then asked the council that the land taken for a road in 1944 but not required when the road was built be re-vested in them. The extra land was closed as a road in 1972 and the Cook County Council approached the Commissioner of Crown Lands to have it declared part of an adjoining domain. The Maori owners approached the Minister for assistance in having the land re-vested. They were willing to allow the public to use the land but were concerned that it be returned to Maori ownership. They were also willing to give the council a formal lease so it could provide public amenities on the land but they wanted to retain as much land as possible in Maori ownership. In 1973, Maori Affairs Minister Rata decided to have the land re-vested under section 436 of the Maori Affairs Act 1953. The delighted owners promised to continue negotiations over the lease of the land for a domain.

The matter did not end there however. In 1973 the council was still approaching ministers in an effort to gain more land for the dump and eventually recreation purposes. In a deputation early in 1973 the mayor and city engineer claimed that the present rental the Maori owners received from the land was very small anyway and that a lease in perpetuity might be an option. The council mentioned that it always had the Public Works Act as a last resort but claimed it was now reluctant to use it. The Minister, Rata, emphasised his reluctance to see land taken under the Act and suggested alternatives were preferable. In November 1973 when this file ends there was still uncertainty over whether the council would use its taking powers under the Act.<sup>149</sup>

Even when Maori needed to sell land, town planning provisions could cause problems. When a block of land was vested in the Maori Trustee for a sale on behalf of the owners, it was then found that a proposed motorway cut through the block with land on one side zoned residential and on the other side rural. This made it very difficult to sell the land and before long rates demands began to equal a significant proportion of the land value. The Maori Trustee asked Works to take the land and pay compensation but this was refused as the National Roads Board did not have the money, and actual construction of the proposed motorway was many years off. Works suggested that the trustee use the provisions of the Town and Country Planning Act 1953 to apply for the designation to be lifted or alternatively to require the National Roads Board to buy the land. This was attempted but it was then found that the motorway was a 'requirement' not a 'designation', and the provisions only allowed for the forcible removal of a designation. In the meantime, the Maori Trustee could not find a buyer and rates continued to accumulate. The trustee then found that the local airport committee had been in a similar position and had reached a satisfactory compensation agreement with Works. The Maori Trustee approached Works again to reconsider the matter in view of the airport committee precedent. The trustee was told the case might be reconsidered if overwhelming hardship was involved. The Trustee made a case pointing out that a buyer could not

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149. Correspondence and papers, MA 1, 32/2/1, vol 1

be found because of the designation and in the meantime owners were suffering from growing rates requirements. The application was turned down.<sup>150</sup>

Other town planning issues were also of concern to Maori. One of the submissions to the review committee of 1976 to 1977 on the Public Works Act by the department of Maori Affairs for example, concerned the power of local bodies and roads boards under an amendment to the Public Works Act to declare limited access roads that were clearly detrimental to the owners of Maori land. In the submission and further reports the department described the ‘obnoxious legislation’ as meaning such roads could only be used for through traffic and provided no legal access and no crossings. This was yet another obstacle in the way of Maori owners who wanted to utilise their land as it was impossible to subdivide individual lots if there was no authorised crossing place for each lot. By this means legal access could be taken away without any right of objection. The department also complained of the cavalier attitude of the Ministry of Works in using this provision.<sup>151</sup>

While Maori found planning processes were often working to their detriment they also appeared to have enormous difficulty in having local bodies respond to their planning needs. The problem appears to have been particularly acute when it came to proper provision of roading. Councils were notoriously reluctant to take responsibility for roads servicing Maori-owned areas, partly as a result of old antagonisms over rating. In many cases Maori landowners had to seek assistance from the Maori Affairs department and the Maori Land Court to try and force councils to take some responsibility.<sup>152</sup>

There have been improvements in the use of planning processes in more recent years particularly after requirements to take Maori interests into consideration were included in the 1977 Act as discussed in the overview of legislation. The planning division of Works in particular became much more responsive to Maori concerns in its later years. An example is the perceptive report produced by Ree Anderson in 1983.<sup>153</sup>

It has often been assumed, particularly after the requirements enacted in the 1977 legislation to take Maori concerns into account, that the hearing process will act as an acceptable substitute for the lack of specific requirements in the main Public Works Act. This was the view of the committee reviewing the public works legislation in 1976 and 1977. This requires more research but it is not clear that this will always provide an adequate check on takings for public purposes. Maori owners face barriers in going through the objection process, for example as identified by the Waitangi Tribunal in the *Mangonui Report*. It is also not clear that planning processes in the end can entirely control the use of public works taking provisions. In the case concerning the protection of the lease for the Ohaaki power station for example, the Planning Tribunal found that a planning scheme could not prevent the exercise of statutory powers by another Act of Parliament.<sup>154</sup>

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150. Correspondence, early 1970s, MA 1, 38/2, vol 7

151. MA 22/2, AAMK 869/739c

152. For example see MA 1, 22/1/1

153. R Anderson, *Planning For Maori Needs*, Auckland, Town and Country Planning Division, Ministry of Works and Development, 1983

154. *Maori Land Trust v Ministry of Works and Development* (1980) 7 NZTPA 108

*Policies and Procedures, 1928–1981*

In summary, preliminary research indicates that the application of public works land taking policies and procedures and associated town planning processes, may have impacted relatively more harshly on Maori land. This was the result of the application of often discriminatory legal provisions as well as the apparent failure to actively accommodate the special problems arising from the nature of Maori title and the special concerns and interests of Maori with regard to their land as guaranteed by the acknowledged principles of the Treaty of Waitangi. This perceived failure has resulted in the continued alienation of Maori opinion and contributed towards the still evidently strongly held belief among many Maori that public works takings of Maori land are a continuation of wartime confiscations with all the sense of bitterness and injustice that this implies.



