

## PUBLIC WORKS TAKINGS

### 11.1 The British Crown and Public Works Takings, 1840–60

In 1840, New Zealand inherited the centuries-old English tradition of the right of the state (or the Crown) to take private land for public purposes in exchange for the payment of full and equivalent compensation and the assurance that takings would only be made under legislative authority. While private enterprise had been willing and able to promote and develop public works in England, the same could not be said for New Zealand after 1840. This meant an early modification of the English tradition in New Zealand towards central, provincial and local government responsibility for public works. In addition, the prior rights of the Maori people to (amongst other things) possession and rangatiratanga of their land had been recognised by the British Crown in the Treaty of Waitangi. This encouraged further modifications of the English model in its application in New Zealand.

From 1840 to the end of the 1850s, there was practically no legislation regarding compulsory public works lands takings in New Zealand. In late 1841, the Surveyor-General, Felton Mathew, did lay out roads and public reserves in Port Nicholson before the purchase of the land had been completed by the New Zealand Company and the Crown. Governor Hobson seems to have relied upon the Crown's claim to prerogative rights to the foreshore, and radical title to land, in authorising these arrangements. The Municipal Corporations Ordinance 1842 authorised the government to make over the public roads and reserves to local government. Governor Grey, in the late 1840s, sought to increase the protection of Wellington, the Hutt Valley and Porirua districts by extending roads to link up these areas; thereby providing a public service and fulfilling a military purpose also. It is doubtful if he had the chiefs' consent to build the road.

Generally, however, the Crown purchased land ahead of settlement needs and made provision for public works from it, thereby avoiding the taking of either Maori or Pakeha land for such purposes. Generally speaking, public works related legislation during this period, such as the Public Roads and Works Ordinance 1845, was concerned with works at a local level. It encouraged local responsibility for the construction and, most importantly, payment for works programmes in an effort to save money. While the legislation did not provide provincial government or local bodies with the authority to take land, it did allow for the levying of rates to pay for the cost of construction and maintenance of works on land already acquired and settled.

When compulsory takings did start in the late 1850s, these were generally to improve amenities within settlements or on land which had already been purchased from Maori, as in the South Island. During this time, Maori were encouraged to believe that meaningful accommodation of their customary rights was possible. Furthermore, keen to pursue participation in trade and economic growth, some Maori 'gifted' land for public works in these early years.

The 1852 Constitution Act, however, allowed increased control of land taking to the settler government (rather than the Governor). Furthermore, it confirmed a distinction between Crown granted and customary Maori land where none had previously existed in local law, and exempted customary Maori land from takings under the Act. It stated that Provincial Councils were not able to legislate regarding Crown land and unextinguished Maori land. The Act reserved Native Affairs to the Governor. Subsequent public works provisions, such as the Wellington Province Roads Act 1853 and the Taranaki Province Public Works Ordinance 1855, determined public works at a provincial level only, and increasingly afforded protections (*rangatiratanga*) to customary lands only, while Crown granted Maori land was subject to the same provisions as general land. For example, the New Plymouth 1855 Public Works Ordinance only exempted aboriginal land which was 'the common property of a tribe or community' (s 43) while the 1858 Roads and Bridges Ordinance excluded land from rating that was owned or occupied by aboriginal Natives except where title was derived from the Crown (s 50).

### 11.2 1860–80: Settler Government and Public Works Takings

The possibility of war prompted debate in the early 1860s about the settler government's rights in respect of Maori land. Settler politicians clearly felt that Crown granted Maori land, which was formally subject to received law and statute law, could be taken for public works. However, they sought advice on their right to take to take land over which Native title had not been extinguished. In response, Attorney-General Henry Sewell advised in November 1862 that the Crown had the right to make roads through all lands because it was sovereign.<sup>1</sup> Assistant Law Officer, Francis Fenton (responding in late 1862), felt that Sewell was wrong and argued that by virtue of the Treaty and the 1852 Constitution Act, 'aboriginal land' was admitted to be the distinct property of Maori.<sup>2</sup> On the other hand, Sewell's successor, Frederick Whitaker, was in agreement with Sewell and advised in early 1863 that in terms of the Treaty, a positive enactment of the legislature would prevail over the terms of the Treaty if there was any conflict.<sup>3</sup>

All three opinions were sent to the British Colonial Office for legal advice, during which time the Colonial Office resigned control of Native affairs to colonial

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1. Opinion of 22 November 1862, AJHR, 1863, e-3, s1, p 6

2. Opinion of F Fenton, 28 November 1862, AJHR, 1863, e-3, s1, pp 13–16

3. Opinion of F Whitaker, 21 February 1863, AJHR, 1863, e-3, s1

government, expressing the hope that the colonial government policy towards Maori would be ‘just, prudent and liberal’.<sup>4</sup>

In the Native Land Act 1862, provision was made for the governor to take five percent of land *purchased* from Maori, for the purpose of roading. Arguably this did not impinge directly on Maori. However, following the resumption of warring in 1863, the settler politicians’ public works legislation empowered provincial governments to undertake the work required on confiscated lands to make them attractive for settlement. Despite its relinquishment of responsibility for ‘Native policy’ in New Zealand, however, the Colonial Office disallowed the Provincial Compulsory Land Taking Act 1863 (which authorised the provincial councils to take any land for public works) saying that it was ‘repugnant to the spirit of English law’ in that it applied to Native land over which customary title had not been extinguished.<sup>5</sup>

