

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'.¹ 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).

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 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.² 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.³

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

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.⁴ This error appears to have been corrected in the Native Land Act 1913.

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

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.⁵ The decision to abolish the right was made by Cabinet in November 1927.⁶ 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

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’.⁷

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.⁸ 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

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.⁹

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:

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'.¹⁰

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'.¹¹

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

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.¹²

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.

12. MA 1, 92/2163, and attachments

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.