## APPENDIX I

# PRACTICE NOTE

### WAITANGI TRIBUNAL

CONCERNING the Treaty of Waitangi Act 1975

AND Rangahaua Whanui and the claims as a whole

### PRACTICE NOTE

This practice note follows extensive Tribunal inquiries into a number of claims in addition to those formally reported on.

It is now clear that the complaints concerning specified lands in many small claims, relate to Crown policy that affected numerous other lands as well, and that the Crown actions complained of in certain tribal claims, likewise affected all or several tribes, (although not necessarily to the same degree).

It further appears the claims as a whole require an historical review of relevant Crown policy and action in which both single issue and major claims can be properly contextualised.

The several, successive and seriatim hearing of claims has not facilitated the efficient despatch of long outstanding grievances and is duplicating the research of common issues. Findings in one case may also affect others still to be heard who may hold competing views and for that and other reasons, the current process may unfairly advantage those cases first dealt with in the long claimant queue.

To alleviate these problems and to further assist the prioritising, grouping, marshalling and hearing of claims, a national review of claims is now proposed.

Pursuant to Second Schedule clause 5A of the Treaty of Waitangi Act 1975 therefore, the Tribunal is commissioning research to advance the inquiry into the claims as a whole, and to provide a national overview of the claims grouped by districts within a broad historical context. For convenience, research commissions in this area are grouped under the name of Rangahaua Whanui.

In the interim, claims in hearing, claims ready to proceed, or urgent claims, will continue to be heard as before.

Rangahaua Whanui research commissions will issue in standard form to provide an even methodology and approach. A Tribunal mentor unit will review the comprehensiveness of the commission terms, the design of the overall programme, monitor progress and prioritise additional tasks. It will comprise Tribunal members with historical, Maori cultural and legal skills. To avoid research duplication, to maintain liaison with interested groups and to ensure open process:

*Public Works Takings of Maori Land, 1840–1981*

- (a) claimants and Crown will be advised of the research work proposed;
- (b) commissioned researchers will liaise with claimant groups, Crown agencies and others involved in treaty research; and
- (c) Crown Law Office, Treaty of Waitangi Policy Unit, Crown Forestry Rental Trust and a representative of a national Maori body with iwi and hapu affiliations will be invited to join the mentor unit meetings.

It is hoped that claimants and other agencies will be able to undertake a part of the proposed work.

Basic data will be sought on comparative iwi resource losses, the impact of loss and alleged causes within an historical context and to identify in advance where possible, the wide ranging additional issues and further interest groups that invariably emerge at particular claim hearings.

As required by the Act, the resultant reports, which will represent no more than the opinions of its authors, will be accessible to parties; and the authors will be available for cross-examination if required. The reports are expected to be broad surveys however. More in-depth claimant studies will be needed before specific cases can proceed to hearing; but it is expected the reports will isolate issues and enable claimant, Crown and other parties to advise on the areas they seek to oppose, support or augment.

Claimants are requested to inform the Director of work proposed or in progress in their districts.

The Director is to append a copy hereof to the appropriate research commissions and to give such further notice of it as he considers necessary.

Dated at Wellington this 23rd day of September 1993

Chairperson  
WAITANGI TRIBUNAL

## APPENDIX II

# PUBLIC WORKS TAKINGS OF MAORI LAND IN THE *NEW ZEALAND GAZETTE*

The database of Public Works takings prepared by Nita Zodgekar can be accessed at the Tribunal library, located in the Tribunal offices, 110 Featherston Street, Wellington.

### ABOUT THE AUTHOR

My name is Nita Zodgekar. I completed a BA in Social Policy at Victoria University in 1993. In 1994, I was employed as a researcher at the Ministry of Education, where I worked on two projects: *He Mahi Tahi Tatou: Positive Practices Promoting Good Race Relations in New Zealand Schools*, and *Beginning School Mathematics*. In 1995, I returned to university and graduated with an honours degree in Social Policy. Over the last three years I have also tutored two university social policy courses. I was employed as a researcher at the Tribunal from December 1995 to April 1997. During this time I was principally involved with the public works project. For this assignment I searched through all the *New Zealand Gazettes* and some of the *Provincial Council Gazettes* for public works takings of Maori land, created a database from this information, and briefly investigated other sources. I have also been involved in claims facilitation tasks for the central Auckland district.

### INTRODUCTION

In 1994, Cathy Marr produced a report on public works takings of Maori land investigating the period from 1840 to 1981, which pointed out the lack of statistical information on these takings.<sup>1</sup> In response to this, and as part of the Waitangi Tribunal's Rangahaua Whanui project, the Tribunal undertook to compile a database of public works takings of Maori land using the *New Zealand Gazettes*. Because many of the claims registered with the Waitangi Tribunal are concerned with public works takings, it is anticipated that this database will be widely used by historians and by claimant groups alike. By employing a keyword search, one can find examples of Maori land taken from particular blocks or survey districts.