The Public Works Lands Act 1864 provided the first specific legislative authority for central government to take both *customary* and Crown granted Maori land for public works purposes. Criticisms were made of the Bill when it was first introduced to the House that it flew in the face of established legal principles and the guarantees of the Treaty. Ministers themselves admitted that administrative convenience was being put before not only the Treaty, but also ordinary legal rights. For example, Mr G Graham opposed the Bill because it would infringe the Treaty of Waitangi and in addition it would be manifestly unjust to make roads through land used by Maori as *urupa*.<sup>6</sup> However, majority opinion supported the Bill. In particular, Mr Weld rejected concerns about the Treaty in respect of *wahi tapu* (such as *urupa*) saying that the Treaty gave sovereign rights to the Crown to take land, and ‘even of taking a road through a graveyard’.<sup>7</sup> The terms of the Act, once it was passed, meant that there was little practical difference between punitive confiscations and compulsory takings of land for public works, particularly as public works takings at this time were of a military nature. Under section 5 of the Act, the compensation for the compulsory taking of Native Land was to be in accordance with the New Zealand Settlement Act 1863 (in other words, available only to those Maori not in ‘rebellion’). The Act provided few of the protections found in English public works legislation (on which the legislation was supposedly based). For example, the Governor was not required to give notice or application to the land owner prior to the taking and holding of the land. Furthermore, the Act offered no protection to land in use or occupation, or for *wahi tapu*, neither was there a first right for the return of surplus lands to the former owners. Although in principle the Act applied equally to Maori and Pakeha land, Maori land would ultimately be most affected by it.

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

5. Cathy Marr, *Public Works Takings of Maori Land: 1840–1981*, Report for the Treaty of Waitangi Policy Unit, Wellington, December 1994, p 47. In 1866, the Act was passed in a revised form which included Maori land held by Crown grant and Maori reserves, while native land over which customary title was unextinguished was still exempt.

6. NZPD, 1864–66, p 154

7. *Ibid*

The Native Lands Act 1865 (which established the Native Land Court) made it lawful for the Governor to make reserves for roads, not exceeding 5 percent of any land over which a Crown grant was issued (s 76). The Act removed from Maori customary land the protections insisted upon by the Colonial Office and exposed it to the obligations and duties relating to all Crown granted land. It also extended the 1862 provisions to apply to all Maori land investigated by the Native Land Court and Crown granted, whether sold or not. The Act differentiated between Maori and general land in that the right to take Maori land extended for ten years after the date of the Crown grant – significantly longer than for other Crown granted land. Also, the Act made no provision for compensation to be paid for some types of Maori land taken (identified as ‘outlying’ land) which clearly contrasted with the requirement for public works takings of general land at that time.

The Immigration and Public Works Act 1870 and the Public Works Act 1876 were key pieces of legislation during the ‘public works boom’ of the 1870s, intended to encourage sustained economic development, while at the same time ‘pacifying’ and ‘civilising’ those Maori attracted to employment on public works. The former Act has been described by Marr as discriminatory in its apparent ‘lack of concern for special Maori interests’.<sup>8</sup> For example, orchards and gardens on land under private title were offered protection while cultivations, urupa, and other wahi tapu on customary land were not identified for special consideration. Under section 7 of the Act, no compensation was payable for taking water from rivers, streams, or natural watercourses. Under section 22, confiscated land was declared waste land of the Crown. In 1872, an amendment to the Act (s 36) extended the right to take Maori land for roads without compensation to include land for railways also.

The Public Works Act 1876 attempted to consolidate the public works legislation for central government. The newly established counties and boroughs (which replaced the provincial councils) as well as the central government, were empowered to take Maori land. Under the Act, certain areas were not to be entered onto for the purposes of public works without the written consent of the owner. Such areas included gardens, vineyards and pleasure-grounds but did not mention sites important to Maori, such as urupa and other wahi tapu (s 15) although surveyors were prohibited from entering upon Native land without the consent of the Minister (s 78). The Act retained, and in many cases strengthened, earlier protections for most lands required for public works (with the exception of certain land for railways) while all roads being used by the public were considered vested in the Crown (s 79). This last provision included roads established by Maori prior to 1840 along which Europeans had been allowed right of passage. According to section 38 of the Act, all persons suffering damage under the Act with an interest in land taken were entitled to compensation, to be determined by the Compensation Court. Although not discriminatory against Maori specifically, the bureaucratic nature of

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8. Marr, p 71

the process and the complexity of Maori title would have made it difficult for Maori to secure compensation, especially for customary land.

Other relevant legislation in the 1870s includes, the Highway Boards Act 1871, which sought to remove the restrictions imposed on provincial councils under the Constitution Act 1852, including those over lands where aboriginal title had not been extinguished. The Act allowed customary Maori land to be rated 'if in occupation of any other than an aboriginal Native'. Also, the Native Land Act 1873, and its amendment in 1878, continued the Governor's power, under the 1865 Act, to take up to five percent of the land granted under the Native Land Act for roads. Under the 1873 Act, this was possible for up to 10 years after the date of the Crown grant. This was extended to 15 years under the 1878 Act (no 2). Compensation was payable.

