

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 pre-emptive 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

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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.¹

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.

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

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

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.

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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 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

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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 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.

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