The project is divided into two parts: a survey of the *New Zealand Gazettes*, and a second phase involving a survey of takings using other sources, for example, Maori Land Court title records. The *New Zealand Gazette* is a newspaper of the New Zealand Government. An official *Gazette* has been published in various forms since 1840. The *Gazette* is the

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1. Marr's report will be published as part of the Rangahaua Whanui series (National Theme G).



means of publishing all kinds of official notices and proclamations. These include many types of notices that range from statutory regulations to the individual appointments of members of professional bodies by the Government and its agents. While this report is concerned with information derived from the published *Gazette* notices (contained in the proclamations), some comments or supplementary research for the second phase of the study are included. It is important to remember that this report focuses on published information in the *Gazettes* pertaining to those Maori land takings that can be distinguished from takings of general land. The emphasis was on finding notices that could definitely be classified as Maori land as opposed to general land.

This report is limited to looking at the *New Zealand Gazettes* as a source of information for public works takings of Maori land. It is organised into five parts. It begins by looking at the method used in extracting the information required from the *New Zealand Gazettes*. The next four parts discuss some findings drawn from the *Gazette* notices in terms of the various public works Maori land was taken for, the legislation used to take land for these purposes, some observations regarding the discriminatory way Maori were treated in terms of notification procedures in the *Gazettes*, and finally some issues in relation to obtaining data for this database.

## **METHODOLOGY**

The main task in the first stage of this study was to find information in the *New Zealand Gazette* on Maori land taken for public works purposes, to input this information into the database, and to provide some analysis of the results. The database is organised in chronological order. A hard copy of the database has been compiled. It contains a photocopy of every notice used and is collated in chronological order. Each entry includes the following details:

- the year and volume of the *Gazette*, and the date of the notice;
- the section, number, and name of blocks where land was taken or proposed to be taken;
- the survey district and the provincial district where land was taken or proposed to be taken;
- the legislation enabling the taking; and
- details of whether the land was ordered, proposed, or declared to be taken, and the purpose it was taken for.

### **Searching through the *Gazettes***

The major problem in exploring the *Gazettes* for Maori land taken for public works purposes, was finding notices that distinguish between the taking of Maori and general land. It was not until 1883 that the proclamation notices in the *Gazettes* detailing land to be taken for public works made this distinction.<sup>2</sup> The *Gazette* notices from 1883 to 1912 made this distinction by explicitly stating in the heading of the proclamation, that it was Maori land being taken for public works purposes.<sup>3</sup> After 1912, this clear differentiation between Maori and general land was not made in the *Gazettes*. From 1912 to 1974, land taken for

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2. The Public Works Act 1882 set out the requirement to publicly notify works proposed to be executed.

3. In fact, these were only examples of customary land taken (elaborated on in the methodology section).

## *Public Works Takings of Maori Land in the 'New Zealand Gazette'*

roads under Native Land Acts can be clearly distinguished as Maori land and so was included in this database.

The method used for finding this information was largely to search through the indexes of the *Gazettes*. Although the indexes are very detailed, especially for the earlier *Gazettes*, they are not always consistent. Maori land taken for public works purposes could be found under a number of headings such as 'Native land', 'Native Land Court', 'Land', and 'Orders in Council'. These headings would list Maori land proposed to be taken and the purpose for which it was required. In the *Gazettes* after 1912, land taken for public roads under Native/Maori Land Acts, was usually found in the indexes under the headings 'Road-line proclaimed as a public road' or under 'Roads and Streets' saying 'Laying out and taking a road'.

The same notice is usually repeated a few times in later *Gazettes*.<sup>4</sup> In the earlier *Gazettes*, the notices pertaining to Maori land are headed with: 'Native land taken'; 'Native land proposed to be taken'; 'Consenting Native land to be taken' (the Governor's consent was needed when taking wahi tapu land); and 'Laying off roads over Native Land'. In the *Gazettes* after 1912, the notices were usually headed with the following: 'Laying-out and taking a Road'; 'Proclaiming road-lines laid out'; 'Road traversing Maori land'; and 'Declaring land in a roadway laid out'. After the mid-1950s most of the notices on the database are under this latter heading.

### **Customary Maori land**

Customary Maori land is land held by Maori people in accordance with their traditional customs and usages before title has been determined by the Native Land Court. After 1840, the Crown not only pursued a policy of alienating land from Maori ownership, but also of converting land remaining in Maori hands from customary title into title derived from the Crown. This became known as Crown-granted or freehold Maori land. Little Maori customary or freehold land remains; by 1980 the latter had dropped to 5 percent of the total area of New Zealand. In addition, a significant amount of Maori freehold land was set aside as reserves. Crown agencies had control of this land and some of it was sold or used for public works.<sup>5</sup>

In legislation before 1852, the words 'Native land' were used to mean all Maori land (which was generally still in customary title). After 1852, a distinction had been made between 'Native' (customary land) and 'Maori' land (land derived from a Crown grant or some other legal title as Maori freehold land). It is important to note this, because between 1882 and 1912, the *Gazettes* distinguished between the taking of Maori customary and Maori freehold land. Nearly all takings between 1882 and 1912 recorded on this database are takings of Maori customary land. This conclusion was reached for two main reasons. First, most of the notices stated that land was not derived from the Crown, and secondly the use of the term 'Native Land' in the headings of the earlier notices is consistent with the terminology used to describe Maori customary land during that period.

In the later *Gazette* notices a variety of Maori freehold and Maori customary land was taken under Native Land Acts. The use of the 'Native land' in the title of these Acts is a

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4. Perhaps as a result of the 1882 Act requirement that the proposal be twice publicly notified.