During most of the 1870s the Crown (in particular Donald McLean, Minister of Native Affairs) continued to negotiate with Maori on public works takings. For their part Maori generally co-operated with public works requirements and continued to 'gift' land for roading and other requirements. However, it was clear that McLean's objective was to facilitate European settlement and cater for European needs. Official reports, for example, consistently described roads in terms of their suitability for European settlement needs rather than their advantages for Maori. Furthermore, according to Marr, the Crown sometimes offered Maori an unreasonably low purchase price, backed up with threats that the land would be compulsorily purchased under the Railways Act (see next section) if the price was rejected.<sup>9</sup> Some local authorities, on the other hand, used the confusion arising from the mass of legislation which related to Maori land to their best advantage by avoiding consultation and negotiation with Maori in favour of compulsory purchase. Marr provides the example of the pressure brought to bear on a District Road Board to avoid obtaining agreement from Maori for a road when the provision existed for the road to be taken without compensation.<sup>10</sup>

The matter of rating as it relates to public works takings was also a major local issue because rating was intended to pay for and maintain public works (see ch 19 below). Maori saw no services on customary land, and Crown granted land proved difficult to rate because title had been fragmented by the Land Court and many owners did not even live in the district. Maori opposition infuriated local authorities who used the non-payment of rates as an excuse to further neglect Maori rights in respect of public works takings. According to Marr, the Crown had to take some responsibility for allowing this situation to develop because it created the circumstances, such as the discriminatory legislation discussed above, under which local bodies targeted Maori land for public works. Furthermore, settler government accepted, with little regard for differences in land tenure and culture or the lack of access by Maori to capital, that 'property had its duties as well as its rights'. They interpreted Article 3 of the Treaty to mean that wherever Pakeha subjects were affected by public works and ratings provisions, Maori should be treated similarly.<sup>11</sup>

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9. Ibid, p 83

10. ap 2/2, 1873/1716 (cited in Marr, p 83)

Maori members of Parliament, on the other hand, suggested that Maori objections to rating could be taken into account (without undermining the purpose of rating *per se*) by allowing Maori the opportunity to provide an equivalent to rating, such as the provision of materials and labour. While such requests generally fell on deaf ears, in 1875, James Mackay (Civil Commissioner in the Thames District) wrote to McLean recommending that Native lands (Crown granted or other) be exempted from rating under any Highway Act because many Maori had sought guarantees in granting land for roads that they not pay rates on the road because they were often simply unable to pay.<sup>12</sup> Under-Secretary H T Clarke endorsed this view and added that Maori should be relieved of these taxes and should not be subject to them if they chose to hold onto their lands. In the end, however, settler demands for public works which suited their needs overwhelmed attempts by the Native Department to give some protection to Maori. Native Minister McLean's response to other suggestions was that it would not do for the Native Department to be seen to be 'opposing the opening up of the country'.<sup>13</sup>

Many legislative provisions were seriously criticised by Maori, particularly once Maori received representation in Parliament (with the four Maori seats created in 1867). The fact that Maori land was generally taken in preference to European land was openly admitted by the Minister of Works (who considered it 'decidedly unfair') in 1888 and commonly complained about by Maori.<sup>14</sup> Despite some amendments to legislation, Maori landowners continued to encounter problems with Councils illegally taking land without a response from Government departments who failed to display any real political will to remedy admitted injustices. For example, in the late 1880s a local authority wanted to take the land of Matene Tuwhare, when European land was obviously better located for roading purposes. The land was taken from Matene and the road built, despite his complaints to the Native department. Despite further evidence supported by a judge that the local authority's lawyer had acted in a questionable manner, the government refused to interfere in the local issue.<sup>15</sup>

### 11.3 1880–1900: Public Works Policy and Law

By the late 1870s and early 1880s, as Europeans came to perceive Maori as less of a threat (the number of settlers having greatly increased) the government's policy regarding public works takings became more hard-line. Maori in Taranaki responded to the pushing of roads and surveys though their *rohe* with non-violent protest. Government in turn responded with force, in particular at Parihaka in 1881, when the people living there were forcibly dispersed and their leaders arrested.

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11. NZPD, vol 10, 1871, p 384 (cited in Marr, p 86)

12. Marr, pp 88–89

13. H T Clarke to McLean, 2 November 1874, McLean papers, ms 32, folder 218, no 74

14. NZPD, 1888, vol 61, p 609

15. ma 1 92/2163 and attachments

Subsequently, the Public Works Act 1882 began a new pattern of separate provisions for taking Maori land, described by Marr as 'harsh and vindictive'.<sup>16</sup> The Act, in particular, introduced distinctly different provisions for land takings and the compensation paid for Maori land as opposed to general land; Maori land attracted penalties rather than the protections guaranteed in the Treaty, a legacy which lasted well into the twentieth century. The 1882 Act allowed the Crown to 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). In terms of compensation, while Maori land held by Crown grant was treated the same as European land, the provision for customary Maori land was that the Minister (not the owners of the land) 'may' make application for compensation. Such legislation took away from Maori many of the protections hitherto theoretically available to all landowners in the 1870s and still available for European-owned land under the 1882 Act, while increasing the Crown's power to take Maori land without prior consultation and agreement.

Amendments to the Public Works Act in 1885, 1887, 1889 and 1894 did little to improve protection for Maori land, instead extending the powers of local authorities. For example the 1889 Amendment allowed for land taken by the government for railways to be vested in a local authority for a road. The Public Works Act 1894 allowed up to five percent of land to be taken for roads from land which had not had its title investigated by the Native Land Court. Compensation was not payable, and land occupied by pa, village, cultivation, burial grounds (etc) could be taken with the consent of the Governor in Council. In addition to these general legislative developments, Maori lands were also taken under Acts such as the Tongariro National Park Act 1894.

Other legislation relating to public works was passed in the late 1880s, including the following Acts.<sup>17</sup> The Counties Act Amendment Act 1883 gave powers to County Councils to control and supply water for irrigation purposes for farming. Drainage rights were extended by means of the Land Drainage Act 1893. The Native Land Administration Act 1886, allowed roading costs to be deducted from the purchase money or rent before it was distributed to owners. The Native Land Court Act 1886 allowed the Governor to lay off public roads from up to five percent of land granted under any Act relating to Native land or held by Naitves under Certificate of Title or Memorial of ownership. This power was to cease fifteen years after the grant was issued, although under the 1888 amendment to the Act, this was reduced to ten years, and at the same time it was stated that where a road was to run between native and European land, land should be taken equally from both sides. Under the Native Land Court Act in 1894, the time frame was again extended to 15 years after the first issue of title.

Maori petitioned repeatedly about public works takings and criticised the lack of consultation with them on the part of taking authorities. For their part, taking authorities claimed that it was impossible to serve notice on all appropriate Maori

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16. Marr, p 91

17. David Williams, *The Maori Land Legislation Manual*, pp 77–78

land owners because of the number of individual owners listed with each block (as a result of the breakdown of customary title by the Land Court). Maori also expressed concern regarding the lack of legislative protections for their land when compared to general land, a situation which encouraged the taking of Maori land. They argued that in the absence of such protections, financial considerations and administrative convenience along with other imperatives, were taking preference over their special rights as land owners.

#### 11.4 1900–28

The myriad of Acts and amendments pertaining to the taking of Maori land continued into the twentieth century. The Otago Heads Native Reserve Road Act 1908 (with compensation paid), referred to takings in local areas, while the Scenery Preservation Act 1903 was a more general piece of legislation used to facilitate land takings in the volcanic plateau and other districts. While Maori freehold land was excluded from the operations of the Scenery Preservation Act 1906, the Public Works Amendment Act 1903 provided that land could be taken for scenery preservation purposes under the public works provisions.<sup>18</sup> Substantial and important mahinga kai could be taken under these provisions. Other Acts included the Public Works Act 1905, the Native Land Act 1909, and the amendments to these Acts. According to the Native Land Settlement Act 1907, Maori land boards were able to lay off roads in lands vested in them for settlement (s 12). The Act also stated that no land was to be offered for sale or lease by the boards until it was satisfactorily roaded and bridged, with these costs (plus four percent interest) to be repaid out of revenue received from the land (s 39). The Native Land Act 1909 allowed the Native Land Court to lay out roads when partitioning lands (s 117). It also allowed the Governor, without the consent of any person and without the liability to pay compensation, to lay out and proclaim roads over customary lands (s 387, repealed in 1927).

The sheer quantity of these Acts and amendments created confusion in respect of the status of Maori land which could be taken for roads and railways under the main public works provision (discussed earlier) or under the Crown right to take certain lands without compensation. This, it has been argued with much justification, ‘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 [to Maori land]’.<sup>19</sup>

In respect of rights over water, the sole right to use water in lakes, falls, rivers or streams for the purposes of generating or storing electricity was vested in the Crown in the Water Power Act 1903. The Land Drainage Act 1908 and the Swamp Drainage Act 1915 authorised drainage activities which destroyed traditional Maori

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18. Tom Bennion, ‘The Aotea Maori Land Board and Scenery Preservation’, a supplement to the Whanganui River Report, Wai 167 rod, doc a-19f, p 12

19. Marr, p 62

fisheries and encroached on disputed foreshores areas. Under the 1908 Act, section 17(f), a Board of Trustees (as constituted under the Act) was expected to pay 'reasonable compensation' determined by a Magistrate (if the parties could not agree to an amount themselves) and owners had one month to lodge an objection to proposed action with the Clerk of the Board (s 21). The 1915 Act, on the other hand, noted that 'land used exclusively for the purposes of Native settlement shall not be so taken or purchased unless its acquisition is, in the opinion of the Governor, necessary for the successful conduct of the drainage operations' (s 7(1)). While compensation or purchase money was payable in respect of land taken or purchased (s 7(2)), the Act made no mention of an appeal process.