5. G Asher, and D Naulls, *Maori Land*, Wellington, New Zealand Planning Council, Planning Paper no 29, 1987

reflection of the terminology used before the Maori Purposes Act 1947, instead of an indication that it is only customary land to which the Acts refer. This supports Marr's assertion that: 'Public Works definitions varied at different times as to whether "Native Land" meant customary land only or included Crown granted Maori land as well'.<sup>6</sup> In the post-1912 notices of land taken for roads under Native Land Acts, the land taken is definitely under freehold title if the proclamation contains a reference to a legislative provision allowing a 'well grounded objection'.<sup>7</sup>

### **Appellations**

In a booklet on survey records, provided at a research training workshop held at the Department of Land and Survey Information (DOSLI), it states that from the appellation (or labelling) of a parcel of land, one can discern the unique identification of land.<sup>8</sup> Thus, it is claimed that different appellation systems apply to each of the main tenure types of land; Crown, General (European freehold), and Maori. Crown land appellations usually begin with: *Section # of a Block of a Survey District*. General land usually has a lot number and deposited plan number: *Lot # DP#*. This document states that all Maori land parcel appellations start with the block name, for example, Mangawhara.

This system was not always used, however, by the writers of the *Gazette* notices. There are examples of Maori land taken, where the description of the land according to this identification system would be Crown land. In *Gazette*, 1889, volume 1, page 500, for example, the notice is headed with: *Native Land proposed to be taken for the Construction of a Police-station . . .* and the appellation detailed it as being from a *Section* number. There are also examples of Native land with appellations that would traditionally label it as General land. For example, in *Gazette*, 1906, volume 1, page 4, the Maori owners gifted land to the Crown for a Native school, and the appellation described the land in terms of General land numbers. Furthermore, one cannot be certain that all appellations starting with a block name are actually references to Maori land. This system of 'tagging' or labelling a parcel of land is only *indicative* of the tenure status of a piece of land described.<sup>9</sup> Thus this system could not be used with sufficient precision to distinguish between Maori and General land taken.

## **THE CROWN'S EXPANDING EMINENT DOMAIN**

[Road and Rail] had great symbolic significance: paths of civilisation, bring order and doom to natives and nature.<sup>10</sup>

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6. C Marr, 'Public Works Takings of Maori Land, 1840–1981', unpublished draft, Wellington, Treaty of Waitangi Policy Unit, 1994, p 5
  7. For example, section 50 of the Native Land Amendment Act 1913
  8. Department of Survey and Land Information, *Survey Records: A Research Training Workshop*, Wellington, 1996
  9. This was decided after a discussion I had with coordinator of the DOSLI course, Ronald Hermon.
  10. Belich; 1996:353

### **Public works purposes**

The definition of what constitutes a public work has widened over the years. In the 1928 Act, the definition was similar to previous public works legislation. It had to be based on some statutory authority or on Parliament's appropriation of money for the work. The definition of public work included any survey, railway, tramway, road, street, gravel pit, quarry, bridge, drain, harbour, dock, canal, river, water-work, and mining and associated work. It also included electric telegraph, rifle and artillery ranges, lighthouses, and buildings for public purposes. This definition was even more widely extended in subsequent years:

by 1945, land could be taken for subdivision, development, improvement, provision or preservation of amenities, public safety in respect of any public work and for regrouping or better utilisation.<sup>11</sup>

The *Gazettes* in the 1880s indicate that there were a number of major road lines and railways in construction that involved the taking of Maori land. In terms of these major works the taking notices proclaimed Maori land as taken for: the Great North Road, West Coast Road, Cambridge–Rotorua Road, Wellington–Napier Railway, Kawakawa Railway, Waikato–Thames Railway, Foxton–New Plymouth Railway, Nelson–Greymouth Railway, Hurunui to Waitaki Railway, Maungakawa to Waiorongomai Road, and the North Island Main Trunk Railway line.

Roads and railways, however, only constitute some of what was taken under the label of public works. The sheer variety of purposes that land was taken for shows the very broad definition that 'public work' has had in New Zealand legislative history. The following list of the public purposes that Maori land was taken for and proclaimed in the *Gazettes*, illustrates the wide domain of the Crown's powers to take land for public purposes: lighthouses, gravel-pits, police stations, hospitals, scenery preservation, school sites, native schools, electric lighting, wharf sites, cemeteries, landing reserves, stock paddocks, post offices, drainage systems, courthouse sites, public buildings, internal communication between lakes Rotomahana and Tarawera, a station for collecting rainbow trout ova, the construction of beacons and leading lights, model kaainga, waterworks, magazine reserves, abattoirs, bridges, recreation grounds, historic purposes, pilot and signal stations, travellers' accommodation, public health purposes, and defence works. This demonstrates the immense variety of purposes for which land could be taken as a public work.

### **Land taken for 'lesser' purposes**

Details about the purpose for which land was taken are often ambiguous in the gazette notices. Land was taken for public buildings, or public health purposes, for example, without specifying what sort of public building, or what kind of public work needed land for public health purposes (a hospital perhaps). Land taken for 'historical purposes' or 'internal communication between lakes' are also examples of vague reasons in terms of public notification and justification. These unclear descriptions of why the land was taken are good examples of how widely public works legislation could be applied. It would also

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11. Marr, p 117

be interesting to find out how often the land taken was used for the ‘specific’ purpose, even when a particularised purpose was actually identified in the *Gazette* notice.