Ongoing legislative developments, in roading in particular, consistently failed to require central government to ensure basic protections for Maori. For example, taking authorities were not required to show that compulsory takings for roading without compensation were essential and in the best interests of the whole community. Consultation with Maori suffered as a result and was replaced, for the most part, with taking by compulsion without the protection of the right to notice which was afforded to general land. In 1927, the Native Minister admitted that previous legislation relating to public works had discriminated against Maori.<sup>20</sup>

### 11.5 Public Works Acts and Related Legislation, 1928–81

The Public Works Act 1928 (and its frequent amendments) became the principal legislation for public works until it was replaced in 1981. Under the Act, Maori land was dealt with under separate provisions from general land and continued to receive less protection especially customary Maori land, although the right to take 5 percent of the land without compensation was removed in the 1928 legislation. The Act confirmed that both the Crown and local authorities had the power to take land (including Maori land under any title) for public purposes. The taking of land could be by agreement or compulsion. Maori customary land generally fell into the latter category. Crown granted Maori land was distinguished from general land by the provision that Maori land interests were not required to be published in the gazette. This diminished the opportunity for Maori to be informed about their land and cloaked from public scrutiny the extent of taking of Maori land.

Provisions for compensation were also significantly different for Maori land under the 1928 Act. While compensation was payable in relation to general land it was not a mandatory requirement for Maori land, either customary or Crown granted. Instead, the onus for making a claim for compensation fell on the taking authority (most often the Minister) who according to the Act, 'may at any time' make a claim (as with the Public Works Act 1882), though with no limit on how long application could be delayed. Compensation claims were heard by the Maori Land Court in the case of Maori land, as opposed to the Land Valuation Court

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20. NZPD, vol 216, 1927, p 537

which heard claims for compensation for general land. The expertise of the Maori Land Court in assessing complex compensation law was often called into question by Maori (discussed further below).

Furthermore, while the 1928 Act provided for the return of surplus lands taken but not required for public works, later amendments excluded Maori land from the offer back provisions and allowed it to be used for 'secondary purposes' when no longer needed for its original purpose. For example, an amendment in 1948 provided that land taken for a public work could be used for a secondary purpose under certain conditions (s 37). The offer back provision was not fully restored in legislation until 1981. Up until 1945 at least, Maori were also disadvantaged by the requirement for special legislation to re-vest their lands.

The Public Works Act 1981 was passed in response to criticisms that protections to owners of general land had been eroded over the years and that too much power was now in the hands of the taking authority. For example, the provision was reintroduced that land could be taken only for 'essential work' (s 22). Many Maori concerns were inadvertently addressed and resolved in this process also, although there was still no recognition of specifically Maori interests in the 1981 legislation. During the debate about the Bill the Legislature was reassured that 'provision is made in the Bill to give extra protection to our Maori friends.'<sup>21</sup> Despite this, the member for Western Maori criticised the lack of consultation with Maori in the drafting of such a controversial and important Bill for Maori and the member suggested that the Bill should be considered by more Maori groups. The member was assured that problems in identifying owners of Maori land affected by the Bill could be referred to the Maori Land Court for resolution and the matter was dropped.<sup>22</sup>

Aside from the central public works Acts, other legislation containing general or specific taking provisions continued to impact on Maori land from 1928 to 1981. Legislation regulating the ownership and management of natural resources followed a similar history to that of public takings, as did drainage and river control.

## **11.6 Public Works Taking Policy and Procedure: 1928–81**

### **11.6.1 Land-taking decisions and the application of taking procedures**

The Public Works Department ('Works') was the main Government department responsible for public works takings from 1928 to 1981 (and Lands and Survey to a lesser extent), with the exception of Railway and other business oriented state services such as State Coal. Local authorities were also major players in public works takings with close links with central government, although they were more independent in setting policy and procedures. Of greatest concern for Maori in the relationship between central and local government with respect to land takings, was

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21. NZPD, 1981, vol 438, p 1484

22. Ibid

central government's refusal to 'interfere' in the actions of local authorities, even when Ministers were advised of, and had recognised, Maori concerns regarding the protection of their lands.

Maori land was the prime target for takings and most often this was the result of Crown policies such as the fragmentation of Maori land title which allowed taking authorities to abandon the procedures routinely applied for general land, such as negotiation and consultation with owners. Maori land which lay 'idle' once title had been established was also a tempting target for taking authorities who presumed that because the land was not properly kept it was of little concern to the owners and could be used for public purposes. For reasons explained below, it was also generally easier to avoid paying compensation to Maori.

Maori complained that public works takings not only diminished their total holdings of freehold land, but also contributed to the loss of remaining ancestral land which was culturally, politically, and socially important to iwi or hapu. According to Marr, local authorities had more regard for financial advantage than the interests of Maori land owners, sometimes using public works provisions simply to shift Maori out of town. For example, in Kaikohe in 1947, Maori owners complained that a proposed taking for a hospital site would be generally detrimental to Maori. Some officials even pointed out that there was ample European land more suitable for the purpose, but the land was taken regardless. Taking authorities also seemed unconcerned when their own interests conflicted with longstanding Maori interests to develop the land in question. This situation was not helped by the lack of consultation between taking authorities and Maori. Furthermore, official documents reveal that non-Maori were able to bring considerably more influence to bear on taking authorities than were Maori. In particular, takings involving wahi tapu and urupa have been a source of major concern and resentment for Maori, who have claimed that taking authorities used legal technicalities to avoid requirements regarding burial sites. Maori also claim that inaccessible or marginal land reserved from sales for their own purposes (such as hunting game or gathering flora for a variety of purposes) was often later subject to public works takings because of its scenic and recreational value for Pakeha. Traditional fisheries were also lost in this manner. In other cases, remaining Maori land was effectively landlocked by takings.