Many of the takings in the *Gazettes* seem to be for what would be deemed more ‘essential’ public works, for example roads and railways. However, there are also examples of Maori land taken for what appear to be less important purposes, such as a station for collecting rainbow trout ova, recreation purposes, travellers’ accommodation, and model kaainga. It is debateable whether these works were important for the wider public good, however this was defined at the time. They were unlikely to have been of any benefit to Maori.

Judging from the number of acres taken for each specific purpose in the *Gazettes*, it seems that land may often have been taken that was surplus to the requirements of the work. In 1908, for example, 54 acres 3 roods of land was taken for building a lighthouse in Maunganui, Bay of Islands.<sup>12</sup> In 1899, 7 acres 2 roods of land was taken for the construction of a police station in Te Whaiti, Whakatane.<sup>13</sup> These are just some examples of amounts of land that were likely to be in excess of the purposes that it was taken. The Tribunal’s *Te Maunga Railways Land Report* deals with issues to do with land no longer needed for public works and rights under the Treaty in terms of the return of such land.<sup>14</sup>

## **LEGISLATION AUTHORISING TAKINGS IN THE *GAZETTE***

### **Legislation used to take Maori land for public purposes in the *Gazette***

The procedure for taking lands set out in the Public Works Act 1882 required a notice to be gazetted, and to be twice publicly notified, stating the place where the plan was open for inspection, with a general description of the works proposed to be executed, and the lands required to be taken. This notice would also call upon all persons affected by the proposed development to send any well-founded objections in writing within 40 days from the first publication. After all objections, if any, had been given due consideration, the proposed works were to go ahead with the consent of a minister or local authority. The *Gazette* notices began to distinguish between Maori customary and other types of land taken after this Act.

The legislation that the takings on this database have been authorised by are as follows:

- Public Works Act 1882
- Native Land Court Act 1886
- Drainage Act 1893
- Public Works Act 1894
- Native Land Court Act 1894
- Reserves, Endowments, and Crown and Native Lands Exchange, Disposal, and Enabling Act 1898
- Public Works Amendment Act 1900
- Scenery Preservation Act 1903
- Public Works Act 1905
- Native Land Act 1909
- Public Works Act 1908

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12. *New Zealand Gazette*, 1908, vol 2, p 2577

13. *New Zealand Gazette*, 1899, vol 1, p 500

14. Waitangi Tribunal, *Te Maunga Railways Land Report 1994*, Wellington, Brookers, 1994

## *Public Works Takings of Maori Land in the 'New Zealand Gazette'*

- Native Land Amendment Act 1913
- Native Land Amendment Act 1914
- Native Land Claims Adjustment Act 1918
- Native Land Amendment and Native Land Claims Adjustment Act 1921–22
- Urewera Lands Act 1921–22
- Native Land Amendment and Native Land Claims Adjustment Act 1923
- Public Works Act 1928
- Native Land Amendment and Native Land Claims Adjustment Act 1928
- Maori Land Act 1931
- Maori Affairs Act 1953

Thus this project is not concerned with takings under public works legislation only, because many takings occurred under other legislation. This also shows the sheer volume of legislation used for taking Maori land.

The legislation used to take and to notify these takings of Maori land for public purposes was poorly drafted. This is reflected in what seem to be ad hoc provisions in the myriad of Native Land Acts passed during the early 1900s. Section 51 of Native Land Amendment Act 1913, for example, sets out that it was in the public interest that any road line laid out should be proclaimed in the *Gazette* as a public road. The Native Land Amendment and Native Land Claims Adjustment Act 1918, stated that if a road line had been laid out under section 117 of the Native Land Act 1909, and had not been proclaimed as a public road, then it could be proclaimed as a public road under section 48 of the Native Land Act 1913, and section 15 of the Native Land Amendment Act 1914. This is a case where legislative provisions seem inconsistent and unclear as to exactly how to go about notifying information in the *Gazette*. Marr emphasises the confused state of this legislation: 'Very careful reading of all the legislation together can still result in uncertainty about precise provisions applying at any one time'.<sup>15</sup> Furthermore, the provisions in Native Land Acts, and Public Works Acts did not always coincide. This led to more inconsistency and uncertainty in terms of which provisions applied at any particular time.

A significant trend throughout this period was the widening of the powers of the Maori Land Court in order to facilitate the taking of Maori land. The Native Land Court Act 1886 allowed the court to make partition orders on application by any Maori or European purchasers. This Act allowed up to 5 percent of any block of newly partitioned Maori land to be taken for roading, without any compensation payable. The Tribunal's *Ngati Rangiteaorere Report* considered this issue of taking land without compensation in the context of lands that were compulsorily taken for a road from Maketu to Tikitere under this Act, between 1889 and 1890.<sup>16</sup> The Public Works Amendment Act 1887 extended the jurisdiction of the Maori Land Court further, by allowing it to determine compensation for all Maori-owned land, not just unextinguished customary land as under the 1882 Act.

### **Different taking provisions for Maori customary and freehold land**

As far as taking procedures were concerned, in the legislation used to take Maori land that was documented in the *Gazette*, it is clear that Maori customary land was treated in a discriminatory way, as compared to Maori freehold land. The Native Land Amendment Act 1894 prescribed that when a road ran along a boundary between European and Maori

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15. Marr, p 54

16. Waitangi Tribunal, *The Rangiteaorere Claim Report*, Wellington, Brooker and Friend, 1990

freehold land, that road was to be taken equally from both sides. This protection did not apply to customary land, leaving it more vulnerable to being taken. The Public Works Act 1894 explicitly detailed the different procedures for taking freehold as opposed to customary land. Section 2 of this Act outlined the gazetting procedures for taking Maori freehold land. The *Gazette* notice had to include a call for any objections to the proposed work. In section 88 dealing with customary land, there was no such clause for allowing objections. However, this clause gave the Maori freehold owner little power anyway, because the Act explicitly stated that an objection regarding the amount of compensation under offer did not constitute a well-grounded objection. Furthermore, customary land could be taken for public works without public notification if it was not registered under the Land Transfer Act 1915 (which it would not normally have been).<sup>17</sup>

The safeguard of notification for owners of customary land was important because apart from gazetting there was no other provision for notifying owners of customary Maori land when their land was required for public works.<sup>18</sup> In terms of compensation, customary and freehold land were treated differently; for example, section 26 of the Public Works Act 1882 says that compensation for customary land was to be determined by the Native Land Court. Part III of the same Act emphasises that full compensation should be provided for any Maori freehold land taken. Eventually the Maori Land Court determined compensation for both customary and Maori freehold land. The section 387 of the Native Land Act 1909, states that the Governor may, without the consent of any person and without liability to pay compensation, lay out and proclaim roads over customary land. This is another example of less protection being given to Maori customary land.

The Urewera Lands Act 1921–22 is an example of special legislation and public works provisions negotiated by the Native Affairs and Lands Departments. It provided that the Crown got the bush around Lake Waikaremoana and Maori were to contribute about 20,000 acres worth of land to the Crown as a contribution towards roading costs. These were to result in the Crown acquiring large chunks of land suitable for settlement. In the *Gazettes* there is an example of this Act being used to acquire large areas of land under the name of public works. In the 1930 *Gazette*, volume two, page 2194, 1660 acres of Maori land was documented as being taken under the Urewera Lands Act for roads.

Marr emphasises the involvement and wide discretionary powers of local bodies in takings of land for public purposes.<sup>19</sup> In the *Gazettes*, this survey found some examples of local body takings of Maori land for public purposes. These notices are under the 'Private Advertisements' section, and did not always appear to have conformed with prescribed taking procedures for notices in the *Gazettes*. For example, the Otago Heads Road Board gave notice that it was intending to take land from a native reserve for a road, but it did not give the precise amount of land being taken, the provisions of the Public Works Act 1908 it was taken under, and did not have the Governor's seal of approval.<sup>20</sup>

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17. All surveyed land (both customary and freehold) was to be registered under this Act.

18. Marr

19. Marr, p 119

20. *The New Zealand Gazette*, 1911, vol 2

## **POOR NOTIFICATION PROCEDURES FOR MAORI LANDOWNERS**

### **Deficient gazetting processes**

In order for a taking to be legal it had to be gazetted in full according to the provisions of the Public Works Act 1882. Many of the *Gazette* notices do not describe the precise piece of land that is being taken. Instead they often say 'Part' of a particular block of land. The *Te Maunga Railways Land Report* pointed out that the incomplete description of the land in the *Gazette* resulted in the owners not knowing what was being taken.<sup>21</sup> It was often seen as too cumbersome to notify all the owners of Maori freehold land in multiple ownership. It is dubious how often these gazetting procedures were complied with. The Tribunal's *Turangi Township Report* gives an example of the Crown entering Ngati Turangitukua lands with bulldozers without consulting or notifying them, before any proclamation taking the land was gazetted.<sup>22</sup> In this case the Crown was exempt from the notice requirements in sections 22 and 23 of the Public Works Act 1928.

Not all public works takings had to be gazetted. Where Maori owned land that was needed for public works, but it was not registered under the Land Transfer Act 1915, notification procedures did not take place. Only surveyed land was registered and even 30 years later, a lot of Maori land was not on the register.<sup>23</sup> However, there were some instances of notices in the *Gazettes*, proposing to take land that was unsurveyed.<sup>24</sup> Until the Maori Affairs Amendment Act 1974, legislation for public works takings had separate and less secure provisions for taking Maori land and were thus discriminatory.

### **Discriminatory notification procedures**

Using *Gazette* proclamations as a way of notifying owners when their land was to be taken, shows the total lack of communication and consultation made with Maori. Throughout the period this *Gazette* survey covers, Maori were subject to discriminatory notification provisions:

for a large proportion of even Crown granted Maori land, notification procedures were much less effective than for non-Maori land and this of course had a large bearing on the ability to make objections.<sup>25</sup>

Ngata pointed out the unfair method in which public works takings were administered, particularly since the Maori owner was often the last to know about the proposed works:

The Native owner should be the very first man to be consulted. If it were European owned land the very first thing the Government would do was to approach the European owner.<sup>26</sup>

Gazetting as a way of notifying owners was a totally ineffective way of advising Maori landowners of proposed takings, as the *Te Maunga Railways* case illustrates: 'What is more significant is that because there had been no meeting of owners, it is quite likely that many

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21. Waitangi Tribunal, *Te Maunga Railways Land Report 1994*, Wellington, Brookers, 1994, p 74