The terms upon which Maori land was relinquished for public works requires consideration. As there was no viable alternative for Maori other than consent, even takings described as a 'willing agreement' must be treated with suspicion. There is evidence that Maori were obliged to sell land because it was made clear to them that if the owners did not agree to a purchase, the land would be taken.<sup>23</sup> It also appears that the government was willing to apply pressure to reach an agreement or settlement with Maori, or to apply legislative pressure in order to force agreement from Maori. Although mechanisms (albeit limited ones) had been in place since the Native Land Act 1909 for contact with Maori owners when purchasing land; it

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23. Marr, p 165

appears that the taking authorities themselves appeared reluctant to use these provisions. As late as the 1970s, it was common for Works to ignore all the normal protections for landowners when dealing with Maori land under the guise that it was necessary to use compulsory provisions because of the complications of multiple ownership.

While conditions showed some signs of improvement for Maori in the 1970s, the change in attitude lacked legal backing. Earlier attempts to improve procedures for the taking of Maori land, as in 1952 when Works attempted to coordinate better communication between departments involved in Maori land administration, were similarly haphazard in their application. As a result, by the 1960s and 1970s it was still common for Works to undertake smaller public works assignments (such as road alignment) without consultation with the Maori land owners.

### **11.6.2 Compensation: policies and procedures**

Full and prompt payment of compensation in keeping with the tradition of English law theoretically separates land 'takings' from land 'confiscations'. In practice however, the principle of compensation for public works takings was eroded by legislative rules and case law.

In terms of compensation, Maori land owners were affected by discriminatory legal requirements (including weaker notification requirements), the dispersion of compensation payments when they were made due to multiple ownership (making reinvestment more difficult for Maori) and the assumption that the payment of compensation (when this did occur) overruled any objections which might later have been made. Maori land which was marginal and undeveloped appears to have been valued at very low rates for compensation purposes by valuers with European perspectives toward land value. Maori owners were often not even aware that land had been taken and that compensation had been awarded. There were certainly occasions on which Maori felt aggrieved at the levels of compensation (sometimes none at all) paid for their land. From the 1960s the Maori Trustee was required under statute to negotiate compensation for Maori land taken for public works which was held in multiple ownership. While the Trustee was often deeply involved in challenging compensation payments on behalf of Maori landowners, and threatened at times to take the matter through the Courts (much to the frustration of the taking authorities) the office of the Trustee was limited in its usefulness because it often did not know of a taking until long after it had occurred.

The issue of royalties for material taken from land also illustrates that compensation assessment rules were often applied most harshly to Maori land. The otherwise reasonable principle that compensation would not be made to the owner of land containing material (such as raw metals) if there was not a ready-made market for the material (other than the taking authority) was an unduly harsh penalty for Maori land owners. Despite the fact that Maori were aware of the resource, and possibly could have found a market for it, they encountered problems in raising the capital and getting licences for a venture such as a metal quarry. Also more generally, due

to their shortage of funds and inexperience in such matters, Maori were less able to pursue the matter of compensation through the appropriate channels. Generally speaking, taking authorities were able to evade compensation payments without Maori being able to enforce such payments.

Delays in compensation payments were also problematic. First, there were often delays between the beginning of a work and the formal taking of the land. In addition, in the case of Maori land, there would also be delays before application for compensation would be made by the taking authority. There are many examples of cases where Works made no attempts to start proceedings until the department was pressured by the owners. Furthermore, negotiations between the Maori Trustee and Works regarding levels of compensation could take decades to reach an agreement. The Maori Trustee was hesitant to take the matter to court for fear of incurring costs that would have to be paid if Works won. Finally, once (and if) compensation was awarded, there were often further delays in the taking authority paying out to Maori. In many cases such delays resulted in clear financial advantage to the taking authority. While this was a common criticism from all land owners, Marr remarks that the delays with Maori land seem to have been inordinately long and protracted.<sup>24</sup> As with other aspects of public works takings, the matter of compensation was improved in the 1970s as public opinion and complaints from Maori leaders came to bear on Works.