22. Waitangi Tribunal, *Turangi Township Report*, Wellington, Brookers, 1995, p 360

23. Marr

24. For example, *New Zealand Gazette*, 1896, vol 1, p 8

25. Marr, p 119

26. Ngata, April 1916, NZPD, 1916, p 743



of the 19 owners did not know that land was being taken at the time'.<sup>27</sup> It is clear that Maori notice rights were being breached. The first warning that their land was being taken came in the proclamation in the *Gazette* taking the land, if they were lucky enough to have proposed works over their land actually published in the *Gazette*. Many Maori landowners were subject to stress caused by rumours of proposed works over their lands due to ineffective gazetting procedures.<sup>28</sup> The Crown does not appear to have protected Maori owners' rights of rangatiratanga in the approach they took in proclaiming land for public works purposes. The Tribunal's *Mohaka River Report* also found no record of any consultation between the Public Works Department and the Maori owners when land was taken in 1921 and 1926 from the river frontage.<sup>29</sup>

These Acts gave the Crown extremely wide powers to take Maori land for roads, by just using Maori land informally as a road, and then later declaring it to be public ownership. Section 484 of the Native Land Act 1931, for example, stated that if a road traversing Native land had been used as if it were a public road, or if it had been improved or formed using public funds, then it could be declared a public road. The *Gazette* notices show that a significant number of pieces of land were acquired for roads this way under the Native Land Amendment and the Native Land Claims Adjustment Act 1928 and the Native Land Act 1931. This method of deciding that land should be taken for a road lacks any of the formal procedures of consultation that European owners were given.

These examples all reflect the gradual extension and opening up of the Crown's ability to take Maori land, partly as a reaction to the decrease in Maori land sales. The unequal and inequitable way Maori were treated in the taking procedures for land that was appropriated for these works may have been a breach of article 3 of the Treaty, which guarantees Maori the same rights and privileges as Pakeha. It was stated at the time that more communication occurred when European-owned land was needed for public works.<sup>30</sup>

## **DATA ON PUBLIC WORKS TAKINGS OF MAORI LAND**

This project is one step towards the collation of statistical data related to takings of Maori land for public works purposes. This kind of data would be very useful for addressing the Treaty implications of policy and practice in public works land takings. Marr stated that a major problem in producing her report was that statistical data related to takings of land for public works purposes was not readily available in any usable form. This data is even more elusive for Maori land.

It is of some concern that we do not have this information available in any usable form. There are qualitative accounts of Maori land taken for public works purposes, but there is not the quantitative information on a national scale. This database will be a valuable source of evidence for the Crown, historians, and claimants. However, the usefulness of this database in its present form is very restricted in terms of statistical information on total amounts of public works takings of Maori land. The limitations of the *Gazettes* for getting a complete picture of these takings means that there was likely to be much more land taken

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27. Ibid

28. Waitangi Tribunal, *Turangi Township Report*, Wellington, Brookers, 1995

29. Waitangi Tribunal, *Mohaka River Report*, Wellington, Brooker and Friend, 1992

30. Ngata, April 1916, NZPD, 1916, p 743

## *Public Works Takings of Maori Land in the 'New Zealand Gazette'*

than this *Gazette* survey shows. Therefore, breaking down this information, for example into Rangahaua Whanui districts, would be problematic if one is searching for an accurate figure of how much land was taken for public works.

The total amount of customary land taken for public works purposes, that has been recorded on this database from 1883 to 1912, is only 12,502 acres 1 rood 2 perches. A graph has been constructed to show trends over the period from 1883 to 1910.<sup>31</sup> The bar showing takings from 1907 to 1910 illustrates an increase of over three times the taking on the other bars. It could be the case that authorities were more diligent about gazetting information during this period, or perhaps the extended powers to take Maori land under the Native Land Act 1909 resulted in more land being taken. More research would be needed to determine this point.

Other sources of information for public works takings of Maori land appear to be equivocal. If this project is to continue, the second phase of this study will involve a survey of takings using other sources. These sources have not been fully investigated as yet. I have identified the following possible avenues for investigation:

- (a) Local land titles offices should have all records of public works land takings, but it may be difficult to access all Maori land takings. This information is organised on a parcel by parcel basis. In each parcel there may be several titles. All the information they have has been gazetted. This may be a good source of information after the 1920s, if there is some way of distinguishing between Maori and General land taken. However, to go through these records would be an extremely time-consuming process, and thus perhaps not a feasible exercise.
- (b) Maori Land Court title records may be a useful source for after the 1950s.<sup>32</sup> The district offices will have this information since it is organised on a district by district basis. The district offices have organized this information block by block. If the amount of compensation could not be agreed on between the owners and the Crown, then the minute books of the Maori Land Court also may have some information. If there was firm resistance on the part of the owner or owners, or some dispute, there may be a file as well. The *Gazettes* have file references that can be followed up for details regarding compensation.<sup>33</sup>
- (c) LINZ (formerly part of the Department of Lands and Survey Information) have individual files per property which give detail on land taken, but apparently these do not explicitly say whether it is Maori land. However, by following up the legal description one might be able to tell in some cases, since land was taken under separate provisions. LINZ also have a Public Works Register of Proclamations which covers the years from 1874 to 1950. This register mainly has purchase information and the appellation notices may give an indication of the land tenure in terms of the kind of ownership (that is, Maori, General, or Crown land). They also have land compensation claims registers, but the information on public works is repeated in the Public Works Register. Series 224 held by LINZ at Heaphy House, Wellington, has records called 'Maori land compensation claims', which cover 1911 to 1913. This gives information on Maori land taken for public works. Unfortunately this information only spans two years.
- (d) Transit New Zealand have records that were created by several successive agencies, namely the Main Highway Board, the Ministry of Works and

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31. See appendix 1

32. The older records may be archived.

33. These files can be tracked down at Archives (see point five).

## *Public Works Takings of Maori Land, 1840–1981*

Development, Roading Division, and finally the National Roads Board. Part of the Ministry of Works and Development, the National Roads Board, was established in 1953. This board had sole power of construction, maintenance, and control of all state highways and subsidised the cost of local roads, until 1989 when Transit New Zealand took over its responsibilities. Transit New Zealand currently have papers relating to the acquisition or purchase of land for roading and motorways.

- (e) National Archives have Land and Survey files, Works and Provincial Records, Policy files, and a card index of takings. From 1926, volume 2, the *Gazette* notices have file references that can be followed up at Archives using the Land and Survey files. The reference is usually at the bottom of the page (such as L and S 16/1993; or PW 33/1176).<sup>34</sup> In the notices before 1926, sometimes the plan reference can be followed up for a file on the taking. However, research in this area will also be limited due to time constraints.
- (f) The Maori Trustee has some very scattered information. They only have files on individual cases, which they suspect are held at National Archives; even then these do not detail anything about where land was taken and for what public purpose. Their records only outline compensation.
- (g) For this survey, a search of the *Provincial Council Gazettes* for Maori land taken for public purposes was conducted. These gazettes were published by the Provincial Councils from 1853 to 1976, and did not have much useful information for the purpose of this project. In terms of Maori land and public works, the type of material they contained included such things as the duties of the Superintendent and other authorities in terms of land regulations and the setting apart of reserves for any purpose of public advantage; proclamations regarding the regulations associated with extinguishment of Native title over blocks of land; notice under Native Land Acts of times and places for investigating claims; the details of the completed plans of some towns and suburban sections, including how many acres of land will be devoted to roads and public reserves; dispatches for individual commissioners relative to land in particular areas; tenders for making roads and other public works; regulations for the licensed occupation of pastor lands; regulations for applications to buy land that the Crown had acquired from Maori. There were no notices of takings in the provincial gazettes.

Tracking down these sources, identifying the appropriate data, and collating this information is a large research task. It appears likely that problems will arise in distinguishing between Maori and general takings in these sources. Perhaps the result of this type of research will be a series of general trends and overall quantities in terms of land taken for public works, instead of an estimate of exactly how much Maori land was taken in specific areas. Nevertheless this information will be invaluable.

The way for this project to proceed is on a district by district basis. There is no easy way of quantifying the amount of Maori land that was taken for public works purposes in a particular district for two main reasons. First, most of the information in the second phase of this study is organised according to the geographical location of the taking, for example, Maori Land Court records. Secondly, and more importantly, the kind of trends we want to discern from this material will require this breakdown of material. There is the intention that the data will be organised into Rangahaua Whanui districts for analysis at some later stage in the process of this study. It would be interesting to get statistics comparing North

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34. L and S was Lands and Survey Offices and P W was the Public Works Department.

and South Island takings, and the impact of takings in tribal areas where a lot of land has been lost by other means. Also data on the relative amounts of Maori and non-Maori land taken, and the impact of various Government policies on the amounts taken for public works purposes will provide worthwhile information. The Crown and claimants should indicate to the Tribunal whether they feel that such a quantitative study would be useful on a district by district basis.

## CONCLUSION

The dominant problem with the *Gazettes* is that they do not distinguish between Maori and General land taken after 1912, and that not all Maori land takings were gazetted in any case. Apparently using the appellations detailed in the individual notices would not be a reliable way of differentiating the status of land tenure for each piece of land taken for public works. Furthermore, I am not confident as to the consistency in gazetting. Hence this database is limited to takings of Maori customary land from 1882 to 1912 and Maori land taken for roads under Native and Maori Land Acts from 1912 to 1974.

With reference to the quantities, even of customary land, we can conclude that not all takings were gazetted. The statistical information gained through this exercise is too incomplete to support a thorough statistical analysis of the amounts of land taken for these purposes in New Zealand. However, judging from my preliminary search, data should exist at various repositories, but it will undoubtedly be in a very scattered and unprocessed form.

The *Turangi Township Report* refers to the Crown's 'draconian statutory powers' in terms of public works takings. This exercise has shown that the Crown's actions when gazetting public works takings of Maori land reflects this harshness in their wide definition of what constitutes a public work, the nature of legislation authorising the takings, and the use of the *New Zealand Gazettes* as the method for notifying owners. In this respect, it would be helpful to have information about the print run, circulation, and main repositories of nineteenth-century and twentieth-century *Gazettes*.

It seems that much of the land taken was not used to benefit Maori, but instead was a form of obtaining their land compulsorily. This is reflected in the *Gazette* notices detailing land taken for purposes not essential for the public good, ambiguous descriptions of works land was taken for, and taking land clearly surplus to the requirements of a public work without any obligation to return the land. The poor quality and confused state of legislation allowing these takings contributed to the restrictions on Maori ability to object to these takings. The discriminatory way customary Maori land was treated as opposed to Maori freehold land, but more significantly, the way Maori land was taken in comparison to European-owned land, illustrate these points. Lack of notification in terms of communication with owners is reflected in the incomplete gazetting procedures and the general inadequacy of the gazette as a method of notifying Maori owners of proposed takings. This confusion and ambiguity allowed the Crown to take Maori land with minimal consultation.

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