### **11.6.3 Policies regarding the control and disposal of land no longer required for public works**

The options on first purchase by original owners of land no longer required for public purposes, and the assumption that land would only be used for the purposes for which it was taken, were both gradually weakened by legislative developments (after the 1928 Public Works Act). While this affected all land owners, it typically had a greater impact on Maori who were less well placed to challenge disposal decisions and whose interests were generally of a low priority in the decision making process of taking authorities (again raising the question of the responsibility of taking authorities under the Treaty of Waitangi). In fact, financial gain or administrative convenience of the taking authority often appeared to have been given higher priority than the needs or rights of the Maori land owner. Also, in practical terms the fragmentation of Maori title by the Land Court made it much more difficult to return land or vest land in Maori owners which was no longer needed than it was to do the same for general land. Time, energy and administrative convenience made it more likely that taking authorities would not attempt to return or re-vest Maori land. Furthermore, there appears to have been no particular legislative or policy requirement to give priority to land of special significance to Maori (such as urupa) in re-vesting land. Land that was returned was offered back to the original owners at the current market price (and at the improved value), which was

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24. Marr, p 186

often impossibly high for the previous Maori owners to afford given their generally limited access to capital. The Public Works Act 1981 required that the land be offered back at the current market price where it was practical, reasonable and fair to do so, but the amendment in 1982 introduced the discretion of the Commissioner of Lands or the local authority to offer a lower price if it was felt reasonable to do so.

#### **11.6.4 The application of town planning processes**

The application of planning designations and processes such as zoning and making of public reserves requirements appear to have had a detrimental impact on Maori rangatiratanga over Maori land and resulted in further loss of such land for public works purposes. The hearing process itself has been a difficult and expensive barrier for Maori in conjunction with a general lack of communication between Maori and government departments. Maori generally encountered difficulties in getting local bodies to respond to their needs in respect of planning issues, particularly in the area of proper provision of roading, due to the reluctance of Councils to take responsibility for roading on Maori land as a result of old difficulties with rates (discussed chapter 9 below).

In more recent years, especially since the Town and Country Planning Act 1977 which required that Maori interests be taken into account, there have been improvements in the use of planning processes from the perspective of Maori.

### **11.7 Legislative Development of the Concept of ‘Native Lands’**

A brief review of the history of the terms identifying the status of Maori land reveals the state of confusion created by legislative developments. In 1862 (Native Lands Act) ‘Native Land’ meant land over which customary title was unextinguished. In 1865 (under the Native Lands Act) the term ‘hereditaments’ was introduced to refer to land held under title derived from the Crown. In 1881, (in the Native Succession Act) ‘Native Land’ meant land owned by Natives under their customs or uses, the title of which had been determined by the Native Land Court, while in 1888, according to the Native Land Court 1886 Amendment Act, ‘Native land’ was that for which title had not been determined by the Court. Under the Public Works Act 1894, Native land was ‘land held by Natives under their customs or usages, whether the ownership thereof had been determined by the Native Land Court or not.’ The Native Land Court Act in 1894 introduced the term ‘customary land’ which referred to Native land under customary ownership the ownership of which had been determined by the Court (although the title had not) while ‘Native land’ had not been investigated by the Court. The next year the meaning of ‘Native land’ was changed again in the Native Townships Act 1895 to include all Native land whether or not it had passed through the Court. The confusion continued with the Native Land Act 1909 which differentiated between ‘customary land’ and

‘Native freehold land’, the latter referring to land owned by a Native under an award of the Native Land Court and subsequently Crown granted. Native land, on the other hand, meant either customary land or Native freehold land. Obviously the confusion in definition created by this legislation would have only added to the complex management of Maori land at the time.<sup>25</sup>

### 11.8 Public Works Takings and the Waitangi Tribunal

The Waitangi Tribunal has identified certain principles which attempt to balance the Article 1 right of the Crown to exercise kawanatanga (governance) with Article 2 protection of Maori rangatiratanga, as well as the guarantee to Maori of all the rights and privileges of British citizens under Article 3. These general overarching Treaty principles have at times been specifically applied to public works related claims. For example, in the Mangonui Report 1988, the need to take account of Maori interests in carrying out public works projects was specifically identified in the comment 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>26</sup>

In earlier reports, the Tribunal also asked whether compulsory takings of Maori land for public purposes were in themselves a breach of the Treaty. While it did not say that they were absolutely breaches in all cases, the Tribunal stated that takings had to be clearly justifiable, perhaps as a ‘last resort’ or where there were clearly issues of peace, security and good order involved, and with due regard for the obligation of prior consultations and negotiations and payment of compensation (for compulsory takings). For example, in the Orakei Report 1987, the Tribunal commented in respect of the taking of land for defence purposes:

the Crown’s actions in compulsorily taking this land appear to be in breach of article two 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 order. It is arguable that the sovereign act of the Crown in taking land for defense 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>27</sup>

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25. See David Williams, *Appendices to the Maori Land Law Manual*

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

27. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 3rd ed, Wellington, GP Publications, 1996, p 167

While the Tribunal was willing to concede on this occasion that the taking of land for defence purposes might not constitute a breach of the Treaty, it argued with regard to the taking of land for the purposes of housing that:

The Crown prejudicially affected . . . [t]hose 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>28</sup>

The Tribunal found, in this report, 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 (without reference to the Article under which the Crown is obliged to do so).<sup>29</sup> The Tribunal also referred to the 1912 taking of land for a sewer under the Auckland and Suburban Drainage Act 1908, which resulted in the loss of shellfish beds and flooding, as being contrary to the Treaty.<sup>30</sup>

In both the Ngati Rangiteaorere and the Mohaka River claims, the Crown acknowledged that, while there was a general public benefit in a road or railway for which land was taken, there was also a related issue of Crown failure to negotiate with Maori owners before using compulsory provisions. In the Mohaka River Report, the Tribunal stressed that Maori rights of rangatiratanga were being ignored.<sup>31</sup> In the Ngati Rangiteaorere Report, the Tribunal expressed doubts as to whether the Crown could properly assert its kawanatanga over Ngati Rangiteaorere's rangatiratanga by compulsorily acquiring their lands for roads, and advised that the Crown had failed to consult about the need for a road and had failed to genuinely negotiate over the purchase of the land. On this basis, the Tribunal concluded that the Crown 'therefore had no right to proceed to compulsory acquisition' and that the taking of the land without compensation (which was without justification) was clearly in breach of Article 2 of the Treaty.<sup>32</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 felt that there was no need for the Crown to take freehold land because other alternatives, such as leasing, could have been negotiated. Leasing, the Tribunal advised, 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. The Tribunal recommended that the Public Works Act 1982 be amended to require policy consistent with the Treaty of Waitangi. Also, that legislative provisions were required to enable the lease of land, rather than the transfer of full freehold title and return of Maori land no longer required for any public purpose.

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28. Ibid, p 162

29. Ibid, p 158

30. Ibid, p 3

31. Waitangi Tribunal, *The Mohaka River Report 1992*, 2nd ed, Wellington, GP Publications Ltd, 1996, p 70

32. Waitangi Tribunal, *The Ngati Rangiteaorere Claim Report 1990*, 2nd ed, Wellington, GP Publications, 1996, pp 46-48

In reviewing the Crown Counsel's submission in the Turangi Township Report 1995, the Tribunal found that the submission contained a fallacy. It explained that:

It does not follow that, because under the Treaty the Crown has the authority to govern, such authority is unqualified. Plainly it is not. It is limited by and subject to, the provisions of article 2. To determine whether the Crown 'had all the authority to legislate in terms of the Public Works Act 1928 and the Turangi Township Act 1964', it is necessary to determine whether these provisions can be reconciled with the guarantee in article 2.<sup>33</sup>

In determining whether the Public Works Act 1928 and the Turangi Township Act 1964 (described by the Tribunal as 'draconian measures') were inconsistent with Treaty principles, the Tribunal advised that:

the cession by Maori of sovereignty was in exchange for protection by the Crown of Maori rangatiratanga. The confirmation and guarantee of rangatiratanga in article 2 necessarily qualifies or limits the authority of the Crown to govern. In addition, under article 2, the chiefs gave the Crown a pre-emptive right to purchase land as they might be disposed to sell at such prices as may be agreed upon.

The Tribunal concluded on the strength of such reasoning that:

Statutory powers giving the Crown a right to ride rough-shod over the solemn rights guaranteed to Maori by article 2 could be justified only, as we earlier indicated, in exceptional circumstances and as a last resort in the national interest.<sup>34</sup>

The Tribunal went on to say that:

The Tribunal considers that [the various statutory measures] are not merely inconsistent with the terms of the Treaty and relevant Treaty principles; they are tantamount to a unilateral abrogation of article 2 in that they deprive Maori owners of any protection of their Treaty rights under article 2. Far from actively protecting the Maori owners' right not to be deprived of their land without their consent and at an agreed price, they have been denied such protection by the powers vested in the Crown in the Public Works Act 1928 and the Turangi Township Act 1964.<sup>35</sup>

In the Ngai Tahu Ancillary Claims Report 1995, the Tribunal stated that the circumstances of each public works taking has to be considered independently in order to come to any conclusions about a breach of Treaty principles. The Tribunal found that:

we have found that the Crown's compulsory acquisition of this land above the owners objection to be in breach of article 2 of the Treaty, given the subsequent revocation of the scenic reserve status and sale of much of the area'.<sup>36</sup>

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33. Waitangi Tribunal, *The Turangi Township Report 1995*, Wellington, Brookers Ltd, 1995, p 296

34. *Ibid*, p 300

35. *Ibid*, p 302

36. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995*, Wellington, Brookers Ltd, 1995, p 363

The Tribunal then turned its attention to the recurring grievance regarding the failure of the Crown to return lands once they are no longer needed for the purpose for which they were taken. Having cited examples of this occurring with respect to Ngai Tahu lands, the Tribunal commented that:

Such actions, we feel, display an arrogance on the part of the Crown agents and can hardly be reconciled with the Crown's duty to both act in good faith and protect Ngai Tahu's rangatiratanga over their lands . . . Ngai Tahu . . . are well justified in objecting to the Crown's failure to return such land once that public interest has been served.<sup>37</sup>

With respect to notification of Maori land owners prior to the taking of their land, the Tribunal found that:

the statutory shortcomings in the notification given to Maori landowners of the taking of their land in no way recognise or protect Ngai Tahu's rangatiratanga over their lands. Such provisions also fly in the face of the Treaty principle of partnership which requires the Crown to act towards its Treaty partner with the utmost good faith. The fact that Maori landowners were not afforded the same rights as non-Maori owners' can also be viewed as a breach of article 3.<sup>38</sup>

For discussion of the Crown's policy on Treaty claims involving public works acquisitions, see volume i, appendix v.

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37. Ibid, p 365

38. Ibid, p 364